5 Article 102

Richard Whish BA BCL (Oxon), QC (Hon), David Bailey LLB (King’s College London), LLM (Harv)

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Richard Whish, David Bailey

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1. Introduction

Article 102 TFEU is an important companion of Article 101. Whereas Article 101 is concerned with agreements, decisions and concerted practices which are harmful to competition, Article 102 is directed towards the unilateral conduct of dominant firms which act in an abusive manner. Article 102 provides as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(p. 181) (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The purpose of this chapter is to describe the main features of Article 102. Section 2 contains an overview of the law and practice of Article 102. Section 3 introduces the Commission’s Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (‘the Guidance on Article 102 Enforcement Priorities’ or ‘the Guidance’)², an important document that will be referred to at several points in the text that follows and in later chapters of this book. Section 4 discusses the meaning of undertaking and section 5 examines the requirement of an effect on trade between Member States: concepts that have already been discussed in the context of Article 101³. Section 6 considers what is meant by a dominant position under Article 102. Section 7 looks at the requirement that any dominant position must be held in a substantial part of the internal market. Section 8 looks at the central—and most complex—issue in this chapter; the meaning of abuse: more detailed analysis of individual abusive practices will be found in chapters 17, 18 and 19, which examine, respectively, non-pricing

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abuses, pricing abuses and abuses that can arise in relation to the exercise, or sometimes the non-exercise, of intellectual property rights. Section 9 considers defences to allegations of abuse, and section 10 briefly considers the consequences of infringing Article 102.

2. Overview of the Law and Practice of Article 102

Many of the most controversial decisions of the Commission have been taken under Article 102. One was the finding in 2004 of two abuses on the part of Microsoft, a refusal to supply interoperability information to competitors and the tying of a media player with its operating software, for which Microsoft was fined €497.2 million\(^4\). Another controversial decision was the fine of €1.06 billion imposed on Intel for exclusionary practices including the offering of exclusivity rebates to customers who purchased all or most of their microprocessor chips from that undertaking\(^5\). Intel lost its appeal against this decision in 2014\(^6\); on further appeal to the Court of Justice the case was referred back to the General Court for a reassessment of whether the rebates in question could exclude competitors as efficient as Intel from the market\(^7\). A further controversial decision was Google, fined €2.42 billion in June 2017 for abusing its dominant position in general internet search in order to promote its own comparison shopping service\(^8\). The fact that these very large fines were imposed by the European Commission on US firms highly successful in the ICT sector where EU firms are noticeable by their absence adds a certain frisson to the controversy in this area of law\(^9\).

A complaint on the part of some critics has been that the Commission and EU Courts tend, when applying Article 102 in cases such as Microsoft, Intel and Google, not to concern themselves with the maintenance of the competitive process but, instead, with the protection of competitors, a quite different matter. To put the point another way, in any competition, whether economic, sporting or of some other kind, the most efficient or the fittest person will win: this is an inevitable part of the competitive process. This would suggest that, if a firm ends up as a monopolist simply by virtue of its superior efficiency, this should be applauded, or at least not be condemned. A more specific criticism of the Commission and of the EU Courts has been that they adopt a formalistic (as opposed to an economics-based) approach to the application of Article 102 and that as a consequence business practices of dominant firms have been condemned that did not have, or could not have, any harmful effect on consumer welfare; and which, indeed, may have been pro-competitive. Clearly it would be a strange paradox if it were to transpire that the application of Article 102 resulted in the condemnation of competitive behaviour that benefits consumers. However a number of cases in recent times, culminating in the judgment of the Grand Chamber of the Court of Justice in Intel in September 2017, have clearly established that it is not the role of Article 102 to protect less efficient competitors. Paragraph 133 of the Intel judgment could hardly be clearer:

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\text{In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.}
\]

The challenge in this area of the law is to devise administrable rules that capture those types of conduct that could exclude from the market firms as efficient, or more efficient, than the dominant undertaking; to avoid rules that could inhibit pro-competitive behaviour; and to achieve a balance between these two desirable outcomes that gives a reasonable
degree of certainty to businesses, their professional advisers, competition authorities and to courts.

3. The Commission’s Guidance on Article 102 Enforcement Priorities

In 2004 the Commission launched a review of the law and practice of Article 102 as it applied to exclusionary (as opposed to exploitative) abuses (this distinction is discussed later in this chapter). In December 2005 a staff working paper was published (p. 183) by DG COMP and there followed a feverish debate as to the proper application of Article 102. The outcome of this process was the adoption by the Commission in February 2009 of its Guidance on Article 102 Enforcement Priorities. The clear intention of the Guidance was that the Commission would, in future, select for investigation allegations of abusive exclusionary conduct only where it seemed plausible that significant harmful effects to consumer welfare were likely to occur: The Commission would not proceed on the basis of form-based rules, but economic effects; and would not intervene to assist less efficient competitors. Paragraph 20 of the Guidance set out a series of factors that the Commission would take into account when selecting a case for investigation, and also provided specific guidance as to how the Commission would deal with cases on exclusive dealing, tying and bundling, predation and refusal to deal and margin squeeze.

It is important to understand that the Guidance is not a set of guidelines on the law of Article 102; the document is what it says it is: guidance on the Commission’s enforcement priorities. The law of exclusionary abuse under Article 102 is contained in the jurisprudence of the EU Courts. In Post Danmark II the Court of Justice, in response to a specific question from the Danish Maritime and Commercial Court, said explicitly that the Guidance: merely sets out the Commission’s approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts.

The fact that national courts and national competition authorities (‘NCAs’) are not bound by the Commission’s Guidance does not mean, however, that it is not influential; for example in the UK the former Office of Fair Trading and, now, the Competition and Markets Authority, have referred several times to the Guidance when investigating allegations of abuse of dominance.

The Guidance is not binding on the EU Courts: indeed paragraph 3 specifically says that it is not intended to constitute a statement of the law and is without prejudice to the EU Courts’ jurisprudence. There have been occasions on which the Court of Justice has applied Article 102 more strictly than the approach that the Commission suggests that it would adopt: one example is Konkurrensverket v TeliaSonera Sverige AB, where its approach to the abuse of margin squeeze is clearly stricter than the Guidance; another is Tomra where the Court’s application of Article 102 to exclusivity rebates was stricter than the Commission’s Guidance suggests.

Some commentators consider that this apparent dissonance between the case law of the EU Courts and the Commission’s Guidance gives rise to legal uncertainty and that the Commission should therefore withdraw it; a less extreme view is that the Guidance fails (p. 184) to establish priorities, and may leave undertakings more confused about the law in this area than they were before. To the authors of this book these criticisms are unconvincing. To repeat: the Guidance is not a set of guidelines that describe the existing law. Rather it explains why the Commission, with its finite resources, would have a greater interest in investigating some cases than others; in particular it explains that it is the...
likelihood that particular conduct could cause anti-competitive foreclosure, thereby, ultimately, causing harm to consumers, that legitimates intervention by the Commission\textsuperscript{20}.

Although the Guidance does not bind the EU and national courts, this is not to say that it will not have an influence on the future application of Article 102 to exclusionary behaviour. In TeliaSonera\textsuperscript{21} Advocate General Mazák said that the Guidance does not bind the Court, but that it did provide a ‘useful point of reference’\textsuperscript{22}. It is noticeable that several judgments of the Court of Justice since the Guidance was published have emphasised that the function of Article 102 is not to protect less efficient competitors, culminating in the paragraph from Intel set out in the previous section; this is entirely consistent with the Commission’s Guidance.

Whatever the merits of the criticisms of Article 102 over the years, it is clear that a dominant firm (or one that fears that it might be found to be dominant) must behave with great caution. A transgression of Article 102 may have serious consequences. The Commission (or an NCA) may impose a large fine, as in Microsoft, Intel and Google; and an injured third party may bring an action for an injunction and/or damages in a national court\textsuperscript{23}. Furthermore the Commission has explicit power to impose structural remedies, albeit subject to limitations, pursuant to Article 7 of Regulation 1/2003; it did so for the first time in ARA Foreclosure\textsuperscript{24}, and several cases have been closed as a result (p. 185) of undertakings offering commitments to divest assets under Article 9 of Regulation 1/2003\textsuperscript{25}.

4. Undertakings

The term ‘undertaking’ has the same meaning in Article 102 as in Article 101, and has been discussed in chapter 3\textsuperscript{26}. Several of the cases on the meaning of an undertaking have arisen in the context of Article 102, for example where complaints were made to the Commission about the monopsonistic power of the Spanish Health Service\textsuperscript{27} or the standard-setting power of Eurocontrol\textsuperscript{28}; it was held that neither of those entities was acting as an undertaking, with the consequence that the competition rules did not apply to them. Similarly litigation in Austria turned on whether the Companies Registry in that country, responsible by law for storing data about companies registered there, was acting as an undertaking: the Court of Justice considered that this did not amount to economic activity, so that a refusal to supply data to third parties did not infringe Article 102\textsuperscript{29}.

The application of the competition rules to public undertakings or to undertakings entrusted with exclusive or special rights will be discussed in chapter 6\textsuperscript{30}; four points about Article 102 and the public sector should, however, be noted here. First, the fact that an undertaking has a legal monopoly does not, in itself, remove it from the ambit of Article 102\textsuperscript{31}. Secondly, Member States have a duty under Article 4(3) TEU not to do anything ‘which could jeopardise the attainment of the Union’s objectives’, one of which is the internal market which includes a system ensuring that competition is not distorted\textsuperscript{32}. This means that a Member State cannot confer immunity on undertakings from Article 102, except to the limited extent provided for in Article 106(2)\textsuperscript{33}. Thirdly, the derogation from the competition rules in Article 106(2) has consistently been interpreted narrowly\textsuperscript{34}. Lastly, Article 37 TFEU prevents Member States from discriminating in favour of their own state monopolies of a commercial character: this provides the Commission with an alternative weapon for dealing with some monopolies in the public sector\textsuperscript{35}.

(p. 186) 5. The Effect on Inter-State Trade

The meaning of this phrase was analysed in chapter 3\textsuperscript{36}. For the purpose of Article 102 particular attention should be paid to the Court of Justice’s judgment in Commercial Solvents v Commission\textsuperscript{37} in which it held that the requirement of an effect on trade between Member States would be satisfied where conduct brought about an alteration in the structure of competition in the internal market\textsuperscript{38}. This test is of particular importance in Article 102 cases: Article 102 can be applied only where there is already a dominant
position and it is unsurprising that the Commission will be concerned with the structure of
the market in such cases. In the Soda-ash decisions under Article 102 the Commission
held that rebates offered by ICI and Solvay in their respective markets had the effect of
reinforcing the structural rigidity of the EU market as a whole and its division along
national lines. In these decisions it was US exporters who were excluded from the EU, but
the Commission still held that there was an effect on inter-state trade: imports would have
helped to undermine the dominant positions of ICI and Solvay in their respective markets.

The Commission’s Guidelines on the effect on trade concept contained in Articles [101] and
[102] of the Treaty give specific consideration to the circumstances in which abusive
behaviour—for example exploitative abuses that harm downstream trading partners and
exclusionary abuses that harm competitors—might have an effect on trade between
Member States.

Under Regulation 1/2003 national courts and NCAs must apply Article 102 where an
abuse of a dominant position has an effect on trade between Member States. However
this does not preclude them from adopting or applying on their own territories stricter
national laws controlling unilateral conduct engaged in by undertakings; and the
obligation is without prejudice to the application of national laws that predominantly pursue
an objective different from those pursued by Articles 101 and 102.

(p. 187) 6. Dominant Position

Article 102 applies only where one undertaking has a ‘dominant position’ or where two or
more undertakings are ‘collectively dominant’. The expression ‘dominant position’ is not
one that will be found in the economics literature; rather it is a term of art that determines
the point at which the unilateral behaviour of an undertaking becomes subject to scrutiny
under Article 102.

The Court of Justice in United Brands v Commission laid down the following test of what
is meant by a dominant position:

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

Paragraph 65 of the Court’s judgment in United Brands can be understood to equate
dominance with the economist’s concept of substantial market power; the Commission does
so in paragraph 10 of its Guidance on Article 102 Enforcement Priorities where it says that
the notion of independence referred to by the Court is related to the degree of competitive
constraint exerted on the undertaking under investigation. Where competitive constraints
are ineffective, the undertaking in question enjoys ‘substantial market power over a period
of time’; the Guidance says that an undertaking has substantial market power if it is
‘capable of profitably increasing prices above the competitive level for a significant period
of time’. The same definition of dominance is used in the International Competition
Network’s (the ICN) Unilateral Conduct Workbook.

As noted in chapter 1, there are degrees of market power: at one end of the spectrum
would be a firm with no or only imperceptible market power; at the other end a firm which
is a true monopolist. Between these two extremes could be found firms with ‘some’, or
‘appreciable’, or ‘significant’, or ‘substantial’ market power. It is important to note that the
legal expression ‘dominant position’ is a binary term: either an undertaking is dominant and
subject to Article 102; or it is not, in which case its unilateral behaviour is not subject to EU
competition law. This is why a finding of dominance is so important; and (p. 188) why some
commentators would like there to be a fairly generous ‘safe harbour’ for market shares below a certain percentage.\textsuperscript{53}

A finding of dominance involves a two-stage assessment. The Court of Justice held in Continental Can v Commission\textsuperscript{54} that a proper definition of the relevant market is a necessary precondition for any application of Article 102. Market definition has been discussed in detail in chapter 1, in particular the ‘hypothetical monopolist’ or ‘SSNIP’ test; the problem of the ‘Cellophane Fallacy’ in Article 102 cases which might lead to the inclusion of false substitutes in the market definition; and the types of evidence that may be of assistance when defining relevant product, geographical and temporal markets.\textsuperscript{55}

Having defined the relevant market, it is necessary in an Article 102 case to determine whether an undertaking has a dominant position in that market. This cannot be determined purely by reference to an undertaking’s market share. A finding of a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative; it is necessary to examine (at least) three issues, as set out in paragraph 12 of the Guidance:

- constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors)
- constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry)
- constraints imposed by the bargaining strength of the undertaking’s customers (countervailing buyer power)

Each of these three criteria has been discussed in chapter 1.\textsuperscript{57} Some additional commentary will be provided here based on the judgments of the EU Courts and the decisional practice of the Commission in Article 102 cases.

\textbf{(A) Actual competitors}

True monopoly is rare, except where conferred by the state. The majority of cases are therefore concerned with the problem of deciding at what point an undertaking, though not a true monopolist, has sufficient power over the market to be dominant.

\textbf{(i) Statutory monopolies}

Various cases have concerned undertakings with a statutory monopoly in the provision of goods or services.\textsuperscript{58} The Court of Justice has rejected the argument that, because a monopoly is conferred by statute, this immunises the undertaking from Article 102; where an undertaking has a statutory monopoly it must comply with Article 102, its only special privilege being that conferred by Article 106(2).\textsuperscript{60}

\textbf{(p. 189) (ii) The relevance of market shares}

In Hoffmann-La Roche the Court of Justice pointed out that:

A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned.\textsuperscript{61}

The Commission’s Guidance on Article 102 Enforcement Priorities says that market shares provide a ‘useful first indication’ of the market structure and of the relative importance of the undertakings active on it.\textsuperscript{62} The Guidance goes on to explain that an assessment of market power requires that market conditions generally be taken into account, including
the dynamics of the market, the extent to which products are differentiated and the trend or development of market shares over time\textsuperscript{63}.

As far as Article 102 is concerned, it is obvious that the larger the market share, the more likely a finding of dominance. A market share of 100\% is rare in the absence of statutory privileges, although not unheard of\textsuperscript{64}. However some firms have been found to have very large market shares. For example in \textit{Tetra Pak I (BTG Licence)}\textsuperscript{65} Tetra Pak’s market share in the market for machines capable of filling cartons by an aseptic process was 91.8\%; and in \textit{BPB Industries plc}\textsuperscript{66} BPB was found to have a market share in plasterboard of 96\%, although the Commission had excluded wet plastering from the market definition. In \textit{Microsoft}\textsuperscript{67} Microsoft had over 90\% of the market for personal computer operating software systems and at least 60\% of the market for work group server operating systems\textsuperscript{68}. In \textit{Google}\textsuperscript{69} the Commission found that Google was dominant in each national market for general internet search throughout the 31 countries of the European Economic Area and that its market shares exceeded 90\% in most.

(a) \textit{The Court of Justice’s judgment in Hoffmann-La Roche v Commission}  
In \textit{Hoffmann-La Roche v Commission}\textsuperscript{70} the Court of Justice said:

\begin{quote}
41 ...Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time ... is by virtue of that share in a position of strength ...
\end{quote}

(p. 190) (b) \textit{The AKZO presumption of dominance where an undertaking has a market share of 50\% or more}  
In \textit{AKZO v Commission}\textsuperscript{71} the Court of Justice referred to the passage from \textit{Hoffmann-La Roche} quoted above and continued that a market share of 50\% could be considered to be very large so that, in the absence of exceptional circumstances pointing the other way, an undertaking with such a market share will be presumed dominant; that undertaking bears the evidential burden of establishing that it is not dominant. Clearly this is an important presumption, which means that firms are at risk of being found to be dominant where they fall considerably short of being monopolists in the strict sense of that term. Some critics of Article 102, who believe that it is applied in too intrusive a manner, would like to see the 50\% threshold in \textit{AKZO} raised\textsuperscript{72}; perhaps to 75\%; the binary effect of Article 102, whereby conduct that is legal when practised by a non-dominant firm becomes illegal when the firm is dominant, would be less pronounced if the presumption of dominance was set at a higher market share threshold. However the EU Courts have frequently affirmed the \textit{AKZO} presumption\textsuperscript{73}; indeed in \textit{AstraZeneca} the General Court went so far as to say that the Commission could not disregard the importance to be attached to AZ’s very large market share throughout the relevant period of alleged abuse\textsuperscript{74}.

The Commission does not refer to the \textit{AKZO} presumption in its \textit{Guidance on Article 102 Enforcement Priorities}\textsuperscript{75}, perhaps suggesting that it is not keen on a presumption that attaches such weight to a market share figure. Instead it notes at paragraph 15 that the higher the market share, and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position; however the Commission also says that it would come to a final conclusion on dominance only after examining all the relevant factors that may be relevant to constraining the behaviour of the undertaking under investigation.
(c) Findings of dominance below a market share of 50%

The Court of Justice held in *United Brands* that that firm, with a market share in the range of 40% to 45%, was dominant. In that case other factors were considered to be significant: the market share alone would not have been sufficient to sustain a finding of dominance; however the case shows that a firm supplying less than 50% of the market may be found to hold a dominant position. In *United Brands* the Court said that, even though there was lively competition on the market at certain periods of the year, United Brands could still be held to be dominant for the purposes of Article 102; a dominant position does not therefore imply the absence of any competitive constraint.

The decision in *Virgin/British Airways* marked the first (and only) occasion on which an undertaking with a market share of less than 40% has been found by the Commission (p. 191) to be in a dominant position under Article 102. BA was held to be dominant in the UK market for the procurement of air travel agency services with a market share of 39.7%. On appeal the General Court agreed that BA was dominant, noting that its market share was considerably larger than that of any other individual competitor or of the next five competitors combined; its position was reinforced by the world rank held by BA in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network; the Court also considered that BA was an obligatory business partner for travel agents. The General Court stated specifically that the fact that BA's market share was in decline could not, in itself, demonstrate that it was not dominant.

Some commentators would like there to be a ‘safe harbour’ below which a firm could not be found to be dominant. However the case law of the EU Courts does not provide one, and the Commission is not in a position to create one in the absence of jurisprudence enabling it to do so. In paragraph 14 of its *Guidance on Article 102 Enforcement Priorities* the Commission says that dominance is ‘not likely’ if the undertaking’s market share is below 40%; however it goes on to say that there could be some cases below that figure that may deserve its attention. Clearly this falls short of a safe harbour.

(B) Potential competitors

As was stressed in chapter 1 and earlier in this chapter, market shares do not in themselves determine whether a firm has a dominant position; in particular they cannot indicate the competitive pressure exerted by firms not yet operating on the market but with the capacity to enter it in a timely manner. The Commission’s *Guidance on Article 102 Enforcement Priorities* explains the importance of the impact of expansion by existing competitors and entry by potential ones to any assessment of dominance. In particular paragraph 17 provides examples of various barriers, such as legal barriers; economic advantages enjoyed by the dominant undertaking; costs and network effects that impede customers from switching from one supplier to another; and the dominant firm’s own conduct and performance.

(i) Legal barriers

Intellectual property rights may constitute barriers to entry, depending on their strength and duration, although they do not, in themselves, confer dominance. In *Tetra Pak I (BTG Licence)* the acquisition by Tetra Pak of a company that had the benefit of an exclusive patent and know-how licence was regarded as a factor indicating dominance, as it made entry to the market more difficult for other firms that would be unable to gain access to the licensed technology. In *Servier* the Commission found that the range of patents owned by Servier and its willingness to enforce them were barriers to entry contributing (p. 192) to its dominant position. Other obvious legal barriers to entry are Government licensing requirements and planning regulations, governmental control of frequencies for
the transmission of radio signals\textsuperscript{86}, statutory monopoly power\textsuperscript{87} and tariffs and non-tariff barriers.

(ii) Economic advantages

Various economic advantages have been considered to be barriers to entry or expansion:

- the Court of Justice considered economies of scale to be a relevant factor in United Brands\textsuperscript{88}, and the Commission referred to this matter specifically in BPB Industries plc\textsuperscript{89} and in Amazon\textsuperscript{90}; economies of scope would no doubt be treated in the same way\textsuperscript{91}
- the control of an essential facility could confer an economic advantage on an incumbent undertaking\textsuperscript{92}, as could preferential access to natural resources, innovation or R&D; this factor was emphasised by the Commission and the General Court in Telefónica\textsuperscript{93}
- the Court of Justice treated an undertaking’s superior technology as an indicator of dominance in United Brands\textsuperscript{94}, Hoffmann-La Roche\textsuperscript{95} and Michelin\textsuperscript{96}
- in Continental Can\textsuperscript{97} the Commission regarded that firm’s access to the international capital market as significant, and this factor was stressed in United Brands\textsuperscript{98}
- in United Brands\textsuperscript{99} the Court of Justice described the extent to which UBC’s activities were integrated—it owned banana plantations and transport boats and it marketed its bananas itself—and said that this provided that firm with commercial stability which was a significant advantage over its competitors
- in Hoffmann-La Roche\textsuperscript{100} the Court of Justice pointed to Roche’s highly developed sales network as a relevant factor conferring upon it commercial advantages over its rivals. The Commission has treated both vertical integration and the benefit of well-established distribution systems as a barrier to entry in several other decisions\textsuperscript{101}, since this could impede access for a would-be entrant to the market
(p. 193) • in United Brands\textsuperscript{102} the Court of Justice considered that United Brand’s advertising campaigns and brand image were significant factors indicating dominance: United Brands had spent considerable resources establishing the Chiquita brand name which was well protected by trade marks. In its second Michelin decision the Commission relied upon the ‘indisputable’ quality and reputation of the Michelin tyre brand in its finding of dominance\textsuperscript{103}. The Commission has noted (in cases under the EU Merger Regulation) that advertising expenditure could make entry difficult into the market for fast-moving consumer goods such as soft drinks\textsuperscript{104}, sanitary protection\textsuperscript{105} and toilet tissue\textsuperscript{106}
- in France Télécom\textsuperscript{107} the General Court held that Wanadoo’s ‘link-up’ with France Télécom conferred on it such advantages over its competitors as to contribute to its dominance
- in AstraZeneca\textsuperscript{108} the General Court and the Commission considered AZ’s ‘first-mover’ status to be a factor indicating dominance.

(iii) Costs and network effects

Costs, and other impediments faced by customers in switching to a new supplier, may be a barrier to expansion or entry\textsuperscript{109}. Such costs may result from network effects\textsuperscript{110}: this was a relevant consideration in Microsoft\textsuperscript{111}. The Commission said that the ubiquity of Microsoft in the personal computer operating systems market meant that nearly all commercial applications software was written first and foremost to be compatible with the Microsoft platform. This gave rise to a self-reinforcing dynamic: the more users there were of the
Microsoft platform, the more software was written for it, and vice versa. The Commission again referred to network effects in Google.

The switching costs in Motorola were of a different kind from Microsoft and Google: the widespread adoption of the 2G standard for smartphones meant that mobile phone manufacturers were ‘locked-in’ to using Motorola’s patented technology, and could not switch to other suppliers.

(iv) Conduct

The Court of Justice in United Brands v Commission agreed with the idea that the conduct of a firm could be taken into account in deciding whether it is dominant. This means, for example, that it might be legitimate to take into account the fact that a firm has offered discriminatory rebates to certain customers in deciding whether it is dominant: the rebates may themselves prevent competitors entering the market and so constitute a barrier to entry. In Michelin v Commission the Commission had relied on Michelin’s price discrimination as an indicator of dominance. Michelin argued before the Court of Justice that this approach was circular: the Commission was saying that because it had offered discriminatory prices, it was dominant, and because it was dominant its discriminatory prices were an abuse. The Court of Justice did not explicitly deal with this issue in its judgment, but in affirming the Commission’s decision there is tacit approval of considering conduct as a factor indicating dominance. The Commission also took conduct into account in determining dominance in Eurofix-Bauco v Hilti, AKZO and in Michelin II.

(v) Performance

The economic performance of an undertaking may be a factor indicating dominance. The fact that a firm had idle capacity was regarded as significant in Hoffmann-La Roche v Commission. In Servier the Commission found that the persistent and substantial ‘economic rents’ of Servier were direct evidence of its dominance.

(C) Countervailing buyer power

As explained in chapter 1, a further issue of significance is whether a supplier or suppliers are confronted with buyer power. In Motorola the Commission emphasised that one of the key elements of countervailing buyer power is a buyer’s ability (or credible threat) to switch to competing suppliers, which Apple lacked in that case.

(D) Previous findings of dominance

In Coca-Cola Co v Commission the General Court held that, whenever the Commission adopts a decision applying Article 102 (or the EU Merger Regulation), it must define the relevant market and make a fresh analysis of the conditions of competition within it on the basis of the available evidence at the appropriate time; this may lead to a determination of the market which is different from a previous finding. Furthermore a national court (or an NCA) would not be bound in a later case by a previous finding of dominance by the Commission in a different case. However the actual decision in an Article 102 case may serve as a basis for an action for damages brought by a third party before a national court in relation to the same facts, even where the Commission’s decision did not impose a fine; (p. 195) and the Commission is entitled to take into account past assessments of the market in a current investigation when there is nothing to suggest that the conditions of competition on the relevant market have substantially changed compared with earlier decisions.
(E) The degree of market power and super-dominance

The outcome of several Article 102 cases seems to have turned on the degree of market power that the dominant undertaking enjoyed. For example Tetra Pak’s market share in the market for aseptic cartons and carton-filling machines was in the region of 90 to 95%, and it was found to have abused a dominant position where its conduct did not take place in the market in which it was dominant, and was not intended to benefit its position in that market\(^\text{132}\). In *Compagnie Maritime Belge* the shipping conference’s market share was 90% or more\(^\text{133}\), and it was found to be guilty of an abuse by selectively cutting its prices to some customers, but not to below cost in the sense of the law on predatory pricing\(^\text{134}\), whilst charging higher prices to others. In *IMS Health*\(^\text{135}\) the Commission, when ordering IMS to grant a licence of its copyright to third parties on a non-discriminatory basis, noted that IMS was in a ‘quasi-monopoly situation’\(^\text{136}\). In *Microsoft*\(^\text{137}\) the Commission said that Microsoft, with a market share above 90%, had an ‘overwhelmingly’ dominant position\(^\text{138}\). The Commissioner for Competition said after the General Court’s judgment upholding the Commission’s decision that the Court’s judgment ‘sends a clear signal that super-dominant companies cannot abuse their position to hurt consumers and dampen innovation by excluding competition in related markets’\(^\text{139}\).

The Court of Justice in *TeliaSonera*\(^\text{140}\) said that, as a general rule, the degree of market strength of a dominant firm is relevant to the assessment of the effects of that firm’s conduct rather than to the question of whether an abuse as such exists\(^\text{141}\). The Court stated the same thing in *Tomra*\(^\text{142}\), and in *Intel* it said that the Commission should look at the extent of an undertaking’s dominant position on the relevant market when considering the likely effects of conditional rebates\(^\text{143}\). The conduct of a firm with a particularly strong market position is more likely to have a correspondingly strong effect on the market and, therefore, is more likely to fall within the mischief of Article 102. A different way of expressing this point is to identify a concept over and above dominance, that we might call ‘super-dominance’, where the risks of being found to be acting abusively are higher due to the effects of a super-dominant firm’s conduct on the market.

The Commission does not use the expression ‘super-dominance’ in its *Guidance on its Article 102 Enforcement Priorities*. However, one of the factors that the Commission takes into account when deciding whether to intervene is the market strength of the dominant firm. The Commission says that the stronger the dominant position of the undertaking (p. 196) under investigation, the higher the likelihood that conduct protecting that position would have an anti-competitive foreclosure effect on the market. This approach accords with the judgments in *TeliaSonera* and *Tomra*.

7. A Substantial Part of the Internal Market

Once it has been established that a firm has a dominant position on the market, one further jurisdictional question must be answered: is that dominant position held in the whole or a substantial part of the internal market? If not Article 102, by its own terms, does not apply; however the domestic equivalent of Article 102, a variant of which will be found in all the Member States of the EU, may apply.

Obviously there is no problem with the issue of substantiality where an undertaking is dominant throughout the EU. The position may be less obvious where dominance is more localised than this. Suppose that a firm is dominant in just one Member State, or even in a part of one Member State: when will that area be considered to constitute a substantial part of the EU? Four points should be noted.
The first is that the requirement that dominance should exist over a substantial part of the internal market is not the same as the definition of the relevant geographic market: that concept is part of the substantive assessment as to whether an undertaking has a dominant position.

A second point arises from the judgment of the Court of Justice in *Suiker Unie v Commission*[^144^]. The Court said that for this purpose:

the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered[^145^].

This indicates that substantiality is not simply a question of relating the *physical* size of the geographic market to the EU as a whole. In *Suiker Unie* the Court considered the ratio of the volume of Belgian and South German production of sugar to EU production overall and concluded on this basis that each of those markets could be considered to be substantial.

The third point is that it is likely that each Member State would be considered to be a substantial part of the internal market, in particular where an undertaking enjoys a statutory monopoly[^146^], and *Suiker Unie* further established that parts of a Member State can be[^147^].

The fourth point is that neither the EU Courts nor the Commission have laid down that any particular percentage of the internal market as a whole is critical in determining what is substantial. In *BP v Commission*[^148^] Advocate General Warner took the view that sole reliance should not be placed on percentages in such cases and was of the opinion that the Dutch market for petrol, which represented only about 4.6% of the EU market as a whole, could be considered substantial. The Court of Justice did not comment on this issue, as it quashed the Commission’s finding of abuse on other grounds.

There are numerous examples of the test of substantiality having been satisfied in relation to a single facility: in each of *Merci Convenzionali Porto di Genova v Siderurgica* (p. 197) *Gabriella*[^149^], *Sealink/B&I—Holyhead: Interim Measures*[^150^], *Sea Containers v Stena Sealink—Interim Measures*[^151^], *Flughafen Frankfurt/Main*[^152^], *Corsica Ferries*[^153^], *Portuguese Airports*[^154^], *Ilmailulaitos/Luftfartsverket*[^155^] and *Spanish Airports*[^156^] ports or airports have been found to be sufficiently substantial. Furthermore the Court of Justice has held that, where national law confers a contiguous series of monopolies within a Member State which, taken together, cover the entire territory of that state, that law creates a dominant position in a substantial part of the internal market[^157^].

8. Abuse

(A) Introduction

It is not controversial to say that Article 102 is controversial. In the case of Article 101 undertakings are liable only when they enter into agreements or concerted practices that restrict competition; a great deal of the Commission’s (and of the NCAs’) attention is focused on the deliberate and secret cartelisation of markets, and there are few apologists today for this kind of behaviour[^158^]. Article 102, on the other hand, bears upon the individual behaviour of dominant firms[^159^]; by its nature the application of Article 102 involves a competition authority or a court having to decide whether that behaviour deviates from ‘normal’ or ‘fair’ or ‘undistorted’ competition, or from ‘competition on the merits’, none of which expressions is free from difficulty. It should be added that the controversy surrounding Article 102 is not unique to the EU: all systems of competition law contain provisions on the unilateral conduct of firms with substantial market power, and competition authorities and courts worldwide have had to grapple with the issues under consideration in this chapter. Significant work has been undertaken under the auspices of the ICN on this topic: in particular the Unilateral Conduct Working Group, established in

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2006, has adopted Recommended Practices on Predatory Pricing Analysis Pursuant to Unilateral Conduct Laws; it is also preparing a ‘workbook’ on the analysis of unilateral conduct, and has so far produced draft chapters on Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, Predatory Pricing Analysis and Exclusive Dealing/Single Branding and Tying and Bundling. The text that follows will examine the meaning of abuse by reference to the underlying purpose of Article 102 as well as the jurisprudence of the EU Courts; it will then consider three categories of cases under Article 102, namely exploitative, exclusionary and single market abuses. However, a few preliminary points may be helpful.

(B) Four preliminary points

(i) The ‘special responsibility’ of dominant firms

It is not unlawful for a firm to have a dominant position; what is prohibited is the abuse of a dominant position. However the Court of Justice in Michelin v Commission stated that a firm in a dominant position has a ‘special responsibility not to allow its conduct to impair undistorted competition’ on the internal market. This statement is routinely repeated in the judgments of the EU Courts and the decisions of the Commission on Article 102. In a sense it is a statement of the obvious: it is clear that Article 102 imposes obligations on dominant firms that non-dominant firms do not bear. Unilateral behaviour is not controlled under Article 101, which applies only to collusive conduct; unilateral acts however can amount to an infringement of Article 102. However the conundrum for anyone interested in Article 102 is to determine what, precisely, is meant by an abuse of a dominant position.

(ii) Article 102 does not contain an exhaustive list of what amounts to abusive behaviour

Article 102 gives examples of conduct that is abusive—charging unfair prices, limiting production and discrimination that places certain trading parties at a competitive disadvantage—but this list is not exhaustive; the Commission and the EU Courts have applied Article 102 to numerous practices not specifically mentioned in it. An example of this is the Court of Justice’s judgment in AstraZeneca AB v Commission in which it held that a pattern of making misleading misrepresentations to patent offices in various Member States that led to the extension of patent protection for pharmaceutical products to which AZ was not, in fact, entitled amounted to an abuse of a dominant position; the same was true of AZ’s requests to public authorities to deregister market authorisations for particular drugs, thereby impeding entry to the market by generic manufacturers. A reading of the list of examples of abusive behaviour in Article 102 would not prepare any but the most imaginative reader to suppose that these practices were abusive; but the EU Courts appear to have had no hesitation in finding them to be illegal. Examples of practices found to be abusive will be given later in this chapter and will be considered in depth in chapter 17 (non-pricing abuses) and chapter 18 (pricing abuses).

(iii) False positives and false negatives

A difficulty with Article 102 is that the line between pro- and anti-competitive conduct is not always an easy one to draw, and there is an obvious danger that, if Article 102 is applied too aggressively, firms might refrain from conduct that is in fact pro-competitive. Clearly it would be the ultimate paradox if a law designed to promote competition in fact (p. 199) were to have the effect of diminishing it. However it is equally clear that unduly lenient treatment on the part of competition authorities and courts could lead to the exclusion from the market of efficient competitors, with adverse consequences for the competitive process and consumer welfare.
A more stylised way of presenting this problem is to consider the difference between what are sometimes referred to as ‘false positives’ and ‘false negatives’\(^{168}\).

**A false positive** occurs where a competition authority incorrectly concludes that pro-competitive behaviour is abusive: a harm to the firm(s) found guilty, and also to consumers, since the pro-competitive behaviour will be prohibited. The problem here is that the law is over-inclusive.

**A false negative** occurs where a competition authority incorrectly concludes that anti-competitive behaviour is not illegal and therefore permits it: a harm to consumers. Here the law is under-inclusive.

Given the inherent difficulty of determining which unilateral acts are anti-competitive and which are pro-competitive, it is inevitable that competition authorities will sometimes make errors; a policy question when framing rules on unilateral behaviour is to decide which of the two errors is preferable. There is an undoubted perception that the enforcement authorities and the courts in the US are more concerned about false positives than false negatives: that is to say that they err on the side of non-intervention under section 2 of the Sherman Act 1890, which forbids the monopolisation of markets\(^{169}\), whereas the Commission and the EU Courts perhaps tend the other way\(^{170}\). In *Verizon Communications Inc v Law Offices of Curtis Trinko*\(^{171}\) the US Supreme Court, in a refusal to supply case, was explicit about its fear of false positives:

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs ... Mistaken inferences and the resulting false condemnations are ‘especially costly, because they chill the very conduct the antitrust laws are designed to protect’ ... The cost of false positives counsels against an undue expansion of s. 2 liability\(^{172}\).

The same attitude helps to explain the conclusion of the Supreme Court in *Pacific Bell v linkLine*\(^{173}\), where it held that a margin squeeze is not an independent infringement of section 2 of the Sherman Act\(^{174}\). In contrast one might note that on many occasions when (p. 200) the EU Courts have been invited to expand Article 102 liability they have done so: for example when establishing that Article 102 could apply to mergers\(^{175}\); when deciding that there did not need to be any causation between the market power held by a dominant firm and its abusive behaviour\(^{176}\); when accepting that the dominance, abuse and effects of the abuse can be in different markets\(^{177}\); when extending the application of Article 102 to collective, as well as to individual, dominance\(^{178}\), and when acknowledging the possibility of an individual abuse of a collective dominant position\(^{179}\). This record does not suggest the same reticence as that of the US Supreme Court in *Verizon*.

**(iv) Single and continuous abuse**

Just as it is possible under Article 101 for there to be a ‘single overall agreement’ that violates that provision\(^{180}\), so too it is possible for there to be a ‘single overall abuse’ (or a ‘single and continuous abuse’) under Article 102. For example in *AstraZeneca v Commission*\(^{181}\) the General Court confirmed the finding of the Commission that AstraZeneca was guilty of a ‘single and continuous’ abuse consisting of a deliberate strategy of misleading national patent offices\(^{182}\). In *Intel v Commission*\(^{183}\) the Court of Justice concluded that, for the purposes of establishing jurisdiction on the basis of qualified effects, it was appropriate to look at Intel’s ‘overall strategy’, rather than looking at each separate act on its part, which ‘would lead to an artificial fragmentation of comprehensive anticompetitive conduct’\(^{184}\). The Commission found a single overall abuse in *Telekomunikacja Polska*\(^{185}\), in *Romanian Power Exchange: OPCOM*\(^{186}\) and in *Servier*\(^{187}\).
(C) What is the purpose of Article 102?

Before considering the jurisprudence of the EU Courts and the practice of the Commission on the meaning of abuse, it is necessary to give some consideration to the underlying purpose of Article 102. The various possible objectives of competition law have been discussed in chapter 1 of this book. There it was pointed out that competition authorities today stress the central importance of consumer welfare when applying competition law, but that other matters such as the redistribution of wealth and the protection of small firms against more powerful rivals have also been influential at various points in time.

(i) Protection of competitors or protection of competition?

A specific criticism of Article 102 is that it is used to protect competitors, including inefficient ones, rather than the process of competition, which is a quite different matter. According to this view Article 102, in effect, subjects dominant firms to a handicap: competitive acts, such as price reductions or the bundling of different products, that are perfectly legal for non-dominant firms, become illegal when a firm is dominant. The complaint is that this means that firms that possess superior efficiency are restrained in order to provide a place in the competitive arena for less efficient ones. This characteristic of Article 102 would be exacerbated if it is, indeed, the case that institutions in the EU have a tendency to be more concerned about false negatives than false positives.

The criticism that Article 102 protects competitors rather than competition brings to mind Robert Bork’s attack on the antitrust rules as they were applied in the US in the 1960s and 1970s, and in particular what he regarded as the ‘uncritical sentimentality in favour of the small guy’ of the enforcement authorities and the courts there at that time. The most high-level accusation of the EU’s supposed predilection for protecting competitors rather than competition came from the Assistant Attorney General for Antitrust at the US Department of Justice in response to the judgment of the General Court of the EU in September 2007 upholding the European Commission’s decision that Microsoft had abused its dominant position. After expressing ‘concern’ about the standard applied to unilateral conduct in Europe, the Assistant Attorney General said that:

In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors.

Without saying more, his meaning could hardly have been clearer: that in the EU the prime concern is not with the protection of consumers through competition, but with the protection of competitors.

Some commentators lay the blame for what they see as an unduly interventionist application of Article 102 at the door of the school of ordoliberalism which, through its concern to protect economic freedom, including the right of access to markets unconstrained by barriers such as exclusive agreements or rebating and discounting practices having analogous effects, led to the adoption of formalistic rules capable of having perverse consequences.

However, in the opinion of the authors of this book the assertion that the fingerprints of the ordoliberal school are to be found on the case law of Article 102, and that this has led to a systematic bias in favour of competitors and against efficient dominant firms, is at best a misdescription of the true position and at worst little more than a slogan by protagonists of minimalist intervention. One commentator has examined the travaux préparatoires of Article 102 and suggested that its drafters were mainly concerned with increasing economic efficiency; their intention was not to protect competitors, but their customers. This explains why the language of Article 102 is predominantly focused on exploitative behaviour, such as the imposition of unfair selling prices, unfair trading conditions and the limitation of markets to the prejudice of consumers, rather than (p. 202) exclusionary...
abuses. It also tends to refute the widely-held belief in the English-language literature that Article 102 is based on ordoliberal foundations.

(ii) Article 102 protects competition; and competition is for the benefit of consumers

Numerous statements to the effect that Article 102 is concerned with the protection of competition rather than the protection of competitors can be found. Many of these come from the Commission (or from Commission officials), but they can also be found in judgments of the EU Courts, particularly in recent years in judgments such as Deutsche Telekom, TeliaSonera, Post Danmark I, Post Danmark II and Intel.

A clear statement to this effect was made by Neelie Kroes, the former Commissioner for Competition, when discussing the Commission’s review of exclusionary abuses at the annual conference at Fordham in September 2005:

My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm.

I like aggressive competition—including by dominant companies—and I don’t care if it may hurt competitors—as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 102 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market.

The same idea is stated at several points in the Commission’s Guidance on Article 102 Enforcement Priorities. A few examples illustrate the point. In paragraph 5 the Commission says that:

The Commission ... will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.

In paragraph 6 it says that:

[T]he Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market (emphasis added).

The Commission adds, in paragraph 23, that:

[T]he Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking (emphasis added).

Judgments of the Court of Justice themselves stress the importance of protecting the process of competition for the benefit of consumers. Even before the judgment of the Court of Justice in Intel, it seemed to go out of its way to stress that Article 102 protects only ‘as-efficient’ competitors, and not inefficient ones. At paragraph 177 of its judgment in Deutsche Telekom the Court said that:
Article [102 TFEU] prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors (emphasis added)\(^{198}\).

The same language occurs repeatedly throughout the judgment\(^ {199}\); the same is true of the judgments in *TeliaSonera*\(^ {200}\), *Post Danmark*\(^ {201}\) and *Intel*\(^ {202}\).

Collectively this reveals a consistent tendency on the part of the Court of Justice and the Commission, at least in recent times, to stress competition, efficiency and consumer welfare as the key objectives of Article 102. It is difficult, therefore, to sustain the argument that the EU institutions today have an active policy of protecting competitors rather than the process of competition.

**(D) Jurisprudence on the meaning of abuse**

Article 102 does not contain an exhaustive list of all the practices that can amount to an abuse. Nor is there one particular judgment of the Court of Justice or the General Court that provides an all-encompassing definition of what is meant by abuse. This is understandable: cases on abuse of dominance turn on their own particular facts—a point stressed on numerous occasions\(^ {203}\)—and the EU Courts have refrained from broad theoretical statements, preferring instead to decide each case on its merits (albeit taking into account earlier judgments). As Philip Lowe, at the time the Director-General of DG COMP, said in his remarks on unilateral conduct in Washington in September 2006:

[](Just as physicists strive to find the theory that unifies Newtonian physics and quantum mechanics, so economists strive to find the theory that unifies the various aspects of anti-competitive unilateral conduct. And the economists, just as the physicists, have not yet found it\(^ {204}\).

**(i) Hoffmann-La Roche v Commission**

One paragraph that is regularly cited on the meaning of abuse will be found in *Hoffmann-La Roche v Commission*\(^ {205}\). At paragraph 91 the Court of Justice said that 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 transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

(p. 204) This is an important paragraph, but it does not provide an overarching definition of abuse. For example it does not capture the idea of exploitative, as opposed to exclusionary, practices of a dominant firm, such as charging customers excessively high prices: such conduct cannot be said to hinder competition, and yet it can undoubtedly amount to an abuse of a dominant position, as Article 102 explicitly states. However the Court’s judgment in *Hoffmann-La Roche* does introduce the idea that dominant undertakings must refrain from ‘methods different from those which condition normal competition’. Of course this begs the question: what is ‘normal’ competition, a vague and indeterminate word\(^ {206}\). However the idea of ‘normal’ competition comes more clearly into focus if slightly different language is used: namely that dominant firms should ‘compete on the merits’, and that competition that is not on the merits is ‘abnormal’ competition.
(ii) Competition on the merits

The EU Courts use the language of competition on the merits, noticeably so in some recent judgments. For example in *Deutsche Telekom v Commission*207 the Court of Justice said, after quoting from paragraph 91 of *Hoffmann-La Roche*, that a dominant firm must not strengthen its dominant position:

By using methods other than those which come within the scope of competition on the merits208.

In *AstraZeneca v Commission*209 the Court of Justice commenced its discussion of abuse by stating that a dominant firm must not eliminate a competitor other than by methods that come within the scope of competition on the merits210. In *Post Danmark I*211, after noting that not every exclusionary effect is necessarily detrimental to competition, the Court of Justice said that:

Competition on the merits may, by definition, lead to the departure from the market or the marginalization 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 innovation212.

The Court of Justice repeated this statement in *Intel*213. The Commission has given examples of what it considers to be competition on the merits in paragraph 5 of its *Guidance on Article 102 Enforcement Priorities*: offering lower prices, better quality and a wider choice of new and improved goods and services. When compared to business behaviour of this kind, it is not difficult to see that other acts—such as the misleading of patent authorities leading to the award of additional patent protection from generic producers of pharmaceutical products and payments for delaying the launch of a competing product—do not amount to competition on the merits, and are therefore abusive.

(E) Are there or should there be any *per se* rules under Article 102?

The discussion so far suggests that Article 102, as applied today, is concerned to protect consumer welfare; it does not protect competitors as such; and that dominant firms should compete on the merits and refrain from ‘abnormal’ competition. However, even if this is the case, there remains a problem: can these ideas be expressed in administrable rules capable of being applied by competition authorities, courts, professional advisers and dominant undertakings themselves? More specifically, is it possible to avoid the problem of false positives and false negatives, both of which are undesirable in principle?

One of the most common complaints about Article 102 is that the Commission and the EU Courts apply it in too formalistic a manner. This criticism can be articulated in various ways. One is the argument that some practices appear to be unlawful *per se*, but that *per se* rules are inappropriate for behaviour such as price cutting and refusals to deal which may, depending on the facts of a particular case, be pro-competitive, anti-competitive, or neutral. Another way of voicing the same criticism is to argue that the Commission and the EU Courts often fail to demonstrate how a particular practice could have significant effects on the market; some critics argue that they fail to articulate a convincing theory of harm and/or to produce evidence that adverse effects would follow from the practice under investigation.

(i) Are there any *per se* rules under Article 102?

Historically there was a tendency on the part of both the EU Courts and the Commission to apply *per se* rules, at least to some abuses. This was particularly true of the law on loyalty rebates. The Court of Justice in *Hoffmann-La Roche v Commission* had formulated a rule on exclusive dealing and loyalty rebates by a dominant undertaking in *per se* terms214. In paragraph 89 of its judgment, after saying that it would be unlawful for a dominant firm to
enter into exclusive dealing agreements with customers, it continued that the same would be true where that firm:

[a]pplies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.

This approach was followed in several cases on rebates\textsuperscript{215}.

In \textit{Intel v Commission}\textsuperscript{216} the General Court continued to adopt a strict approach to rebates granted in return for exclusivity, which it said were illegal unless the dominant firm could show an objective justification for granting them\textsuperscript{217}. However there was an increasing intellectual consensus against the application of \textit{per se} rules to unilateral behaviour, and the judgment of the General Court in \textit{Intel} attracted particular hostility because of its ‘formalistic’ approach to exclusivity rebates. On appeal the Court of Justice in \textit{Intel v Commission}\textsuperscript{218} appears to have recognised this criticism and has, in effect, put an end to \textit{per se} analysis under Article 102, as explained in the following section.

**(ii) Recent case law and decisions do require effects analysis**

The Commission in its \textit{Guidance on Article 102 Enforcement Priorities} said that it would concentrate its enforcement activity on practices likely to have seriously anti-competitive (p. 206) effects on the market. In various Article 102 decisions the Commission has sought to produce evidence against the application of \textit{per se} rules to unilateral behaviour, even where it considered that it was not legally obliged to do so: this was true, for example, of the decisions in \textit{Microsoft}\textsuperscript{219}, \textit{Intel}\textsuperscript{220}, \textit{Servier}\textsuperscript{221} and \textit{Google}\textsuperscript{222}.

Several judgments of the Court of Justice have stressed the need for a demonstration of actual or likely anti-competitive effects. For example in \textit{Deutsche Telekom v Commission}\textsuperscript{223} the Court of Justice stated that potential anti-competitive effects must be demonstrated before a margin squeeze is condemned as unlawful\textsuperscript{224}. In \textit{TeliaSonera}\textsuperscript{225} it said that:

\begin{quote}
in order to establish whether [a margin squeeze] is abusive, that practice must have an anti-competitive effect on the market\textsuperscript{226}.
\end{quote}

In \textit{Post Danmark I} the Court of Justice said that when determining whether a pricing practice could be abusive it was necessary to take into account ‘all the circumstances’ which would include the likely effects of the practice in question\textsuperscript{227}, a formulation repeated in \textit{Post Danmark II}\textsuperscript{228}. In \textit{Intel v Commission} the General Court seemed to be swimming against this tide by saying that a rebate given in return for exclusivity was presumptively unlawful unless it could be objectively justified\textsuperscript{229}. On appeal the Court of Justice, at paragraph 137 of its judgment, cited paragraph 89 of the judgment in \textit{Hoffmann-La Roche}, set out in the previous section, that appeared to apply a \textit{per se} rule to loyalty rebates; however in paragraph 138 the Court added an important qualification:

\begin{quote}
However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.
\end{quote}

This ‘clarification’ of the law means that if a dominant firm, in response to an allegation of abuse, argues that the practice in question could not have a foreclosure effect, the Commission is obliged to address that argument. It is hard to imagine that a dominant firm that is convinced that its behaviour is not anti-competitive would not submit such evidence. It follows that the Court’s qualification would seem, \textit{de facto}, to mean that conduct can be abusive only where it can be shown to be capable of having anti-competitive effects on as-
efficient competitors. To put the point another way, there is no *per se* illegality under Article 102.

In passing it should be noted that the specific question in *Intel* was whether exclusivity rebates offered by Intel to its customers were abusive. The Court of Justice concluded that the General Court had failed to examine arguments raised by Intel as to the way in which the Commission conducted its assessment of its rebates: for this reason the General Court’s judgment was set aside and the matter was referred back to it for further (p. 207) examination. It remains to be decided, therefore, whether the rebates in this particular case were abusive\textsuperscript{230}.

**(iii) De minimis doctrine under Article 102?**

An interesting question related to effects analysis is whether the conduct of a dominant firm could fall outside Article 102 because its effect is *de minimis*. In *Intel v Commission*\textsuperscript{231} the General Court held that in a case of abuse of dominance there is no *de minimis* doctrine: since dominance means that the structure of competition on the market is already weakened, it follows that any further weakening of competition may be abusive. This was based on a sentence in paragraph 123 of the Court of Justice’s judgment in *Hoffmann-La Roche v Commission*\textsuperscript{232}. In *Post Danmark II*\textsuperscript{233} a Danish court specifically asked the Court of Justice whether there was an ‘appreciability’ requirement under Article 102 and it received a very clear answer. After citing paragraph 123 of *Hoffmann-La Roche* the Court of Justice said:

> It follows that fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates.

What is unclear is whether the judgment of the Court of Justice in *Intel* by implication overrules *Post Danmark II*. As noted, paragraph 138 of *Intel* states that a dominant firm may respond to an accusation of abuse by submitting evidence that the conduct in question could have no foreclosure effect; if *Post Danmark II* remains good law, this must mean that the dominant firm must prove that there would be no foreclosure effect whatsoever, rather than that any foreclosure would be *de minimis*.

The authors of this book consider that there should be a *de minimis* threshold in Article 102 cases. The law ought not to concern itself with trivial or insignificant effects on competition. To require the person alleging an infringement of Article 102 to show an appreciable effect on the market would be consistent with the Court’s judgments in *TeliaSonera* and *Intel*, both of which indicate that the degree of dominance is relevant to effects analysis\textsuperscript{234}.

**(F) Exploitative, exclusionary and single market abuses**

When reviewing the decisional practice of the Commission and the jurisprudence of the EU Courts, it is possible to identify at least two, and perhaps three, types of abuse. The first consists of *exploitative abuses*. The most obvious objection to a monopolist is that it is in a position to reduce output and increase the price of its products above the competitive level, thereby exploiting customers\textsuperscript{235}. However in the absence of barriers to entry a monopolist earning monopoly profits would be expected to attract new entrants to the (p. 208) market: in other words exploitation of a monopoly position may in itself increase competition over time.
Of greater long-term significance is behaviour by a dominant firm designed to, or which might have the effect of, preventing the development of competition, and much of the case law of the EU Courts and the decisional practice of the Commission has been concerned with exclusionary abuses of this kind. The Commission’s Guidance on Article 102 Enforcement Priorities recognises the distinction between exploitative and exclusionary abuses, and paragraph 7 explicitly states that it is limited to exclusionary conduct.

In order to illustrate the kind of behaviour which falls within the mischief of Article 102 it is therefore helpful to consider exploitative and exclusionary abuses separately, although this is not to suggest that there is a rigid demarcation between these two categories: the same behaviour may exhibit both characteristics. For example a dominant firm that refuses to supply may have an exploitative purpose (for example where it is threatened or effected in order to make a customer pay a higher price) and/or an exclusionary one (where it is intended to remove a competitor from the market).

A possible third category of cases under Article 102 is concerned with single market abuses. For example excessive pricing, as well as being exploitative, may be a ploy to impede parallel imports and to limit intra-brand competition, as in the case of British Leyland v Commission236. Abusive practices will be considered in greater detail in later chapters of this book, and in particular in chapters 6, 17, 18 and 19. At this stage it is intended to provide an overview of the type of practices that might be found to be abusive.

(G) Exploitative abuses

It is clear from its very wording that Article 102 is capable of application to exploitative behaviour: Article 102(2)(a) gives as an example of an abuse the imposition of unfair purchase or selling prices or other unfair trading conditions. Exploitative pricing practices are considered further in chapter 18237. There have also been cases on the activities of collecting societies in which their rules have been scrutinised in order to ensure that they do not act in a way that unfairly exploits the owner of the copyright or the would-be licensee of it; collecting societies are considered in chapter 19238. Unfair trading conditions were condemned by the Commission in AAMS239 and in 1998 Football World Cup240, where it considered that the arrangements for the sale of tickets were unfair to consumers resident outside France.

In its colloquial sense, exploitation suggests the earning of monopoly profits at the expense of the customer. However one of the other ‘benefits’ of the monopolist is the ‘quiet life’ and the freedom from the need to innovate and improve efficiency in order to keep up with or ahead of competitors241. This raises the question whether inefficiency or inertia on the part of a dominant firm could be an abuse under Article 102. Article 102(2)(b) gives as an example of abuse the limitation of production, markets or technical development to the prejudice of the consumer, and in British Telecommunications242 the (p. 209) Commission objected to behaviour on BT’s part which, among other things, meant that the possible use of new technology was impeded. This is dealt with in chapter 6243.

(H) Exclusionary abuses

Article 102 has most frequently been applied to exclusionary behaviour.

(i) Continental Can v Commission

The Court of Justice established in Continental Can v Commission244 that Article 102 was capable of application to exclusionary abuses as well as exploitative ones. The specific question before the Court was whether mergers could be prohibited under Article 102. One argument against this was that Article 102 was concerned only with the direct exploitation of consumers and not with the more indirect adverse effects that might be produced by harming the competitive process245, according to this argument structural changes in the
market could not be caught. The Court of Justice rejected this. It was not appropriate to draw a distinction between direct and indirect effects on the competitive process; instead it was necessary to interpret Article 102 in the light of the spirit of the Treaty generally. Article 3(3) TEU provides that the EU shall establish an internal market which, as explained in Protocol 27 to the Treaties, includes ‘a system ensuring that competition is not distorted’. Articles 101 and 102 had to be interpreted with this aim in mind: it would be futile to prevent agreements which distort competition under Article 101 but then to allow mergers which resulted in the elimination of competition. The enactment of the EU Merger Regulation means that Article 102 is now largely redundant in respect of mergers; however *Continental Can* remains important to the law on Article 102, since it confirmed that it could be applied to exclusionary as well as to exploitative abuses.

**(ii) Causation**

One of the arguments raised by Continental Can was that, even if mergers were caught by Article 102, it had not used its market power to effect the merger; there was a break in the chain of causation between its position on the market and the behaviour alleged to be abusive. It had not, for example, threatened to drive the target firm out of the market by predatory price cutting if it refused to merge. The Court of Justice rejected this argument as well. It was possible to abuse a dominant position without actually exercising or relying on market power. It was an abuse simply for a dominant firm to strengthen its position and substantially to eliminate competition by taking over a rival. Abuse is an objective concept, and the conduct of an undertaking may be regarded as abusive in the absence of any fault and irrespective of the intention of the dominant undertaking. The scope of Article 102 would obviously be reduced if the Commission could apply it only to practices which were attributable to the exercise of market power that a dominant undertaking enjoys. In *Hoffmann-La Roche* the Court of Justice said that:

> The interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted.

In *Tetra Pak II* the Court of Justice stated at paragraph 27 of its judgment that ‘application of Article 102 presupposes a link between the dominant position and the alleged abusive conduct’. This may appear to contradict the ‘no causation’ point in *Continental Can*. However, the issue in *Tetra Pak* was whether it is possible for the abuse to take place in a market different from the one in which an undertaking is dominant; the Court was not concerned with the issue of whether the market power had to have been used in order to bring about the abuse.

It is interesting to note that some systems of law—for example Australia and New Zealand—do require a causal connection between the position of dominance and the abusive behaviour: the majority judgment of the UK Privy Council in *Carter Holt Harvey Building Products Group Ltd v The Commerce Commission* contains an interesting discussion of the case law in those two countries. Clearly such an approach will result in fewer findings of abuse; however the *Continental Can* judgment is clear that causation is not required under Article 102. The General Court relied on the judgments of the Court of Justice in *Continental Can* and *Hoffmann-La Roche* in *AstraZeneca AB v Commission*, where it said that ‘an abuse of a dominant position does not necessarily have to consist in the use of the economic power conferred by the dominant position’.
(iii) Horizontal and vertical foreclosure

If a competitor is foreclosed by the superior efficiency of a dominant firm, the foreclosure would not be anti-competitive or abusive. The concern about exclusionary abuses is that a dominant firm is able to behave in a way that leads to anti-competitive foreclosure, and thereby to prevent potential competitors from entering the market. The foreclosure might occur ‘upstream’ or ‘downstream’ in the market. Suppose that a firm is vertically integrated: it extracts a raw material, widgets, from its widget mines and processes widgets into widget dioxide: the upstream market is raw widgets, the downstream one is widget dioxide. Harm to competition could occur at either level of the market:

- **horizontal foreclosure** arises where the dominant firm takes action to exclude a competitor that supplies widgets (see Figure 5.1)
- **vertical foreclosure** arises where the dominant firm takes action to exclude a competitor in the downstream market for widget dioxide (see Figure 5.2).

Fig. 5.1 Horizontal foreclosure

Fig. 5.2 Vertical foreclosure
Many exclusionary abuses are concerned with horizontal foreclosure: for example exclusive purchasing agreements, rebates and predatory pricing. Others however, for example refusal to supply and margin squeezing, are predominantly concerned about harm to competition in the downstream market.

**(iv) The dominant position, the abuse and the effects of the abuse may be in different markets**

It is not necessary for the dominance, the abuse and the effects of the abuse all to be in the same market. In a simple case, X may be dominant in the market for widgets and charge high prices to exploit its customers or drop its prices in order to eliminate competitors from the widget market: clearly Article 102 can apply to this behaviour. However more complex situations may occur. X might be present on both the widget market and the downstream widget dioxide market, and may act on one of those markets in order to derive a benefit in the other: as we have just seen, there may be a horizontal or a vertical foreclosure of the market.

Some examples will illustrate the range of possibilities.

**(a) Michelin v Commission**

Michelin was dominant in the market for replacement tyres and committed various abuses in order to protect its position in that market.

**(p. 212) (b) Commercial Solvents**

Commercial Solvents supplied a raw material in which it was dominant to a customer which used it to make an anti-tuberculosis drug. The raw material was the upstream product; the drug was the downstream product. Commercial Solvents decided to produce the drug itself and ceased to supply the customer. Commercial Solvents was found to have abused its dominant position: it refused to supply the raw material in relation to which it was dominant, but this was done to benefit its position in the drug market, where it was not yet present at all.

**(c) De Poste-La Poste**

The Belgian Post Office, dominant in the market for the delivery of ‘normal’ letters, abused its dominant position in that market in order to eliminate a competitor in the neighbouring market for business-to-business mail services.

**(d) Télémarketing**

The dominant undertaking, a broadcasting authority with a statutory monopoly, decided to enter the downstream telemarketing sector. It ceased to supply broadcasting services to the only other telemarketer, thereby eliminating it from the market and effectively reserving the telemarketing business to itself.

**(e) Sealink/B&I—Holyhead: Interim Measures**

Sealink, which owned and operated the port at Holyhead, was considered to have committed an abuse on the market for the provision of port facilities for passenger and ferry services, in which it was dominant, by structuring the sailing schedules there to the advantage of its own downstream ferry operations and to the disadvantage of its competitor at that level of the market, B&I. The same point arose in *Sea Containers v Stena Sealink—Interim Measures*.

**(f) British Gypsum v Commission**

British Gypsum was dominant in the plasterboard market, but not dominant in the neighbouring plaster market (these markets were horizontally, rather than vertically, related). Among its abuses, British Gypsum gave priority treatment to customers for plaster who remained loyal to it in relation to plasterboard. This differs from the earlier
examples, since in British Gypsum the abuse was committed in the non-dominated market in order to protect British Gypsum’s position in its dominated market.

**Tetra Pak II**

The Court of Justice concluded that Tetra Pak had infringed Article 102 by tying practices and predatory pricing in the market for non-aseptic liquid repackaging machinery and non-aseptic cartons. It was not dominant in this market, but the abusive conduct was intended to benefit its position in that market. Tetra Pak was dominant in the (horizontally) associated market for aseptic machinery and cartons. The Court of Justice, after citing Commercial Solvents, Télémarketing and British Gypsum, held that ‘in special circumstances’ there could be an abuse of a dominant position ‘where conduct on a market distinct from the dominated market produces effects on that distinct market’. The Court of Justice went on to describe the ‘close associative links’ between the aseptic and non-aseptic markets which amounted to sufficiently special circumstances to engage Article 102: for example Tetra Pak had or could have customers in both markets, it could rely on having a favoured status in the non-dominated market because of its position in the dominated one, and it could concentrate its efforts on the non-aseptic market independently of other economic operators because of its position in relation to the aseptic market. This case extends the scope of application of Article 102 beyond, even, British Gypsum. The Commission relied specifically on this aspect of Tetra Pak II in its decision in Microsoft.

Table 5.1 Domination, abuse and neighbouring markets

<table>
<thead>
<tr>
<th>Case</th>
<th>Market A</th>
<th>Market B</th>
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<tr>
<td>Michelin v Commission</td>
<td>Dominance</td>
<td>Abuse</td>
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<td>Benefit</td>
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<td>Commercial Solvents</td>
<td>Dominance</td>
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<td>Télémarketing</td>
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<td>De Poste-La Poste</td>
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<td>Sealink decisions</td>
<td>Benefit</td>
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<td>British Gypsum</td>
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<td>Tetra Pak v Commission</td>
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<td>Benefit</td>
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Many of the Commission’s decisions under Article 102 in recent years have involved two markets rather than one. Obvious examples are Deutsche Telekom v Commission, Microsoft v Commission and TeliaSonera, in the latter judgment the Court said that Article 102 gives no explicit guidance as to the market in which the abuse takes place: each case must be decided in the light of its specific circumstances. The Commission’s decision in Google was that Google abused its dominant position in general internet search in order to exclude competitors in the online comparison shopping services markets.

Footnote 39 of the Commission’s Guidance on Article 102 Enforcement Priorities says that the Commission may pursue predatory practices by dominant firms on markets on which they are not yet dominant. The Commission could presumably apply the reasoning...
described in this section in the context of neighbouring product markets to dominance, abuse and benefits in neighbouring geographical markets\textsuperscript{276}.

\textbf{(p. 214) (v) How is effects analysis conducted in practice?}

As noted earlier, the Commission has accepted in recent decisions that, where unilateral behaviour of a dominant firm is in issue, effects analysis is needed to show that it is abusive\textsuperscript{277}. Judgments such as Deutsche Telekom and TeliaSonera endorse this approach, and the Intel judgment of September 2017 has confirmed irreversibly the move towards a more effects-based approach to the application of Article 102. This section considers how effects analysis is conducted in practice.

\textbf{(a) Selecting the right cases}

The Commission’s \textit{Guidance on Article 102 Enforcement Priorities} explains, at paragraph 19, that the aim of its enforcement activity in relation to exclusionary abuses is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way: the concern is that such behaviour would have an adverse effect on consumer welfare, for example by raising prices, by limiting the quality of goods or services or by reducing consumer choice. ‘Anti-competitive foreclosure’ differs from ‘mere foreclosure’, which occurs where the dominant undertaking wins business on the merits as a result of its superior efficiency; this is an important distinction, with which the Court of Justice agrees\textsuperscript{278}. Paragraph 20 of the \textit{Guidance} sets out a series of factors which the Commission will take into account when deciding whether to intervene in relation to an alleged exclusionary abuse under Article 102: these factors will enable it to determine whether the conduct in question is likely to lead to an anti-competitive foreclosure of the market. The Commission adds that it would want there to be cogent and compelling evidence before it would intervene. The factors include:

- **the position of the dominant undertaking**: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure

- **the conditions on the relevant market**: these include the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects

- **the position of the dominant undertaking’s competitors**: even a fairly small competitor may play a significant competitive role where it is the closest competitor to the dominant undertaking, is particularly innovative or has the reputation of systematically cutting prices

- **the position of the customers or input suppliers**: this may include the possible selectivity of the conduct in question, for example where the dominant undertaking applies the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure

- **the extent of the allegedly abusive conduct**: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely anti-competitive foreclosure effect

- **possible evidence of actual foreclosure**: where the conduct in question has already been taking place, there may be actual evidence of the dominant undertaking’s market share having increased, or of competitors having exited the market
Direct evidence of any exclusionary strategy: there may be direct evidence—for example internal documents—of a strategy to exclude competitors, and this may be helpful in interpreting the dominant undertaking’s conduct.\textsuperscript{279}

Paragraph 21 of the Guidance explains that, when pursuing a case, the Commission will develop its analysis, that is to say whether particular conduct is likely to have an anti-competitive foreclosure effect, using the general factors set out in paragraph 20, and the specific factors set out in later sections of the Guidance. This is an important point to note. Later paragraphs of the Guidance discuss particular issues that are relevant to the assessment of anti-competitive foreclosure arising from specific practices. These paragraphs should always be understood within the broader context of the general factors discussed in paragraph 20 of the Guidance: they are a complement to, and not a substitute for, that paragraph.

(b) What standard of proof?

It is necessary to determine the standard of proof that the person alleging an exclusionary abuse should satisfy. If every case were to require the demonstration of anti-competitive foreclosure effects beyond reasonable doubt, the enforcement of Article 102 might become all but impossible, which would bring one back to the problem of false negatives and false positives.\textsuperscript{280} The Court of Justice has not been consistent on this issue. In Post Danmark II the Court of Justice said that the anti-competitive effect of a rebate ‘must be probable’,\textsuperscript{281} the standard applied by the Guidance and required by the case law in merger cases.\textsuperscript{283} In some cases the EU Courts have required the Commission to show that a practice would merely be ‘capable’ of restricting competition.\textsuperscript{284} In Post Danmark II\textsuperscript{285} the Court of Justice seems to have used the terms ‘capable’ and ‘likely’ interchangeably to denote the standard of proof.

(c) What evidence?

The evidence of effects in an Article 102 case may come from a number of sources, including the economic and market context, contemporaneous documents, witness evidence and/or economic analysis. Paragraph 19 of the Guidance says that, when identifying likely consumer harm, the Commission may rely on qualitative and, where appropriate, quantitative evidence.\textsuperscript{286} In Post Danmark II\textsuperscript{287} the Court of Justice recognised that the Commission may have recourse to the as-efficient competitor test in rebate cases, which it did in the Intel case.\textsuperscript{288} This does not mean that effects analysis must be based on the as-efficient-competitor test; rather, that test is ‘one tool amongst others’ for assessing whether there is an exclusionary abuse.\textsuperscript{280}

Paragraph 22 of the Guidance envisages that the anti-competitive effects may be inferred without a detailed analysis where it is clear that ‘the conduct can only raise obstacles to competition and that it creates no efficiencies’; Intel’s payments to customers to delay or cancel the marketing of its competitor’s product (so-called ‘naked restrictions’) are an example of such conduct.\textsuperscript{291}

(vi) Examples of exclusionary abuses

The Commission and the EU Courts have condemned many practices that could have anti-competitive foreclosure effects. These will be examined in detail in chapters 17 to 19, which will consider in turn the following abuses:

- exclusive dealing agreements\textsuperscript{292}
- tying\textsuperscript{293}
- refusals to supply\textsuperscript{294}
• miscellaneous other non-pricing abuses 295
• exclusivity rebates and other practices having effects similar to exclusive dealing agreements 296
• bundling 297
• predatory pricing 298
• margin squeezing 299
• price discrimination 300
• refusals to license intellectual property rights or to provide interoperability information 301.

(I) Abuses that are harmful to the single market

As one would expect, Article 102 has been applied to behaviour that is harmful to the single market 302. Examples will be found later in this book of non-pricing 303 and pricing 304 abuses in which this was an obvious concern.

(p. 217) 9. Defences

The term ‘abuse’ bears great intellectual strain, particularly as there is no equivalent in Article 102 to Article 101(3) whereby an agreement that restricts competition can nevertheless be permitted because it produces economic efficiencies. It would be perverse if the significance of efficiencies were to be recognised under Article 101 but not Article 102. Over a number of years the Commission and the EU Courts came to recognise that there was some conduct which, although presumptively abusive, in fact did not amount to a violation of Article 102 because it had an ‘objective justification’ 305. For example in Sot. Lélos 306 the Court of Justice stated that the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked; however the Court added that such behaviour cannot be allowed if its purpose is to strengthen the dominant position and thereby abuse it. In Post Danmark I 307 the Court was emphatic that a dominant firm may seek to justify behaviour that would otherwise be caught by Article 102, in particular by arguing that it is objectively necessary or that any exclusionary effect on the market is counterbalanced, or outweighed, by advantages in terms of efficiency that also benefit consumers 308. This is consistent with the Commission’s Guidance on Article 102 Enforcement Priorities in which, from paragraphs 28 to 31, it says the same thing.

This section will examine what is meant by objective justification; it will briefly consider the question of whether a defence can be based on the principle of non-interference with property rights; and will conclude with a discussion of the burden of proving a defence.

(A) Objective justification

The language of objective justification 309 can be found in many judgments and decisions, coupled with the proposition that, to be objectively justified, the conduct in question must be proportionate. For example in Centre belge d’études de marché— Télémarketing v CLT 310 the Court of Justice held that an undertaking in a dominant position in television broadcasting which entrusted ‘telemarketing’ to its own subsidiary, thereby excluding other firms from entering this market, would be guilty of an abuse where there was no objective necessity for such behaviour 311. The principles of objective justification and proportionality have been invoked on other occasions 312 and are firmly part of Article 102 analysis.
At paragraph 29 of the Guidance on Article 102 Enforcement Priorities the Commission says that a claim to objective necessity would have to be based on factors external to the dominant undertaking: for example, where a particular type of conduct is needed in order to guarantee health or safety considerations. The Commission points out that it is normally the task of the public authorities to set and enforce public health and safety standards: this is based on judgments of the General Court in Hilti and Tetra Pak II. In Romanian Power Exchange/OPCOM the Commission rejected OPCOM’s argument that its abusive behaviour was objectively justified in order to avoid the risk of criminal charges if it failed to collect VAT, and because of the need to avoid a mismatch of cash flow in the Romanian market for the spot-trading of electricity.

In Streetmap.EU Ltd v Google Inc the English High Court held that Google had an objective justification for displaying its own thumbnail map at or near the top of its search results in response to geographic queries, since there was no other viable or effective way of showing an online map.

(B) Efficiencies

Conduct that apparently forecloses competitors can be defended on efficiency grounds. At paragraph 30 of the Guidance the Commission explains that four cumulative conditions would have to be fulfilled for an efficiency ‘defence’ to succeed:

- the efficiencies would have to be realised, or be likely to be realised, as a result of the conduct in question
- the conduct would have to be indispensable to the realisation of those efficiencies
- the efficiencies would have to outweigh any negative effects on competition and consumer welfare in the affected markets and
- the conduct must not eliminate all effective competition.

The authors of this book are not aware of any case in which an efficiency defence has succeeded under Article 102. The General Court in Intel v Commission noted that, in its appeal, Intel had not provided any evidence to show that its exclusivity rebates would lead to increased efficiency. On appeal the Court of Justice acknowledged that a dominant firm could plead efficiencies as a defence to a rebate found capable of foreclosing competition, but did not opine on the application of such a case on the facts of the particular case.

(C) Abuse of dominance and property rights

In a number of cases under Article 102 a particular issue has been the extent to which a dominant undertaking could be held to have acted abusively in relation to the way in which it chose to use, or not to use, its own property. Article 345 TFEU provides that:

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

If it is possible for the Commission, under Article 102, to order the owner, for example, of an essential facility to provide access to it to a third party, this clearly affects that undertaking’s property rights; but has it affected them to the point where the rules on property ownership in Member States have been prejudiced? The issue arose in relation to Frankfurt Airport where the Commission required FAG, the owner and operator of that airport, to allow competition in the market for ground-handling services there. The Commission rejected the argument that this would interfere with the property rights of FAG. The Commission noted that the Court of Justice in Hauer v Land Rheinland-Pfalz had acknowledged the existence of a fundamental right to property in the EU legal order; however it had also noted that the constitutions of the Member States recognised that the exercise of property rights may be restricted in the public interest. In the Frankfurt Airport
decision the Commission said that it followed from the *Hauer* judgment that the competition rules in the Treaty may be considered to constitute restrictions on the right of property which correspond to objectives of general interest pursued by the EU. In the Commission’s view, allowing the provision of ground-handling services within the airport would not constitute an excessive or intolerable interference with FAG’s rights as owner of the airport; it would not interfere with FAG’s own ability to provide these services, and FAG could charge a reasonable fee to third parties for their right to do so.

In his Opinion in *Masterfoods Ltd v HB Ice Cream Ltd* Advocate General Cosmas had no doubt that:

> it is perfectly comprehensible for restrictions to be placed on the right to property ownership pursuant to Articles [101 and 102 TFEU], to the degree to which they might be necessary to protect competition.

In *Van den Bergh Foods Ltd v Commission* the General Court rejected an argument that the Commission’s decision in *Van den Bergh Foods Ltd*, requiring that space be made available in Van den Bergh’s freezer cabinets for the ice-cream of competitors, amounted to a disproportionate interference with its property rights. In *Microsoft v Commission* the General Court rejected the argument that Microsoft was entitled to refuse to supply interoperability information to competitors because it was protected by intellectual property rights: this would be inconsistent with the rule, derived from the *Magill* and *IMS Health* cases, that, in exceptional circumstances, there can be an obligation to grant licences to third parties.

When determining the conditions under which an injunction may be sought by a dominant firm to enforce its standard-essential patents in *Huawei Technologies Co Ltd v ZTE Corp*, the Court of Justice said that a balance has to be struck between maintaining free competition, on the one hand, and safeguarding the right of an owner of intellectual property to bring an action for infringement, on the other.

**D) Burden of proof**

In *Microsoft v Commission* the General Court stated that:

> 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 cannot be accepted.

The General Court went on to state that it was not sufficient for the dominant undertaking to put forward ‘vague, general and theoretical arguments’ in support of an objective justification. Paragraph 31 of the Commission’s *Guidance on Article 102 Enforcement Priorities* adopts the same approach to the burden of proof.

The factors relied upon by the dominant undertaking as the basis for contending that its conduct was objectively justified must normally be ones that the firm took into account at the time of that conduct. It is not sufficient to put forward a justification that did not form any basis for the dominant undertaking’s conduct at the time.

**10. The Consequences of Infringing Article 102**
(A) Public enforcement

Where the Commission finds an abuse of a dominant position it has power, pursuant to Article 23 of Regulation 1/2003, to impose a fine, and to order the dominant undertaking to cease and desist from the unlawful conduct in question; where necessary, it may also order a dominant undertaking to adopt positive measures in order to bring an infringement to an end. It is even possible for the Commission to order the divestiture of an undertaking’s assets, or to break an undertaking up, under the powers conferred by Article 7 of the Regulation 1/2003, provided it is proportionate and necessary to bring the infringement to an end and provided that there is no equally effective behavioural remedy or that such a remedy would be more burdensome. This happened in ARA Foreclosure: the Commission imposed a structural remedy (in that case with ARA’s consent) to make sure that the infringement could not be repeated.

(B) Private enforcement

The civil law consequences of infringing Article 102 are discussed in chapter 8.

Footnotes:


5 Intel, Commission decision of 13 May 2009.

Case C-413/14 P Intel v Commission EU:C:2017:632; the judgment is discussed at various points in the text that follows.

Commission decision of 27 June 2017, on appeal to the General Court Case T-612/17 Google v Commission, not yet decided.


See ‘Exploitative, exclusionary and single market abuses’, pp 207–208 later in chapter.


They are set out below: see ‘How is effects analysis conducted in practice?’, pp 214–216 later in chapter.

See Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651, para 52.

See eg Flybe, OFT decision of 5 November 2010; Idexx, OFT decision of 17 November 2011; Unilever, CMA decision of 10 August 2017; these were all ‘no grounds for action’ decisions.

Case C-52/09 EU:C:2011:83.


Case T-155/06 Tomra Systems v Commission EU:T:2010:370 (General Court), upheld on appeal Case C-549/10 P Tomra Systems v Commission EU:C:2012:221 (Court of Justice).


An interesting question is what the legal position would be if the Commission were to refuse to consider a complaint about conduct that clearly infringes Article 102 according to the jurisprudence of the EU Courts on the basis that it does not comply with the Guidance on Article 102 Enforcement Priorities: see Wils ‘Discretion and Prioritisation in Public Antitrust Enforcement’ (2011) 34 World Competition 353; Petit ‘Rebates and Article 102 TFEU: The European Commission’s Duty to Apply the Guidance Paper’ (November 26, 2015), available at www.ssrn.com.

Case C-52/09 EU:C:2010:483.


It was reported in the media that out-of-court settlements were reached between Microsoft and various of the complainants against it for the payment of damages: a report in the Financial Times of October 2005 suggested that Microsoft had paid a total of $3.73 billion; it was similarly reported that Intel had agreed to pay damages to AMD, the complainant in that case, amounting to $1.25 billion: see Financial Times, 13 November 2009; numerous damages actions are pending against Google in the courts of several Member States.

Commission decision of 20 September 2016, paras 132–148: note that ARA had offered to make the divestiture required by the decision.


Case C-138/11 Compass-Datenbank EU:C:2012:449.


Case 311/84 Centre belge d’études de marché—Télémarting v CLT EU:C:1985:394, para 16; see also Case 26/75 General Motors v Commission EU:C:1975:150; Case 41/83 Italy v Commission EU:C:1985:120; Case 226/84 British Leyland v Commission EU:C:1986:421; Case C-41/90 Höfner v Macrotron EU:C:1991:161, para 28; Case C-18/93 Corsica Ferries EU:C:1994:195, para 43; Case C-242/95 GT-Link v De Danske Statsbaner (DSB) EU:C:1997:376, para 35; see also the Commission’s decision in French-West African Shipowners’ Committees OJ [1992] L 134/1, para 64; Case C-351/12 OSA EU:C:2014:110, para 81.

Protocol 27 to the Treaties; see eg Case C-260/89 Elliniki Radiophonia Tilérassianonimi Etairia (ERT) v Dimotiki Etairia Plirforioressis (DEP) EU:C:1991:254, para 27; note also that, under Article 119(1) TFEU, Member States (and the EU) are required to observe the principle of an ‘open market economy with free competition’.


Soda-ash/Solvay OJ [1991] L 152/21 and Soda-ash/ICI OJ [1991] L 152/1; these decisions were annulled on procedural grounds by the General Court: Cases T-30/91 etc Solvay SA v Commission EU:T:1995:115; the Commission’s appeal to the Court of Justice failed, Cases C-286/95 P etc EU:C:2000:188; the Commission readopted the decisions in December 2000: OJ [2003] L 10/1, which were substantially upheld in Case T-57/01 Solvay SA v Commission EU:T:2009:519, and Case T-66/01 Imperial Chemical Industries Ltd v Commission EU:T:2010:255; the second Solvay judgment was quashed on appeal to the Court of Justice Case C-109/10 P Solvay SA v Commission EU:C:2011:686 as Solvay’s rights of defence had been infringed as a result of the Commission’s failure to grant proper access to the file.


Ibid, paras 73–76 (dealing with abuses covering several Member States); paras 93–96 (abuses covering a single Member State); paras 97–99 (abuses covering part only of a Member State); and paras 106–109 (abuses involving undertakings located in third countries).

Regulation 1/2003, Article 3(1); see ch 2, ‘Obligation to apply Articles 101 and 102’, pp 76–77.

Regulation 1/2003, Article 3(2).

Ibid, Article 3(3); on the objective of Articles 101 and 102 TFEU see recital 9 of Regulation 1/2003.

The issue of whether any dominance is collective is discussed in ch 14 of this book, which considers in general terms the issues of oligopoly and tacit coordination between independent undertakings.

Case 27/76 EU:C:1978:22, para 65; it has used the same formulation on several other occasions, eg in Case 85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para 38.

This definition does not adequately reflect (what is undoubtedly true) that Article 102 also applies to market power on the buying as well as the selling side of the market, since that was not in issue in United Brands; a powerful purchaser may be able to behave independently of its sellers who are not ‘customers’ in the normal sense of that word; for action taken against undertakings with buyer power see Re Eurofima [1973] CMLR D217; Re GEMA OJ [1971] L 134/15; Case 298/83 CICCE v Commission EU:C:1985:150; UK Small Mines Commission’s XXIst Report on Competition Policy (1991), point 107; Virgin/British Airways OJ [2000] L 30/1, upheld on appeal to the General Court Case T-219/99 British Airways plc v Commission EU:T:2003:343: the Court stated specifically at para 101 of its
judgment that Article 102 can apply to undertakings with a dominant position on either side of the market; see also ch 1, ‘Procurement markets’, p 37.

50 OJ [2009] C 45/9, para 11; the Commission goes on in this paragraph to explain that ‘increase in prices’ is a shorthand term which includes other ways of influencing competition to the advantage of the dominant undertaking, eg by decreasing output, innovation, variety or quality of goods or services; on the same point see ch 1, ‘Market Definition and Market Power’, pp 25–49.

51 Chapter 3 of the Workbook on the ‘assessment of dominance’ is available on the ICN website at www.internationalcompetitionnetwork.org.


53 See ‘Findings of dominance below the 50% threshold’, pp 190–191 later in chapter.


55 See further ch 1, ‘Market definition’ and following sections, pp 25–42.

56 Guidance on Article 102 Enforcement Priorities, para 11 and case law cited.


59 See the cases cited at ch 5 n 31 earlier.


61 Case 85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para 40.


64 In GVL OJ [1981] L 370/49 that body had a 100% market share in the market in Germany for the management of performing artists’ rights of secondary exploitation; see also Amministrazione Autonoma dei Monopoli di Stato (AAMS) OJ [1998] L 252/47, para 31, where the Commission found AAMS held a de facto monopoly of the Italian market for the wholesale distribution of cigarettes, upheld on appeal to the General Court Case T-139/98 AAMS v Commission EU:T:2001:272, para 52; Telefónica, Commission decision of 4 July 2007, para 233, where the Commission found Telefónica had a de facto monopoly of the regional market for wholesale broadband access, upheld on appeal to the General Court, Case T-336/07 Telefónica SA v Commission EU:T:2012:172, paras 151–167; Motorola—Enforcement of GPRS standard essential patents, Commission decision of 29 April 2014, para 225.


Commission decision of 27 June 2017, on appeal Case T-612/17 Google v Commission, not yet decided.

Case 85/76 EU:C:1979:36; the Commission specifically referred to this paragraph in Van den Bergh Foods Ltd OJ [1998] L 246/1, para 258.

Case C-62/86 EU:C:1991:286, para 60.

See O’Donoghue and Padilla The Law and Economics of Article 102 TFEU (Hart, 2nd ed., 2013), stating that many commentators consider that the threshold for establishing dominance under Article 102 TFEU is too low.


The Guidance refers, in fn 8, to AKZO as part of the case law on very large market shares.

See eg Telefónica, Commission decision of 4 July 2007, para 236 and BEH Electricity, Commission commitment decision of 10 December 2015, para 40.

See eg Servier, Commission decision of 9 July 2014, para 2552, citing United Brands; similarly see Guidance on Article 102 Enforcement Priorities, para 10.

OJ [2000] L 30/1.


See also Case T-321/05 AstraZeneca AB v Commission EU:T:2010:266, para 270.


See eg Case T-321/05 AstraZeneca AB v Commission EU:T:2010:266, para 270; similarly see the AG Opinion in Case C-170/13 Huawei Technologies Co Ltd v ZTE Corp EU:C:2014:2391, para 57.


Case 27/76 EU:C:1978:22.
89 See ch 5 n 66 earlier, para 116.
90 Commission commitment decision of 4 May 2017, para 65(3).
91 Economies of scale and scope are discussed in ch 1, ‘Economies of scale and scope and natural monopolies’, pp 10–11.
92 On essential facilities see ch 17, ‘Is the product to which access is sought indispensable to someone wishing to compete in the downstream market?’, pp 717–723.
94 Case 27/76 EU:C:1978:22, paras 82–84.
95 Case 85/76 EU:C:1979:36, para 48.
96 Case 322/81 EU:C:1983:313; see also Eurofix-Bauco v Hilti (ch 5 n 82 earlier), para 69 and Tetra Pak I (BTG Licence) (ch 5, n 84 earlier), para 44; Michelin OJ [2002] L 143/1, paras 182–183.
98 Case 27/76 EU:C:1978:22, para 122.
99 Ibid, paras 69–81, 85–90.
100 Case 85/76 EU:C:1979:36, para 48; see similarly Case 322/81 Michelin v Commission EU:C:1983:313, para 58.
102 Case 27/76 EU:C:1978:22, paras 91–94.
103 Michelin OJ [2002] L 143/1, para 184.
109 Guidance on Article 102 Enforcement Priorities, para 17.
110 On network effects see ch 1, ‘Network effects and two-sided markets’, pp 11–13.
112 Ibid, paras 448–459, referring to an ‘applications barrier to entry’.
114 Commission decision of 29 April 2014, paras 227–236.
117 Case 322/81 EU:C:1983:313.


PO-Michelin OJ [2002] L 143/1, paras 197–199.

Case 85/76 EU:C:1979:36, para 48.


See also Napier Brown—British Sugar OJ [1988] L 284/41, para 55.

See ch 1, ‘Countervailing buyer power’, p 45.

Commission decision of 29 April 2014, paras 237–268.


Cases T-125/87 etc EU:T:2000:84, para 82.

Ibid, para 85.


See ‘The dominant position, the abuse and the effects of the abuse may be in different markets’, pp 211–213 later in chapter.

See similarly, on the responsibility of a monopolist, Case 7/82 GVL v Commission EU:C: 1983:52, para 56; this was cited by the Commission in 1998 Football World Cup OJ [2000] L 5/55, para 85.

See ch 18, ‘Selective price cutting but not below cost’, pp 764–768.


OJ [2002] L 59/18, para 58; this decision was subsequently withdrawn by the Commission: see Commission Press Release IP/03/1159, 13 August 2003.


Ibid, para 435.


Case C-52/09 EU:C:2011:83.

Ibid, paras 78–82.

Case C-549/10 P EU:C:2012:221, para 39.
It is important to remember however that the abuse must also have an effect on trade between Member States to fall within Article 102: see ‘The Effect on Inter-State Trade’, p 186 earlier.

Article 102 can also apply to the abuse of collective dominance, although this is not a concept that has been explored in much detail in the case law: see ch 13, ‘Abuse of collective dominance under Article 102’, pp 591–594.

Available at www.internationalcompetitionnetwork.org; many other interesting work products on unilateral conduct laws will be found on this site, along with the current and long-term work plans of the ICN in this area; see also the OECD Roundtable, Competition on the Merits (2005), available at www.oecd.org.

For recent statements to this effect see Case C-457/10 P AstraZeneca AB v Commission EU:C:2012:770, para 134; Case C-209/10 Post Danmark I EU:C:2012:172, para 23; Case C-413/14 P Intel v Commission EU:C:2017:632, para 135.

The respective roles of Articles 101 and 102 are spelt out particularly clearly in the judgment of the General Court in Case T-41/96 Bayer v Commission EU:T:2000:242, paras 175–176.


A series of essays on the question of whether (mis)application of laws dealing with unilateral conduct has a chilling effect on competition, by Bourgeois, Fingleton and Nikpay, Lewis and Lugard respectively, will be found in chs 15–18 of [2008] Fordham Corporate Law Institute (ed Hawk).

Economics literature sometimes uses the expressions ‘Type I errors’ and ‘Type II errors’, but the tendency to confuse which error is of which type (sometimes referred to jocularly as a ‘Type III’ error) argues in favour of the language of false positives and false negatives.


For an interesting discussion of the differences in approach in the US and the EU, suggesting that the position in the US can lead to anti-competitive behaviour escaping sanction, see Fox ‘A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal’ (2005) 28 Fordham International Law Journal 952.


Ibid.


See ‘Causation’, pp 209–210 later in chapter.

See ‘The dominant position, the abuse and the effects of the abuse may be in different markets’, pp 211–213 later in chapter.


Case T:321/05 EU:T:2010:266.

Ibid, paras 890–899; this issue was not discussed on appeal to the Court of Justice.

Case C-413/14 P EU:C:2017:632.

Ibid, paras 54–58; on the qualified effects doctrine as a basis of jurisdiction see ch 12, ‘The qualified effects doctrine’, pp 504–505.

Commission decision of 22 June 2011: see Art 1 of the operative part of that decision.

Commission decision of 5 March 2014: see para 320 and Art 1 of the operative part.

Commission decision of 9 July 2014: see paras 2961–2963.


See ‘Exploitative, exclusionary and single market abuses’, pp 207–208 later in chapter on the distinction between exploitative and exclusionary abuses.

SPEECH/05/537, 23 September 2005; numerous statements to the same effect can be found: see eg speech by Lowe ‘Innovation and Regulation of Dominant Firms’, 23 September 2008 and speech by Commissioner Alumnia ‘Converging paths in unilateral conduct’, 3 December 2010, available at www.ec.europa.eu.


Case C-280/08 P EU:C:2010:603, para 177.


Case C-209/10 Post Danmark v Konkurrencerådet EU:C:2012:172, paras 21, 22, 25 and 38.

Case C-413/14 P Intel v Commission EU:C:2017:632, paras 133, 134, 136, 139, 140.

See eg Case C-95/04 P British Airways plc v Commission EU:C:2007:166, para 64; see also para 68 of the Opinion of AG Jacobs in Case C-53/03 Syfait EU:C:2004:673.


Case 85/76 EU:C:1979:36; for a more recent statement to the same effect see eg Case C-280/08 P Deutsche Telekom AG v Commission EU:C:2010:603, para 174 and the case law cited therein.

In National Grid Plc v Gas & Electricity Markets Authority [2010] EWCA Civ 114, the English Court of Appeal said that ‘normal’ competition is not ‘a sufficiently hard-edged concept that it can be determined as a matter of law’; it is a ‘question of expert appreciation’: ibid, para 41.

Case C-280/08 P EU:C:2010:603.

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Case C-457/10 P EU:C:2012:770.

Ibid, para 75.

Case C-209/10 EU:C:2012:172.

Ibid, para 22.

Case C-413/14 P Intel v Commission EU:C:2017:632, para 134.

Case 85/76 EU:C:1979:36.


Ibid, para 81; see also para 94 which refers both to the possibility of objective justification and to an efficiency ‘defence’; on defences see ‘Defences’, pp 217–220 below.

Case C-413/14 P EU:C:2017:632.


Commission decision of 13 May 2009, paras 1597–1616; in Case T-286/09 RENV Intel v Commission the General Court has been required by the Court of Justice to conduct a judicial review of the Commission’s ‘as-efficient competitor’ analysis in paras 1002–1576 of its decision.


Commission decision of 27 June 2017, on appeal Case T-612/17 Google v Commission, not yet decided.

Case C-280/08 P Deutsche Telekom AG v Commission EU:C:2010:603.


Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB EU:C:2011:83.

Ibid, para 64.

Case C-209/10 EU:C:2012:172, para 26.

Case C-23/14 EU:C:2015:651, para 29.

Case T-286/09 EU:T:2014:547, paras 81, 94.

For further discussion of rebates generally and the Intel case in particular see ch 18, ‘Conditional Rebates’, pp 746–754.


Case 85/76 EU:C:1979:36.

Case C-23/14 EU:C:2015:651, paras 72–73.
Note that in Streetmap.EU Ltd v Google Inc [2016] EWHC 253 (Ch), paras 95–98, the English High Court distinguished Post Danmark II and held that, where the effect of an abuse is on a separate market from the one in which an undertaking is dominant, it was necessary to show that the effect is an appreciable one: for discussion see Whish ‘Article 102 and De Minimis’ [2016] Comp Law 53; see also Ibáñez-Colomo ‘Appreciability and De Minimis in Article 102 TFEU’ (2016) 7 JECLAP 651.


Case 226/84 EU:C:1986:421; see ‘Abuses that are harmful to the single market’, p 216 later in chapter and ch 18, ‘Pricing Practices That are Harmful to the Single Market’, pp 782–783.


OJ [2000] L 5/55, para 91; see also paras 99–100.


OJ [1982] L 360/36, upheld on appeal Case 41/83 Italy v Commission EU:C:1985:120.

Ch 6, ‘Manifest inability to meet demand’, p 239.


See eg Joliet Monopolisation and Abuse of Dominance (Martinus Nijhoff, 1970); it was also argued in Continental Can that mergers were not caught by Article 102 as Article 66(1) of the former ECSC Treaty dealt with them explicitly so that, by inference, the EC Treaty (now TFEU), which was silent on the issue, could not apply to them; and that anyway behaviour could not be abusive unless it was attributable to and caused by the use of the position of dominance (see ‘Causation’, later in chapter).

This objective was previously contained in Article 3(1)(g) of the EC Treaty and, at the time of the Continental Can judgment, in Article 3(f) of the EEC Treaty: see ch 2, ‘The competition chapter in the TFEU’, pp 51–52.


Case 85/76 EU:C:1979:36, at para 91; note the suggestion by AG Reischl at para 7c of his Opinion in Hoffmann-La Roche that causation might be treated differently according to the nature of the abuse in question.


See ‘Horizontal and vertical foreclosure’, below.
254 Case T-321/05 EU:T:2010:266.
255 Ibid, para 354.
256 See eg Case C-209/10 Post Danmark A/S v Konkurrencerådet EU:C:2012:172, para 22; Case C-413/14 P Intel v Commission EU:C:2017:632, para 134.
257 The language of ‘horizontal’ and ‘vertical’ foreclosure is taken from paras 69–73 of DG COMP’s Discussion paper on the application of Article [102] of the Treaty to exclusionary abuses, December 2005; the Commission’s Guidance on Article 102 Enforcement Priorities does not use the same language, while the Commission’s Guidelines on the assessment of non-horizontal mergers OJ [2008] C 265/6, paras 30–59, distinguish between ‘customer’ and ‘input’ foreclosure, which are synonymous for horizontal and vertical foreclosure respectively.
258 A refusal to supply may sometimes have a horizontal effect: see ch 17, ‘Horizontal foreclosure’, p 725.
259 Case 322/81 EU:C:1983:313.
262 Case 311/84 Centre belge d’études de marché—Télémarketing v CTL EU:C:1985:394.
266 Case C-333/94 P EU:C:1996:436; the Court of Justice’s approach to the issue of abuse was different from that of the Commission’s in its decision.
268 Ibid, para 27.
271 Case C-280/08 P EU:C:2010:603.
274 Ibid, paras 84–89.
275 Commission decision of 27 June 2017, paras 341 ff, on appeal to the General Court Case T-612/17 Google v Commission, not yet decided.
276 The UK Competition Appeal Tribunal considered that the reasoning in Tetra Pak II could be transposed to geographic markets: see Case 1044/2/1/04 IJ Burgess & Sons v OFT [2005] CAT 25, paras 379–385; see also Interbrew in the Commission’s XXVIth Report on Competition Policy (1996), point 53, where Interbrew was considered to have acted in non-dominated geographical markets to protect its dominant position in Belgium.
277 See ‘Recent case law and decisions do require effects analysis’, pp 205–207 earlier.
278 Case C-209/10 Post Danmark I EU:C:2012:172, para 22.

See ‘False positives and false negatives’, pp 198–199 earlier in chapter above.

Case C-23/14 EU:C:2015:651, para 74; see also para 69.


See eg Case C-12/03 P Commission v Tetra Laval EU:C:2005:87, para 42; Cases C-413/06 P Bertelsmann v Impala EU:C:2008:392, para 52.


Case C-23/14 EU:C:2015:651, paras 31, 35, 38, 50, 68 (capable) and paras 49, 67, 69 (likely); similarly see Case T-201/04 Microsoft v Commission EU:T:2007:289, para 561 (no difference between ‘risk of elimination of competition’ and ‘likely to eliminate competition’).

On the content and presentation of economic evidence see DG COMP’s Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases, available at www.ec.europa.eu.


Case C-23/14 EU:C:2015:651, para 57.

Ibid, para 61; similarly see Guidance on Article 102 Enforcement Priorities, para 24.


Ch 17, ‘Exclusive Dealing Agreements’, pp 698–705.


Ch 17, ‘Refusal to Supply’, pp 713–728.

Ch 17, ‘Miscellaneous Other Non-Pricing Abuses’, pp 728–731.

Ch 18, ‘Conditional Rebates’, pp 746–754.


Ch 17, ‘Non-Pricing Abuses That are Harmful to the Internal Market’, pp 727–728.

For an interesting discussion of the concept of objective justification see the Opinion of AG Jacobs in Case C-53/03 Syfait EU:C:2004:673, paras 71–72.

Cases C-468/06 etc Sot. Lélos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton EU:C:2008:504, para 50.

Case C-209/10 EU:C:2012:172.

Ibid, paras 40–41.


Case 311/84 EU:C:1985:394.

Ibid, para 26; see also Case C-95/04 P British Airways plc v Commission EU:C:2007:166, para 69.


Commission decision of 5 March 2014.


[2016] EWHC 253 (Ch), paras 142–176.


Paragraph 30 of the Guidance says that the exclusionary conduct of a super-dominant firm is unlikely to satisfy the conditions for an efficiency defence.


Case C-413/14 P Intel v Commission EU:C:2017:632, para 140.


Case 44/79 EU:C:1979:290, para 17.


328 Case C-344/98 EU:C:2000:249, para 105.


333 Case C-170/13 EU:C:2015:477, para 42.


338 See eg Clearstream, Commission decision of 2 June 2004, paras 326-327; see also Purple Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch), paras 179 and 180-3.

339 See eg Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading [2002] CAT 1, paras 251-254.


343 OJ [2003] L 1/1; see ch 7, ‘Structural remedies’, p 262.

344 See ch 7, ‘Past infringements’, pp 262-263.
