UNIVERSITY OF OXFORD
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The interface between competition and the Internal Market:

Market separation under Article 102TFEU

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ABSTRACT

The thesis explores the interface between competition law and market integration, in the application of Article 102TFEU. It focuses on 'market separation' and addresses conduct that has the intent, or effect, of hindering cross-border trade, either in the form of geographic price discrimination or in the form of exclusionary abuses, in which out-of-State competitors are affected.

In doing so, the thesis delves into a comparative analysis of the Treaty requirements under Article 102TFEU when applied in market separation cases and the Treaty requirements under the free movement provisions. It begins with a comparison of the objectives of the two sets of provisions and assesses how their historical link is echoed, presently, in the requirement of 'effect on trade' under Article 102TFEU (Chapter I). Following this, the thesis explores the asymmetry as between the addressees of the two sets of provisions (Chapter II). It is argued that 'undertaking with a dominant position', as a distinct condition of the application of Article 102TFEU, is the outer limit to any expansive view of direct horizontal applicability of the freedoms. Therefore, alleged market separation by dominant undertakings should be subject to Article 102TFEU alone.

Subsequently, the material scope of the prohibitions contained in the two sets of provisions is addressed. Here, it is argued that, in the vast majority of market separation cases, there is nothing special about the interface between competition law and the Internal Market. Rather, the inherent limits of economic integration, as reflected in the notion of trade barriers, should also be taken into account under the enforcement of Article 102TFEU against dominant undertakings (Chapter III). Tensions between competition law and the Internal Market may, nevertheless, arise when non-economic values, as reflected in the notion of justified trade barriers, come into play. In these cases, the interface between competition law and the Internal Market is better conceptualised as a question of unclear attribution of the market-distorting effect to the undertaking and/or the State (Chapter IV). A revised defence of shared responsibility for the market separation is proposed, which would render the legality of State intervention under the free movement provisions a necessary condition for the application of Article 102TFEU against the dominant undertaking (Chapters V and VI).

LIST OF ABBREVIATIONS

AG	Advocate General
BEREC	Body of European Regulators for Electronic Communications
EAGCP	Economic Advisory Group on Competition Policy
EC	European Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
HCC	Hellenic Competition Commission
IP	Intellectual Property
IPRs	Intellectual Property Rights
MEQR	Measures Equivalent to Quantitative Restrictions
NCA	National Competition Authority
NRA	National Regulatory Authority
NYR	Not Yet Reported
OFCOM	Office of Communications
OFT	Office of Fair Trading
RegTP	Regulatory authority for Telecommunications and Post
SEA	Single European Act
UK	United Kingdom
ULL	Unbundled Local Loop
US	United States

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INTRODUCTION

1. The interface between competition and the Internal Market: Market separation under Article 102TFEU

It is widely assumed in the academic literature that the distinctive characteristic of European Union (EU) competition law is the correlation between competition and market integration.[1] This has been fuelled, since the inception of (what is now) the EU, by the clause on 'a system ensuring that competition in the Internal Market is not distorted',[2] as well as by the enforcement of the competition law provisions against conduct that has essentially the same effect as *inter*-State trade barriers, prohibited under the Treaty free movement provisions.[3]

While one may have expected that the progressive achievement of the Internal Market might render competition law enforcement more independent and less motivated by market integration considerations,[4] recent case law and the changes introduced by the Lisbon Treaty show a revival of market integration considerations under the competition law provisions, in particular Article 102TFEU.[5] These trends

[1] Virtually all EU competition law textbooks consider market integration as an additional, stand-alone, objective of EU competition law, which may conflict with other objectives under certain circumstances.

[2] Article 3(1)(g)TEC. The Article has been repealed by virtue of the Lisbon Treaty and replaced by Protocol No 27TFEU.

[3] This was particularly the case in regard to Article 101TFEU enforcement against the exercise of vertical market power, as in the distribution agreements providing for absolute territorial protection across national lines; see e.g. the seminal Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299.

[4] A Albors-Llorens in C Barnard and J Scott (eds), *The Law of the Single European Market* 328-331.

[5] See, e.g. L Parret in D Zimmer (ed), *The Goals of Competition Law* 82, on the objectives of EU competition law *post*-Lisbon. In addition, conduct that hinders *inter*-State trade has been added as a 'new' category of abuse of the dominant position in the latest (2011) edition of a leading EU Competition law textbook; see A Jones and B Sufrin, *EU Competition Law* 550.

are interesting and raise questions as to whether there still is a legitimate role for market integration under the application of EU competition law provisions and, conversely, whether these provisions are used legitimately as an instrument for the building and the proper functioning of the Internal Market. The present thesis seeks to explore and analyse these fundamental questions, which define the very identity of the system of EU competition law.

In so doing, the emphasis of the research is placed on the enforcement of Article 102TFEU against 'market separation', [6] namely conduct which has the intent or effect of hindering *inter*-Member State trade, either in the form of geographic price discrimination or in the form of exclusionary abuses, in which out-of-State competitors are affected. Therefore, the present thesis forms part of the academic literature on Article 102TFEU, which has grown since the Commission launched the process of reforming Article 102TFEU at a policy level.[7] Over the past three years, five monographs were published on Article 102TFEU, each focusing on a different aspect of the application of Article 102TFEU; however, none of these monographs singles out the interface between competition and the Internal Market.[8] By addressing

[6] See Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Opinion of AG Van Gerven [22] (in comparing the free movement and the competition law provisions of the TFEU) 'For that purpose they prohibit (*inter alia*) [conducts] which are responsible in trade between Member States for partitioning the [European] market into separate national markets'.

[7] The Commission initiative culminated in Commission (EC), 'Guidance on Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertaking' [2009] OJ C45/7.

[8] E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law: Rethinking Article 82 of the EC Treaty* focuses on the distinction between agreements and unilateral conduct; E Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* singles out the categorization of the conduct as the basis for a spectrum of conduct-specific tests for exclusionary abuses; L Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* focuses on the distinction between economic freedom and economic efficiency in regard to the aims of Article 102TFEU; R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principle of Article 102* argues in favour of long-term social welfare, and not consumer welfare, as the objective of Article 102TFEU; P Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* argues against the distinction between exclusionary and exploitative abuses.

the fundamental question of the role of market integration in Article 102TFEU application, this thesis also seeks to make a contribution to the debate surrounding the EU regulation of unilateral anti-competitive conduct.

2. Methodological remarks on the analysis of 'market separation under Article 102TFEU'

The purpose of this thesis is to discern and rationalise the principles governing the interface between Article 102TFEU and the allegedly distinctive objective of EU competition law, market integration. A viable methodology and structure for conducting this research was identified as a result of three preliminary steps. First, the factual scenarios within the compass of market separation cases under Article 102TFEU were identified. Secondly, a comparative method for evaluating market separation cases under Article 102TFEU was adopted, based on the definition of the Internal Market by reference to the Treaty free movement provision in Article 26(2)TFEU. Thirdly, it has been explored whether the type of competition law enforcement proceedings, public or private, are significant for the evaluation of market separation cases under Article 102TFEU. These three elements shaped the structure and influenced the arguments presented in the thesis.

2.1 Factual scenarios within the compass of market separation cases under Article 102TFEU

Introduction

This thesis is inspired by new factual scenarios, which reflect the economic reality at Member State level in relation to State intervention in the market, and which led to two specific market separation cases under Article 102TFEU; *Deutsche Telekom* and *Sotirios Lelos*.[9] In both cases there is prior State regulation in the public interest, alleged to have contributed to the anti-competitive effect. However, this is the first time that the factual scenarios involved do not fit into the traditionally-used formula for addressing State intervention in the context of Article 102TFEU enforcement proceedings. Both Deutsche Telekom and Glaxo, the incumbents involved, are unequivocally 'undertakings', which are not 'granted special or exclusive rights' by the State. In *Deutsche Telekom* the incumbent undertaking was a former State-owned monopoly, but at the material time the sector was fully liberalised. In *Sotirios Lelos*, the market power of Glaxo had not been granted by the State but was achieved in the market. In addition, the prior State conduct was, technically, distinct from the undertaking's conduct, even though they both had an effect on the profit margins of the undertaking. For example, in *Sotirios Lelos* the relevant State conduct was price regulation, whereas Article 102TFEU enforcement proceedings were initiated for quantity restrictions on the part of Glaxo.

These factual scenarios have a twofold effect in regard to the interface between competition and the Internal Market. First, State intervention cannot be assessed under the typical formula of Article 106(1)TFEU in conjunction with Article 102TFEU, precisely because there are no 'undertakings granted special or exclusive rights'. Therefore, these factual instances form a new category of 'gap' cases, which require recourse to the indirect construction of the State action doctrine (Article

[9] Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27; Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139.

4(3)TEU-L) in regard to Article 102TFEU for the first time (see Chapter V, Section 3). Second, it becomes, for the first time, apparent that the dominant undertakings cannot, procedurally, bring the question of State responsibility before the European Courts, once Article 102TFEU enforcement proceedings are initiated. Neither the concept of 'undertaking', nor the 'State action defence', as currently construed, are adequate and operable filters to accommodate assessment of the State action, under the factual scenarios mentioned above. This is because the State conduct is a reason, but is not the only reason for the private 'autonomous conduct' of the type prohibited under Article 102TFEU (see Chapter V, Sections 2.1 and 4).

It is important to note that market separation cases under Article 102TFEU are not only comprised of cases in which non-economic values, and, therefore, State action, come into play. The majority of market separation cases merely involve conduct by dominant undertakings, which has the intent or effect of hindering *inter*-Member State trade, namely geographic price discrimination or exclusionary abuses that affect out-of-State competitors (see Chapter II, Section 2 and Chapter III, Section 4). Nevertheless, conduct which, by its very nature, has a cross-border element is not treated as a market separation case in the present thesis. For example, the provision of roaming services or the provision of clearing and settlement services to an International Central Securities Depository are conducts which inherently involve a cross-border movement.[10] In these factual scenarios, the cross-border element stems from the very nature of the service involved, rather than the undertaking's conduct and, for that reason, they are not treated as market separation cases.[11]

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[10] See e.g. Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-3155.

[11] In these cases, the 'effect on trade requirement' should always be established. However, this is all, in terms of the application of the competition law provisions. Under the free movement provisions,

2.2 Definition of the Internal Market

The methodology employed in the present thesis is based on a comparative analysis of the Treaty requirements under Article 102TFEU in market separation cases with the Treaty requirements under the free movement provisions. The comparison takes place as between the objectives (see Chapter I), the addressees (see Chapter II), and the material scope of the prohibitions contained in the two sets of provisions (see Chapters III, IV, V, VI).

The definition of 'Internal Market' provided for in Article 26(2)TFEU is the reason for adopting this method of evaluation of the market separation cases under Article 102TFEU. According to Article 26(2)TFEU, the Internal Market is defined by reference to the provisions of the free movement. Therefore, it is legitimate to compare and draw analogies between the tests under the free movement provisions and the tests under Article 102TFEU, if the purpose is to rationalise the weight that is being applied to market integration for establishing an abuse of the dominant position.

In addition, convergence between the free movement provisions is assumed, in particular in regard to the conceptual foundations of finding a prohibition (see Chapter III, Section 3) and a justification (see Chapter IV, Section 2.1). Article 26TFEU incorporates the four freedoms in the definition of the Internal Market and, therefore, reflects convergence from the perspective of their common aim, namely the construction of the Internal Market. In the detailed analysis presented in the thesis,

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precisely because the test for 'internal situations' and the substantive test for finding a restriction are conflated (see Chapter I, Section 4.2), it could be argued that these conducts fall, outright, within the scope of the prohibitions. For example, this seems to be the premise of the Opinion of AG Maduro, in relation to the Roaming Regulation (see Chapter II, text to n 83).

emphasis is, nevertheless, put on the free movement of goods out of all the free movement provisions.

Goods and services are the most relevant economic factors for the present research, because the market separation cases under Article 102TFEU have exclusively been about either goods or services.[12] However, priority is given to the case law under the free movement of goods, specifically in the examination of the test which governs the finding of a trade barrier, namely a discrimination or a market access test, based on judgments concerning the rules on the use of goods (see Chapter III, Section 3.2). The reason for this is that the case law on goods has always lagged behind in terms of shifting from a discrimination analysis to a unified market access test, which may be explained pragmatically by the nature of the contested measures. Measures affecting the provision of services have, almost always, a direct impact on consumers. In other words, they are equivalent to rules regulating the use of goods, which only recently reached the Court of Justice because there were many more rules concerning prior-to-use stages, such as production and marketing, to be litigated.

2.3 The significance of the type of enforcement proceedings: Public and private enforcement of Article 102TFEU

The type of the Article 102TFEU enforcement proceedings, public or private, is significant for the purpose of conducting the comparative analysis as between the case law under Article 102TFEU and under the free movement provisions for two reasons.

[12] Indeed, goods and services are also close to each other, viewed from the perspective of the economic function which they perform See, e.g., Case C-390/99 *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* [2002] ECR I-607 [29-33], in which the Court decided the case simultaneously in light of both freedoms. See also Joined Cases C-403/08, C-429/08 *Football Association Premier League and Others* [2011] ECDR 11, Opinion of AG Kokott [168-170].

First, the type of competition law enforcement proceedings affects the substantive standard of legality under the relevant competition law provisions, for example the test for an abuse of the dominant position, because of the wide discretion in regard to case selection and prioritisation, which is involved in public enforcement of competition law. In particular, the broad discretion of the Commission and the National Competition Authorities, in regard to the cases which they decide to investigate, is associated with the non-enforcement of competition prohibitions which could be over-inclusive.[13] Conversely, private litigation requires that the substantive test under the competition law provisions be clearly circumscribed, to avoid sham litigation or over deterrence. This is why the decentralisation of the enforcement regime and the introduction of private enforcement of the competition law in Europe were launched hand in hand with the re-orientation of the application of competition law towards a more economics-based approach.[14]

The link between the type of enforcement proceedings and the substantive standard under Article 102TFEU presents a limitation to the appraisal of the existing case law under Article 102TFEU, which is the main primary material for the present research. The majority of the existing cases originate in public enforcement proceedings, and it is expected that the Commission should only pursue cases of outright abuse. However, the very few existing preliminary references, which originate in private litigation at the national level, are useful comparators in regard to economic justifications or public policy considerations under Article 102TFEU (see Chapter III, text to n 18-19, and Chapter IV, text to n 67-68), for example. At the

[13] See W Wils (2011) 353-382.

[14] Also, it is noteworthy that the Commission Guidance Paper on the re-orientation of the application of Article 102TFEU to a more economics-based approach is entitled Commission (EC), 'Guidance on Commission's *Enforcement Priorities* in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertaking' [2009] OJ C45/7 (emphasis added).

same time, this link between the type of enforcement proceedings and the substantive standard under Article 102TFEU also legitimises the present thesis which seeks to provide clarity and consistency by advancing a unitary framework for taking into consideration market integration under Article 102TFEU. The possibility of private enforcement of Article 102TFEU at the national level highlights the need for such analytical clarity.

Second, the decentralised and private enforcement of the competition law provisions before national courts means that there is no longer any asymmetry in the type of enforcement between the competition law and free movement provisions. The free movement provisions have always been considered to grant individual rights enforceable before national courts. There is now a 'market' for law enforcement in regard to competition law, in addition to the free movement provisions, open to be tested by, often ingenious, private litigants. In light of this, the present research associates the two questions of private and State responsibility under the two sets of provisions, once the market players themselves have decided, in terms of procedure, that they are willing to bear the costs of litigating competition law. Furthermore, the proposed interface between private and State responsibility would eliminate artificial obstacles to the process of case selection suitable for public enforcement of Article 102TFEU, in as much as it involves the obligation of the Commission or NCA to disapply Article 102TFEU under certain circumstances (see Chapter VI, Section 2.3). This feeds back to the link between the type of enforcement and the substantive standard under Article 102TFEU, because the Commission would not take up a case which has a viable defence. The present thesis establishes that such a defence can, in effect, be a defence based on State responsibility under the free movement provisions.

3. Summary of the Chapters of the thesis

The thesis is presented in six chapters. In Chapter I it is argued that, historically, market integration was not a stand-alone objective of Article 102TFEU, but, rather, it served as the interpretative lens through which the objectives of Article 102TFEU were viewed. This historical link between the objectives of Article 102TFEU and market integration is legitimately echoed in the current interpretation of the jurisdictional requirement of 'effect on trade' under Article 102TFEU. Once it is established that the conduct of the dominant undertaking 'affects trade between Member States', the assessment of its effects on competition is placed under the European, rather than national, market regulatory framework. Research in the following chapters focuses on the scope of 'abuse of a dominant position', and an attempt is made to explain the extent to which market integration should affect the substantive analysis for finding an 'abuse of a dominant position'.

Chapter II suggests that Article 102TFEU, with its distinct conditions of application and, in particular, the requirement that the undertakings possess significant market power, is the outer limit to any expansive view of the horizontal application of the freedoms. This assumes the functional definition of the notion of 'undertaking'. Accordingly, it is argued that alleged market separation by dominant undertakings should only be subjected to Article 102TFEU, rather than to both Article 102TFEU and the free movement provisions. The analysis progresses to examine how this assessment is to be conducted under Article 102TFEU, and what weight is to be applied to economic and non-economic values, which underpin the Internal Market, for substantiating an abuse of the dominant position.

In Chapter III it is argued that, in the vast majority of cases, there is no conflict between the notion of market separation, as an abuse of the dominant position, and market integration, as reflected in the notion of trade barriers. *A fortiori*, the relocation of the clause on a 'system of undistorted competition within the Internal Market' to Protocol No 27TFEU would permit the inherent limitations of economic integration to be taken into account under Article 102TFEU.

When non-economic values underpinning the notion of 'justified trade barriers' come into play under Article 102TFEU enforcement proceedings, there is always the potential for State involvement to occur, triggered, in part, by conduct by the dominant undertakings as part of the democratic processes. This is explained in Chapter IV. On this basis, it is argued that public policy considerations should be excluded from the scope of Article 102TFEU at the outset. Therefore, the interface between market separation, as an 'abuse of a dominant position', and non-economic values, as reflected in the notion of justified trade barriers, is better understood as a question of shared responsibility of, or as a question of attribution to, the undertaking and/or the State. The subsequent Chapters address this question, by seeking to identify criteria for a principled attribution of the market distorting effect to the undertaking and/or the State in cases of shared responsibility for market separation.

In effect, the State action defence is presented in Chapter V, because it is the closest concept for articulating attribution criteria used by the European Courts. However, it is argued that there is a structural imbalance between State responsibility under the competition law provisions ('State action doctrine'-Article 4(3)TEU-L in conjunction with Article 102TFEU) and the dominant undertaking's responsibility for market separation. This is why the State action defence has never succeeded. The State action defence requires compulsion by the undertaking, regardless of the legality

of the State action, whereas the State action doctrine requires that private responsibility under Article 102TFEU (‘autonomous conduct that constitutes an abuse of the dominant position’) is a reason for the anti-competitive effect of the State action. This leads to biased outcomes against the dominant undertaking, because the latter has, procedurally, no other legal route to bring the question of State action legality before the European Courts.

In Chapter VI, a revision of the State action defence is proposed in order to incorporate the assessment of the legality of State action, in cases of shared responsibility for market separation between the dominant undertaking and the State, in the context of Article 102TFEU enforcement proceedings against the undertaking. In practice, the proposed revision would lead to an assessment of the State action under the free movement provisions as a subordinate issue, at the stage of geographic market definition and, in particular, of regulatory entry barriers. Article 102TFEU would be applied against the dominant undertaking only if the regulatory framework is in conformity with the free movement provisions, by extending the geographic market involved beyond national lines. At the constitutional level, the proposed revision is reflected in the relocation of the clause on a ‘system of undistorted competition within the Internal Market’ to Protocol No 27TFEU.

I. *Objectives of Article 102TFEU and market integration: From a historical analysis to the current jurisdictional approach*

CHAPTER I

Objectives of Article 102TFEU and market integration: From a historical analysis to the current jurisdictional approach

1. Introduction

This Chapter explores the spectrum of values underlying Article 102TFEU as well as their relationship to market integration from a historical perspective. It aims to identify the patterns of correlation between competition and integration. On that basis, it provides arguments as to why those patterns cannot be ignored in a future attempt to redefine the hierarchy of values promoted and protected under Article 102TFEU, whether or not they are desirable to change at a policy and normative level.

In Section 2 the two objectives of EU regulation of anti-competitive unilateral conduct (Article 102TFEU), efficiency and economic freedom, are presented, both of which involve trade-offs between the various categories of protected consumers. In Section 3, these two objectives are linked to EU trade liberalisation, by exploring the prevailing assumptions at the initial stage of the European integration project as to the relationship between competition and the Single (or Internal) Market. Therefore, the historical inquiry in this Section covers, chronologically, the developments up until the enactment of the Single European Act (SEA) in 1987,[1] in light of the 1992 project

[1] Single European Act (SEA) [1987] OJ L169/1. Weiler's three-period evolution of EU law, which involves the Foundational period (1958-73), the 'Eurosclerosis' period (1973-85) and period of the Completion of the Internal Market (1985 and beyond), is well-established in the literature. See J Weiler (1990-1991); D Gerber, *Law and Competition in the Twentieth Century Europe* 346 *et seq*; R Wesseling, *The Modernisation of EC Antitrust Law* 9; I Maher in P Craig and G de Burca (eds), *The Evolution of EU Law* 725-727.

to 'create an area without internal frontiers'.[2] The vehicle through which the link between the objectives of Article 102TFEU and market integration has been achieved is the teleological interpretation of the notion of 'abuse of a dominant position'. In Section 4, it is argued that the historical link between competition and market integration cannot be conclusive as regards the use of Article 102TFEU as an instrument to foster market integration almost 50 years after the original Treaty. However, the link still influences the interpretation of Article 102TFEU, because it is expressly echoed in the requirement of 'effect on trade'. The function of the latter requirement is a jurisdictional one and, as such, it represents the minimum legitimate role for market integration in the analysis carried out under Article 102TFEU. The question remains as to the role of market integration under the substantive analysis of an 'abuse of a dominant position'. In Section 5, it is concluded that market integration has never been a stand-alone objective of Article 102TFEU but, rather, the lens through which the objectives of Article 102TFEU have been interpreted.

2. Objectives of EU regulation of unilateral anti-competitive conduct (Article 102TFEU)

In this Section the spectrum of values underlying Article 102TFEU is addressed. The research focuses on two conflicting views as to the objectives of regulating the unilateral exercise of market power, i.e. economic efficiency and economic freedom. Varying degrees of protection are afforded to different categories of consumers in the

[2] As defined in the original Article 8a EEC, which was inserted by the SEA and was eventually renumbered as (ex-)Article 14TEC. The goal was set in Commission (EC), 'Completing the Internal Market' (White Paper) COM(85) 310, June 1985, while at the same time the SEA introduced qualified majority voting in relation to the '1992 measures' (Article 100a EEC inserted by SEA).

EU under each standard of objectives, but for different reasons. This enquiry represents the first step in assessing whether market integration is a distinct aim of Article 102TFEU on the spectrum of values, alongside economic efficiency and economic freedom, or whether it is an independent variable, external to the spectrum of values behind EU competition law.

2.1 Competition and economic efficiency: A trade-off between present and future consumers

One rationale behind Article 102TFEU is to prevent the exercise of monopoly power, which harms society and consumers. The underlying assumption is that the profitable exercise of monopoly power is harmful to both the efficient allocation of resources and efficient production. Allocative inefficiency occurs because society has less desirable goods (artificial scarcity) and pays too much for those goods (wealth transfers from consumers who continue to purchase at the monopolistic price to producers).[3] The consumer demand that goes unsatisfied when producers restrict output and increase prices represents the 'deadweight loss of monopoly'.[4] Productive inefficiency occurs because producers who can profitably increase prices by restricting output do not have incentives or they are unable to minimise costs of

[3] There is debate as to whether the wealth transfer from consumers to producers is relevant for assessing the pro- or anti-competitive effects of a conduct. The debate originates in the Chicago School of thought. Chicagoans believe that re-distribution of wealth, if it is a concern at all, it is not a matter for antitrust law. See R Bork, *The Antitrust Paradox* 110-115; R Posner, *Antitrust Law* 9-32; O Williamson (1968) 27-28. At EU level, see R Nazzini, *The Foundations of European Union Competition Law* 32-49, who argues for the superiority of the total (social) welfare objective, but acknowledges that consumer welfare may be a better test, under certain circumstances, to achieve the intended outcome of prohibiting a conduct which reduces total welfare in the long run.

[4] S Bishop and M Walker, *The Economics of EC Competition Law* 25; M Motta, *Competition Policy: Theory and Practice* 41-44; C Veljanovski, *The Economics of Law* 115.

production (X-inefficiency),[5] or they waste resources to achieve or protect their market power (rent-seeking).[6]

However, undertakings that can profitably increase prices by restricting output may be able to generate productive efficiency gains, for example, to exploit economies of scope and scale[7] or network effects[8] or to use monopoly profits as resources allocated to the development of new processes and products (often termed as dynamic efficiency).[9] These two sources of efficiencies directly benefit either the producers, in the case of economies of scale and scope, or future consumers, in the case of dynamic efficiencies, but not present consumers, who contribute to financing those efficiencies by either foregoing consumption or paying higher prices, at least not in the short-run; hence, the debate as to the standard of assessing efficiency as the objective of competition law.

There is not much economic evidence that market structure, either monopoly or competition, has a significant impact on innovation with regard to the trade-off between static (price) and dynamic efficiency.[10] However, it is firmly established in

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[5] H Leibstein (1966) introduced the term to convey the idea that monopoly power, and the 'quiet life' it comes with, bring about managerial inefficiency.

[6] R Posner (1975), *cf* F Fisher (1985); after all, the actual amount of losses is an empirical issue, *Motta* (n 4) 44-45.

[7] E.g., see, in the context of merger analysis, the so-called 'Williamson trade-off', which shows that productive efficiency gains from small cost reductions usually offset the allocative efficiency losses from increasing prices above cost; O Williamson (1968); O Williamson (1977).

[8] *Motta* (n 4) 82-85; N Economides (1996) 682-683; H Hovenkamp, *The Antitrust Enterprise: Principles and Execution* 278-285.

[9] This hypothesis is often attributed to J Schumpeter, *Capitalism, Socialism and Democracy*, who was among the first to state that perfect competition is incompatible with innovation.

[10] G Sidak and D Teece (2009) 586-599; G Manne and J Wright (2010) 166-167. See also A Schmutzler (2010); C Velu and S Iyer (2010), for a recent review of the economic literature and for examples of the inability to expect *a priori* one relationship between market concentration and innovation. According to W Kerber in J Drexl, L Idot and J Moneger (eds), *Economic Theory and*

economic theory that innovation is critical to economic growth, because it brings about new commodities, new processes, new sources of supply and new business models.[11] It is critical because it transforms the Darwinian selection process within an industry of individual firms who compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements, a process described as 'creative destruction'.[12] For that reason, it is argued, and supported by empirical evidence in the case of industries such as the communications and media industries as well as pharmaceuticals,[13] that the interests of future consumers should, as a policy choice, trump the interests of present consumers when in opposition to one another, thereby also changing the cost-error minimizing analysis of the application of competition law.[14]

However, the Court of Justice does not seem to endorse dynamic efficiencies as a matter of law in its analysis under Article 102TFEU. For example, the most recent manifestation of the said trade-off between future and present consumers is a case concerning parallel trade in pharmaceuticals.[15] In *Sotirios Lelos*, GLAXO

Competition Law 98-101, this is the reason why the innovation dimension remains to a large extent outside mainstream neoclassical equilibrium theory and its normative role is not clear.

[11] In Schumpeter's own words, 'this kind of competition [...] is so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long-run expands output and brings down prices is in any case made of other stuff', *Schumpeter* (n 9) 84-85.

[12] The terms are used by *Schumpeter* (n 9) 81-86. See also R Posner (2001) 925-943; *Sidak and Teece* (n 10) 603-610 with further references to the literature of evolutionary theory in economics.

[13] H Shelanski and G Sidak (2001); R Schmalensee (2000); N Petit (2010); G Tsouloufas (2011) 389-390.

[14] S Singham (2010) 3, 7; *Manne and Wright* (n 10) 166-167; G Immordino and M Polo (2011). See also M Lemley (2011), in favour of an industry-specific antitrust policy for innovation; *cf* J Kirkwood and R Lande (2008) 239-240, who view the total surplus standard as a form of 'trickle-down economics'.

[15] The case first came before the Court of Justice as a reference for preliminary ruling from the Hellenic Competition Commission, but was rejected on jurisdictional grounds; C-53/03 *Syfait and Others v*

refused to supply wholesalers in Greece engaging in parallel exports and argued, *inter alia*, that

> 'parallel trade in medicines reduces the profits that pharmaceuticals companies can invest in research and development activities. By contrast, distributors which profit from parallel trade make no contribution to pharmaceutical innovation'.[16]

However, the Court rejected the argument and insisted on the static (price) efficiency gains of parallel trade.[17] By contrast, AG Jacobs in his Opinion in *SYFAIT* had suggested that

> '[...] dominant pharmaceutical undertakings would respond to an obligation to supply parallel traders within a given Member State by removing existing products from the market in that State, if they were able to do so, and by delaying the launch of new products there. Price differentials would be replaced by a greater fragmentation of the market, with a differing range of products available from State to State'.[18]

Nevertheless, both sides of the debate align as to one feature. The substantive value underlying protection of competition against monopoly power is wealth, economic growth and its contribution to raising the standards of living. In the case of productive efficiency this appears straightforward, it is the production of maximum

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Glaxosmithkline AEVE [2005] ECR I-4609. The same reference was then made by the Athens Court of Appeal in Joined Cases C-468/06 to C-478/06 *Sot. Lelos and others v GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE* [2008] ECR I-7139.

[16] Joined Cases C-468/06 to C-478/06 *Sot. Lelos and others v GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [44].

[17] '[...] the attraction of the other source of supply which arises from parallel trade in the importing Member State lies precisely in the fact that that trade is capable of offering the same products on the market of that Member State at lower prices than those applied on the same market by the pharmaceuticals companies', *ibid* [55].

[18] Case C-53/03 *Syfait and Others v Glaxosmithkline AEVE* [2005] ECR I-4609, Opinion of AG Jacobs [95]. A similar tension arises in refusal to supply cases in the electronic communications markets. See, e.g. Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601 [647-648, 710]; *cf* the approach of the US Supreme Court in a refusal to supply case in the electronic communications market. 'The opportunity to charge monopoly prices [...] induces risk taking, that produces innovation and economic growth'; *Verizon Commc'ns Inc v Law Offices of Curtis V. Trinko* LLP 540 US 398, 124 S.Ct. 872 (2004) [407].

outputs from minimum inputs, thereby increasing society's overall wealth.[19] Allocative efficiency, allocates goods to those that value them the most, thereby one interpretation could be based on some egalitarian basis in the sense that each consumer takes responsibility of the true costs of their actions and there is no discrimination between individuals.[20]

However, in both cases members of the society are solely treated in their capacity as 'consumers', and in economic terms this is labelled 'surplus', rather than 'welfare', which also conveys the preliminary question as to the value of the market to society.[21] Therefore, any distribution trade-off between present, future consumers and 'consumers-producers' is internal to the concept of competition as a vehicle to economic growth.[22] Under the efficiency standard, the sets of consumers whose interests may conflict are not related to the distinction between final/end-consumers and intermediate buyers as such, but, rather, to the degree that each group of interests contributes to the economic growth of the industry at stake.

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[19] T Prosser, *The Limits of Competition Law* 28.

[20] This holds true under the Chicagoan view of 'producers' as 'consumers' whose interests count on the same basis as those who are not producers; i.e. it is a formal equality among all economic agents; see *Nazzini* (n 3) 40. However, it is the consumer surplus standard that is treated in the literature as reflecting equity concerns; see e.g. K Cseres (2007) 126-129; R Ahdar (2002) 345-349; J Farrell and M Katz (2006) 9-10. The latter standard is conceptually distinct from an overall distribution of wealth in society, *Kirkwood and Lande* (n 14) 200-201.

[21] B Orbach (2010) 28; See, in particular, the early debate as between R Dowrkin (1980) and R Posner (1980) with regard to the question as to why wealth is a worthy social value. Recently, the distinction is more often expressed in terms of 'consumer welfare' as opposed to 'citizen/social welfare'; see e.g. M Lodge in K Dowding *et al* (eds), *Challenges to Democracy*; J Davies, *The European Consumer Citizen in Law and Policy* 68-109. See also, e.g., M Freedland in M Freedland and S Sciarra (eds), *Public Services and Citizenship in European Law*; D Lewinsohn-Zamir (1998-1999), in the specific context of public services or public goods.

[22] However, see challenges to that proposition by O Black, *Conceptual Foundations of Antitrust* 40-61, in particular 58-61, as well as by the advocates of libertarian paternalism and the theory of nudge, e.g. C Sunstein (2007) 328-330; R Thaler and C Sunstein, *Nudge* 1-14.

2.2 Competition and economic freedom: A trade-off between intermediate buyers and end-consumers

An alternative justification for protecting competition under Article 102TFEU is the protection of individual choice in itself, on libertarian grounds.[23] Competition in the market is considered to be an expression of individual freedom. Individuals are free to make choices as to what to produce and what to consume and prices comprise the coordinating mechanism of supply and demand *via* market transactions: these permit individuals to reveal their preferences, which may result in exit and in rejecting the products of one supplier in favour of another.[24] Therefore, competition-as-a-process is promoted and protected against 'private market power as a degeneration of freedom, against which the freedoms of all must be guaranteed, and competition law is seen not as a negation but a limitation of that power'. [25]

This perception of competition as safeguarding the conditions of operation in the market is not uniquely European. Market openness, setting fair rules of the game and giving access rights and opportunities have occasionally been perceived to be the goals of US antitrust law,[26] and have, more recently, been interpreted as ensuring that individual, and in particular consumer, choices determine the market outcomes.[27]

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[23] *Prosser* (n 19) 19-20; O Odudu, *The Boundaries of EC Competition Law* 14-16.

[24] R Sally, *Classical Liberalism and International Economic Order* 17-21; A Shipman, *The Market Revolution and its Limits* 13.

[25] J Amato, *Antitrust and the Bounds of Power* 76, 113. See also F Böhm's aphoristic formula 'The one who has power has no right to be free and the one who wants to be free should have no power', as quoted in W Möschel (2001) 4.

[26] E Fox (1981) 1182; E Fox and L Sullivan (1987) 959.

[27] Termed as 'consumer sovereignty' by N Averitt and R Lande (1997); N Averitt and R Lande (2007). I Lianos and A Matteus (2009) 32-33 suggest that the European concept of a dominant firm's 'special

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However, competition has been strongly associated, through what is known as 'Ordoliberalism', with protecting the individual freedom of market players as a value in itself from undue economic power in the EU regulation of unilateral anti-competitive conduct. A 'constitutionalised' [28] competitive order guarantees price stability, [29] which, in turn, ensures a prosperous and human society. [30] Economic efficiency is but an indirect and derived goal, while the competition process has an intrinsic value for guaranteeing the basic equality of individuals as economic subjects.[31] In regard to the exercise of monopoly power, the Ordoliberal standard for assessing its legality is the 'as-if-they-were-subject-to-competition' standard, as opposed to conduct designed to impede the rivals' ability to compete and perform.[32]

As a matter of law, this conception of competition as a process can, nevertheless, lead to interventions that protect choice as the main constituent element of individual economic freedom. There are two categories of consumers, whose freedom of choice is protected under the process-based conception of competition;

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responsibility' should be understood as a proxy for 'consumer sovereignty', since open markets are a prerequisite for consumer empowerment.

[28] The concept of 'Economic Constitution' was the means by which Ordoliberals integrated economic and legal/political thought; its role was to provide basic principles of economic conduct, shaped into a Rule of Law, rather than a mechanism of *ad hoc* discretionary political decisions, D Gerber (1994) 44-47.

[29] See Eucken's structural and regulating principles in S Karsten (1985) 175-177.

[30] The Ordoliberal 'economic order' is realising the Kantian ethic of ensuring freedom of citizens against other citizens and the State, by guaranteeing equality of individuals and civil liberties, *Möschel* (n 25) 6-7; *Sally* (n 24) 111; L Gormsen (2007) 332-336.

[31] The deontological and rights-based approach of protecting 'competition-as-a-process' is often contrasted with utilitarianism on a philosophical basis, W Möschel in H Willgerodt and A Peacock (eds), *German Neo-liberals and the Social Market Economy* 146; C Wartin, in A Kilmarnock (ed), *The Social Market and the State* 92-95.

[32] *Gerber* (n 1) 252-253; *cf* H Schweitzer in C D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82TEC* 133-134.

end-consumers and intermediate buyers.[33] The economic freedom of end-consumers is often presumed to be restricted when their choice as to the source of supply is limited, once a competitor of the dominant undertaking is squeezed out of the market.[34] The often-quoted assumption that Article 102TFEU protects the dominant undertaking's competitors, rather than competition or consumers, stems from this,[35] as is illustrated in most Article 102TFEU cases dealing with allegedly exclusionary abuses.[36]

In addition, the protected economic freedom under Article 102TFEU could be the economic freedom of intermediate buyers, who are customers but not competitors of the dominant undertaking. For example, in *British Airways*, a case concerning loyalty-inducing rebates, the General Court held that it is sufficient to examine whether the scheme tended to remove or restrict the travel agents' freedom to sell their services to the airlines of their choice and, thereby, whether it hindered the access of British Airways' competitors to the market.[37] This approach seems deeply

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[33] See Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 [170-171] on the distinction between the freedom of action of an intermediate consumer to choose his/her customers, and the freedom of action of the end-consumer to choose his/her source of supply.

[34] L Gormsen (2008) 232-236, 249-250; E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* 194.

[35] D Gerber in C D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82TEC* 45 places this claim among the misconceptions concerning the objectives of Article 102TFEU.

[36] See e.g. Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601 [651-652]; Case C-202/07P *France Telecom v Commission* [2009] ECR I- 2369 [112]; Case C-280/08P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [182]. See Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Judgment of 27 March 2012 (NYR) [22], 'Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation', for a recent re-affirmation.

[37] Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917 [270].

rooted in EU competition law. Even in the Commission's policy documents with regard to an economics-based approach to Article 102TFEU, it is stated that 'harm to intermediate buyers is generally presumed to create harm to final consumers'[38]

The standard for an assessment of the restriction to their economic freedom seems to vary between these different sets of 'consumers', namely end-consumers and intermediate buyers, in particular in intermediate goods markets. [39] However, as long as the guiding principle is economic freedom, the distinction is internal to the concept of 'competition-as-a-process'.

3. Linking the objectives of Article 102TFEU to EU trade liberalisation

The research presented in this Section links the two objectives of Article 102TFEU to EU trade liberalisation, based on a historical analysis of the early years of enforcement of Article 102TFEU. The analysis is preceded by a note on terminology, due to the interdisciplinary connotation of the term 'market integration' in the EU, which spans areas of political science, international economics and law.

3.1 Delimitation of the notion of 'market integration' in the EU

[38] Commission (EC) 'DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses' (December 2005) [55]; In Commission (EC), 'Guidance on Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' [2009] OJ C45/7 [19], it is suggested that harm will be addressed at either level or at both levels.

[39] See e.g. P Evans (2007) 26; P Akman (2008), E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* 469-470. See also P Akman, *The Concept of Abuse in EU Competition Law* 246-257, who uses the specific example of price discrimination.

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In this Chapter, 'market integration' in the EU refers to the form of economic integration sought by Member States until the Commission's White Paper on the completion of the Internal Market in 1985.[40] In international economics, economic integration is concerned with 'the discriminatory removal of all trade impediments between at least two participating nations-States and with the establishment of certain elements of coordination between them'.[41] Balassa has identified five conventional stages of economic integration,[42] and market integration in the EU, in light of the 1992 project to 'create an area without internal frontiers', constituted a 'common market' which involved the freedom to provide goods and services as well as free factor mobility across national member frontiers.[43] However, the term used in policy documents, in particular in the 1985 White Paper and later in the Treaty itself, was 'Internal Market', in recognition that the prescriptions of the Treaty of Rome had not been achieved because non-tariff (or technical) barriers to trade persisted, and as an attempt to signal a new impetus to the then Community.[44] Therefore, internal trade liberalisation comprises the core of market integration in the EU.

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[40] Commission (EEC), 'Completing the Internal Market' (White Paper), Brussels 14 June 1985, COM (85) 310 final.

[41] A El Agraa in A El-Agraa (ed), *The European Union: Economics and Policies* 1.

[42] B Balassa, *The Theory of Economic Integration* identifies five forms of economic integration: a free trade area, a customs union, a common market, an economic union and complete economic integration.

[43] See n 42. Elimination of customs duties and quantitative restrictions to trade was introduced in 1958 and a common external tariff in 1968.

[44] The term 'Common Market' was retained in Article 94TEC, concerning the approximation of laws which 'directly affect the establishment or functioning of the Common Market', as opposed to the use of the term 'Internal Market' in Article 95TEC, concering the approximation of laws which 'have as their object the establishment and functioning of the Internal Market'. See Chapter VI, text to n 6-12, for the legal debate as to whether the 'Common Market' and the 'Internal Market' under these two provisions was the same concept.

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The distinction between 'negative' and 'positive' (market) integration,[45] as well as its intersection with the ambiguous notion of policy integration,[46] will be analysed in Chapter III and, largely, in Chapter IV, from a legal perspective.[47] In those early years, the only relevant concept of policy integration was that of a 'collective decision-making' to achieve market integration.[48] In legal terms, this is reflected both in the constitutional principles of supremacy and direct effect of the Treaty free movement provisions, and in the conferral of law-making powers to the EU for enacting relevant harmonisation measures.[49]

3.2 Market integration: Not a stand-alone objective of Article 102TFEU

The purpose of the historical inquiry is to highlight that market integration was not a distinct objective of Article 102TFEU, alongside efficiency and economic freedom, on the spectrum of values that underlie the enforcement of the latter Article. Market

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[45] The distinction was introduced by J Tinbergen, *International Economic Integration* 76, on the basis that (national) policy instruments are simply eliminated or new (common/centralised) instruments are formed. It was, subsequently, used in the context of the then EEC by J Pinder in G Denton (ed) *Economic Integration in Europe* 145, on the basis that the purpose of market integration is to remove discrimination or maximise the welfare optimum of the integrated area in other ways.

[46] In light of the traditional economic integration theories, policy integration is associated with the achievement of economic unions, as opposed to market integration which is associated with earlier stages of economic integration (e.g. common markets); see J Pelkmans (1980) 334-335. Other scholars equate policy integration with 'positive' integration; see R Bouterse, *Competition and Integration: What Goals Count?* 7.

[47] See Chapter III, Section 3.1 and Chapter IV, Section 2.1, which address the mismatch between the European Market and a European Polity.

[48] L Lindberg, *The Political Dynamics of European Economic Integration* 4-8. See also F Scharpf, *Governing in Europe: Effective and Democratic?* 43-83 on the concepts of positive and negative integration, until the entry into force of the Treaty of Maastricht. This 'old constitutionalism' is central to the understanding of the EU as a constitutionalised polity; see J Shaw in P Craig and G de Burca (eds), *The Evolution of EU Law* 585.

[49] Until the enactment of the SEA, it was limited by unanimity vote in Council, see n 2.

integration is an external value that influenced the interpretation of either efficiency or economic freedom as the objectives of Article 102TFEU. Therefore, the historical inquiry does not attempt to identify either efficiency or economic freedom as the prevailing objective of Article 102TFEU enforcement. This may have been the case over some periods of time, depending on various influences and factors, such as the prevailing economic schools of thought or institutional arrangements or the power politics within the Commission at the time.

For example, in the early years, there was virtually no enforcement of Article 102TFEU. It is well documented early on since the ECSC Treaty[50] and the Spaak Report,[51] that the reason for this was, in part, the post-war policy to strengthen the productive efficiency of European firms to compete internationally and the widespread assumption that the growth and the size of the firms are instrumental to higher productivity.[52] However, over following decades, there was enforcement of Article 102TFEU, based on a structural interpretation to the notion of 'abuse of the

[50] Article 102TFEU contains similar wording to Article 66(7) ECSC Treaty. Cases under the competition provisions of the ECSC Treaty show that large production and sales unit were seen as a requirement for technical and commercial evolution. See, e.g., Case 13/60 *"Geitling", Ruhrkohlen-Verkaufsgesellschaft mbH and others v High Authority of the ECSC* [1962] ECR 83, 110 (English Special Edition). It is documented that the competition law provisions in the ECSC Treaty were inserted under strong American intellectual influence; see J Gillingham, *Coal, Steel and the Rebirth of Europe:1945-1955* 266-283.

[51] 'While on the one hand the United States, in almost every sector, produces one-half of the world's goods, and on the other the Communist countries, counting a third of the world's population, are increasing their production annually by ten or fifteen per cent, Europe, which once had a monopoly in the manufacturing industries and could count on its overseas possessions for considerable resources, now finds its external position weakening, its influence declining and its capacity for progress diminished by internal divisions', Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers ('Spaak Report') 21st April 1956 [9] (Translation from the French).

[52] H Thorelli (1958-1959) 233; B Hawk (1972-1973) 231-235.

dominant position'.[53] This interpretation arguably embraced the view that the individual economic freedom of third parties and their opportunities to compete on merits are protected from the harm that they would not risk suffering in a competitive market.[54] At the time, E-J Mestmäcker, an Ordoliberal scholar, was advising the Commission, which was already known as 'the German DG'.[55]

Therefore, at different times, efficiency or economic freedom was predominant as the objective of European competition law and policy. However, it is argued that the attainment of either objective has historically been linked to market integration. In particular, market integration has been the 'first principle' of European competition law and policy from the foundational period until the setting of the '1992 benchmark'. This is aptly revealed in the Commission's first Competition Policy Report. 'With regard to rules of competition applicable to enterprises, the Community's policy must, in the first place, prevent governmental restrictions and barriers—which have been abolished—from being replaced by similar measures of a private nature'.[56] According to AG Lagrange, 'the application of [Articles 101 to 106TFEU] is not only a necessary factor, but one of the most important ones, in the

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[53] In Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 the Court of Justice held that Article 102TFEU could be applied to a situation, in which a dominant undertaking eliminates competition by acquiring a competitor. At the time, legal writers and in particular R Joliet, *Monopolization and Abuse of Dominant Position* 252 favoured a purely behavioural interpretation of the notion of 'abuse of a dominant position', on the basis that dominant position, as such, is legal.

[54] Case 85/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461 [91]; Case 322/81 *Nederlansche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461 [57, 70]; See E-J Mestmäcker (1972) 639-643.

[55] *Gerber* (n 1) 263-265, *Gormsen* (n 34) 233; M Cini and L McGowan, *Competition Policy in the European Union* 49. Also, some authors find parallels between the Ordoliberal approach towards market power and the Harvard School of thought, which, at the end of 1960s, refuted the assumption that concentration of market power is the key factor to higher productivity, based on empirical research. See *Gormsen* (n 34); *Rousseva* (n 34) 37-38.

[56] Commission (EEC), 'First Report on Competition Policy' (Annexed to the 'Fifth General Report on the Activities of the Communities') April 1972 [13].

gradual establishment of the Common Market, rather than merely one of the ways in which it functions'.[57]

The statements above correspond to the two sides of the historical link between competition and market integration. The first statement sees economic efficiency as an objective of EU competition law, because economic efficiency is an objective of market integration in the first place. This is based on the assumption that the economic benefits derived from the integration project would only occur, because private economic agents would take advantage of changes in the market structure, rather than acting strategically to protect their home markets.[58] From an economic point of view, this is a one-way relationship, since the reverse assumption, namely that changes in competitive intensity affect trade patterns, does not seem to be confirmed.[59]

The second statement sees economic freedom as an objective of EU competition law, because economic freedom is an objective of market integration in the first place. This assumes that the legitimacy of market integration in the EU is founded on individual rights, including the freedom to compete, as opposed to all forms of public power.[60]

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[57] Case 13/61 *Kledingverkoopbedrijf De Geus en Utidenbogerd v Robert Bosch et al.* [1962] ECR 45, Opinion of AG Lagrange [64], who rejected the view of the referring Court that Article 101TFEU was not directly applicable, until the Common Market had become a reality, which was not yet the case. However, the Court of Justice did not follow the AG's submissions.

[58] M Egan, *Constructing a European Market* 44-46; *Bouterse* (n 46) 5 speaks of the assumption that market integration will result in more intense competition in national markets; *Wesseling* (n 1) 12 points to the 'functional' character of the European competition rules, on the basis of the same assumption.

[59] See M Levenstein *et al* (2010).

[60] E-J Mestmäcker (1994) 631; M Streit and W Mussler (1995) 14-15; E-U Petersmann (1992) 4-15.

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The following Sections analyse the assumptions of the two sides of the historical link between market integration and competition, before arguing that this link was achieved, in law, through recourse to ex-Article 3(1) (g)TEC. Therefore, market integration is treated as the interpretative lens through which the two objectives of Article 102TFEU are viewed, and not as a third, stand-alone, objective of competition law that may, in some instances, conflict with the other objectives.[61]

Finally, it is not contested that European market integration, in itself, had long-term non-economic objectives since its inception, namely the objective to foster solidarity between the European nations, so that war would be prevented.[62] However, those objectives presupposed the achievement of the immediate economic task of integrating the markets of the Member States,[63] and are not relevant with regard to the interface between market integration and competition.[64]

3.2.1 Market integration and economic efficiency: A uniform level of protection

[61] The latter is the prevailing approach in virtually all competition law textbooks. A notable exception seems to be *Nazzini* (n 3) 113-121, who takes the Internal Market into account as a factor which influences the interpretation of Article 102TFEU. He also acknowledges that the relevant elements in that regard are only the economic objectives of the Internal Market, specifically because the competition rules are a key element of economic policy.

[62] See The Schuman Declaration, 9 May 1950. See also Chapter IV, text to n 10.

[63] At least, this was the assumption at the initial stage of market integration in the EU. Therefore, Article 2EEC Treaty specified that 'The Community shall have as its task, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it'.

[64] See Chapter IV, Section 2.1, on the non-economic values embedded in the process of market integration.

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The main and immediate objective of European market integration since its inception was to enhance the allocational efficiency of the economies of Member States.[65] According to the Spaak Report, 'the merging of the markets [...] will allow, through increased division of labour, to eliminate the wasteful use of resources, and, through increased certainty of supplies, to give up the production at uneconomic cost'.[66] At the same time, 'while in many industries, no national market can allow firms to reach their optimum size, unless they enjoy a virtual monopoly, [...] this merging of the markets, creates large enough outlets to permit the use of advanced production techniques'.[67]

In economic terms, the static effects of trade liberalisation stem from the combined effect of 'trade creation' and 'trade diversion',[68] as well as the ability of Member States to cooperate to distribute the gains, so that all partners may benefit, unlike the results of independent action.[69] The effects are static, since they represent a one-shot increase in the levels of welfare gain, principally affecting the prices of the traded products. The underlying comparative advantage of the Member States, subsequent to the removal of trade barriers, determines the allocation of production to

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[65] See W Molle, *The Economics of European Integration* 235.

[66] *Spaak Report* (n 51) [13] (Translation from the French).

[67] *Ibid*.

[68] 'Trade creation' denotes the movement of trade from a high-cost domestic producer to a low-cost partner producer and 'trade diversion', the reverse situation; F McDonald in F McDonald and S Dearden (eds), *European Economic Integration* 45.

[69] A El-Agraa (2) in A El-Agraa (ed), *The European Union: Economics and Policies* 128.

those countries that are relatively more efficient at providing output, because of the decrease in transaction costs and increased specialisation.[70]

At the same time, trade liberalisation has dynamic effects that stem from exploitation of economies of scale and increased competition.[71] On the one hand, if the minimum efficient scale exceeds national demand, market integration permits larger product markets and internal economies of scales for firms.[72] On the other hand, market integration increases the possible sources of supply within a Member State, by including trade from other Member States. Therefore, the competitive pressure in the national market is intensified or firms are induced to form networks, which results in reduced transaction costs when firms conduct their business (external scale economies).[73]

The Commission estimated both the static and the dynamic potential gains of market integration in 1988 in a project named 'The Costs of Non-Europe' (or the so-

[70] *Egan*, (n 58) 47; *F McDonald* (n 68) 48, Figure 1.5 (Reaping comparative advantage), showing the distributional effects between consumers and producers in each (export and import) countries.

[71] T Scitovsky (1956).

[72] *F McDonald* (n 68) 48, 51, Figure 1.8 (Economies of scale) showing the importance of the technical relationship between cost and output for the magnitude of the cost reduction of any output increase that might arise from economic integration.

[73] *Molle* (n 65) 242; *Egan*, (n 58) 48-49; *F McDonald* (n 68) 47,49. See also *Spaak Report* (n 51) 14 'National protection that eliminates external competition is particularly harmful [...] In a wider market, it is no longer possible to maintain out-dated methods of production that lead to both high prices and low wages; companies, instead of remaining static, are subject to a constant pressure to invest, in order to increase production, improve the quality of their products and modernize their production methods: they must progress, or they fail', (translation from the French).

called 'Cecchini Report'),[74] which largely focused on efficiency gains from removing 'non-tariff barriers' to trade.[75]

The realisation of the above-discussed static or dynamic efficiency gains of market integration occurs specifically because the gain is uniform across the Member States involved. This is exemplified by parallel imports, which occur when goods intended for sale in one national market are exported from their original destination to another Member State that has a pre-existing source of supply for the same goods.[76] From an economic point of view, parallel imports are deemed to be efficient when the interference with the manufacturer's retail discriminatory pricing takes place among countries with similar consumer demand structure,[77] because this leads to lower prices. On the other hand, unrestricted parallel trade, and price uniformity in the EU stemming from this, may impair the manufacturer's profits and hinder the dynamic benefits of launching new products in the long-run, at least in low-price Member-States.[78] In both cases, the efficiency gain is uniform across each category of

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[74] P Cecchini (1988). The report uses predictive models to estimate the net benefits of trade liberalisation as indicated by economic theory, by measuring departures from it. It is treated with caution for that reason. See *F McDonald* (n 68) 53-60; B Ardy and A El-Agraa in *El-Agraa* (n 41) 140-142.

[75] Non-tariff barriers are non-tariff government policy measures that intentionally or unintentionally alter the quantity or direction of trade. Therefore, they are artificial, not natural conditions; see *Ardy and El-Agraa* (n 74) 133.

[76] S Horner, *Parallel Imports* 1; C Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* 2.

[77] K Maskus in *P Lloyd and C Milner, The World Economy: Global Trade Policy 2000* 1276-1277, points to the redistribution, under price discrimination, of consumer benefits in high-price countries to consumers in low-price countries and to the redistribution from consumers in high-price countries that are net-importers to producers in countries that are net-exporters; see also *Stothers* (n 76) 21. C Stevenson in J Grayston (ed), *European Economics and Law* 92-93, specifically points out that the existing level of competition in the market concerned is crucial to whether regulation of parallel imports permits unfair price discrimination to occur.

[78] *Maskus* (n 77) 1275-1276; T Valletti (2005). See also *Motta* (n 4) 23, 'price uniformity may even induce a monopolist not to sell at all in countries where it would sell under price discrimination'.

consumers in the EU; present consumers or future consumers. The trade-off between product or price market fragmentation, is internal to the decision as to whether or not to regulate parallel imports.[79]

3.2.2 Market integration and economic freedom: A uniform level of protection

Market integration in the EU is closely associated with individual economic freedoms, which guarantee open markets against public power.[80] According to the definition of a 'trade barrier' in *Dassonville*, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[EU] trade are to be considered as measures having an effect equivalent to quantitative restrictions'.[81] The Court has gradually expanded the scope of the free movement provisions based on this definition, as guarantees of a 'substantive economic due process' or of an 'unhindered pursuit of commerce in individual Member States', in the words of AG Tesauro in *Hünermund*.[82]

The expansion of the scope of free movement of goods to cover national rules which aim to restrict the freedom to compete is arguably the best illustration of the

[79] See, in particular, the debate with regard to the question of international or regional exhaustion of Intellectual Property (IP) rights, which normally confer exclusive, export and import, rights to the owner; I Avgoustis (2012); E Bonadio (2011); A Feros (2010); G Grossman and E Lai (2008).

[80] See n 60.

[81] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837 [5].

[82] Case 292/92 *Hünermund v LandesapothekerkammerBaden-Württemberg* [1993] ECR I-6787, Opinion of AG Tesauro [1]. The analysis by AG Tesauro focuses on measures which, 'by affecting the supply (e.g. by a channelling of imports) or demand (e.g. by restricting opportunities to advertise) for the products concerned, including imports, may bring about a decrease in sales', *ibid* [9]. The opinion of AG Tesauro to exclude these measures from the scope of Article 34TFEU was followed by the Court of Justice in Joined Cases C-267/91 and C-268/91, *Bernard Keck and Daniel Mithouard, Criminal Proceedings against* [1993] ECR I-6097 [14], 'in view of the increasing tendency of traders to invoke [Article 34TFEU] as a means of challenging any rules whose effect is to limit their commercial freedom',

interface between competition and market integration through the objective of economic freedom. Such national laws, which, for example, regulate prices, are caught by Article 34TFEU, when they result in a loss of the competitive advantage enjoyed by imports: either because the minimum fixed price does not allow the lower cost price of imports to be reflected or because the maximum fixed price only allows imports to be marketed at a loss.[83]

The core of the conceptualisation of market integration in the EU as a process of ensuring economic freedoms is to afford a uniform level of protection in all Member States to a particular class of traders. This can be exemplified by parallel imports, where such parallel trade flows between distributors in different Member States, or between distributors and retailers, and not just between manufacturers who exercise price discrimination directly at the retail level. [84] In these cases the restrictions which, for example, an IP rights owner may impose over the distribution chain or its licensees in order to secure some vertical control,[85] are treated as trade

[83] Case 82/77 *Openbaar Ministerie of the Kingdom of the Netherlands v Jacobus Philippus van Tiggele* [1978] ECR 25 [18]; Joined Cases 177 and 178/82 *Jan van de Haar and Kaveka de Meern BV, Criminal proceedings against* [1984] ECR1797 [19]; Case 231/83 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 305 [23, 25-27]; Case 181/82 *Roussel Laboratoria BV and others v État Néerlandais* [1983] ECR 3849 [17, 21-23]. See also Joined Cases C-267/91 and C-268/91, *Bernard Keck and Daniel Mithouard, Criminal Proceedings against* [1993] ECR I-6097, Opinion of AG van Gerven [4-5], who distinguishes between prohibitions of sales at a loss at the level of retail trade and at the level of manufacturer, importer or wholesaler as a marketing strategy. *Cf* Joined Cases 177 and 178/82 *Jan van de Haar* [1984] ECR1797 [18] and Case 231/83 *Cullet v Leclerc* [1985] ECR 305 [28].

[84] *Maskus* (n 77) 1277-1278.

[85] This is because it permits quality consistency or maintenance of pre-sales (e.g. advertising) and post-sales (e.g. repair services) services; see J S Chard and C J Mellor (1989) 73-74; *Stothers* (n 76) 22.

barriers because they impair the subjective right to EU-wide movement of a particular class of traders, the parallel traders, in absolute, not comparative terms.[86]

The rights-based approach to trade liberalisation has an additional dimension that extends beyond the substance of the market freedoms. The Court of Justice has interpreted the objective prohibitions of trade restrictions as directly enforceable individual rights since *Van Gend an Loos*.[87] The recognition of EU trade law as a source of individual (economic) rights has given further rise to neo-liberal interpretations of market integration in the EU, as a 'self-organising system'.[88] The freedom of trade is directed against the public power of the sovereign, so this interpretation has rendered competition among national rules subject to market choice as the prevailing method of market integration.[89] This was also the initial meaning of the principle of mutual recognition, which was introduced by the Court of Justice in *Cassis de Dijon*[90] and was included in the new approach to harmonisation following the 1985 White Paper.[91] According to Mestmäcker, the economic freedoms have this dual function, as they protect individuals against interference with their right to participate in trade between Member States and, simultaneously, they establish the

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[86] See Commission (EEC), 'Sixth Report on Competition Policy' (published in conjunction with the "Tenth General Report on the Activities of the Communities") April 1977 [45-52].

[87] Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 12.

[88] *Streit and Mussler* (n 60) 9-10, 14-15.

[89] M Maduro, *We the Court* 129-130. *Wesseling* (n 1) 13 refers to the normative, socio-political role of competition, as a means of integrating national economies; C Joerges (2004) 17-19.

[90] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[91] Commission (EEC), 'Completing the Internal Market' (White Paper), Brussels 14 June 1985, COM (85) 310 final [17-23]. See Chapter IV, text to n 22-25, for the evolution of the principle of mutual recognition and its place in a reformed approach to the free movement provisions.

legislative powers of the EU, for implementing those economic liberties. These legislative powers are inherently limited by the purpose of the underlying individual rights.[92]

3.3 Teleological interpretation of 'abuse of a dominant position': The vehicle linking competition to market integration

The two objectives of market integration, efficiency and economic freedom, influenced the early enforcement of Article 102TFEU through the use of teleological interpretation as the preferred method for interpreting the notion of 'abuse of a dominant position'. The teleological (or functional) method has a polysemous character and consists of interpretation by reference to the context, the whole system of the Treaty, its general objectives and philosophy.[93]

The teleological reasoning was employed by the Court of Justice within the domain of Article 102TFEU, by going back to 'the spirit, general scheme, and wording of [Article 102TFEU] as well as to the system and objectives of the Treaty'.[94] In *Continental Can*, the Court of Justice affirmed the Commission's structural interpretation of 'abuse of a dominant position' to cover exclusionary abuses, including the acquisition of a competitor by the dominant undertaking, which 'practically leads to elimination of competition in a substantial part of the common

[92] *Mestmäcker* (n 60) 632; in a similar vein, *Petersmann* (n 60); E-U Petersmann (1995) 1154.

[93] A Bredimas, *Methods of Interpretation and Community Law* 77, with further citations. This is also the core component of Barak's 'purposive interpretation', A Barak, *Purposive Interpretation in Law* 85-96. In the context of the legal reasoning of the Court of Justice, see J Bengoetxea, N MacCormick and L Moral Soriano in G de Búrca and HJJ Weiler, *The European Court of Justice* 44-47.

[94] Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 [22].

market'.[95] The Court did so by reference to the objectives of the Treaty and in particular to Article 3(f)EEC, which was the *pre*-Lisbon Article 3(1)(g)TEC. According to Article 3(1)(g)TEC, the (then) Community's activities were to include the institution of a system ensuring that competition in the Internal Market was not distorted. The Court of Justice rejected the applicant's arguments that 'this provision merely contains a general programme devoid of legal effect' and recalled that '[Article 102TFEU] is part of the common rules on the [Union's] competition policy', which, in turn, is based on [(ex-)Article 3(1)(g)TEC].[96] The Court then read ex-Article 3(1)(g)TEC that provides for a system of undistorted competition, as requiring *a fortiori* that competition must not be eliminated.

> 'Any restraints on competition which the Treaty allows, [...] are limited by the requirements of [(ex-)Articles 2 and 3TEC]; going beyond these limits involves the risk that the weakening of competition would conflict with the aims of the Common Market'.[97]

The important role played by the teleological method of interpretation in European law has been attributed to the autonomy and comprehensiveness of the European legal order in which there is no place for 'silent' judges, in conjunction with the open-ended wording of the Treaty provisions.[98] The function of the method is to fill in gaps in the legislation. In *Continental Can*, the Court of Justice did so by introducing limited merger control, since the relevant provisions in the Treaty on the

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[95] *Ibid* [18, 26].

[96] *Ibid* [23].

[97] *Ibid* [24].

[98] B van der Esch (1991-1992) 366-367; *Bredimas* (n 93) 70-71.

European Coal and Steal Community (ECSC)[99] were not included in the EEC Treaty. The Court rejected the applicant's argument that the absence of a merger control provision similar to the one in the ECSC Treaty was explicitly intended by the legislator,[100] implying, thus, that the underlying policy assumption regarding market power had changed.[101]

The example above highlights the benefits of the teleological method of interpretation. During the early years of the development and enforcement of Article 102TFEU, its flexibility allowed the Court of Justice to link competition to market integration. In many Article 102TFEU cases, the Court of Justice makes reference to ex-Article 3(1)(g)TEC for the purpose of establishing an 'abuse of the dominant position'.[102] The underlying assumption is that the total exclusion of competition leads to market isolation, as explained in the previous Sections. In that way, either efficiency or economic freedom, as objectives of market integration, were linked to European competition policy. The link between the two means that the protection afforded to the various categories of consumers under the efficiency or economic freedom standard under Article 102TFEU is uniform across the EU, since uniformity is the key feature of market integration, as discussed earlier.

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[99] Article 66(1) to (6)ECSC.

[100] Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, 224 (Submissions of the parties); *ibid* [22].

[101] See W van Gerven (1974) 46-50, who argues that the judgment is well motivated in law but that the Court of Justice could have equally applied the opposite view and decided not to install imperfect merger control.

[102] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223 [25]; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 [63, 183]; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461 [125, 132]; Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 [29]. Article 3(1)(g)TEC used to be Article 3(f)EEC.

However, the very same quality feature of the teleological method of interpretation, namely its flexibility, that historically linked competition to market integration in Europe, equally makes teleological interpretation receptive to introducing new policy developments into Article 102TFEU. Such a change can be fuelled by the relocation of ex-Article 3(1)(g)TEC after the Lisbon Treaty came into force.[103] Therefore, the historical link identified in this Chapter between competition and integration, i.e. viewing the protection, under an efficiency- or freedom-oriented approach to competition, as uniform across an EU-wide market, does not necessarily dictate the current link between Article 102TFEU and market integration. The notion of 'abuse of a dominant position' is amenable to change, because of the flexibility of the interpretative method used. However, the historical link cannot be ignored, in as much as it is expressly echoed in the requirement of 'effect on *inter*-State trade'. This is explored in the following Section.

4. 'Effect on trade': An analytical approach to jurisdictional elements with hindsight from the past

It is argued in this Section that market integration remains a concept relevant for the interpretation of Article 102TFEU. In particular, the historical link between competition and market integration is, and should, be taken into account to determine whether the conduct in question 'may affect trade between Member States'. The

[103] The question of potential changes in the interpretation of Article 102TFEU in light of the enactment of the Lisbon Treaty is explored throughout the remainder of this thesis and, in particular, it is discussed in Chapter III, Section 5.2 and Chapter VI, Section 2.

requirement of 'effect on trade' represents the minimum of a legitimate link between market integration and competition under Article 102TFEU on jurisdictional grounds.

4.1 The jurisdictional function of the requirement of 'effect on trade'

The link between competition and market integration originates from the early years of the development and enforcement of Artice102TFEU, until the formal completion of the Internal Market. Twenty years after the formal completion of the Internal Market it is still legitimate to take this link into account when establishing the 'effect on trade' under Article 102TFEU. The reason for this is the jurisdictional function of that requirement within the scheme of Article 102TFEU.

The core component of the historical link between competition and market integration is the uniformity of the protection afforded to various categories of consumers across a market which is EU-wide. Accordingly, if the threshold of 'effect on trade' is crossed, the allegedly abusive conduct is assessed against a uniform level of competition law protection across the EU. This is because of the jurisdictional function of the requirement of 'effect on trade', which delimitates the sphere of application of EU and national competition laws.[104]

A statement of the jurisdictional function of the requirement of 'effect on trade' under Article 102TFEU and its interconnection with market integration is traced in *Hugin*:

[104] Commission (EC), 'Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty' (Notice) [2004] OJ C101/81 [12]. The test for 'effect on trade' and its role are common to Articles 101 and 102TFEU. It should be noted, though, that according to Article 3(2) Regulation 1/2003, Member States are not precluded from adopting stricter national laws only for unilateral anti-competitive conduct.

I. *Objectives of Article 102TFEU and market integration: From a historical analysis to the current jurisdictional approach*

> 'The interpretation and application of the condition relating to effects on trade between Member States contained in [Articles 101 and 102TFEU] must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by [EU] law and the law of the Member States. Thus [EU] law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market'.[105]

This basic test for establishing an 'effect on trade' was explained by the Court of Justice in two alternative tests, namely a test of 'altering the patterns of inter-State trade' or one of 'altering the competitive structure of the market'. The first test ('altering the patterns of inter-State trade') is examined in relation to its link with the test under Article 34TFEU for Measures Equivalent to Quantitative Restrictions (MEQR) in Section 4.2. The second test ('altering the competitive structure of the market') is examined in relation to its link with the substantive test of 'abuse of the dominant position' in Section 4.3. However, both tests link competition and market integration on jurisdictional grounds,[106] and, for the purposes of this thesis, emphasis is placed on this element.[107]

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[105] Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869 [17]. In the same vein, see Case 73/74 *Groupement des fabricants de papiers peints de Belgique and others v Commission* [1975] ECR 1491, Opinion of AG Trabucchi [6], 'the criterion [...] must be interpreted in such a way as to bring within the prohibitions of [Article 101TFEU] agreements in restraint of competition which affect the attainment of the objectives for which the common market was established. [...] Even from this wider standpoint, this requirement would still perform the function of tracing the dividing line between the area exclusively within national jurisdiction and that subject to [EU] law on competition'.

[106] J Faull (1989) 488-489.

[107] Rather than on the notions of 'trade between Member-States' and 'appreciable effect'.

4.2 'Effect on trade' test: Identical to or distinct from the test under Article 34TFEU for MEQR?

'Effect on trade' between Member States requires that the conduct in question 'is capable of constituting a threat, direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a Single Market between States'.[108] It is striking that the wording in *Dassonville* used by the Court of Justice to define 'trade barriers' under Article 34TFEU is virtually identical to the above definition of 'effect on trade'.[109] However, the Court of Justice rejected an interpretation of the notion of 'measures having an equivalent effect to quantitative restrictions' (MEQR) under Article 34TFEU on the basis of the case-law on 'effect on trade', when it was asked to do so.[110] In particular, the Court distinguished between the aims of the two sets of provisions, even though its emphasis was on rejecting a *de minimis* requirement under the free movement provisions, as opposed to the condition that the effect on trade needs to be appreciable under the competition law provisions.[111] In any case, under the 'effect on trade' requirement, there is no need to calculate the actual volume of trade or what the level

[108] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 341 (English Special Edition).

[109] See n 81, on the wording of the *Dassonville* definition of MEQR. See also Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Opinion of AG Van Gerven [21-22].

[110] Joined Cases 177 and 178/82 *Jan van de Haar and Kaveka de Meern BV, Criminal proceedings against* [1984] ECR1797 [11-14].

[111] The development of the case law under the free movement provisions shows, however, that the rejection of a *de minimis* threshold under Article 34TFEU is contested, in particular after the judgments in Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I- 4273; and Case C-110/05 *Commission v Italian Republic* [2009] ECR I- 519. See the research presented in Chapter III, text to n 88-89.

of trade would have been in the absence of the conduct.[112] It is sufficient that the conduct is capable of having such an effect.[113]

The comparison, as regards the quantitative magnitude of the conduct in question, between the 'effect on trade' under Article 102TFEU and the substantive test for MEQR under Article 34TFEU is guided by the similarity in the wording of the tests, as they are formulated by the Court of Justice. However, the comparison seems misleading, because the objective of the competition law provisions is dictated by the substantive prohibitions, rather than the jurisdictional requirement of 'effect on trade'. A more principled comparison as regards the magnitude of the prohibited effect would be between MEQR under Article 34TFEU and the condition, under the competition law provisions, that the restriction on competition be appreciable.[114]

However, the comparison between the 'effect on trade' and the test for MEQR under Article 34TFEU is valuable and justified, due to their common wording in the Court's formulation. The common wording is, further, explained on the basis that the very same jurisdictional function of the 'effect on trade' under the competition law provisions is assumed under the substantive tests in the free movement provisions, even though they do not expressly mention it. It is settled case law that the free movement provisions do not apply to situations in which all the relevant facts of the

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[112] Commission (EC), 'Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty' (Notice) [2004] OJ C101/81 [27].

[113] Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge transports SA and Compagnie maritime belge SA et al v Commission* [1996] ECR II-1201 [201-203]; Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [170]

[114] See e.g. Commission (EC), 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)' [2001] OJ C368/07.

case are confined within a single Member State ('purely internal situations').[115] However, in the case of the free movement of goods, the 'purely internal situations' test is conflated with the substantive test of MEQR, because the Court of Justice seems to require not only that a cross-border element *exists*, but also that the measure in question *impedes* this cross-border movement.[116]

It could be argued that 'effect on trade' is more broad than 'purely internal situations' as reflected in the MEQR test, even though no conclusive remarks can be drawn from the existing case law.[117] One way to argue that 'effect on trade' is more broad is by identifying competition law cases in which the conduct in question boosts, rather than impedes, trade.

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[115] For a recent re-affirmation, see C-245/09 *Omalet NV v Rijksdienst voor Sociale Zekerheid* [2010] ECR I-13771 [12].

[116] This approach originates from Joined Cases 314/81, 315/81, 316/81 and 83/82 *Procureur de la République and Comité national de défense contre l'alcoolisme v Alex Waterkeyn and others* [1982] ECR 4337 [11-12]. See A Tryfonidou in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* 199-201. This conflation of the 'cross-border element' with the MEQR test is also evidenced by comparing and contrasting the 'purely internal situations' test in the goods cases to the 'purely internal situations' test in the context of the movement of natural persons. In the latter cases, the Court of Justice has dissociated the 'cross-border element' test from the scope of application of the substantive test under the relevant free movement provision, and has attached a wider significance to it, by associating it with the scope of the Treaty, including the EU citizenship provisions and the fundamental rights. It could be said that this is reflected in the case law since Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. See N NicShuibhne in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* 170-174, on the relationship between the EU citizenship provisions and the specific free movement provisions, as regards their outer limit of a 'cross-border movement' requirement. In that regard, see also Chapter V, text to n 131, on the development of the case law.

[117] A conclusive way to test this proposition would be to find cases in which both the free movement and the competition law provisions were invoked, namely State action doctrine cases, and in which the free movement question is inadmissible ('purely internal situation'), while Article 4(3)TEU-L, read together with Articles 101 or 102TFEU, are breached and, therefore, an 'effect on trade' is established. Case C-393/08 *Emanuela Sbarigia v Azienda USL RM/A and Others* [2010] ECR I-6337 is the only case found to date. However, in this case the free movement question is inadmissible ('purely internal situation'), while Article 4(3)TEU-L, read together with Articles 101 or 102TFEU are not breached because the condition of 'effect on trade' is not established; see Chapter V, text to n 129-130 (more generally, in Chapter V, Section 3.4, the relationship between the State action doctrine and the free movement provisions is addressed). In addition, there has not been found any State action doctrine case in which 'effect on trade' is not established, but the free movement question is admissible.

In particular 'effect on trade' is established if it is shown that it is 'possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the [conduct] in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States',[118] and the term 'pattern of trade' is neutral. This test for 'effect on trade' is more commonly used under Article 101TFEU, but it has also been used in Article 102TFEU cases, in particular in cases which concern contractual abuses.[119]

In *Consten and Grundig*, the Court of Justice ruled that an increase in the volume of trade between Member States is not sufficient to exclude the possibility that trade may be affected.[120] However, it should be noted that the conduct in question in *Consten and Grundig* was one that impeded parallel trade and had the effect of isolating a national market. Therefore, it was hostile to market integration. By contrast, in the Commission's decision in *Napier Brown/British Sugar*, there was an increase in the level of trade between Member States as a result of the dominant firm's refusal to sell domestically-produced industrial sugar to Napier Brown, an undertaking active in the retail sugar market. In reaction, Napier Brown purchased large quantities of imported industrial sugar from France, Denmark and the Netherlands, instead of purchasing cheaper domestic industrial sugar.[121] The

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[118] Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 235, 249 (English Special Edition).

[119] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 [135]; Joined Cases C-215/96 *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. (BNP)* and C-216/96 *Cassa di Risparmio di Genova e Imperia SpA (Carige)* [1999] ECR I-135 [47, 60].

[120] n 108. Similarly (under Article 101TFEU), see Case T-141/89 *Tréfileurope Sales SARL v Commission* [1995] ECR II-00791 [57]; and, more recently, C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Ausbanc* [2006] ECR I-11125 [38].

[121] *Napier Brown-British Sugar* (Case No IV/30.178) Commission Decision 88/518/EEC [1988] OJ L284/41 [80].

Commission, citing *Consten and Grundig*, found that such an increase in imports was not an obstacle in establishing that trade was affected for the purpose of applying Article 102TFEU. Despite the seemingly pro-market-integration effect of the refusal to sell domestically-produced industrial sugar, this was in fact combined with the likely exclusion of Napier Brown from the retail sugar market in Great Britain. The exclusion would lead to the elimination of the link between the price of industrial sugar, which was limited by the price of imports,[122] and retail sugar, the price of which was not equally limited by the price of imported sugar.[123] Therefore, the increase in imports was combined with the likely elimination of a competitor, 'which would have repercussions on the competitive structure within the common market'.[124] Thus, whether the requirement of 'effect on trade' is established in purely internal situations, which are outside the scope of free movement provisions, when the cross-border movement either does not exist or is not impeded is inconclusive.[125]

A second argument that 'effect on trade' is broader than the 'purely internal situations' test under Article 34TFEU is obtained by observing that the latter test assumes functions that are undertaken at three different stages in the application of the competition law provisions (in the context of preliminary references). The first

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[122] *Ibid* [78]; Napier Brown was free to choose its source of industrial sugar for repackaging, either domestic or imported, whichever is cheaper at any moment in time, mainly depending upon currency fluctuations.

[123] Mainly because of higher transport costs compared to imported industrial sugar, *ibid* [44].

[124] *Ibid* [79].

[125] S Weatherill (1996) 1022-1023 submits that the purely internal character of the market distortion should not be an obstacle in triggering the application of the EU competition law provisions; A Tryfonidou, *Reverse Discrimination in EC Law* 67-71 seems to approach the issue from the opposite direction. She argues that because an 'effect on trade' can be established even when the conduct in question is applied to products confined within the territory of a single Member State, the test under free movement provisions should also not be restricted to the specific goods and services that are involved in the facts of the case and that have moved or (are going to move) between Member States.

function is to permit the Court of Justice to determine whether a question referred to the Court as a preliminary reference is admissible.[126] The second is the jurisdictional function of delimiting the spheres of application of EU and national law, while the third function is the actual application of the free movement provision (as a matter of substance), as discussed above. A very clear illustration of these three different stages in the application of EU competition law is *Ausbanc*, in which the three stages, namely admissibility criteria for a preliminary reference, 'effect on trade' and restriction of competition under Article 101(1)TFEU, build from the broader to the narrower.[127] The 'effect on trade' requirement, which performs only the second of the above-mentioned functions, can be broad enough, because there is a distinct substantive test to further narrow down the scope of the competition law provisions. This is analysed in Section 4.3 on the basis of cases in which the conduct covers only a single Member State, yet the 'effect on trade requirement' is established, without necessarily leading to a finding of an 'abuse of a dominant position'. Arguably, in those cases it can be assumed that the Internal Market is already established and competition law is a tool for the proper functioning of this Internal Market. In that case, the concept of 'serious impediments to the proper functioning of the Internal Market' is distinct from the concept of an 'effect on *intra*-[EU] trade' and, it 'may

[126] See *Tryfonidou* (n 125) 215, on the traditional implicit assumption that in purely internal situations, EU (substantive) law does not apply, but also that the Court of Justice does not have jurisdiction to answer a preliminary reference.

[127] See C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Ausbanc* [2006] ECR I-11125 [17, 20-21] on the admissibility criteria for a preliminary reference, [33-39] on the 'effect on trade requirement' and [61] on the 'restriction of competition under Article 101(1)TFEU, which was not established in that case.,

constitute one of the criteria for evaluating whether there is sufficient [European] interest to necessitate the investigation of a complaint by the Commission'.[128]

For the very same reason, it is easier for the Court of Justice to assert a real link between the facts of the specific case and EU law in order to answer a preliminary reference under Article 102TFEU.[129] This could lead to a wide interpretation of 'effect on trade', even where the Court of Justice does not have all the necessary factual information as regards 'effect on trade'. For example, in *TeliaSonera,* the Court suggested that the reference was admissible, even though the procedural rules of Sweden did not permit the national court to assess in advance questions of facts such as whether trade between Member States has been affected.[130] However, regardless, an abuse of a dominant position may or may not be established.

The Court of Justice is, by contrast, more careful in assuming jurisdiction to address the 'purely internal situations' at the admissibility stage of a preliminary reference under the free movement provisions, the reason being that the 'purely internal situations' test is conflated with the substantive test under the free movement of goods. It is true that the Court of Justice has held that, even in a purely internal situation, it is useful to answer the question referred if, in essence, the national law prohibits reverse discrimination and, hence, the rights depend on the interpretation of

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[128] Case C-425/07 P *AEPI AE v Commission* [2009] ECR I-3205 [49-50, 52].

[129] In Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*. [1998] ECR I-7791 [10, 12-22] the Court held that the question referred was admissible, on the basis that the national court was concerned 'to ensure compliance with the rule of the primacy of [EU] law and, consequently, not to tolerate a situation in national law contrary to [EU] law'. It stated that 'whether trade between Member States was genuinely affected concern the applicability of [Article 102TFEU] to the factual situation forming the subject-matter of the main proceedings […] and are irrelevant for the purposes of verifying whether the questions referred to the Court are admissible', even though the national court had found that the condition was met in the main proceedings.

[130] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18 [17, 10].

EU law.[131] However, this test has been applied in a way that the Court of Justice requests the referring court to show that the national law actually prohibits reverse discrimination.[132] Therefore, the Court of Justice seems to require an explicit 'renvoi' technique employed by the national law under the free movement provisions,[133] which should actually prohibit reverse discrimination for the Court of Justice to answer a preliminary question on a 'purely internal situation'.

4.3 'Effect on trade' test as distinct from the substantive test of 'abuse of dominance'

In most Article 102TFEU cases, the Court of Justice uses the test of 'altering the competitive structure of the market' in order to establish the 'effect on trade' requirement. According to the Court,

> 'when an undertaking in a dominant position within the common market abuses its position in such a way that a competitor in the common market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the common market, once it has been established that this elimination will have repercussions on the competitive structure within the common market'.[134]

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[131] See Case C-245/09 *Omalet NV v Rijksdienst voor Sociale Zekerheid* [2010] ECR I-13771 [15] 'even in such a purely internal situation, the Court's answer may nevertheless be useful to the referring court, in particular if its national law required it to grant the same rights to a national of a given Member State as those which a national of another Member State in the same situation would derive from European Union law', for a recent re-affirmation.

[132] *Ibid* [16-17]. However, this check has not been applied consistently. See e.g. Joined Cases C-94/04 and C-202/04 *Federico Cipolla v Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v Roberto Meloni* [2006] ECR I-11421 [30-31] for a counter-example. See C Ritter (2006) 696-703, for a critique against the 'relaxed version' of the test.

[133] The terminology is borrowed from Johnston's typology/taxonomy of 'spillover'-type situations from EU law into national law; A Johnston in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (forthcoming-Chapter 16).

[134] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223 [33]; On that basis, the Court also rejected the undertaking's arguments that 90% of the affected competitor's production is traded outside the common market, *ibid* [30-35]. The same approach was followed, *inter alia*, in Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461 [124-126]; Case 27/76 *United Brands Company and*

The underlying support for market integration in these cases is evidenced when the geographic market in question covers more than one Member States and, thus, the affected competitor ceases to be a source of supply within those Member States.[135] When the geographic market concerned covers a single Member State, the condition of 'effect on trade' is also normally established,[136] either because the abusive conduct makes it more difficult for competitors from other Member States to penetrate the market, thereby leading to isolation of national markets; or because the affected undertaking imports from, or exports to, other Member States. For example, in *Michelin I*, the Court of Justice held that a system of loyalty rebates operating in the Netherlands alone reduced the chances for competitors of significant size established in other Member States of penetrating the Netherlands' market. [137] In *Irish Sugar*, the General Court upheld that a scheme of 'sugar export rebates' that discriminates between the dominant undertaking's industrial sugar customers according to whether or not they exported their own processed products, affected trade between Member States. The geographic market concerned was Ireland alone and the General Court rejected the applicant's arguments that the Commission did not assess the scheme's

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United Brands Continentaal BV v Commission [1978] ECR 207 [201]; Case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II- 485 [76-78].

[135] All cases cited above in n 134. See also Commission (EC), 'Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty' (Notice) [2004] OJ C101/81 [75].

[136] Commission (EC), 'Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty' (Notice) [2004] OJ C101/81 [93-95]. See also, as counter-examples in a case in which 'effect on trade' was not established, Case T-229/05 *AEPI AE v Commission* [2007] ECR II-84 [49-50, 51].

[137] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 [100-105]

beneficial effects on exports outside Ireland and also that the Commission rested on the false premise that the Irish market was already isolated.[138]

However, not every allegedly abusive conduct affects the competitive structure of the market. In *Hugin*, a Swedish undertaking (Hugin)[139] refused to supply cash register spare parts to an independent servicing and repair undertaking in London (Liptons), which according to the Commission was an example of Hugin's [EU]-wide policy not to allow distribution of spare parts outside its own network and, thus, prevented Liptons from importing Hugin spare parts bought elsewhere in the EU. [140] The Court of Justice annulled the Commission's decision on the ground that there was no effect on trade. In particular, after establishing that 'the refusal to supply independent undertakings applied whatever the geographic location of the undertaking', [141] the Court focused on the activities of the affected undertaking, Liptons, whose activities had never extended beyond the UK, nor would in the future, because of the nature of these commercial activities. Therefore, it held that

> 'if Liptons had been able to obtain spare parts from a Hugin subsidiary in another Member State, it would have been because Hugin was willing to sell those parts outside its own distribution network. In such a case, however, it would be customary for Liptons to apply to the Hugin subsidiary in its own country rather than to a subsidiary in another Member State'. [142]

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[138] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [125 *et seq*,] and [145-148]**, '**By securing the loyalty of its exporting customers for their supplies of industrial sugar, the applicant prevented those of them who were the most open to inter-State trade from seeking supplies from competitors established in other Member States', *ibid* [147].

[139] Prior to Sweden joining the EU.

[140] Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869, 1888 (Submissions and arguments of the parties); *Hugin/Liptons* Case No IV/29.132 Commission Decision 78/68/EEC [1978] OJ L22/23, 32.

[141] Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869 [21]; 'it has not been alleged that Hugin applies differentiated prices at various locations', *ibid* [23].

[142] *Ibid* [24].

Therefore, the 'effect on trade requirement' is linked to the Internal Market, but it is arguably broader than the substantive test under the free movement provisions (see Section 4.2). However, this broad scope of the 'effect on trade' does not necessarily mean that the objectives of market integration are transcended into the notion and the substantive test of 'abuse of a dominant position'.[143] The reason is that some but not necessarily all of the conducts that have an 'effect on trade' will be found to be abusive. 'Abuse of the dominant position' exists as an additional element in the scheme of Article 102TFEU. It cannot be assumed that it is not an independent condition for the application of Article 102TFEU, nor that its role is limited to internal situations, in which 'effect on trade' is established, as analysed above.[144]

4.4 Geographic market definition as an example of the likely different roles of market integration at jurisdictional and substantive level

The link between market integration and 'effect on trade' upon jurisdictional grounds is fairly uncontested. The broad interpretation of 'effect on trade' does not necessarily mean that market integration also affects the substantive analysis under Article 102TFEU; it may or, equally, it may not. In this Section, geographic market definition is used as an example to illustrate how market integration may influence the

[143] This seems to be the assumption made by K Mortelmans (2001) 623, in as much as he makes out of the common wording of the 'effect on trade' test and the definition of MEQR that the 'primary and overriding objective of the provisions on free movement and competition [is] the establishment and operation of the Common Market'.

[144] See text to n 127-128. Besides, in these cases, market integration considerations should not normally come into play because the Internal Market has already been established and competition law is a tool for its proper functioning (as mentioned earlier).

substantive analysis under Article 102TFEU or, conversely, may not do so. The purpose is to highlight that the geographic market involved and the geographic coverage of the effect of the allegedly abusive conduct coincide or diverge based on whether market integration is a valid consideration for establishing an 'abuse of a dominant position'. Similarly, the geographic market definition and the geographic coverage of the 'effect on trade' do not coincide necessarily, because the latter is influenced by market integration considerations.

In free movement cases, the geographic market definition is not part of the process of applying the aforementioned rules. In as much as purely internal situations are outwith the scope of the free movement provisions, any fragmentation that is condemned takes place along national lines, because the targeted measure has only national territorial scope at most (e.g. it is the Member State's legislation or administrative practice). Even if the MQER test under Article 34TFEU moves towards an 'appreciable restriction to market access' test for non-discriminatory measures,[145] market access would still need to be delineated by reference to one Member State, because the restrictive measure is of a regulatory nature.

Geographic market definition under Article 102TFEU has a specific purpose, namely to identify the competitive constraints that the undertaking faces, in order to assess the degree of its market power.[146] Therefore, the geographic market context in which the undertaking operates and coverage of the conduct's object or effect should, in principle, coincide. This has been pointed out by the General Court, by reference to

[145] See Chapter III, Section 3.2.

[146] Commission (EC), Notice on the Definition of Relevant Markets for the Purposes of Community Competition Law [1997] OJ C372/5 [2].

the example of abusive discrimination under Article 102(c)TFEU.[147] The General Court, by reference to *United Brands* and *Tetra Pak II*, clarified that charging different prices,

> 'may, in the absence of objective explanation, constitute an indicium of discrimination where those prices are applied on a particular geographic market, characterised by sufficiently homogeneous conditions of competition, [but] this is not the case where they are applied on separate geographic markets, characterised by insufficiently homogeneous conditions of competition, regard being had in particular to the relevant regulatory framework'.[148]

Therefore, if a product market is not integrated, so is not already EU-wide, because the regulatory framework is fragmented but the incumbent undertaking is active at an EU-wide level, the geographic market cannot consist of more than one Member State, since the conditions of competition are not homogeneous. In the latter case, let us assume that market integration influences Article 102TFEU by determining the object or effect of the unilateral conduct in question. In that case, a paradox is revealed, namely that the geographic market definition and the market coverage of the conduct's effect do not coincide, and this diversification defeats the purpose of defining the market in the first place in order to apply Article 102TFEU.

For example, in *Syfait* the Greek Competition Commission found that the geographic market involved in Glaxo's refusal to supply specific medical products to Greek distributors, involved in parallel trade, is Greece, because of the special

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[147] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 [177-179].

[148] *Ibid* [177], citing Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 [44 -56, 207, 208, 225, 228, 233]; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755 [92-96, 161, 164, 165, 167, 170].

regulatory regime as regards the distribution and the prices of the medical products.[149] However, according to the dissenting opinion of two members of the Greek Competition Commission, in parallel trade cases the geographic market comprises the entire EU, because the effects of either sanctioning or allowing the unilateral conduct are felt throughout the EU, where Glaxo is active.[150] Equally, in *Deutsche Telekom*, the geographic market was Germany alone, because of the telecoms network geographic coverage and the existence of regulatory arrangements along national lines.[151] However, the Commission established an abusive margin squeeze, in light of the fact that the prices charged by the incumbents would not allow as efficient competitors established in another Member State to enter the German market.[152]

The same paradox is observed when the 'effect on trade' requirement is established but the geographic market under Article 102TFEU is comprised of a single Member State. The paradox is that the geographic market definition and the geographic coverage of the 'effect on trade' diverge. It is noteworthy that in *Michelin I* and *Irish Sugar* the dominant undertakings challenged the Commission decisions, complaining about, *inter alia*, the geographic market definition.[153]

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[149] Hellenic Competition Commission, Decision No 229 /III/2003 of 28 February 2002 [16] (in Greek).

[150] *Ibid*. Interestingly, there is a case at EU level, in which the Commission has essentially argued the same opinion, namely that, because parallel trading is highly likely between the Member States, the relevant geographic market is the EU as a whole. See Case T-30/89 *Hilti AG v Commission* [1991] ECR II-01439 [79-81]. However, in this case there was no fragmented regulatory framework, but rather parallel trade was due to low transport costs for the traded goods.

[151] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003] OJ L263/9 [92-95]; Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II -477 [35].

[152] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003] OJ L263/9 [183, 201-203].

[153] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 [22-23]; Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [69-79].

Highlighting this paradox does not necessarily serve the purpose of arguing that, for example, in parallel trade cases the geographic market should be broader. This depends on whether market integration is a valid consideration for substantiating an 'abuse of a dominant position', which is the main question to be explored in the remainder of this thesis.[154] Conversely, with regard to the 'effect on trade' requirement, the same paradoxical situation is justified and confirms the claim that market integration plays a legitimate role in establishing this jurisdictional requirement, as discussed earlier.

5. Conclusions

This Chapter explores the objectives of Article 102TFEU and their relationship to market integration. Two main objectives are identified, namely economic efficiency and economic freedom. The analysis shows that in either case, there are trade-offs between various categories of consumers as regards the protection that is afforded to them, for example between present and future consumers under an efficiency standard or between intermediate and end-consumers under a freedom-oriented standard.

Subsequently, the historical link of these two objectives with market integration is identified, based on policy documents and early case law, until the formal completion of the Internal Market in 1992. The analysis shows that far from being a stand-alone, third objective of Article 102TFEU, market integration served, traditionally, as the lens through which the two objectives of Article 102TFEU were

[154] It is concluded in this thesis that market integration should be taken into account under Article 102TFEU if regulatory intervention is in conformity with the free movement provision, and, further, that the latter assessment is better accommodated under the geographic market definition; see Chapter VI, Section 2.2.

interpreted, *via* (ex-)Article 3(1)(g)TEC. Efficiency and economic freedom were the objectives of market integration in the first place, affording a uniform level of protection to the above-identified various categories of consumers.

The historical link between competition and market integration is not conclusive, with regard to the interpretation of 'abuse of a dominant position' in the future, because of the flexibility of the teleological method of interpretation employed by the Court of Justice. In the final Section of this Chapter, however, it is argued that the historical link is legitimately echoed in the requirement of 'effect on trade' under Article 102TFEU, because of the latter's jurisdictional function, to delineate the boundaries between EU and national competition law. The analysis of the Commission's and European Courts' case law regarding the 'effect on trade' test reveals that a broad approach is adopted, since 'effect on trade' is established even when the goods in question do not actually cross national frontiers, or when a cross-border movement exists but is not impeded by the conduct in question. However, the case law does not endorse the view that all allegedly abusive conducts have an 'effect on trade', nor that the substantive test under the notion of 'abuse of the dominant position' is rendered redundant, once 'effect on trade' is established.

This confirms that, for market integration to be taken into account, 'effect on trade' is the minimum legitimate requirement under Article 102TFEU, which leaves open the question as to what extent market integration should affect the substantive analysis of finding an 'abuse of a dominant position'. The example of the geographic market definition is advanced, to show the likely different influences of market integration upon the substantive analysis under Article 102TFEU.

CHAPTER II

Market separation under Article 102 TFEU: The role of dominance

1. Introduction

The assessment of the effects on competition of the conduct by a dominant undertaking is placed under the European market regulatory framework, rather than national one, once it is established that such conduct 'affects trade between Member States' (Chapter I). This Chapter explores the question as to which is the correct regulatory instrument -the free movement provisions or Article 102TFEU- under which to address alleged market separation by dominant undertakings. Cases in which conduct by dominant undertakings is condemned under Article 102TFEU, because there is a protectionist intent or effect (market separation), are identified in Section 2.[1] Therefore, 'abuse of a dominant position', which has the intent or effect of hindering cross-border trade, can be conducted by dominant undertakings. On the face of it, such conduct seems materially similar to a 'restriction on free movement'. However, conduct by private actors has also been condemned under the free movement provisions. These cases, which are often referred to as cases of horizontal (direct) application of the freedoms,[2] are examined in this Chapter, as a category of regulation

[1] Therefore, cases in which the undertaking's conduct, such as discrimination on the grounds of nationality, is assessed under Article 102TFEU in conjunction with Article 106TFEU are outside the scope of this Chapter. See, for example, Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; Case C-163/99 *Portuguese Republic v Commission* [2001] ECR I-2613; *Deutsche Post AG- Interception of cross-border mail* (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L 331/40.

[2] See J Baquero Cruz, *Between Competition and Free Movement* 106-108, for a critique of the use of the term.

of private conduct, which involves, potentially, market separation by dominant undertakings as one of its specific manifestations. The purpose of this examination is to support the view that Article 102TFEU, with its distinct conditions of application and, in particular, the requirement of significant market power, constitutes a meaningful limitation to any expansive view of the horizontal application of the freedoms.[3] Therefore, market separation by dominant undertakings is not a specific manifestation of a generic application of the freedoms to private actors. Three arguments are advanced to support this, following a brief description of the asymmetry between the addressees of the competition law provisions and the addressees of the free movement provisions (see Section 3). This description assumes that the functional definition of the notion of 'undertaking' under Article 102TFEU is employed according to the case law.[4]

First, the existing cases that apply, simultaneously, both the freedoms and the competition law provisions to the same conduct are to be read in the context of a mutually exclusive, functional, understanding of 'State-actors' and 'undertakings', namely on the basis of 'regulatory power' and 'economic activity'. The fact that there are cases of false classification of the actor can, arguably, be explained by the significance of public enforcement of the competition law provisions as opposed to the prevailing private enforcement of the freedoms (see Section 4).

Second, the recent cases in which the Court of Justice does not seem to require a link between the power of the actor to obstruct the freedom and a regulatory

[3] *Contra* C Krenn (2012) 203-206, with very poor argumentation.

[4] In Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979 [21] the Court of Justice construed the definition of the concept of an undertaking as '[...] encompassing every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. See O Odudu, *The Boundaries of EC Competition Law* 23-56, for an analysis of the functional approach to the definition of an undertaking.

function do not negate the significance of 'dominant undertakings' for the purpose of applying Article 102TFEU. These cases erode one side of the 'mirror image' of 'regulation' and 'economic activity' as the benchmarks of the personal scope of the two sets of provisions. The personal scope of the free movement provisions has expanded beyond regulatory functions, but it has never crossed the line of an 'undertaking' as set by the concept 'economic activity'. This argument is complemented by a normative and a legal analysis that shows dominance as a condition *sine qua non* under which the anti-competitive effect of market separation occurs under Article 102TFEU. By contrast, no quantitative threshold as regards the ability of 'State measures' to obstruct the freedoms has been established (see Section 5).

Third, a textual argument, drawn from the Treaty itself, and in particular Article 106(2)TFEU, confirms the view that alleged market separation by dominant undertakings was intended to be subject to Article 102TFEU alone (see Section 6).

2. Cases of market separation by dominant undertakings under Article 102TFEU

The Commission and the European Courts have condemned market separation along national lines within the EU as an abuse of a dominant position under Article 102TFEU. A distinction is drawn, for reasons of systematic presentation, between cases that deal with geographic price discrimination and those with exclusionary practices which hinder competition across national borders, in light of the four categories listed in Article 102TFEU as examples of abusive conduct. Although the distinction implies that geographic price discrimination has been treated as an independent ground of abuse under Article 102(c)TFEU, it will be revealed that the

Commission and the European Courts have, only formally, condemned this as unlawful in itself. Rather, discrimination under Article 102(c)TFEU is the inherent result of another independent, either exclusionary or exploitative, abuse.[5] Therefore, the focus of the case-law description in this Section is not placed on the distinct, legal and economic, guiding principles of abusive discrimination.[6] The Section presents the cases of any abuse of a dominant position, regardless of its form, that has been found to have an effect, or intent, of creating artificial barriers to trade between Member States.

2.1 Geographic price discrimination

The first case to address geographic price discrimination is *United Brands.*[7] The Commission, confirmed by the Court of Justice, condemned as abusive the policy of UBC to charge differing prices for the sale of its branded bananas to distributors, according to the Member State in which the distributor is established and, thus, the bananas intended to be sold. At the same time, UBC's general sales conditions incorporated a clause, which prohibited the resale, within a single State or between Member States, of bananas while still green and which had a similar effect to export prohibition. The Court of Justice held that:

[5] Conversely, price discrimination cannot in itself constitute an exclusionary abuse; see Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Judgment of 27 March 2012 (NYR) [30].

[6] See R O Donoghue and J Padilla, *The Law and Economics of Article 82EC* 202-206, 552-555; D Geradin and N Petit in Swedish Competition Authority (eds) *The Pros and Cons of Price Discrimination* 21; D Gerard (2005), on the use of Article 102(c)TFEU as a legal basis for various categories of price discrimination.

[7] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

> 'The discriminatory prices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered .
> 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'.[8]

The Court of Justice seems to suggest that UBC segregated the Internal Market along national lines from the outset through contractual clauses prohibiting exports, thereby being able to charge artificially different prices in each Member State.[9] It seems that charging different prices in each Member State was, then, found to be abusive in itself, because its market partitioning effect allegedly placed the distributors at a competitive disadvantage, even though distributors/ripeners from different Member States were not in competition with one another once the geographic market had been segregated.

Similarly, in *Tetra Pak II* the Commission, confirmed by the General Court, found discriminatory pricing contrary to Article 102TFEU on the basis of the different selling prices of the Tetra Pak cartons and machines between Italy and the other Member States.[10] However, the Commission and the General Court did not focus on establishing the competitive disadvantage flowing from Tetra Pak's policy to apply

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[8] *Ibid* [232-233].

[9] The Court of Justice held that the contractual clause, in itself, is '[...]an abuse of the dominant position since it limits markets to the prejudice of consumers and affects trade between Member States, in particular by partitioning national markets. Thus UBC' s organization of the market confined the ripeners to the role of suppliers of the local market and prevented them from developing their capacity to trade vis-à-vis UBC [..]', *ibid* [159-160].

[10] *Tetra Pak II* (Case IV/31043) Commission Decision 92/163/EEC [1992] OJ L72/1 [154-155, 160]; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755 [160-173].

different prices within the same geographic market. Rather, the Commission and the General Court found various contractual resale restrictions to be abusive because they comprised a 'market compartmentalisation policy [...] thereby creating the right conditions for the success of policies such as a profit maximization policy, based on discrimination, or a policy of eliminatory prices intended to preserve or strengthen a dominant position'.[11] It seems that geographic price discrimination was the result of (or a proof of) the market partitioning effect of Tetra Pak's contractual abuses.

British Leyland is another case of geographic price discrimination under Article 102TFEU.[12] British Leyland, which had a statutory monopoly for the issue of certificates of conformity for British Leyland vehicles in the UK, marketed its vehicles in the UK through a selective distribution network. Parallel trade in the re-importation of British Leyland cars, mainly from Belgium, was developed as a result of the differences between the prices charged by British Leyland in the UK for right-hand-drive vehicles and in the continental European Member States for left-hand-drive vehicles, because conversion of left-hand-drive to right-hand-drive vehicles was easy. The Commission, confirmed by the Court of Justice, found that the non-renewal of conformity certificate for re-imported left-hand-drive vehicles, in addition to the charging of higher fees for the grant of conformity certificates for said vehicles was abusive as a result of British Leyland's intent to create barriers to re-importation in the UK of left-hand-drive cars and to protect its domestic distributors.[13] The

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[11] *Tetra Pak II* (Case IV/31043) Commission Decision 92/163/EEC [1992] OJ L72/1 [154]; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755 [170-171].

[12] Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECR 3263.

[13] *Ibid* [18, 21, 24, 29].

Commission found that the fee charged was both excessive and discriminatory.[14] However, the Court of Justice focused not on discrimination itself but rather on the 'disproportionate [price level of the fee] to the economic value of the service provided'.[15] In addition, it is noteworthy that it was British Leyland's own conduct which 'allowed a trade in the re-importation of [left-hand-drive] cars to develop. That trade came about as a result of its pricing policy'.[16]

This is in contrast with the recent *Sotirios Lelos* case, which involved parallel trade in pharmaceuticals.[17] In this case, despite Glaxo's undisputed intent to limit parallel trade in the market for specific prescription medicines,[18] the Court of Justice opined that, in assessing GSK's refusal to supply wholesalers in Greece involved in parallel exports, 'it cannot be ignored that such State intervention [price regulation in the pharmaceuticals sector] is one of the factors liable to create opportunities for parallel trade'.[19] It seems that the Court of Justice did not consider Glaxo's conduct, which aimed at neutralising the benefits in terms of prices that parallel exports could

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[14] *British Leyland* (Case IV/30.615) Commission Decision 84/379 [1984] OJ L207/11 [26].

[15] Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECR 3263 [31].

[16] *Ibid* [13].

[17] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139.

[18] *Ibid* [36].

[19] *Ibid* [67].

bring to other Member States, to be abusive *per se*, as was the case in *British Leyland*.[20] This was precisely because the price differences allowing for the development of parallel trade did not stem from Glaxo's own pricing policy. However, the Court of Justice seems to infer that Glaxo's practice, which was aimed at limiting parallel exports, was liable to eliminate competition in Member States other than Greece and, therefore, was abusive *prima facie.*[21] In exceptional circumstances, it could be justified and, hence, the Court focused its analysis on the question as to whether the conduct was a reasonable and proportionate way of protecting Glaxo's legitimate commercial interests.[22]

2.2 Exclusionary abuses hindering competition across national borders

The Commission and the European Courts condemn certain conducts because of their exclusionary effects under Article 102TFEU. In a streamline of cases, the exclusionary effect of the dominant undertaking's conduct is, in part, equated with hindering competition across national borders or raising barriers to market entry for out-of-State competitors.

For example, in *British Gypsum*, the dominant undertaking decided to withdraw the 4% rebate that it had granted to Northern Ireland merchants who

[20] Ibid [37, 66], in which *British Leyland* is being cited.

[21] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [35].

[22] *Ibid* [69].

intended to import plasterboard from Spain and, at the same time, it decided to grant a rebate of 5% to the merchants who agreed to obtain their supplies exclusively from BG. [23] The General Court held that

> 'Such a practice, by virtue of its discriminatory nature, was clearly intended to penalize those merchants who intended to import plasterboard and to dissuade them from doing so, thus further supporting BG' s position in the plasterboard market'.[24]

It seems that the exclusionary effect of the loyalty rebates stems from the fact that the rebates were conditional on the recipients not handling imported products and that they necessarily made it more difficult for plasterboard importers to penetrate the Northern Ireland market. At the same time, the dominant undertaking implemented a policy of giving priority to orders for plaster placed by customers in the UK who did not handle imported plasterboard from Spain. The General Court held that

> '[...] the criterion adopted in this case by BG was based on a distinction between, on the one hand, customers who marketed plasterboard imported and produced by certain of its competitors and, on the other, "loyal" customers who obtained their supplies from BG. Such a criterion, which results in the provision of equivalent services on unequal terms, is in itself anti-competitive by reason of the discriminatory purpose which it pursues and the exclusionary effect which may result from it'.[25]

In *Irish Sugar* the dominant undertaking operated a system of 'sugar export rebates' which discriminated between its industrial sugar customers according to whether or not they exported their own processed products. Also, it operated a system of 'border rebates', which were granted to certain retailers established in the border area between Ireland and Northern Ireland and which aimed at 'confronting'

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[23] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389.

[24] *Ibid* [119].

[25] *Ibid* [94].

competition from sugar imported from Northern Ireland.[26] As regards the system of 'export rebates', the General Court pointed out that

> '[...] the Commission did not simply rely on the discriminatory character of the [export rebates] in order to find them contrary to [Article 86]: it has also demonstrated that granting them placed the applicant's competitors on the industrial sugar market who were based outside Ireland at a competitive disadvantage'.[27] '[...] granting such [rebates] prevents other potential suppliers from competing, on a fair basis, with the services offered by the applicant to its exporting customers. In any event, the Commission has shown that the [export rebates] constituted a hindrance to importations of industrial sugar into Ireland, inasmuch as they reinforced the isolation of the Irish market'.[28]

In relation to the 'border rebates' scheme, the General Court found the scheme discriminatory and, thus, abusive on the basis of the dominant undertaking's own submission that

> '[...] its economic capacity to offer rebates in the region [where retailers faced competition from cheap imports from another Member State] depended on the stability of its prices in other regions, which amounts to recognition that it financed those rebates by means of its sales in the rest of Irish territory.'[29]

In addition the General Court held that

> '[...] the influence of the pricing policy of operators active principally on a neighbouring market, in this case the British and Northern Ireland market, on that of operators active on another national market is of the very essence of a common market. Anything which restricts that influence must therefore be regarded as an obstacle to the achievement of that common market and prejudicial to the outcome of effective and undistorted competition, especially with regard to the interests of consumers.'[30]

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[26] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969.

[27] *Ibid* [145].

[28] *Ibid* [148].

[29] *Ibid* [188].

[30] *Ibid* [185].

More recently, in *Deutsche Telekom* the Commission, confirmed by the General Court and the Court of Justice, equated the competitive harm flowing from a margin squeeze practice with raising barriers to market entry for competitors, in particular those aiming at a 'geographically extended competition'.[31] The Commission held that

> 'The abuse involves the whole territory of the Federal Republic of Germany and jeopardises the proper functioning of the common market by raising barriers to effective entry to the relevant telecommunications markets in Germany, thus impeding the establishment of transnational markets.
> Through this abuse, DT is jeopardising the objective of achieving EU-wide establishment of an Internal Market for telecommunications networks and services with undistorted competition'.[32]

2.3 Comment: The significance of geographic market definition

The preceding description of the case law under Article 102TFEU shows that there are, indeed, cases in which market separation by dominant undertakings has been condemned as abusive, because it has the intent, or effect, of creating artificial trade barriers between Member States and leads to the isolation of national markets; therefore, it falls under the material scope of Article 102TFEU. In some of these cases, such as *UB* and *Tetra Pak II*, the application of Article 102TFEU is qualified by the assumption that the geographic market in which the dominant position is established involves more than one Member States.[33] However, in most cases the geographic market involved is comprised of a single Member State, even though the

[31] *Deutsche Telekom AG* Commission Decision 2003/707/EC [2003] OJ L263/9 [183]; Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477 [235]; Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [255].

[32] *Deutsche Telekom AG* Commission Decision 2003/707/EC [2003] OJ L263/9 [202-203].

[33] See also Chapter I, text to n 147-148.

effect of the abusive practice is felt throughout the territory of more than one Member State. In such cases, the starting point is that the Member States are geographically distinct markets, based on objective factors, such as the regulatory framework[34] or transport costs.[35] The exclusionary effect of the abusive conduct is equated to raising the barriers to enter a national market for out-of-State competitors.

3. An analytical approach to market separation by private actors under the free movement provisions and its relationship to market separation by dominant undertakings

Section 2 identified the judgments in which conduct that creates artificial barriers to trade between Member States by dominant undertakings was held abusive under Article 102TFEU. Therefore, 'abuse of a dominant position', which has the intent or effect of hindering cross-border trade, can be conducted by dominant undertakings. On the face of it, such conduct seems materially similar to a 'restriction on free movement'. However, there are also conducts by private actors, which have been condemned under the free movement provisions.

The discussion of the horizontal direct applicability of the free movement provisions is outwith the scope of this thesis. The question as to whether the addressee of the freedoms includes private actors, who are not caught by Article 102TFEU, is conceptually distinct from the enquiry as to whether conduct by dominant

[34] Hellenic Competition Commission, Decision No 229 /III/2003 of 28 February 2002 [16] (in Greek); *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003] OJ L263/9 [92-95].

[35] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [80-84], in which the General Court rejected the applicant's argument that the Commission failed to take into account potential (out-of-State) competition when assessing the undertaking's market power in Ireland.

undertakings, which separates the Internal Market, should, at a normative level, qualify as an abuse. However, the discussion of the case law on the horizontal application of the freedoms is a necessary exercise in order to discern whether there are limits to treating market separation by dominant undertakings as an abuse of a dominant position. The reason is that horizontal application of the free movement provisions is defined by reference to conduct which is not within the compass of the competition law provisions. Thus, if the competition law provisions are still a meaningful limitation to horizontal applicability of the freedoms, then undertakings with significant market power should not be subject to the free movement provisions, as the obvious candidate to comprise an additional category of private actors to the existing ones, which are subject to the freedoms.[36] Therefore, the following Sections, in effect, support a view that obstacles to trade between the Member States created by dominant undertakings ought, in principle, to be assessed under Article 102TFEU alone, rather than by applying both sets of provisions to the same conduct, or the free movement provisions in place of Article 102TFEU.[37] The fact that the intermediate category of cases in which the freedoms apply horizontally is, itself, subject to criticism at a normative level,[38] does not preclude the descriptive use of the relevant case law, to the extent that it is still good law.

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[36] See the question as set by G Davies in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (forthcoming-Chapter 4), who seems to suggest the opposite view, namely that the freedoms should, potentially, apply to dominant undertakings.

[37] O Odudu (2010) 836 uses the same assumptions to make an argument in regard to the horizontal application of the free movement provisions, namely that the obligations established by the case law which applies the free movement provisions to private parties ought to be distinct and narrower than the obligations imposed under the same provisions to State actors. Therefore, he frames his argument in terms of a distinction within the free movement provisions, based on whether they are applied to private or public functions, rather than in terms of a distinction between the competition law provisions and the free movement provisions, when they are both applied to a private function.

[38] See, e.g., H Schepel (2012), who argues that this leads sometimes to a constitutionalised market and sometimes to a marketised constitution, without there being any principled way of distinguishing between the two.

3.1 The asymmetry between the addressees of the competition law provisions and the free movement provisions

While the competition law provisions are expressly addressed to undertakings, the same does not apply to the free movement provisions. The Court of Justice implied a distinction between Treaty provisions which impose obligations upon individuals and Treaty provisions which impose obligations upon the Member States, in its seminal judgment in *Van Gend & Loos*.[39] The purpose of the Court was to establish directly enforceable rights of the individuals stemming from Treaty provisions that impose obligations upon the Member States. However, the presence in the Treaty of provisions that impose obligations upon individuals enabled the Court to do so.[40]

The wording of the Treaty free movement provisions does not dictate that the addressees of the obligations are only the Member States and not individuals. For that reason, academic debate has centred on the question as to whether private actions having the aim or effect of creating artificial barriers to *inter*-State trade fall exclusively under the competition law provisions or whether private actions that do not fall under the competition provisions are, nevertheless, assessed under the free movement provisions. In other words, if the specific requirements of Articles 101 and 102TFEU are not established, should private actors escape both sets of provisions or is this an unwarranted gap or asymmetry in the scheme of the Treaty?[41]

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[39] Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 12. The same distinction is made more clearly in Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 20, Opinion of AG Roemer.

[40] See R Lane in N Nic Shuibhne (ed), *Regulating the Internal Market* 246.

[41] See, in particular, the vigorous discussion between Judge P Pescatore (1987) and an adviser (at the time) of the Commission, G Marenco (1987), the first arguing in favour of a cross-application of both

II. *Market separation under Article 102TFEU: The role of dominance*

The question remains unresolved despite the evolution of the definition of the notion of 'undertaking' under the competition law provisions, on the basis of which the Court of Justice embraced a functional approach to the notion and defined it by reference to an 'economic activity'.[42] Arguably, this is because the alleged asymmetry is related to the abstract determination of the personal scope of the competition law provisions and the free movement provisions. 'Undertakings that hold a dominant position' is a narrower concept than the notion of private parties. This is not the case under the free movement provisions. There is no further qualification to the notion of 'State measure', even if a functional definition of the 'State' is employed.[43]

In addition, the concept of 'economic activity' is associated with the definition of 'undertaking' under the competition law provisions. By contrast, under the free movement provisions, the term 'economic activity' is associated with the much broader market element as referred to in ex-Article 2TEC,[44] which is necessarily established if it is established that there is an 'undertaking'.[45] Moreover, 'economic

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sets of provisions based on an 'eventual unity of purpose', while the second argued against such gap-closing interpretation, on the basis that the asymmetry is deliberate and justified; see also R Joliet (1989) and R Joliet (in collaboration with D Keeling) (1991) 313, who are in favour of keeping the distinction based on the addressee of the provision.

[42] See *Odudu* (n 4) 45-56, who uses the functional approach as a means for maintaining the private/public divide of the Treaty provisions; *Baquero Cruz* (n 2) 121-125 is in favour of determining the personal scope of free movement provisions based on the nature of the action, but he is against the maintenance of a private/public divide.

[43] See Case 249/81 *Commission v Ireland ('Buy Irish')* [1982] ECR 4005, in which the behaviour of the Irish Goods Council was attributed to the Irish government because of its involvement in the establishment and financing of the organisation in question. See also Joined Cases 266 and 267/87 *The Queen v Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers and others* [1989] ECR 1295 and Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, in which the State delegates parts of its regulatory and disciplinary powers to the pharmacists' associations in question.

[44] 'The Community shall have as its task […] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities'.

[45] A similar, confusing, double use of the notion of 'economic activity' is provided by the Court of Justice under the Sixth (VAT) Directive 77/388/EEC in Case C-369/04 *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise* [2007] ECR I-5247 [34-42]. The Court of Justice seems to confirm that there is a broader concept of 'economic activity' (at [42]), under which both

activity' under the free movement provisions is associated with the interplay between economic and non-economic values under the prohibition-justification scheme of the Treaty provisions, in as much as purely economic grounds can never serve as a justification.[46] An example of this double use of 'economic activity' in the same judgment is *Walrave.*[47] The reference to the practice of sports as an 'economic activity' is made in paragraph [4] in relation to ex-Article 2TEC, whereas in paragraph [8] it is made in relation to the material scope of the prohibition of discriminatory barriers to the free movement of workers. This double use of the term 'economic activity' under the freedoms has led to misunderstandings in regard to its relationship with the notion of 'undertaking'.[48] Article 3TEU-L, which replaced in substance Article 2TEC, omit the reference to 'economic activities' in ex-Article 2TEC, after the entry into force of the Lisbon Treaty.[49] This leaves 'economic activity' as relevant only to the material scope of the free movement provisions and, hence, suggests an asymmetry in that the core of the definition of the *personal* scope of the competition law provisions is only associated with the *material* scope of the free movement provisions. Therefore, anything that is outside the scope of the competition law provisions, because it is not an 'economic activity' as defined under

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regulatory activities and economic activities fall based on their purpose (at [38]). This second notion of 'economic activity' is, based on its purpose, defined by reference to the case law on the notion of 'undertaking' under the competition law provisions.

[46] See Chapter III, Section 3.1.

[47] Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1405.

[48] The most prominent example of a misunderstanding of the relationship between the two concepts of 'economic activity' under the free movement provisions and the notion of 'undertaking' is Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209 [69-70, 73]. See also P Ibáñez Colomo (2006) 4, 7, on the confusing, double, use of the notion of 'economic activity' in *Piau.*

[49] This confirms the theory endorsed in this thesis of inclusiveness of any non-economic value under the free movement provisions and the emphasis on the 'internal' element of the internal market, since the threshold for the market element is very low; see Chapter III, n 45 and Chapter IV, Section 2.1.

the notion of 'undertaking', can potentially be caught by the free movement of goods, workers or freedom to provide services.

The question remains as to whether conduct by dominant undertakings can also be put to the same test, as a more specific type of conduct by private parties subject to the freedoms. The following three Sections provide three arguments against such an expansive view of the horizontal applicability of the freedoms and, in effect, support the view that the intended and principled difference in the personal scope of the freedoms and the competition law provisions spills over their material scope of finding a restriction. Therefore, market separation by dominant undertakings cannot be assimilated with restrictions of the free movement.

4. Functionalism and the significance of public enforcement of the competition law provisions

The majority of cases of horizontal application of the freedoms are seemingly about an expansion of the personal scope of the freedoms to private parties but, in fact, they are about a functional understanding of a 'State-actor'. Interestingly enough, it is in these cases in which the Court has been invited to apply simultaneously both the free movement provisions and the competition law provisions to the same conduct.

For example, in *Walrave* and *Bosman,* the Court of Justice applied Article 45TFEU to private sports associations' rules, which are 'aimed at regulating in a collective manner gainful employment and the provision of services'.[50] In addition,

[50] Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1405 [17]; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* (*'Bosman'*) [1995] ECR I-4921 [82]. Similarly, Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François*

the Court of Justice held in *Bosman* that 'there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health'.[51] In these judgments the Court of Justice seems to extend the personal scope of Article 45TFEU to private parties, which dispose 'regulatory power' regardless of any formal delegation by the State, because regulatory power is inherently a 'State-like' activity.[52]

The Court of Justice did not answer the competition law questions raised in these cases.[53] In *Bosman*, AG Lenz considered that the rules of private sports associations permitting a football club to release a player, even after the expiry of his contract, after receiving a transfer free, could be subject to both the freedom of movement for workers and Articles 101 and 102TFEU. According to AG Lenz, the two sets of provisions may be applicable to a single factual situation, in absence of a Treaty provision 'regulating the inter-relationship of the two'.[54] AG Lenz first asserted that professional football clubs are likely to be considered as undertakings and then found that the transfer rules constituted a 'restriction on competition'. However, AG Lenz seems to assume that professional football clubs are

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Pacquée ('*Deliège')* [2000] ECR I-2549 [47]; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) ('Lehtonen')* [2000] ECR I-2681 [35]; Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177 [30-32].

[51] Case C-415/93 *Bosman* [1995] ECR I-4921 [85-86].

[52] This seems to be confirmed by Case C-379/09 *Maurits Casteels v British Airways plc* Judgment of 10 March 2011 (NYR) [19-20, 22-23], in which the Court of Justice applied Article 45TFEU to a collective labour agreement governing the supplementary pension rights of the employees and held that Article 45TFEU applies against any measure hindering or rendering less attractive the exercise of the fundamental freedoms. However, *Schepel* (n 38) 185-186 seems to challenge the assumption that 'collective regulation' is significant because it is a 'State-like' activity.

[53] Case C-415/93 *Bosman* [1995] ECR I-4921 [138]; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549 [36-40]; Case 176/96 *Lehtonen* [2000] ECR I-2681 [28-30].

[54] Case C-415/93 *Bosman* [1995] ECR I-4921, Opinion of AG Lenz [253]. In principle, the opinion of AG Lenz is repeated in Joined cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, Opinion of AG Cosmas [103-114] as regards freedom to provide services.

'undertakings' in so far as the exercise of sports constitutes an 'economic activity' within the meaning of ex-Article 2TEC, which is a logical fallacy in as much as 'economic activity' under ex-Article 2TEC is more broad that 'undertakings'.[55] The Court of Justice held that it is not necessary to rule on the application of the competition law provisions, since the transfer rules are unlawful under Article 45 TFEU.

Similarly, in *Wouters* the Court of Justice found that Articles 49TFEU and 56TFEU are potentially applicable to the rules of the Dutch Bar Association, which prohibit any multi-disciplinary partnerships between members of the Bar and accountants.[56] The regulatory powers of the Dutch Bar Association were delegated by the national Constitution and secondary legislation.[57] However, the functional understanding of the public realm in that judgment is evidenced in the application of essentially the same reasoning under the competition law provisions, in particular Article 101(1)TFEU.[58] The Court of Justice found that the restriction of competition is necessary for achieving a regulatory function, the proper practice of the legal profession, by citing a free movement of services case.[59] Therefore, *Wouters* is arguably a case of false classification of the actor and shows that subjecting the same

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[55] Case C-415/93 *Bosman* [1995] ECR I-4921, Opinion of AG Lenz [255], cross-citing [125].

[56] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 [119-123].

[57] *Ibid* [3-12].

[58] See R Whish, *Competition Law* 127-128, 'it is possible that the Court was deliberately trying to reach a similar outcome under [Article 101TFEU] to that which would have been achieved under [Article 56TFEU] had the case been argued under the provisions on the free movement of services'; *Odudu* (n 4) 166, 'classification as public or private activity is then of less importance, since the correct norm is applied regardless of how the activity is initially classified'.

[59] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 [97, 110], by citing Case C-3/95 *Reisebüro Broede v Gerd Sandker* [1996] ECR1-6511. This makes *Wouters* 'a clear-cut example of convergence'; see J van de Gronden in A Schrauwen (ed), *Rule of Reason: Rethinking Another Classic of European Legal Doctrine* 84; similarly, R O'Loughlin (2003) 68-69.

factual situation to both sets of provisions is superfluous, in as much as the Court applied the reasoning underlying the application of the correct norm, Article 49TFEU, under both Article 49TFEU and Article 101(1)TFEU.[60]

The *Wouters* approach under Article 101(1)TFEU is repeated in *Meca Medina*, in which arguments based on both sets of provisions were advanced. However, unlike *Wouters*, *Meca Medina* did not come before the Court of Justice as a preliminary reference, but originated in a Commission decision which rejected a complaint under Regulation 1/2003; hence the Court of Justice could not but hold that Article 56TFEU was inapplicable, [61] while it repeated the *Wouters* approach under Article 101(1)TFEU. In that sense *Meca Medina* is not unusual or any different from *Wouters* and this is confirmed by the fact that it is cited in *Viking* in support of the proposition that if something is excluded from the scope of the competition rules, it does not necessarily fall outside the scope of the freedoms.[62] Had the actor been classified correctly in *Wouters* and Article 49TFEU alone been applied, there would not be any academic discussion or even anxiety as to the generalisation of the *Wouters* interpretative approach under competition law outside the field of sports.[63]

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[60] See the references in n 58.

[61] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I- 6991 [58].

[62] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 [53]. See Chapter V, text to n 137, on the rejection of the '*Albany* exclusion' under the free movement provisions. The oddity concerning the Court of Justice judgment in *Meca Medina* is that it equally implies the reverse relationship, namely that if something is excluded from the scope of the freedoms because it does not constitute an 'economic activity', this does not necessarily mean that it falls outside the (personal) scope of the competition law provisions; Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I- 6991 [31, 33]. This is irrational, since the notion of 'undertaking' under the competition law provisions is included in the broader notion of 'economic activity' as was referred in ex-Article 2TEC.

[63] See S Weatherill, (2010) 288 concerning such an anxiety. *Wouters* is an unfortunate judgment as regards the choice of the legal provision under which the given test was applied, since both Articles (101TFEU and 49TFEU) were advanced by private litigants.

Therefore, as long as a functional definition of the personal scope of the free movement provisions is adopted, the mutually exclusive classification of the actor as an undertaking or an actor with regulatory powers as regards goods, services or workers determines the line between the latter provisions and the competition law provisions. Both these categories of actors fall under the broader category of 'economic activities' as the term was referred in ex-Article 2TEC, which is now omitted. The classification of the actor matters, as it determines the rule under which the response to a question is given. However, the fact that the competition law provisions were exclusively enforced, prior to the enactment of Regulation 1/2003, by the Commission, also means that the Commission could be forced to answer a question which is asked under the wrong rule. This is the reason why the cases which support a mutually exclusive understanding of the personal scope of the two sets of provisions also support the claim of substantive convergence between the free movement provisions and the competition law provisions when they are applied simultaneously to one and the same conduct. Therefore, these cases do not provide an argument for a cumulative and complementary application of the two sets of provisions to conduct by dominant undertakings.

5. Beyond functionalism: The significance of a quantitative power-threshold

The current state of case law suggests that the 'mirror image' of the functional understanding of 'State-measures' and 'undertakings' on the basis of the mutually exclusive notions of 'regulation' and 'economic activity' is, in part, cracked. This Section describes how the functional approach to the personal scope of the freedom of

establishment in *Viking*[64] and of the freedom to provide services in *Laval*[65] is, indeed, eroded. There is no need for a positive assertion of a link with a function equivalent to regulation for a conduct to fall under the scope of the free movement provisions. In that regard, Schepel argues that the case law applying the free movement of workers (*Angonese*),[66] the freedom of establishment (*Viking*) and the freedom to provide services (*Laval*) to private actions seems to suggest that the significant element is rather 'the ability to obstruct free movement, an ability that could also find its source in market power or in the mobilisation of people to picket or lay their bodies on a motorway'.[67]

It is however disputed that, because the Court of Justice did not require a positive link with some regulatory function in these judgments, the pragmatic ability of the actor, including the market power of an undertaking, to obstruct the free movement is the trigger mechanism for the application of freedoms. No matter how distinct from some form of regulation has the application of the freedoms been, this application has never crossed the outer limit as set by 'conduct by dominant undertakings', even though the Court of Justice was asked to do so. In particular, the

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[64] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

[65] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767. The first judgment to erode the functional understanding of the personal scope of the free movement of workers is Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, in which the Court held that the possession of a certificate of bilingualism as a condition for taking part into a competition for a post with an Italian private bank is indirectly discriminatory on grounds of nationality and, hence, in breach of Article 45TFEU. Therefore Article 45TFEU was applied to a unilateral conduct by a private party, as opposed to collective regulations as well as private contracts. However, Article 45TFEU is a special case, because it contains a textual prohibition on discrimination in Article 45(2)TFEU.

[66] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

[67] *Schepel* (n 38) 187. See also W Sauter and H Schepel, *State and the Market in European Union Law* 102-103 for an earlier articulation of the same proposition.

Court of Justice did not follow the opinion of AG Maduro in *Roaming Regulation*, which addressed the EU competence under Article 114TFEU to adopt legislation aimed at tackling restrictions to free movement arising from the behaviour of *undertakings*.[68] This argument is further complemented by a contrast fleshed out in the following Section. Whereas dominance is a necessary condition for abusive market separation under Article 102TFEU, no quantitative threshold is required under the freedoms, as regards the ability of 'State measures' to obstruct the free movement (see Section 5.1).

Both *Viking* and *Laval* concern unilateral behaviour by trade unions. In *Viking* a Finnish trade union, supported by an international association of trade unions, threatened strike action and boycotts in light of the Finnish ferry operator's plans to re-flag a Finnish ship to Estonia, in order to force the operator to enter into a collective agreement maintaining its current wage levels. Similarly, in *Laval* a Swedish trade union took collective action in the form of a blockade against a Latvian construction company, to force it to negotiate the rates of pay for its workers posted in Sweden and sign a collective agreement in the building sector.

In both cases, the approach adopted by the Court of Justice is pragmatic as regards the applicability of Articles 49TFEU and 56TFEU. The applicability of these Treaty provisions seems to be based on the factual ability of the trade unions to impose restrictions on the freedom of establishment or freedom to provide services, even if there is no apparent link with regulatory competence and power.[69] In *Viking*,

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[68] Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999, Opinion of AG Maduro.

[69] It is noteworthy that in both cases it was the employees' rather than the employers' organisations that took action, which defeats the 'imbalance of power' argument that is often used to equate labour relationships with the relationship between private parties and the State and thus to link such behaviour to the public interest. See C Semmelmann (2010) 529.

the wording of the judgment may indicate a concern by the Court to link the collective action of the trade union with the conclusion of the intended collective agreement.[70] However, the Court of Justice expressly rejected an interpretation of the case law on horizontal application that restricts such application 'to associations or to organisations exercising a regulatory task or having quasi-legislative powers'.[71]

In *Laval* the question as to the regulatory nature of the conduct of the trade union was more complex, because of the additional question as to whether Sweden had correctly transposed Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, since it had not

> 'made use of the arrangements provided for in the Directive to extend or endorse, by a measure vested with public authority, the application of collective agreements concluded in its territory to foreign service providers which post workers there temporarily'.[72]

The Court of Justice provided a negative answer and held that

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[70] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 [35-37, 60], particularly [36], 'collective action [...] which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking'. D Wyatt (2008) 8, 'this is presumably legally significant or the Court would not emphasise it'. Similarly, A Dashwood (2007-2008) 235-236. *Contra Schepel* (n 38) 187; J Krzeminska-Vamvaka (2009) 28-29; M Karayigit (2011) 324, who dispute the relevance of a link between the restriction and collective regulation in the judgment at a descriptive level.

[71] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 [64-65]. L Azoulai (2008) seems to assume that the trade union's conduct in *Viking* and the Bar Association's conduct in *Wouters* are comparable and, based on this, concludes that the Court of Justice made the choice to treat *Viking* differently. However, his assumption is unfortunate because, in *Wouters*, there are references to the national law which granted legal autonomy to the Bar Association and, thus, regulatory power. See n 57. This is not the case in *Viking*, at a descriptive level.

[72] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767, Opinion of AG Mengozzi [133]. See also *ibid* [135, 136], in which AG Mengozzi rejected Laval's argument 'to widen the concept of a State in such a way that, in the present case, trade unions are regarded as a subdivision of the Swedish State, against which Laval could then directly invoke Directive 96/71'. He observed that 'those unions are certainly not public authorities and they are not entrusted, by an act of a public authority, with performing, under the latter's control, a service of public interest, nor are they vested, for such a purpose, with powers that go beyond the rules applicable to relations between private individuals'.

> 'the national authorities in Sweden have entrusted management and labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers'.[73]

After repeating the case law on the application of the freedoms to collective regulation, the Court concluded straight away that:

> 'it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector [...] is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of [Article 56TFEU]'.[74]

Therefore, the Court seems to deduce that the freedom of movement is applicable *rationae personae* from the material finding of a restriction on the freedom.

However, it should be disputed that, based on those two cases, it is not the qualitative type of the power of the actors which triggers the application of the free movement provisions, but rather its quantitative significance as regards a restriction of the free movement. One could argue that the Court of Justice did not require a positive link between the ability of the trade unions to obstruct free movement and the achievement of collective regulation. However, it cannot be further assumed that the Court also rejects a mutually exclusive understanding of the 'State' as the addressee of the free movement provisions and an 'undertaking' under the competition law provisions, on the basis of *Viking* and *Laval*. The reason is that the trade unions' conduct in both cases, no matter how distinct from some form of collective regulation, did not constitute conduct by 'undertakings' under the competition law provisions. Regardless of how loosely defined 'State' is, the notion of 'undertaking' remains a

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[73] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767 [68-69].

[74] *Ibid* [98-99].

well-defined concept with its underlying policy concerns regarding private autonomy in the market sphere, so far outwith the scope of application of the freedoms. Indeed, in cases in which the Court of Justice has expressly rejected a horizontal direct application of Article 34TFEU, the private party involved was an undertaking.[75]

This logical fallacy is particularly striking in the Opinion of AG Maduro in *Viking*.[76] He first addressed the common function of both the freedoms and the competition law provisions as granting rights to market participants to challenge impediments to their opportunity to compete on equal terms in the Common Market, in pursuit of allocative efficiency in the EU as a whole. Subsequently, he pointed out that these rights can be invoked against Member States and undertakings, either acting in collusion or holding a dominant position.[77] After having set the question, he observed:

> 'Other [scholars], however, have pointed out that private action – that is to say, action that does not ultimately emanate from the State and to which the competition rules do not apply – may very well obstruct the proper functioning of the Common Market, and that it would therefore be wrong to exclude such action categorically from the application of the rules on freedom of movement. I believe the latter view to be more realistic.'[78]

However, it is a retrograde step in his reasoning to argue to that, once it has been established in law that there is no state action and the competition rules do not apply, there is, in fact, behaviour that has the effect of obstructing the functioning of

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[75] See more on these cases in Chapter VI, text to n 14-17, which address the question of attribution of the market distorting effect to the undertaking's conduct and/or the State conduct, because the decisive element in these cases seems to be the existence of a national law merely permitting the undertaking to adopt the conduct in question.

[76] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, Opinion of AG Maduro.

[77] *Ibid* [33-34].

[78] *Ibid* [37-38].

the market; hence this behaviour should, as a matter of law, qualify as a trade barrier. Also, this view of the relationship between the freedoms and the competition law provisions is implicitly self-defeating. It contradicts the initial assumption as set by AG Maduro at paragraphs [33-34], namely that the competition provisions of the Treaty, in part, concern the functioning of the Internal Market and, therefore, constitute, together with the freedoms, a systematic whole.

The Court of Justice was given the opportunity to go down the path of a generalised application of the free movement provisions based exclusively on their distinct material scope and regardless of the very existence of Article 102TFEU. In *Roaming Regulation,* the Court was called to assess the competence of the EU under Article 114TFEU to set a Europe-wide maximum price limit for the provision of inter-State voice calls at both wholesale and retail level (*Eurotariff*).[79] Article 114TFEU grants the European legislature the competence to approximate differences in Member States' laws, should the perceived disparity affect the functioning of the Internal Market, such that EU intervention 'actually contributes to eliminating obstacles to free movement and to the freedom to provide services, and to removing distortions of competition'.[80]

AG Maduro asked the Court of Justice to apply the logical consequences of its case law on the horizontal application of the free movement rules to its analysis under Article 114TFEU. He argued in favour of such regulatory intervention on the basis that certain private actions directly disfavour a cross-border economic activity (here,

[79] Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

[80] Case C-376/98 *Federal Republic of Germany v Parliament and Council* [2000] ECR I-8419 [95] in which the Court of Justice held, in effect, that Article 114TFEU is not a source of general regulatory competence but a competence to harmonise for defined ends associated with market building, in compliance with the principle of attributed powers provided for in ex-Article 5(1)TEC.

roaming) compared to intra-State economic activity (here, domestic use of mobile phone services).[81] This view disregards the existence of Article 102TFEU with its distinct conditions of application, including dominance, since the mobile operators are unequivocally 'undertakings'. It is noteworthy that, before the enactment of the Roaming Regulation, the Commission had initiated Article 102TFEU infringement proceedings against O2 and Vodafone UK as well as against T-Mobile and Vodafone Germany.[82] However, the competition law proceedings were stayed for a long period and finally withdrawn, because, after 2004, the introduction of new tariff direction technology has made it difficult to sustain findings of dominance on the Wholesale International Roaming market. [83]

The Court did not go down the same path as the Advocate General. Instead, it upheld the EU's competence under Article 114TFEU to address

> 'likely national measures aiming to address the problem of the high level of retail charges for [EU]-wide roaming services through rules fixing the rate of retail charges [...] taken by the Member States based on their residual competence as regards consumer protection rules'. [84]

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[81] Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999, Opinion of AG Maduro [19-23]. To ascertain the existence of EU competence to regulate the Internal Market under Article 114TFEU may require examination of the difficult question as to whether such competence extends to measures that do not qualify as restrictions of the free movement provisions. However, in that case, AG Maduro seems to assume that the mobile operators' actions would be caught by the freedom to provide services and, for that reason, the EU has competence under Article 114TFEU.

[82] Commission (EC), 'Staff Working Paper-Impact Assessment of policy options in relation to a Commission proposal for a Regulation on roaming on public mobile telephone networks within the Community' (Impact Assessment) COM(2006) 386 final, 12 July 2006 [1.2.1].

[83] See M Martino (2007) 137 for a technical discussion of the effectiveness of this technology and its regulatory implications, in particular upon market definition and, hence, dominance.

[84] Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999 [45-46]. The Court's ruling seems to imply that undertakings are permitted under the Treaty provisions to take advantage of 'gaps' in non-economic regulations, such as consumer protection, at national level, while it rests upon the legislator at the national or EU level to address these issues. This fits into the argument presented in Chapter IV, namely that non-economic considerations should be excluded from the scope of the competition law provisions, because there is always the potential for State involvement to occur.

This confirms that the current state of the case law under the freedoms does not negate Article 102TFEU, with its distinct conditions of application and, in particular, significant market power, which is the outer limit to any expansive view of horizontal application of the freedoms.

5.1 Dominance as a condition *sine qua non* for anti-competitive market separation under Article 102TFEU: Normative and legal considerations

The above-described cases indicate that, no matter how remote from a regulatory function, the 'private actors', which are subjected to the freedoms, are not considered to be undertakings. Therefore, the distinction between the addressee Article 102TFEU and 'State measures' under the free movement provisions seems to be retained and to be intentional. This analysis is complemented by the normative considerations which underpin the legal condition of significant market power akin to dominance under Article 102TFEU in market separation cases. By contrast, there is no similar quantitative threshold as regards the ability of 'State measures' to obstruct the freedoms, when the free movement provisions are applied beyond regulatory functions by the Court of Justice.[85]

Interestingly enough, in *Viking*, AG Maduro draws a distinction, at a normative level, between States and private actors, as regards the power they possess.[86] According to AG Maduro, '[…] the normative and socio-economic power

[85] In Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, Opinion of AG Maduro [49], seems to suggest such a quantitative threshold as a corollary to his suggestion that the only significant element for the application of Article 56TFEU is the factual ability to obstruct the freedom to provide services.

[86] Private actors, in general, rather than between States and undertakings: i.e. he draws the distinction within the free movement provisions, after he has rejected the relevance of the competition law

inherent in State authorities entails that these authorities have, by definition, significant potential to thwart the proper functioning of the Common Market'.[87] He then gives the counter-example that

> 'an individual shopkeeper who refuses to purchase goods from other Member States would not be liable to obstruct the functioning of the Common Market. The reason is that suppliers from other Member States would still have the opportunity to market their goods through alternative channels'.[88]

Indeed, it is a fundamental assumption of neoclassical economics that undertakings are guided by profit maximisation incentives,[89] and that market-distorting practices can be profitable if the undertaking has significant market power.[90] This is fully reflected in the definition of dominance adopted by the European Courts, as 'a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers'.[91]

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provisions. However, this is a logical fallacy, as indicated in Section 5, because it ignores the systematic interpretation of the Treaty provisions on free movement and on competition as a whole.

[87] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, Opinion of AG Maduro [41].

[88] *Ibid* [42]. See *Wyatt* (n 70) 22-24, who rejects the application of Article 34TFEU to the purchasing choices of private market operators as opposed to their sale choices, even when they hold a significant market position.

[89] See C Mantzavinos, *Individuals, Institutions and the Markets* 10-15, for the general hypothesis of individuals striving to increase their own utility, which is based on the assumption that we have great ignorance of the motivational system of humans. Similarly, see G Mitchell (2002) 1912-1913, who attributes a 'pessimism bias' to behavioral law and economics literature, because 'a rational review of the evidence on […] human decision making should lead one to agnosticism'. See J Persky (1995); S Bowles and H Gintis (1993), for the *homo economicus* hypothesis.

[90] Similarly, even if one adopts a behavioural economics perspective, only dominant undertakings may be in a position to directly influence the market activities of other economic agents and therefore constitute informal institutions, shaping consumers' ultimate choices. See I Lianos and A Matteus (2009) 32.

[91] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 [65]; Case 85/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461 [38].

II. *Market separation under Article 102TFEU: The role of dominance*

The Court of Justice has unequivocally confirmed the significance of a quantitative threshold of market power under Article 102TFEU in the specific case of abusive market separation, as opposed to State action under the freedoms. It did so in *Bayer*, a parallel trade case which concerns successive reductions in the volumes of medicinal products supplied by Bayer to its exporting wholesalers.[92] *Bayer* is an Article 101TFEU case and the ruling is confined to the notion of 'agreement' under Article 101TFEU. However, the Court of Justice held *obiter* that:

> 'Under the general system of the Treaty, measures adopted by a Member State which prevent parallel exports are indeed prohibited by [Article 34TFEU], but unilateral measures taken by private undertakings are subject to restrictions, by virtue of the principles of that Treaty, only if the undertaking in question occupies a dominant position on the market, within the meaning of [Article 102TFEU], which is not the case here'.[93]

In addition, the general case law of the European Courts requires a link between the dominant position and the alleged abuse. In *Continental Can* and in *Hoffmann La Roche* the Court of Justice rejected the applicants' argument that there must be causality between the dominant position and the abuse, in the sense that the economic power should be the means by which the abuse is brought about.[94] However, this does not mean that there is no need, in principle, to establish any connection whatsoever between dominance and abuse.[95] Indeed, the Court of Justice has expressly confirmed the need for a link between dominance and abuse in the more

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[92] Joined Cases C-2/01P and C-3/01P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23.

[93] *Ibid* [70].

[94] Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 [27], Case 85/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461 [91].

[95] *O'Donoghue and Padilla* (n 6) 215-217.

recent *TeliaSonera* case.[96] In addition, it has been suggested that the Court's reasoning in *Continental Can* and *Hoffman LaRoche* did not rule out the need for such a link in general; it only concerned the link between dominance and the conduct element of the abuse, namely the acquisition (in *Continental Can*) and the exclusive agreement (in *Hoffman LaRoche*), as opposed to the link between dominance and the anti-competitive effect of the abuse.[97]

An additional challenge to the requirement of significant market power as a distinct condition for the application of Article 102TFEU arose during the consultation process for reviewing the policy, which underpins Article 102TFEU enforcement. The focus was epsecially on cases in which there is a link between dominance and the effect-element of the alleged abuse. It was argued that the continuous widening of the notion of dominance by the European Courts, in conjunction with the notion of 'special responsibility of the dominant undertaking not to allow its conduct impair undistorted competition',[98] had led to certain forms of practices to be prohibited virtually *per se*, once an undertaking is found to be dominant. This concern was voiced, in particular, by the Economic Advisory Group on Competition Policy (EAGCP) in its report on 'An Economic Approach to Article

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[96] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige* [2011] 4 CMLR 18 [86], '[...] the application of Article 102 TFEU presupposes a link between the dominant position and the alleged abusive conduct [...]'.

[97] E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law: Rethinking Article 82 of the EC Treaty* 73-79. Rousseva builds on an early article by P Vogelenzang (1976) 66-72, who distinguishes between three categories of 'dominance-abuse' types of connection: a connection between dominance and the act of abuse (e.g. in excessive pricing), a connection between dominance and the anti-competitive effect of abuse (e.g. in refusal to supply, discriminatory pricing) and a connection between dominance and a worsening effect on competition (e.g. exclusive dealing, rebates, contractual tying).

[98] The Court of Justice first referred to the 'special responsibility' of the dominant firm in Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 [57], at the stage of assessing whether Michelin was in a dominant position. It is in subsequent case law that the notion of 'special responsibility' has been applied to indicate normative examples of abuses; see R Allendesalazar in C D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82EC* 319-320.

82EC'. The EAGCP suggested that the substantive assessment of the undertaking's market power should be integrated with the assessment for establishing competitive harm.[99] This proposal provoked academic debate as regards the link between dominance and the effects of the alleged abuse.[100]

Ultimately, the Commission's Guidance Paper retained the assessment of the undertaking's market power as a separate, first, step in the application of Article 102TFEU.[101] After the publication of the Guidance Paper, the Court of Justice confirmed in *TeliaSonera* that when the threshold for establishing dominance is crossed, the degree of market power is, as a general rule, significant not as regards the existence of the alleged abuse as such, but only as regards the extent of the effects of the conduct.[102] The question of dominance is, then, significant because it impacts on the level of intervention and the risk of chilling competition, since the establishment of a violation depends on the strength of evidence of consumer harm and the robustness of the relevant economic theory.[103] In addition, merging the two steps of

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[99] EAGCP, 'An Economic Approach to Article 82EC' (Report) July 2005 http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf [14-15].

[100] See, e.g, G Niels and H Jenkins (2005), A Majumdar (2006), T Eilmansberger (2006).

[101] Commission (EC), 'Guidance on Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' (Communication) [2009] OJ C45/7 [9].

[102] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18 [78-82].

[103] *Majumdar* (n 100) 163-164. For example, I Kokkoris in F Etro and I Kokkoris (eds), *Competition Law and the Enforcement of Article 102TFEU* 139 argues that there is, indeed, a case for underenforcement of Article 102TFEU in cases of consumer harm induced by the conduct of non-dominant firms. However, it is very difficult to identify gap cases because the Commission does not publish detailed decisions in which the undertaking is not found to be dominant and, hence, an abuse is not substantiated.

the analysis would also involve the risk of over-reliance on the 'monopoly-explanation', which was first expressed by Coase.[104]

Therefore, the question of keeping or discarding dominance as a separate step in the analysis arises in cases in which dominance is a condition for the anti-competitive effect to occur, rather than the act of abuse itself. The cases presented in Section 2 show that market separation by dominant undertakings is one such category of abuses, in which dominance is linked to the anti-competitive effect rather than to the conduct as such.

For example, if an undertaking is dominant and refuses to supply parallel traders, the latter may find it impossible to find alternative supplies. Any undertaking may refuse to provide them with supplies, but only if the supplier is dominant, it may be the case that the refusal has an anti-competitive effect. In addition, there are cases in which market separation is conducted as a contractual abuse, as in *British Gypsum* and *Irish Sugar*, in which it takes the form of rebates, or is conducted as geographic price discrimination tied to some other contractual abuse, such as the clauses which prohibit exports in *UB* and *Tetra Pak II*. In these cases, dominance is not a condition for the worsening of the negative effect on competition, as is argued by Rousseva, but, rather, a condition for the negative effect to occur in the first place.[105] The reason is the disproportionate lack of parity of the parties to the agreements, which matters only once the conduct is classified under Article 102TFEU rather than Article 101TFEU.[106] Under Article 101TFEU the form of the conduct, namely an 'agreement', manifests

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[104] 'If an economist finds something − a business practice of one sort or another − that he does not understand, he looks for a monopoly explanation. And, as in this field we are very ignorant, the number of un-understandable practices tends to be very large, and the reliance on monopoly explanation, frequent', as cited in J Vickers (2004) 4.

[105] *Rousseva* (n 97) 463-664.

[106] See Chapter III, Section 2.2, on the criterion for distinguishing between the two situations.

itself over the degree of the market power of the undertakings involved; the fact that one of the contracting parties is dominant simply makes that party subject to the obligation to pay damages to the other contracting party.[107] By contrast, in the case of contractual abuses, market power akin to dominance is a condition for the anti-competitive effect to occur, rather than for the worsening of the anti-competitive effect.[108] The reason is that the latter situation would presuppose that there is a quantitative threshold identifiable *a priori* below dominance, due to which the negative effect on competition occurs.[109] Unfortunately, this is not yet the case.

The subsequent question is related to the degree of market power that is required for the undertaking to be subjected to Article 102TFEU for alleged separation of markets along national lines. The concept of barriers to entry is particularly instructive, since market separation by private parties under the free movement provisions in the cases analysed above points to making cross-border access to a market more difficult. Entry barriers are precisely features of the market that make it difficult for a newcomer to access a market or more difficult than it was

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[107] See the example of an undertaking which controls a network of similar contracts that have a negative cumulative effect on competition, but holds a 19% share of the relevant market, as is the case with Courage; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I- 6297 [34-35], 'In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of [Article 101 TFEU], particularly where in practice the terms of the contract were imposed on him by the party controlling the network', '[...] making a distinction as to the extent of the parties' liability does not conflict with the case law of the Court to the effect that it does not matter, for the purposes of the application of [Article 101 TFEU], whether the parties to an agreement are on an equal footing as regards their economic position and function'.

[108] *Contra Rousseva* (n 97) 463-664, who argues that dominance worsens the negative effect, which would have been brought about anyway and, therefore, the dominant undertaking bears a special responsibility.

[109] See also L Ortiz Blanco, *Market Power in EU Antitrust Law* who sets the question as to whether a specific quantitative limit in terms of market power must be established to apply the competition law provisions, and, if so, at what level. Ortiz Blanco argues that we do not know what a reference criterion below dominance could be and, hence, it is better to fix the level of intervention to that of a dominant position across the competition law provisions. 'The cosy utopia [of using entirely reliable econometric techniques] does not appear to be just around the corner', *ibid* [vii].

for the incumbent, depending on whether economists adopt an absolute or relative understanding of the concept.[110]

Generally, under the dominance assessment, the notion of barriers to entry serves the very specific purpose of identifying the ability of potential competition to limit the market power of the incumbent.[111] Both legal barriers and strategic barriers, including the undertaking's own conduct, are amongst the entry barriers identified in the Commission's Guidance Paper.[112] Legal barriers, such as tariffs or licensing procedures, could be subject to the free movement rules. As regards the undertaking's own conduct, in the specific case of market separation it is important not to over-rely on behavioural indications of selectivity, because of the circularity of such an approach.[113] However, both legal and strategic entry barriers are very important in market separation cases because assessment of the undertaking's market power feeds back to geographic market definition,[114] which was, in effect, identified in Section 2.3 as the significant factor for the qualification of a conduct as abusive market separation in some of the cases described.

6. The specific example of Article 106(2)TFEU

[110] See P McAfee, H Mialon and M Williams (2004) for a review of the economic theories on entry barriers.

[111] See in particular D Carlton (2004) on the use of the (unclear) economic concept of entry barriers in antitrust or regulatory proceedings.

[112] Commission (EC), 'Guidance on Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' (Communication) [2009] OJ C45/7 [17].

[113] However, see *Ortiz Blanco* (n 109) 64-65, who argues that the circularity can be overcome if behavioural and structural considerations are cumulatively taken into account.

[114] See Chapter I, text to n 146.

Finally, a textual argument is drawn from the Treaty itself to support the view that Article 102TFEU, with its specific conditions for application, is a meaningful limitation to the application of the freedoms to private actors. Conduct by dominant undertakings which allegedly has the intent or effect of creating artificial barriers to trade should be subjected to Article 102TFEU alone, rather than cumulatively to both Article 102TFEU and the freedoms.[115] Where the founders of the Treaty wanted to subject dominant undertakings to the obligations under the free movement provisions, they did so explicitly.

One such example is Article 106(2)TFEU, which makes the conduct of undertakings entrusted with (a specific type of) monopoly rights subject to the Treaty rules, *in particular* the competition law provisions. Article 106(2)TFEU is phrased as providing for an exception from the application of the Treaty provisions to which it refers. However, an exception presupposes that the conduct of the undertakings is, in principle, subject to those Treaty provisions. In addition, the example of Article 106(2)TFEU is advanced to support not a rejection of the horizontal application of the freedoms to any private action, but something more limited. The argument drawn is limited to rejecting application of the freedoms to dominant undertakings. The reason is that the undertakings concerned under Article 106(2)TFEU are entrusted with monopoly rights, which confer a dominant position if the reserved activity constitutes, on its own, a relevant market or a substantial part of it.

The wording of Article 106(2)TFEU ('in particular'), indicates that there are other than competition law Treaty provisions to which undertakings entrusted with (a specific type of) monopoly rights are subject. These other Treaty provisions also

[115] This is the mirror image of the argument which is advanced in Section 5.1, namely that dominance is required for the purpose of subjecting market separation by an undertaking to the Treaty provisions.

include the free movement provisions, as confirmed by the Court of Justice in the *Electricity Monopolies* cases. The Court held that these particular undertakings 'are subject to all the rules laid down in the Treaty' and that the scope of Article 106(2)TFEU is to be assessed in combination with Article 106(1)TFEU. The latter paragraph is 'intended to ensure that the Member States do not take advantage of their relations with those undertakings in order to evade the prohibitions laid down by other Treaty rules addressed directly to them, such as those in [Articles 34, 35 and 37TFEU], by obliging or encouraging those undertakings to engage in conduct which, if engaged in by the Member States, would be contrary to those rules'.[116]

7. Conclusions

This Chapter has examined what is, and ought to be, the correct regulatory instrument for assessing alleged market separation across national lines by dominant undertakings, Article 102TFEU or the free movement provisions. In so doing, the functional understanding of the notion of 'undertaking' has been assumed. Hence, the focus has shifted from the question of the functional definition of 'undertaking' as such to the question as to whether the notion of 'dominant undertaking' still constitutes a meaningful limitation to an expansive view of the horizontal applicability of the freedoms. In addition, the role of significant market power ('dominant position') as a distinct condition for the application of Article 102TFEU is addressed.

After identifying market separation cases under Article 102TFEU as well as the asymmetry in the addressee of the competition law provisions and the freedoms, three arguments are advanced to support the view that the difference between the two

[116] Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699 [29-30].

sets of provisions is intended. Therefore, it is proposed that market separation by dominant undertakings is not a specific manifestation of horizontal application of the freedoms.

First, the cases of horizontal application of the freedoms, in which competition law provisions have been applied cumulatively, were examined. It is argued that those cases are to be read in the context of a mutually exclusive, functional, understanding of the personal scope of the two sets of provisions; hence these cases also support a view of substantive convergence of the cumulatively applicable provisions. The use of the inappropriate provision is justified in some instances by the public enforcement of Article 102TFEU, which allows for more discretion to the Commission to control the substantive standard for responsibility under the competition law provisions.

Second, it is argued that the cases in which the application of the freedoms to private parties was triggered by their mere ability to obstruct the free movement, do not discount the application of Article 102TFEU to market separation by dominant undertakings. This is because, in these cases, the private actors involved, no matter how remote from some regulatory function, did not constitute 'undertakings'. This is confirmed by a normative and legal analysis of the quantitative threshold of market power, namely a dominant position, which is required as a separate step of analysis under Article 102TFEU, for alleged market separation by an undertaking to be subjected to the latter Article. By contrast, no quantitative power threshold is established as regards the ability of 'State measures' to obstruct the freedoms.

Finally, a textual argument is drawn from Article 106(2)TFEU, because Article 106(2)TFEU, as interpreted by the Court of Justice, subjects a specific category of dominant undertakings to the freedoms, in addition to the competition law provisions.

Therefore, all the three arguments support the view that market separation by dominant undertakings should only be subjected to Article 102TFEU, rather than to both Article 102TFEU and the free movement provisions.

CHAPTER III

Market separation under Article 102TFEU: The role of economic justifications

1. Introduction

Chapter II identified Article 102TFEU as the only regulatory instrument that should be used to address alleged market separation by dominant undertakings. This Chapter and those which follow examine how the assessment of such conduct under Article 102TFEU is to be carried out and what weight is to be applied to market integration for substantiating an abuse of the dominant position.

The structure of Article 102TFEU and how assessment of the anti-competitive effects of the market separation is to be accommodated under it are examined in Section 2 of this Chapter. Contrary to the two-step structure (prohibition-exception) of Article 101TFEU, the definition of 'abuse of the dominant position' appears to be a one-step analysis, this having a consequence for the allocation of the burden of proof of 'efficiencies' or 'objective justifications'. The qualitative and legal difference between unilateral conduct and agreements is also addressed. The purpose of this is to distinguish between the methodology used under Articles 101TFEU and 102TFEU in the specific case of contractual abuses, since many market separation cases under Article 102TFEU take the form of contractual abuses.

In Section 3 the elements which determine the scope of the provisions on free movement and are significant for assessing market separation under Article 102TFEU, notably the interplay between economic and non-economic values, are highlighted. The focus of this Chapter is on the economic values promoted by finding a restriction of the free movement of goods ('trade barriers') and, consequently, on the two relevant tests, discrimination and market access. Understanding the 'internal'

element of the Internal Market, as reflected in the notion of 'trade barriers', will help to understand the actual integrationist thrust of market separation cases under Article 102TFEU.

Section 4 examines the two tests for establishing market separation as an abuse of dominance: first, the intent-based test and, subsequently, the effects-based test, which focuses on 'efficiency' or 'objective justifications' in market separation cases under Article 102TFEU. A comparison and an analogy are then drawn between the intent-based test and discriminatory trade barriers, as well as between the effects-based test and trade barriers failing the market access test. The analogy is drawn between each of the two tests for substantiating an 'abuse' and the two tests for broadly finding a 'trade barrier', regardless of whether the trade barrier can be justified by reference to non-economic values. The comparison is structured so as to reveal the specific areas in which the underlying values of market integration and Article 102TFEU coincide.

It is argued in Section 5 that the *raison d'être* of Article 102TFEU and market integration, as reflected in the notion of 'trade barriers', is efficiency. Market separation cases that involve economic justifications are not cases in which a conflict of substantive values between competition and market integration can arise. Rather, they are cases in which the inherent limits of economic integration should also be respected under Article 102TFEU enforcement, otherwise the outcome does not make sense from an economic perspective. However, two main differences in the way in which efficiency is realised under the two sets of provisions are identified. The differences are market, as opposed to regulatory, equivalence of the products concerned and, consequently, the different use of economics. Finally, this conclusion is put into the constitutional context of the Treaty *post*-Lisbon.

2. The analytical framework for assessing market separation as an abuse of the dominant position

The purpose of this Section is to sketch out the framework for establishing market separation as an abuse of the dominant position under Article 102TFEU. First, the structural vehicles through which assessment of conduct and effects are being carried out under Article 102TFEU are identified; second, the methodology employed under Article 102TFEU is distinguished from that employed under Article 101TFEU. Both steps are important in the context of the present research, because they determine whether market separation either can conceptually, or should from a policy perspective, be assessed under both Articles, particularly when it takes the form of contractual abuses. This should further provide a response to the question whether precedents under Article 101TFEU should be used to establish a finding under Article 102TFEU.

The terms 'objective' or 'efficiency' justifications are employed interchangeably in the present Section because they both refer to the structure of the analysis under Article 102TFEU, rather than to the substantive values underpinning such justifications. In terms of substantive values, only economic justifications - which, in the traditional competition law discourse are termed 'efficiency defence', 'meeting competition defence' and 'factors beyond the control of the dominant undertaking'- are addressed in the present Chapter. Therefore, economic justifications do not involve the so-called objective justifications based on public policy considerations, which are addressed in Chapter IV under the heading of non-economic justifications. However, the terms 'objective' and 'efficiency' justifications are

adopted interchangeably in the present Section because the same structural analysis of Article 102TFEU applies to both economic and non-economic justifications.[1]

2.1 The structure of Article 102TFEU: 'Objective' or 'efficiency' justifications and the burden of proof

The text of Article 102TFEU prohibits any 'abuse of a dominant position', with no explicit provision for the exemption of a conduct otherwise falling under the scope of this Article. This is in contrast with the two-step analysis under Article 101(1) and (3)TFEU, as interpreted in a literal sense. As AG Jacobs has stated, 'the very fact that conduct is characterised as an "abuse" suggests that a negative conclusion has already been reached, by contrast with the more neutral terminology of "prevention, restriction, or distortion of competition" under [Article 101TFEU]'.[2] This approach is confirmed by the definition of the notion of 'abuse' first given by the Court of Justice in *Hoffmann-La Roche,* according to which:

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

[1] Research into the structure of the analysis under Article 102TFEU is incorporated in Chapter III on economic justifications, even though the structure is common to both economic and non-economic justifications. The reason for this is that non-economic justification and conduct by the dominant undertaking are mutually exclusive, as is argued in Chapter IV.

[2] Case C-53/2003 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609, Opinion of AG Jacobs [72]. Similarly, Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR 803 [32]; Case T-51/89 *Tetra Pak Rausing SA v Commission (Tetra Pak I)* [1990] ECR II- 309, Opinion of AG Kirschner [21].

> maintenance of the degree of competition still existing in the market or the growth of that competition'.[3]

The reference to 'normal competition on the basis of the transactions of commercial operators' (or 'the traders' performance')[4] indicates that this type of competition is perfectly legal and there is no presumption of responsibility for breach of Article 102TFEU.[5] On the contrary, unilateral conduct is 'inherently meritorious; it reflects the merits of an undertaking acting on its own'.[6]

This further explains the distribution of the burden of proof of an infringement of Article 101TFEU and Article 102TFEU according to Article 2 Regulation 1/2003, as is explained below. Whereas, in the context of Article 101TFEU, the legal burden of persuasion shifts from the party alleging an infringement of Article 101TFEU to the undertakings claiming the benefit of Article 101(3)TFEU, there is no such reversal in the context of Article 102TFEU with regard to 'objective' or 'efficiency' justifications. The very text of Article 102TFEU, and subsequently the allocation of the burden of proof according to Article 2 Regulation 1/2003, had led the General Court to reject an 'objective' or 'efficiency' justification as a defence *proper*, in other words as a legally recognised 'excuse' that allows this conduct despite its negative

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[3] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461 [91].

[4] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 [70], '[...] practices which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market'.

[5] Economists also support this view; see C Albhorn and J Padilla in C D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82TEC* 90-91, with further citations.

[6] D Waelbroeck in F Etro and I Kokkoris (eds), *Competition Law and the Enforcement of Article 102TFEU* 122; similarly, R O'Donoghue and L Macnab (2009) 162-163, E Rousseva, *Rethinking exclusionary abuses in EU Competition Law* 467-468.

effects.[7] In *Atlantic Container Line*, the General Court held that '[...] because [Article 102TFEU] does not provide for any exemption, abusive practices are prohibited regardless of the advantages which may accrue to the perpetrators of such practices or to third parties'.[8]

Despite this, both the Guidance Paper on exclusionary abuses and the Court of Justice recognise an efficiency justification, modelled upon the substantive conditions found in Article 101(3)TFEU but functioning rather as a 'denial defence'.[9] This means that efficiency claims are directed against a *prima facie* case of abuse, which involves a shifting only of the evidential burden (or burden of production), and not of the legal burden.[10] In *Microsoft*, the General Court held, as a matter of principle, that

> '[...] although the burden of proof of the existence of the circumstances that constitute an infringement of [Article 102TFEU] is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted'.[11]

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[7] On the so-called 'affirmative' defences, see A Gavil (1999) 1119-1122, R Nazzini (2006) 530.

[8] Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II 3275 [1112]. See also, Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107 [217], 'An undertaking which charges predatory prices may enjoy economies of scale and learning effects on account of increased production precisely because of such pricing. The economies of scale and learning effects cannot therefore exempt that undertaking from liability under [Article 102TFEU]'. It is not, however, clear as to whether, in this case, the General Court rejected the efficiency justification as a defence on the facts or as a matter of principle.

[9] Commission (EC), 'Guidance on Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' [2009] OJ C45/7 [30-31]; Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331 [86]; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18 [76]; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Judgment of 27 March 2012 (NYR) [41-42].

[10] The distinction between legal and evidential burden of proof is typical of denial defences in common law systems, see *Nazzini* (n 7) 523-526.

[11] Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601 [688].

It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that 'the efficiencies have been, or are likely to be, realised as a result of its conduct'; 'the conduct is indispensable to the realisation of those efficiencies'; 'the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare'; and 'the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition'. It then falls upon the Commission, which weighs up any apparent anti-competitive effects against any advanced and substantiated efficiencies, to make the ultimate assessment as to whether the conduct is likely to result in consumer harm.[12]

Even though the suggested distribution of the burden of proof fits well with the text of Article 102TFEU as well as of Article 2 Regulation 1/2003, the substantive conditions that need to be demonstrated have been heavily criticised by commentators as 'manifestly ill-suited for the assessment of unilateral conduct by dominant undertakings'.[13] This is because, once dominance and the anti-competitive effect are established, the condition that the conduct 'does not eliminate competition' is, in practice, highly unlikely to be satisfied.[14] Therefore, the availability of a denial defence based on efficiencies is rather inconsistent with the basic test of (exclusionary) abuses in *Hoffmann-La Roche*. In addition, balancing the pro-and anti-

[12] Commission (EC), 'Guidance on Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' [2009] OJ C45/7 [30-31].

[13] *Waelbroeck* (n 6) 121-126; J-F Bellis and T Kasten in F Etro and I Kokkoris (eds), *Competition Law and the Enforcement of Article 102TFEU* 131-133,136-137; R O'Donoghue and J Padilla, *The Law and Economics of Article 82EC* 232-234; *Rousseva* (n 6) 292-293; A Albors-Llorens (2007) 1758-1759. See also R Nazzini, *The Foundations of European Union Competition Law* 304-309, who focuses his criticism of the Guidance Paper on the latter's divergence from the case law.

[14] *Contra Rousseva* (n 6) 293 who suggests that the same conduct is treated more leniently under Article 102TFEU than under Article 101TFEU.

competitive effects of unilateral conduct is not, in practice, easy for dominant undertakings in their everyday real-time business decisions.[15]

A solution to the assessment of objective or efficiency justifications under Article 102TFEU would be: (a) to incorporate as a condition the absence of any such justification; and (b) to assess the alleged justifications independently of the conduct's likely negative effect of hindering the maintenance or growth of competition. This takes into account the qualitative difference between unilateral conduct and agreements and considers the limitations imposed by the wording of the two Articles.[16] The **lack** of any objective or efficiency justification would be a necessary condition for establishing an abuse of the dominant position. However, if such a justification is proved, this would preclude the application of Article 102TFEU and allow the unilateral conduct, **although** that conduct has the likely effect of hindering the maintenance or growth of competition. Methodologically, this solution finds support in the early case law of the Court of Justice that alludes to the notion of objective justification with no systematic treatment of the relevant arguments, especially in relation to the exercise of IP rights.[17]

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[15] D Melamed (2005) 1252-1255; E Elhauge (2003) 317.

[16] *Rousseva* (n 6) 480-481, 498-500 and P-J Lowenthal (2005) 462 provide academic support for this solution. Rousseva's suggestion is based on the distinction between unilateral conduct and agreements, but emphasises more the problem of inconsistencies in areas of overlapping application of Articles 101TFEU and 102TFEU. See also E Rousseva (2005). Lowenthal suggests that the distinction between Articles 101TFEU and 102TFEU is not so great, since the eventual outcome under Article 102TFEU will not differ significantly whether 'objective justification' is an exception to abusive conduct or a factor which is taken into account when determining whether an abuse has been committed. *Contra Nazzini* (n 13) 307, who considers the balancing test appropriate, as 'a qualitative assessment of the comparative magnitude of the competitive harm and benefits'.

[17] Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69 [17]; Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECR 487 [19]; Case 395/87 *Ministère public v Jean-Louis Tournier* [1989] ECR 2521 [45-46]; Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261 [27]. The proposed structure for incorporating efficiency or objective justifications in Article 102TFEU analysis is also reflected in the

There is a lack of case-law acceptance of objective or efficiency justification arguments. This may indicate precisely that such arguments cannot operate as a denial defence once the Commission has already taken up the case, because the latter would only pursue cases of outright abuse. It may be the case that, in the context of private litigation being boosted in the future, arguments based on the lack of any justification will be tested, given that there will be no initial screening of the cases being pursued. This is confirmed by the preliminary reference in *Post Danmark*, in which the Court of Justice did not examine the efficiency justifications claimed by the dominant undertaking (scale economies), but only because there was no anti-competitive effect and, hence, no abuse *prima facie*.[18] The receptiveness of the Court of Justice as regards efficiency justifications is contrasted to its stance with regard to public policy justifications, which remains unaltered in recent private enforcement cases that culminated in preliminary references.[19]

2.2 The distinction between unilateral conduct and agreements: The specific case of contractual abuses

A question arises as to whether market separation can conceptually, or should from a policy perspective, be assessed under both Articles 101TFEU and 102TFEU, or exclusively under one of them, given the different analytical framework governing the application of those Articles. Particularly in the area of contractual abuses, the established law suggests that Articles 101TFEU and 102TFEU can apply

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legal construction of margin squeeze abuses, most recently confirmed in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18 [31].

[18] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Judgment of 27 March 2012 (NYR) [40, 43].

[19] See Chapter IV, text to n 67-68.

concomitantly to the same matter and, furthermore, that an agreement which is exempted under Article 101(3)TFEU (or block exempted), does not, for that reason, escape review under Article 102TFEU.[20] The question is extremely important in market separation cases under Article 102TFEU, since: (a) they often take the form of contractual abuses, such as rebates in the cases of *Irish Sugar*[21] or *British Gypsum,*[22] or of geographical price discrimination which is tied to some other contractual abuse, as in the case of *United Brands*[23] and *Tetra Pak II*[24]; and (b) even in cases of genuinely unilateral conduct, as in *Sotirios Lelos*, the Court substantiates the abuse *prima facie* by explicit reference to the case law on anti-competitive agreements by object under Article 101TFEU aimed at restricting parallel trade.[25]

Rousseva has recently argued that Article 102TFEU should apply only to unilateral conduct and that the criterion for distinguishing the mutually exclusive concepts of 'unilateral conduct' and 'agreement' for the purposes of EU competition law is whether the implementation of the purchasing transaction is conditional on

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[20] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461 [116], 'the fact that agreements ... might fall within [Article 101] and in particular within paragraph 3 thereof does not preclude the application of [Article 102] [...] so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets on which they operate, to proceed on the basis of [Article 101] or [Article 102]'; Case T-51/89 *Tetra Pak Rausing SA v Commission (Tetra Pak I)* [1990] ECR II- 0309 [20-21, 25-31]; Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365 [130]; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II 3275 [939].

[21] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969.

[22] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389.

[23] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

[24] Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755.

[25] Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [65-68]

prior commitment on the part of customers.[26] Thus, exclusive dealing, loyalty rebates and contractual tying cases under Article 102TFEU should be discarded and addressed under Article 101TFEU. This criterion is in line with the definition of agreements under Article 101TFEU. It is also in line with the distinction drawn by the General Court, affirmed by the Court of Justice, between genuinely unilateral measures whose aims can be achieved without the express or implied participation of another undertaking, and 'merely apparent unilateral measures' which receive at least tacit acquiescence by another undertaking.[27]

There is much merit in Rousseva's analysis, in the sense that genuinely unilateral conduct, such as refusal to supply, discriminatory or excessive pricing, is liberated from the restrictions imposed by the analytical framework of Article 101TFEU. The distinction also makes good sense form a policy perspective. Whereas agreements involve risk-sharing and are reached in relative transparency and with information exchange between the parties, unilateral conduct does not involve prior detailed assessment of its effect, precisely because a single undertaking has no

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[26] *Rousseva* (n 6) 460-463.

[27] Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383 [66-72]. A broad interpretation of the notion of 'agreement' was adopted by the Court of Justice in Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* [1983] ECR 3151; Joined Cases 228 and 229/82 *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission* [1984] ECR 1129; Case C-277/87 *Sandoz prodotti farmaceutici SpA v Commission* [1990] ECR I- 45, in which an export ban was read into an agreement, even though it did not operate in the distributor's interest. However, the Court of Justice affirmed the General Court judgment in Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23 [101-102] and held that 'an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by [Article 101(1)TFEU] may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of [Article 102TFEU]. For an agreement within the meaning of [Article 101(1)TFEU] to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers'.

detailed knowledge of the commercial strategy of its competitors.[28] Therefore, in the context of market separation, unilateral refusals to supply distributors involved in parallel trade, as in *Sotirios Lelos*, or geographic price discrimination under Article 102(c)TFEU, shall not be found to be abusive on the basis of the case law of Article 101TFEU. This applies in particular with regard to reproduction of precedents from restrictions of competition by object under Article 101TFEU.

However, in the context of market separation cases under Article 102TFEU, the above-mentioned proposal does not seem to be operable where market separation by dominant undertakings takes the form of contractual abuses. This is because, in practice, the contractual abuse is rarely the only form of conduct condemned. In *UB*[29] and *Tetra Pak*,[30] plurality of actions by the dominant undertaking, including both contractual and genuinely unilateral abuses, occurred.[31] For example, in *UB*, the dominant undertaking was facing allegations not only of contractually prohibiting the resale of its products under certain conditions but also of refusal to supply, of geographic price discrimination and of charging excessive prices.[32] Similarly, in *Tetra Pak II,* the dominant undertaking was fined for contractual tying and also for geographic price discrimination and predatory pricing.[33] In such cases, even assuming that Article 101TFEU covers contractual abuses, the question as to why the

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[28] *Rousseva* (n 6) 466-467.

[29] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

[30] Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755.

[31] More generally, this limitation to convergence (or distinction) between Article 101TFEU and 102TFEU is also recognised by T Eilmansberger in J Drexl, L Idot and J Moneger (eds), *Economic Theory and Competition Law* 156-157, by reference to the various examples of abusive conducts listed in Article 102TFEU.

[32] See n 29.

[33] See n 30.

market distortions stemming from the contract were in fact addressed under Article 102TFEU, rather than Article 101TFEU, remains.

The response appears, in my view, to be more than simply practicalities. It is rather a matter of principle that the distinguishing feature of Article 102TFEU is dominance, whereas that of Article 101TFEU is the existence of an 'agreement' or 'concerted practice'.[34] It is not possible to demarcate the scope of the two provisions in a mutually exclusive way based on one single criterion.[35] Obviously, in the modernised approach to Article 101TFEU, market power is central to the finding of a 'restriction on competition' particularly in relation to vertical restraints.[36] However, market power in Article 101TFEU analysis does not perform the same screening function as dominance, but becomes important only at a later stage. This may occur at the stage of checking whether the agreement falling within the scope of Article 101TFEU can be block exempted. The new Block Exemption Regulation for the categories of vertical agreements provides for a safe harbour when each market share

[34] See particularly Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365 [33-34], 'Simultaneous application of [Articles 101TFEU and 102TFEU] cannot therefore be ruled out a priori. However, the objectives pursued by each of those two provisions must be distinguished. [Article 101TFEU] applies to agreements, decisions and concerted practices, which may appreciably affect trade between Member States, regardless of the position on the market of the undertakings concerned. [Article 102TFEU], on the other hand, deals with the conduct of one or more economic operators consisting in the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers'.

[35] Rousseva assumes that this is possible by rejecting dominance as the distinguishing feature of Article 102TFEU applicability. She maintains that the reference to dominance is devoid of meaning, since application of Article 102TFEU does not require unilateral interest or the exercise of economic pressure and, also, because of the increasing relevance of market power in the assessment under Article 101TFEU. See E Rousseva (2005) 620-624.

[36] See Commission (EU), 'Guidelines on Vertical Restraints' [2010] OJ C130/1 [96-99].

of the supplier and that of the buyer is 30% or less.[37] Alternatively, market power becomes important at the stage of ascertaining the obligation of the one party to pay damages to the other contracting party,[38] or of not imposing a fine on the party that acted under duress.[39] It becomes important by allowing a distinction to be drawn as to the extent of the liability of the parties to the agreement. In other words, the role of market power in the two Articles does not differ simply as a matter of degree.[40] Under Article 102TFEU, market power amounting to dominance is the triggering factor for assessing a conduct's compatibility. The functional equivalent under Article 101TFEU has nothing to do with the market position of the undertakings; rather it concerns the form of the conduct that is to be scrutinised, an agreement (or concerted practice). It may be the case that lack of interest in the agreement does not preclude the application of Article 102TFEU. However, it does preclude the reading into an agreement of an apparently unilateral conduct, thus the application of Article 101TFEU is precluded.[41] Therefore, if one were to find a mutually exclusive way of distinguishing the scope of the two Articles in the 'grey area' of contractual abuses, this should be neither on the grounds of market power nor of the form of conduct.

In practice, I would rather opt for a case-by-case analysis, which enables a determination to be made as to which criterion, market power or the form of the

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[37] Commission Regulation (EU) 330/2010 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 [Article 3].

[38] See Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I- 6297 [34-35]. See also Chapter II, text to n 107-109.

[39] *Volkswagen* (Case IV/35.733) Commission Decision 98/273/EC [1998] OJ L124/60 [208].

[40] Even if one considers that the double market share threshold provided for in the Block Exemption Regulation operates at the screening level (as dominance) but as a presumption of compatibility, there is a meaningful difference of degree in the required market power.

[41] See n 27.

conduct manifests itself more profoundly in the situation under examination. This would determine which Article applies in practice, without it being conceptually impossible for one to assess the conduct under the residual Article. In the market separation cases that take the form of contractual abuses, it is the disproportionate lack of parity between the parties that allows the dominant undertaking to act; this is manifested by the fact that such an act takes various forms, including agreements, refusal to supply, predatory or excessive pricing, as mentioned above. This is why market power, rather than the form of the conduct, is the centre of gravity. On the contrary, in *Van den Bergh Foods*, which may be used as an example of the redundancy of Article 102TFEU in the area of vertical agreements,[42] it was the form of the undertaking's conduct that prevailed over its market position, as manifested by the fact that this was the only form of conduct that occurred and that the individual agreement was part of the network of distribution agreements fulfilling the same conditions.[43] In that respect, the existence of a network of similar vertical restraints is an indication that the form of the conduct (agreement) prevails. The new Block Exemption Regulation for categories of vertical agreements, which provides for a different screening threshold based on market power once a network of agreements has been found to operate in the market, confirms this.[44] Therefore, the difference

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[42] *Rousseva* (n 6) 634-636; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653.

[43] Therefore, as rightly pointed out by Rousseva, there was no need to apply Article 102TFEU. However, the redundancy of Article 102TFEU, according to the thesis advanced here, is case-specific. An example providing a counter-argument to Rousseva's generalisation is discriminatory rebates cases such as Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 [40], in which the decisive factor seems to be the offer by the dominant undertaking of promotional payments to individually selected merchants, rather than offers under a general scheme.

[44] Commission Regulation (EU) 330/2010 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 [Article 6] provides for a withdrawal of the block exemption where parallel networks of similar vertical restraints cover more than 50% of a relevant market.

between the two scenarios is the starting point (dominance in the first case and agreement in the second).

Based on this analysis, market separation conducted by dominant undertakings, regardless of the form of the conduct, should be exclusively assessed under Article 102TFEU. This further requires the application of the distinctive methodology of that Article, as opposed to the methodology of Article 101TFEU. The only qualification to this proposition would be in the grey area of contractual abuses, if the form of the conduct constitutes the centre of gravity and, consequently, manifests itself over the market position of the undertaking involved, as explained above.

3. Conceptual elements of measures constituting a restriction on free movement

The conceptual elements of the free movement provisions, which are used to 'unpack' the often-quoted proposition that Article 102TFEU serves market integration purposes in the EU, are examined in this Section. The free movement provisions are characterised by interplay between economic and non-economic values promoted and protected by restrictions and justified restrictions. This is important for the present research, because its purpose is to examine whether the same distinction is relevant for the application of Article 102TFEU under the above proposed structure for substantiating market separation as an abuse of the dominant position. More importantly, it is relevant because analysis of the notion of restrictions under the free movement provisions allows for understanding of the scope of the 'internal' element of the Internal Market. This is used in Section 4 as the benchmark for assessing the actual integrationist thrust of the case law under Article 102TFEU.

3.1 Distinguishing between economic and non-economic values under the free movement provisions

The mechanism of the Treaty provisions on the free movement involves, as a first step enquiry, consideration of economic values. This step is the finding of a 'trade barrier' (or a 'restriction to the free movement'). The Treaty mechanism also involves a second step enquiry, which relates to more than economic values. This is the question of whether or not the trade barrier is justified.

The link between the promotion of economic values and the finding of a restriction, using the example of trade barriers, is established. The following sub-Section defines these economic values promoted under the free movement provisions, by identifying the two tests, discrimination or market access, for finding a trade barrier. Overall, the first step is aimed at obtaining an understanding of the nature of the 'internal' element of the Internal Market, i.e. what is really internal about the Internal Market. [45]

Whether the non-economic values operate as a justification (via an explicit Treaty provision) for a restriction of the freedom in question or as a negative qualification of the definition of the restriction in the first place is not of primary importance to establishing the link between economic values and restrictions. Similarly, at this stage of the research the extensive academic debate on the scope of the non-economic values under the provisions of the free movement is not relevant.

[45] The focus is on the 'internal' element, rather than the 'market' element of the Internal Market, also because the threshold for finding a 'market' element is generally low or highly random. See e.g. Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I- 4685 [26]; Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht* [2011] 2 CMLR 19 [42, 47]. See also Chapter II, text to n 44-49.

Both debates are addressed here only to the extent that they represent a challenge to the link between economic values and trade barriers (or restrictions more generally).

At first sight, the distinction between economic and non-economic values under the free movement provisions corresponds to the distinction between restrictions and justifications. The evidence for this comes from the specific justifications expressly mentioned in Articles 36, 45(3), 52, 62 and 65(1)(b)TFEU, which refer to non-economic policy objectives, such as public policy, public security and public health. At the same time, the Court has consistently held that Article 36TFEU may not be relied upon by a Member State to protect its economic interests.[46] In addition, the scope of the general justifications for 'indistinctly applicable' measures established in the Court's case law as 'mandatory/imperative requirements' is open-ended,[47] but subject to the condition that purely economic grounds can never serve as such a justification.[48]

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[46] See also Case 7/61 *Commission v Italian Republic* [1961] ECR (English Special Edition) 317, 329 '[Article 36TFEU] is directed to eventualities of a non-economic kind which are not liable to prejudice the principles laid down by [*inter alia* Article 34TFEU]'; similarly, Case 238/82 *Duphar BV and others v The Netherlands State* [1984] ECR 523 [23] (in relation to a 'measure whose primary objective is budgetary in as much as it is intended to reduce the operating costs of a sickness insurance scheme'); Case 288/83 *Commission v Ireland* [1985] ECR 1761 [28].

[47] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 [8]; Case 113/80 *Commission v Ireland* [1981] ECR 1625 [10-11]; Case 177/*83 Th. Kohl KG v Ringelhan & Rennett SA and Ringelhan Einrichtungs GmbH* [1984] ECR 3651 [14, 19]; Case 25/88 *Esther Renée Bouchara, née Wurmser, and Norlaine SA, Criminal proceedings against* [1989] ECR 1105 [10]; Joined cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151 [13]; Case C-484/93 *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955 [15-16]; Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 [37].

[48] See Case C-265/95 *Commission v French Republic* [1997] ECR I-6959 [60, 62], citing the case law under Article 36TFEU (see n 46) ('responsibility for compensation for the loss or damage sustained by the economic operators concerned'); Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias* [1997] ECR I-3091 [23] ('maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and consequently on the economy of the State'); Case C-388/01 *Commission v Italian Republic* [2003] ECR I-721 [18, 21-22] ('cost of managing cultural assets').

III. *Market Separation under Article 102TFEU: The role of economic justifications*

A first, structural, challenge to the link between economic values and restrictions could be the fact that the non-economic values incorporated in the mandatory requirements concept may operate as a negative qualification to the finding of a restriction. However, this challenge is not valid because of the gradual blending of the general and the Treaty-based justifications in the Court's case law. Such blending has been achieved either by shifting the examination of the mandatory requirements from the qualification stage to the justification stage or by examining the Treaty-based justifications at the qualification stage.[49] It has also been achieved by using the mandatory requirements for justifying (indirectly) discriminatory measures.[50] The very recent cases on rules on the use of goods confirm that there is no longer any practical significance attributed to the distinction between Treaty-based justifications and mandatory requirements, since both are being examined interchangeably, once a measure fails the market access test, at either the qualification

[49] The case law on the distinction between justifications under Article 36TFEU and mandatory requirements has never been really consistent, even though the distinction bears consequences in terms of how broadly general rules and exceptions are to be interpreted as well as regarding the allocation of the burden of proof; see P Pecho (2009) 267; P Oliver (2009-2010) 1449.

[50] The language used ('measures applying without distinction' rather than non-discriminatory measures) in the cases cited above (see n 47), has meant that the Court subjected indirectly discriminatory measures as indistinctly applicable to imperative requirements; see more recently Case C-309/02 *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg* [2004] ECR I- 11763 [73-75]; Case C-441/04 *A-Punkt Schmuckhandels GmbH v Claudia Schmidt* [2006] ECR I- 2093 [26]. The matter as to whether direct discrimination can potentially be justified by reference to imperative requirements is not settled in law; see Case C-379/98 *PreussenElektra AG v Schhleswag AG* [2001] ECR I- 2099, Opinion of AG Jacobs [228-229]. However, the Court has, at least in the sphere of imperative requirements in relation to environmental protection, accepted the availability of such a justification for *prima facie* direct discrimination, see Case C-2/90 Commission v Kingdom of Belgium [1992] ECR I-4431 [29-36] and later on, by avoiding explicitly tackling the question of discrimination, see Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075 [42-44]; Case C-379/98 *PreussenElektra AG v Schhleswag AG* [2001] ECR I- 2099 [72-81]. *Contra* Case C-153/08 Commission v *Kingdom of Spain* [2009] ECR I-9735 [36-38]; Case 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767 [117-119], in which the Court explicitly rejected non-Treaty-based justifications to directly discriminatory measures.

or at the justification stage.[51] Therefore, the distinction between economic and non-economic values under the free movement provisions will be adopted as corresponding to the distinction between trade barriers (or restrictions to free movement) and justified trade barriers, for the purposes of the thesis.

A second, substantive, challenge to the above-adopted correspondence of concepts could be the Court's actual practice which, under specific circumstances, is more permissive concerning economic justifications.[52] However, this does not rule out the link between economic values and trade barriers; it only limits the link between non-economic values and justified trade barriers.

In *Campus Oil*, in particular, the Court created an opening for economic interests to be taken into account as justifications, by holding that:

> '[Article 36TFEU] refers to matters of a non-economic nature. A Member State cannot be allowed to avoid the effects of measures provided for in the Treaty by pleading the economic difficulties caused by the elimination of barriers to intra-community trade. However, in the light of the seriousness of the consequence that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security'.[53]

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[51] In Case C-110/05 *Commission v Italian Republic* [2009] ECR I- 519 [58-59], the Court held that rules on the use of goods that hinder market access for imported products constitute MEQR, unless they could be objectively justified based on either one of the public interest grounds set out in Article 36TFEU or imperative requirements (interchangeably). Similarly, Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I- 4273 [28, 31-33], where the Court explicitly merged, at the qualification stage, the examination of environmental protection as general justification and the protection of the health and life of humans, animals and plants set out in Article 36TFEU. In Case C-265/06 *Commission v Portuguese Republic* [2008] ECR I- 2245 [37], the Court held that mandatory requirements and Treaty-based justifications apply interchangeably at the justification level. The issue of using mandatory requirements for justifying directly discriminatory measures did not arise in those cases.

[52] See K Mortelmans (2001) 637; J Snell in A Schrauwen (eds), *Rule of Reason* 35, 39-47.

[53] Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR 2727 [35].

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It seems from *Campus Oil*, as presented above, that the 'purely economic considerations' precluded by Article 36TFEU (or by mandatory requirements) are identified with the effects of the measures under consideration on intra-EU trade. In other words, the Court itself draws a distinction between economic and non-economic values based on the notion of discrimination or (more recently) hindrances to market access as trade barriers. Therefore, *Campus Oil* can only potentially support a partial breakdown of the link between economic/ non-economic values and trade barriers/ justifications;[54] it does not provide an argument against the link between economic values and trade barriers. On the contrary, by explicitly excluding, at the justification stage, only the economic effect of a trade barrier from the non-economic values, the judgment indicates that there is a link between the promotion of certain economic values and trade barriers, whose analytical core cannot be further diminished and shrunk. This view is also supported by the reference in Article 36TFEU to a 'disguised restriction on trade'. [55]

Another category of cases in which the Court has been prepared to accept economic aims as justifications refers to cases involving an economic evaluation of the provision of a service of a non-economic nature. In that sense, this is not an

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[54] As to the link between non-economic values and justifications, it could be argued that the case law in (n 48) supports the view that economic considerations could, at the most, be potentially accepted as a means for the achievement of a non-economic objective. In the context of services Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141 [44] ('good reputation of national financial sector') presents a similar example. Even some Treaty-based justifications, such as protection of Intellectual Property rights, share elements of economic rationales; see e.g. P Regibeau and K Rockett in S Anderman (ed), *The Interface between Intellectual Property Rights and Competition Policy* 506-521. However, the issue of the conceptual foundation of the process at the justification stage, and, therefore, the question as to whether this correspondence breakdown between non-economic values and justified trade barriers is important, is addressed in Chapter IV, Section 2.1.

[55] W-H Roth in M Bulterman *et al* (eds), *Views of European Law from the Mountain* 75-76. Roth describes the notion of economic considerations as having the objective of the protection of the national economy *vis-à-vis* the competitive forces from other Member States, but this is just giving specific definition to the broader notion of trade barrier. Similarly, *Snell* (n 52) 52 poses the question as to whether the Court should use the term protectionist rather than economic aims, and gives a negative answer.

exception to the principle that aims of a purely economic character cannot serve as general justifications, but, rather, it resembles the exception in Article 106(2)TFEU.[56] More recently, after *Viking*, trade unions, as addressees of the fundamental freedoms, are able to justify their actions by reference to the economic interests of their members.[57] Roth interprets this as introducing the protection of domestic working places as an economic objective for justifying the actions of trade unions but not of States.[58] However, first, the Court expressly associates the protection of workers with social protection by reference to ex-Article 2TEC [59] and, second, even if it is considered as an economic objective, it cannot be used as a justification to the extent that such 'a policy results in ship-owners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals'.[60] Therefore, even considered as a justification of economic nature, it can never be equated to being a trade barrier.[61]

To conclude, the conceptual foundation of the first step analysis under the Treaty provisions for the free movement is the promotion of certain economic values.

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[56] In Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I- 1931 [41], the Court repeated that 'aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services' but 'it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind'. This is reflected to some extent in Article 153(4)TFEU, following the Treaty of Nice; see *Mortelmans* (n 52) 638.

[57] See Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 [81].

[58] *Roth* (n 55) 87.

[59] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 [78-79].

[60] *Ibid* [88].

[61] Particularly after *Viking*, there has been extensive debate and academic literature on the scope of non-economic values that are recognised as justifications to restrictions on the freedoms. However, this discussion is not relevant at the present stage of the thesis. Discussion of the justifications being accepted in *Viking* is only relevant to the extent that it considers the question whether the link between economic values and restrictions has been corroded.

These economic values constitute the minimum analytical core of the 'internal' element of the Internal Market, because they trigger the application of the Treaty mechanism under the free movement provisions. The next sub-Section examines the specific content given to these economic values by the Court's case law.

3.2 Economic values promoted by the free movement provisions: A discrimination test, a market access test, or both?

This Section identifies the conceptual basis of the economic values promoted by the free movement provisions. If this is just non-discrimination against foreigners (anti-protectionism), the important factor is the disparate impact of the measure. Alternatively, it may also be a restriction of market access in absolute terms that is prohibited.[62] If the conceptual basis of the prohibited effect under the free movement provisions is identified, then it can be used as an indicator of the actual integrationist thrust of the market separation cases under Article 102TFEU.

One alleged limitation to this approach is the interplay between the two steps of the analysis under the Treaty provisions on the free movement; namely between what has been described in the Section above as restrictions and justifications. Commentators often refer to the political bargaining that actually takes place in every Court judgment. The broader the definition of trade barriers which brings national measures within the scope of the Treaty mechanism, the more assessment takes place

[62] There is extensive academic literature on the interpretation of the case law on the free movement provisions over the years, since the development of (what has been for many years) Community law has primarily rested on the application of free movement provisions. See, for example, the leading books on the subject: C Barnard, *The Substantive Law of the EU: The Four Freedoms*, P Oliver (ed), *Oliver on Free Movement of Goods in the European Union*; L Gormley, *EU Law of Free Movement of Goods and Customs Union*; G Davies, *Nationality Discrimination in the European Internal Market*; J Snell, *Goods and Services in EC Law*.

at the level of justifications advanced by the Member States. It could be argued that it would be more convincing to draw conclusions as to the conceptual basis of the prohibited effect by using cases in which the national measure is actually prohibited at the stage of justification; namely, is overall illegal.[63] However, even in that case, the outer limit of the scope of the prohibitions provided for in the free movement provisions is defined by what constitutes a trade barrier, or a restriction, under the freedoms, rather than by what constitutes a justified, and therefore overall legal, trade barrier. The fact that a trade barrier is only potentially unlawful overall does not detract from its function of the qualification of the measure as a trade barrier in the first place, nor do trade-restricting effects cease to exist if the trade barrier is, after all, justified.[64]

Judgments concerning rules on the use of goods will be the point of reference for the development of the case law in the very recent years. In *Commission v Italy*, the Court has summarised the principles governing the scope of Article 34TFEU. After repeating the three main pillars of the relevant case law (*Dassonville*, *Cassis de Dijon* and *Keck and Mithouard*),[65] the Court, in paragraph [37], defined Measures Equivalent to Quantitative Restrictions (MEQR) as falling within three categories. First, MEQR include measures which have as their object or effect to treat products coming from other Member States less favourably; in other words, measures which discriminate against imports. Second, MEQR include rules that lay down

[63] *Davies* (n 62) 89, in the context of non-discriminatory measures. However, Davies defines (indirect) 'discrimination' as unjustified disparate impact, see *ibid* 11-14; see also L Gormley (2009-2010) 1613-1614, 1616, in relation to the Court's judgment in Case C-110/05 *Commission v Italian Republic* (n 51), that the rejection of the argument that rules on the use of goods should be taken outside the scope of Article 34TFEU, came at the price of accepting the necessity of the rule for the attainment of the legitimate objective advanced by Italy; *cf Oliver* (n 49) 1465.

[64] This also seems to be accepted by *Gormley*, (n 63) 1614,1617, even though he is critical of the use of general and Treaty-based justifications interchangeably.

[65] Case C-110/05 *Commission v Italian Republic* (n 51) [33-36].

requirements to be met by goods which have been lawfully manufactured and marketed in other Member States, even if those rules apply without distinction to all products alike. Third, any other measure which hinders access of products originating in other Member States is included. The first two categories hinge upon the well-established principles of non-discrimination (direct or indirect) against imports, and of mutual recognition.[66] Mutual recognition is also considered an expression of regulatory equivalence,[67] and therefore product-related rules are presumed to have a disparate impact and discriminate against imports, because of the so-called dual burden that they impose.[68]

However, the third category of MEQR has provoked considerable debate, because it seems to define in an affirmative way for the first time the principle of 'free access of [European] products to national markets'.[69] Until *Commission v Italy*, the principle of free access to national markets within the EU in the context of goods had been inferred from the negative presumption established by *Keck and Mithouard*, namely that selling arrangements are outside the scope of Article 34TFEU, precisely because it is presumed that 'they are not by nature such as to prevent their access to the market or to impede access any more than they impede the access of domestic

[66] For an enumeration of the principles, see also Case C-110/05 *Commission v Italian Republic* (n 51) [34].

[67] See the distinction put forward in Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Opinion of AG Van Gerven [13] in regard to trade barriers that arise from the disparities between the various national rules and barriers created by the very existence of the rules. In the latter category of barriers there is no regulatory equivalence in the first place.

[68] See Davies (n 62) 65-67; for a view on the shifting role of discrimination in the construction of the internal market over time, see G de Burca in C Barnard and J Scott (eds), *The Law of the Single European Market* 181; for a view that discrimination (or selectivity) remains the key concept of the free movement provisions, see N Bernard (1996) and more recently G Davies (2010).

[69] Case C-110/05 *Commission v Italian Republic* (n 51) [34].

products'.[70] The Court's pronouncement in *Commission v Italy* has provoked considerable discussion, particularly as to whether it signals abandonment of the *Keck and Mithouard* presumption *in globo*.[71] From the Court's ruling, it is only clear that rules on the use of goods do not fall under the same negative presumption as selling arrangements, presumably because they directly affect the consumer (rather than the producer, importer or retailer). Instead, they are subject to an intensity-based market access test. It cannot be safely concluded from the judgment whether the selling arrangements presumption is still valid or the category of 'any other measures that hinder market access' also covers selling arrangements.[72] The measures in question amounted to total or semi-total banning rather than regulating use, and therefore the Court did not need to rule on the intensity of hindrances to market access. However, the fact remains that the Court chose not to treat explicitly the measures in question under the traditional *Dassonville* formula, even though it could have done so based on

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[70] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I- 6097 [17], to the extent that the conditions set out in paragraph [16] of the judgment are fulfilled, namely that the national provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. It was not clear until the present judgment whether the reference to market access in paragraph [17] of *Keck and Mithouard* was simply a failure to discharge the burden of proof for indirect discrimination in paragraph [16] or a distinct substantive test. Subsequent cases, such as Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843 [42-44] and Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB* [2001] ECR I-1795 [20-25], seem to confirm the view that the reference to market access in *Keck and Mithouard* is closely connected to indirect discrimination, with reversed the burden of proof.

[71] The issue was first raised in Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* (n 51), Opinion of AG Kokott [51], even though there was actually no need to address it in that case since, according to her, the rules resulted in complete exclusion, *ibid* [64]. In light of the Opinion of AG Kokott, the Chamber hearing *Commission v Italy* referred the case to the Grand Chamber, which reopened the hearing proceedings and invited Member States to submit their observations on the issue.

[72] In favour of the view that the Court did not intend to and has not revised the *Keck* exception *Oliver* (n 49) 1462-1463, 1470; *Gormley* (n 63) 1626-1627; *Pecho* (n 49) 262-264; P Wenneras and K Boe Moen (2010) 393-394; in favour of the view that the Court's ruling is narrow and did not analyse the *Keck* exception S Weatherill (2009) 987; in favour of the view that the Court overruled *Keck*, regardless of whether they agree or disagree with the ruling at a normative level, E Spaventa (2009) 922-923; T Horsley (2009) 2015-2016.

the *Toolex Alpha* precedent;[73] instead, it formulated a unified market access test and subjected the rules under examination to that test. Based on the above-mentioned observation, one would be more inclined to interpret paragraph [37] of the judgment in *Commission v Italy* as distinguishing between 'product-bound measures' and 'all other measures' that apply to all products alike, rather than as distinguishing between 'selling arrangements' and 'all other measures'. 'Selling arrangements' remains a distinct sub-division within the broader category of either hindrances to market access or (indirectly) discriminatory trade barriers with reversed burden of proof, which was beyond the facts before the Court in *Commission v Italy*.[74] Subsequent cases include *LIBRO*, which concerned directly discriminatory minimum retail prices for imported German-language books imposed by the Austrian legislation,[75] and *Ker Optika,* which concerned Hungarian legislation prohibiting the selling of contact lenses via the internet.[76] The latter judgment is more important, because it appears to assess certain selling arrangements under the (indirect) discrimination test with reversed burden of proof, while citing *Commission v Italy*.[77] In other words, it seems to keep 'certain

[73] Case C-473/98 *Kemikalieinspektionen v Toolex Alpha AB* [2000] ECR I-5681, where the Court held that a general prohibition on the industrial use of a chemical falls within the scope of Article 34TFEU, because 'it is likely to bring about a reduction in the volume of trichloroethylene imported'; *ibid* [36]. It could be argued that *Toolex Alpha* is not comparable, because it concerns industrial use of a product, rather than use by final consumers; hence it concerns a *Cassis de Dijon*-type of measure imposing a dual-burden on imports. However, this does not challenge the argument that if it were for the Court to retain the *status quo*, the most appropriate available formula to assess the rules on the use of goods by final consumers would be the *Dassonville* formula.

[74] The same is true about Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* (n 51). The non-reference to *Keck* altogether is not conclusive as to whether a measure that fulfils the *Keck* conditions is presumed outside the scope of Article 34TFEU or assessed under the market access test.

[75] Case C-531/07 *Fachverband der Buch- und Medienwirtschafti v LIBRO Handelsgesellschaft mbH* [2009] E.C.R. I- 3717 [22].

[76] Case C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* [2011] 2 CMLR 15 [47-52].

[77] *Ibid* [51].

selling arrangements' as outside the broader category of measures assessed under the 'market access' test established in *Commission v Italy*.[78]

Therefore, in *Commission v Italy*, it appears that the Court intended to reformulate, rather than return to the narrow understanding of the *Dassonville* formula,[79] to the extent that it now appears to apply to non-discriminatory measures. Discrimination appears, at the moment, to be a sufficient but not necessary conceptual basis for finding a trade barrier. Based on the above, if one wishes to look for the broader distinction that underlies the revised definition of MEQR, this lies between discrimination and market access. Discrimination, as formulated in the years between *Dassonville* and *Cassis de Dijon*, was based on market equivalence, namely goods that could be substituted according to their characteristics or uses from the perspective of economic actors.[80] Wilsher has shown that those cases relate to a very narrow situation in which an identical domestic product exists and the rules have a disparate impact upon the imported version.[81] This is why the case law under Article 34TFEU on national rules aimed at restricting the freedom to compete did not actually present a challenge to the discrimination analysis under Article 34TFEU. This includes national laws regulating prices, when they result in a loss of a competitive advantage

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[78] However, it should be noted that it is a 2nd Chamber judgment.

[79] This view rejects the opinion that *Dassonville* overshot its target, in the sense that non-discriminatory measures were already within the *Dassonville* formulation of trade barriers. This is because the subsequent application of the *Dassonville* formula was guided by the principle of non-discrimination, either direct or indirect, on the facts of the cases that came before the Court. The *Sunday Trading* litigation, in which the Court found restrictive effects on European trade to exist despite the fact that the rules applied to and affected imported and domestic products alike, was exceptional and this status is confirmed by the Court's own attempt to remedy the shift from the principle of non-discrimination in *Keck and Mithouard*; see Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 and Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc* [1992] ECR I-6635; similarly, *Wenneras and Boe Moen* (n 72) 388-389.

[80] D Wilsher (2008) 5-6.

[81] *Ibid* 10-11. See Case 82/77 *Openbaar Ministerie of the Kingdom of the Netherlands v Jacobus Philippus van Tiggele* [1978] ECR 25 [14].

enjoyed by imports.[82] The above-mentioned *LIBRO* case, decided after *Commission v Italy,* confirms that this is still the case with directly discriminatory measures. The Court rejected the German government's argument that the Austrian market for German-language books cannot be considered independently of the German market, by holding that 'such considerations do not allow it to be ruled out that the provisions […] have the effect of restricting the ability of Austrian importers to compete, as the latter cannot act freely on their market unlike the Austrian publishers who are their direct competitors'.[83]

To the extent that it also covers non-discriminatory measures that hinder market access, the question is: what is the rationale behind the reformed definition of MEQR?[84] AG Jacobs in *Leclerc-Siplec* based his Opinion on the inadequacy of a test solely grounded on discrimination and market equivalence, 'since restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire [EU]'.[85] It could be argued that the newly formulated market access test embraces such a view, to the extent that it applies

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[82] This is either because the minimum fixed price does not allow the lower cost price of imports to be reflected or because the maximum fixed price only allows imports to be marketed at a loss. See further references to the case law in Chapter I, text to n 83.

[83] Case C-531/07 *Fachverband der Buch- und Medienwirtschafti v LIBRO Handelsgesellschaft mbH* [2009] E.C.R. I- 3717 [23-24].

[84] These measures have no connection to regulatory equivalence, which is at the heart of the principle of mutual recognition. In the present thesis, they are treated as two conceptually different categories of effects, to the extent that the mutual recognition refers to regulatory competition, whereas non-discriminatory MEQR to market competition. For two opposing views as to whether there is conflict between the two, see *Davies* (n 62) 107-112 and C Barnard and S Deakin in C Barnard and J Scott (eds), *The Law of the Single European Market* 197. See Chapter IV, text to n 22-25, for a revised view of mutual recognition, which functionally associates the latter principle with the justification stage under the free movement provisions.

[85] Case C-412/93 *Leclerc-Siplec v TF1 and M6* [1995] ECR I-179, Opinion of AG Jacobs [40]. See also *ibid* [39] 'if an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade'.

to measures that have a direct impact upon the consumer only.[86] In that regard, an examination of how the new test has been applied in the cases concerning rules on use, even though the test seems unqualified, identifies three elements. First, in all these judgments the Court has emphasised the position of consumers, either final or intermediate, in relation to the market access. The point is that if the use of a product is prohibited or restricted, there will be no purchasers and no product market.[87]

Second, most clearly reflected in *Mickelsson and Roos,* the Court has seemed to adopt an intensity requirement for a measure to fall foul of the market access test. The Court, citing *Commission v Italy*, stated that 'the restriction which they impose on the use of a product in the territory of a Member State may, *depending on its scope,* have a *considerable* influence on the behaviour of consumers'[88] and, in addition, that

> 'where national regulations have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of *greatly restricting* their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods'[89] (emphasis added).

Third, the most important element common to the three judgments applying the new market access test on rules on use is the shift to potential, rather than actual

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[86] In that sense, rules on the use of goods are different from selling arrangements such as advertising or rules regulating when and where goods are sold. Selling arrangements do not only affect directly consumers' choices; their predominant impacts are directly on the importer or retailer.

[87] Case C-265/06 *Commission v Portuguese Republic* (n 51) [33]; Case C-110/05 *Commission v Italian Republic* (n 51) [56-57]; Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* (n 51) [26-27].

[88] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* (n 51) [26].

[89] *Ibid* [28]. However, *cf* Case C-443/10 *Philippe Bonnarde v Agence de Services et de Paiement* [2012] 1 CMLR 37 [30] citing *Commission v Italy* but not adopting an intensity requirement. It should be noted, though, that the national legislation required the registration document for all demonstration motor vehicles, irrespective of their origin, to state that it was a 'demonstration vehicle' in order for those vehicles to be granted the ecological subsidy; therefore it was not a rule on the use of products directly affecting the consumer, but, rather, discriminatory rule imposing a 'dual burden' upon the importer or retailer.

inter-State trade and, consequently, to the effect thereupon. In neither case did the Court examine whether there was indeed an existing demand for the product in question.[90] It was sufficient that the importer would be dissuaded from entering that market.

It is not clear whether the Court by adopting an intensity requirement intended to subject the market access test to a *de minimis* rule as to the proportion of import volumes that are affected,[91] or to a remoteness rule based on excluding restrictive effects on trade that are 'too uncertain and indirect'.[92] It would be more consistent, however, with the Court intending to reformulate the *Dassonville* formula, to consider that it is not a remoteness test, given that the latter is the flip-side of the *Dassoville* formula.[93] A more plausible interpretation of this requirement is to find that rules which are equally applicable constitute MEQR, when their effect upon market size is so striking, to the extent that the market ceases to exist or to be profitable as a whole.[94] In that sense, the rationale behind the finding of a trade barrier is not that

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[90] For such an approach, see Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* (n 51), Opinion of AG Kokott [60-64], but in the context of further assessment if the domestic products are less affected than the imported ones.

[91] See particularly Case C-412/93 *Leclerc-Siplec v TF1 and M6* [1995] ECR I-179, Opinion of AG Jacobs [38-49], suggesting a test for non-discriminatory measures based on whether they substantially restrict market access; for academic support see S Weatherill (1996) 897 and C Barnard (2001) 44-52.

[92] Case C-379/92 *Matteo Peralta, Criminal proceedings against* [1994] ECR I-3453 [24]; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chiogga* [1995] ECR I- 3257 [29].

[93] Support for a *de minimis* interpretation is provided by J Snell (2010) 457-458, on the basis that the hindrance need not be direct but can be felt through reduction in demand; see also P Lindh in H Kanninen, N Korjus and A Rosas (eds), *EU Competition Law in Context* 23-25; G Straetmans in M Bulterman et al. (eds), *Views of European Law from the Mountain* 101-105.

[94] See *Davies* (n 68) 683-684, 696-697; however, Davies places this exceptional category of measures in the context of 'selectivity' and argues that overall non-discriminatory measures which, as a matter of economic fact, impede market access are 'more mythical than real'. Similarly, *Wenneras and Boe Moen* (n 72) 396-398 point out that 'the qualified nature of the market hindrance test suggests, therefore, that it will have limited complementary value next to the prohibition on discriminatory restrictions of market access'. See also I Lianos (2010) 734-736, who uses the criterion of 'protectionist manipulation of the behaviour of the consumers' for situations in which there is no

trade barriers impede market access but rather that they impede the enlargement of the market as such.[95] The 'size' of the market is used as shorthand for the potential static and dynamic efficiency gains of an enlarged market.[96] This reorientation is also in line with the more general policy discussion about taking measures to boost growth and reinforce the citizens' confidence in the Internal Market. At a policy level, the Commission in its 'Single Market Act' has very recently confirmed the aim to boost growth in the EU, by identifying twelve specific sectors where measures need to be taken, in accordance with the 'Europe 2020' strategy.[97] This initiative followed a report by M Monti, which outlined a strategy for making the re-launching of the Single Market politically successful and economically and socially viable. The underlying assumption of the report in relation to 'building a *stronger* Internal Market' appears to be that 'achieving a deep and efficient single market is a key factor in determining the EU's overall macroeconomic performance'.[98]

Finally, the reorientation of the application of the free movement provisions towards efficiency displays similarities to, and further develops, the analysis of AG Van Gerven in *Torfaen.* AG Van Gerven suggested that a non-discriminatory rule should fall under Article 34TFEU automatically if it rules out a national market, and be supported by quantitative factors if it merely increases the difficulty in penetrating

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similar or competing domestic production. Therefore, he also incorporates the consumer-/demand-test to discrimination analysis.

[95] See in favour of such an interpretation at a normative level *Spaventa* (n 72) 924-925 and against *Horsley* (n 72) 2012-2019.

[96] See the extensive discussion in Chapter I, Section 3.2.1.

[97] Commission (EU), 'Europe 2020- A strategy for smart, sustainable and inclusive growth' (Communication) COM(2010) 2020 final; Commission (EU), 'Single Market Act-Twelve levers to boost growth and strengthen confidence -"Working together to create new growth"' (Communication) COM(2011) 206 final.

[98] M Monti, ' A New Strategy for the Single Market-At the Service of Europe's Economy and Society' (Report to the President of the European Commission J M Barroso) 9 May 2010, available at http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf [7].

the national market. To that end, he employed an argument based on the effect of vertical agreements caught by Article 101TFEU to compartmentalise the market.[99] This Opinion could be read with the hindsight of the now well-established reorientation of the law on vertical restraints towards an economics-based approach,[100] while acknowledging that the case law in the field of free movement of goods is not settled. In particular, it could be argued that discrimination, either direct or indirect, now appears not to be a necessary element for finding a trade barrier, but is, rather, merely the most blatant manifestation of a restriction to market access. By contrast, measures that directly affect the consumer, such as rules on the use of goods, may be outlawed as MEQR if the impact they have upon an enlarged market can be supported by quantitative factors.

4. Establishing market separation as an abuse

The survey of the case law in the following Section assesses the actual integrationist thrust of the cases identified in Chapter II, Section 2, as involving market separation under Article 102TFEU. These are cases of either geographic price discrimination or exclusionary abuses hindering competition across national borders.[101] The distinction between horizontal and vertical market power of the undertakings involved is not relevant in the context of Article 102TFEU, as opposed to the approach under Article 101TFEU, in which horizontal agreements involving market partitioning by territory

[99] Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Opinion of AG Van Gerven [21-24].

[100] Since the Commission Regulation (EC) 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21 and Commission (EC), 'Guidelines on Vertical Restraints' [2000] OJ C291/1.

[101] See Chapter II, Sections 2.1 and 2.2.

are in general considered to be a hard-core restriction of competition.[102] The reason is that the conduct under examination is a 'qualified' unilateral conduct, as explained in Section 2.2 of the present Chapter. Therefore, market separation under Article 102TFEU has always in practice arisen either out of conduct by vertically integrated undertakings or out of vertical agreements, usually in the context of an independent distribution system.

In particular, as was shown in Section 3 above, two tests can be said to underlie the notion of trade barriers: a discrimination test and a market access test. Similarly, under Article 102TFEU, market separation as an abuse of dominance can be established by two tests: an intent-based and an effects-based test. Analogies between the two sets of tests are provided. Interestingly, the benchmarks for assessing the legality of the conduct are the same only in the second set of comparators (market access and effects-based market separation). In the first set of comparators (discrimination and intent), the individual tests compared differ in terms of substance. However, they perform the same function. They manifest the illegal conduct in such a way that there is no need for the second-phase tests to apply. They are sufficient but not necessary elements for establishing a trade barrier and an abuse of the dominant position. In other words, whereas discrimination and market access are sliding scales of one and the same effect under the provisions of the free movement, there is a qualitative difference between intent-based and effects-based abusive market separation.

4.1 The role of intent: An analogy with discriminatory trade barriers?

[102] See Commission (EC), 'Guidelines on the application of Article 81 (3) of the Treaty' [2004] OJ C 101/97 [23] on the different treatment of horizontal and vertical restraints including market partitioning under Article 101TFEU.

The notion of abuse is an objective concept, as commonly cited by reference to the definition of abuse in *Hoffmann La Roche*.[103] However, the Court's ruling in regard to abuse as an objective concept is made for the purpose of rejecting the parties' argument that there needs to be a causal relationship between dominance and abuse.[104] Therefore, this has less to do with the relationship between the subjective intent of the dominant undertaking and its conduct. The orthodox position in relation to the subjective intent of the dominant undertaking is that fault is neither a sufficient nor a necessary element for establishing an abuse of dominance. In this Section, only the first limb of the orthodox position is critically examined. The second limb, that fault is not a necessary element, is not disputed.[105]

The establishment of the subjective intent of the dominant undertaking to separate the internal market along national lines only when proven is sufficient to substantiate market separation as an abuse of dominance. It can reliably be presumed that the negative effects on competition are likely to occur by proving the existence of the undertaking's conduct and its intent which is externalised as an attempt.[106] The

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[103] See n 3.

[104] See Chapter II, text to n 94-97.

[105] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 [70]; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-3155 [141-143]; Case T- 321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-02805 [359, 493], in relation to the first abuse (misleading representations made to the public authorities for the purpose of improperly obtaining exclusive rights); the General Court ruled that proof of the deliberate nature of the conduct is not necessary for finding an abuse. In other words, the absence of evidence of intent is not conclusive of the absence of effects. Similarly, Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Judgment of 27 March 2012 (NYR) [28, 28-29], in which anti-competitive effect was not established, however, the Court of Justice clearly examined it as a second-phase test, distinct from the intent-based test and only after the latter was failed.

[106] This is why the General Court has stated that 'showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also

reason is that market analysis has already been carried out for the purpose of defining the relevant market and establishing dominance.[107] Equally, this is the reason why the General Court has held that 'where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position'.[108] In that sense, intent in market separation cases under Article 102TFEU can only be proved, not presumed, and the conduct is not then capable of being objectively justified. In other words, under Article 102TFEU intent can point to the likely anti-competitive effects of the undertaking's conduct. However, the reverse proposition is not valid: intent cannot be presumed by the undertaking's conduct alone.

Therefore, the situation under Article 102TFEU is different compared to a restriction of competition 'by object' under Article 101TFEU, which can be established by reference to the necessary consequences of the agreement according to the case law: i.e. it can be deduced rather than only proved. [109] Then, if a plausible explanation exists as to why the necessary consequence is not the intended one, the legal presumption under Article 101(1)TFEU is rebutted and the burden of proof is shifted to showing either lack of anti-competitive effects under Article 101(1)TFEU

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be liable to have such an effect', see Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107 [195]; Case T-203/01 *Michelin v Commission* [2003] ECR II 4071 [241].

[107] This applies to the extent that any kind of market share-based presumption of dominance is open to rebuttal.

[108] Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107 [196]; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 [191].

[109] For the rationale behind this see Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I- 8637, Opinion of AG Trstenjak [45] 'when acting rationally undertakings will expect the agreement to have the effects which can reasonably be assumed according to the circumstances, with the result that they intended those effects at least to some extent'.

or a pro-competitive effect under Article 101(3)TFEU.[110] This is why, at a normative level, the case law under Article 101TFEU, according to which agreements aimed at preventing or restricting parallel exports are considered to be agreements whose object is to restrict competition, should not in principle be repeated under Article 102TFEU when market separation issues arise.[111]

In particular, under Article 102TFEU intent cannot be presumed from the undertaking's conduct alone. The reason for this is that presumptions of intent are deduced based on prior experience, namely that a conduct in fact brings about restriction of competition effects.[112] However, in Article 102TFEU cases there is no such prior experience: first, because there are very few Article 102TFEU cases; and, second, there has been no notification system operating in practice under Article 102TFEU. The experience gained from the notification procedure under Article 101TFEU has essentially led to the adoption of specific market power thresholds for Block Exemption Regulations to apply under that provision. The lack of equivalent experience under Article 102TFEU explains why intent, under the latter provision,

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[110] See in particular O Odudu (2001) and O Odudu (2) (2001) 381-383, who point to the fact that making a reliable prediction of effects requires an assessment of market power, which removes the key advantage of the object category under Article 101TFEU. See, more recently, O Odudu (2009) 14-17. This is also confirmed by recent case law on the restrictions 'by object' under Article 101TFEU, e.g. Case C-551/03 P *General Motors BV v Commission* [2006] ECR I- 3173 [64,66]; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 *P GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I- 9291 [55, 58]; most clearly articulated in Case 209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I- 8637 [17, 19, 21] in which the Court, for the purpose of substantiating the 'object' of the arrangements, rejected BIDS arguments contesting the intent as such of the arrangements as well as arguments relating to pro-competitive effects that would, otherwise, be assessed under Article 101(3)TFEU.

[111] See, for example, the case law under Article 101TFEU cited in Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [65], which is then cited in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I- 9291 [61].

[112] See D Bailey (2010) 362, 367-368, that the reason for presumptions is, *inter alia*, a common sense approach derived from experience to the assessment of the effect of evidence in certain circumstances.

should not be deduced from conduct.[113] It is only in relation to intent-, as opposed to presumption-, based 'by object' restrictions under Article 101TFEU that one is able to draw an analogy with the intent to separate markets under Article 102TFEU. However, this category of criterion for establishing 'object' does not seem to be used by the Court of Justice.[114]

This is not contradicted by the General Court judgment in *Astra Zeneca*.[115] Documentary evidence was found to show Astra Zeneca's intent to exclude parallel imports by deregistering the Losec capsule marketing authorisation. However, at the same time, the General Court held that the conduct in question was not objectively capable of restricting competition.[116] The reason was that the exclusion of parallel imports was dependent upon an additional conduct, namely the withdrawal of the parallel imports licences by the public authorities. Therefore, there was a mismatch between the conduct of the undertaking and the presumed effect in the first place, rather than between the intent and the undertaking's conduct.

Based on the above, the distinction drawn by AG Jacobs in *Syfait* between primary intent to limit parallel trade and the inevitable consequence of a legitimate

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[113] In addition, this would mean that dominance itself is prohibited under Article 102TFEU, since behavioural criteria are taken into consideration as strategic entry barriers, when assessing dominance. See Chapter II, text to n 112-113.

[114] The first case that seems to point to 'intent' as a stand-alone criterion for establishing 'object' under Article 101TFEU is Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I- 8637 [19] in which the Court distinguished between two categories of arguments. First, there is an argument that the arrangements are not anti-competitive in purpose, and, second, an argument is presented that they do not entail injurious consequences for competition. See also Case 209/07, Opinion of AG Trstenjak [44-46] and Case C-551/03 *P General Motors BV v Commission* [2006] ECR I- 3173, Opinion of AG Tizzano [77-79].

[115] Case T- 321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II- 02805.

[116] *Ibid* [849].

intention makes little sense.[117] The dominant undertaking either possesses or does not possess the subjective intent of restricting competition by separating markets along national lines. In this case it was not shown that Glaxo did have the subjective intention to restrict competition.

The method by which the subjective intent is to be proved is a conceptually distinct question. Indeed, this could be difficult, and such difficulty precisely explains why intent is rarely invoked in practice, as well as why commentators have been generally critical with regard to its use.[118] However, this does not preclude in principle the conceptualisation of instances in which evidence of direct intent to separate the markets along national lines may be furnished, and then objective or efficiency justifications should not be available to the dominant undertaking.[119] This seems to be supported by the General Court judgment in *France Télécom*, where cost-saving

[117] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I- 4609, Opinion of AG Jacobs [71]; for the opposite view, see L Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* 137-142, who argues that reliance on intent is acceptable only if pursuing an objective of economic freedom, but not if the focus is consumer welfare.

[118] Precisely because in most cases intent is presumed (rather than proved) from the undertaking's conduct, it cannot then support a presumption of effects. For criticism in regard to the use of induction-based intent in a way that effects are being ignored, see A Bavasso (2005) 621-623; R Moisejevas (2010) 326-328. *O'Donoghue and Padilla* (n 13) 250-251 provide more focused criticism on the use of direct intent evidence. In a similar way, R Cass and K Hylton (2000) 22-23, even though they are in favour of a specific intent (objective) test, on the basis of a theory of minimising the costs of legal errors.

[119] See also *Lowenthal* (n 16) 472. In addition, see *Nazzini* (n 13) 59-65, who suggests that the intent test can be perceived, *inter alia*, as the test for 'naked abuse'.

justifications based on economies of scale and learning effects were rejected,[120] arguably because, in *France Télécom,* direct intent evidence was furnished.[121]

Intent has not been thoroughly analysed by the EU Courts in market separation cases. The only explicit reference was made by AG Jacobs in his Opinion in *Syfait*. In principle, the Court of Justice seems to accept in *United Brands* the proposition made above, namely that 'such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it' (regarding a refusal to supply by the dominant undertaking in order to protect its own commercial interests).[122] However, such actual purpose was not proved in that case. The only reference to direct intent evidence in the judgment is the wording of the 'green bananas' clause. According to the Court, that clause 'implies that UBC, far from rejecting the idea of imposing sanctions on duly appointed distributors which do not comply with its directions, held

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[120] Case T-340/03 *France Télécom SA v Commission* [2007] ECR II- 107 [216-217]. See also the more ambiguous Case T-24-26 and 28/93, *Compagnie Maritime Belge Transports SA and Others v. Commission* (1996) ECR II-1201 [147-148], in which it is not clear if 'meeting competition defence' when eliminatory intent has been proved was rejected as a matter of principle or on the facts of the case.

[121] In general, in Article 102TFEU jurisprudence the Court has had explicit recourse to direct intent evidence only in predation cases in relation to prices above Average Variable Costs but below Average Total Cost, which are considered to be abusive if they are determined as part of a plan for eliminating a competitor. By direct intent evidence, the Court of Justice has accepted documentary evidence of direct threats to a particular competitor made during meetings, that the latter competitor would face retaliation if it did not withdraw from the relevant market, Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I- 3359 [75-82]. The General Court has accepted both the reports of the board of directors referring to the need to make major financial sacrifices in the area of prices and supply terms in order to fight competition as direct intent evidence and a series of factors providing indirect evidence of intent, such as duration and scale of sales at a loss or importation for the purpose of reselling at a loss or lower prices in one Member State as opposed to all other Member States, as in Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755 [151]. Finally, the Commission has relied on a number of internal documents originating with management-level staff within the undertaking and expressed in the context of formal presentations for the purpose of taking a decision, which attest to the existence of a strategy of 'pre-emption' for the relevant market, as in Case T-340/03 *France Télécom SA v Commission* [2007] ECR II- 107 [199-215], in which the undertaking's contestations as to the binding force of those internal documents and their integrity were rejected.

[122]Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 [189].

out this possibility as a threat'.[123] However, there was no direct evidence of intent that the dominant undertaking segregated the market along national lines from the outset through contractual clauses prohibiting exports, which would permit it to charge artificially different prices in each Member State. On the contrary, it could have equally, first, constructed a pricing scheme with differentiated prices among the Member States according to the local market conditions and, then, imposed the 'green bananas' clause to prevent this pricing scheme being by-passed.

Tetra Pak II is the only market separation case in which direct intent evidence could be considered to have played an important role. The Court seems to have based its finding regarding the existence of an overall strategy of partitioning markets on various documents exchanged between Tetra Pak and its subsidiaries, showing that the commercial policy was determined at group level.[124]

The analogy between intended market separation by dominant undertakings and discriminatory trade barriers under the free movement provisions is present here. The analogy is drawn to the extent that discrimination, either direct or indirect, is a sufficient but not a necessary element of a trade barrier, as explained above. In both cases, the effect of the undertaking's conduct or the State conduct is manifested in such a way that there is no need to show any further actual effect. On the one hand, the effect of the conduct is manifested by proven intent externalised as an attempt to separate markets and after market analysis has been carried out for the purpose of establishing dominance in the case of dominant undertakings. On the other hand, it is

[123] *Ibid* [155].

[124] Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755 [92, 171].

manifested by discriminatory action in the case of States.[125] The additional element in both cases substitutes for the need to show actual effect and, in that sense, it seems that the threshold of degree of market distortion required for establishing abuse or a trade barrier is explicitly lowered to potential market distortions.[126] However, intent and discrimination, respectively, are sufficient elements to establish the notion of abuse and a trade barrier, since the Court is also adopting this lowered threshold of proof of potential effects, even in cases of market separation in which intent is not proved, or of hindrance to market access.[127]

4.2 'Efficiency' and 'Objective' Justifications: Is uniformity within the Internal Market an end in itself?

Chapter II showed that market separation cases under Article 102TFEU cover conducts that have the effect of hindering cross-border trade, regardless of the form they take. In cases of allegedly abusive market separation, price uniformity throughout the EU is what is essentially being endangered. This is done either directly through (retail) price differentiation on a geographic basis, or indirectly through

[125] Discrimination in the context of the free movement provisions is effects-based rather than intention- or form-based. However, this does not influence the analogy drawn here, to the extent that discrimination is opposed to market access.

[126] See e.g. Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18 [64-65], in which the Court held that '[it] is sufficient to demonstrate that there is an anti-competitive effect which *may potentially* exclude competitors who are at least as efficient as the dominant undertaking' (emphasis added); and, immediately afterwards, the Court went on to rule that in principle 'where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102TFEU'.

[127] For the shift to potential, rather than actual, *inter*-State trade in the context of rules on the use of goods, see text to n 90. The anti-competitive effect of market separation cases under Article 102TFEU is the subject matter of the following Section 4.2.

exclusionary abuses (refusal to supply, rebates or margin squeeze practices) that limit the sources of supply within one Member State, thereby leading to price increases in that Member State. However, it was explained in Chapter I that this price uniformity, from an economic point of view, is in conformity with the purpose of increasing the allocative efficiency of the economies of the Member States, such that those markets concerned are characterised by equivalent supply-demand situations and other market conditions which are beyond the control of the dominant undertakings. In that case, prevention of market separation prevents the redistribution of consumer benefits from high-price countries to consumers in low-price countries, and the redistribution from consumers in high-price countries that are net-importers to producers in countries that are net-exporters.[128]

However, if direct or indirect price differentiation is rather a response to different market conditions across the EU for which the dominant undertaking is not responsible, condemning such practices actually means that the dominant undertaking will either withdraw its products from the low-priced Member State or will charge a uniform higher price, thereby making at least consumers in some countries worse off. Therefore, in those cases there is no conflict between 'market integration' and 'competition'. Rather, first, the trade-off between the various classes of consumers within the EU whose interests may clash is internal to the policy decision as to what is the desirable form of the Internal Market. Section 3 showed that embracing the market access test guides this decision, particularly in relation to measures that affect final consumers. Second, given the choice on the first policy question, the varying consumer preferences across the EU and, more generally, the fluctuating market conditions for which the dominant undertaking is not responsible represent the

[128] See Chapter I, text to n 77.

inherent limit of economic integration, which should also be respected under competition law enforcement. Otherwise, the use of Article 102TFEU to foster market integration does not make economic sense and is somewhat self-defeating.

This is partly confirmed by the Court's case law on market separation under Article 102TFEU, which indicates that fluctuating market factors beyond the control of the dominant undertaking can in principle serve as objective justifications for a conduct that would otherwise constitute an abuse.

In *UB* the dominant undertaking argued that it charged different prices based on the competitive context in which distributors in the various countries were operating, so as to reflect the anticipated yellow market price in the following week for each national market. Therefore, according to the applicant, price differences were in fact 'due to fluctuating market factors such as the *weather, different availability of seasonal competing fruit, holidays, strikes, government measures, currency denominations*' (emphasis added).[129] The Court in principle accepted that 'differences in *transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition* may eventually culminate in different retail selling price levels according to the Member States' (emphasis added).[130] However, it held that UBC (the wholesaler) could rely upon those factors only to a limited extent, since it was the distributors alone who bore the risk of the consumers' markets.[131] There are two main economic interpretations of the Court's ruling. Bishop has accepted that the dominant undertaking can rely upon those factors as long as they impact upon its actual,

[129] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 [220].

[130] *Ibid* [228].

[131] *Ibid*.

individual costs.[132] A second interpretation provided by Siragusa is that the Court accepted those costs as a justification to the extent that they refer to general or average cost differences among the Member States (by comparison with the traditional economic indicators such as national income per capita), even if the undertaking's own costs are the same in the different countries.[133] However, in either case, ignoring what each geographic part of the market can bear does not make economic sense even from a market integration perspective. Bananas are a final product rather than an input, and the natural circumstances that influence consumer behaviour across the EU are not identical.[134]

In *Tetra Pak II* the Court examined the existence of local markets characterised by objectively different conditions of competition at two stages: first, in the context of defining the geographic market as comprising the whole of the EU; and, second, as a justification for the price differences between Italy and all other Member States. Regarding geographic market definition, the Court relied particularly upon the very low *cost of transport* that made cartons and machines easily and rapidly tradable across Europe and dismissed differences in *consumption patterns*, by stating that 'the alleged differences in *consumer tastes* concerning the type of milk or the form of packaging affected only the overall size of the markets in the relevant products in each Member State and had no effect on the conditions of competition within those markets between the manufacturers of those specific products, who were subject *vis-à-vis* one to another to conditions of competition which were the same for all such

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[132] W Bishop (1981) 292.

[133] M Siragusa (1979) 185

[134] As Bishop (n 132) 290 notes, 'the fact that one firm must pay more for some input in Germany than its competitor in England is no more a violation of the Single Market principle than is the existence of greater sunshine in Sicily a violation because it makes growing oranges cheaper there than in Denmark'; see also L Zanon di Valgiurata (1982) 45-47, 52-55.

manufacturers throughout the Community' (emphasis added).[135] In relation to the justifications of the different prices between the Member States, the Court seems to reject in principle the existence of local markets as a justification by making a cross-reference to the geographic market definition, to the extent that the various Member States have already been found to belong to the same geographic market.[136] This may seem at first sight to contradict the Court judgment in *UB*, in which the geographic market also comprised more than one Member State and, nevertheless, fluctuating market conditions were in principle accepted as justifications. However, as mentioned above, in *Tetra Pak II* the Court partly relied upon direct intent evidence that there was an overall strategy of partitioning the markets.[137] Therefore, the case is not a precedent for accepting that, once fluctuating market conditions have been taken into account in the context of geographic market definition, they are 'exhausted' and cannot justify a varying pricing policy across the Member States. On the contrary, consumer tastes may differ within the Internal Market, in a like manner to that within a single State.[138]

In the remaining market separation cases, the geographic market comprised a single Member State. In *British Leyland*, no justifications based on market conditions beyond the control of the dominant undertaking, or on efficiencies, were advanced; on

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[135] Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755 [94-95].

[136] *Ibid* [164-165, 170-171].

[137] See text to n 124.

[138] Similarly, in Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689 [65-93] the General Court ruled that the definition of the geographic market for the purposes of applying Article 102TFEU does not require the objective conditions of competition between traders to be perfectly homogeneous. However, it agreed to examine in principle the appellant's allegations that the varying costs for providing railway services, as well as the variations in intensity of competition from other transportation means in the western and in the northern journeys, could justify different tariffs for the provision of railway services. Therefore, geographic market definition does not 'pre-empt' the finding that two services are 'equivalent' for the purpose of establishing price discrimination as an abuse of dominance under Article 102(c)TFEU.

the contrary, the parallel trade came as result of the dominant undertaking's own pricing policy, charging in the first place different prices in the UK for right-hand-drive vehicles from prices in the continental EU Member States for left-hand-drive vehicles. British Leyland claimed no objective or efficiency justification for such price discrimination. This resulted in the subsequent conduct of the undertaking in the ancillary market of issuing certificates of conformity for vehicles in the UK[139] being the means for preserving the undertaking's discriminatory pricing policy in the market for sales of vehicles.[140] Therefore, it is legitimate to assume that British Leyland was facing competition in the Continental EU Member States; hence, it could not have raised prices there. Consequently, the parallel trade in re-imported left-hand-drive vehicles in the UK was operating to the benefit of price competition and of the consumers there, leading to price uniformity in the EU. In addition, the means used by British Leyland to attain its objective, namely the misuse of its regulatory control powers, could not, in itself, be justified by reference to administrative cost savings.[141]

This is contrasted with refusals to supply, which can be justified, as a means of restricting parallel imports, by reference to '*the commercial interests of the dominant undertaking'*, to the extent that '*the order is out of the ordinary in terms of quantity based on the prior business relations between the dominant undertaking and the*

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[139] The conduct was the non-renewal of the conformity certificate for re-imported left-hand-drive vehicles as well as the charging of higher fees for the grant of conformity certificates for the said vehicles.

[140] On the contrary, in the more recent judgment in *Astra Zeneca* the General Court examined whether Astra Zeneca's deregistration of product marketing authorisations in regard to Losec capsule from certain Member States constituted an abuse in so far as it restricted parallel trade of that product. The General Court held that a causal link between the two could be upheld only to the extent that the national authorities were liable to withdraw, or did usually withdraw, parallel import licences following the deregistration, at the request of their holder, of the marketing authorisations for the relevant product, which, in itself, was potentially in violation of Articles 34 and 36TFEU, Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805 [838-863].

[141] Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECR 3263 [28].

wholesaler and on domestic consumption' (emphasis added).[142] This interpretation was given by the Court in *Sotirios Lelos* and represents a remarkable shift in the Court's approach to parallel trade. In earlier cases on refusal to supply as a means of restricting parallel trade, the Commission had rejected the dominant undertaking's arguments that the quantity ordered was far too great for the national market concerned.[143] On the contrary, in *Sotirios Lelos* the Court essentially upheld the aggregate amount supplied to satisfy domestic demand as an upper limit to the obligation of the dominant undertaking to supply wholesalers.[144]

In the discriminatory rebates cases based on the geographic location of the customer or of the customer's buyers, the geographic market concerned comprised a single Member State. In *Irish Sugar*, both the system of 'export rebates', and its

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[142] Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [70-73]. For an analysis of the case, see also Chapter IV, Section 3.4 and Chapter V, text to n 152-156.

[143] In *Polaroid/SSI Europe*, Polaroid Netherlands refused to provide a quotation to SSI Europe for a larger than previous order, on the grounds that the quantities were far too great for the Netherlands and even the European Market. The Commission initiated an investigation, Polaroid agreed to provide the quotation and the case was closed; see Commission (EEC), 'Thirteenth Report on Competition Policy' (published in conjunction with "Seventeenth General Report on the Activities of the Communities 1983") 1984 [155-157]. Similarly, in *Eurofix-Bauco v Hilti* (Cases IV/30.787 and 31.488) Commission Decision 88/138/EEC [1988] OJ L65/19 [35-37, 76] Hilti induced its independent distributors in the Netherlands not to fulfil export orders for cartridges for Hilti nail guns to two UK companies, so that the latter companies would be able to supply their own nails together with cartridges for Hilti nail guns. This was found to be abusive and it was not challenged on appeal, see Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439 [27, 40].

[144] In favour of this interpretation of the criterion for 'ordinary', *O'Donoghue and Macnab* (n 6) 159. T T Nguyen, T Minssen and X Groussot (2009) 16 and S Kingston (2009) 698 point to the uncertainty that persists, given that it is for the national courts to apply those criteria on an *ad hoc* basis. The Greek administrative Court of Appeal applied the above-mentioned criteria and annulled the Greek Competition Authority's decision finding that Glaxo had not violated Article 102TFEU. However, Glaxo's refusal to supply was unqualified, in the sense that it did not provide wholesalers at all with the products involved; see Athens Administrative Court of Appeal, Judgment No 1983/2010 [17] (in Greek). The Athens First Instance Court in a string of judgments, which culminated in *Sotirios Lelos*, successfully delved into the details in ascertaining the domestic demand. The domestic demand was estimated based on the total pharmacy sales of the preceding month with an additional 10% to cover a potential increase in demand, and to create stock as well as fully cover hospitals' needs; See, e.g., Athens First Instance Court, Judgments No 6440/2003, 4094/2003, 4084/2003, 4016/2003, 4014/2003 (in Greek). These cases are remarkable in as much as they preceded *Sotirios Lelos*, yet the analysis is consistent with the Court of Justice criterion of domestic demand as an upper limit for the dominant pharmaceutical undertaking's obligation to supply parallel traders. The cases are still pending before the Greek Civil Courts, after the Court of Justice judgment in *Sotirios Lelos*.

allegedly abusive effect, were present in the market for industrial sugar in Ireland. Similarly, in *British Gypsum* the geographic market concerned was that of Ireland alone in relation to the rebates granted, and the UK alone in relation to the policy of priority deliveries. However, in those cases (as opposed to geographic price discrimination cases), the condemned market separation effect was equated to preventing the dominant undertaking's competitors established in another Member State from entering the national market concerned. Therefore, it is more a potential exclusionary effect, to the extent that the competitors established outside Ireland and the UK could not enter the national markets without entering into contracts with the tied customers (i.e. with the exporting customers of Irish Sugar and with the merchants who intended to import plasterboard from Spain or who agreed to obtain their supplies exclusively from BG). In this regard, the application of Article 102TFEU in those cases could, in principle, be in conformity with the market integration objective, since hindering market access to out-of-State competitors means that consumers in the Member State concerned might be denied the lower-cost price of imports. Thus, in *British Gypsum* the dominant undertaking unsuccessfully argued that the introduction of the rebates was not an initiative to counter competition from imported plasterboard as such, but a response to a threat from a group of four merchants in Northern Ireland to sell imported plasterboard from Spain at 'appeal' prices.[145] However, the difference between the two cases is that, while, in *British Gypsum*, conformity with the market integration objective only depended upon the efficiency of those competitors and their ability to match BG's unit price offered to the tied customers, in *Irish Sugar* the potential exclusionary effect also involved the validity of the assumption that the tied customers were more likely to engage in *inter-*

[145] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 [110].

State trade at input level, precisely because they export their own processed products. Thus, Irish Sugar argued that the competitive position of its exporting customers was not commercially comparable to the competitive position of its non-exporting customers. However, the Court rejected the argument by reference to the fact that non-exporting customers also faced competition at retail level by traders established in other Member States.[146]

With regard to the policy of priority delivery of plaster to customers in the UK who did not handle imported plasterboard in *British Gypsum*, the Court held that, in principle, 'it is open to an undertaking in a dominant position and is also a matter of normal commercial policy, in times of shortage, to lay down criteria for according priority in meeting orders, those criteria must be objective and must not be discriminatory in any way'.[147] However, the 'loyalty' of its customers *vis-à-vis* its out-of-State competitors in the market for plasterboard was not accepted by the Court as a factor that could justify the priority delivery of plaster to its customers that did not market imported plasterboard. This is in contrast with the case law regarding refusals to supply in times of shortage. In particular, in *BP and others v Commission*, the Court accepted that the distinction between regular and occasional customers during times of shortage in petroleum could justify a differential treatment in the delivery of supplies to the two categories of customers.[148] A comparison of the two cases seems to suggest that, in *British Gypsum*, there was an additional element, namely that the non-loyal customers were instead marketing imported plasterboard. In

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[146] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [142-144].

[147] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 [94].

[148] Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* [1978] ECR 1513 [22, 32-33]. E Buttigieg (2009) 194-196 argues that the same distinction should be accepted in price discrimination cases in times of shortage, but not in all price discrimination cases.

that sense, unqualified market integration seems to have been used incorrectly to tip the balance between whether or not a violation has occurred.

Finally, in *Irish Sugar* the dominant undertaking argued that the discriminatory rebates granted to its retailers established in the border area between Ireland and Northern Ireland were objectively justified by a defence of meeting competition: namely that it was responding, in the context of its market, to attacks by competitors, particularly foreigners.[149] The pricing practice was condemned under Article 102(c)TFEU, given that the prices charged by Irish Sugar were not predatory within the meaning of the case law. The Court seems to accept, in theory, that the dominant undertaking can protect its own commercial interests when being threatened, and that such protection, in order to be lawful, must 'be based on criteria of *economic efficiency* and consistent with the *interests of consumers'* (emphasis added). [150] However, in that case, the Court rejected the dominant undertaking's claim on the basis that the price alignment was selective and was enabled precisely because of the price stability in the rest of the Irish market, which allowed Irish Sugar to finance those rebates.[151] Therefore, it seems that selectivity itself was condemned, arguably in light of the fact that the competitors attacking Irish Sugar were established in another Member State.[152]

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[149] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [181, 182, 184].

[150] *Ibid* [189].

[151] *Ibid* [188].

[152] P Andrews (1998) seems to disregard this element and wrongly argues that, after *Irish Sugar*, selectivity itself is indicative of predatory intent, to the extent that previously, in *Hilti*, the Court had condemned selective price cuts as specific attempts to attract the customers of the dominant undertaking's competitors, hence requiring an additional element of eliminatory intent. However, first, Hilti's selective and discriminatory pricing policies were directed against its competitors and their customers only in the UK, and also there was direct intent evidence, see *Eurofix-Bauco v Hilti* (Cases IV/30.787 and 31.488) Commission Decision 88/138/EEC [1988] OJ L65/19 [45-47, 80-83] and Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439 [100]; second, as has been argued forcefully

To sum up, Section 3 revealed that the economic values promoted and protected under the free movement provisions through a 'market access' test guarantee uniformity in the treatment of the interests of the various classes of consumers across the EU, but only as far as such uniformity promotes the efficiency of the economies of the Member States of the EU. The same rationale should underpin the condemnation as abuse of conduct that has the potential effect of hindering cross-border trade. In cases in which the geographic market involves more than one Member State, such conduct usually takes the form of geographic price discrimination. In cases in which the geographic market concerned is comprised of just one Member State, it takes the form of exclusionary conduct for out-of-State competitors. However, in either case, fluctuating market conditions and factors that are beyond the control of the dominant undertaking should be capable of justifying differential treatment among the various categories of consumers in the different Member States. Otherwise, an attempt to achieve uniformity and integrate the markets does not make economic sense; rather, it goes against the aim of boosting the efficiency of the Member States' economies, because the market conditions across the EU are not comparable. In that sense, there is full substantive alliance between the second-phase tests under both the free movement provisions and Article 102TFEU, namely the market access test and the effects-based test, respectively.

5. The constitutional basis for aligning the notions of trade barrier and abuse of the dominant position

above, in Article 102TFEU cases, conduct-based presumptions about intent do not make any sense and should not be used.

III. *Market Separation under Article 102TFEU: The role of economic justifications*

In Sections 3 and 4, it was argued that the rationale of finding a trade barrier and an abuse of the dominant position should be and, to some extent, is aligned according to the case law. Subsequently, this Section first highlights the different use of economics under the provisions of the free movement and under Article 102TFEU for the purpose of promoting efficiency. Second, it is argued that the concordance between the aims of market integration and abuse of the dominant position, as well as the different use of economics, is explained at the constitutional level of the Treaty, even after the relocation of ex-Article 3(1)(g)TEC to Protocol No 27TFEU when the Lisbon Treaty entered into force.

5.1 The different use of economics to establish a trade barrier *versus* an abuse of the dominant position

The rationale behind addressing trade barriers originating in the State sphere under the provisions of the free movement and behind addressing abuses hindering *inter*-State trade conducted by dominant undertakings should be aligned. However, the economic values promoted under the notion of trade barriers, under either the discrimination or the market access test, are framed on the basis of the regulatory equivalence of the products involved, rather than market equivalence. For example, in *Commission v Italy*, dealing with a prohibition, pursuant to Article 56 of the Italian Highway Code, on using a motorcycle and a trailer together in Italy the Court distinguished between two types of trailer when assessing the conformity of Article 56 of the Highway Code with Article 34TFEU: namely, trailers specifically designed for motorcycles and

trailers intended to be towed by automobiles or other types of vehicle.[153] Arguably, the distinction is based on the perception of the Italian regulator, as reflected in Article 56 of the Highway Code, to the effect that road safety is being endangered by the use of trailers with motorcycles. Therefore, the Court focused on the effect of the prohibition upon market access for trailers specifically designed for motorcycles only,[154] even if the latter product could be considered to be part of the same product market as trailers intended for other vehicles from a market equivalence perspective.

In contrast, Article 102TFEU is applied within a specific product market, defined on the basis of demand and supply substitution as measured by economic theory[155] or the perception of the dominant undertaking itself as to the product market in which it operates.[156] In any case, the effects of the dominant undertaking's conduct are measured upon products, which are equivalent from the economic actors' perspective. Therefore, one cannot dismiss the high relevance of economics for fact-imperative purposes when applying Article 102TFEU in individual cases. [157] This is so, even if one does not agree with the use of economics in the sphere of EU

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[153] See Case C-110/05 *Commission v Italian Republic* (n 51) [49-51].

[154] *Ibid* [52-54].

[155] See particularly Commission (EC), Notice on the Definition of Relevant Markets for the Purposes of Community Competition Law [1997] OJ C372/5 [13-27, 33-43]. Evidence may be acquired by the Commission by contacting consumers, undertakings in the industry, professional associations or undertakings in upstream markets, in order to identify their views on consumers' behaviour; see e.g. D Hildebrand (2006).

[156] See e.g. *Aberdeen Journals Ltd v OFT* [2003] CAT 11, [2003] CompAR 67 [235] '[...] documents emanating from the undertaking concerned showing how that undertaking saw the market, and the commercial strategy it had adopted in that market, may be decisive evidence of what the market is'.

[157] The distinction between the normative and the fact-imperative role of economics in the sphere of EU Competition Law is drawn by D Gerber in C D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82TEC* 47-48; see also D Zimmer in R Zach, A Heinemann and A Kallerhals (eds), *The Development of Competition Law* 324-329.

competition law for the purpose of providing the standard of legality of the dominant undertaking's conduct.[158]

In addition, there are institutional differences that warrant the use of economics in an alternative manner in the application of either rule. Economics are institutionally embedded in competition law enforcement because of the enhanced economic know-how and the capabilities of the Commission as an enforcer.[159] This has been particularly the case since the Commission's launch of an 'effects-based' approach to competition law. After decentralisation of EU competition law enforcement, it may be the case that procedural rules concerning data access and control in Europe allow a more limited use of economics compared to antitrust litigation in the US.[160] However, compared to preliminary references in the area of free movement rules, private enforcement of Article 102TFEU still allows for a more extensive use of economics. This is because it is the dominant undertaking which bears the evidential burden of objective or efficiency justifications for its conduct in Article 102TFEU proceedings. By contrast, in free movement proceedings before national courts, it falls upon the individual trader to prove the existence of a trade barrier.[161]

5.2 From Article 3(1)(g)TEC to Protocol No 27TFEU: No conflict in substantive values between competition and market integration

[158] See Chapter I, Section 2.1 on the relationship between competition and efficiency.

[159] H Friederiszick in J Drexl, L Idot and J Moneger (eds), *Economic Theory and Competition Law* 4 refers to the ratio of economists to lawyers at DG Comp, which was around one to seven in the early 1990's and had increased to one to two by 2007.

[160] See G Gerber in J Drexl, L Idot and J Moneger (eds), *Economic Theory and Competition Law* 20-44.

[161] See *Davies* (n 62) 96-98, who is in favour of this lack of empiricism in the application of free movement provisions.

The historical link between Article 102TFEU and market integration at the level of objectives has been achieved through the teleological interpretation of the concept of abuse by reference to (ex-)Article 3(1)(g)TEC.[162] The question that arises relates to the relevance of the clause on 'a system ensuring that competition in the Internal Market is not distorted' in the cases of market separation under Article 102TFEU.

On the one hand, the answer to this question is dictated by the fact that in none of the cases of market separation under Article 102TFEU analysed above did the European Courts feel obliged to have recourse to Article 3(1)(g)TEC for the purpose of substantiating an abuse of the dominant position.[163] This is indicative of the lack of conflict in substantive values between market integration and Article 102TFEU, once Article 102TFEU is used to address barriers to *inter*-State trade stemming from the conduct of dominant undertakings. By contrast, in Chapter V it is argued that, whenever the Court uses Article 102TFEU to address market distortions arguably stemming, in part, from the State sphere, it has recourse to Article 3(1)(g)TEC, as an additional instrument to overcome potential conflicts in substantive values and justify the enforcement of Article 102TFEU. For example, this is the case with *Sotirios Lelos* and *Deutsche Telekom*.[164] Therefore, the case law on market separation as an abuse of dominance confirms the view that competition law is one of the cornerstones of the

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[162] See the extensive analysis provided in Chapter I, Section 3.3.

[163] Reference to the clause provided for in Article 3(1)(g)TEC is made in *United Brands*, but this is for the purpose of establishing the dominant position and the refusal to supply a long-standing customer, Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 [63, 183].

[164] Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [66]; Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [180, 230, 234]. Similarly, Article 3(1)(g)TEC has been the cornerstone of the principle that Member States should not introduce measures, which render EU competition rules ineffective (*effet utile*); see Chapter V, Section 4.1.

internal market, on which the European Court has pronounced judgment on other occasions in the field of applying the competition provisions against private undertakings, rather than against the State.[165]

On the other hand, after the entry into force of the Lisbon Treaty, the clause on 'a system ensuring that competition in the Internal Market is not distorted' has been relocated from Article 3(1)(g)TEC to Protocol No 27TFEU. Article 3TEC set out the activities of the then Community for the purposes of achieving the objectives (or tasks) set out in Article 2TEC. Article I-3 (2) of the Treaty establishing a Constitution for Europe promoted in a positive way the 'Internal Market where competition is free and undistorted' as one of the aims of the European Union.[166] However, in the run-up to the French presidential elections and after the French referendum on the Constitution, Nicolas Sarkozy picked up on this issue and insisted on the suppression of the reference to the aim of 'free and undistorted competition'.[167] As a result, in Article 3(2)TEU-L the final clause on 'free and undistorted competition' is not included, and Article 3(1)(g)TEC has been deleted. More generally, the 'activities' of the then Community set out in Article 3TEC have, instead, been transformed into 'competences', including that to 'establish the competition rules necessary for the functioning of the Internal Market' amongst the enumerated exclusive Union

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[165] See e.g. Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I- 3055 [36] in order to establish that the competition provisions are considered rules of public policy, the breach of which could, according to national law, justify annulment of an arbitration award; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 [20] in order to establish the right of a party to a contract in breach of the competition provisions to claim damages from the other contracting party.

[166] [2004] OJ C310/1.

[167] See European Council Statements made by Nicolas Sarkozy, President of the Republic, during his final joint press conference with Bernard Kouchner, Minister of Foreign and European Affairs (Brussels, 23 June 2007) <https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.gb.asp?liste=20070626.gb.html> accessed August 2012.

competences.[168] As a political compromise, and a response to those who feared the downgrading of the *status quo* of competition in the Union, Protocol No 27 on the Internal Market and Competition was adopted, including, *inter alia*, the clause on 'a system ensuring that competition in the Internal Market is not distorted'.[169] The question is whether these changes could have an impact upon the identified concordance between the aims of Article 102TFEU and market integration.

From a legal perspective, according to Article 51TEU-L 'the Protocols and Annexes to the Treaties shall form an integral part thereof'; therefore, they have the same normative value as any other Treaty Article. The relocation of the clause on 'a system ensuring that competition in the Internal Market is not distorted' from Article 3(1)(g)TEC to the Protocol brings about no formal, legal, change in the hierarchy of the competition provisions as fundamental provisions for the functioning of the Internal Market. However, one could argue that its relocation from the head to the tail end of the Treaty has a symbolic meaning. It could be regarded as a sign of the 'emancipation' of competition law and policy from the establishment and functioning of the Internal Market, in the sense of integrating the more economic approach to competition law into the European constitutional order.[170] Such an interpretation can be supported by the fact that the substantive competition provisions remain

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[168] Article 3(1)(b)TFEU. For the meaningless initial debate between Wolfgang Munchau, commentator at the *Financial Times*, and Michel Petite, the then Director General of the Legal Service of the Commission, on the distinction between 'aims' and 'activities', see A Riley (2007) 703-704.

[169] For a detailed examination of the wording of the Protocol, see R Barents in M Bulterrman *et al.* (eds), *Views of European Law from the Mountain* 124; R Lane in M Bulterrman *et al.* (eds), *Views of European Law from the Mountain* 172.

[170] The word 'emancipation' is used by A Komnimos (2010) 6; see arguments against such an interpretation J Drexl in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* 659; for the opposite side of such 'emancipation', see *Weatherill* (n 72) 990 who highlights the potential for 're-orienteering the free movement law towards socially motivated regulation'.

unchanged, while they do not inform the definition of the Internal Market, which is only informed by reference to the free movement provisions in Article 26(2)TFEU.

In the market separation cases under Article 102TFEU considered in this Chapter, such separation of the competition provisions from the Internal Market has no practical significance, to the extent that there is no conflict in substantive values between the two. According to the analysis of the case law carried out in this Chapter, both Article 102TFEU and the provisions on free movement aim at increasing the efficiency of the economies of the Member States, and no reference is made in those cases to Article 3(1)(g)TEC. Consequently, there is no margin for any kind of differentiation in the Commission's and Courts' future reasoning or economic analysis conducted for establishing market separation as an abuse of dominance. This is implicitly confirmed in the recent *TeliaSonera* judgment, the first judgment of the European Court after the entry into force of the Lisbon Treaty.[171] The Court of Justice interpreted Article 102TFEU with explicit reference to Protocol No 27TFEU, so as 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'.[172] Indeed, *TeliaSonera* is a case of an abusive margin squeeze by a dominant undertaking with no regulatory obligation to supply the input to its downstream competitors. Therefore, it is not a case of conflict in substantive values, not even a case of unclear attribution of the alleged market distortion. This is why the Court's reference to the Protocol No 27TFEU is anodyne; it would have been rather

[171] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18.

[172] *Ibid* [20-22].

absurd to ignore decades of case law on exclusionary abuses based on (ex-)Article 3(1)(g)TEC as established in *Continental Can*.[173]

The only change brought about by the alleged 'emancipation' of the competition provisions from the Internal Market by virtue of the relocation of the clause, would be to put into constitutional perspective the different use of economics in Article 102TFEU and the free movement provisions as explained above. However, this consequence would be of marginal significance for the purpose of the present research, which is to understand the enforcement of Article 102TFEU against market separation, since economic analysis has already been shown to constitute an integral part of applying Article 102TFEU. Rather, it could be of great importance to the development of the principles governing the application of the free movement provisions, by providing a legal basis for a re-orientation of their application towards economic efficiency, without necessarily imitating the specifics of the use of economics under competition law.

6. Conclusions

This Chapter has addressed the interface between market separation as an abuse of the dominant position and market integration as reflected in the notion of trade barriers.

It is argued that alleged market separation by dominant undertakings should be exclusively assessed under Article 102TFEU, rather than under both Article 102TFEU

[173] See the analysis in Chapter I, Section 3.3. However, one could criticise the economic analysis itself on margin squeeze conducted by the Court of Justice, particularly in regard to the question as to whether it requires the fulfilment of the conditions for a competition law duty to supply; but this aspect of the economic analysis of margin squeeze is not related to exclusion of out-of-State competitors any more than it is related to Swedish competitors. In any case, it is, as explained in Chapter IV, Section 3.3, an illustrative example of how regular competition law analysis can be distorted by endorsing regulatory standards even exceptionally, as has happened in relation to the test governing margin squeeze abuses, first established in *Deutsche Telekom*.

and Article 101TFEU. The reason is that there is a qualitative difference between genuinely unilateral conduct and agreements. Therefore, precedents of market separation under Article 101TFEU should not be mechanically cited to establish a violation of Article 102TFEU, when market separation takes the form of genuinely unilateral conduct, such as geographic price discrimination or refusal to supply. Similarly, in the grey area of contractual abuses, such as border rebates, the dominant undertaking's conduct should be assessed as a unilateral activity, exclusively under Article 102TFEU, when the market position of the undertaking (dominant position) constitutes the centre of gravity and manifests itself over the form of the conduct (agreement). This delimitation of the scope of Article 102TFEU in relation to the scope of Article 101TFEU has consequences for the allocation of the burden of proving efficiency, or objective, justifications to conduct that would, otherwise, constitute abusive market separation. In particular, balancing interests under Article 102TFEU in a manner similar to that used under Article 101(3)TFEU is not operable. Instead, it is suggested that the lack of efficiency or objective justifications should be a necessary condition for establishing market separation as an abuse of the dominant position.

The research then progressed to identify the guiding principle in assessing the integrationist thrust of market separation cases under Article 102TFEU. This guiding principle is the distinction between economic and non-economic values as reflected in the distinction between the notions of trade barriers and justified trade barriers. Two challenges to the above connection of concepts have been examined and dismissed. The first is that non-economic values incorporated in the mandatory requirements concept operate as a negative qualification to the finding of a trade barrier. The

second is the Court's actual practice which, under specific circumstances, is permissive regarding economic justifications to trade barriers.

Subsequently, the research has shed light on the conceptual foundation of trade barriers under the provisions on free movement of goods, by examining the recent cases on rules on the use of goods. It is argued that discrimination is a sufficient but not necessary element for establishing a trade barrier, as it is the most blatant form of a restriction to market access. Therefore, the conceptual foundation of the economic values promoted by the establishment of a trade barrier is the efficiency of the economies of the Member States as a whole: it is the efficiency of the enlarged market.

Discrimination and market access, as the two tests for establishing a trade barrier, have been compared to the intent–based and the effects-based tests for establishing market separation as an abuse of the dominant position under Article 102TFEU. It is argued that the intent to separate the market must only be proved, and cannot be presumed. Therefore, induction-based presumptions under Article 101TFEU about 'by object' restrictions of competition do not apply under Article 102TFEU. Once proved, intent is sufficient to establish an abuse of dominant position. The reason is that market analysis has already been carried out for the purpose of defining the relevant market and establishing dominance. In that sense, there is an analogy between the intent-based test under Article 102TFEU and discrimination under the provisions of the free movement, since they perform the same function. They manifest the illegal conduct in such a manner that there is no need for the second-phase tests to be applied.

With regard to the second-phase tests, it is argued that there is no conflict in substantive values between market separation as an abuse of the dominant position

and trade barriers. Analysis of the case law under Article 102TFEU confirms that the varying consumer preferences across the EU and, more generally, the fluctuating market conditions for which the dominant undertaking is not responsible represent the inherent limit of economic integration. They can in principle serve as objective justifications for conduct that would otherwise constitute an abuse. Otherwise, enforcement of Article 102TFEU against conduct that hinders cross-border trade does not make sense from an economic perspective.

In the final Section of this Chapter, it is argued that economic efficiency is substantiated differently under Article 102TFEU compared with the free movement provisions. In particular, the use of economics is of central importance under Article 102TFEU because 'uniformity' across the EU is assessed on the basis of the market equivalence of products, whereas, under the free movement provisions, it is assessed on the basis of the regulatory equivalence of products. Both the concordance of objectives and the different use of economics in market separation under Article 102TFEU and trade barriers failing the market access test are justified at the constitutional level of the TFEU. *A fortiori*, this is the case after the relocation of the clause on a 'system of undistorted competition within the Internal Market' from Article 3(1)(g)TEC to Protocol No 27TFEU. It is argued that, in the market separation cases under Article 102TFEU considered in this Chapter, the 'emancipation' of the competition provisions from the Internal Market has no practical significance, to the extent that there is no conflict in substantive values between the two and the case law is, so far, principled.

CHAPTER IV

Market separation under Article 102TFEU and the role of non-economic justifications: A Question of Attribution

1. Introduction

This Chapter addresses the link between market separation under Article 102TFEU and the non-economic values underpinning market integration, as reflected in the notion of justified trade barriers under the free movement provisions.

It is argued that the question of attribution of the market separation to the dominant undertaking or the State, rather than conflicts in substantive values, represents the analytical core of this link. Conflicts in substantive values do come to the surface whenever attribution of the anti-competitive effect is not principled. Therefore, academic debate and more reasoned Court judgments should place the emphasis on formulating the test for attribution to the undertaking and/or the State.

The purpose of this Chapter is to show that the analytical core of the interface between market separation under Article 102TFEU and non-economic values is attribution. Subsequent Chapters (V and VI) will address the actual test of attribution.

The present Chapter is structured into two main Sections, one laying down Treaty-based arguments (Section 2) and one providing an interpretation of the case law in accordance with those arguments (Section 3).

The conceptual foundation of finding a justified trade barrier under the free movement provisions is identified in Section 2. This is the allocation of competences between the EU and the Member States to regulate the Internal Market. Subsequently, the concept of distribution of competence for market regulation is used to question the

setting of such regulations by, otherwise, abusive conduct by dominant undertakings. It is argued that the constitutional distribution of competence between the EU and the Member States is ignored by permitting public policy considerations to operate as a justification under Article 102TFEU.[1] Furthermore, the exclusion of public policy considerations from the scope of Article 102TFEU from the outset is tested against the structure of the analysis under this Article which is not susceptible to balancing, as well as against related arguments common to both Articles 101TFEU and 102TFEU.

Section 3 provides an interpretation of the case law under Article 102TFEU which rejects public policy justifications in conjunction with case law under Article 102TFEU that upholds the right of the dominant undertaking to approach public authorities and 'lobby' in favour of setting specific regulations in the public interest.

In particular, it is argued that the express rejection by the European Courts of public policy justifications under Article 102TFEU on the basis that there are other legal routes for the undertaking to achieve such policy objectives is, at a descriptive level, an indication that conduct by the undertaking and genuine public policy justifications are, as an evidentiary matter, mutually exclusive. Instead, 'lobbying' by the dominant undertakings is more likely to be genuinely in the public interest than to be an abuse of rights, as is confirmed by the relevant case law. Therefore, purely private actions that are genuinely in the public interest are more mythical than real, because there is always the potential for State involvement to occur.

Finally, permitting in principle the public policy justifications advanced by dominant undertakings, never proved by the facts to date, may potentially have added-

[1] Public policy considerations is the predominant term which is used for non-economic values in the comeptition law discourse. However, a comperehensive definition, in particular by those who support the inclusion of public policy considerations, is missing; see also text to n 59. In the present thesis, the line is drawn between economic and non-economic values under the free movement provisions, as it is explained in Chapter III, Section 3.1

costs in terms of distorting the subsequent competition law analysis in cases in which no public policy issues arise. Therefore, excluding public policy considerations from the scope of Article 102TFEU as a matter of principle presents the optimal means of analysis and allows the focus to shift to State action defence, which explicitly addresses the question of attribution.

2. Abuse and public policy justifications: Treaty-based arguments

In this Section, the question explored is whether non-economic values can serve as objective justifications in market separation cases under Article 102TFEU. The imperfect link between non-economic values and justified trade barriers under the free movement provisions is employed as the starting point of this inquiry. It is argued that the analytical core of the interface between market separation and justified trade barriers lies beyond the substantive values promoted by finding a justified trade barrier. Rather, there is no 'stateless market' and market integration (or de-regulation) necessarily needs to be backed up by policy integration (or regulation). The other side of accepting the above proposition is that the conceptual foundation of finding a justified trade barrier is the level at which such policy integration takes place; the national or the European level. Subsequently, it is argued that by permitting public policy considerations to operate within Article 102TFEU, the outcome of competence distribution for market regulation is being pre-empted, in as much as the establishment of the rules on competition falls under the exclusive competence of the EU. Therefore, justifications on the basis of public policy considerations cannot be accepted under Article 102TFEU.

IV. *Market separation under Article 102TFEU and the role of non-economic justifications: A Question of Attribution*

2.1 The conceptual foundation of justified trade barriers: Distribution of competences for market regulation

The conceptual foundation for finding a justified trade barrier is not the substance of the non-economic values that operate as justifications. It is shown in Chapter III, Section 3.1, that the link between the justified trade barrier and non-economic values that operate as justifications is not perfect. The reason is the Court's permissive approach towards economic justifications, despite the fact that it consistently repeats the *dictum* that purely economic grounds can never serve as a justification.[2] Even Treaty-based justifications, such as the protection of IP rights, share a strong element of economic rationale.[3]

The conceptual foundation for finding a justified trade barrier is not the substantive values promoted by finding such a justified trade barrier, because these values can be anything other than the economic values promoted by finding a trade barrier. The second step under the Treaty mechanism, to assess whether or not the trade barrier is justified, refers necessarily to 'trade/market plus'. The importance of these non-economic values is undeniable; hence the conceptual foundation of this second-step should be something that lies beyond the substance of the non-economic values.

Policy integration that backs up market integration is an integral part of the process of constructing a market. This was explained by Karl Polanyi's well-known

[2] See Chapter III, text to n 46, 48, 52.

[3] P Regibeau and K Rockett in S Anderman (ed), *Intellectual Property Rights and Competition Policy* 506-521.

concept of 'embeddedness', on the basis of economic history (or economic sociology).[4] In *The Great Transformation*, Polanyi argued that markets are always socially embedded and that once a dis-embedding stage of market society has been constructed, a re-embedding counter movement becomes visible.[5] This re-embedding stage of the market society is distinguished by regulations, which reinforce the layers of social protection and slow down the rate of change.[6] The contemporary relevance of Polanyi's story telling is emphasised in relation to building the European Internal Market,[7] because of the perceived mismatch between a European market and a European State.[8] A Polanyian interpretation of the process of building the Internal Market inevitably involves regulation beyond efficiency, precisely because there is no

[4] In *The Great Transformation*, Polanyi told the story of the 19th century English industrial capitalism, looking also at what he called 'primitive' (pre-Industrial) man, societies and economies.

[5] It seems that, according to Polanyi, the movement and the counter-movement occur simultaneously, even though they are not balanced; see e.g. his reference to the policy of the Tudor and early Stuart statesmen who 'used the powers of the Crown to slow down the process of economic improvement until it became socially bearable', K Polanyi, *The Great Transformation* 38.

[6] Here, the opposition between Polanyi's 'dis-embedding' stage of market society and economic liberalism in terms of what is spontaneous and what is artificial, market institutions or social movements, is not endorsed, nor even examined; see, e.g., S Frerichs in C Joerges and J Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* 65-84. K Polanyi's story telling is here endorsed only in relation to the re-embedding stage of market societies and as an 'ontological reality', namely once a 'self-regulating market' has already been shown to exist. For the competing view, namely that Polanyi's story telling is not about an impossibility as an 'ontological reality' but as an ideal type, see G Dale, *Karl Polanyi-The Limits of the Market* 72-79 with further references.

[7] See e.g. M Egan, *Constructing a European Market* 1-11; C Joerges (2007) 8-9; J Caporaso and S Tarrow (2008) 9-19; C Joerges and F Rödl (2009) 6-7.

[8] See, e.g., C Scott (2009) 166-170 who uses the example of governance and argues that the EU is 'governing without law' rather than 'governing without government'; more generally, see N NicShuibne (2010) 1601-1605, on the weak political dimension of the EU polity, with reference to its law-making institutional structure.

such a thing as a 'stateless market', and, in that sense, that orthodox position of the EU as a 'regulatory State' is 'not so much wrong as incomplete'.[9]

Adopting such a Polanyian grand-design of the EU free movement provisions, supports the argument that demand for regulations driven by non-economic values is inevitable and that the crucial question is who will enact such regulations, the EU or the Member States. This was the initial conception of the Internal Market, since the creation of the then Common Market was perceived to be a means to a non-economic end, namely 'an ever closer union among the peoples of Europe', 'to preserve and strengthen peace and liberty'.[10] However, the policy integration aspect of the Internal Market was largely considered to be in the hands of the Member States, which, in legal terms, translated into the constitutional principles of supremacy and direct effect of the Treaty free movement provisions *pre*-1992.[11]

The successive Treaty revisions have, however, explicitly changed that assumption by enhancing the social element at EU level. In that regard, the insertion of legal basis for the adoption of legislation at EU level in sectors such as environmental

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[9] *Caporaso and Tarrow* (n 7) 10, in response to Majone's work on the EU as 'a regulatory State'. They use the free movement of workers as a case study. J Snell (2008) 624-631, 631 argues that the orthodox position is 'paying insufficient regard to the fundamentally dynamic nature of European integration, which is defined by an urge to create an ever closer union'; similarly, *NicShuibne* (n 8) 1605-16010 labels a more nuanced EU market, in terms of economic virtues or vices, as the EU 'constitutional market'. See also G Busschaert (2011) 725-739, who uses the examples of the freedom of establishment and the freedom to provide services to assess whether civil solidarity, defined as redistribution by the demands of civil society, is part of the Internal Market law.

[10] See the Preamble of the 1992 consolidated version of the Treaty establishing the European Community; the same ideal was reflected in the Schuman Declaration of 1950, which was the foundation of the European project.

[11] See Chapter I, text to n 48-49.See F Scharpf, *Governing in Europe: Effective and Democratic?* 43-83 and F Scharpf (2002) 645-648 for an accurate description of the 'political decoupling of economic integration and social protection issues' until the Treaty of Maastricht. This political decoupling has also given rise to criticism of social dumping and race to the bottom amongst the competing jurisdictions; see J Snell (2003) 334-335, for a comprehensive rejection of such critiques in the EU context with further references to the literature.

protection or consumer protection;[12] or for the adoption of measures supplementing national measures, for example in the field of public health or culture;[13] the insertion of the horizontal, policy-linking (or flanking) clauses;[14] as well as the thickening of the re-regulatory function of harmonisation legislation once the EU competence is established,[15] are all very significant. An extended social policy-linking clause was added after the enactment of the Lisbon Treaty,[16] and Article 3(3)TEU-L provides for 'a competitive social market economy' as one of the objectives of the EU.[17]

At the same time, diversity at Member States level continues to persist in relation to non-economic values and this is not only acceptable, but often the desirable form of market regulation. The reason is not only the practical difficulty of achieving consensus at a political level. For example, in the 2012 Monti Report for the re-launching of the Single Market, the Member States are grouped into four categories of

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[12] Now Article 192TFEU; Article 169(2)TFEU.

[13] Article 168TFEU; Article 167(2)TFEU.

[14] Article 11TFEU; Article 12TFEU; Article 168(1)TFEU; Article 167(4)TFEU; see S de Vries, *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies*, for a detailed account of the policy-linking clauses.

[15] See Article 114(3)TFEU; S Weatherill in N NicShuibhne (ed), *Regulating the Internal Market* 52 where it is pointed out that 'the quality of a harmonised regime is constitutionally relevant'; Similalry, B de Witte in N NicShuibhne (ed), *Regulating the Internal Market* 68-77.

[16] See Article 9TFEU. See also the Commission rhetoric on re-launching the Single Market, namely that 'the responses to the challenges concerning growth, social cohesion and employment, security and climate change, will be more likely to succeed if the Single Market works as it should'; Commission (EU), 'Towards a Single Market Act-For a highly competitive social market economy-50 proposals for improving our work, business and exchanges with one another' (Communication) COM(2010) 608 final/2 [4].

[17] See R Nazzini, *The Foundations of European Union Competition Law* 116-119, who reads the clause on a 'competitive social market economy' in Article 3(3)TEU-L as prescribing the long-term social welfare of the EU as the objective of the Internal Market; and I Lianos (2010) 755-757, who advocates a more holistic approach to the Internal Market, that integrates consumer/citizen's interests, based on the Commission policy documents as regards the Single Market.

different views on the balance between market and policy integration.[18] In addition, in 'realms remote from the orthodox core of market-building [...] space for local preferences and for regulatory experimentation' is considered to be beneficial.[19] In legal terms, this is the case where justified trade barriers do not trigger (or trigger only partial) EU harmonisation initiatives, or they trigger *minimum* harmonisation.[20] This legislative space left to the national level regulator is arguably subject again to the free movement provisions.[21]

Similarly, recent theoretical work shows that the principle of mutual recognition in the EU, which is conditional upon the functional equivalence of effects of the regulations,[22] is better understood as a kind of test that triggers a dynamic process of re-allocation of regulatory competences.[23] In essence, this allows for the balancing between the advantages of national regulatory autonomy and the disadvantages of the non-removal of trade barriers, without prescribing whether the new allocation of competences should be done through harmonisation, free choice of

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[18] M Monti, ' A New Strategy for the Single Market-At the Service of Europe's Economy and Society' (Report to the President of the European Commission J M Barroso) 9 May 2010, available at http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf [28-30]; the Member States are grouped in the Continental social-market economy countries, the Anglo-Saxon countries, the New Member States and the Nordic countries.

[19] *Weatherill* (n 15) 40.

[20] These are aspects of the two main dimensions of the pre-emptive capacity of the EU legislation, namely the scope and the intensity of the legislative act, as described by R Schutze, *From Dual to Cooperative Federalism* 194-199. See also S Weatherill in C Barnard and J Scott (eds), *The Law of the Single European Market* 52-57, on the scope and intensity of market regulation.

[21] See S Weatherill in D O'Keeffee and P Twomey (eds), *Legal Issues of the Maastricht Treaty* 25. See also M Dougan (2000) 866-878, on the controversy as to whether the more stringent national rules apply to domestic goods only or to domestic and imported goods alike.

[22] See J Weiler in in F K Padoa-Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* 25-84 and K Nicolaidis in M Maduro and L Azoulai, *The Past and Future of EU Law* 447-455, for a historical account of the evolution of the principle in the EU.

[23] See W Kerber and R van den Bergh in I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO* 138-142.

(national) regulations or a combination of these.[24] Therefore, mutual recognition is functionally associated with the second stage of the application of the free movement provisions, namely that of finding a justified trade barrier, rather than with the trade-restricting effects of trade barriers, which refer to market competition and economic values.[25]

Confirmation of the link between the free movement provisions and policy integration, which is achieved by market regulation at either EU or national level, is found in Article 4(2)(a)TFEU. In this Article, the Internal Market, which is defined by reference to the free movement provisions, is listed as an area of shared competence between the Union and the Member States. According to Craig, the original text produced for the Treaty establishing a Constitution for Europe included the four freedoms within the category of exclusive competence but they were then moved to the shared competence category. The reason for including the Internal Market within the category of shared competences is that, otherwise, Member State action that is ahead of EU action would be precluded, even if it might form the drive for EU action.[26] It is acceptable national legislation under the free movement provisions, a justified trade barrier, which provides the impetus for harmonisation legislation at EU level.[27]

The link between the application of the free movement provisions and the subsequent exercise of law-making powers by either the EU, for the first time, or the

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[24] *Ibid* 139-140. The re-conceptualisation of the principle of mutual recognition is based on a critique of the orthodox view that mutual recognition necessarily permits the removal of trade barriers without leading to centralisation or harmonisation. See W Kerber and R van den Bergh (2008) for this critique. See also J Pelkmans in F K Padoa-Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* 97-107.

[25]See also Chapter III, n 85.

[26] P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* 160.

[27] See the seminal article on harmonisation by P-J Slot (1996) 380-382.

IV. *Market separation under Article 102TFEU and the role of non-economic justifications: A Question of Attribution*

Member States is the essence of the shared competence to build the Internal Market. This division of powers largely depends on the application of the proportionality principle by the European Court of Justice under the free movement provisions as well as by national courts.[28] However, this does not make the establishment and the functioning of the Internal Market an exclusive competence. As noted by de Burca and de Witte, building the Internal Market is 'a broad functional power which, by definition, belongs to the [European] institutions and not to the Member States', but 'the concrete policy content of an Internal Market measure can rarely, if ever, be said to fall within the [Union's] exclusive competence'.[29] In fact, the Court of Justice is prepared to apply the third limb of the proportionality principle, proportionality *stricto sensu*, with varied intensity, depending on whether the subject matter of the measure falls under the competence of the EU or the Member States.[30] Even in the former case, the Court recognises that national regulation carries a legitimate value ascribed to it by national preferences and is, therefore, willing to abstain from determining the outcome of the final assessment with increasing frequency for the benefit of the national courts.[31] This is also the underlying political importance of the Court of Justice

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[28] See P-H Jans *et al*, *Europeanisation of Public Law* 151-153; M Jarvis, *The Application of EC Law by National Courts* 227-230. See also the analysis provided by *Snell* (n 11) 337-345, who focuses on the impact of the application of the proportionality principle under the free movement provisions on the vertical division of powers within the EU.

[29] G de Burca and B de Witte in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* 209.

[30] *Snell* (n 11) 342-345; T Tridimas, *The General Principles of EU Law* 209-234. See also N NicShuibne (2009) for the specific case of fundamental rights and free movement law. I Lianos and D Gerard in I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO* 197-206 emphasise that the Court displays great flexibility in adjusting the width of the 'margin of appreciation' granted to Member States from case to case and the Court, thereby, discloses a pluralistic approach to the management of regulatory diversity.

[31] *Tridimas* (n 30) 238-241. See also *Jarvis* (n 28) 231-294 for a review of the application of the proportionality principle under the free movement provisions by national courts.

deciding, in preliminary references, whether the proportionality assessment is a question of interpretation (law) or application (facts).[32]

In short, if the trade barriers are not justified, the national perception of public policy is set aside. Policy integration can then be pursued at EU level on the basis of sector specific Treaty provisions (or preventive harmonisation). Alternatively, policy integration at the national level should be modified to respect the free movement provisions, precisely because the problem is more often the proportionality *stricto sensu* of the measure promoting such justification than the lack of a valid and recognised public interest justification. If the trade barrier is justified, the divergent national perceptions concerning policy integration are permitted to prevail. Furthermore, this can trigger the process of harmonisation at EU level. Harmonisation legislation has a dual function; namely a de-regulatory function and, at the same time, a regulatory function, since it replaces national regulations which constitute justified trade barriers. [33]

In light of this shared competence between the EU and the Member States for market regulation, the key question is how to shape the policy aspect of market integration, in the absence of comprehensive legislative powers. [34] Therefore, the content of justified trade barriers is not, in itself, important. It is, rather, the process of deciding who and how will shape the policy aspect of the Internal Market, which

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[32] See G Davies in N NicShiobhne (ed) *Regulating the Internal Market* 218-224; T Tridimas in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* 77-80.

[33] Legislation at EU level itself should comply with the free movement provisions. However, the Court of Justice adopts a softer approach of judicial review, arguably because all affected parties are represented in the political process at EU level and, therefore, the outcome is in the general interest. See *Snell* (n 11) 345-350; K Mortelmans (2002) 1336; *Jarvis* (n 28) 345-358.

[34] This paraphrases C Semmelmann (2010) 521, who poses the question as to how to shape the social element in the absence of comprehensive legislative powers.

further dictates the substantive choice over potentially conflicting values[35] Kallaugher, writing in relation to the protection of national IP rights as provided for in Article 36TFEU, has put forward that this second stage of applying the free movement provisions 'is in essence a device for determining regulatory competence'.[36] This is, in fact, true with regard to all substantive values underpinning potentially justified trade barriers, and not only IP rights.

Therefore, finding a justified trade barrier has nothing to do with the economic analysis of the effect of the measure in question, as under the competition law provisions. In Chapter III, it was shown that the specific economic values that determine the minimum scope of what is 'internal' in the Internal Market are important, because they trigger the application of the Treaty provisions of the free movement. Once a trade barrier is shown to exist based on this core of substantive values, anything but these substantive market values can be called upon by the Member State to justify the adoption of such a restriction. This means that the regulatory views of either a Member State or the EU legislature are, at this stage, permitted to modify the core of the internal element of the Internal Market. The fact that the economic values will be modified in any case is not questioned; the only question is at which level of governance this will occur. The narrative provided in this Section shows that this process of competence distribution for market regulation as well as its exercise is dynamic and is based on constantly discursive interaction between the EU and national institutions, both legislative and judicial.

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[35]See *Semmelmann* (n 34) 531-534 on the change of focus to proceduralisation and procedure; similarly, on the shift from hierarchy and conflicts to coherence and pluralism, see L Azoulai (2008) 1336-1337.

[36] J Kallaugher in in S Anderman and A Ezrachi (eds) *Intellectual Property and Competition Law* 121

2.2 'Pre-emption' and the exclusive competence to establish the rules on competition

The conceptual foundation of finding justified trade barriers is not the substantive values that underpin policy integration. Rather, this second stage of the application of the free movement provisions is concerned with the allocation of competences between the EU and the Member States as regards the level at which policy integration takes place. In this Section, it is argued that this function of competence allocation cannot be performed in an equivalent manner under Article 102TFEU. Article 102TFEU is linked with the implementation, either centralised or decentralised, of the rules on competition, and the establishment of these rules falls under the exclusive competence of the EU.

A link between the competition law provisions, including Article 102 TFEU, and subsequent legislative action, equivalent to the above-described link in the area of Internal Market, is missing from the scheme of the Treaty. Rather, the reverse relationship exists. Legislative action 'establishing rules on competition' precedes their implementation. Confirmation of the existence of this reverse relationship is found by considering that 'competition law is a tall order', as pointed out by Slot, since it has always been an area of exclusive competence of the EU.[37] Therefore, in as much as the link between the finding of a justified trade barrier and subsequent legislative action is

[37] P-J Slot in A Arnull *et al* (eds), *A Constitutional Order of States?* 375. Article 3(2) Regulation 1/2003, which allows Member States to adopt more strict national rules for unilateral conduct by undertakings, also confirms the exclusive nature of the competence. This deviation is authorised not only by Regulation 1/2003, but *a fortiori* by the Treaty itself which, in Article 103(2)(e)TFEU, provides for the legal basis of Regulation 1/2003. However, *cf* M Dougan, *National Remedies before the Court of Justice* 120-123, who argues that the competence of the then Community as regards the establishment of competition rules was a shared one, before the entry into force of the Lisbon Treaty. However, this shared competence was exercised *de facto* as exclusive, even before the adoption of Regulation 1/2003, in as much as conflicts between European and national competition rules were to be solved by the principle of supremacy of European law as in Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1 [6, 9].

the essence of a shared competence for market regulation,[38] the exclusive competence of the EU to establish the rules on competition confirms the absence of a similar link in relation to Article 102TFEU.

A fortiori since the Lisbon Treaty came into force, competition became expressly listed in Article 3(1)(b)TFEU as an area in which the Union shall have exclusive competence. The category of exclusive competence refers to areas in which 'only the Union can legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts'.[39] Article 3(1)(b)TFEU and the exclusive competence of the Union referred to therein are clearly associated with the 'establishment of the competition rules necessary for the functioning of the Internal Market' and not with their application. [40] Therefore, the decentralised enforcement system established by Regulation 1/2003 did not bring about any change in relation to the exclusive nature of the Union competence as regards competition rules. The EU institutions are exclusively empowered to pour content into the competition law provisions and define their reach of application by adopting legally binding acts. One may be tempted to assume that competition law is 'legislated through directly applicable Treaty provisions'.[41] Even in this case, the exclusive nature of the EU competence to establish rules on competition would more pressingly mean that there should be a unitary framework for assessing, in a consistent manner, whether public policy considerations

[38] See Section 2.1.

[39] Article 2(1)TFEU.

[40] *Craig* (n 26) 160.

[41] E.g. K Cseres (2010) 10. This is not true, since the competition law provisions apply only in as much as the conduct in question 'affects trade'. See Chapter I, Section 4.3, on the jurisdictional function of the latter requirement and its comparator under the free movement provisions.

are suitable and necessary justifications, given the possibility for private enforcement of competition law. This also holds true with regard to the discretionary powers of the National Competition Authorities, as well as of the Commission itself, to apply varying degrees of priority to the complaints submitted to them in the context of decentralised public enforcement. By contrast, the true concern as regards the enforcement of the free movement provisions is the proportionality of the national measure *stricto sensu*, which is why it is problematic when the Court of Justice dictates the outcome of the assessment, rather than engages in a discursive interaction with national courts.[42]

Let us consider a hypothetical question to demonstrate the argument based on the distinction between the exclusive competence to establish rules on competition and the shared competence to establish rules regarding the Internal Market. Could the Council, on a proposal from the Commission and after consulting the European Parliament, adopt a valid Regulation or Directive on the basis of Article 103(1)TFEU? The legislation would provide for the obligations of the Commission, National Competition Authorities and national courts to permit for allegedly exclusionary tying by a dominant undertaking if such a conduct also promotes a specific eco-friendly (tied) product over a particular less eco-friendly one or because the environment is less polluted more generally. For example, the dominant manufacturer of energy efficient washing machines in a Member State ties a specific washing powder to that machine, the consequence being that manufacturers of competing washing powders, which are less eco-friendly, exit the market. Had the obligation to buy the tied washing powder been imposed upon consumers by State regulation, this regulation would have been

[42] See text to n 31-32, above. Theoretically, it could be argued that the same discursive interaction between the Court of Justice and national courts should be evolved in the context of private enforcement of competition law, which could end up in preliminary references to the Court of Justice. However, this is not what actually happens at a descriptive level, and this can be, further, explained by taking into account the historical evolution of competition law enforcement from public to private.

found to be a trade barrier. If it were further found to be justified by the Court of Justice, it would possibly trigger harmonization legislation at the EU level based on Article 114TFEU. This also involves polishing the content of the measure to conform to the principle of proportionality. Both the Courts, European and national, and the Member States and institutions involved in the harmonization process design the framework which governs environmental protection in the washing powder sector. By contrast, under Article 102TFEU the tying conduct will either be upheld or not upheld, regardless of whether Article 102TFEU is applied in the context of public or private enforcement. There is no margin for adjusting the content of the 'conduct'/measure, even if one accepts that the proportionality principle applies with regard to the fines or the remedies imposed. The environmental protection, if upheld, will take invariably the form of excluding less eco-friendly washing powders from the market and allowing the more eco-friendly washing powder to prevail in the market. This is how 'the effectiveness of the European rules on competition would not be jeopardized'. Therefore, a distinction can be drawn between establishment and implementation of competition law for the purpose of defining the scope of the exclusive competence of the EU provided for in Article 3(1)(b)TFEU. To the extent that such a regulation has not been adopted, it cannot be further assumed that the already-established 'rules on competition', including Article 102TFEU, accommodate, for example, environmental considerations, unless it is shown to be so.[43]

This is the flip side of the legal arguments in relation to the use of policy-linking clauses, which are advanced by scholars against assessing public policy

[43] Indeed, see Section 3.1, below, for a description of the current state of the case law.

considerations within the competition law provisions, notably Article 101TFEU.[44] It is worth mentioning that here since the relevant debate is common to both Article 101TFEU and Article 102TFEU *mutatis mutandis*. Odudu has argued that the reading of public policy justifications into the competition law provisions creates horizontal direct effect for provisions incapable of direct effect, such as Articles 11, 12 and 168(1)TFEU on environmental, consumer and human health protection.[45] In particular, Odudu objects to the generation of positive legal obligations by the operation of the said policy-linking clauses, when the EU legislation is simply enforced, rather than adopted.[46] This is similarly confirmed by the observation that the subject matter of the policy-linking clauses falls under areas of shared competence between the EU and the Member States. Therefore, one can arguably read these clauses into Treaty provisions addressed to Member States only in as much as an EU measure has not pre-empted the field.[47] An alternative approach would be to use the policy-linking clauses as rules of

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[44] There is fierce academic discussion surrounding the context of Article 101TFEU because of its bifurcated structure, which led to cases such as *CECD* (Case IV.F.1/36.718) Commission Decision 2000/475/EC [2000] OJ L187/47, prior to the enactment of Regulation 1/2003 abolishing the notification procedure. See the contributions by G Monti (2002); *de Vries* (n 14) 198-221; O Odudu, *The Boundaries of EC Competition Law* 159-180; H Schweitzer (2007); C Townley, *Article 81 EC and Public Policy* 46-103. See also the recent paper by the OFT, 'Article 101 (3)-A Discussion of Narrow versus Broad Definition of Benefits' (Discussion Note for OFT Breakfast Roundtable) 2010 available at <http://www.oft.gov.uk/shared_oft/events/Article101(3)-discussionnote.pdf >.

[45] *Odudu* (n 44) 166-167.

[46] More recently, O Odudu (2010) 8-9, with references to case law and, in particular, to Case C-221/08 *Commission v Ireland* [2010] ECR I-01669 [51-54], in response to *Townley's* (n 44) criticism. Odudu's argument does not dismiss the usefulness of the flanking clauses *in globo*, it properly delimitates their scope of application to instances when the Union legislates (or takes enforcement action against the legislation of Member States). Therefore, the issue is not, as presented by Townley, 'a chicken or egg dilemma', i.e. either ignoring public policy considerations within Article 101TFEU or suggesting that this provision is not directly effective; see *Townley* (n 44) 96. The question is whether the policy-linking clauses are directly effective Treaty provisions in the first place.

[47] This is not challenged by Townley in principle, but only as being irrelevant for the interpretation and application of a Treaty provision like Article 101(3)TFEU. See C Townley (2011) 442, in particular n 17.

interpretation with regard to the application of the competition provisions.[48] However, such use would necessarily turn the policy linking clauses into instruments used to inform and generate legal tests, namely the tests under Articles 101 and 102TFEU.[49] This stems from the particularity of the competition law provisions, which are expressly addressed to undertakings and not to Member States, and is confirmed by the comparable use of the clause provided for in ex-Article 3(1)(g)TEC, which has, in fact, been used judicially to generate the legal test governing exclusionary abuses.[50] Therefore, at a descriptive level, it cannot be said that policy-linking clauses have a binding legal effect vis-à-vis undertakings, until there is a case positively citing a policy-linking clause as a basis for taking public policy considerations under Articles 101 or 102TFEU into consideration.

Article 3(3) Regulation 1/2003 provides a further confirmation of the argument that public policy considerations cannot inform the legal test under Article 102TFEU. Article 3(3) provides for an exemption of the primacy of EU competition provisions, for 'provisions of national law that predominantly pursue an objective different from that pursued by [Articles 101 and 102TFEU] […] provided that such [national] legislation is compatible with the general principles and other provisions of [EU]

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[48] See M Wasmeier (2001) and S Kingston, *Greening EU Competition Law and Policy* 106-119, on the use of the environmental integration principle as a rule for interpretation.

[49] The function of the flanking clauses in relation to the competition law provisions is inspired by E Scotford (2008), who plots the judicial treatment of the environmental law principles provided for in Article 191(2)TFEU into four categories: policy cases, interpretative cases, cases informing and cases generating legal tests.

[50] See Chapter I, text to n 96-97. This is so, even though the Court has often proclaimed that the provision cannot produce legal obligations for the Member States; see e.g. Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I-04785 [46-47]; Case C-181/06 *Deutsche Lufthansa AG v ANA - Aeroportos de Portugal SA* [2007] ECR I-5903 [31].

law'.[51] The latter clause arguably refers to the free movement provisions. Therefore, Article 3(3) Regulation 1/2003 confirms that what seems to be an issue of conflicting substantive values outwith the scope of 'rules on competition', is rather a problem of division of competence between the EU and the Member States in regard to their legislation.

Schmid, writing from the perspective of conflict of laws, qualifies such conflicts between norms with different subject matters which are, also, situated at different hierarchical levels as *diagonal* conflicts. He then advances a justification-based approach within the scope of the competition provisions for procedural, discursive, reasons [52] but, at the same, time he assimilates the test in terms of burden of proof and the enforcement agency's discretion to the test under the free movement provisions for normative consistency purposes. [53] However, if the implicated undertakings and the Commission are placed on a level playing field in terms of margin of discretion and the burden of proof within the competition provisions,[54] the alleged procedural advantage of the discursive solution, is being, in practice,

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[51] This is elaborated in Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 [Recital 9], '[Articles 101 and 102TFEU] have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests *provided that such legislation is compatible with general principles and other provisions of Community law*. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory […]' (emphasis added). See H Ullrich (2005) 6-9, for an analysis in relation to national law on unfair competition.

[52] This is prior to the enactment of Regulation 1/2003, which established the decentralised enforcement of the competition provisions.

[53] C Schmid (2000) 166-171; similarly K Mortelmans (2001) 638-642, 644-645; W van de Gronden in A Schrauwen (ed), *Rule of Reason* 90-92; W van de Gronden (2006) 107, 127-137. These authors all recognise that the judicial review of the undertaking's action cannot permit deference, in as much as the judicial review of State action permits.

[54] As opposed to the 'margin of appreciation' that the defendant State has under the free movement provisions.

withdrawn and the solution is no different from an 'all or nothing' approach of delimiting the scope of the competition law provisions.[55]

This 'all or nothing' jurisdictional approach, which excludes public policy considerations from the scope of Article 102TFEU, is also consistent with the structure of Article 102TEFU, as advanced in Chapter III, with regard to efficiency justifications. In particular, it has been argued that balancing the anti- and pro-competitive effects of the conduct in a similar way as under Article 101(3)TFEU should be rejected under Article 102TFEU. Instead, the lack of any efficiency justification should operate as an affirmative defence.[56] Using the language of proportionality, such a defence would only involve a suitability/necessity test, excluding any form of balancing.[57] Applying such a test to public policy considerations under Article 102TFEU does not make much sense, since for any benefits which cannot be translated into economic benefits, there are arguably other suitable means to attain them than exclusion of a competitor from the market (see Section 3.1, below).[58] This already makes suitability and necessity control by the enforcement authorities or the national courts largely redundant.

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[55] However, the outright, general exemption from the scope of the competition provisions of collective labour agreements in the Court's case law has been criticised from a 'law and economics' perspective by competition law scholars; see P Camesasca and R Van den Bergh (2000) 505-507. This criticism, though, followed the judgment of the Court of Justice in *Albany*, and oversees that the latter is a State action case: there are inherent problems with the State action doctrine (see the comprehensive analysis in Chapter V), which are particularly evidenced by the fact that collective labour agreements, which were exempted from the scope of the State action doctrine, were subjected to the free movement provisions in *Viking* (see Chapter V, text to n 136-137).

[56] See Chapter III, Section 2.1.

[57] See J Steenbergen (2008), on the notion of proportionality in competition law and policy. However, he seems to suggest that the standard of scrutiny under the proportionality principle in Article 102TFEU is higher than indispensability; *ibid*, 266.

[58] See, in particular, Section 3.1.2, on the right of the dominant undertakings to influence and incite public authorities to act (right to 'lobby').

3. Abuse and public policy justifications: Interpretation of the case law

In the previous Section, the interface between market separation as an abuse of dominance and justified trade barriers has been analysed. It has been argued that non-economic justifications should be excluded from Article 102TFEU at the outset, in as much as the EU legislator has not established rules on competition by integrating public policy considerations. Given the current status of the law, the distribution of competence between the EU and the Member States for market regulation would be sidestepped, had public policy considerations been permitted as justifications under Article 102TFEU. Therefore, it falls upon academics who advocate that public policy considerations should be brought within the scope of Article 102TFEU, when it is enforced against dominant undertakings, to provide normative arguments to that end. This also involves the additional question of providing a substantive definition of public policy considerations that can positively be taken into account under Article 102TFEU, since this definition is not provided by EU legislation.

In turn, this Section examines the existing case law under Article 102TFEU, all of which has rejected alleged public policy justifications at a descriptive level. An alternative interpretation of the case law is provided. In particular, it is argued that conduct by dominant undertakings and public policy justifications are mutually exclusive, because whenever public policy considerations come into play, there is at least the potential for State involvement to occur. Therefore, the focus should predominantly shift to the question of attribution of the market distorting effect to the

undertaking or the State.[59] Nevertheless, to be able to reflect upon, and articulate, a principled test for attribution, the first step is to expressly recognise that there is a question of attribution. Answering this question allows one to identify whose conduct is being assessed, prior to formulating or blurring the substantive legality test applicable to the conduct under assessment. This is what this Section does, to identify the analytical core of the interface between abuse of dominance and public policy considerations as being a question of attribution. Chapters V and VI provide an answer to this question.

3.1 Interpretation of the case law at a descriptive level

The first stage of the analysis concerns a conjoint reading of the cases under Article 102TFEU that treat, on the one hand, abusive market participation and, on the other hand, the exercise of the right of dominant undertaking to 'lobby' as alternative means for the achievement of public policy. According to the European Courts the two sets of cases constitute the two sides of the same coin: to the extent that the dominant undertaking is not allowed to pre-empt with its 'anti-competitive' behaviour the setting of regulations, the other side is, naturally, the right of the undertakings to incite the

[59] In the academic discussion under Article 101(3)TFEU, taking into account non-economic benefits is very often being presented as desirable, without first those non-economic benefits being defined, or without expressly acknowledging that any definition necessarily centres around the link with State action. For example, the 2010 OFT discussion paper concerning Article 101(3)TFEU, (n 44) is, in itself, an attempt to define the benefits that should be taken into consideration under Article 101(3)TFEU. In paragraph [3.28] indirect economic benefits (as reductions in cleaning and disposal costs for local councils) as well as non-economic benefits (as a less polluted environment) of an agreement between food retailers to charge an agreed amount for the use of plastic bags, are presented as part of the government's encouragement of self-regulation for the purpose of reducing environmental pollution; hence, permitting such an agreement would not block the governmental policy. This means that the non-economic benefits desirable to be considered under Article 101(3)TFEU are somehow linked to governmental action, which confirms the view endorsed here. The decisive element is the attribution of the conduct and effect to the undertaking and the remoteness or intensity of its link with State action.

public authorities to act, as part of democratic processes. The exercise of this right should be and is, according to case law, neutral in regard to its assessment under Article 102TFEU.

3.1.1 Market participation

A review of the case law under Article 102TFEU reveals that the European Courts have never allowed justifications advanced by the dominant undertaking, on the basis that the abusive conduct is in the public interest. Such for example has been the case in *Hilti*, in which the applicant claimed that its tying practice was justified by its 'duty of care under product-liability law' as a manufacturer, in light of the misleading advertisement of the competitor's product as compatible with Hilti's products.[60] The General Court rejected the argument on the basis that:

> 'there are laws in the United Kingdom attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of any product. There are also authorities vested with powers to enforce those laws. In those circumstances 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 or at least as inferior in quality to its own products'.[61]

Similarly, in *Tetra Pak II* the General Court, affirmed by the Court of Justice, rejected the applicant's claim that the tied sales of machines and cartons were justified by requirements for the protection of public health and the interests of consumers.[62] It held that:

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[60] Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439 [105-107].

[61] *Ibid* [118].

[62] Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755 [82-85] in relation to product market definition, but with cross reference in relation to the finding of an abuse, *ibid* [138-139];

> '[…] the protection of public health may be guaranteed by other means […], the remedy must lie in appropriate legislation or regulations, and not in rules adopted unilaterally by manufacturers, which would amount to prohibiting independent manufacturers from conducting the essential part of their business'.[63]

More recently, in *Sotirios Lelos* the dominant pharmaceutical undertaking advanced a defence to its refusal to supply wholesalers engaged in parallel exports based on public health considerations, namely to prevent shortage of medicines on a given national market. The Court of Justice rejected the claim and held that

> '[…] in cases where parallel trade would effectively lead to a shortage of medicines on a given national market, it would not be for the undertakings holding a dominant position but for the national authorities to resolve the situation, by taking appropriate and proportionate steps that were consistent with national legislation as well as with the obligations flowing from Article 81 of Directive 2001/83'.[64]

All cases seem to demonstrate that, when there are other means available for achieving public policy considerations outside the scope of Article 102TFEU, namely either the adoption or the enforcement of appropriate legislation, public policy considerations do not form objective justifications. In all cases, the Court seems sceptical of private undertakings unilaterally shaping public policy objectives and treats market participation and recourse to democratic processes as true alternatives with regard to achieving public policy objectives. Therefore, the observation made, that it is not clear from those cases if the defence failed on the merits or as a matter of

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affirmed by the Court of Justice in Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951 [36-37].

[63] Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755 [84].

[64] Joined cases C-468/06 to C-478/06 Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE [2008] ECR I-7139 [75].

principle,[65] is not valid, since the option of adopting legislation or enforcing the already existing legislation will always be open as an alternative means for the attainment of those objectives and as part of the democratic processes. The *dictum* that private conduct is inappropriate for the attainment of regulatory objectives is also repeated by the General Court in *Irish Sugar* and in *British Gypsum*, in relation to ensuring compliance with legal standards at the national level, with reference to its judgment in *Hilti*.[66]

However, for the purposes of strengthening the argument advanced, it will be assumed, that, in the cases mentioned above, the public policy justifications failed on the facts, as an evidentiary matter. Thus, the minimum interpretation of the case law under Article 102TFEU for rejecting public policy justifications is adopted, to fortify the argument against allegations that the depiction of the case law is not accurate. All the cases show that public policy justifications have been used strategically in litigation by dominant undertakings, and the standard of proving that such justifications are genuine required by the European Courts is high. Once again, the difficulty of actually

[65] See e.g. E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law: Rethinking Article 82 of the EC Treaty* 267. Similarly, A Albors-Llorens (2007) 1740, who points to the fact that the Commission's decision in *Hilti* was very comprehensive in demonstrating that the undertaking's actions were not routed in a genuine concern for safety. However, this was not decisive as the Court based the rejection of the undertaking's arguments on a principled reason, namely that it is inappropriate to use private conduct for the purpose of defining public policy considerations. G Davies (2009) 564-565 states that in *Hilti* and *Tetra Pak* the undertakings lost their argument on the facts, even though he acknowledges that private undertakings should not be allowed to define the public interest on their own initiative.

[66] Case T-228/97 Irish Sugar plc v Commission [1999] ECR II-2969 [192]; Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission [1993] ECR II-389 [47, 58, 69]. Similarly, in relation to ensuring compliance with EU rules, see *Cement* (Cases IV/33.126 and 33.322) Commission Decision 94/815/EC [1994] OJ L343/1 [53 (8)], '[…] The Commission would point out first that it is not for undertakings to substitute themselves for the [EU] authorities, which are responsible for the implementation of [Articles 107 and 108TFEU], and to prevent the movement within the [EU] of products which they believe, rightly or wrongly, are receiving government aid'.

proving genuine public policy justifications for allegedly abusive conduct indicates that the European Courts are sceptical of private conduct shaping the public interest.

A counter argument to this facts-based approach to the case law is that the Commission has been 'self-policing' when deciding which cases to take up, so as to pursue only cases of outright abuse. This counter argument would only make sense in the context of public enforcement of competition law, since it is indeed unlikely that the Commission would begin an investigation in the first place, if a viable objective justification were evidenced. However, *Sotirios Lelos* is a case that reached the Court of Justice as a preliminary reference from a national court, in the context of private competition law enforcement.[67] Despite the lack of initial screening, the Court of Justice firmly confirmed that there are other legal routes open for achieving public policy objectives. This point is further reinforced by contrasting the differentiated stance of the Court of Justice in regard to efficiency justifications under Article 102TFEU in (older) public enforcement cases and (more recent) private enforcement cases.[68] The receptiveness of the Court to efficiency justifications in a private enforcement case indicates that the 'self-policing' argument cannot provide an adequate explanation of the unaltered stance of the Court of Justice in regard to the rejection of public policy justifications.

[67] This point is not invalidated by the fact the Hellenic Competition Commission (HCC) was the first to send the same preliminary reference to the Court of Justice, which was rejected as inadmissible in Case C-53/03 *SYFAIT and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I- 4609. The reason for this is that the litigation before the Greek Civil Courts, namely the actions for damages for violation of Article 102TFEU, pre-dated the complaint to the Hellenic Competition Commission. The relevant judgments by the Athens First Instance Court are remarkable in as much as they form the basis of the reasoning of both the HCC decision and the Court of Justice judgment in *Sotirios Lelos*; see also Chapter III, n 144.

[68] See Chapter III, text to n 18-19.

Besides, the fact that all cases in which a public policy justification was advanced failed on the facts maybe considered a weak proxy for arguing in absolute terms that genuine public policy considerations and conduct by dominant undertakings are mutually exclusive. However, it can be considered one indication, in comparative terms, when juxtaposed to the contrary view that regulation genuinely in the public interest by market participation is, hypothetically, possible.

3.1.2 'Lobbying' and incitement to public authorities to act

According to the Courts, the alternative to not allowing the dominant undertaking to shape public interest by otherwise 'abusive' market participation is to uphold the undertaking's right to approach the public authorities and either negotiate or lobby in favour of setting or enforcing specific regulations that may be considered to be anti-competitive.[69] The rationale for upholding the right of undertakings to influence public authorities was pointed out by AG Jacobs in *Albany*, with regard to the joint application by the employers and trade unions to the government to make affiliation to a sectoral pension fund compulsory for all undertakings belonging to the sector:

> 'Coordinated application to the State authorities is part of our democratic societies. Natural or legal persons are entitled to organise themselves and to submit jointly their requests to the government or the legislature. The public authorities then have to decide whether the proposed action is in

[69] The issue has not been dealt with extensively from the perspective of the undertaking's conduct, even though there is plethora of academic literature on 'regulatory capture' which is always internalised in the analysis of the conformity of the regulations with the competition provisions; for example, see H Vedder (2009) 55, and M Gal and I Faibish (2007) 73-75. See R Wainwright and A Bouquet (2003) 560-562 and A Vossesstein (2000) 1383-1402, who, exceptionally, consider the right of the undertaking to approach government and its conformity with the competition provisions.

> the public interest. They have sole power, but also sole responsibility for their decision'.[70]

This proposition itself may seem obvious. However, what is here advanced is a conjoint reading of the cases on the right of undertakings to 'lobby' under Article 102TFEU, as the flip side of the cases that reject public policy justifications under Article 102 TFEU.

Indeed, the Commission and the General Court have held that mere efforts by undertakings to approach and influence public authorities at the national level are not, as such, infringements of the competition law provisions.[71] Similarly, with regard to the use of institutional channels at EU level, the Commission found in *Industrie des Poudres Sphériques* that 'having recourse to a legitimate instrument of [EU] law such as the anti-dumping procedure did not, in itself, constitute an abuse, even were a dominant position is to be demonstrated'.[72] The legality of the undertakings' conduct is consistent with the case law rejecting public policy considerations as objective justifications,[73] and confirms the argument that has been raised above. There are other

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[70] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Opinion of AG Jacobs [293]. The Court of Justice did not rule on the issue because it held that agreements concluded in the context of collective negotiations between management and labour, in pursuit of social policy objectives, must, by virtue of their nature and purpose, be regarded as falling outside the scope of the competition provisions.

[71] *French-West African Shipowners' Committees* (Case IV/32.450) Commission Decision 92/262/EEC [1992] OJ L134/1 [68], on jointly approaching public authorities, in their own common interests; *Cement* (Cases IV/33.126 and 33.322) Commission Decision 94/815/EC [1994] OJ L343/1 [53 (8)], on jointly notifying public authorities about infringements and, to that end, holding preparatory discussions; Case T-111/96 *ITT Promedia NV v Commission* [1998] ECR II- 2937 [60] on bringing legal proceedings, which can be considered abusive in wholly exceptional circumstances.

[72] Commission (EC), 'XXVIth Report on Competition Policy-1996 (Published in Conjunction with the General Report on the Activities of the European Union-1996)' 1997 [138-139].

[73] This is pointed by AG Jacobs in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 [289], who distinguishes between mere efforts to convince public authorities and direct action against competing undertakings, by citing *Cement* and *Hilti*, respectively.

means than exclusionary conduct by dominant undertakings for achieving public policy objectives, which decisively lie in the hands of the competent authorities, but can be triggered, in part, by the undertakings themselves in the form of a genuine 'lobbying' effort to promote their self-interest.

There is a question whether genuine 'lobbying' efforts by the dominant undertakings to achieve public policy and otherwise abusive conduct in the market genuinely in the public interest are in fact true alternatives from the perspective of the undertaking, as suggested by the Courts. From the perspective of the undertaking there is definitely a time gap, since otherwise exclusionary conduct in the market provides an 'instant' remedy to the undertaking's concerns about, e.g., unsafe products or shortage in medicines; whereas 'lobbying' can take considerable time and effort, particularly with regard to setting new regulations, rather than incitement to the public authorities to enforce the already existing regulations. Given the above-mentioned caveat, the following sections will explain why it is still normatively desirable not to allow public policy justifications under Article 102TFEU. However, from the perspective of the public authorities, the European Courts firm position, at the descriptive level, that genuine 'lobbying' efforts by the dominant undertakings is neutral with regard to competition law assessment would also provide to dominant undertakings an incentive to invest more in 'lobbying'. Therefore, by showing that public policy considerations should not be allowed to operate as objective justifications under Article 102TFEU, this jigsaw of incentives is being reinforced and allowed to fully unfold its potentials.

3.2 The potential for abusive conduct genuinely in the public interest *versus* the potential for genuine 'lobbying' efforts

IV. *Market separation under Article 102TFEU and the role of non-economic justifications: A Question of Attribution*

The Section above described two alternative routes open to dominant undertakings for advancing public policy objectives. The first route is market participation which would, otherwise, constitute an abuse of dominance but which is genuinely in the public interest; the second is genuine 'lobbying' efforts for the adoption or enforcement of anti-competitive regulations by the competent authorities. The first route should not be available, based on an examination of the potential for the genuine *versus* the de-generated form of each route to occur. There are no cases in which public policy justifications to otherwise abusive conduct are accepted on the facts; all the cases are about the de-generated form of that first route, namely, meritless claims tactically used in litigation. In contrast, there is exceptionally little case law finding that the exercise of the right of the dominant undertaking to 'lobby' is not genuine but, rather, constitutes an abuse of law. By showing the rarity of the latter instance in the European Courts case law, it is argued that the potential for the two forms of each route to occur are proportionless.

Private conduct that is an expression of the right of undertakings to approach and influence public authorities has been distinguished *de facto* from instances in which the preceding private conduct is not merely an incitement to public authorities to act, but a strategic use of regulatory rights, and the State conduct is merely a consolidation of the undertaking's expressed will.[74] These are instances in which the dominant undertaking unilaterally changes the regulatory situation and any subsequent State conduct exclusively relies upon the private conduct without examining its merits. This has been shown to be a very narrow issue and is dependant upon the factual

[74] Both E Blomme (2007) 259 and *Wainwright and Bouquet* (n 69) 562 assume the distinction without providing any criteria for it.

instances of the litigation. So far, it has arisen under the EU competition law provisions in only two cases, *CMB* and *Astra Zeneca*, and the assessment of the undertaking's conduct is pinpointed by the context of the litigation.[75]

In *CMB*, a shipping conference was granted, by a non-Member State, the exclusive right to transport all cargoes, with the entitlement to agree to waive that right, and it was found that the conference's insistence on the government's complying with their agreement as to the third parties' right to access the transport market was an abuse of a dominant position. The shipping conference's claim that its conduct was 'mere inducement of governmental action', namely of compliance to an agreement, was rejected by the General Court, which was affirmed by the Court of Justice.[76] According to Vossesstein, the reasoning of the European Courts is misleading, because it seems to be based on a distinction between a request to the public authorities to exercise discretionary powers and a request to comply with a specific contractual obligation.[77] Indeed, a more principled reasoning would be based upon the inversed order of succession of the private and State conducts in light of the facts of the case, as well as the exclusive reliance of the State conduct on the private conduct without any

[75] However, it should be noted that both cases could be used as examples of general principles of abuse of EU rights/law, regardless of the degree of market power of the undertaking involved and of Article 102TFEU enforcement. On the emerging doctrine of 'abuse of EU rights/law', see E Sorensen (2006) 423-459; P Schammo (2008) 351-376; and the contributions in R de la Feria and S Vogenauer (eds), *Prohibition of Abuse of Law: A new General principle of EU Law?*.

[76] Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports SA and Compagnie Maritime Belge SA and Others v Commission* [1996] ECR II-1201 [88, 108-109]; Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA and Others v Commission* [2000] ECR I-1365 [81-84].

[77] *Vossesstein* (n 69) 1397-1398. See Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA and Others v Commission* [2000] ECR I-1365 [82], 'there is a difference between a request to a public authority to comply with a specific contractual obligation and mere incitement or inducement of the authority to take action. In the latter case, there is a simple attempt to influence the authority concerned in the exercise of its discretion. The purpose of a request to comply with a specific contractual obligation, by contrast, is to enforce legal rights which the authority concerned is, by definition, bound to observe'.

further examination of its merits. In *CMB* it seems that the dominant undertaking first decided not to exercise its right to veto granted to it by an agreement with the government, and the government simply adhered to the latter agreement and consolidated the undertaking's will, although there had been no private conduct implementing the government's adherence to the agreement. More importantly, the conferral of exclusivity by the Zairian government could not be subject to EU rules, for example, on free movement, as would have been the case with a Member State.[78]

The facts- and evidence-specific nature of finding an abuse of rights is well illustrated in *Astra Zeneca*. The General Court annulled part of the Commission decision that found the de-registration of the marketing authorisations for Losec capsules in Denmark to be an abuse of a dominant position, because

> '[the Commission] did not establish that the Danish authorities were actually inclined to withdraw, potentially in violation of [Articles 34 and 36TFEU], the parallel import licences as a result of AstraZeneca's deregistration of its marketing authorisation for reasons unrelated to public health'.

Therefore, the Commission did not establish the causal order of succession of the private conduct and State conduct.[79] However, in principle the use of regulatory procedures by the dominant undertaking can qualify as an abuse of the dominant position, rather than mere inducement of the public authorities' conduct, if tangible evidence is adduced that

[78] In any case, the Court of Justice observed that '[…] Cewal sought to rely on the contractual exclusivity provided for in the Ogefrem Agreement in order to remove its only competitor from the market. Such conduct was in no way required by that agreement, since, under the second paragraph of Article 1 thereof, express provision is made for possible derogations, so that the requirements of [Article 102TFEU] could be met'; *ibid* [86].

[79] Case T- 321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II- 02805 [848].

> 'the national authorities were liable to withdraw or did usually withdraw parallel import licences following the deregistration, at the request of their holder, of the marketing authorisations for the relevant product'.[80]

In that case, the roles of the public and private conducts are inverted, and the public authorities' conduct simply gives effect to the abusive unilateral change of the regulatory situation exercised by the dominant undertaking. This is a relatively narrow point, as opposed to the shared responsibility between the undertaking and the authorities.[81] In addition, it could be said that, in *Astra Zeneca*, the conduct by the undertaking did not qualify as an 'incitement to public authorities to act' (or 'petitioning' in the US antitrust dialect),[82] because the public authorities would exclusively rely upon unilateral representations of the dominant undertaking before de-registration and withdrawal of parallel import licences.

Nevertheless, the difficulty of actually proving that the dominant undertaking's conduct is an abuse of rights and, thus, the exceptional character of the degenerated form of the second route is also indicated by the fact that, in *Astra Zeneca,* the General Court upheld the Commission decision in relation to only one out of the three Member States in which the undertaking had exercised its right.

3.3 The potential for added-costs in terms of legal analysis

It has been argued so far that, given the alternative routes open to dominant undertakings, conduct by dominant undertakings and genuine public policy

[80] *Ibid* [845-846]; this was the case in Astra Zeneca's conduct in Sweden, and the General Court did not annul the Commission decision, as it did with regard to Denmark and Norway, *ibid* [862-863].

[81] T Graf (2010).

[82] For an analysis of the case along this line, see M Maggiolino and M L Montagnani (2011) 248-253.

justifications are 'more mythical than real', if not mutually exclusive, because of the potential for State involvement to occur. In addition, permitting in principle the, so far never shown as an evidentiary matter, marginal potential for 'abusive' conduct genuinely in the public interest also has potential costs in terms of legal analysis.

Retention of the possibility of advancing public policy justifications under Article 102 TFEU has added-costs in terms of legal analysis, because it can potentially lead to a distorted application of competition law. In particular, the concern is the application of competition law with a regulatory mind-set, not in the actual case in which the public policy justification has arisen, but in subsequent cases in which there is no interface between competition and regulation. These are the majority of cases, since the category of the cases in which the dominant undertaking genuinely claims public policy justifications to its otherwise abusive conduct is marginal, as shown above.

The most illustrative example of the potential assimilation of regular competition law analysis has occurred when the abuse takes the form of 'margin squeeze'.[83] The test governing 'margin squeeze' was established at EU level in *Deutsche Telekom*, a case of allegedly shared responsibility between the State and the dominant undertaking, which involved the regulatory obligation of the dominant undertaking to provide access to its network.[84]

The same test was applied soon afterwards in *TeliaSonera*, a case of allegedly abusive margin squeeze, which did not involve the regulatory obligation imposed upon

[83] A similar point is made by H Auf'mkolk (2012), from the perspective of the concurrent application of generic competition law and sector-specific regulation, by using the example of 'margin squeeze'.

[84] *Deutsche Telekom AG* Commission Decision 2003/707/EC [2003] OJ L263/9; Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477; Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27.

the dominant undertaking to supply the input, but the latter had chosen to do this, and the supply was to new customers.[85] There are good economic arguments that, for a margin squeeze to be abusive, there should be (either a regulatory or) a competition law obligation to supply an indispensable input.[86] However, the Court simply cited *Deutsche Telekom* and held that indispensability of the input is just one element taken into account for the purpose of assessing the potential anti-competitive effect; even under that test, its absence is not always conclusive.[87] In contrast, AG Mazak argued in favour of the indispensability of the input as a condition for establishing margin squeeze as an abuse. He pointed to the submissions that a number of alternative technologies were available to provide end-users with broadband services, as well as that, in the long term, TeliaSonera's competitors may have been capable of buying another form of access.[88] In addition, the test for margin squeeze under Article 102 TFEU, established with a regulatory mind-set in *Deutsche Telekom*, was further applied in a Greek margin squeeze case under the national competition law provisions. However, there was no regulatory obligation to provide bit-stream access, and historical data show that Internet Service Providers were shifting through time from bit-stream to Unbundled Local Loop.[89] Therefore, the distorted application of

[85] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18.

[86] There is considerable literature on the exceptional nature of the duty to supply under competition law and, in particular, its impact upon incentives to innovate. See the most well known contribution by E Elhauge (2003) 295.

[87] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18 [69-72].

[88] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] 4 CMLR 18, Opinion of AG Mazak (NYR) [16-21]; in support, D Geradin (2011); *Auf'mkolk* (n 83) 156.

[89] EETT No 447/01/26-07-2007 (in Greek). See V Brisimi and D Yannelis (2012) 2-18, for a critical analysis.

competition law analysis spills over into national competition law, side by side with EU competition law.

3.4 Attribution as a question distinct from, and prior to, the substantive legality test

The research presented so far indicates that public policy justifications and market participation by dominant undertakings is, in practice, mutually exclusive. There is always the potential for State involvement to occur when public policy considerations come into play, triggered in part by the lobbying efforts of the dominant undertakings. In this Section, it is suggested that the debate should move forward to explore the question of attribution of the anti-competitive effect to the undertaking or the State, before assessment of the substantive legality of the conduct takes place. The recent example of a market separation case under Article 102TFEU, *Sotirios Lelos*, illustrates the importance of recognising the question of attribution as a step prior to applying a particular substantive legality test to the dominant undertaking's conduct.[90]

The argument advanced is exemplified by depicting a chain of conducts by both the undertaking and the State, such as approaching the public authorities and 'lobbying' by the dominant undertaking, State action in the public interest that facilitates or encourages abuse or even renders abuse superfluous, and allegedly abusive conduct by the dominant undertaking. The fact that the efforts by dominant undertakings preceded the State conduct in the chain of conducts does not render such efforts the source of the anti-competitive effect and of the exclusion of competitors. Therefore, it does not exert any effect upon the legality of the subsequent State action

[90] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139.

or of the private action, which is causally linked to the latter. Otherwise only, the undertaking would be able to claim that its allegedly abusive conduct is justified by the same public interest considerations that underpin State regulation. The context of the litigation in *Sotirios Lelos* fits this paradigmatic sequence of conducts.

In *Sotirios Lelos* the undertaking participated in price negotiations with public authorities at the national level, State regulation set the selling prices for medicines and/or the scales of reimbursement of the cost of prescription medicines by the relevant social health insurance systems, and the undertaking refused to supply wholesalers, in low-price Member States, who engaged in parallel trade. The judicial proceedings were only launched in regard to the last conduct (refusal to supply). The undertaking advanced a justification based on the second conduct within Article 102TFEU (State price regulation in the public interest alleged to be an obstacle to the undertaking's protection of its commercial interests). The Court of Justice, on its own motive, pre-fixed the first conduct (the undertaking's participation in price negotiations) to State regulation, in order to dismiss the undertaking's defence, while admitting that the defence ought to be operating at the applicability level.[91]

From the perspective of attribution, the Court could have had recourse to the undertaking's participation in price negotiations. However, it should have then dismissed the defence that the market distortion stems from State regulation, on the basis that the dominant undertaking took its turn in influencing public health expenditure and the amount of pharmaceutical R&D expenditure subsidised by the State. An alternative to this is that the Court should not have invoked the undertaking's

[91] AG Mazak in his Opinion in Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555 [13], hints at this inter-connection between the use by the Court of the 'negotiations' criterion and the applicability of Article 102TFEU, rather than the actual way that the Article is to be applied, by citing the Court's judgment in *Sotirios Lelos* when discussing the attribution of the alleged infringement in *Deutsche Telekom* and, therefore, applicability of Article 102TFEU.

participation in price negotiations, as this is neutral in regard to competition law assessment and, therefore, immaterial for assessing the legality of the subsequent both State and private conducts. In that way, the Court would have been obliged to assess the legality of the State regulation.

Unfortunately, the Court of Justice, following the Opinion of AG Colomer,[92] held that:

> 'the level at which the selling price or the amount of reimbursement of a given medicinal product is fixed reflects the relative strength of both the public authorities of the relevant Member State and the pharmaceuticals companies at the time of the price negotiations for that product'.[93]

Based on the above, the Court further ruled, by reference to the Treaty clause on 'a system ensuring that competition in the Internal Market is not distorted',[94] that:

> 'although the degree of price regulation in the pharmaceuticals sector *cannot preclude the Community rules on competition from applying*, […] it cannot be ignored that such State intervention is one of the factors liable to create opportunities for parallel trade. Furthermore, […] the Community rules on competition are also incapable of being interpreted in such a way that, *in order to defend its own commercial interests*, the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level' (emphasis added).[95]

Sotirios Lelos, viewed from the perspective of attribution of the market distorting effect, indicates that whenever public policy justifications in proceedings

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[92] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139, Opinion of AG Colomer [90-93].

[93] Joined cases C-468/06 to C-478/06 Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE [2008] ECR I-7139 [63].

[94] *Ibid* [66].

[95] *Ibid* [67-68].

under Article 102TFEU come into play,[96] there has been the potential for State involvement to occur, triggered in part by the dominant undertaking's 'lobbying' efforts. Had the Court focused on a more principled examination of the causal link between the State and the undertaking's conducts, the test applied under Article 102TFEU would have probably been different, or, at least, have been explicitly allied with a concomitant assessment of the State conduct's legality, arguably under the free movement provisions.[97]

4. Conclusions

This Chapter has explored the interface between market separation as an abuse of the dominant position and non-economic justifications, as reflected in the notion of justified trade barriers. It has been argued that putting a trade barrier into the justification test initiates a dynamic and discursive process of competence distribution between the EU and the Member States for market regulation, rather than determining the substantive, non-economic, content of such regulation in itself. The link between justified trade barriers and subsequent legislative action at either level is confirmed by the listing of the competence to build the Internal Market in the category of shared competences (Article 4(2)(a)TFEU).

An equivalent link is missing from the application of Article 102TFEU and any (hypothetical) subsequent legislative intervention. Rather, the reverse link exists and

[96] *Sotirios Lelos* falls under that category, with the twist that the dominant undertaking did not allege public policy justifications to its own conduct, but, rather, invoked State regulation in the public interest as an impediment to protecting the undertaking's own commercial interests.

[97] See Chapter V, text to n 152-156, for the outocme of such potential assessment.

this is confirmed by the listing of the competence to establish rules on competition in the category of exclusive competences of the EU (Article 3(1)(b)TFEU). Legislative action establishing the rules on competition precedes the implementation, centralised or decentralised, of the said rules. Therefore, in as much as such legislative action integrating public policy considerations to competition law has not taken place, it cannot be assumed that non-market considerations, as reflected in the notion of justified trade barriers, are within the scope of Article 102TFEU; otherwise, the competence distribution for market regulation would be 'pre-empted'.

Subsequently, this Chapter examined the existing cases in which a dominant undertaking has advanced a claim that its very same, allegedly abusive, conduct is justified by public policy considerations. So far, such claims have never been shown, as an evidentiary issue, to be genuine, but, rather, have been used strategically in litigation. By contrast, alternative routes, such as genuine 'lobbying' efforts for the adoption and enforcement of 'anti-competitive' regulations, which have been pinpointed by the European Courts as the other side of the coin, have very rarely been found to constitute an abuse of rights. Therefore, whenever public policy considerations come into play, there is always the potential for State involvement to occur. In addition, permitting these more mythical than real claims to be advanced may lead to spill-over from cases in which a 'regulatory competition law' applies to cases appropriate for regular competition law analysis. The suggested way forward for the academic debate, as well as better-reasoned Court judgments, is to recognise that the question of the interface between a dominant undertaking's conduct and public policy justifications is a question of unclear attribution to the undertaking or the State. Subsequently, the focus should be on revising the State action defence, with an

emphasis on clarifying the substantive test that governs the type, as well as the intensity, of the link between the State and the private conduct.

It is noteworthy that research in relation to both Treaty-based arguments presented in this Chapter and the interpretation of the case law converge in regard to the reason why it is not permitted nor is desirable to introduce public policy considerations within the scope of Article 102TFEU. This reason is the risk of a biased outcome against the Member State concerned and its non-market identity, and this conclusion will be applied in the subsequent Chapters of this thesis, in which the question of attribution is addressed.

CHAPTER V

Shared responsibility for market separation by dominant undertakings and the State: The question of attribution revisited

1. Introduction

The previous Chapter identified non-principled attribution as the analytical core of the interface between market separation, as an abuse of the dominant position, and non-economic values, as reflected in the notion of justified trade barriers under the free movement provisions. When public policy considerations come into play under Article 102TFEU, there is always the potential for State involvement to occur, triggered in part by the incitement of dominant undertakings on public authorities to take action. Therefore, non-economic justifications to market separation cases raise *de facto* the question of attribution of the anti-competitive effect.

The following Chapters build on these conclusions and seek to provide criteria for a principled attribution of the market distorting effect to the dominant undertaking and/or the State, in these cases of shared responsibility for market separation. This Chapter explores the so-called 'State action defence' as the closest concept for articulating attribution criteria used by the European Courts. The fact that a State action defence has never succeeded so far, lends support to the preliminary assumption that it does not provide adequate nor operable attribution criteria. The analysis in Chapter V fully confirms this assumption; hence alternative solutions are being introduced in Chapter VI.

The State action defence, as currently construed by case law, determines whether Article 102TFEU is applicable and involves the claim that the conduct by the

dominant undertaking is imposed by State regulation, at national or EU level, in the public interest. The essence of the claim is that, if it were not for such State action, the conduct of the dominant undertaking would not have occurred altogether. Therefore, what is in the public interest or the substance of the non-market values promoted by the State regulation are not directly invoked.

From an analytical point of view, any academic discussion as to the normative value of the State action defence is linked to the question as to whether public policy justifications should also be available to undertakings under the competition provisions. The reason is that the State action defence, as a construction, seems to be aimed at counterbalancing principled objections to the legality of the undertaking's conduct, namely, that there is lack of democratic authorisation, rather than defending a specific public policy objective. The dominant undertaking is not claiming to have unilaterally defined a public policy objective, but, rather, that its conduct is authorised by the State as part of the pursuance of a public policy objective and, therefore, any restriction of competition should be attributed to the State.[1] The academic literature does not distinguish between the 'attribution' and 'legality' of the conducts by either the State or the undertaking, but attempts to incorporate considerations, based on both the democratic authorisation of the actor and the substantive values underpinning the measure, into one procedural test.[2] However, attribution should logically be

[1] As pointed by G Davies (2009) 565, this is the case of the exceptions under Article 106(2)TFEU regarding undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly.

[2] See, for example, J Baquero Cruz in G Amato and C-D Ehlermann (eds), EC *Competition Law-A Critical Assessment* 588-590 and H Schepel (2002) 33. The most complete articulation of the process view (in the context of the US antitrust distinction between state and private action) is by E Elhauge (1991), whose arguments stem from the view that financially interested actors cannot be trusted to decide which restrictions on competition advance the public interest whereas financially disinterested and politically accountable actors, are able to make such decisions.

determined first, since it leads to the identification of the entity that acts on each occasion.

In light of the above, this Chapter analyses the State action defence as currently construed by case law. First, the type of link as well as the intensity of the link required between the dominant undertaking's conduct and the State regulation for a State action defence to succeed is examined. Second, the type of link and the intensity of link between the undertaking's conduct and the State regulation for assessing the conformity of State regulation with Article 102TFEU in conjunction with Article 4(3)TEU-L (State action doctrine) is examined. In addition, whether the legality of the State action can be assessed against the free movement provisions, independently of any private conduct by undertakings, is explored.

The emphasis of this inquiry is on recent market separation cases, in particular *Deutsche Telekom* and *Sotirios Lelos*.[3] In these cases there were no procedural means by which the dominant undertaking was able to bring claims based on the alleged illegality of the State regulation before the EU Courts. This assessment of the legality of State regulation cannot be accommodated under the State action defence as currently construed. In addition, it is the first time that the factual scenarios in these market separation cases would need to be assessed under Article 102TFEU in conjunction with Article 4(3)TEU-L, rather than in conjunction with Article 106(1)TFEU.

[3] Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27; Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139.

V. *Shared responsibility for market separation by dominant undertakings and the State: The question of attribution revisited*

In the final part of the Chapter, the interplay between private and State responsibility for breach of Article 102TFEU is described, based on the above structural analysis of the State action defence and the State action doctrine in market separation cases. It is argued that the State action defence is not adequate as a threshold for determining the scope of application of Article 102TFEU and this is why it has never succeeded. Whenever public policy considerations (and, hence, at least potential State action) come into play, the degree of legislative constraint upon the undertaking's autonomous conduct (relevant for the State action defence), necessarily leads to finding an abuse of dominance and establishing private responsibility for breach of Article 102TFEU. This is depicted by the dual use of the clause on a 'system of undistorted competition in the Internal Market'; first, to establish the State action doctrine and, second, to substantiate market separation as an abuse of the dominant position whenever a State action defence has not succeeded.

2. Abuse and the State action defence: Establishing private responsibility

A State action defence in EU competition law is based upon the claim that the dominant undertaking's abusive conduct is required by State legislation, and for that reason, it should be outwith the scope of Article 102TFEU. The defence relies on two main elements, namely the type of the required link between State legislation and the undertaking's conduct and the intensity of the aforementioned link. It is argued that the determinations by the European Courts of these two elements are inadequate and involve major problems. First, the rejection of a legality-type of link bolsters the Commission decision to address responsibility only against the undertaking from judicial review. Second, the requirement of compulsion, for ascertaining conduct

which is not autonomous, means, in practice, that if compulsion were to exist, the activity would not be an economic function in the first place; and where compulsion does not exist, this can only be asserted on the basis of a substantive competition law analysis of the market involved. This mismatch between the consequence and the process of establishing the 'autonomous conduct' indicates that the State action contributes, in part, to the market distorting-effect and highlights the problem of rejecting a legality-type of link between the private and State conducts.

2.1 The type of link between State legislation and the undertaking's conduct: The legality, purpose and margin of autonomous conduct

This Section explores how a prior assessment of the legality of the State regulation or, more broadly, of the State action is excluded from the contours of proceedings against the dominant undertaking under Article 102TFEU. The only material consideration, according to the case law, is whether the prior State action affects the autonomous conduct of the dominant undertaking. It is argued that this exclusion of a legality-type of link under the State action defence is problematic, in as much as the Commission has unrestrained discretion as to whom and how to address market separation in situations of shared responsibility between the undertaking (in proceedings under Regulation 1/2003) and the State (in proceedings under Article 258TFEU).

Indeed, case law has, so far, considered that the legality or the purpose of the national legislation is immaterial in the context of a State action defence. The only criterion, as formulated in *Ladbroke Racing* by the Court of Justice, is whether the implicated undertaking is able to behave autonomously and engage in the conduct on its own initiative. In particular, competition rules may apply where 'the national

legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition'.[4] Conversely, a State compulsion defence (and thus the inapplicability of Article 102TFEU) is only accepted if the anti-competitive conduct is 'required of undertakings by national legislation or if national legislation creates a legal framework which, itself, eliminates any possibility of competitive activity on the undertakings' part'.[5]

By contrast, in the judgment under appeal, the General Court ruled that the Commission could not decide on the part of the complaint concerning the undertakings without deciding on the substance of the complaint against the State, i.e. on the compatibility of the national legislation with Article 106TFEU. This is due to the fact that proceedings as regards the substance of the complaint against the State were still in progress at the time.[6] This led the Commission to challenge the judgment on the basis that the General Court established

> 'an order of priority as between the procedure provided for in [Regulation 1/2003] […] and the procedure against a Member State for failure to fulfil its obligations, which is incompatible with the Commission's discretion to decide what aspect of a complaint should be considered first and against whom (the undertakings or the State) proceedings should be first initiated'.[7]

It is noteworthy that, slightly earlier, the Commission itself decided to suspend the procedure it had initiated under (what is now) Regulation 1/2003 in *Rendo*, which concerned the prohibition on the importation of electricity in the field of public

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[4] Joined Cases C-359/95 P and C-379/95 P *Commission and French Republic v Ladbroke Racing* [1997] ECR I-6265 [34].

[5] *Ibid* [33].

[6] Case T-548/93 *Ladbroke Racing v Commission* [1995] ECR II-2565 [43-50].

[7] Joined Cases C-359/95 P and C-379/95 P *Commission and French Republic v Ladbroke Racing* [1997] ECR I-6265 [16].

supply. The Commission suspended the procedure in as much as this prohibition was covered by a new (national) law. It decided to 'defer consideration of that issue until the proceedings which are to be brought against the Kingdom of the Netherlands under [Article 258TFEU]' (relating to public monopolies in the sector of trade in electricity)[8] yielded an outcome, 'which will determine the assessment to be made, in the light of [Article 106(2)TFEU] of the corresponding restrictions'.[9] The General Court, once again, confirmed the Commission decision. It curtailed the Commission's discretion by establishing a hierarchy between the two procedures against the undertakings under (what is now) Regulation 1/2003 and the Member State concerned under Article 258TFEU, on the basis that examination of the legality of the national law under Article 258TFEU proceedings involves questions of national public policy interests which are likely to be the subject of political and institutional debate.[10] According to the General Court, this would even justify the delay in the exercise of the procedural rights of the complainants, who would need to apply for the procedure

[8] Case T-16/91 *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission* [1992] ECR II- 2417 [48].

[9] *Ibid* [47]. The relevant case is one of the electricity monopoly cases in the mid-1990s, namely Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699.

[10] Case T-16/91*Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission* [1992] ECR II-2417 [103-107]. In this case, it was only the complainants who challenged the General Court judgment, which was later confirmed by the European Court of Justice. However, the latter focused on the finding that the Commission was entitled to take the view that Article 258TFEU procedure was the most appropriate procedure for assessing the compatibility of the national law with the Treaty, rather than on the finding that ruling on the anti-competitive object or effect of the agreement could not have any practical effect so long as it had not been established that the national law in question is incompatible with the Treaty; Case C-19/93 P *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission* [1995] ECR I-3319 [22-23].

under Regulation 1/2003 to be continued, only once the procedure under Article 258TFEU has come to an end.[11]

Rendo involves market separation considerations in the form of import prohibitions albeit under Article 101TFEU. At the same time, it raises the question of justified restrictions on the basis of national public policy interests in the field of energy, which are not embedded in competition law analysis. Indeed, the Court of Justice dismissed the Commission application against the Netherlands under Article 258TFEU, on the basis that the Commission had not adequately taken into account the justifications advanced by the Member Sate concerned under Article 106(2)TFEU for the exclusive import rights, which were, otherwise, incompatible with Article 37TFEU.[12] The justifications in that case concern the supply of electricity across the country in a socially responsible manner with costs that are as low as possible. Had the Commission not suspended proceedings against the undertaking under Regulation 1/2003, it would not have been possible for the Court to give due consideration to national public policy interests that were justified under Article 106(2)TFEU.[13]

The only case in which the Commission actually took 'double action' against both the undertaking and the Member State was the *CNSD* case which involved the setting of compulsory tariffs by a public body, the representatives of customs agents,

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[11] Case T-16/91 *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission* [1992] ECR II- 2417 [111]. However, the fact that the procedural rights of the complainants have been impaired is what renders the decision to suspend the administrative proceedings under Regulation 1/2003 actionable, *ibid* [53-57], confirmed in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International, Inc and Others v Commission* [2003] ECR II-1 [99]. *Cf* Case T-59/00 *Compagnia Portuale Pietro Chiesa Soc. coop. rl v Commission* [2001] ECR II-1019 [49-52] in which the Commission initiated, first, proceedings against the Member State and would only potentially initiate proceedings against the undertaking. This scenario does not render actionable any act by the Commission, by which it informs the complainant on the progress of the first proceedings.

[12] Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699.

[13] *Ibid* [63-71].

for their services. The Commission first issued a decision against the undertaking under Article 101TFEU which was challenged before the General Court. Pending the appeal, the Commission initiated proceedings against Italy under Article 258TFEU. The General Court stayed proceedings pending the judgment of the Court of Justice and rejected the appeal after the Court of Justice condemned Italy for failure to fulfil its obligations under Article 4(3)TEU-L (ex-Article 10TEC) in conjunction with Article 101TFEU.[14]

After the Court of Justice judgment in *Ladbroke Racing* it is clear that substantive compatibility of national legislation with competition rules is not decisive as to the applicability and actual application of Article 102TFEU (and Article 101TFEU) to the conduct of undertakings which comply with that legislation. Therefore, whether the national legislation is justified on the basis of public interest or not is immaterial for the purpose of ascertaining the lawfulness, under Article 102TFEU, of the undertaking's conduct in conformity with the legislation. The sole purpose of a prior evaluation of national legislation is to determine what effect that legislation may have on the existence of such conduct.[15]

Deutsche Telekom stands out from the subsequent cases in which the issue has arisen. *Deutsche Telekom* is a market separation case under Article 102TFEU, which involved an allegedly abusive margin squeeze between regulated wholesale prices and approved retail tariffs regulated by a price cap in the markets for access to the Unbundled Local Loop (ULL). The European institutions equated the competitive

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[14] Case C-35/96 *Commission v Italian Republic* [1998] ECR I-3851; Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali (CNSD) v Commission* [2000] ECR II-01807.

[15] See Section 2.2 on the intensity of the required link.

harm with raising barriers to entry for out-of-State competitors.[16] Deutsche Telekom challenged, before the Court of Justice, the premise that the existence of scope of autonomous conduct, in this case, scope to adjust its retail prices for end-user access services to the ULL, is a necessary and sufficient requirement for the attribution of an infringement of Article 102TFEU. It argued that both the legality and the purpose of the national regulatory intervention should also be taken into consideration.[17]

The Court of Justice insisted that the type of link between the national regulatory intervention and the dominant undertaking's conduct required for a State action defence to succeed is only related to the scope of autonomous conduct by the undertaking. The fact that the national regulatory intervention in that case by the German Regulatory Authority for Telecommunications and Post (RegTP) is itself potentially incompatible with Article 102TFEU in conjunction with Article 4(3)TEU-L (ex-Article 10TEC) is immaterial. The reason is that Deutsche Telekom was able to make applications to RegTP for authorisation to adjust its retail prices for end-user access services within the price cap.[18] Therefore, it could be argued that the content of autonomous conduct involves the exercise of the undertaking's right to approach the public authorities and incite them to change their conduct. This is consistent with the analysis in Chapter IV, on subjecting to Article 102TFEU the right of dominant

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[16] See Chapter II, text to n 32.

[17] Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [66-73].

[18] *Ibid* [85-91]. The finding that Deutsche Telekom was able to make applications for retail price adjustments was not challenged. Also, the Court of Justice rejected as inadmissible claims in relation to wholesale prices made both by the Commissions (that Deutsche Telekom had scope to adjust, in addition, its wholesale prices for access services by applying for a reduction of its wholesale prices if its costs decreased) and by the appellant (that the wholesale prices set by the RegTP were excessive and not cost-oriented); *ibid* [35-43].

undertakings to 'lobby'.[19] However, it should not have any normative implications in regard to the legality of the national authorities' conduct as such.

Similarly, the Court ruled that assessment of the purpose of the regulatory intervention is immaterial and could in no way deny the appellant the opportunity to engage in autonomous conduct. It ruled in this manner in relation to the prohibition of cross-subsidization between retail access services or in relation to a weighted average retail price for a basket of broadband and narrowband access services.[20]

In addition, the Court refused to review the exercise of the Commission's discretion to initiate proceedings against the Member State concerned (Germany) in the context of litigation under Regulation 1/2003 as it considered this to be outside the remits of those proceedings.[21] Proceedings against Germany could have been initiated for failure to ensure the fulfilment by the RegTP of its obligations under EU law, including compliance with Articles 102TFEU and 4(3)TEU-L.[22] The way the Commission has exercised its discretion, as well as the judicial control of such

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[19] See Chapter IV, Section 3.1.2.

[20] Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [92-95].

[21] *Ibid* [44-47].

[22] The fact that the sector is governed by EU regulations aimed at gradually increasing competition and providing national authorities with discretion in that respect does not pre-judge the application of Articles 4(3)TEU-L and 106(1)TFEU. See, in relation to air transport services, Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR 803 [50-52]. In addition, contrary to some commentators e.g. M Hellwig (2008) 6-7, the principle of supremacy of EU law vis-à-vis national law does not preclude a state action defence from applying, where the undertakings have not contested the validity of national regulation. See Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [49-50], [52-55] in which the Court of Justice tried to resolve the tension by imposing on National Competition Authorities a duty to disapply the national legislation, while limiting the state compulsion defence to immunity from fines and damages for past conduct; see R Wainwright and R Bouquet (2003) 552-557. However, in *Deutsche Telekom* the Commission did not impose a symbolic fine on Deutsche Telekom, but simply reduced the basic amount of the fine by 10%; *Deutsche Telekom AG* Commission Decision 2003/707/EC [2003] OJ L263/9 [212], confirmed in Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477 [310-313] and Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [277-279].

exercise, in this case only against the operator, Deutsche Telekom, is contrasted with the exercise of the same powers in the case of tariff imbalances in Spain. In the latter case, the Commission was led to, first, initiate proceedings against the Member State concerned in 2001,[23] and, subsequently, to fine under Regulation 1/2003 and issue a decision against Telefonica, the Spanish traditional operator for alleged margin squeeze abuse of its dominant position (from September 2001 until December 2006).[24] However, only in the case brought by the Commission against Spain, was there an opportunity for the Court to hold that Telefonica's commercial freedom, even to the maximum extent under the price cap system, was insufficient to achieve the tariff rebalancing and that the tariff imbalances were partly attributable to the Spanish authorities (at least for the period 2001-2002).[25] It is noteworthy that Spain itself brought an action for annulment of the Commission decision against Telefonica, essentially suggesting that Spain, by acting through the Spanish regulator for telecommunications as an organ of the State, might have been a better target for the Commission than Telefonica.[26] However, the General Court repeated that even if the Spanish regulator had infringed a rule of EU law and the Commission could initiate proceedings against Spain based on Article 258TFEU, such possibilities have no

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[23] Case C-500/01 *Commission v Kingdom of Spain* [2004] ECR I-583.

[24] *Wanadoo Espana v Telefoo Es* (Case COMP/38.784) [2008] OJ C83/6 (Summary Commission Decision).

[25] Case C-500/01 *Commission v Kingdom of Spain* [2004] ECR I-583 [37], in relation to the tariff imbalances recorded for the period after the introduction of the price cap system at the retail level. Whether such a pronouncement regarding state responsibility had any effect upon the level of the fine imposed on Telefonica cannot be asserted by comparison to *Deutsche Telekom*. This is because in *Telefonica* the wholesale prices were not regulated and hence, according to the Commission, 'the room for manoeuvre left by regulation to Telefonica was much wider than that in *Deutsche Telekom*'; *Wanadoo Espana v Telefoo Es* (Case COMP/38.784) [748].

[26] Case T-398/07 *Kingdom of Spain v Commission* Judgment of 29 March 2012 (NYR). Telfonica lodged a separate action for annulment of the same Commission Decision (Case T-336/07).

effect on the lawfulness of the Commission decision against Telefonica for breach of Article 102TFEU.[27]

This confirms that there is in fact no judicial control over the exercise of the Commission's discretion to initiate proceedings under Article 258TFEU in situations in which it decides to attribute the responsibility exclusively to the undertaking. Even though the Commission itself seems to accept, in *Deutsche Telekom*, that the RegTP was to some extent responsible for the margin squeeze,[28] it would be counter-productive for the Commission to initiate proceedings against Germany in order to discipline the National Regulatory Authorities (NRAs), because this would undermine the cooperative management of the decentralised enforcement of the sector-specific regulation.[29] Therefore, the Commission was shielded from judicial review as to its exercise of discretion not to initiate proceedings under Article 258TFEU. Subsequent institutional reforms in the electronic communications sector, including the establishment of the Body of European Regulators for Electronic Communications (BEREC),[30] may suggest that the rationale for enforcing Article 102TFEU against Deutsche Telekom lay within the Commission's own limited powers to regulate the

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[27] Case T-398/07 *Kingdom of Spain v European Commission* Judgment of 29 March 2012 (NYR) [115].

[28] '[RegTP] made only a rough assessment to check that the applicable index figures were respected and that the proposed charges did not manifestly breach the requirements of the Telecommunications Act', *Deutsche Telekom AG* Commission Decision 2003/707/EC [2003] OJ L263/9 [165]. C Veljanovski (2008) 3 points to the inconsistency of the approach since, had the RegTP fixed, rather than capped the retail tariffs, no competition law infringement by Deutsche Telekom would have been found, but, simply, an unfortunate regulatory error. G Monti (2007/2008) 129-131 associates the weakness of the RegTP with political interferences that undermine its independency.

[29] N Petit in D Geradin, R Muňoz and N Petit (eds), *Regulating Through Agencies in the EU* 200.

[30] Council Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L337/1 [Article 1].

NRAs.[31] In other words, if in the context of a State action defence in proceedings under Regulation 1/2003 the European Courts do not adopt a legality criterion (of the national legislation or, more broadly, of the the State action), the Commission's exercise of discretion as to whom, and how, the market distortion is attributed, remains outside the scope of judicial review.

It is true that the Commission's exercise of discretion in regard to the instigation of proceedings against the Member State concerned is unconstrained. The Court has held that 'decisions whereby the Commission closes the case definitively on complaints of a State's conduct capable of giving rise to the initiation of infringement proceedings are not challengeable acts'.[32] Similarly, it is settled case law that

> 'individuals do not have standing to challenge a refusal by the Commission to initiate proceedings against a Member State for failure to fulfil its obligations. The Commission is not required to commence proceedings for failure to fulfil obligations, but enjoys a discretion, which precludes any right for individuals to require it to take a specific position and to bring an action against its refusal to take action'.[33]

The lack of transparency in Article 258TFEU proceedings has been an issue of concern more generally in relation to both its functions as securing the rule of law and as a public policy instrument.[34] However, the legality of the Commission's decision is

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[31] Similarly, R O'Donogue (2008) 5.

[32] E.g. Case T-247/04 *Aseprofar and Edifa v Commission* [2005] ECR II-3449 [60].

[33] E.g. Case T-443/03 *Retecal and Others v Commission* [2005] ECR II-1803 [44]; similarly Case T-247/04 *Aseprofar and Edifa v Commission* [2005] ECR II-3449 [40].

[34] See e.g. European Parliament, 'Report on the 25th annual report from the Commission on monitoring the application of Community law (2007)' (6 April 2009) A6-0245/2009 [13]; also see the decision by the European Ombudsmen on complaint 1288/99/OV concerning failure of the Commission to initiate proceedings against Greece, as a high-ranking Commission official was also involved in a Greek political party. See M Smith, *Centralised Enforcement, Legitimacy and Governance in the EU* for a thorough analysis of the multiple functions of infringement proceedings under Article 258TFEU.

of paramount importance in 'mixed situations' of allegedly shared responsibility by the Member State and the individual undertaking under competition law, since the 'authorities of the Member States may in certain cases have a sufficient degree of latitude in regulating certain matters […] in light of the specific social and cultural features of each Member State',[35] which the undertakings do not have. This is confirmed by the case law in which the Commission's broad-ranging powers not to take action against a Member State under Article 106(3)TFEU are upheld and actions by individual complainants against the Commission for failure to act are rejected as inadmissible.[36] By contrast, there is strict judicial review of the Commission's obligation to state the facts on the basis of which it finds no infringement of the competition rules by undertakings and rejects a complaint, even though the Commission is under no obligation to rule on whether there has been an infringement.[37] This indicates that there is a purportedly differentiated treatment in the way in which the Commission decides on attributing responsibility to the Member States and the undertakings, justified by the nature of the entity that acts on each occasion. The nature of the actor may reasonably support the inadmissibility of actions against the Commission's decision not to initiate proceedings Article 258TFEU against a Member State, but would equally justify a stricter judicial control of Commission decisions fining an undertaking under Regulation 1/2003. Therefore, in cases of alleged shared responsibility by the undertaking and the State for market

[35] Case T-32/93 *Ladbroke Racing Ltd v Commission* [1994] ECR II-1015 [37].

[36] E.g. Case T-32/93 *Ladbroke Racing Ltd v Commission* [1994] ECR II-1015 [34-46]; Case T-111/96 *ITT Promedia NV v Commission* [1998] ECR II- 2937 [95-98].

[37] E.g. Case T-387/94 *Asia Motor France SA and others v Commission* [1996] ECR II- 961 [46].

distortions there is a tension between the two standards that are needed to apply to judicial review of the Commission's discretion to address such a responsibility.

The Commission's decision not to attribute responsibility to the Member State involved cannot be assessed in the context of proceedings under Regulation 1/2003 on the basis of an alleged State action defence, nor can the responsibility of the Member State, as such, be taken into account. An alternative route for the fined undertaking to seek relief would be to go to national courts and seek damages on the basis of State responsibility. The national court would then be obliged to make a preliminary reference to the Court of Justice. This is certainly inefficient in terms of judicial economy. A more principled objection is that the undertaking does not have, in advance, an obligation to assess the legality of the regulatory framework in its everyday business decisions.[38] In addition, it may be the case that the Commission may lack information concerning regulatory violations by the Member State involved, which come to its attention for the very first time when competition proceedings are initiated.

2.2 The intensity of the link between State legislation and the undertaking's conduct: Encouragement and compulsion

In light of the adoption by the European Courts of the autonomous conduct criterion, the subsequent question is how close the association between State legislation and the

[38] In *Ladbroke Racing* the Court of Justice did not accept the Commission's submission that the proper course of conduct for the undertaking would be to contest the validity of the national regulation, invoke the primacy of Articles 101 and 102TFEU and refuse to comply with the national regulation. See Joined Cases C 359/95 P and C 379/95 P *Commission and French Republic v Ladbroke Racing* [1997] ECR I-6265 [20], later confirmed in Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [49-50] [52-55].

undertaking's conduct should be. As early as *Suiker Unie*, the Court of Justice held that 'if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to [Articles 101 and 102TFEU]'. [39] This only means that the 'behaviour of the undertakings concerned could not be regarded with the usual severity', [40] and, therefore, the fines imposed by the Commission had to be reduced, 'in light of the legal framework which is a mitigating factor'.[41] Similarly, the Court of Justice, in *CIF* and *Deutsche Telekom*, has upheld these propositions.[42]

The autonomy of the undertaking's conduct is, therefore, affirmed, whenever any exercise of competitive conduct is permitted, including other forms of competition than that required of the undertaking by national legislation. [43] Specifically, in *CIF*, the Court of Justice held that

> 'price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be given. Consequently, pre-determination of the sales price of matches

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[39] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663 [63-73], as summarised and cited in Case C-280/08 Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [82].

[40] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663 [619-620].

[41] Ibid, as cited in Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [57].

[42] Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [56-57]; Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [82, 277-278].

[43] Similarly, in *GlaxoSmithKline* under Article 101TFEU, the General Court held that the latter provision remains applicable if parameters of competition other than the price, which is regulated, and in particular innovation, can be affected by the agreement. See Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 [104-108], confirmed in Joined Cases C 501/06 P, C-513/06 P, C-515/06 P and C 519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291 [74-75]. This analysis is also confirmed by Case T-87/05 *EDP - Energias de Portugal, SA v Commission* [2005] ECR II-3745 [116-119, 126]; the case law on the impossibility of wilful exercise of any form of competition is cited in support of precluding the application of Article 2(3)ECMR where competition in the market does not exist as a result of national and EU legislation, the Second Gas Directive in this case.

> by the Italian State does not, on its own, rule out all scope for competitive conduct. Even if limited, competition may operate through other factors'.[44]

However, it is difficult to see how the Commission, a National Competition Authority (NCA) or a national court can apply such a criterion without having undertaken a full market analysis, in order to suggest that Article 102TFEU is applicable. On a similar note, in *Deutsche Telekom,* the Court of Justice assessed the undertaking's fault (intent or negligence) in order to ascertain attribution to the undertaking of any infringement of Article 102TFEU. It held that it is sufficient that

> 'the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty. […] [Deutsche Telekom] could not have been unaware that, notwithstanding the authorisation decisions of RegTP, it had genuine scope to set its retail prices for end-user access services and, moreover, the margin squeeze entailed serious restrictions on competition'.[45]

However, this condition cannot be fulfilled without a full market analysis for assessing the effects of the margin squeeze.[46]

Conversely, according to the Court of Justice in the same two judgments, *CIF* and *Deutsche Telekom,* the possibility of excluding particular anti-competitive conduct from the scope of Articles 101 and 102TFEU can be upheld only if that conduct has been required of the undertakings in question by existing national legislation or the legislation has precluded all scope for any competitive conduct on

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[44] Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [68-69].

[45] Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [124-125].

[46] To the extent that one accepts that the subjective element of the state action defence (intent or negligence) is symmetrical in scope to the objective element of the claim.

their part.[47] Thus, the degree of legislative constraint that is required for a State action defence to succeed is very high, close to compulsion and lacking in autonomy.[48] The Court, both in *CIF* and in *Deutsche Telekom*, cites *Italy v Commission* (telecommunications monopoly) and the Belgian and Dutch cases on tax legislation and price controls in the tobacco industry, as examples of cases where a State compulsion defence has 'partially' or 'to a limited extent' been accepted.[49]

Italy v Commission places the question in the context of assessing whether there is an economic activity by an undertaking, in relation to the autonomous exercise by British Telecommunications of rule-making powers strictly limited to the fixing of tariffs and the conditions of service provision of public telecommunications equipment for users.[50] In addition, any arguments by the applicants in relation to the substance of the Commission's finding, were framed in terms of Article

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[47] Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [67]; Case C-280/08 P *Deutsche Telekom v Commission* [2010] 5 CMLR 27 [81]. A similar claim was advanced in Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 [129-131] in relation to the system of 'sugar export rebates', but the Court rejected it, as the applicant had not cited any specific legislation or measure of the Irish Government. Finally, in Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275 [1128-1132] the Court examined claims that certain practices by the linear conference were required by US law.

[48] Alternatively, the General Court has held that 'In the absence of any binding regulatory provision imposing the conduct at issue, […] the Commission is entitled to reject the complaints for want of autonomy on the part of the undertakings in question only if it appears on the basis of objective, relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses', Case T-387/94 *Asia Motor France SA and others v Commission* [1996] ECR II- 961 [65]. Again the language used by the General Court indicates the requirement of compulsion. Similarly, Case T-65/99 *Strintzis Lines Shipping SA v Commission* [2003] ECR II- 5433 [119-122] and Case T-66/99 *Minoan Lines SA v Commission* [2003] ECR II-5515 [176-179]. The exercise of irresistible pressure was not demonstrated in any of the above-mentioned cases.

[49] Case 41/83 *Italian Republic v Commission* [1985] ECR 873; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831.

[50] Case 41/83 *Italian Republic v Commission* [1985] ECR 873 [15-23].

106(2)TFEU.[51] Therefore, citing the case as an example in which a State compulsion defence was (even partially) accepted is misleading. Similarly, in a case involving the levy of surcharges on the price of electricity, the Court cites *Ladbroke Racing* on the autonomous conduct criterion, but dismisses the application of Articles 101 and 102TFEU on the basis that the activity falls within the exclusive competence of the Member State concerned. [52]

In regard to tax cases in the tobacco sector, the Court's assessment is clearly part of its substantive analysis as to whether the undertakings' conduct restricts competition (under Article 101TFEU), rather than on the applicability of the competition provisions in the first place. In neither case was compulsion found to exist. In fact, both cases produced similar assessments to that in *Suiker Unie,* since the Court held that the Belgian, and to a less extent the Dutch, legislation reduced the scope for retail price competition but did leave tobacco manufacturers and importers with sufficient margin for effective competition.[53]

It is noteworthy that the Belgian tax case, *Van Landewyck,* resembles *Sotirios Lelos*. In the Belgian case the Court held that the price control measures encourage joint negotiations between the revenue authorities and the trade unions, during which 'great influence on the fixing of the retail price is exercised by the revenue authorities whose concern is above all to guarantee the revenue arising from the taxation of the

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[51] *Ibid* [27-33].

[52] Case C-207/01 *Altair Chimica SpA v ENEL Distribuzione SpA* [2003] ECR I- 8875 [30-35]; '[Articles 101 and 102TFEU] are intended to apply only to the anti-competitive conduct of undertakings and are not intended to eliminate differences which may exist between the tax regimes of the different Member States', *ibid* [36].

[53] Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 [123-134]; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831 [23-29].

products in question'.[54] However, this would not prevent 'the manufacturer or importer from allowing particular wholesalers on an individual basis a larger profit margin out of the manufacturers' or importers' share of the retail price'.[55] This resembles *Sotirios Lelos*, in which the Court assessed the participation of the dominant pharmaceutical undertaking in the negotiations with the relevant public authorities.[56] However, in the tobacco case there was an overlap between the nature of the tax authorities' conduct and the conduct of the association of undertakings under question; namely fixing the profit margins and the financial advantages which the manufacturers and importers permit to the intermediary traders. By contrast, technically, there was no overlap between the form of the conduct of the authorities (fixing prices) and of the undertaking (restricting quantities) in *Sotirios Lelos*, even though both conducts had an effect on profit margins.

Overall, the intensity of the link required by the European Court for a State compulsion defence is such that, in practice, it has never succeeded. The analysis indicates that assessment of the State compulsion defence has been part of the substantive analysis on restriction of competition within the scope of Articles 101 and 102TFEU, rather than of the conceptually distinct level of determining whether the competition law provisions are applicable. The reason for this is that autonomous conduct is defined by reference to any form of competition in the market. This definition of autonomous conduct under the State compulsion defence indicates that there is a market-distorting effect and that State responsibility also exists, in part,

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[54] Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 [129].

[55] *Ibid* [131].

[56] See Chapter IV, Section 3.4.

every time the State action defence is rejected. It also firmly indicates that, far from being concerned with the conduct of the undertaking as such, the link between the undertaking's conduct and the national legislation affects the causation between the conduct and the market-distorting effect. Furthermore, in cases in which it could be argued that a State action defence has, in part, succeeded, the Court actually classifies the issue as one of defining whether the function involved is an economic activity. Finally, the only case in which a State action defence was examined by the Court in the context of assessing attribution of the alleged violation was *Deutsche Telekom*, a market separation case under Article 102TFEU. However, once again, compulsion was not found to exist.

3. Abuse and the State action doctrine: Establishing State responsibility

The State action doctrine and the State action defence are two opposite sides of the same coin, to the extent that the undertaking's allegation is that its conduct is authorised by the State, therefore, any alleged restriction of competition should be attributed to the State. However, whether such an alleged restriction should be sanctioned and whether Article 102TFEU should be the legal standard of assessment both depend on the nature and the intensity of the link between the national legislation and the dominant undertaking's conduct. This is because Article 102TFEU is not addressed to Member States. An additional question that arises is whether State action can be found to be anti-competitive independently of any private conduct infringing Article 102TFEU under a different set of provisions, such as the free movement provisions.

V. *Shared responsibility for market separation by dominant undertakings and the State: The question of attribution revisited*

Before embarking on a structural analysis of the State action doctrine in relation to Article 102TFEU, it should be noted that the recent market separation cases in which an issue of State involvement has arisen, namely *Deutsche Telekom* and *Sotirios Lelos*, bring to light instances of conduct by undertakings that are not covered by Article 106TFEU. They can be viewed as a new category of cases, in as much as it is the first time that indirect recourse to Article 4(3)TEU-L (ex-Article 10TEC) in conjunction with Article 102TFEU is, allegedly, required. *Deutsche Telekom* and *Sotirios Lelos* involve new factual scenarios that do not fit into the traditionally used formula of Article 106TFEU in conjunction with Article 102TFEU, because the dominant undertakings are not 'granted special or exclusive rights'. In *Deutsche Telekom* the incumbent undertaking was a former State-owned monopoly, but at the material time the sector was fully liberalised. In *Sotorios Lelos*, the market power of Glaxo had not been granted by the State but achieved in the market.

Indeed, until now, the vast majority of Article 102TFEU cases involving State action were dealt with under the specific provision of Article 106TFEU because they involved 'undertakings to which Member States grant special or exclusive rights'. The very limited use of Article 4(3)TEU-L in conjunction with Article 102TFEU, has only been in cases involving claims based on both Article 101TFEU and Article 102TFEU, in particular cases of setting prices/tariffs, from which the need for a judicial construction had arisen,[57] and in some rare instances the association of undertakings

[57] E.g. Case 136/86 *Bureau National Interprofessionnel du Cognac v Yves Auber* [1987] ECR 4789; Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v SARL "Au blé vert" and others* [1985] ECR 1; Case 231/83 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 305; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801; Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769.

setting the prices was also dominant.[58] The only exception to this, where Article 4(3)TEU-L was applied in conjunction with only Article 102 TFEU, was the very first case in which the Court addressed the issue of anti-competitive effects of national legislation, *INNO v ATAB*.[59]

Therefore, the following analysis of the State action doctrine is undertaken with a view to suggesting the optimal means of filling the gap that has recently emerged in market separation cases under Article 102TFEU. As explained above, this gap cannot be filled by direct recourse to Article 106(1)TFEU in conjunction with 102TFEU, because the dominant undertakings are not 'granted special or exclusive rights' as it is required by Article 106(1)TFEU. It seems that Article 106(1)TFEU, with its specific wording, could possibly follow the same path as Article 37TFEU, which is used rarely, if used at all, so long as 'State monopolies of a commercial character' do not form, any more, part of the economic reality at Member State level. That is, of course, until there is a new shift in politics at Member State level, which determines the factual scenarios in market transactions.

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[58] Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883 [20, 31, 34]; Case C-38/97 *Autotrasporti Librandi Snc di Librandi F. & C. v Cuttica spedizioni e servizi internationali Srl* [1998] ECR I-5955 [26, 27, 37]; Joined cases C-140/94, C-141/94 and C-142/94 *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chiogga* [1995] ECR I-3257 [14, 15, 24, 27]; Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395 [44, 47]; C-250/03 *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano* [2005] ECR I- 1267 [29, 37]; Joined cases C-94/04 and C-202/04 *Federico Cipolla v Rosaria Fazari, née Portolese at al* [2006] ECR I-11421 [46, 53-54]. Yet again, the number of cases is negligible, because in the vast majority of cases where a joined issue of Article 101TFEU and Article 102TFEU arose, there was an undertaking granted with a special or exclusive right, hence, Article 102TFEU was applied in conjunction with 106(1)TFEU.

[59] Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECR 2115 [31, 33] in relation to retail prices in tax labels of tobacco products. In this case, the Court has also expressly addressed the relationship between Article 4(3)TEU-L and Article 106(1)TFEU, which will be analysed in the following Section 3.1.

3.1 The relationship between Article 4(3)TEU-L (ex-Article 10TEC) and Article 106(1)TFEU in conjunction with Article 102TFEU

The starting point of the State action doctrine is to be found in the principle of *effet utile* of the competition provisions, which are expressly addressed to undertakings and not to Member States. Is the Member State responsible when it encourages and facilitates infringements of Article 102TFEU by dominant undertakings? States cannot be held accountable directly under Article 102TFEU alone when they assist an abuse of the dominant position by an undertaking. Commentators have perceived such inapplicability of Article 102TFEU to State action as a constitutional gap under the scheme of the Treaty, which would not correspond to the reality of the 'mixed' economies of some Member States that have no clear division between private and public actors.[60] The Court of Justice soon filled in this perceived gap by using the clause on 'a system of undistorted competition within the common market' provided for in ex-Article 3(1)(g)TEC, which is the cornerstone of the State action doctrine. For the first time in *INNO v ATAB,* the Court held, by reference to (ex-)Article 3(1)(g)TEC and Article 4(3)TEU-L (ex-Article 10TEC),[61] that

> 'while it is true that [Article 102TFEU] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provisions of its effectiveness'.[62]

[60] See, in particular the doctrinal debate originally between P Pescatore (1987) and G Marenco (1987), and, as further developed, between L Gyselen (1989); L Gyselen (1993) and R Joliet (1988).

[61] Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECR 2115 [29-30].

[62] *Ibid* [31].

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As explained above, State responsibility in relation to Article 102TFEU has more frequently arisen in conjunction with Article 106(1)TFEU, than with Article 4(3)TEU-L, while the latter is more commonly associated solely with Article 101TFEU. Davies comments that this division is more the result of the wording of Article 106(1)TFEU ('undertakings to which Member States grant special or exclusive rights'), which makes it fit more comfortably with questions of dominance and abuse.[63]

However, already in *INNO v ATAB* the Court of Justice had associated the principles of State responsibility under Article 106(1)TFEU and Article 4(3)TEU-L in conjunction with Article 102TFEU, so that it makes little difference under which set of provisions is the State action addressed. In particular, directly after proclaiming the *effet utile* principle of the competition provisions in relation to State action under Article 4(3)TEU-L, the European Court went on to State that

> '[Article 106TFEU] provides that, in 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 to inter alia the rules provided for in [Articles 101 to 109TFEU]. *Likewise* Member States may not enact measures enabling private undertakings to escape from the constraints imposed by [Articles 101 to 109TFEU]' (emphasis added).[64]

Therefore, it seems that the European Court itself construed the State action doctrine as a general rule, which finds specific application in Article 106(1)TFEU.[65]

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[63] *Davies* (n 1) 552.

[64] Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECR 2115 [32-33].

[65] Confirmed expressly in the same judgment, *ibid* [42], in relation to the preliminary question on the application of Article 106(1)TFEU. The Court has also made the same pronouncement when it addressed the question from the perspective of Article 106(1)TFEU, e.g. Case C-387/93 *Giorgio Domingo Banchero, criminal proceedings against* [1995] ECR-I 4663 [46], 'The obligations which

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The fact that Article 106(1)TFEU is perceived as a *lex specialis* whereas Article 4(3)TEU-L is a *lex generalis* would lead to the tentative conclusion that Article 106(1)TFEU cannot have a broader scope than Article 4(3)TEU-L, at least in the areas of overlap, namely when applied in conjunction with Article 102TFEU. However, this approach does not take into account the fact that the general principle was derived from a specific Treaty provision, Article 106(1)TFEU. Therefore, while it may be completely legitimate to restrict the scope of application of this judicially-construed general principle, its restriction does not necessarily translate into a restriction of the scope of Article 106(1)TFEU. Before the construction, and, equally, after any hypothetical abolition of the State action doctrine, the provision of Article 106(1)TFEU existed and will continue to exist in the Treaty.[66] At the same time, in light of cases such as *Deutsche Telekom* or *Sotirios Lelos*, in which the dominant undertaking does not fall under the personal scope of Article 106TFEU, the latter provision can be used as an inspiration for a solution based on the free movement provisions, since Article 106(1)TFEU also applies in conjunction with the freedoms which are indisputably addressed to Member States. In other words, the very few existing cases applying Article 4(3)TEU-L in conjunction with Article 102TFEU illustrate the structural defects of the State action doctrine, while the specific Treaty provision, Article 106(1)TFEU, can be used more extensively in relation to one of its aspects. That aspect is its combined application with the freedoms, which are already

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Member States must perform in good faith under [Article 4(3)TEU-L] include the obligation, set out in [Article 106(1)TFEU], whereby they must not let public undertakings and undertakings to which they grant special or exclusive rights enact or maintain in force any measure contrary to the rules contained in the Treaty'.

[66] See, forcefully on that opinion, J-L Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* 266-267; more nuanced *Davies* (n 1) 551-552; *Baquero Cruz* (n 2) 556.

addressed to any State measure and not only to State measures granting special or exclusive rights to undertakings.

3.2 The type of link between State legislation and the undertaking's conduct: Autonomous conduct prohibited under Article 102TFEU

A Member State cannot be held responsible under either Article 4(3)TEU-L (ex-Article 10TEC) or Article 106(1)TFEU in conjunction with Article 102TFEU without an associated but autonomous infringement of Article 102TFEU by the dominant undertaking. The reason is that the competition law Treaty provisions are expressly addressed to undertakings, and any other interpretation would risk being considered *contra legem*. Indeed, Article 4(3)TEU-L is not a substantive provision; it does not impose new obligations on Member States or, as highlighted by Temple Lang, it cannot make EU law rules broader by way of analogy.[67] Therefore, the need for a link with a dominant undertaking's independent conduct infringing Article 102TFEU stems from the express wording of the latter Article, which is only addressed to undertakings.[68]

In *INNO v ATAB* the Court expressly stated that the obligation, which stems from the combined application of the two provisions, is not to permit Member States to enact measures enabling private undertakings to escape from the Treaty

[67] J Temple Lang in U Bernitz *et al* (eds), *General Principles of EC Law in a Process of Development* 80.

[68] *Ibid*. Similarly, D Gerard (2010) 206; E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* 97; more nuanced, *Baquero Cruz* (n 2) 586-587 in favour of a link but not necessarily of an automatic link of lawfulness (or unlawfulness).

prohibitions.[69] Similarly, in the very few cases in which the issue of combined application of Article 4(3)TEU-L and Article 102TFEU arose,[70] the Courts repeated the test first formulated in *Spediporto*

> '[ex-]Article 3(g)TEC, [Article 4(3)TEU-L and Article 102TFEU] could only apply to legislation of the kind contained in the Italian Law if it were proved that the legislation concerned placed an undertaking in a position of economic strength enabling it to prevent effective competition from being maintained on the relevant market by placing it in a position to behave to an appreciable extent independently of its competitors, of its customers and ultimately of the consumers'.[71]

However, in none of the cases in which the issue of combined application of Article 4(3)TEU-L and Article 102TFEU arose was the national legislation found to contravene the latter Articles, because the legislation was not even regarded as placing the undertakings in a dominant position. For this reason, these few cases mention nothing about the need for a link between national legislation and an independent abuse of dominance by an undertaking, in as much as dominance is not established in the first place. This is in contrast with the situation under Article 101TFEU in which the Court, after the so-called 'November Revolution',[72] has restrictively applied Article 4(3)TEU-L by, first, examining if an agreement exists contrary to Article 101TFEU and, second, if the State has backed it up 'by requiring or favouring the adoption of such an agreement or by reinforcing its effects'.[73] In that

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[69] Case 13/77 *SA G.B.-INNO-B.M. v ATAB* [1977] ECR 2115 [33].

[70] See n 58.

[71] Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883 [31].

[72] N Reich (1994) 459-492.

[73] The test has been applied restrictively by the Court of Justice in Cases C-2/91 *Wolf W. Meng, Criminal proceedings against* [1993] ECR I-5751; C-185/91 *Bundesanstalt für den Güterfernverkehr v*

sense, the Court of Justice has been quite explicit in requiring a link, already since it stated in *Leclerc* that 'national legislation which renders corporate behavior of the type prohibited under [Article 101(1)TFEU] *superfluous*' [74] does not contravene Article 4(3)TEU-L in conjunction with Article 101TFEU.

State action has never been found in breach of Article 4(3)TEU-L combined with Article 102TFEU, because there was no link with a dominant position and, as a result, there could not possibly be an abuse, as explained above. When such a dominant position existed, the case was treated under Article 106(1)TFEU in conjunction with Article 102TFEU. Under that provision, it was ambiguous whether national legislation granting special or exclusive rights is prohibited because it has the same exclusionary *effects* as an abuse of the dominant position, even when such an abuse has not *actually* or *potentially* taken place. [75] In other words, it was not clear whether a special or exclusive right granted by the State was, itself, contrary to the conjoint application of Articles 106(1)TFEU and 102TFEU, despite the fact that the dominant position itself is not prohibited under Article 102TFEU.[76]

Indeed, the confusion was created during the process of liberalising former State-owned monopolies, because of the strategic use by the Commission of

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Gebrüder Reiff GmbH & Co. KG [1993] ECR I-5801; C-245/91 *Ohra Schadeverzekeringen NV, Criminal proceedings against* [1993] ECR I-5851, all delivered during November 1993, just before the seminal Joined cases C-267/91 and C-268/91 *Bernard Keck and Daniel Mithouard, Criminal proceedings against* [1993] ECR I-6097 in the field of free movement of goods.

[74]Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v SARL "Au blé vert" and others* [1985] ECR 1 [15].

[75] See J Maillo in in G Amato and C-D Ehlermann (eds), EC *Competition Law-A Critical Assessment* 559-603 on the three categories of state measures that, first, lead to actual abuses; second, lead to potential abuses; and, third, merely have similar effects to an abuse.

[76] More generally, see D Edward and M Hoskins (1995); A Gardner (1995); *Buendia Sierra* (n 66) 151-189; and J Temple Lang in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* 51-59, on the two opposing views regarding exclusive rights, namely the 'limited sovereignty approach' and the 'limited competition approach' under Article 106TFEU.

Directives based on Article 106(3)TFEU in the telecommunications sector and the threat of its use in other sectors, such as energy and postal sectors.[77] The proactive use of Article 106(3)TFEU is closely related to the shift in the interpretation of Article 106(1)TFEU in conjunction with Article 102TFEU, advocated first by the Commission[78] and endorsed by the Court in *RTT*.[79] The purpose of this was to suggest that some exclusive rights essentially have the same *effects* as abuses of dominant positions. Until then, exclusive rights were found incompatible with Article 106(1)TFEU in conjunction with Article 102TFEU only in as far as separate abusive *behaviour* of the monopolist existed, which would, in principle, be contrary to Article 102TFEU alone.[80] The suggestion that exclusive rights were illegal under Article 106(1)TFEU in conjunction with Article 102TFEU, even without an associated abuse of a dominant position by the undertaking involved, was further strengthened by the

[77] For a brief overview, see *Szyszczak* (n 68) 139-176; and the contributions in D Geradin (ed), *The Liberalization of State Monopolies in the European Union and Beyond*.

[78] E.g. Commission Directive (EEC) 90/388 on Competition in the Markets for Telecommunications Services [1990] OJ L192/10 [Recitals 13-17].

[79] Case C-18/88 *Régie des Télégraphes et des Téléphones (RTT) v GB-Inno-BM SA* [1991] ECR I-5973. The Court held that the extension by law of the monopoly in the operation of the telephone network to the market in telephone equipment infringes Article 106(1) in conjunction with Article 102TFEU; *ibid* [24]. The law (state measure) granted to RRT the exclusive power to approve its competitors' telephone equipment, which was equated by the Court to an exclusive right to sell the equipment. This second exclusive right was *prima facie* illegal because it eliminated all competition in the market in telephone equipment; *ibid* [19]. The same interpretation was adopted in Joined Cases C-271/90, C-281/90 and C-289/90 *Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission* [1992] ECR I-5833, concerning the Telecommunications Service Directive 90/388 (n 78).

[80] See Case 155/73 Sacchi [1974] ECR 430 [14-18]; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT) and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925 [37-38]; Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-2017 [29-31]; Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889 [16-19].

Court of Justice judgment in *Corbeau*.[81] The Court of Justice directly examined whether the extension by law of a postal monopoly to specific services dissociable from the traditional postal service (such as collection from the senders' address) was justified, without first having considered whether the monopoly was prohibited in light of an independent breach of Article 102TFEU by the undertaking concerned.[82]

However, *Corbeau* is not good law any more,[83] to the extent that the Court of Justice seems to have shifted back to its prior case law.[84] In the first case, *la Crespelle*, it held that by granting an exclusive right, the Member State is in breach of Articles 106(1) and 102TFEU, only if 'in *merely exercising the exclusive right*, the undertaking in question *cannot avoid abusing* its dominant position' (emphasis added).[85] In *la Crespelle* the national law

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[81] Case C-320/91 *Paul Corbeau, Criminal proceedings against* [1993] ECR I-2533.

[82] *Ibid* [11-14].

[83] *Corbeau* has been cited in subsequent judgements either alongside cases such as *la Crespelle* (e.g. C-55/96 *Job Centre coop. arl.* [1997] ECR I-7119 [31]); or at the level of justification under Article 106(2)TFEU, once analysis under Article 106(1)TFEU based on the exercise of the right by the undertaking has preceded (e.g. Joined Cases C-147/97 and C-148/97 *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS and Citicorp Kartenservice GmbH* [2000] ECR I-825 [48]; Case C-340/99 *TNT Traco SpA v Poste Italiane SpA and Others* [2001] ECR I- 4109 [46-48]; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I- 4863 [50-51]); or in support of other requirements under Article 106TFEU irrelevant to the debate (e.g. on the notion of undertakings entrusted with exclusive rights, C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I- 3743 [54]).

[84] Case law prior to *Corbeau* is cited in n 80.

[85] 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] ECR I-5077 [18]; further cited and followed by the Court in Case C-387/93 *Giorgio Domingo Banchero, Criminal proceedings against* [1995] ECR I- 4663 [51-56]; Case C-55/96 *Job Centre coop. arl* [1997] ECR I-7119 [31-38]; Case C-163/96 *Silvano Raso and Others, Criminal proceedings against* [1998] ECR I-533 [27-32]; Case 67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I- 5751 [93-97]; Case C-115/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I- 6025 [93-97]; Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I- 6121 [83-87]; Case C-180/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I- 6451 [127-128]; Case C-340/99 *TNT Traco SpA v Poste Italiane SpA and Others* [2001] ECR I- 4109 [44-47]; Case C-49/07 *Motosykletistiki Omospondia Ellados*

> 'merely allowed insemination centers to require breeders who requested the centers to provide them with semen from other production centers to pay the additional costs entailed by that choice. Although it left to the insemination centers the task of calculating those costs, such a provision did not lead the centers to charge disproportionate costs and thereby abuse their dominant position'.[86]

Therefore, the Court of Justice seems to require a link between the right granted by the State and an actual or potential abuse of the dominant position acquired exactly because of the right that has been granted.[87]

Based on the above it is submitted that if the gap that has arisen in market separation cases, such as *Deutsche Telekom* and *Sotirios Lelos,* in relation to the State action involved (approval of tariffs and setting of prices, respectively) were to be covered by the conjoint application of Articles 4(3)TEU-L and 102TFEU, there should be a clear link with independent conduct by the dominant undertaking of the sort that is prohibited under Article 102TFEU. Therefore, if compared with the type of link required for a State compulsion defence, an additional element is required here. Autonomous conduct by the dominant undertakings is not sufficient but the autonomous conduct should also be in breach of Article 102TFEU, for the State action doctrine not to end up being a *contra legem* interpretation of the Treaty.

NPID (MOTOE) v Elliniko Dimosio [2008] ECR I- 4863 [48-53]. The link between the granting of an exclusive right and a separate abuse is retained as a distinct step of assessment prior to justification, even in subsequent cases in which *la Crespelle* is not cited, such as Joined Cases C-147/97 and C-148/97 *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS and Citicorp Kartenservice GmbH* [2000] ECR I-825 [48].

[86] 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] ECR I-5077 [20-21].

[87] For the case of a potential abuse, the issue arises mainly in relation to conflict of interests scenarios in which the undertaking is active in the market for which it has been granted e.g. the power to give authorisations (Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I- 4863 [51-52]) or, e.g., the right to supply temporary labour (Case C-163/96 *Silvano Raso and Others, Criminal proceedings against* [1998] ECR I-533 [28, 31]).

3.3 The intensity of the link between State legislation and the undertaking's conduct: An issue of indeterminacy

The intensity of the required link between State action and the undertaking's conduct raises the most significant doubts as to the usefulness of the State action doctrine itself (Article 4(3)TEU-L in conjunction with Article 102TFEU). There must be a link between the national legislation and an independent breach of Article 102TFEU by the undertaking involved, as argued in Section 3.2. However, the degree of causation between the national legislation and independent breach of Article 102TFEU by the undertaking cannot be determined ('indeterminacy question'). The reason is that, on the one hand, compulsion would counteract any autonomy of the conduct by the dominant undertaking, which is a precondition for finding the required independent breach of Article 102TFEU (see Section 2.2). On the other hand, encouragement by creating, or by strengthening, the dominant position of an undertaking would not be sufficient, because any high market power granted, rather than achieved in the market, facilitates abuse.

In what follows, the tension between the autonomous abusive conduct by the undertaking and State compulsion, as it is reflected in the application of Article 106(1)TFEU, is explored. It is argued that such tension does exist but it not easily discernible, because State action takes the form of granting market power (amounting to monopoly), which is also the distinguishing element of Article 102TFEU itself and a condition for the anti-competitive effect of certain abuses to occur.[88] This is contrasted with the State action cases in relation to Article 101TFEU, under which the

[88] See Chapter II, text to n 97-109 and Chapter III, Section 2.2.

autonomous conduct of the type prohibited should take a specific form, namely should be an agreement (or concerted practice). Therefore, the difficulty of determining with precision the intensity of the link between this conduct and State compulsion is noticeable in relation to cases under Article 101TFEU. It is argued that the gap cases of market separation under Article 102TFEU are more comparable to State action cases under Article 101TFEU[89] and, for that reason, they bring the indeterminacy question in relation to State action under Article 102TFEU to the surface. Subsequently, guidance on answering the indeterminacy question in relation to Article 102TFEU is sought by looking into the case-law under Article 37(1)TFEU (see Section 3.3.1).

The tension between autonomous abusive conduct and State compulsion is the essence of the indeterminacy question. This tension exists under Article 106(1)TFEU in conjunction with 102TFEU and is reflected in the test followed by the Court of Justice consistently after *la Crespelle*: 'in merely exercising the granted right, the undertaking is led to abuse [or cannot avoid abusing] its dominant position'. The autonomous abusive conduct is reflected in the 'mere exercise' of the right, whereas the inducement by the State is reflected in the use of words indicating coercion, such as 'cannot avoid' or 'led to'.[90]

However, the tentative outcome is to tip the balance between the two sides in favour of paying additional attention to the 'coercion' side in relation to 'special or exclusive rights' under Article 106(1)TFEU. This is because dominance (which

[89] Than to Article 106(1), read together with Article 102TFEU; see also Section 3, above, on the new factual scenarios introduced by these gap-cases, which do not fit into the personal scope of Article 106(1)TFEU.

[90] See *Davies* (n 1) 559-560, for a thoughtful analysis of the language of the Court of Justice in Article 106(1)TFEU cases.

regularly comes together with exclusivity) is a condition for the anti-competitive effect to occur.[91] Therefore, whether the dominant position has been achieved by the undertaking alone in the market or granted to it by someone else (such as the State), influences the attribution of the anti-competitive effect to the undertaking (or to the State).[92] This is also recognised by the Commission in its Guidance Paper on Enforcement Priorities under Article 102TFEU in relation to refusals to supply, where it is stated that

> 'an obligation to supply is manifestly not capable of having negative effects on the incentives to invest and innovate upstream, […] where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by State resources'.[93]

This part of the Guidance Paper has received fierce criticism by academics, given that the Commission and the Court have already made use of it in margin squeeze abuses.[94] However, from the point of view of attribution of the market distorting

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[91] At least in market separation cases; see Chapter II, text to n 97-107.

[92] In Case C-209/10 *Post Danmark A/S v Konkurrencerådet* Judgment of 27 March 2012 (NYR) [23] the Court of Justice seems to imply that the existence of a dominant position which has its origins in a former legal monopoly affects the scope of its special responsibility not to allow its conduct to impair undistorted competition.

[93] Commission (EC), 'Guidance on Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking' (Communication) [2009] OJ C45/7 [82].

[94] In *Telefonica*, a margin squeeze case, this line of reasoning provided the basis for the Commission to reject Telefonica's argument that there was no competition law duty, on the basis of *Oscar Bronner*, to supply the upstream input; *Wanadoo Espana v Telefonica* (Case COMP/38.784) [302-309, particularly 304]. This is confirmed by the General Court in Case T-398/07 *Kingdom of Spain v Commission* Judgment of 29 March 2012 (NYR) [73-76]. For a criticism, see E G Diaz and J Padilla (2009) 7: 'it is far from being the case that where the investor is a government, it will spend money without considering the impact of an ex post obligation to supply on its future finances', for a critical approach. See also, D Geradin (2010) 10: 'whether or not the 'firm's upstream market position has been developed under the protection of special or exclusive rights or has been financed by state resources' may not be clear cut'. See also, R Downing and A Jones in S Anderman and A Ezrachi (eds), Intellectual Property and Competition Law 233-234.

effect, it reflects the reason why it seems natural to assume inducement by the State, at least in cases of 'special of exclusive rights' granted by the State.

By contrast, under Article 101TFEU applied to State action, in conjunction with Article 4(3)TEU-L, the State action can be distinguished from the undertaking's autonomous conduct of the type prohibited under Article 101TFEU. The reason for this is, precisely, that the market power needed for the anti-competitive effect to occur under Article 101TFEU has to originate in a specific form of conduct, namely an agreement between undertakings.[95] For example, in *Albany* the same State measure involving the granting of an exclusive right, notably making affiliation to a specific pension fund compulsory at the request of organizations representing employers and workers in a given sector, received different treatment under Articles 101TFEU and 102TFEU.[96] Under Article 101TFEU in conjunction with Article 4(3)TEU-L the Court famously held that:

> '[on the basis of]an interpretation of the provisions of the Treaty as a whole which is both effective and consistent, agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101(1)TFEU]'.[97]

By contrast, when it came to the assessment of the same State measure under Article 106(1)TFEU in conjunction with Article 102TFEU the Court, first, held that

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[95] See Chapter III, Section 2.2 on the distinction between unilateral conduct and agreements.

[96] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I- 5751; similarly, Case C-115/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I- 6025; and Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I- 6121.

[97] Case 67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I- 5751 [60].

> 'the decision of the public authorities to make affiliation to a sectoral pension fund compulsory necessarily implies granting to that fund an exclusive right to collect and administer the contributions paid with a view to accruing pension rights';[98]

and, second, that

> 'doubtless, some undertakings in the sector might wish to provide their workers with a pension scheme superior to the one offered by the Fund. However, the fact that such undertakings are unable to entrust the management of such a pension scheme to a single insurer, and the resulting restriction of competition, derive directly from the exclusive right conferred on the sectoral pension fund'.[99]

The difference in treatment is arguably justified on the basis of the different distinguishing elements of Articles 101TFEU and 102TFEU, the form of the conduct and the degree of market power, respectively. When the State measure in question grants exclusivity and therefore market power to the required degree, it is much more difficult to deny the risk of potential abuse. Therefore, in the case of 'special and exclusive rights' the intensity of the link between the State measure and the undertaking's conduct can, as an issue subject to proof, be affirmed without the need to be determined with further precision. Any type of exercise of an exclusive right qualifies as both a voluntary act and, at least, a potential abuse. By contrast, in relation to Article 101TFEU, which is distinguished because it applies to a specific form of conduct rather than to a certain degree of market power, the difficulty of defining the intensity of the link with precision is evident. The specific type of conduct required by the undertaking either exists or does not exist, while it is distinct

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[98] *Ibid* [90].

[99] *Ibid* [97]. However, the exclusive right granted to the fund was found to be justified under Article 106(2)TFEU for the same reasons why the Court of Justice excluded collective labour agreements from the scope of Article 101TFEU.

from the State action.[100] However, the fact that the indeterminacy of the intensity of the link is not noticeable under Article 106(1)TFEU, in conjunction with Article 102TFEU, does not mean that the question does not arise.[101]

The indeterminacy question with regard to Article 102TFEU comes to the surface in the gap cases identified above, such as *Deutsche Telekom* and *Sotirios Lelos*. These cases cannot be addressed under Article 106(1)TFEU as there is no undertaking granted with a special or exclusive right. If they were to be treated under Article 4(3)TEU-L, in conjunction with Article 102TFEU, it is hard to determine the intensity of the link required between the State action and the undertaking's autonomous abuse of the dominant position. The market power of the undertaking has not been granted by the State but rather achieved in the market, as in the case of Glaxo. Even in the case of Deutsche Telekom, which is a former State-owned monopoly, 'it will not always be easy to say that the source of funds is unambiguously public in nature. Much of the infrastructure of former State monopolies has been the subject of significant improvements following privatization with the result that

[100] Critiques of the State action doctrine in relation to Article 101TFEU on the basis of the incapability to precisely identify the intensity of the link between the State conduct and the undertaking's conduct are voiced in the Opinion of AG Jacobs in Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 [161]; Opinion of AG Léger in Case C-35/99 *Manuele Arduino, Criminal proceedings against* [2002] ECR I-1529 [87]; Opinion of AG Maduro in Joined cases C-94/04 and C-202/04 Federico *Cipolla v Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v Roberto Meloni* [2006] ECR I-11421 [32-35]. In particular, AG Maduro focuses the critique on the inconsistencies in applying the 'active supervision by the State' (or 'the delegation') criterion.

[101] In addition, State action cases in which both an Article 101TFEU question and an Article 102TFEU (in conjunction with Article 106(1)TFEU) question arise, like *Albany*, demonstrate that the issue of attribution extends beyond the classification of the entity that acts as an undertaking. For example, in *Albany*, the Court could not have addressed one question altogether under the notion of undertaking, which is common under both Article 101TFEU and Article 102TFEU. The reason is that Article 106 TFEU would then be deprived of any scope of application, since it requires that an undertaking exists.

sources of funding are now substantially mixed'.[102] Therefore, it becomes more difficult to strike a balance between autonomous abusive conduct by the dominant undertaking on the one hand and inducement to such a degree as to implicate the State on the other hand, precisely because the State involvement does not take the form of granting market power.

The two gap cases mentioned above are similar to Article 101TFEU State action cases, in which it could be said that voluntarism, as an indication or a result of the link between the undertaking's conduct and the State's conduct, is reflected in the type of conduct required, namely, an agreement. For example, had *Deutsche Telekom* been an Article 101TFEU case, and had the undertaking set the tariffs not unilaterally but via an agreement with another undertaking, it could have been argued that there is an independent conduct by the undertaking, possibly of the type prohibited under the relevant competition law provision. In *Sotirios Lelos*, the autonomous conduct by Glaxo can be distinguished from the public authorities conduct, in as much as, technically, the former's conduct was of a different form (restriction of quantities) in comparison with the latter's conduct (setting prices). However, in both cases the market distorting effect of the undertaking's conduct was induced by the State: in *Deutsche Telekom* the RegTP had set a price cap, whereas in *Sotirios Lelos* the public authorities had set the profit margins in the relevant markets. This is the reason why the subsequent question of the intensity of the link arises in a discernible manner in these cases.

It is doubtful whether there is merit in setting a legal test across the lines of a distinction that cannot be described *a priori* with precision. It follows from the

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[102] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige* [2011] 4 CMLR 18, Opinion of AG Mazak (NYR) [27].

analysis above that the indeterminacy question of the intensity of the link between the State conduct and the undertaking's conducts is visible in the recent market separation cases, in which there were no special or exclusive rights granted by the State to the undertakings. The following sub-Section examines whether one could draw guidance from the jurisprudence under Article 37(1)TFEU, second sub-paragraph, for the purpose of articulating a test to determine with precision the intensity of the link required. If no such conclusion can be reached, that would confirm and reinforce the inappropriateness of the State action doctrine itself in setting the standard of assessment for the legality of the State action.

3.3.1 *De facto* discrimination under Article 37(1)TFEU

Article 37TFEU regulates State monopolies of a commercial character and, in particular, it imposes upon the Member States an obligation to adjust such monopolies, so as to ensure that 'no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States'. The second sub-paragraph of Article 37(1)TFEU stipulates that the obligation also applies to 'situations in which the national authorities are in a position to control, direct or appreciably influence trade between Member States through a body established for that purpose or a delegated monopoly'. This latter test confirms that Article 37TFEU aims at eliminating obstacles to the free movement arising, not from a State measure, but from the *conduct* of State monopolies.[103] According to AG

[103] See Case C-438/02 *Krister Hanner, Criminal proceedings against* [2005] ECR I-4551, Opinion of AG Léger [27-28], who cites the Spaak Report: 'A particular problem arises when imports are directly

Cosmas, the situations governed by the second sub-paragraph of Article 37(1) TFEU must consist of two elements; both an organic element and a functional element. They compose

> 'the capacity of the national authorities to influence intra-Community trade by means of the abovementioned 'bodies' or entities, where such influence may, in accordance with the second sub-paragraph of Article 37(1), consist in controlling or supervising, in law or in fact, imports or exports between Member States, or any other type of direct or indirect influence, provided that it is appreciable'. [104]

It is important to look at what the alternative is according to the case-law, when the said test is not fulfilled, in order to assess whether this test can be of any help in determining with precision the intensity of the link required between the State conduct and the undertaking's abusive conduct under the State action doctrine. On the one hand, there are cases in which the Court of Justice applied Articles 101 or 102TFEU in conjunction with Article 106(1)TFEU as an alternative.[105] On the other hand, there are cases in which the Court of Justice applied the free movement provisions as another alternative measure.[106] Only the first category of cases are relevant for the question of attribution, because the Court, in those cases, decides whether or not to hold the State responsible for an autonomous breach of Treaty

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regulated, not by means of quotas, but by the institution of a purchasing monopoly […]. The authority which determines the import ceiling and the purchaser itself are one and the same'.

[104] Joined Opinion of AG Cosmas in Cases C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699, C-158/94 *Commission v Italian Republic* [1997] ECR I-5789, C-159/94 *Commission v French Republic* [1997] ECR I-5815 and C-160/94 *Commission Kingdom of Spain* [1997] ECR I-5851 [28].

[105] See the cases analysed below in the present Section.

[106] See e.g. Case C-170/04 *Klas Rosengren and Others v Riksåklagaren* [2007] ECR I-4071 [17-18], in which the case-law on national rules which are separable from the operation of the monopoly, although they have a bearing upon it, and which must be examined with reference to Article 34TFEU, is summarised. See also Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699 [24], 'Since SEP's exclusive import rights are thus contrary to [Article 37TFEU], it is unnecessary to consider whether they are contrary to [Article 34TFEU] or, consequently, whether they might possibly be justified under [Article 36TFEU]'.

provisions by the undertakings. By contrast, in the second category of cases the Court makes decisions already within the State's sphere of exclusive responsibility and it determines the specific content of such responsibility. In other words, this second category of cases raise the question as to whether the obligations stemming from Article 37TFEU and Article 34TFEU have the same content and, hence, whether the Articles apply jointly in a complementary or alternative way. However, that reasoning has nothing to do with attribution, since it is already the State conduct that is being exclusively assessed.[107]

The research presented here examines cases in which the Court has reasoned on the basis of whether Article 37TFEU regulates the behavior of State monopolies of a commercial character and whether such regulation is to the exclusion of the application of Articles 101 and 102TFEU in conjunction with Article 106(1)TFEU. If Article 37TFEU, on the one hand, and Articles 106(1) and 102TFEU, on the other hand, apply concomitantly, it can be assumed that the intensity of the link between the State conduct and the undertaking's conduct is the same as the test provided for in the second subparagraph of Article 37(1)TFEU for the State to be held responsible. Otherwise, it could be argued that the delegation test under Article 37(1)TFEU is, in terms of intensity, more stringent than the link required for State responsibility under Article 106(1)TFEU.

[107] One limitation to this distinction of the cases could be that the case law on the reach of Article 37TFEU and its interaction with either Article 34TFEU or Article 106TFEU is not consistent. To some extent this is natural because of the different factual setting of the cases as well as the arguments raised by the parties and the questions referred by the national courts. However, Article 37 TFEU itself has established a reputation of 'obscure clarity', precisely because of the uncertainty as to the normative content of the obligation it contains, see *Buendia Sierra* (n 66) 110; the Court of Justice itself has referred to the 'complexity of its wording' in Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585 (English Special Edition) [598].

V. *Shared responsibility for market separation by dominant undertakings and the State: The question of attribution revisited*

In *Hansen*, the Court of Justice held that Article 37TFEU was breached in light of the marketing of a product with the aid of public funds at an abnormally low resale price compared to the price, before tax, of a product of comparable quantity imported from another Member State.[108] This was so, despite the fact that

> 'there is no causal connection between the amount of the aid […] and the selling price, […] the selling price being determined independently by the monopoly for reasons inherent in its sales policy, without reference to the destination and the amount of aid'.[109]

This case may indicate that Member States may indeed be held responsible under Article 37TFEU for apparently independent behaviour of State monopolies of a commercial character.[110] However, the judgment says nothing in regard to the question of attribution, since Article 37TFEU is not *expressis verbis* a reference rule in regard to the competition law provisions, equivalent to Article 106(1)TFEU. Therefore, no conclusion can be drawn from a case in which arguments based on Articles 101 or 102TFEU were not litigated, regarding State responsibility for behaviour potentially caught by Articles 101 and 102TFEU.

By contrast, in *Bodson* the Court of Justice explicitly reasoned along the lines of a mutually exclusive distinction between Article 37TFEU and Treaty provisions applicable to undertakings, in particular Articles 101, 102 and 106TFEU. The measure in question was national legislation that entrusted the 'external services' for funerals to the communes, which are at liberty to grant private undertakings the

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[108] Case 91/78 *Hansen GmbH & Co. v Hauptzollamt Flensburg* [1979] ECR 935.

[109] *Ibid* [13].

[110] See *Buendia Sierra* (n 66) 107.

concession to provide the service, to leave it entirely unregulated or to operate it themselves.[111] The Court ruled that

> 'the fact that the holders of concessions in a number of communes covering a large part of the national territory belong to a single group of undertakings and can thus influence patterns of trade is the result of the conduct of the undertakings in question and not of the national or municipal authorities'.[112]

On that basis, it rejected the applicability of Article 37TFEU in favour of Articles 106(1)TFEU and 102TFEU. On the latter issue, the Court ruled that

> 'the grant of the concession for the 'external services' for funerals is regarded in France as a contract concluded between the commune and the concession holder […]. It follows from that finding that the level of prices is indeed attributable to the undertaking, since the latter assumes full responsibility for the contracts which it has concluded'.[113]

From that case, it seems that the intensity of the link under Article 106(1)TFEU between the undertaking's conduct and the State conduct is more lax compared with the delegation test under the second sub-paragraph of Article 37(1)TFEU. This observation does not necessarily provide any useful guidance as to the precise degree of State involvement under Article 106(1)TFEU.[114]

Similarly, in *Almelo* the Court rejected the application of Article 37TFEU to prohibitions, by means of an exclusive purchasing clause, of electricity importation, imposed by a regional electricity distributor (holding a non-exclusive concession for

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[111] Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 2479.

[112] *Ibid* [14].

[113] *Ibid* [32].

[114] Equally, it could be argued that the very same observation supports the view that the delegation test under Article 37(1)TFEU is empty of content when juxtaposed with the test under Article 106(1)TFEU. Indeed, this interpretation seems to be more often assumed, precisely because of the reduction over time of the use of Article 37TFEU, as state monopolies are 'adjusted'.

the distribution of electricity in the territory covered by the concession) on local electricity distributors. The Court held that

> 'the contracts determine the conditions under which the [regional undertaking] supplies electric power to the local distributors, and do not have the effect of transferring to those distributors the public service concession granted to the regional undertaking. The conditions of supply, in particular the exclusive purchasing clause, stem from the agreement between the parties and are not inherent in the territorial concession granted to [the regional undertaking] by the public authorities'.[115]

However, in this case the prohibition on imports imposed by the regional distributors on the local distributors was simply subjected to Articles 101, 102 and 106(2)TFEU, without any concomitant assessment of the State involvement under Article 106(1)TFEU. The reason may be that the Commission addressed the legality of the State's earlier intervention in the form of conferring exclusive import rights to the undertakings responsible for production ('generators') under Article 37TFEU.[116] In any case, the genuinely independent behaviour of the undertakings, namely the regional distributors, could not be attributed to State action. Therefore, no conclusions can be drawn from the case with regard to the required intensity of the link between the undertaking's conduct and the State conduct, because it seems that the Court of Justice did not confirm the existence of such a link in the first place.[117]

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[115] Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477 [31].

[116] In one of the monopoly cases in the electricity sector against the Netherlands; Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699.

[117] Similarly, in Case C-387/93 *Giorgio Domingo Banchero, Criminal proceedings against* [1995] ECR I-4663 [26, 30-31] the Court of Justice held that the Article 37TFEU does not apply to national legislation which reserves the retail sale of manufactured tobacco products to distributors authorised by the State, provided that the procurement choices were a matter entirely for retailers to determine on the basis of market demands. In addition, the Court rejected the applicability of Article 106(1)TFEU in

Overall, the case law under the second sub-paragraph of Article 37(1)TFEU does not clarify the intensity of the link between the undertaking's conduct and the State conduct required for the State to be held responsible under the State action doctrine. *Bodson* is the only relevant case. However, its relevance with regard to the question of attribution is limited to the observation that the intensity of the link under the State action doctrine is less stringent than the functional element under the second sub-paragraph of Article 37(1)TFEU. Therefore, it is suggested from the case law that there is a spectrum of links between the State conduct and the undertaking's conduct, under which the State may be held responsible for a breach of different Treaty provisions. In the case of the free movement provisions there is no need for such a link in the first place, since it is the State conduct which is exclusively assessed; in the case of the second sub-paragraph of Article 37(1)TFEU there should be a link so intense, that the State monopoly's conduct is attributed, exclusively, to the State; finally, in the case of the State action doctrine, there should be a link which is less intense than the link under Article 37(1)TFEU but which, at the same time, does not preclude an autonomous undertaking's conduct of the type prohibited under the competition law provisions. How that latter link can be described with precision is yet to be identified, if that is, indeed, possible.

3.4 The relationship between the State action doctrine and the free movement provisions

conjunction with Article 102TFEU, because there was no link between the national legislation and the producer's conduct; *ibid* [43, 52].

V. *Shared responsibility for market separation by dominant undertakings and the State: The question of attribution revisited*

The above-described spectrum leads to the question whether State action allegedly falling under the State action doctrine could be assessed, instead, only under the free movement provisions.[118] Is there an added-value of the State action doctrine, in light of the requirement for a link between the State conduct and the undertaking's conduct? Historically, the European Courts have shown a preference for the free movement provisions, because the State action doctrine is a narrower rule. In other words, if there is no violation of Article 4(3)TEU-L read together with Article 101TFEU or 102TFEU, because, for example, there is no independent breach of the competition provisions by the undertakings, this does not necessarily mean that the State measure cannot be in breach of the free movement provisions, irrespective of the undertaking's conduct. Therefore, there is no automatic link of lawfulness between the undertaking's conduct and the State measure.

This is supported by the case law under Article 4(3)TEU-L in conjunction with Article 101TFEU, particularly the French cases on book (*Leclerc*) and fuel (*Cullet*) retail minimum price fixing. The Court of Justice first declared that 'national legislation which renders corporate behaviour of the kind prohibited by [Article 101TFEU] superfluous' is compatible with Article 4(3)TEU-L in conjunction with Article 101TFEU 'as [EU] law stands'. [119] Subsequently, it assessed the same national law under the free movement of goods even though the national court had not raised the relevant question. In *Leclerc*, the Court held two specific provisions of the

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[118] See U Ehricke (1990) 101-102 and *Gerard* (n 68) 207-210 who are in favour of subjecting state intervention to the free movement provisions only. *Davies* (n 1) 556, 562, writing in relation to measures contrary to Article 106(1)TFEU, adopts the view that 'such measures will invariably be restrictions on free movement'.

[119] Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v SARL "Au blé vert" and others* [1985] ECR 1 [15,20]; similarly, Case 231/83 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 305 [17].

national legislation relating to imports and re-imports to be measures equivalent to quantitative restrictions, to the extent that the minimum fixed price did not allow the lower cost price of imports to be reflected and it was therefore indirectly discriminatory (or else distinctly applicable).[120]

Similarly, under Article 106(1)TFEU the granting of 'special or exclusive rights' will normally be in breach of the free movement provisions independently of any 'exercise of such rights' by the undertakings involved. The reason is that it favours the domestic incumbent and, hence, the market foreclosing effect is indirectly discriminatory, or it could be said to substantially impede market access for imported goods.[121] For example, in *la Crespelle* discussed above,[122] the Court upheld, under Articles 106(1) and Article 102TFEU, the exclusive right granted to the insemination centres to require breeders who requested the centres to provide them with semen from other production centres to pay the additional costs entailed by that choice, because there was no independent abuse of dominance by the undertakings. However, the Court found that:

> 'Rules of a Member State which require private economic operators importing into its territory quantities of bovine semen from another Member State to store it, subject to a charge, in an authorized center which enjoys an exclusive concession with regard to storage of the semen and insemination constitute such a barrier to imports. Since that requirement applies at the stage immediately following importation and

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[120] Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v SARL "Au blé vert" and others* [1985] ECR 1 [25-27]. Similalry in Case 231/83 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 305 [23, 25-27].

[121] According to *Buendia Sierra* (n 66) 192-202, one function of Article 106(1)TFEU is to *remind* Member States that they should respect the free movement provisions even when the beneficiary of the measure is a public undertaking or one granted special or exclusive rights.

[122] See text to n 83-87.

> imposes an economic burden on importers, it is liable to restrict the volume of imports'.[123]

In the sphere of Article 102TFEU in conjunction with Article 4(3)TEU-L, the Court of Justice had already in *INNO v ATAB* implied the link between the State action doctrine and the free movement provisions. After upholding the national scheme under Article 4(3)TEU-L in conjunction with Article 102TFEU, it stated, in addition, that:

> 'In any case, a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with [Articles 34 and 35TFEU], which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect'.[124]

Trying to further pinpoint the specific areas of overlap between the two sets of provisions, it becomes clear that in *INNO v ATAB* the additional application of the free movement of goods is arguably unrelated to the substantive assessment of the private conduct under competition provisions, which is conclusive in regard to the State action doctrine. In particular, the Court of Justice stated that 'the national court must also determine, taking into account the obstacles to trade in manufactured tobacco between States which may result from the nature of the fiscal arrangements in question, whether that measure as such is capable of affecting trade between Member States' (in paragraph 38) and this, 'apart from any abuse of a dominant position which such arrangements might encourage' (Operative Part, point 2). Further, the inquiry that the national court was asked to do to establish 'effect on trade', as described in paragraph 38, is the same as the one that was required to do in order to establish

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[123] 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] ECR I-5077 [29].

[124] Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECR 2115 [35].

whether the national measure is compatible with the free movement of goods, as described in the judgment in paragraphs 52-56.[125] This arguably indicates that the statement found in paragraph 35, namely that national measures compelling anti-competitive practices would generally be incompatible with the free movement provisions, is based on the fact that such a national measure 'affects trade' within the meaning of Article 102TFEU, even before an abuse of dominance is established.[126] Indeed, on the facts of the case, the national scheme that sets retail prices at the level fixed freely upstream by the manufacturer or the importer would most probably also escape the prohibition of Article 34TFEU to the extent that 'no distinction is made between domestic products and imported products, because it generally has exclusively internal effects'.[127]

It could be said that State measures that fall outside the scope of the freedoms are the alleged added-value of the State action doctrine vis-à-vis the free movement provisions. The conjoint application of Article 4(3)TEU-L and Article 102TFEU would then cover these excluded State measures, such as purely internal situations or cases that impact upon market access in a too indirect and uncertain manner. In Chapter I, Section 4.2, it is shown that 'effect on trade' is, arguably, a concept more broad than the 'purely internal situations' test, as the latter test is reflected in the MEQR under Article 34TFEU, but there is no conclusive case law. If 'effect on trade' is established in, otherwise, 'purely internal situations' (e.g. when the conduct covers

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[125] It is striking the similarity in the language used by the Court, particularly in paragraphs 38 and 56.

[126] See also Chapter I, Section 4.2, on the comparison between MEQR under Article 34TFEU and 'effect on trade'.

[127] Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECR 2115 [53].

only a single Member State), then it should be possible to assume that the Internal Market is established and competition law is just a tool for the proper functioning of the Internal Market.[128] Therefore, it is expected that State action cases would not arise then.

Besides, in a recent case the Court of Justice rejected as inadmissible a preliminary reference as regards the interpretation of Articles 56TFEU and 49TFEU, since all aspects of the main proceedings were confined within one Member State.[129] In addition, the Court rejected as inadmissible the question with regard to Articles Article 4(3)TEU-L and 101 or 102TFEU, on the basis that 'it is quite obvious that the national legislation at issue in the main proceedings, […] cannot, in itself or by its application, affect trade between Member States'.[130]

Furthermore, to the extent that Article 102TFEU is expressly addressed to undertakings, the extension of the reach of EU law to cover such cases should be done explicitly under the freedoms, not indirectly through the back door of Article 4(3)TEU-L and Article 102TFEU, if it is desirable at all in the first place. Indeed, the recent cases on citizenship confirm the heated debate as to the extension of EU residence and movement rights when there is no link to cross-border movement.[131]

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[128] However, in practice, this is not always the case, since the geographic market is defined across national lines, whenever there are divergent regulatory interventions. See Chapter VI, Section 2.2, on the suggested revision of the geographic market in these cases.

[129] Case C-393/08 *Emanuela Sbarigia v Azienda USL RM/A and Others* [2010] ECR I-6337 [23-25, 28].

[130] *Ibid* [31-33].

[131] See Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* Judgment of 8 March 2011 (NYR); Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* Judgment of 5 May 2011 (NYR); Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* Judgment of 15 November 2011 (NYR). See P Van Elsuwege (2011) 271-276; H van Eijken

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Academics have voiced arguments that pushing for more inclusion under the free movement provisions (or the EU citizenship provisions) could present challenges from the perspective of EU competence and legitimacy.[132] It should be recalled that the Court of Justice seems to require an explicit 'renvoi' technique employed by the national law, which should actually prohibit reverse discrimination, when a preliminary question is admitted in purely internal situations.[133] By contrast, it is arguable that there would not be so many 'competence creep'-based objections to the expansion of the application in purely internal situations of the competition law provisions when enforced against undertakings.[134]

A fortiori, the same critique could be voiced in cases of justified trade barriers under Article 36TFEU or the mandatory requirements doctrine. By keeping both legal routes open, namely the State action doctrine and the free movement provisions, the Commission and the Courts can decide whether to assume competence for market regulation. The reason is that market regulation under the competition law provisions would, necessarily, take place at EU level.[135] On the one hand, when non-economic values come into play, which would merit protection even by anti-competitive national regulations, those non-economic values have been exempted from the scope of the competition law provisions applied to State action. The reason is precisely that

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and S de Vries (2011) 709-713; for two opposing views as to reach of the 'market citizenship', see N NicShuibne (2010) 1612-1619 and F Wollenschläger (2011).

[132] In particular see D Hanf (2011) 55-58, 57 'Despite its inherent inconsistencies, and the existence of alternative approaches, the internal situation doctrine is a suitable instrument to meet the constitutional necessity of respecting the division of powers between the Union and its Member States'. See C Ritter (2006) 696-703, 709-710, for a similar competence-based argument.

[133] See Chapter I, text to n 131-133.

[134] See text to n 128.

[135] This is why public policy considerations cannot be taken into consideration under the competition law provisions, when enforced against undertakings; see Chapter IV, Section 2.2.

a balancing exercise similar to the one under the free movement provisions cannot be undertaken under the competition provisions. The outcome is characterised by inconsistency without any persuasive justification. In that respect, the typical example is the treatment of collective labour agreements which were exempted from the scope of the State action doctrine in *Albany*[136] but, as expected, were subjected to the free movement provisions in *Viking* and *Commission v Germany* (in the field of public procurement), on the basis that 'those two sets of provisions are to be applied in different circumstances'.[137]

On the other hand, it seems that if the EU institutions seek to assume competence for market regulation without putting non-economic values into the test, the easiest way to address the market distorting effect is against the undertaking involved, via competition law infringement proceedings. This is arguably the situation of the gap in the State action doctrine with regard to Article 102TFEU, as revealed in *Deutsche Telekom* and *Sotirios Lelos*, which is analysed in the following Section 4.[138]

4. The interplay between private and State responsibility under competition law provisions

[136] The state action doctrine in relation to Article 101TFEU; on the difference between the latter and the conjoint application of Article 102TFEU and 106 TFEU in *Albany*, see text to n 96-101.

[137] Case C-271/08 *Commission v Federal Republic of Germany* [2010] ECR I-7091 [48]; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 [53], in which *Meca Medina* is also cited in support (see Chapter II, text to 62 on this point). It is noteworthy that AG Trstenjak in her Opinion in Case C-271/08 *Commission v Federal Republic of Germany* [2010] ECR I-7091 [68] seems to suggest that, instead of applying the *Albany* exclusion from the scope of the competition rules to the scope of the freedoms, the principles established in *Albany* in relation to competition law would need to be re-examined.

[138] In particular, see the analysis presented in Section 4.2.

V. *Shared responsibility for market separation by dominant undertakings and the State: The question of attribution revisited*

This section critically describes the interplay between the State action defence and the State action doctrine, with the hindsight of the preceding structural analysis of the two mechanisms. In so doing, the focus is on the recent market separation cases. In those cases, the Commission and/or the Courts have only addressed the one side of the coin, namely private responsibility under the competition provisions, even though arguments in regard to State responsibility have been raised.

4.1 The dual role of (ex-)Article 3(1)(g)TEC

The interplay between the State action defence and the State action doctrine is an elusive one, and this is depicted in the dual use of ex-Article 3(1)(g)TEC on a 'system of undistorted competition within the Internal Market'. First, the clause is undeniably the cornerstone of the State action doctrine.[139] Second, the clause has played a preponderant role in substantiating an abuse of a dominant position in market separation cases, in which a State action defence was raised unsuccessfully, thereby confirming that the State action defence cannot adequately fulfil its role as an applicability threshold.

In *Deutsche Telekom* the Court of Justice had recourse to the regulatory obligation to provide wholesale access to ULL, by reference to a 'system ensuring that competition in the Common Market is not distorted'.[140] It did this, for the purpose

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[139] See Section 3.1, text to n 60-62.

[140] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] 5 CMLR 27 [170, 180]. Even more so, at paragraph [180], the Court cross-cites its judgment in *Sotirios Lelos* (Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [68]), in which the Court upheld the protection of price competition from restrictions on parallel trade, by reference to 'the Treaty objectives to protect consumers by means of undistorted competition and the integration of national markets'.

of establishing that the spread between the wholesale and the retail prices charged by the dominant undertaking is abusive, because it makes market entry for potential equally efficient competitors very difficult and limits the choices available to consumers as to their sources of supply.[141] In addition, the Court upheld the finding that the EU regulatory principle of tariff rebalancing and the prohibition of cross-subsidisation require consideration of the revenues only from retail access services. Revenues from call services are not included, even though access services and call services can indeed constitute a whole from the point of view of the end-user.[142] This is because 'a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators'.[143] Therefore, it seems that the Court's finding of an abusive margin squeeze is based on the prior regulatory intervention. This is so without, however, the Court having assessed the legality or the purpose of such regulatory intervention, but only after having rejected its impact upon the scope of autonomous conduct by the dominant undertaking.[144] This justifies the need to have recourse to the clause of (ex-)Article 3(1)(g)TEC for the purpose of informing the legal test, which governs market separation as an abuse of a dominant position.

Similarly, in *Sotirios Lelos* the Court of Justice by reference to the Treaty objective 'of ensuring that competition in the Internal Market is not distorted' held that

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[141] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] 5 CMLR 27 [169-184, 255].

[142] *Ibid* [221, 227, 230-236].

[143] *Ibid* [230, 234].

[144] *Ibid* [91-92].

> 'practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States' are *prima facie* abusive because '[…] by partitioning the national markets, they neutralise the benefits of effective competition in terms of the supply and the prices that those exports would obtain for final consumers in the other Member States'.[145]

However, as explained in Chapter IV, the Court subsequently asserted the participation of the dominant pharmaceutical undertaking in the negotiations for setting the price regulation. In that way, the Court seems to suggest that the effect of the regulation is actually attributed to the undertaking. The Court seems to further suggest that the undertaking's practices to avoid all parallel exports are, after all, abusive only to the extent that they are actually attributed to the dominant undertaking, since price regulation 'is one of the factors liable to create opportunities for parallel trade'.[146] However, the legality or the purpose of such price regulation at national level is not part of the Court's reasoning on substantiating why the prevention of the parallel exports is abusive.

4.2 Structural imbalance between private and State responsibility under the competition law provisions

The ideal scenario of interaction between private and State responsibility under the competition law provisions could be depicted in the following chain of causation. Private responsibility under Article 102TFEU is a precondition for State responsibility under Article 4(3)TEU-L (or Article 106(1)TFEU in conjunction with Article

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[145] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139 [66].

[146] *Ibid* [67]; see also Chapter IV, Section 3.4.

102TFEU), which then feeds backs to private responsibility and forestalls the enforcement of Article 102TFEU. However, this chain of causation is inherently paradoxical in EU law, because the causal link between private responsibility triggering State responsibility cannot not be the same as the link that needs to exist for the State action defence to be successful.[147] In other words, on the one hand a State action defence can only succeed if the State has forced the undertaking to abuse its dominant position ('compulsion'), but, on the other hand, so tight a link nullifies any willfulness and autonomy of the undertaking's conduct, that is a precondition for finding an abuse from which State responsibility is derived. Similarly, the link between private conduct and State conduct only affects the existence of the private conduct, whereas, from the perspective of State responsibility, private responsibility is a cause for the anti-competitive effect of the national legislation.

The case law has construed the State action defence in such a way that it is conceptually impossible to find State responsibility for breach of competition law and immunity for the undertaking's conduct as the two sides of the same coin, i.e. to attribute the violation either to the State or to the undertaking.[148] This is also evidenced in the only case in which the Commission took double action against both the undertaking and the Member State involved; the Italian custom agents case (*CNSD*).[149] It is striking that the Court of Justice judgment against Italy pre-empted the outcome of the General Court judgment on the responsibility of the undertaking,

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[147] See also F Castillo de la Torre (2005) 412 who, however, uses this paradox in order to argue that the state action defence is too 'lenient' for the dominant undertakings affected and should be abolished altogether, *ibid* 421-422.

[148] *Cf Baquero Cruz* (n 2) 552 and 590 who seems to assume that the state action doctrine (both as it stands and in his revised version) and the state action defence are symmetrical.

[149] See text to n 14.

precisely because, for the purpose of substantiating State responsibility, the Court of Justice had first to substantiate that the undertaking's autonomous conduct was restrictive of competition.[150]

The following table depicts the structural imbalance between the conditions required for the State action defence and the State action doctrine to succeed:

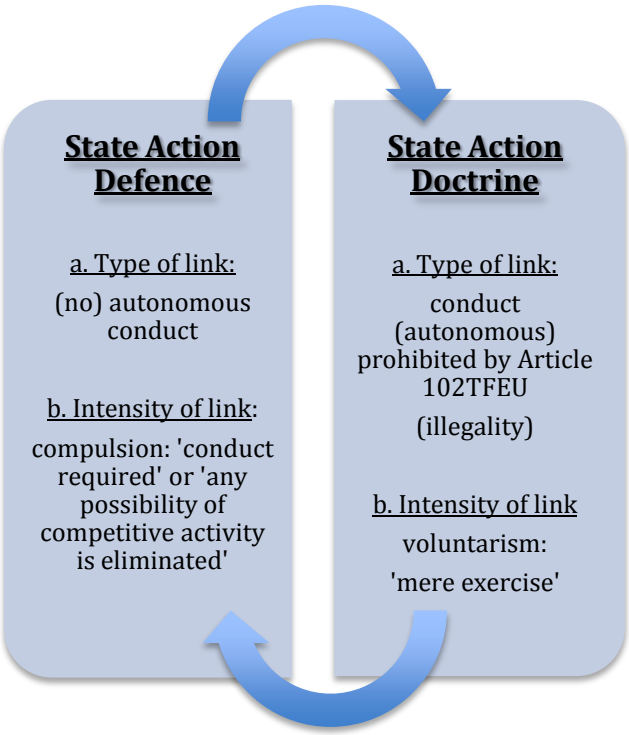

Figure 1: Structural Imbalance between the State Action Defence and the State Action Doctrine

At the same time, there are no compulsory procedural (enforcement) mechanisms that would permit the State involved to be brought before the Court of Justice, as the Commission's exercise of discretion to initiate proceedings under Article 258TFEU is not subject to judicial review.[151] Once the Commission has decided that it will not address the market distortion against the Member State

[150] Case C-35/96 *Commission v Italian Republic* [1998] ECR I-3851 [45-51].

[151] See Section 2.1.

involved, private responsibility is established since a State action defence cannot succeed. Therefore, the problem is not an evidentiary one in a grey only zone of shared State and private responsibility, but it turns out to be a problem of principle. The State responsibility under the EU competition law provisions remains unaddressed, precisely because of the way that the State action doctrine and the State action defence interact according to case law. *Deutsche Telekom* and *Sotirios Lelos*, in which, allegedly, there was shared responsibility between the dominant undertaking and State regulation for the anti-competitive market separation, have recently brought that issue to the surface. The reason is that in neither case was the dominant undertaking procedurally able to bring before the European Courts the question of the legality of State action.

In particular, the problem in this situation is, first, that the market distorting effect is attributed exclusively to the undertaking. This leads to a biased outcome in cases in which both State and private conduct are alleged to have contributed to the anti-competitive effect (alleged illegality), but State conduct is not the only cause of the private conduct (namely there is 'autonomous conduct'). Second, if the question of the legality of the market distorting State regulation does not reach the EU Courts, it does not matter whether such market distorting regulation is justified or not, for the purpose of attributing the conduct to the undertaking under a State action defence. This can, in addition, involve a biased outcome against the Member State concerned, to the extent that the national non-economic values involved are not taken into consideration when enforcing Article 102TFEU.

One typical such example is *Sotirios Lelos*. Public health is a largely unharmonised sector, because the organization and delivery of health services and

medical care have been expressly excluded from the scope of EU action.[152] The non-economic values underpinning price and distribution regulation at national level in the pharmaceutical sector are related to each Member State's health care expenditure objectives; and the degree of price regulation is dependent upon the aim to protect the budgets of the social health insurance funds in each Member State as well as the extent to which each Member State is willing to subsidize pharmaceutical R&D.[153]

Therefore, obliging a dominant undertaking to charge a uniform price across Member States, with varying degrees of price regulation, would reduce access for consumers in countries where prices are currently lower, where economic and social conditions mean that consumers cannot afford higher prices. Price uniformity would also provoke a steady diminution of Europe's contribution to pharmaceutical R&D investment by reducing the profit margin allowed in countries where prices are currently high.[154] However, it is doubtful whether those uniform effects could be achieved by subjecting the national, price and distribution, regulations to the free

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[152] Under Article 152(5)TEC, 'Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care.' Article 152(5)TEC has been replaced by Article 168(7)TFEU, 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care'.

[153] See T Nguyen, T Minssen and X Groussot (2009) 22-24, for a summary of the national regulation underpinning the pharmaceutical sector. See G Tsouloufas (2011) 287-289, for a detailed survey of the regulatory practice of the Member States with regard to price controls of pharmaceutical products. See also Commission (EC), 'A Stronger European-based Pharmaceutical Industry for the Benefit of the Patient – A Call for Action' (Communication) COM(2003) 383 final [15-16]; and *Glaxo Wellcome* (Case IV/36.957/F3), *Aseprofar and Fedifar* (Case IV/36.997/F3), *Spain Pharma* (Case IV/37.121/F3), *BAI* (Case IV/37.138/F3), *EAEPC* (Case IV/37.380/F3) Commission Decision 2001/791/EC [2001] OJ L302/1 [162], in which the Commission did not object 'the grouping together of Germany, the United Kingdom, Denmark, Sweden, Finland, Ireland and Austria as high price countries and Belgium, Portugal, Italy, France, Greece and Spain as countries with relatively lower prices'.

[154] Case C-53/03 *Synaiterismos Farmakopoion Aitolias & Akarnanias and others (Syfait) v. GlaxoSmithKline AEVE* [2005] ECR I-4609, Opinion of AG Jacobs [79]; Commission (EC), 'On the Single Market in Pharmaceuticals' (Communication) COM(1998) 558 final [10-11], [11-15]; Commission (EC), 'A Stronger European-based Pharmaceutical Industry for the Benefit of the Patient – A Call for Action' (Communication) COM(2003) 383 final [14-15], [21-22].

movement provisions. As regards price controls, a recent opinion of AG Trstenjak in a case concerning the interpretation of Directive 89/105/EEC (Transparency of measures regulating the prices of medicinal products for human use) summarises the relevant case law.[155] According to the case law, the relevant national regulations have consistently been held to be compatible with the free movement provisions. Even if price controls are caught by Article 34TFEU, which would arguably be the case under a market access test, they would be justified on the basis of an economic evaluation (e.g. financial balance of health care funds and pharmaceutical R&D) of a non-economic service (healthcare).[156]

5. Conclusions

This Chapter examines the operability of the State action defence in market separation cases, as a test for attribution of responsibility for market separation under Article 102TFEU. The argument advanced is that the degree of legislative constraint upon the undertaking's autonomous conduct is not only evidentially relevant in order to attribute an alleged competition law violation to the dominant undertaking, but it necessarily leads to the finding of a violation of Article 102TFEU. Therefore, it becomes decisive in principle and renders the defence not operable as an applicability threshold.

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[155] Joined Cases C-352/07 to C-356/07, C-365/07 to C-367/07 and C-400/07 *Menarini Industrie Farmaceutiche Riunite Srl* [2009] ECR I-2495, Opinion of AG Trstenjak [60-65], with extensive citations. See also J Snell (2003) 508-512.

[156] For precedents, see e.g. Case C 120-/95 *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831 [39] and Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I- 1931 [41]. See also Chapter III, text to n 56.

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The reason why the legislative constraint becomes decisive in principle under Article 102TFEU is that there is structural imbalance between the State action defence and the State action doctrine (State responsibility under Article 4(3)TEU-L (ex-Article 10TEC) in conjunction with Article 102TFEU). The State action defence does require compulsion by the undertaking, regardless of the legality of the State action, whereas the State action doctrine requires that private responsibility under Article 102TFEU (autonomous conduct that constitutes an abuse of dominance) is already a reason for the anti-competitive effect of the national legislation.

Recent market separation cases such as *Deutsche Telekom* have brought into light such imbalance between private and State responsibility under Article 102TFEU, because it is the first time when State action would need to be dealt with under Article 4(3)TEU-L (ex-Article 10TEC) in conjunction with Article 102TFEU rather than Article 106(1)TFEU. More importantly, these cases demonstrate the identified structural imbalance precisely because there was, procedurally, no other legal route for the dominant undertaking to bring the question of the State action legality before the EU Courts. The imbalance between private and State responsibility under the competition law provisions leads to a biased outcome against the dominant undertaking and this is reflected in the use of the clause of ex-Article 3(1)(g)TEC for the purpose of substantiating private responsibility. In some instances, it also leads to a biased outcome against the non-economic values promoted by the Member State involved.

Finally, in analysing the State action doctrine, a spectrum has been constructed with regard to the varied intensity of links required under the different Treaty provisions between the State conduct and the undertaking's conduct, for the State to be held responsible for a breach of these Treaty provisions. The free movement

provisions, the 'delegation test' under Article 37(1)TFEU on 'State monopolies of a commercial character' and Article 106(1)TFEU on 'undertakings granted special or exclusive rights' are the Treaty provisions considered. It is submitted that the inability to identify with precision the intensity of such a link under the State action doctrine can be overcome by subjecting the State action to the free movement provisions. The latter do not require any link with independent conduct by the undertaking involved. This proposition will be analysed and will form the basis of the suggested revision of the State action defence in Chapter VI.

CHAPTER VI

Principled attribution of market separation to the dominant undertaking and the State: A revised State action defence

1. Introduction

It has been argued in the present thesis that the analytical core of the interface between market separation under Article 102TFEU and non-economic justifications is the question of attributing the market distorting effect to the dominant undertaking or the State. The alternative of incorporating non-economic justifications into the assessment under Article 102TFEU, exposes the risk of biased outcome against the Member State concerned and its non-market identity (Chapter IV). Furthermore, it has been shown that the existing attribution mechanism, the so-called State compulsion defence, is not adequate as an applicability threshold, as construed by the case law. The principal reason is that it leads to biased outcome against the dominant undertaking, since it cannot accommodate an assessment of the State's responsibility (Chapter V).

This Chapter identifies a solution to the question of principled attribution of market separation in proceedings under Article 102TFEU, by combining the two findings mentioned above. The conclusions of Chapter IV only permit distinct substantive legality tests for the dominant undertaking and the State. However, the conclusions of Chapter V indicate that the State compulsion defence excludes assessment of State responsibility, whereas it necessarily leads to establishment of private responsibility under Article 102TFEU, rather than simply ascertaining that there is autonomous conduct by the undertaking. This is the reason for the structural

imbalance between private and State responsibility under the competition law provisions. The proposed solution is to incorporate assessment of the legality of the State action under the free movement provisions, in the context of Article 102TFEU enforcement proceedings against the dominant undertaking.

This is addressed in Section 2 of the present Chapter, which is structured as follows. First, the substantive legality test for State action is analysed in Section 2.1. Building on the spectrum of links required under the different Treaty provisions between the State conduct and the undertaking's conduct, it is argued that State conduct should be subjected to the free movement provisions only, rather than to Article 102TFEU read together with Article 4(3)TEU (or Article 106(1)TFEU).

Second, Section 2.2 explores how the assessment of the dominant undertaking's conduct and the State conduct could be linked in the context of enforcement proceedings against the dominant undertaking. The geographic market definition is proposed as an adequate filter for introducing the control of State responsibility as a subordinate issue in the context of Article 102TFEU enforcement proceedings. The implications of such a measure for the applicability and actual application of Article 102TFEU against the dominant undertaking are further analysed.

The institutional capacity of competition enforcement authorities (namely, the Commission, the National Competition Authorities -NCA- and the national courts) to undertake control of State responsibility under the free movement provisions is explored in Section 2.3. The implications of the Court of Justice judgment in *SYFAIT* are emphasised, in which a preliminary reference from a NCA was held to be inadmissible.

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Section 3 tests the proposed defence of contributory responsibility for market separation in proceedings against the dominant undertaking, through the example of regulation of Intellectual Property Rights (IPRs) in the context of private litigation. The 'non-exhaustion' of specific IPRs under the free movement provisions fits in the proposed interaction between the competition law and the free movement provisions, when they are applied concomitantly in the context of private litigation. By contrast, the 'exhaustion' of IPRs under the free movement provisions does not fit in the proposed, principled, application of the two sets of provisions and, for this reason, it illustrates the risk for added-costs in terms of legal analysis and doctrinal assimilation.

2. From Article 3(1)(g)TEC to Protocol No 27TFEU: Distinct substantive legality tests and associated enforcement mechanisms

The starting point of the analysis is the structural paradox identified in Chapters IV and V. There needs to be independent conduct by the undertaking of the type prohibited under Article 102TFEU for State responsibility to be established under the State action doctrine, while at the same time, the causal link between the State conduct and the undertaking's conduct requires compulsion under a State action defence.

2.1 Demise of the State action doctrine in favour of the free movement provisions

Davies, writing in the context of Article 106(1)TFEU, suggests that one principled solution, to the paradox of the causal link between the undertaking's conduct of the type prohibited under Article 102TFEU and the State responsibility under Article

106(1)TFEU, is to include the State responsibility under the free movement provisions at the very beginning of the chain of causation.[1] Then, the dominant undertaking, by 'merely exercising' rights granted in violation of the free movement provisions, would itself violate Article 102TFEU.

That proposition illustrates that the dominant undertaking's autonomous conduct would then depend upon the illegality of the State conduct. The latter is a precondition that should be asserted before one may commence talk about the 'mere exercise' of illegally granted rights as a voluntary act. This assessment of the conformity of the State conduct with the free movement provisions cannot be part of the State action defence as presently construed by case law, but does require the revision of the doctrine. Similarly, this suggestion may have further implications as regards the actual application of Article 102TFEU against the undertaking, in cases in which the right granted is not illegal under the free movement provisions.

The suggested solution is inspired by the General Court ruling in *Ladbroke Racing*, that the Commission could not decide on the part of the complaint concerning the undertakings without deciding on the substance of the complaint against the State.[2] In *Ladbroke Racing* the substance of the complaint against the State is based on the competition provisions through Article 4(3)TEU-L. By contrast, it is here advanced that the vehicle through which applicability of Article 102TFEU would be asserted is dependent upon the substance of a complaint against the State based on the free movement provisions. Figure 1, below, depicts the proposed interaction between State and private responsibility for competition law violations, in particular for market

[1] G Davies (2009) 556-558, 562, who, hence, rejects any added-value of Article 106(1)TFEU (or the Article 4(3)TEU-L) read together with Article 102TFEU, over the free movement provisions.

[2] See Case T-548/93 *Ladbroke Racing v Commission* [1995] ECR II-2565 [47-51] reversed on appeal by the Court of Justice in Joined Cases C-359/95 P and C-379/95 P *Commission and French Republic v Ladbroke Racing* [1997] ECR I-6265 [30-32].

separation, within the current context of the State action defence. This involves the following three steps (under A, B and C).

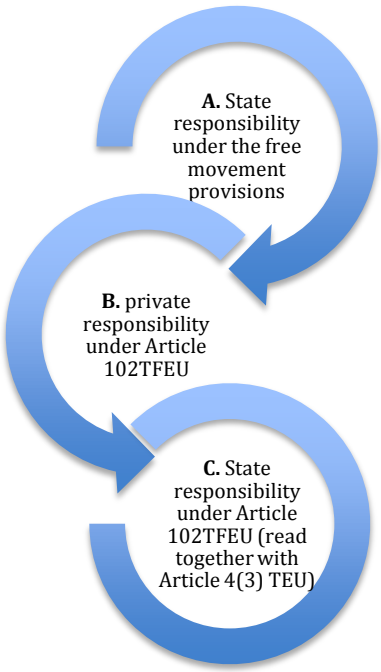

Figure 1: State responsibility under the free movement provisions as a supplement within the remits of the State action defence

However, the introduction of the assessment of State responsibility under the free movement provisions, namely Step A in Figure 1, leads, first, to a replacement of the standard of legality as regards the State action; namely the use of the free movement provisions instead of the State action doctrine. Secondly, the replacement necessarily leads to a reversal of the order of assessment of legality between the undertaking's conduct and the State conduct; hence to a revision of the State action defence. Therefore, Step C in Figure 1 is redundant and its added-value is lost, whereas the assessment under Step B is dependent upon the outcome of the assessment under Step A. Figure 2 depicts this simplified version of the interaction between State and undertaking's responsibility for competition law violations.

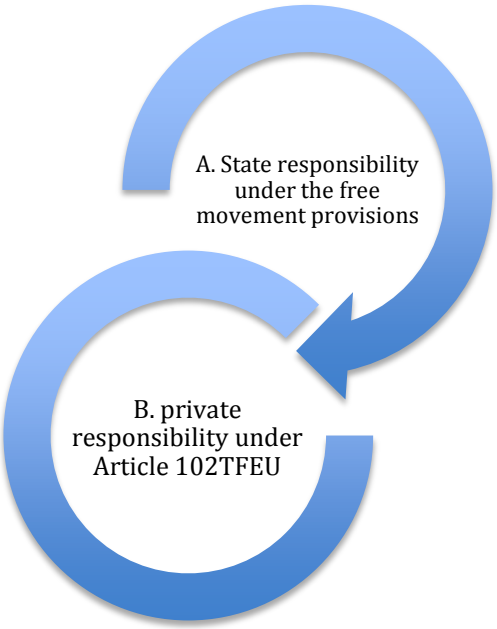

Figure 2: Replacement of the standard of legality for State action and the concomitant revision of the State action defence

The proposed interpretation could be considered as fueled by the relocation of the clause provided for in ex-Article 3(1)(g)TEC to Protocol No 27TFEU on the Internal Market and Competition, which states that the Internal Market 'includes a system ensuring that competition is not distorted'. The link between competition and free trade, as identified in Chapter I,[3] is reflected in the analysis for finding trade barriers against Member States. At the same time, the policy integration necessary for backing up market integration is achieved at national level by finding justified trade barriers, which can further trigger EU initiatives to harmonise such policy areas.

The link between competition and free trade, as well as of the important role played by policy integration in the realm of Member State action, was recently

[3] See Chapter I, Section 3.2.

confirmed in *FIFA v Commission*.[4] In that case, the General Court confirmed the Commission's approval of measures taken by the UK in accordance with Article 3(a) of Directive 89/552/EEC, concerning broadcasting rights on an exclusive basis for events of major importance to the United Kingdom society, including the Football World Cup. The measures involved restrictions of the freedom to provide services on an exclusive basis for broadcasters who provide services that can be received by less than 95% of the population. FIFA challenged the decision claiming, *inter alia*, that this is contrary to the freedom to provide services, the freedom of establishment, the rules on competition and Article 106(1)TFEU in conjunction with Article 102TFEU. The General Court explicitly merged the competition law considerations in relation to the reduction in the number of broadcasters competing for exclusive right to broadcast World Cup matches live with the restrictions on the freedom to provide services. However, precisely because those restrictions were held to be justified under the free movement provisions, the General Court held that the measures were also not contrary to the rules on competition.[5] However, neither the complainant nor the General Court identified what was actually meant by 'rules on competition', which indicates that a single set of rules applies, namely the free movement provisions. The latter rules also cover 'a system ensuring that competition in the Internal Market is not distorted', which can only be side-stepped in cases of overriding reasons of public interest.

Similarly for secondary legislation under Article 114 TFEU, the Court has confirmed, since the adoption of the Single European Act, that measures having as

[4] Case T-68/08 *Fédération internationale de football association (FIFA) v Commission* Judgment of 17 February 2011 (NYR). An appeal is pending before the Court of Justice; Case C-205/11P *FIFA v Commission* [2011] OJ C232/13.

[5] Case T-68/08 *FIFA v Commission* Judgment of 17 February 2011 (NYR) [173].

their object the establishment and the functioning of the Internal Market include measures which directly affect the establishment and functioning of the then Common Market provided for in Article 115TFEU [6] This overlap primarily concerns appreciable distortions of the competition conditions, as was first analysed by AG Tesauro in *Titanium Dioxide.*[7] AG Tesauro held that harmonisation of the conditions of competition 'should be functionally linked with the establishment and the functioning of the Internal Market', because they both relate to the same level of integration in terms of depth.[8] More recently, in *Laserdisken ApS*, the Court of Justice was called upon to rule on the validity of the EU-wide exhaustion principle established by Directive 2001/29/EC on harmonisation of certain aspects of copyright, in light of the Treaty rules relating to the establishment of a competition policy.[9] The Directive in question is based on Article 114TFEU and the Court first upheld the legal basis of the Directive, on the ground that 'it allows for the taking of measures necessary for the smooth functioning of the Internal Market as regards freedom of establishment and the freedom to provide services, through harmonisation of national laws pertaining to the content and exercise of copyright and related rights'.[10] Second, the Court ruled that 'the harmonisation achieved by that Directive is also intended to

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[6] See Case C-300/89 *Commission v Council* [1991] ECR I-2867 [15]: 'In order to give effect to the fundamental freedoms mentioned in [Article 26(2)TFEU], harmonising measures are necessary to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. For that reason, [Article 114TFEU] empowers the Community to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States and lays down the procedure to be followed for that purpose'.

[7] Opinion of AG Tesauro in Case C-300/89 *Commission v Council* [1991] ECR I-2867.

[8] *Ibid* [10]. However, AG Tesauro recognised that, at that time, the breadth of harmonised conditions of competition was wider than the Internal Market, since it extended to areas which were not part of the 'Internal Market'.

[9] Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089.

[10] *Ibid* [31-32].

ensure undistorted competition in the Internal Market, in accordance with [ex-]Article 3(1)(g)TEC'.[11] Therefore, the Court of Justice re-affirmed the close link between free movement law and competition policy when it comes to EU legislation harmonising Member States laws.[12]

The alleged added-value of subjecting State measures to the State action doctrine rather than only to the free movement provisions is that the former covers national regulations which are anti-competitive but have purely internal effect or they concern cases of reverse discrimination. It could be argued that, with the demise of the State action doctrine in the suggested way, namely as part of the application of the free movement provisions, such an advantageous treatment of the 'undistorted competition' is lost. In other words, anti-competitive State measures are not, any longer, prohibited when they concern purely internal situations; hence they are no longer "special" compared to all other State measures that may potentially constitute a trade barrier. However, there are principled arguments in favour of such an interpretation, based on the fact that Article 102TFEU is expressly addressed to undertakings. Therefore the abolition of the cross-border limitation upon the reach of EU law, in relation to State action, should be carried out under the free movement provisions.[13] From that perspective, one could view the relocation of the clause of (ex-)Article 3(1)(g)TEC to the Protocol No 27TFEU as a downgrading of the status of competition policy in the scheme of the Treaty.

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[11] *Ibid* [49].

[12] At a policy level, the Commission also points out competition screening as an integral part of the impact assessment for EU legislation. See Commission (EC), '2005 Annual Report on Competition Policy' [27-29].

[13] See the analysis in Chapter V, Section 3.4.

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However, the structural paradox in the application of the State action defence is exemplified by the demise of the State action doctrine, because independent private conduct of the type prohibited under Article 102TFEU is not required for finding a violation of the free movement provisions. This is a prerequisite for permitting a revision of the actual manner in which Article 102TFEU is applied to the dominant undertaking's conduct (namely, step B in Figure 2). Therefore, once step C in Figure 1 becomes redundant, the analysis carried out as well as its outcome under Step B is dependent on the outcome of the assessment carried out under Step A (see Figure 2). The latter relationship is explored in the following Section 2.2. The aim is to liberate competition law analysis from policy integration considerations and make it more self-contained in instances of shared responsibility between the dominant undertaking and the State for market separation.

The basis for the revision of the State action defence is the proposition that the order in which the legality of the State conduct and the undertaking's conduct are assessed is reversed necessarily, by replacing the State action doctrine with the free movement provisions. This proposition finds, paradoxically, support in the cases in which the horizontal direct application of the free movement of goods provision is rejected. Both in *Haug-Adrion* and in *Sopad Audic,* the private conduct in question was a clause into a contract between undertakings.[14] However, what seems to be decisive in both cases is that there was a national law, which merely permitted the undertakings to adopt the clauses, and which was assessed under Article 34TFEU and found not to be in breach of the latter provision. This is noteworthy because, in light of the existence of private conduct linked to the prior State action, one would have

[14] This also fits into the research presented in Chapter II, Section 5, according to which in cases of horizontal application of the freedoms, the private actors involved, no matter how remote from some regulatory function, did not constitute undertakings; see also Chapter II, n 75.

expected the Court of Justice to simultaneously address both conducts under the State action doctrine. Instead, the Court asserted the compatibility of the State measures with the free movement provisions.

In *Haug-Adrion*, the Court of Justice held that the national rules did not fall within Article 34TFEU because 'they merely authorize insurance companies to take into account in their tariff conditions particular circumstances in which vehicles are used which increase or diminish the insurance risk'.[15] Therefore, the national rules merely permitted the motor insurance contract in question, which did not provide for a bonus to customers exporting their cars. Similarly, in *Sopad Audic* there was a national law, which was interpreted by the Court of Justice as imposing only a general obligation to identify the packaging collected for disposal by an approved undertaking (in a system for waste disposal) and which was found to be a selling arrangement, outwith the scope of Article 34TFEU.[16] In this case, the national rules also merely did not prohibit the undertakings involved to give to this general obligation the specific form of an obligation to apply a mark or label on the packaging. Therefore, regardless of what the Court actually ruled with regard to the subsequent private conduct by the undertakings (namely the contractual clause),[17] it first subjected the prior national legislation, which permitted such private conduct, to the free movement provisions.

2.2 Geographic market definition

[15] Case 251/83 *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* [1984] ECR 4277 [21].

[16] Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031[71-73].

[17] See Case 251/83 *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* [1984] ECR 4277 [22]; and Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 [74].

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There is no need for a prior finding of independent conduct by the dominant undertaking of the type prohibited under Article 102TFEU, under the free movement provisions. Therefore, subjecting State action to the free movement provisions, instead of the State action doctrine, also reverses the order of assessment of the legality as between the undertaking's conduct and the State conduct within the context of Article 102TFEU enforcement proceedings. The subsequent questions are, first, at which stage of the analysis under Article 102 TFEU would an assessment of the legality of a State action be accommodated, and, second, whether such an assessment exerts influence on the applicability or actual application of Article 102TFEU.

Geographic market definition is the most appropriate stage of the analysis under Article 102TFEU, under which to accommodate an assessment of the conformity of State action with the free movement provisions. The underlying proposition is that regulatory interventions influence competitive pressure which the dominant undertaking faces in a given geographic area and, for that reason, they isolate this area from other geographic areas.[18] This is why, in cases of the extreme example of regulatory intervention, namely statutory monopoly rights which cover the whole of the territory of a Member State, the geographic market involved is defined across national lines.[19]

In Chapter I, a paradox was highlighted, as regards market separation cases. If a product market is not integrated, namely is not already EU-wide because the regulatory framework is fragmented, but the undertaking concerned is active at an

[18] See, in particular, Commission (EC), 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C372/13 [30], in which the example of 'regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc' is mentioned.

[19] See, for example, Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689 [55].

EU-wide level, the geographic market definition and the market coverage of the effect of the conduct do not coincide. This defeats the purpose of defining, in the first place, the market in the context of Article 102TFEU enforcement, which is to identify the competitive constraints that the undertaking faces, in order to assess the degree of its market power.[20] In addition, it has been pointed out in Chapter II that legal entry barriers can be assessed against the free movement provisions.[21] Legal entry barriers are taken into consideration when determining the undertaking's market power, which feeds back to the geographic market definition.[22]

A revised application of Article 102TFEU is needed in market separation cases in order to accommodate a prior assessment as to whether State action is in conformity with the free movement provisions. This could be achieved at the stage of geographic market definition, in particular under the notion of legal entry barriers. The geographic market definition is part of the assessment of the undertaking's market power.[23] Market power is the concept that associates the personal and material scope of Article 102TFEU, since it is a condition *sine qua non* for the anti-competitive effect of market separation to occur.[24] As such, 'market power' is conceptually suitable to accommodate an enquiry into the question of contributory responsibility between the dominant undertaking and the State for market separation.

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[20] See Chapter I, Section 4.4..

[21] In addition, I Lianos (2010) 726-728, for example, promotes an understanding of the case law under Article 34 TFEU by association with the Bainian or Stiglerian economic definition of an entry barrier.

[22] Chapter II, text to n 110-114.

[23] See, for example, Case T-68/1998 *Volkswagen AG v Commission* [2000] ECR II- 2707 [230] '…For the purposes of [Article 102TFEU], the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined'.

[24] Chapter II, Section 5.1.

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To incorporate the assessment of the legality of a State action into enforcement proceedings of Article 102TFEU has implications for the applicability, or actual application, of Article 102TFEU. The content of the Step B in Figure 2 depends on the outcome of the assessment carried out under the Step A in Figure 2, namely whether the State action is in conformity with, or in breach of, the free movement provisions. It is proposed that State action in conformity with the free movement provisions, substantially alters the analysis under Article 102, in particular because it leads to a wider, than national, geographic market definition. By contrast, State action in breach of the free movement provisions, rules out the subsequent enforcement of Article 102TFEU against the dominant undertaking.

On the one hand, if the State conduct is in conformity with the free movement provisions, as was arguably the case of pharmaceutical price regulation in *Sotirios Lelos,*[25] then the geographic market should be exclusively defined on the basis of the economic activity of the undertaking involved and perception of the undertaking of the market in which it is active.[26] In the case of parallel trade in pharmaceuticals, the geographic market would be EU-wide rather than national.[27] Consequently, the geographic market involved and the geographic coverage of the effects of the conduct would coincide. In that sense, there is no interference of competition law with distributional effects, since all the benefits and costs of the conduct considered are within the same market but in relation to different categories of consumers, rather

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[25] See Chapter V, text to n 152-156.

[26] See *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4; [2002] CompAR 167 [103]; *Genzyme Limited v OFT* [2004] CAT 4; [2004] CompAR 358 [217], for precedents in regard to market definition in Article 102TFEU cases, on the basis of the dominant undertaking's own perception of the market in which it is active.

[27] In *Sotirios Lelos*, this approach was advocated by the dissenting opinion in the decision by the Hellenic Competition Commission, from which *Syfait* originated; see Chapter I, text to n 149-150.

than across different markets.[28] This is also in line with the Commission's Notice on market definition and, in particular, with paragraph 32 as regards taking into account wider geographic markets, because of the continuing process of market integration, when defining the market concerned in the context of assessment of concentrations and structural Joint Ventures.[29] The effects of restricting, or permitting, parallel trade may lead to a structural change in the supply of a product in the future and, hence, it could be argued that it is similar to the assessment of concentrations.[30]

The application of Article 102TFEU would change in two ways if the geographic market concerned is wide. First, it may be that the undertaking is not dominant any more. Second, it could be the case that different types of costs and benefits are aggregated across various categories of consumers in different countries.

If, on the other hand, the State conduct breaches the free movement provisions, the dominant undertaking's subsequent conduct should be shielded from the application of Article 102TFEU, regardless of whether the undertaking's autonomous conduct was required or simply facilitated by the State. The Commission could then only, potentially, address the market distortion against the Member State, by exercising its discretionary powers to initiate proceedings under Article 258TFEU. However, once subordinate control of the conformity with the freedoms of the State

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[28] See OFT, 'Article 101(3)-A Discussion of Narrow versus Broad Definition of Benefits' (Discussion Note for OFT Breakfast Roundtable) 2010 available at <http://www.oft.gov.uk/shared_oft/events/Article101(3)-discussionnote.pdf > [4.1-4.30], on a similar discussion under Article 101(3)TFEU and the arguments in favour, and against, aggregating costs and benefits to consumers across separate geographic markets directly affected by an agreement. See [4.11], on the distributional effects, in particular.

[29] Commission (EC), 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C372/13 [32].

[30] See also *ibid* [12], '…The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour'.

action has been conducted either in the context of an appeal against a Commission decision under Regulation 1/2003 or against a decision by a NCA or in the context of private enforcement of competition law, the dominant undertaking would be protected from Article 102TFEU enforcement. The Commission, the NCA, or national court would be under an obligation to abstain from applying Article 102TFEU in the specific case, while, at the same time, disapplying the national legislation.

In effect, this is very close to the obligation imposed by the Court of Justice upon NCAs in *CIF*, to control State intervention under the State action doctrine in the context of a State action defence raised in proceedings under Regulation 1/2003. Indeed, in *CIF* the Court of Justice held that

> 'the primacy of [EU] law requires any provision of national law which contravenes an [EU] rule to be disapplied, regardless of whether it was adopted before or after that rule. The duty to disapply national legislation which contravenes [EU] law applies not only to national courts but also to all organs of the State, including administrative authorities'.[31]
> '[…]As regards, by contrast, the penalties which may be imposed on the undertakings concerned, it is appropriate to draw a two-fold distinction […] by reference to whether the facts at issue pre-dated or post-dated the National Competition Authority's decision to disapply the relevant national legislation.
> […] If the general [EU]-law principle of legal certainty is not to be violated, the duty of National Competition Authorities to disapply such an anti-competitive law cannot expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned.
> The decision to disapply the law concerned does not alter the fact that the law set the framework for the undertakings' past conduct. The law thus continues to constitute, for the period prior to the decision to disapply it, a justification which shields the undertakings concerned from all the consequences of an infringement of [Articles 101 and 102TFEU] and does so vis-à-vis both public authorities and other economic operators'.[32]

[31] Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [48-49].

[32] *Ibid* [52, 53, 54].

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Therefore, Article 102TFEU remains also inapplicable until a decision disapplying national law in breach of EU law has been made, that is when arguably the dominant undertaking becomes aware of the illegality of the State action. In the UK, a case in which the *CIF* reasoning was directly applied is *VIP Communications Ltd v OFCOM.* [33] The Competition Appeal Tribunal held that the dominant undertaking, T-Mobile, is shielded from Article 102TFEU application (and the equivalent provision of national competition law) for its refusal to provide services to a customer which enable that customer to carry on an activity contrary to domestic law, unless or until there is a definite decision by OFCOM to disapply the national law. The compatibility of that law with EU sectoral directives was questionable, even though OFCOM had not, yet, disapplied it.[34]

This is arguably the case of *Deutsche Telekom*. Assessment of the legality of the RegTP conduct under Article 102TFEU could not be accommodated within the State action defence. Had the legality according to the freedoms been incidentally assessed when defining the geographic market which involved only Germany, because of the existence of regulatory arrangements across national lines, the dominant undertaking would have been shielded from Article 102TFEU in as much as, according to the Commission, the RegTP was also responsible for the margin squeeze.[35]

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[33] *VIP Communications Ltd v OFCOM* [2009] CAT 28, [2010] CompAR 13.

[34] *Ibid* [15-27] and in particular [24] 'In the present case there has been no disapplication of the relevant UK domestic legislation – OFCOM does not accept that there is any need for any such disapplication. We accept […] that if legislation is incompatible with [EU] rules, then OFCOM is under a duty to disapply that legislation. But whether or not OFCOM's failure to disapply the relevant UK provisions is right does not, in our judgment, concern us because it is clear from *CIF* that unless or until that issue is resolved and the decision to disapply the law becomes definitive, T-Mobile is shielded from all the consequences of an infringement of [Articles 101 and 102TFEU] vis-à-vis both public authorities and other economic operators'.

[35] See Chapter V, text to n 28.

2.3 Procedural limitations and institutional capacities of the actors involved

However, there are procedural limitations to addressing State responsibility for market separation under the free movement provisions in the context of Article 102TFEU enforcement proceedings. Those limitations come up only in the context of public enforcement of Article 102TFEU at either national or EU level; the latter governed by Regulation 1/2003. The reason is that, in the context of private enforcement of Article 102TFEU, there is no divergence between the procedure and the institutional actors involved, in comparison with private enforcement of the free movement provisions, which form the vast majority of cases. In both cases, it is the national courts that concurrently have the power and obligation to apply both sets of directly applicable Treaty provisions, from their own initiative or when invoked by individual applicants.

The institutional actors involved in public enforcement of Article 102TFEU are either the Commission empowered under Regulation 1/2003 or NCAs. They could also be National Administrative Authorities mainly responsible for application of sector-specific regulations, which have the concurrent power to apply generic competition law in the sector.[36] The question is whether those enforcement authorities are empowered, at either level, to apply the free movement provisions in the context of Article 102TFEU enforcement proceedings against a dominant undertaking or, in

[36] For example, in the UK, the communications regulator, the Office of Communications, is entrusted with *ex post* competition enforcement powers, concurrently with the Office of Fair Trading, in relation to activities connected with communications matters; see Communications Act (2003), Part 5, Chapter 1, ss 369-372.

other words, if the free movement provisions are Treaty provisions directly applicable not only before a national court but, rather, before an administrative authority.[37]

The question arises precisely because public enforcement of the competition law provisions is authorized under Regulation 1/2003, which is silent as regards the application of directly applicable Treaty provisions other than Articles 101 and 102TFEU by the Commission or the NCAs.[38] An associated consequence is that the European Courts, when reviewing applications for annulment of Commission decisions under Regulation 1/2003 or appeals, have consistently held that their jurisdiction is necessarily limited to the competition provisions and cannot extend to other Treaty provisions. In *Piau* and *Meca Medina*, those other Treaty provisions were the free movement provisions.[39] Similarly, under the national law which allocates competence to NCAs or to national courts to review decisions made by the NCAs, such competence expressly only refers to the application of Articles 101 and 102TFEU, as well the equivalent provisions of national laws. For example, in the *VIP Communications Ltd v OFCOM* case mentioned above, the UK Competition Appeal Tribunal held that it had no jurisdiction to review whether the administrative authority concerned, OFCOM, had a duty to revoke domestic legislation incompatible with EU

[37] For a similar inquiry as regards Article 106(2)TFEU, in particular, see N Zevgolis (2012) 89-90.

[38] See Articles 4, 5 and 6 Regulation 1/2003, which deal with the powers of the Commission, National Competition Authorities and national courts respectively to apply Articles 101 and 102TFEU. Similarly, in Case T-398/07 *Kingdom of Spain v Commission* Judgment of 29 March 2012 (NYR) [47], the General Court stated that 'in the context of proceedings conducted by the Commission pursuant to [Articles 101 and 102TFEU], […] Articles 11 to 16 of Regulation 1/2003, in Chapter IV headed 'Cooperation', do not impose an obligation on the Commission to consult the National Regulatory Authorities, nor do they provide for the Commission being able […] to undertake 'joint action' with them in proceedings conducted by the Commission pursuant to [Articles 101 and 102TFEU].

[39] Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209 [79], confirmed in Case C-171/05 P *Laurent Piau v Commission* [2006] ECR I-37 (Summary Publication) [56-58]; Case Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 [58].

law, because the relevant class of appealable decisions concerned only infringements of Articles 101 and 102TFEU as well as their equivalent national provisions.[40]

However, those procedural limitations do not, in themselves, prohibit the assessment of the legality of State action under the free movement provisions in Article 102TFEU enforcement proceedings. The reason is that such an assessment influences the applicability or actual application of Article 102TFEU, based on the proposed revision of the State action defence. The Commission, NCAs and the reviewing Courts unequivocally have competence and jurisdiction for the application of the latter Article 102TFEU.[41]

Besides, in *Fratelli Costanzo* the Court of Justice held that when the conditions under which individuals may rely on a provision of EU law before national courts are met, all organs of State administration are obliged to apply that provision.[42] Therefore, national authorities, including NCAs, are bound by EU free movement rules. In addition, *Fratelli Costanzo* was the basis for the Court of Justice to establish in *CIF* the obligation of NCAs to disapply national legislation incompatible with the competition law provisions read together with Article 4(3)TEU-L.[43] Therefore, it could be argued that the direct applicability of the competition law provisions before

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[40] According to s 46 of the Competition Act (1998). See *VIP Communications Ltd v OFCOM* [2009] CAT 28, [2010] CompAR 13 [12-14].

[41] See, in particular, Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209 [79], '[…]This review can therefore extend to compliance with other provisions of the Treaty only in so far as any infringement of them reveals a concomitant *breach* of the rules on competition. Moreover, it can relate to a possible breach of fundamental principles only in the event that that breach resulted in an infringement of the rules on competition' (emphasis added). Similarly, *VIP Communications Ltd v OFCOM* [2009] CAT 28, [2010] CompAR 13 [14] 'In our judgment, the issue of the alleged inconsistency of our domestic legislation can only be relevant to this appeal if it is relevant to the question whether OFCOM's decision *to reject the complaint* of abusive behaviour was wrong' (emphasis added).

[42] Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839 [28-33].

[43] Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 [49].

the NCAs in the case of State action is derived, according to *CIF*, from the Treaty itself on the basis of *Fratelli Costanzo*, rather than Regulation 1/2003, and the same direct applicability before the NCAs should apply to the free movement Treaty provisions, which are Treaty provisions directly applicable before national courts.[44]

Aside from the procedural limitations sketched out above, a more important question is the institutional capacity and expertise of the NCAs to apply the free movement provisions. Public enforcement of the competition law provisions involves a great deal of discretion at the stage of selection of the cases. By contrast, in the context of private enforcement, the national courts could not possibly deny ruling on a claim or that would, indeed, be denial of justice. This is the reason why in a system relying almost exclusively on private enforcement of competition law it is very important to set restrictive substantive standards, in light of the absence of self-controlling limitations to private applicants. [45] Given the consequence of a finding of incompatibility of the State action with the free movement provisions, namely non-applicability of the competition provisions, it could be argued that NCAs, as well as the Commission, have the discretion to select those cases of outright abuse that would be more likely to succeed rather than result in a finding of inapplicability. The discretion of the NCAs in regard to case selection is retained, if a case involves State

[44] *Fratelli Costanzo* is cited in Case C-429/09 *Günter Fuß v Stadt Halle* [2010] ECR I-12167 [40, 85], in support of the direct effect of specific provisions of Directive 2003/88 before a National Administrative Authority in its capacity as public employer. However, no question of diasapplication of national law arose on the facts of this case. Similarly, see Joined Cases C-444/09 and C-456/09 *Rosa María Gavieiro Gavieiro and Ana María Iglesias Torres v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia* [2010] ECR I-14031 [73]; and Case C-314/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-00047 [80-81]. See also Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* Judgment of 8 September 2011 (NYR) [53, 61], in which *Fratelli Costanzo* is cited but, on the facts of the case, it was a national court, and not a National Administrative Authority, involved.

[45] This is well illustrated through the example of the re-orientation of EU competition law to a more 'economics-based' approach, at the same time when the modernisation initiative, based on a decentralised and private enforcement of the competition rules, was launched. See O Odudu (2010) 839-840.

action in breach of the free movement provisions. However, NCAs have a duty to abstain from applying Article 102TFEU, once they pick up such a case, while at the same time to diaspply the national regulation. Therefore, the proposed revision of the State action defence also eliminates artificial obstacles to the selection process of cases suitable for public enforcement, while it is left in the hands of private litigants to decide whether they are willing to bear the costs for testing borderline cases before the Courts.

In the rather exceptional case in which there is an appeal either against a rejection by a NCA of a complaint or against a decision by a NCA rejecting a defence by the dominant undertaking that the State action is incompatible with EU law, the reviewing Court should be fully capable of proclaiming on both issues of competition law and the free movement provisions. In that respect, the possibility of the NCAs to send preliminary references to the Court of Justice would operate as a safety valve and it would also be consistent with considerations of judicial economy. However, this possibility is excluded by the Court of Justice judgment in *SYFAIT*.[46] *SYFAIT* was the predecessor of *Sotirios Lelos*, since the same preliminary questions, which were raised in the latter case by the national court, were first raised by the NCA and rejected as inadmissible. The reasoning in *SYFAIT* seems to suggest that no NCA can be considered a Court or a Tribunal for the purposes of sending a preliminary reference in proceedings intended to lead to a decision of a judicial nature. The reason is that, according to Article 11(6) Regulation 1/2003, the NCAs are relieved of their competence where the Commission initiates its own proceedings, hence the proceedings initiated before that Authority will not lead to a decision of a judicial

[46] Case C-53/03 *SYFAIT and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609.

nature.[47] However, as clearly stated by AG Jacobs in his Opinion in *SYFAIT*, it would be preferable to send to the Court of Justice the preliminary question at the earliest possible stage, before additional proceedings are initiated before a reviewing Court, which would, in any case, be obliged to send the relevant questions.[48] This would also strengthen the safeguards of the uniform application of EU law, particularly after the Court of Justice judgment in *CIF*.[49] Therefore, the need for the possibility of a NCA to send preliminary reference is already existent as the case law stands, without the exclusion of such a possibility having affected the obligation of the NCAs to disapply national law incompatible with the competition law provisions. It would be preferable to allow that possibility, but in no way would its exclusion be a barrier to the suggested revision of the State action doctrine and defence.

3. Principled attribution of market separation controlled: The example of the 'exhaustion' of Intellectual Property Rights

The exercise of Intellectual Property Rights (IPRs) is a very specific case in which the Court of Justice has been called upon to apply, or has applied on its own motion, both the free movement provisions and the competition law provisions, including Article 102TFEU, in the context of private litigation. This potentially makes the regulation of IPRs an example of how the proposed revision of the State action defence could be

[47] Case C-53/03 *SYFAIT and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609 [34-36].

[48] Case C-53/03 *SYFAIT and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609, Opinion of AG Jacobs [45].

[49] *Ibid*.

applied or an anti-example showing the disadvantages associated with the non-principled interface between the free movement and the competition law provisions.

A historical overview of the early cases on the 'existence/exercise' dichotomy of IPRs is provided in Section 3.1, as regards the interface between the free movement and the competition law provisions. In those early cases, IP was regarded as an evil, because the relevant rights were national territorial rights. The purpose of this historical overview is to show that there has been a swift reversal of the initial proposition underpinning the interface between free movement and competition law, namely that conformity of the national IP law with the free movement of goods ('non-exhaustion') is a condition for the applicability of the competition law provisions, which is normally met. This proposition makes non-exhaustible IPRs a case-study which fits in the main thesis underpinning the proposed revision of the interface between State and private responsibility for market separation. In Section 3.2, the EU principle of exhaustion of IPRs under the free movement of goods is considered, which, applied concomitantly with the competition law provisions, does not fit in the proposed as principled interface of the two sets of provisions. For this reason, nevertheless, the case of exhaustible IPRs illustrates the risks for added-costs in terms of unwarranted assimilations in the legal analysis under the free movement and the competition law provisions.

3.1 Side one of the interface between the free movement and the competition law provisions in regard to IPRs: Non-exhaustion

Broadly speaking, IPRs confer upon the owners the right to prohibit third parties from carrying out certain activities, namely they confer exclusive rights *inter alia* to

exports and imports. They do so for various reasons, depending on the type of IPR involved, such as encouraging and rewarding innovation and investments (patents), creativity and originality (copyright) or indicating the trade origin of a product (trademarks). A potential tension between those exclusive rights and market integration is easily discernible, in particular as regards parallel trade, and could lead to regulation of IPRs for the purpose of tackling barriers to inter-State trade. In that regard, the EU has adopted an EU-wide exhaustion regime, according to which the exclusive right of the IPRs holder to control subsequent marketing of the protected goods is lost once the goods have been placed on the market within the EU by the rights holder or with his consent.[50] However, Article 36TFEU provides for an exception to Article 34TFEU (justification), based on the protection of 'industrial and commercial property'. In addition, according to Article 345TFEU 'the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

The way in which the EU-wide exhaustion regime was established by the Court of Justice, raises questions in regard to the applicability of the free movement provisions to conduct by private undertakings; namely whether this application is a form of horizontal application of the freedoms. The reason is that, according to case law, the free movement provisions govern the exercise of the IPRs by their holder, even when the conditions for the application of the competition law provisions are not fulfilled, or cumulatively in the application of the competition law provisions. An analysis of the origins of the exhaustion principle under the free movement provisions explains why the subsequent application of the competition law provisions in recent

[50] See Chapter I, text to n 76-79, for the efficiency arguments in favour and against (international or regional) exhaustion of IPRs.

IP cases involving market separation involves a distorted legal analysis (see Section 3.2). By contrast, the historical overview of the evolution of the exhaustion regime, which follows in this Section, reveals the initial proposition of the concomitant application of the two sets of provisions, which fits into the proposed paradigm of interface between the two. This initial proposition is comprised of the conformity of the national IP law with the free movement provisions, and hence non-exhaustion, as a precondition for the application of the competition law, which is normally met.

The Court of Justice, from as early as 1966, has dealt with the relationship between Article 345TFEU and the regulation of IPRs in the context of the competition law provisions by establishing a dichotomy between the 'existence' (or grant) and the 'exercise' of IPRs. In *Consten and Grundig* the Court upheld the Commission's decision that an exclusive distribution agreement conferring absolute territorial protection from parallel imports via trademark rights was subject to Article 101TFEU. It rejected the appellant's arguments that the Commission decision not to permit the use of trademark rights to impede parallel trade was in breach of Article 345TFEU, by stating that the decision 'does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under [Article 101(1)TFEU]'.[51] The European Court had already

> 'carried out a competitive analysis, abridged but real, during the course of which it held, in particular, that the agreement in question sought to eliminate any possibility of competition at the wholesale level in order to charge prices which were sheltered from all effective competition'.[52]

Similarly in regard to patent rights, the Court of Justice held in *Parke Davis*

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[51] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 345.

[52] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 [120], citing Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* 299, 342-343.

> 'first, that the existence of the rights granted by a Member State to the holder of a patent is not affected by the prohibitions contained in [Articles 101(1) and 102TFEU]; secondly, that the exercise of such rights cannot of itself fall either under [Article 101(1)TFEU], in the absence of any agreement, decision or concerted practice prohibited by that provision, or under [Article 102TFEU], in the absence of any abuse of a dominant position'.[53]

Most significantly, for the purpose of the discussion here, in *Parke Davis*, the Court of Justice began to reason by stating that the rules relating to the protection of IPRs are not harmonised within the EU and, therefore, the principles found in Article 36TFEU are equally applicable to the sphere of the competition rules. As a consequence, the exercise of the rights does not, of itself, constitute an infringement of the competition provisions.[54] In regard to the finding of an abuse of dominance, the Court held that

> 'a higher sale price for the patented product as compared with that of the unpatented product coming from another Member State does not necessarily constitute an abuse'.[55]

The same reasoning appears in *Sirena v Eda*, in which case the Court further accepted, under Article 102TFEU, an unqualified objective justification defence, by stating that

> 'the price level of the product may not of itself necessarily suffice to disclose such an abuse, it may, however, if unjustified by any objective criteria, and if it is particularly high, be a determining factor'.[56]

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[53] Case 24/67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55, 72.

[54] *Ibid* [71].

[55] *Ibid* [72].

[56] Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69 [17].

VI. *Principled attribution of market separation to the dominant undertaking and the State: A revised State action defence*

It seems, from these early cases, that the Court of Justice subjected the 'existence' of IPRs to the free movement provisions as opposed to the 'exercise' of the rights, which is subject to the competition provisions.[57] This makes great sense because Member States do not exercise IPRs, but, rather, determine their scope and, in particular, the legal requirements for granting IPRs through legislation or through judicial or administrative enforcement.[58] By contrast, private undertakings exercise those rights through agreements or unilateral practices. Therefore, it is apparent from those early cases that subjecting the exercise of the IPR to the competition law provisions, implied that the grant of the right, in light of its exercise in the specific circumstances of the case, is already in conformity with the free movement provisions; otherwise there would be no right to be exercised, recognised at EU level, and this exercise to be subject to control under EU competition law.

This has been the general test governing the interface between Article 102TFEU and the free movement provisions, in relation to IPRs. The test was first expressly stated in *Hoffmann La Roche v Centrafarm*, while the Court of Justice analysed the conditions under which a restriction of repackaging of goods under trademark rights could be in breach of Articles 34 and 36TFEU. The Court held that

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[57] In Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-473, Opinion of AG Gulmann [31], AG Gulmann points out that 'An exercise of rights that falls within the specific subject-matter of an intellectual property right will relate to its existence. In other words the distinction between the existence and the exercise of rights and the application of the concept of the specific subject-matter are basically expressions of the same conceptual approach'.

[58] C Stothers, *Parallel Trade in Europe* 29; R Lane in N Nic Shuibhne, *Regulating the Internal Market* 263-264; J Snell in M Adenas and W-H Roth, *Services and Free Movement in EU Law* 214-215; similarly, G Marenco and K Banks (1990) 225-226 on the basis that the prohibitions contained in Articles 34 and 36TFEU have a more incisive effect, they prohibit a national law to the extent that it empowers the rights holder to exercise his right in given circumstances and, as a result, they contemplate the possible existence of objectionable aspects of Intellectual Property law. *Contra* D Keeling, *Intellectual Property Rights in EU Law-Volume I* 53-54; A Heinemann in S Anderman and A Ezrachi (eds) *Intellectual Property and Competition Law* 320 backs up the application of the competition provisions to restrictions on parallel trade by reference to their role in complementing the rules on exhaustion under the free movement provisions.

> 'the extent to which the exercise of a trademark right is lawful in accordance with the provisions of [Article 36TFEU], such exercise is not contrary to [Article 102TFEU] on the sole ground that it is the act of an undertaking occupying a dominant position on the market if the trademark right has not been used as an instrument for the abuse of such a position'.[59]

Thus, the finding that the form of exercise of the IPR is typical of the category of IPR at stake and, hence, justified under Article 36TFEU is a necessary condition for the further enquiry as to whether such exercise constitutes an abuse of dominance.[60]

The distinction between 'existence' and 'exercise' may seem, on the face of it, artificial and formalistic.[61] However, it clearly connotes, as argued by Kallaugher, that there is an initial basis which does not reflect a policy judgment regarding the respective merits in fostering economic efficiency but is, rather, a jurisdictional division of the EU competence to apply EU competition law and the Member States competence to create systems of IPRs.[62] According to the same author, the policy considerations, which inform the exercise of the specific type of IPR, may,

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[59] Case 102/77 *Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1978] ECR 1139 [14, 16]. AG Capotorti argued in his Opinion that Article 102TFEU could be in breach only if the exercise of the trademark rights were outside the scope of Article 36TFEU, see *ibid* 1180.

[60] This is more clearly shown by considering that competition law also applies to the exercise of IPRs, which are not national but, rather, conferred by secondary EU legislation, such as the trademark rights under Directive 2008/95/EC. See for example Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* [2009] ECR I-6155, in which Article 102TFEU was applied to the fee required by DSD for the appearance of the 'Green Dot' logo on all products. Before, the Court of Justice had rejected the argument according to which the Commission's finding under Article 102TFEU infringes Article 5 Directive 2008/95/EC, because the relationship between the proprietor and its contractual partners as regards the use of the trademark is outside the scope of Article 5 Directive 2008/95/EC. See n 69, for more on that judgment.

[61] Indeed the extent to which an IP right can be exercised also determines its economic value and its existence. See e.g. V Korah (1972) 363, for a critique.

[62] J Kallaugher in S Anderman and A Ezrachi (eds) *Intellectual Property and Competition Law* 120-121; see also S Anderman and H Schmidt, *EU Competition Law and Intellectual Property Rights* 21, 23-25 against a generalised widening of the concept of 'existence' of the IPR beyond the conditions for granting the IPR to extend to the legal prerogatives of the rights holder. Indeed, this is a specific example of the conceptual foundation of finding a justified trade barrier, which was identified in Chapter IV, Section 2.1, as the process of competence allocation for market regulation.

exceptionally, become relevant at the stage of the initial competence allocation, if such allocation is not clear in the specific case.[63] Otherwise they become relevant at the later stage of competition law application, namely once it is asserted that the competition law provisions are applicable.[64]

The same principles could be articulated via the prism of the suggested revision of State and private responsibility for market separation, which shows that non-exhaustible IPRs under the free movement provisions are a case-study for the purposes of the thesis. If the form of exercise of the IPR is typical of the category of the IPR at stake, and, therefore, justified under Article 36TFEU, this is a necessary condition for the applicability of Article 102TFEU to the dominant undertaking's conduct which represents a specific use of that IPR. However, it does not necessarily lead either to finding a breach of Article 102TFEU, or to, further, shielding the conduct from the application of Article 102TFEU. The Court of Justice, in those early cases, referred the case back to the national court, which was instructed to conduct an economic analysis for the purpose of substantiating an abuse of a dominant position. Therefore, it is noteworthy that assimilations in terms of outcome or reasoning under the free movement and the competition law provisions in cases in which the exercise of the IPR was not exhausted, were avoided. There are no cases in which the Court of Justice says that the competition law provisions are not infringed for consistency purposes, once it has found that the IPRs at stake are not exhausted under Articles 34

[63] *Kallaugher* (n 62) 120-129. According to Kallaugher, even in those cases, the examination by the Court of the economic purpose of the IPRs created by the national law through the concepts of 'essential function' and 'specific subject-matter' of the IPR is not equivalent to the case-by-case analysis under competition law.

[64] *Ibid* 138-139 in favour of limiting Article 102TFEU enforcement by excluding from its scope of application the exercise of 'core' IPRs, which determine in effect the 'existence' of the IPR.

and 36TFEU. This type of assimilation would be very risky because it would cause a gap in the deterrent effect of competition law enforcement.

A typical example of this side of interaction between the free movement and competition law provisions is the case law governing non-exhaustible rights under the freedom to provide services. The application of Article 102TFEU is principled, in particular as regards the practice of collecting societies, arguably because no exhaustion doctrine is developed in relation to communication to the public, performance, rental and lending rights under Article 56TFEU.

Coditel I, on the freedom to provide services, is the first case to establish that the exercise of the right to communicate a film to the public by performances assigned by copyright is not contrary to Article 56TFEU. This is so, when the right is exercised in a way as to require fees for any exhibition and to prohibit the exhibition of that film by means of cable diffusion, after the film has been broadcasted in another Member State by a third party, even with the consent of the original owner of the copyright.[65] In addition, in *Coditel I* the Court of Justice held that Article 56TFEU did not, in principle, constitute an obstacle to the geographical limits which the parties to a contract of assignment of copyright have agreed upon in order to protect the author and his assigns in this regard.[66] Following that judgment, in *Coditel II* the Court of Justice had to determine whether the competition provisions were inapplicable because the exercise of communication to the public and performance rights were compatible with the free movement provisions. The Court, responding in the negative, stated that it is for the national court to make the enquiry as whether the exercise of the right

[65] Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881 [12-14].

[66] *Ibid* [16].

> 'creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market'.[67]

The self-contained character of the application of the competition law provisions as regards the exercise of IPRs, after a finding that the freedom to provide services has not been infringed, is more evident in the cases, which concern the exercise of IPRs by collecting societies on behalf of a number of rights holders.[68] In *Tournier* the Court of Justice examined whether the royalties a national copyright management society charges for music played in public by means of sound recording, constitute an abuse of dominant position, when the rates are appreciably higher than those charged in other Member States. The Court held that it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States, otherwise the comparison of the rates provides a useful indication of abuse.[69] In that context, it examined in detail, and rejected, the justifications produced

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[67] Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECR 3381 [19].

[68] The emphasis is on Article 102TFEU; however, these cases also raised issues under Article 101TFEU regarding reciprocal representation practices along national lines as a concerted practice between the national collecting societies. Recently, the Commission held that territorial delineation of mandates based on national lines were not, in themselves, in breach of Article 101TFEU, but the coordination in a way which limits a licence to the territory of each collecting society only was in breach of Article 101TFEU; see *CISAC* (Case COMP/C-2/38.698) [2008] OJ C 323/12. The decision is only limited to performing rights in relation to online, cable and satellite exploitation.

[69] In Case T-151/01 *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* [2007] ECR II-1607 [193-196] the General Court held that DSD was abusing its dominant position by requiring a fee for all packaging bearing the 'Green Dot' logo (registered as a trademark), even in cases in which it is proved that its customers are not using the DSD system for collection and recovery of all of that packaging (under Article 102 TFEU). However, that finding did not preclude the possibility for DSD to levy an adequate fee for merely using the mark, even if that packaging is not actually brought to the DSD system. The mark may have economic value as such, since it can inform the consumer that the

by SACEM.[70] The Court had, earlier, classified the imposition of a performance royalty for music played by means of sound recordings as being governed by the services, rather than the goods, case law, thereby permitting the application of the *Coditel I* principles that excluded an exhaustion regime in relation to the exercise of communication and performance rights.[71]

3.2 Side two of the interface between the free movement and the competition law provisions in regard to IPRs: Exhaustion

Exhaustible IPRs under the free movement provisions and the subsequent application by the Court of Justice of the competition law provisions does not fit in the proposed concomitant application of the two sets of provisions, in as much as the competition law provisions are applied regardless of whether or not the IPR is in breach of the free movement of goods provisions. Recent cases under the freedom to provide services illustrate unwarranted assimilation in terms of legal analysis under the competition

packaging at issue may be brought to the DSD system. That finding was confirmed by the Court of Justice in Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* [2009] ECR I-6155 [72-78].

[70] Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECR 2521 [34-46], particularly that the difference between the rates is justified by the high prices charged by discothèques in France, the traditionally high level of protection provided by copyright in France, and the peculiar features of French legislation whereby the playing of recorded musical works is subject not only to a performing right but also to a supplementary mechanical reproduction fee. Similarly, see Joined Cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811 [21-33]. More recently the *i-Tunes* case that was referred by the OFT to the European Commission on the basis that UK users had to pay more to download tracks than users in Germany or France, was settled following Apple's announcement to equalise prices in Europe, see Press Release, IP/08/22 (9 January 2008) http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22.

[71] Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECR 2521 [10-15]. Earlier in Case 402/85 *Basset, G. v Société des auteurs, compositeurs et éditeurs de musique (SACEM)* [1987] ECR 1747, the Court had classified sound recordings as products to which the free movement of goods apply, but held that the 'supplementary reproduction fee' charged by the society is not in breach of Article 34 and 36TFEU, on the basis that the fee is not charged on the importation or marketing of the sound recordings but by reason of their public use. Therefore, it seems that the Court applies the right principles, regardless of the formal classification of the case as a services- or goods- case.

law provisions, when the latter provisions are applied after a finding that the relevant free movement provision is infringed.

The exhaustion regime has been fully developed in the field of free movement of goods. In *Deutsche Grammophon* the European Court transplanted the *Consten and Grundig* distinction between the existence and exercise of IPRs from the competition provisions to the application of Articles 34 and 36TFEU in the field of copyright. The Court stated that

> 'if the exercise of the right does not exhibit those elements of contract or concerted practice referred to in [Article 101(1)TFEU], it is necessary, in order to answer the question referred, further to consider whether the exercise of the right in question is compatible with other provisions of the Treaty, in particular those relating to the free movement of goods'.[72]

It is striking that the question referred by the national court was framed only in terms of the competition law provisions. Therefore, it was the Court, on its own motion, that subjected the exercise of IPRs to the free movement of goods provision.

In addition, it appears that the Court of Justice, by establishing the exhaustion regime in the first place, allowed a simultaneous application of the two sets of provisions.[73] For example, in *Deutsche Grammophon* the Court held that the exercise of the exclusive right to distribute the products protected under copyright in a manner so as to prohibit the sale, in that Member State, of products placed on the market by him or with his consent in another Member State would not be justified under Article 36TFEU. However, it held that the difference between the controlled price and the

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[72] Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECR 487 [7].

[73] See O-A Rognstad in J Drexl (ed), *Research Handbook on Intellectual Property and Competition Law* 429-432, for a summary of the academic literature. Rognstad is critical not so much of the simultaneous application of the two sets of provisions, but of the lack of interdependence in their application, in the sense that competition law does not determine exhaustion; *cf* S Enchelmaier in J Drexl (ed), *Research Handbook on Intellectual Property and Competition Law* 417-423.

price of the product re-imported from another Member State does not necessarily suffice to disclose an abuse of dominant position and left it for the national court to determine whether the price was unjustified by any objective criteria and is particularly marked. In other words, it left the national court to carry out an economic analysis under Article 102TFEU, which is not necessarily violated.[74]

This represents a double reversal of the initial proposition which underpinned the distinction between the existence and exercise of IPR, namely that justification under Article 36TFEU (and therefore non-exhaustion), is a condition for the application of the competition law provisions (see Section 3.1). First, it appears that whether or not the IPR is exhausted, does not matter for the purpose of ascertaining applicability of the competition law provisions. Second, it appears that exhaustion of the IPR in light of its specific exercise is not an exceptional case, which would further permit that specific exercise to be assessed under the competition law provisions. It is, rather, under the free movement provisions that the Court makes a policy choice with regard to the breadth of territorial protection afforded, regardless of the compliance of the rights holder's conduct with the competition law provisions.

For example, in the early cases on exhaustion of patents the Court of Justice held that a national patent right is exhausted if the product is marketed by, or with the consent of, the patent holder in another Member State, even though he may be unable to get a reward of monopoly profits in the Member State of export, in which the

[74] Similarly, under Article 101TFEU in relation to territorial import and export restrictions in licensing agreements; for example, in Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015 [62-63], the Court held that application of Article 101TFEU 'is not affected by the fact that persons or undertakings subject to such restrictions are in a position to rely upon the provisions of the Treaty relating to the free movement of goods in order to escape such restrictions'.

product is not patentable.[75] The Court of Justice also held that the different national policies, in relation to price controls of pharmaceutical products, could not justify the exercise of the patent rights by putting the products into first circulation, unless the holder of the patent can prove that it is under a genuine, existing legal obligation to market the product in that Member State.[76] This ruling is, in effect, similar to the one in *Sotirios Lelos* in regard to dominant undertaking's refusal to supply parallel traders.[77] Namely, the exhaustion of patent rights in pharmaceuticals under the free movement of goods restricts the ability of the pharmaceutical companies to discriminate geographically in Europe, regardless of the prevailing varying national regulations on pharmaceutical prices. In neither case were the national pricing regulations assessed under the free movement provisions. Korah notes that the incidental effect of the Court of Justice ruling on exhaustion of patent rights was to bring national laws on pharmaceutical pricing closer, by pushing the French pharmaceutical companies to persuade the French government to raise the maximum allowed selling price for pharmaceuticals.[78] This effect is very similar to that identified in Chapter IV, Section 3.1, of the case law on rejecting public policy justifications under Article 102TFEU. This similarity confirms that the question of the exhaustion of the patent rights should have been, rather, addressed under the

[75] The principle was established in Case 187/80 *Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler* [1981] ECR 2063 [9-13], by extending the earlier ruling in Case 15/74 *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc* [1974] ECR 1147 [9, 11].

[76] See Case 15/74 *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc* [1974] ECR 1147 [22-24]; Joined Cases C-267/95 and C-268/95 *Merck & Co. Inc. and others v Primecrown Ltd and others v Europharm of Worthing Ltd* [1996] ECR I-6285 [43-52].

[77] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139.

[78] V Korah, *Intellectual Property Rights and the EC Competition Rules* 9.

competition law provisions, in light of the fact that public policy justifications constitute an integral part of the free movement Treaty provisions.

It seems that the establishment by the Court of Justice of the exhaustion regime in the field of free movement of goods led the national courts to request further preliminary references framed in terms of both the free movement and the competition provisions. In that way, the Court was able to focus on the application of the free movement provisions that lacks enthusiasm concerning empiricism and economic analysis,[79] and to make the competition law analysis seem secondary and dependant, for consistency reasons, upon the outcome of applying the free movement provisions. Of course, any such reading of the Court's case law would be subject to the assumption that, in the preliminary reference procedure, the nature of the question plays a significant role.[80] Therefore, it is indeed valid to say that there are differences between the regulation of trademarks on the one hand, and the regulation of copyrights and patents on the other hand, both in terms of how important a sophisticated economic analysis is for the parties involved and in terms of how far the EU has exercised its competence to harmonise the relevant divergent national laws.[81] However, it is also fair to say that competition law provisions provide a more structured and appropriate forum for the analysis of the territorial breath of the geographic protection afforded to the rights holder, even in the case of trademark rights. This is especially the case in the context of preliminary references, which originate in litigation before national courts, because the Court of Justice has

[79] See Chapter III, Section 5.1.

[80] See M Broberg and N Fenger, *Preliminary References to the European Court of Justice* 421-423.

[81] The stakes and money involved in infringement of copyright and patent rights are extraordinary compared to trademark infringement. This may precisely be the reason why the trademark protection is almost fully Europeanised, whereas the former remain national-based.

jurisdiction to interpret the law, but not to apply it on the facts of the actual case, and the distinction between interpretation and application is far from easy to draw.[82] Therefore, the framework within which a question is asked, also feeds back to the reasoning and the outcome of the case.

This has recently been illustrated in a case involving reception and viewing of Greek broadcasts of Premier League matches in the UK.[83] The Court appears to assume that satellite transmission services over protected works in one Member State involve the reception of those services by persons resident outside the Member State of broadcast. In other words, accessing and watching the broadcasts in a Member State other than the Member State of origin is not a separate act of exploitation of the IPR.[84] Based on this, the Court restricted its analysis in assessing compatibility with the freedom to provide services of the first broadcasting in Greece only, as Article 1(2)(b) of the Satellite Broadcasting Directive provides that 'the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication'.[85] This permitted the Court to rule out from the specific subject matter of that right the payment of a premium for UK exclusivity, since remuneration had already been paid to the rights holder by the Greek broadcaster. The latter could calculate the number of actual and potential viewers, because reception of the broadcast requires possession of

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[82] See, e.g. J Snell (2004) 187-193, who argues that the distinction is not dependant upon how detailed the analysis is but upon how abstract or concrete is the language used in the ruling. *Cf* G Davies in N NicShuibhne, *Regulating the Internal Market* 225-233.

[83] Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2012] 1 CMLR 29.

[84] *Ibid* [153-182].

[85] *Ibid* [111].

a decoding device card, and consequently, pay the appropriate remuneration to the rights holder.[86] On that basis, the Court also distinguished the case from *Coditel I* and the question of exhaustion.[87]

However, the reasoning of the Court led it to assess the one and the same alleged obstacle to cross border reception of broadcasting services under, first, the provisions of the free movement, and second, the competition law provisions. The Court did so, even though it conceded that 'the actual origin of the obstacle to the reception of such services is to be found in the contracts concluded between the broadcasters and their customers', on the basis that 'as the legislation confers legal protection on those restrictions and requires them to be complied with on pain of civil-law and pecuniary sanctions, it itself restricts the freedom to provide services'.[88]

Once the Court found both provisions to be applicable, it is very interesting to highlight the assimilation in its reasoning under the two sets of provisions. The Court first established a violation of the freedom to provide services, which is not well informed in terms of economic analysis, by using language reminiscent to Article 102TFEU case law on excessive pricing. It held the restriction not to be justified by the specific subject-matter of the IPR for the following reasons:

> 'the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration […] only appropriate remuneration for each use of the protected subject-matter. In order to be appropriate,

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[86] *Ibid* [106-116].

[87] *Ibid* [118-120].

[88] *Ibid* [88]. However, *cf* Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II- 02805 [362], with a very distinct factual background (namely, misleading representations made to the public authorities for the purpose of improperly obtaining exclusive rights). The General Court rejected the applicants' argument that a finding of an abuse of a dominant position requires that the exclusive right has been enforced, on the basis that such an argument would tend to make the application of Article 102TFEU conditional on the contravention by competitors of the public regulations by their infringing the exclusive right of an undertaking.

> such remuneration must be reasonable in relation to the economic value of the service provided. […]'[89]
>
> '[the] premium is paid to the right holders concerned in order to guarantee absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the Internal Market'.[90]

Subsequently, the Court of Justice did not engage in a full economic analysis under the competition law provisions, by making a cross reference to the above-mentioned finding under the freedom to provide services, arguably for consistency reasons.[91] Had the Court first (or only) addressed the obstacle under the competition law provisions, it would have been harder to substantiate a violation.[92] Therefore, it seems that the double framework of one and the same question provides the Court of Justice with a flexible mechanism by which to influence the outcome of the question at its discretion.

Another example of the distorted concomitant application of the free movement provisions and the competition law provisions as regards the exercise of IPRs is provided, from the perspective of the referring national courts, by the judgment of the UK Court of Appeal in *Oracle America (formerly Sun*

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[89] Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2012] 1 CMLR 29 [108-109].

[90] *Ibid* [115].

[91] *Ibid* [145]. The Court of Justice ruling is narrower than the suggested solution by the AG Kokott, because it based its findings under the provisions of both the free movement and the competition law on the interpretation of 'communication to the public' under the Satellite Broadcasting Directive. On the contrary AG Kokott developed a much broader theory that services, as goods, are subject to exhaustion; see Opinion of AG Kokott in Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECDR 11.

[92] For the consequences of the ruling in terms of the options now available to FAPL for organising its licensing policy, see A Wood (2012) 207 and E Szyszczak (2012) 173-174.

Microsystems).[93] Lady Justice Arden allowed an appeal against a summary judgment and ordered the case to be remitted to the Chancery Division for trial, with a view to the judge making a reference to the Court of Justice. The summary judgment had ruled that, because Oracle's rights to sue for trademark infringement were not exhausted according to Articles 5 and 7 of the Trademark Directive 2008/95/EC, a defence based on alleged violation of Articles 34 and 36TFEU did not have realistic prospects to succeed.[94]

Lady Justice Arden argued that, in principle, the complete harmonisation regime of EU-wide exhaustion of trademarks established by Articles 5 and 7 of the Trademark Directive did not exclude the defences based on Articles 34 and 36TFEU, when it is shown that the proprietor of a trademark has adopted practices which distort trade within the single market. In the case of *Oracle America*, such practices comprise the conduct of the trademark holder in failing to make publicly available a serial mark tracker for the purpose of identifying whether the goods are produced under the licences granted by it, in aggressively pursuing infringement proceedings against non-licensed resellers of goods using its mark and in agreeing terms it contends are designed to reduce a grey market in its goods.

A reasoned means to understand the ruling is as a claim of abuse of rights conferred by the Trademark Directive based on Article 114TFEU, which would *a fortiori* violate the primary Treaty provisions on the free movement of goods.[95] Lady

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[93] *Oracle America Inc (formerly Sun Microsystems Inc) v M-Tech Data Ltd* [2010] EWCA Civ 997; [2011] 1 CMLR 43. The judgment is reversed on appeal by the Supreme Court in *Oracle America Inc (Formerly Sun Microsystems Inc) v M-Tech Data Limited* [2012] UKSC 27. The analysis here-advanced complements the analysis advanced in the Supreme Court judgment.

[94] *Sun Microsystems Inc v M-Tech Data Limited, Stephen Lawrence Lichtenstein* [2009] EWHC 2992 (Pat).

[95] See, in other areas of law, the example of AG Mengozzi in Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767 [149], 'A measure that is

Justice Arden hints at this analytical interpretation by making a reference to the defendants' arguments on the basis of *Halifax*.[96] She contends that Oracle's refusal to provide access for independent resellers to its internal database has 'more to do with restricting imports with the object of preventing price competition within the EEA and thereby protecting Oracle's profit margins than with the proper exercise of the right to control the first marketing of Oracle equipment within the EEA'[97]

It is submitted that it is illogical to bring competition law considerations, such as price competition, into the equation of controlling, under the cloudy doctrine of abuse of rights, the exercise of IP rights conferred by secondary Internal Market legislation, by reference to the free movement provisions. The application of Article 102TFEU to private conduct, such as the refusal of Oracle to provide access to the serial track marker, could, indeed, inform the value judgment as to whether such conduct constitutes an abusive exercise of the rights conferred by the Trademark Directive, since these rights were not exhausted under Internal Market law. [98] This proposition of the interface between the free movement and the competition law provisions is identified in Section 3.1, namely that application of the competition law

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incompatible with Directive 96/71 [which is based on Articles 53(1) and 62TFEU] will, *a fortiori*, be contrary to [ex-]Article 49TEC, because that Directive is intended, within its specific scope, to implement the terms of that article'. In *Oracle America*, the Supreme Court seems, implicitly, to adhere to the reading of the Court of Appeal ruling as an 'abuse of rights' claim; see *Oracle America Inc (Formerly Sun Microsystems Inc) v M-Tech Data Limited* [2012] UKSC 27 [26] 'the only economically intelligible way in which M-Tech's case may be understood, […] is in principle an *ordinary exercise* of the essential right conferred on him by articles 5 and 7 (1) of the Trademark Directive' (emphasis added).

[96] Case C-255/00 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-1609. See R de la Feria (2008) 395-441, for a first theorisation of 'abuse of rights' after *Halifax*.

[97] *Oracle America Inc (formerly Sun Microsystems Inc) v M-Tech Data Ltd* [2010] EWCA Civ 997 [33].

[98] Had Article 102TFEU applied in this case, it could be argued that the prohibition of an abuse of a dominant position functions as a 'European anti-abuse clause' to the exercise of European-based rights.

provisions to the exercise of IPRs presupposes that the IPR is in conformity with EU Internal Market law.

However, application of Article 102TFEU in the case of Oracle also presupposes that its own substantive conditions are fulfilled, as well as that, procedurally, the relevant claim has been advanced within the prescribed limitations. Lady Justice Arden herself submits that 'the judge may ultimately be right in saying that these complaints sound in competition law rather than trade mark law, but the space between the two sets of rights is not necessarily exclusively populated by the one or the other set of provisions of European Union law and, thus, the points are in my judgment reasonably arguable under the Trademark Directive'.[99] The doctrine of abuse of rights by reference to the free movement provisions, in this case trademark rights conferred by secondary harmonisation legislation, should not be used as a back door by which to side-step the substantive and procedural requirements for applying Article 102TFEU.[100] Recourse in *Oracle America* to the free movement provisions, in order to define what constitutes an abuse of rights as conferred by the Trademark Directive, indicates a misunderstanding of the initial proposition that Article 102 TFEU is applicable to the exercise of an IPR only once the right is justified under the free movement provisions.

4. Conclusions

[99] *Oracle America Inc (formerly Sun Microsystems Inc) v M-Tech Data Ltd* [2010] EWCA Civ 997 [33].

[100] See J Snell in R de la Feria and S Vogenauer, *Prohibition of Abuse of Law* 219-231, for normative arguments as regards the very exceptional use of the doctrine of abuse of rights.

VI. *Principled attribution of market separation to the dominant undertaking and the State: A revised State action defence*

This Chapter has provided a principled answer to the question of shared responsibility for market separation by the dominant undertaking and the State. The guiding principle for attribution of the market distorting effect is that competition law enforcement takes the regulatory structure of the (Internal) Market as given. This means that the legality of State intervention is a necessary condition for Article 102TFEU applicability. State compulsion defence, therefore, is not adequate as an applicability threshold, because it cannot accommodate an assessment of the legality of the State action and, hence, may lead to a biased outcome against the undertaking involved. It has also been argued that the substantive legality test for State conduct should be different from the test governing the undertaking's conduct under Article 102TFEU, to avoid biased outcomes against the State involved and its non-market identity. The free movement provisions already provide a structured test for the assessment of the legality of the State action, since a 'system of undistorted competition' is an integral part of the Internal Market sought by the latter provisions. Therefore, the fact that the clause of ex-Article 3(1)(g)TEC has moved to the Protocol No 27TFEU might lead to a revision of the State action doctrine, by applying the free movement provisions to State conduct instead. In practice, a defence based on shared responsibility for market separation in the context of Article 102TFEU enforcement proceedings would lead to an assessment of the State action under the free movement provisions as a subordinate issue at the stage of geographic market definition and, in particular, of regulatory entry barriers. If the regulatory framework is not in conformity with the free movement provisions, then the undertaking's conduct is further shielded from the application of Article 102TFEU. The additional application of the competition law provisions ensured, in the past, that the free movement rules are, indeed, enforced against market distortions stemming from the national

regulations in light of the undertaking's conduct. However, this purpose is now obsolete since the question of the State action legality under the free movement provisions is procedurally associated with Article 102TFEU enforcement proceedings and is, therefore, addressed before a Court. By contrast, if the regulatory framework is in conformity with the free movement provisions, then market integration should be taken into account in the analysis under Article 102TFEU, by leading to a wide geographic market definition, rather than to a geographic market defined across national lines.

If Article 102TFEU is enforced by public authorities at national level, it would be better, in terms of judicial economy, to allow a NCA to make preliminary references to the Court of Justice. This is currently precluded by the Court of Justice judgment in *SYFAIT*. The distinction between assessment of the undertaking's conduct in light of the regulatory framework and assessment of the regulatory framework in light of the undertaking's conduct is difficult to draw when Article 102TFEU is enforced by national courts. This is exemplified by the regulation of IPRs and, in particular, the historical evolution of the interface between the exhaustion of IPRs under the free movement provisions and application of Article 102TFEU. The framework in which a question is asked feeds backs to the outcome of the case. Therefore, non-exhaustible IPRs under the free movement provisions, and the concomitant application of the competition law provisions, constitute a case-study of the principled interface between the two sets of provisions, in as much as the relevant case law reveals that 'non-exhaustion' is a precondition for the application of competition law. By contrast, the reversal of this relationship in the case of exhaustible IPRs does not fit in the proposed interface, but, for this reason, illustrates the risks of assimilation in the legal reasoning under the two sets of provisions.

CONCLUSIONS

The present thesis argues that there is nothing special about the interface between competition and market integration that would justify a distinctive treatment of market separation cases under Article 102TFEU, other than a principled understanding of the Treaty as a whole. Indeed, deconstruction of the elements for establishing market separation in the Internal Market as an abuse of the dominant position emphasises that clinging to tensions between competition and market integration presents, in the vast majority of cases, imaginary, rather than actual, conflicts.

The inherent, economic, limits of market integration should also be respected under Article 102TFEU enforcement; otherwise, it may be difficult, if not impossible, to justify these outcomes, from an economic perspective. These economic limits are reflected in the conceptual foundation for finding a trade barrier, based on a market access test, which defines the very core of what is considered 'internal' in the Internal Market, regardless of whether or not such trade barrier is found to be justified.

Tensions between competition and the Internal Market may, nevertheless, arise when non-economic values, which are reflected in the finding of justified trade barriers, come into play. It is a cornerstone of this thesis that the interface between market separation by dominant undertakings and non-economic values is best understood as a question of shared responsibility for the market distorting effect between the undertaking and the State. The existing tensions are conceptualised as stemming from an unclear attribution of the anti-competitive effect of market separation in regard to the dominant undertaking and the State. Therefore, these tensions are expected to be relieved, if the question of principled attribution to the

undertaking or the State is addressed before the assessment of the substantive legality of the undertaking's conduct takes place.

A widening of the objectives of EU competition law, to embrace non-economic values, is desirable, in accordance with the Lisbon Treaty reforms which are predicated on the objective of a 'social market economy', as well as in accordance with the new reality that a alleges a growth of business self-regulation. However, the widening of the objectives of EU competition law cannot oppose or ignore basic principles, namely the normative distinction between market participation and market regulation. A strict distinction between the undertaking's conduct in the market and the State is not possible. Nor is absolute convergence between the substantive tests under the legal rules applied to market participation and to State regulation. The aim should, therefore, be to manage the overlap of private and State responsibility, rather than either separate them or model one on the other. Grey areas will always exist and the present thesis advances what is considered to be, first, the most appropriate 'label' for such grey areas and, second, the most appropriate place under Article 102TFEU to unravel the threads behind this 'label'.

The proposed 'label' is a defence based on shared responsibility between the dominant undertaking and the State for the alleged market-distorting effect. It is suggested that the defence should operate at the earliest possible stage of the application of Article 102TFEU. The earliest possible stage is that of geographic market definition and, in particular, the notion of regulatory trade barriers, which are, in themselves, subject to the free movement provisions, while the geographic market definition also feeds back to the substantive test for establishing an abuse of a dominant position.

Conclusions

Front-loading the issue of State responsibility under the free movement position means that applicability and the actual application of Article 102TFEU takes into account the legality, including non-economic objectives, of regulatory interventions in the Internal Market in a consistent and transparent manner. This is all the more important in a framework of private and decentralised enforcement of Article 102TFEU once private litigants have decided to bear the costs of litigating borderline competition law cases. In addition, analytical clarity as to the conditions for non-applicability of Article 102TFEU removes artificial obstacles to case selection suitable for public enforcement of competition law. Hence, it could be said that, from an enforcement policy viewpoint, the revised State action defence might lead to a reversal of the Commission enforcement priorities at EU level, in accordance with the progressive evolution of the Internal Market.

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