UNIVERZITA KARLOVA

Právnická fakulta

Miroslav Jakab

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Faculty of Law

Miroslav Jakab

Use of Theories of Harm in the Application of Article 102 TFEU

Master's thesis

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Poděkování
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Introduction

Article 102 of the TFEU prohibits abuse of dominant position by one or more undertakings within the internal market or in a substantial part of it. It is one of the oldest provisions in the history of EU primary law. Its wording remained essentially unchanged since 1957, when the Treaty of Rome[1] was ratified.

The age and stability of this provision stands in stark contrast to the development its application has undergone.[2] Even more than 60 years after the adoption of this provision, we are witnesses of changes to some of the fundamental aspects of its interpretation and application. It has not been left aside in the ongoing process of 'modernisation' of EU competition law, a series of often quite impactful changes in the approach to competition regulation and enforcement, the beginning of which can be traced to the 1990s. This process of modernisation led to changes such as the decentralisation of competition enforcement by virtue of the new rules set by *Regulation 1/2003*[3] as well as a stronger influence of economic thinking and effects-based analysis in the application of competition law in general, having the EU regulator focus (at least by its own declaration) more on the goals of efficiency and protection of consumers.

The purpose of this master's thesis is to map the development of the Art. 102 TFEU application practice of the Commission within the boundaries set by the EU courts, as it evolved in the last two decades with respect to analysis of the effects of an impugned conduct and the application of the consumer welfare standard. This period begins by pre-modernisation decisions which were largely dubbed as *economic wasteland* by Hans Zenger and Mike Walker[4] and ends by the newest available decisions published well after the Commission's declared shift to an effects-based approach. The development will be discussed in relation to the notion of 'theory of harm' – broadly speaking, the explanation to what anticompetitive effect did the contested conduct lead and how it did or could result in this effect.

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[1] Treaty establishing the European Economic Community. There has been one rather formal change in the wording of Art. 102 TFEU from "common market" to "internal market" in 2007. This change stems from Art. 2(2)(g) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01).

[2] For an overview of the historical development of application of Art. 102 TFEU, see e.g. ŠMEJKAL, Václav. *Soutěžní politika a právo Evropské unie 1950-2015: vývoj, mezníky, tendence a komentované dokumenty*. Vydání první. Praha: Leges, 2015. Teoretik. ISBN 978-80-7502-108-3.

[3] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25.

[4] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online]. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

Coverage of this topic is motivated by several factors. First, Art. 102 TFEU is widely considered to be in lag with respect to the speed at which other areas of competition law are shifting to a more economic approach. There seems to be considerable variability in the way the Commission applies theories of harm on a case by case basis. Second, the situation is somewhat peculiar given that all the pressure to change seems to be a "bottom-to-top" push by the European Commission, without actively being pressured by the EU courts to change its enforcement methods. Third, such a shift does not direcly follow from the letter of the law as such. Unlike Art. 101(1) TFEU, Art. 102 TFEU does not explicitly mention the effects of the dominant undertaking's conduct. Fourth, as I argue in Chapter 1, a well-developed theory of harm based on a transparent methodology may in fact contribute to a higher level of legal certainty and foreseeability of competition regulation in this area. Thus, it is a topic worth studying.

The current literature in this area provides a good account on the Art. 102 TFEU modernisation as regards the efforts of the Commission in the area of its discussions and soft law as well as the reaction of the Court of Justice.[5] As regards the effects-based approach as such, Pablo Colomo and Alfonso Lamadrid present a good descriptive analysis of the effects-based approach in the main areas of EU competition law in relation to the case law of the General Court and the Court of Justice.[6] Works like the one of Hans Zenger and Mike Walker[7] or Damien Geradin and Ianis Girgenson[8] then discuss the Commission's and EU courts' case law from the more technical perspective of economic analysis.

On the other hand, I am not aware of a comprehensive and up-to-date discussion of the Commission's recent Art. 102 TFEU case law from the perspective of the effects-based approach with focus on a consumer welfare standard. Moreover, the more analytically focused accounts of the inner workings of the effects-based analysis often seem to be presented independently of legal analyses of the more general questions addressed in the EU courts' case law and vice versa. This master's thesis thus strives to present an account that takes into consideration both the more

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[5] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016. ISBN 978-0-19-872342-4.

[6] IBÁÑEZ COLOMO, Pablo and Alfonso LAMADRID. *On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know* [online]. SSRN Scholarly Paper. ID 2849831. Rochester, NY: Social Science Research Network. 2016 [Accessed 2018-10-17]. Available from: https://papers.ssrn.com/abstract=2849831

[7] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online]. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

[8] GERADIN, Damien and Ianis GIRGENSON. *The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach* [online]. SSRN Scholarly Paper. ID 1970917. Rochester, NY: Social Science Research Network. 2011 [Accessed 2019-03-07]. Available from: https://papers.ssrn.com/abstract=1970917

general discussion of the legal boundaries as set by the EU courts with the more economic perspective on practical requirements regarding the analysis as such. As competition law does and has to dwell on a very fact-specific analysis, I believe that even more general legal analyses should not shy away from these more practical questions of competition policy enforcement. To this end, I therefore consider necessary to review the case law of the Commission in relation to the rulings of EU courts. It is, after all, the Commission, who ultimately has the necessary expertise and resources to conduct a proper analysis of the effects of an allegedly anti-competitive conduct.

Concerning the methodology, this master's thesis first provides a descriptive and analytical theoretical discussion building on previous literature to identify the legal boundaries which limit the Commission's discretion as to the properties of the analysis in its decisions. The Commission's case law itself will be analytically tested against two basic criteria. Does the Commission apply a consumer welfare standard? Does the Commission present a credible analysis of the effects of the dominant undertaking's conduct? Building on the basic insights stemming from this analysis, a more qualitative discussion will follow, drawing some general conclusions about the Commission's practical approach to the modernisation of Art. 102 TFEU. This should provide a better understanding of whether and how is the effects-based approach applied in day to day practice and identify possible problems linked to this approach.

Regarding the structure of this work, this master's thesis will consist of six parts, including this Introduction. Chapter 1 will focus specifically on the notion of theories of harm in antitrust cases and, more specifically, the object of protection and method of determining anti-competitive effects in competition law, leading to a description of the current state-of-the-art and its open questions. A brief description of the development of economic ideas underlying competition policy, including the discussion of EU competition law modernisation in relation to the more effects-based approach to Art. 102 TFEU will be presented in Chapter 2. Chapter 3 will contain the results of the analysis of the competition case law *vis a vis* the preestablished criteria. Finally, Chapter 4 will discuss the results of this analysis. The main findings and possible future research will be addressed in the Conclusion.

1. Conceptual Background

The purpose of this chapter is to provide a theoretical background necessary for tackling the issue of assessing the effects of the scrutinised conduct in antitrust cases. On the way, I will introduce some basic concepts from economic theory that will ease the discussion of the repercussions of the application of competition rules. The first part of this chapter will be dedicated to the discussion of these basic concepts and the related theory, while the second part will apply these terms in the description of the notion of a theory of harm.

1.1. Basic concepts

To be able to properly discuss the objects of protection in competition law, the notions of economic welfare (using surplus as a metric), efficiency, perfect competition and monopolies have to be addressed. The two latter notions represent two ideal and borderline cases of market structure. The two former ones serve as theoretical metrics for comparison of markets in general.

The presented ideas and, more importantly, the way they are presented, are prevailingly based on neoclassic economics. One might object that these do not reflect the cutting edge of economic theory (of competition and in general). Nevertheless, they are relied on by contemporary competition policy.[9] It appears suitable to frame the discussion on the aspects of competition policy in terms in which it was developed.

In order not to turn this master's thesis into an economics textbook, the following notions can only be addressed in brevity. For a more detailed account, the reader is invited to consult the basic textbook by Paul Samuelson and William Nordhaus[10] for a more thorough introduction or the microeconomics textbook by Raymond Rees and Hugh Gravelle[11] for a nuanced discussion relying heavily on mathematical modelling.

1.1.1. Economic welfare

To begin with the first metric for comparing markets, the welfare created by a given market is usually analytically determined by its *total surplus*.[12] Economists tend to distinguish so

[9] TOR, Avishalom. *Should Antitrust Survive Behavioral Economics?* [online]. SSRN Scholarly Paper. ID 3291886. Rochester, NY: Social Science Research Network. 2018 [Accessed 2019-02-16]. Available from: https://papers.ssrn.com/abstract=3291886.

[10] SAMUELSON, Paul A. and William D. NORDHAUS. *Economics*. 19th edition. Boston: McGraw-Hill Education, 2009. ISBN 978-0-07-351129-0.

[11] GRAVELLE, H. S. E. and Raymond REES. *Microeconomics*. B.m.: Addison-Wesley Longman, Incorporated, 1992. ISBN 978-0-582-02386-4.

[12] MOTTA, Massimo. *Competition Policy: Theory and Practice*. B.m.: Cambridge University Press, 2004, p. 18. ISBN 978-0-521-01691-9. The terms *welfare* and *surplus* are often used interchangeably in this context. For

called *consumer surplus*, *producer surplus* and *total surplus* as the sum of the two former surpluses.[13]

Simply put, a producer gains surplus every time they sell a good for more than the costs, they incurred to produce it. A consumer, on the other hand, gains surplus every time they buy a good for less than the maximum price, they are willing to pay for it. Summing up all these surpluses (*total surplus*) then gives us a hypothetical quantification of how much is everyone better off thanks to the exchanges of value that have been exercised within the economy.[14] It can answer the question why we have markets at the first place or, more specifically, how much do they contribute to the well-being of the agents involved.

1.1.2. Economic efficiency

If the notion of surplus informs us how much are we better off thanks to a given market, the notion of efficiency helps us to determine if the market can serve its purpose better than it currently does or not. There are two distinctions that deserve underlining. The first one is the distinction according to the process undertaken within the economy which we want to evaluate. This is a common distinction in competition law that recognizes *allocative efficiency*, *productive efficiency* and *dynamic efficiency*.[15] The other concerns the standard for evaluating efficiency as such, the notions of *Pareto efficiency* and *Kaldor-Hicks efficiency* are the ones that are commonly distinguished.

Concerning the former distinction based on the evaluated process, allocative efficiency describes a state of an equilibrium market where the optimum quantity of the good produced is sold for the optimum price, so that no agent could improve its position without worsening the position of some other agent, therefore it is also described as the market Pareto optimum. Productive efficiency, on the other hand, means that firms produce their goods for the lowest possible cost. Finally, dynamic efficiency describes the market development instead of the comparatively static equilibria described by the previous two terms. It reflects how a market can deliver innovation and technological progress.[16]

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aarguments to the contrary, see e.g. DASKALOVA, Victoria. Consumer welfare in EU competition law: what is it (not) about? *The Competition Law Review (2015)*. 2015, **11**(1), 131–160. In any event, I do not claim that consumer harm is to be determined purely by a reduction in consumer surplus, as can be seen bellow.

[13] SAMUELSON, Paul A. and William D. NORDHAUS. *Economics*. 19th edition. Boston: McGraw-Hill Education, 2009, p. 161. ISBN 978-0-07-351129-0.

[14] Ibid, p. 161.

[15] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 7. ISBN 978-0-19-872342-4.

[16] Ibid.

The distinction based on the criterion of efficiency as such does not seem to be discussed that much in the context of competition regulation. On one hand, Pareto efficiency means (as noted above in relation to the Pareto optimum) that no agent may be made better off without making some other agent worse off. Consequently, a Pareto improvement is such a change that makes at least one agent better off without worsening anybody else's position.[17] It knows only winners and those who are indifferent.

On the other hand, the requirements of Kaldor-Hicks efficiency are less stringent. The general condition of a Kaldor-Hicks improvement is based on the notion of an increase of overall utility/benefit. If, after implementing a hypothetical measure, the ones who were made better off by the measure *could* reimburse the ones who were made worse off and still be better off, the change would present a Kaldor-Hicks improvement. Note that those worse off can be reimbursed (that would be a special case of a Pareto improvement) but they do not have to be offered any remedy for their losses. Thus, a Kaldor-Hicks improvement may have its losers. This obviously grants a policymaker a wider margin within which it can act but also raises issues of how to quantify the losses and gains as well as some basic issues of fairness of a such an approach.[18]

Nonetheless, I would argue that this criterion is more relevant in the area of regulation, competition policy included. One can hardly imagine a measure/decision that would cause no harm to anybody if it is supposed to lead to some meaningful change in the society.

1.1.3. Perfect competition

Moving to the ideal models of markets as such, the idea of perfect competition is a remarkably old concept of neoclassical economic theory. It was developed by the end of the 19th century by scholars such as Carl Menger, Léon Walras, Alfred Marshall or Arthur Cecil Pigou.[19] Notably, one can find the representatives of the Austrian, Lausanne and Cambridge schools of economics of the time in this list, i.e. the representatives of all the major European schools of economics of the time.[20]

The model of a market under perfect competition assumes (1) rationality of consumers and firms, (2) homogeneity of goods, (3) zero transaction costs, (4) no barriers to entry to the market, (5) immediate reaction of agents to changes on the market, (6) no direct influence of

[17] WEITZEL, Tim. *Economics of Standards in Information Networks*. B.m.: Springer Science & Business Media, 2003, p. 59. ISBN 978-3-7908-0076-0.
[18] Ibid, p. 60.
[19] MUNKOVÁ, Jindřiška. *Soutěžní právo*. B.m.: C.H. Beck, 2012, p. 6. ISBN 978-80-7400-424-7.
[20] HOLMAN, Robert. *Dějiny ekonomického myšlení*. B.m.: Nakladatelství C H Beck, 2005, pp. 172–285. ISBN 978-80-7179-380-9.

agents on the process of price formation, (7) no externalities and (8) a very high number of consumer and firms.[21]

In many ways, perfect competition can be understood as competition at its finest. According to neoclassical microeconomic theory, this model leads to allocative and productive efficiency. The maximum consumer (and total) surplus is also attained when the assumptions of perfect competition are met, and the perfectly competitive market has attained its equilibrium – this equilibrium is also a Pareto optimum under the given circumstances.[22]

The question of dynamic efficiency is not dealt with in this simple framework, it merely describes the equilibrium of a market or set of markets under the given circumstances – it is static.[23]

1.1.4. Monopoly

As opposed to the model of perfect competition, a monopoly is in many ways an antithesis of this model. It simulates a market controlled by one firm that is the only producer of a given good. Therefore, it is free to decide upon what will be the quantity produced and what will be the price for which the good will be sold, whereas firms under perfect competition are price-takers. This setup allows the monopolist to produce for a price that is higher than would be the market equilibrium price under perfect competition and reap a part of the total surplus that would otherwise belong to the consumers.[24]

This comes at a cost. Under the assumptions above, monopolies create so-called *dead weight loss*, a loss in total surplus, that would be otherwise produced under perfect competition but is not produced when the market is controlled by a monopolist. As noted e.g. by Alison Jones and Brenda Suffrin,[25] this is one of the core objections of economists against monopolists – they are *inefficient* in terms of allocative efficiency.

It is noteworthy, however, that this does not always have to be the case. We can imagine a monopolist that is able to exercise perfect price discrimination (also known as *first degree price discrimination*): a price setting mechanism that allows the monopolist to sell a good to a certain consumer for the highest price the individual consumer is willing to pay for it and the consumers are not able to further resell the bought goods via arbitrage trading. Given such

[21] MUNKOVÁ, Jindřiška. *Soutěžní právo*. B.m.: C.H. Beck, 2012, p. 7. ISBN 978-80-7400-424-7.
[22] Ibid, p. 7.
[23] HOLMAN, Robert. *Dějiny ekonomického myšlení*. B.m.: Nakladatelství C H Beck, 2005, p. 235. ISBN 978-80-7179-380-9.
[24] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 9. ISBN 978-0-19-872342-4.
[25] Ibid, p. 9.

conditions, the monopolist will be incentivised to sell goods to every last consumer to which they can be sold without a loss. Consequently, there would be a zero dead weight loss and the monopolised market would be just as allocatively efficient as a perfect competitive one.[26]

I consider it necessary to mention this hypothetical scenario because it is not all that unthinkable, in my opinion. Currently, there are some results available that point in the direction of price discrimination conducted by certain online platforms.[27] It seems the ever-improving ways to construct pricing algorithms are largely restricted only by human imagination and regulators (be it competition regulators or others).

This only points to the relevance of the underlying values of competition regulation. If we strictly aim at attaining a Pareto-efficient state on a given market, we might be forced to allow for a dominant undertaking fiercely defending its position by whatever means necessary. On the other hand, we can aim at protecting the consumers and say that the dominant undertaking should not be allowed to fight for and/or defend its position *even though* its behaviour would generate no dead weight loss on the market. It shows the possible problems that might result from the notion of competitive harm not being well defined.

1.2. The notion of a theory of harm

A theory of (anti-competitive) harm is a structural part of an effects-based assessment of an allegedly anti-competitive conduct of an undertaking. In broad terms, it is a theoretical explanation of the way how a concrete conduct of a concrete undertaking hurts a value protected by competition law.[28,29]

The vague language is chosen intentionally. There is no dispute as to whether competition law should apply only to *harmful* behaviour or not. In this sense, we can see clear endorsements of asking competition authorities and claimants to bring forward theories of harm in competition cases in competition law textbooks.[30] Indeed, one does not have to delve deep

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[26] GRAVELLE, Hugh and Ray REES. Microeconomics. 3: e uppl. *Harlow: Prentice Hall*. 2004, p. 196. ISBN 9780582404878.

[27] HANNAK, Aniko, Gary SOELLER, David LAZER, Alan MISLOVE a Christo WILSON. Measuring Price Discrimination and Steering on E-commerce Web Sites. In: *Proceedings of the 2014 Conference on Internet Measurement Conference* [online]. New York, NY, USA: ACM, 2014, pp. 305–318 [Accessed 2019-03-14]. IMC '14. ISBN 978-1-4503-3213-2. Available from: doi:10.1145/2663716.2663744

[28] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online], p. 1. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed. 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

[29] WHISH, Richard and David BAILEY. *Competition Law*. B.m.: OUP Oxford, 2012, p. 484. ISBN 978-0-19-958655-4.

[30] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 46. ISBN 978-0-19-872342-4.

into the literature to find mentions about "type I errors"[31] or discussions on the topic of under- or over-enforcement.[32]

The problem is elsewhere. The opinions start to differ once one delves into the specifics. The vague definition above leaves much to be desired. One might start asking questions about who or what is supposed to be harmed by the anti-competitive conduct? What is the legal test or other standard that should be upheld when determining that the conduct is harmful? Or, once we accept that the conduct did not have to cause any actual harm to be anti-competitive, what attention should we pay to the possibility/probability of the harm occurring?

To me, the notion seems to be problematic because it often splits on the differing points of view of economic optimality and of legality (although the following positions are more of a caricature in their extremism). From a legal perspective, it is a way of establishing causal nexus between the conduct of an undertaking and its anti-competitive effect.[33] If the analysis of a competition case at least strives to be effects-based, establishing how the conduct was or could have been harmful is an indispensable step. Applying a more effects-based approach, however, as pleasing as the idea might appear to some, raises legitimate concerns about legal certainty of competition enforcement across jurisdictions.[34] Legal certainty would require a threshold that is reasonably foreseeable. In this respect, even a very simple form-based rule (say, that rebates conditional on *de facto* exclusivity should be precluded under any circumstances when stipulated by a dominant undertaking)[35] will be based on some notion of their harmful nature (the question of economic evidence is a different thing here). A lawyer can be satisfied by the rules' simplicity and foreseeability.

An economist, on the other hand, is more concerned about the properness of the analysis as such. This view can be well seen on the example of what Mike Walker and Hans Zenger describe as the important aspects of a good theory of harm.[36] It should:

- *articulate how competition and, ultimately, consumers will be harmed relative to an appropriately defined counterfactual;*

[31] A case when e.g. an innocent person is falsely identified as guilty (a false positive), unlike the type 2 error, where an actual perpetrator is mistakedly declared innocent (a false negative).

[32] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 47. ISBN 978-0-19-872342-4.

[33] NIÑO, López and Jonás YAEL. Importancia de una teoría del daño en casos de competencia [online], p. 2. 2015 [Accessed 2019-03-11]. Available from: http://repositorio-digital.cide.edu/handle/11651/530

[34] STUCKE, Maurice. Does the Rule of Reason Violate the Rule of Law The Antitrust Marathon: Antitrust and the Rule of Law - Discussion - Discussion. *Loyola Consumer Law Review*. 2009, **22**, 28–50.

[35] As was hinted in the now quashed decision of the General Court in Case T-286/09, Intel Corp. v European Commission, EU:T:2014:547.

[36] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online], p. 1. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

- *be logically consistent;*
- *be consistent with the incentives that the various parties face; and*
- *should be consistent with (or at least not inconsistent with) the available empirical evidence.*

The reader may note that, except for the value-based presumption of who/what is protected by competition law, all the above considerations are of a methodological nature. Their faithful application will lead to a proper analysis and a minimisation of type I errors. What this view lacks, is the stress on legal certainty and foreseeability. Also, a proper in-depth economic analysis is not the same thing as a speedy analysis, quite to the contrary.[37] It is not necessary to stress that this can run counter the requirement of the investigation's result being not only fair and foreseeable, but also reasonably quick.

This is nothing new *per se*. Lawyers and economists do have their differences when it comes to competition regulation. As explained by Giorgio Monti,[38] it is to be expected that some necessary simplification of economic theory will occur when applied by lawyers. It does not stop at simplicity, though. When accepting that the law as such is not a value-neutral system,[39] we can come to the conclusion that lawyers will naturally ask questions concerning the purpose of a certain regulation, its (ir)reconcilability with a specified set of values. Competition law is no different.

The contrast outlined above is more than just a theoretical remark. The requirement of legal certainty and the requirement of a 'proper' analysis are both not to be taken lightly. As noted by Maurice Stucke in a more comprehensive list of requirements,[40] the antitrust legal standard should

- *promote accuracy (and thus minimise false positives and false negatives);*
- *be administrable and thus easy to apply;*
- *be consistent and thus yield predictable results;*
- *be objective (and thus minimise the subjective input from decision makers);*
- *have a broadly applicable standard; and*

[37] See e.g. COMP@60 - digital publication about 60 years of EU Competition Policy, Phillip Lowe: *The Origins of the Chief Economist Team: Mission, early achievement and challenges*, p. 4. Available at http://ec.europa.eu/competition/compat60/memories/pdf/019-lowe.pdf

[38] MONTI, Giorgio. *EC Competition Law*. B.m.: Cambridge University Press, 2007, p. 74. ISBN 978-0-521-70075-7.

[39] BOBEK, Michal and Zdeněk KÜHN. *Judikatura a právní argumentace*. B.m.: Auditorium, 2013, p. 29. ISBN 978-80-87284-35-3.

[40] STUCKE, Maurice. Does the Rule of Reason Violate the Rule of Law The Antitrust Marathon: Antitrust and the Rule of Law - Discussion - Discussion. *Loyola Consumer Law Review*. 2009, **22**, 28–50, p. 30.

- *be transparent (including the objective of the applied standard).*[41]

These requirements might seem to be contradictory at least to some degree. To a large extent, they just reflect the combination of the requirements of the two approaches outlined above, though. It is hardly imaginable how to minimise false positives and false negatives without looking at the effects of the conduct at least to some degree. And what about the legal certainty? A well-specified theory of harm might be the only saving grace in this respect. Once we depart from well-established form-based rules, it is only a transparent, consistent and ideally broadly applicable methodology of assessment that can ensure that the outcomes of competition investigation and litigation are foreseeable and consistent to a reasonable degree.

Based on the discussion above, two main aspects of theories of harm contained in the Commission's decisions will be addressed for every case. The first is value-driven. It answers the question, what is claimed to be harmed in the concrete decision. This is relevant in the light of the Commission's pledge to apply a consumer welfare standard in its decisions pursuant to the *Guidance Paper*,[42] as explained in Chapter 2. The second aspect is of a more technical nature. It concerns the standard applied by the Commission – did the Commission run a credible analysis of the effects of the conduct in question? This is relevant in the light of the accuracy of enforcement of competition law. The remainder of this chapter will explore more closely these two aspects of a theory of harm in competition cases, establishing what is already known and what questions remain open.

1.3. Who or what is supposed to be harmed?

This is perhaps one of the most intuitive questions to be asked. It is sometimes swept away without much attention. One of the more popular phrases states that the undertaking's anti-competitive behaviour is susceptible to cause *harm to competition and, ultimately, to consumers.*[43] This is not to say that this issue would not be discussed or that it is supposed to be simple to answer. A thorough discussion of this topic would exceed the scope of this thesis. Therefore, I can only present some of the main conclusions and explanations. For a more

[41] Some of the criteria are slightly paraphrased for the sake of brevity.

[42] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01).

[43] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online], p. 1. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.; HAWK, Barry E. *International Antitrust Law & Policy: Fordham Competition Law 2008*. B.m.: Juris Publishing, Inc., 2009, p. 351. ISBN 978-1-57823-253-6.

thorough discussion of this topic or at least some of its facets, there are other works confined to this question specifically, be in in the EU[44,45] or in the USA for a comparative perspective. [46]

To begin, the phrase quoted above gives us two likely candidates: consumers and competition as such, the process of competition. In the context of EU competition law, the goal of integration of the EU single market is supposed to play an important part as well.[47] Other parties which might be harmed by the dominant undertaking's activities are also its direct competitors. Lastly, there are also more specific theories of competitive harm that have some overlap with other general goals, such as the theory of consumer choice restriction,[48] that could be arguably linked to the broader question of consumer well-being.

1.3.1. Other competitors?

Other competitors of the undertaking in question are one of the clearer cases. It is a well-established notion in (not only) EU competition law, that competition law does not seek to protect other competitors as such. If a competitor is e.g. driven out of the market or foreclosed by a dominant undertaking because of being less efficient, it cannot (generally) avail itself of competition law protection.[49]

This is closely linked to the idea of *competition on the merits*, which is to be promoted instead of being stifled. On the other hand, protecting competitors at least as efficient as the dominant undertaking, perhaps by applying the *as-efficient-competitor* (AEC) test,[50] should help to promote and protect competition and market efficiency. But even in such a case, it is not primarily the competitor as such who is protected in this scenario.

1.3.2. Competition as a process?

The notion of competition and its protection, as much as it is one of the cornerstones of *competition* law, is not entirely clearly defined. Robert Bork lists five definitions of competition,

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[44] MONTI, Giorgio. *EC Competition Law*. B.m.: Cambridge University Press, 2007, pp. 20–52. ISBN 978-0-521-70075-7.

[45] ŠMEJKAL, Václav. Ochrana spotřebitele a jeho blahobytu v soutěžním právu EU. *Acta Universitatis Carolinae. Iuridica*. 2012, 31–65. ISSN 0323-0619.

[46] HAHN, Robert W. *High-Stakes Antitrust: The Last Hurrah?* B.m.: Brookings Institution Press, 2003, p. 72–116. ISBN 978-0-8157-9612-1.

[47] MUNKOVÁ, Jindřiška. *Soutěžní právo*. B.m.: C.H. Beck, 2012, p. 42. ISBN 978-80-7400-424-7.

[48] AVERITT, Neil W. and Robert H. LANDE. Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law [article]. *Loyola Consumer Law Review*. 1997, (Issue 1), 44. ISSN 1530-5449.

[49] See Case C-209/10 Post Danmark A/S v Konkurrencerådet, EU:C:2012:172, para 22. (*Post Danmark I*) Yet there is undeniably a case to be made for competitive pressure exercised even by less efficient competitors under certain circumstances, as noted by by the Court of Justice in Case C-23/14 Post Danmark A/S v Konkurrencerådet, EU:C:2015:651, paras 59-61. (*Post Danmark II*).

[50] As spelled out e.g. in recitals 23-27 of Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, p. 7–20, CELEX 52009XC0224(01). (*Guidance Paper*)

namely competition as *(i) the process of rivalry*, *(ii) the absence of restraint over one firm's economic activities by another firm*, *(iii) the state of the market in which the individual buyer or seller does not influence the price by his purchases or sales*, *(iv) the existence of fragmented industries and markets*, and *(v) a state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree*.[51] While Jiří Kindl argues that it is not necessary to specify the notion of competition as such for the purposes of competition regulation (focusing rather on the notion of *effective* competition),[52] the different takes on the definition of competition mentioned above do reflect differing ideas about and approaches to competition regulation. When scrutinising the effect on competition, these different approaches will necessarily influence the formulation of the theory of harm in question.

At least historically speaking, the first two of the five definitions seem to have been dominant in EU competition regulation. The idea of protection of competition as a process appears to be more appealing and accepted, it has been also endorsed by the Court of Justice as early as in 1973.[53] It seems to stem at least partly from the ideal of competition law protecting economic freedom as proposed by the German school of ordoliberalists,[54] which was historically very influential in Germany.[55]

Building on the concepts of consumer/total surplus and efficiency addressed above, we have the tools to tell why competition as a process is (at least seemingly) supposed be defended – note that the definition of competition as a state of efficiency (the fifth Bork's definition) was stated separately.

As mentioned above, according to neoclassical microeconomic theory, the maximum consumer (and total) surplus is attained when the assumptions of perfect competition are met, and the perfectly competitive market has attained its equilibrium. On the other hand, markets controlled by a single monopoly tend to allow the monopolist to dictate a price higher that would be the equilibrium price under perfect competition and consequently create a dead weight loss on the given market. Thus, the argument for protection of competition as such would appear to be the goal of creating as much surplus as possible (and thus focus on allocative efficiency).

Such an argument might thus appear satisfying also in the light of welfare maximisation, but there are certain caveats. To begin with, protecting competition for the sake of allocative

[51] BORK, Robert H. *Antitrust Paradox*. B.m.: Simon & Schuster, 1993, pp. 58–61. ISBN 978-0-02-904456-8.
[52] KINDL, Jiří. *Dohody narušující hospodářskou soutěž*. Univerzita Karlova, 2009, p. 54. b.n.
[53] Case C-6/72 Europemballage Corporation and Continental Can Company Inc v Commission, EU:C:1973:22, para 26.
[54] WHISH, Richard and David BAILEY. *Competition Law*. B.m.: OUP Oxford, 2012, p. 22. ISBN 978-0-19-958655-4.
[55] RICHARDSON, DAVID J., GRAHAM, Edward Montgomery GRAHAM and J. David RICHARDSON. *Global Competition Policy*. B.m.: Peterson Institute, 1997, p. 117. ISBN 978-0-88132-166-1.

efficiency probably would not be enough. There is a case to be made for the protection of dynamic efficiency as well, as in certain markets, a large portion of competition appears to consist in innovation races among the competitors, such as markets for search engines.[56]

Moreover, there are numerous examples where the protection of economic freedom and/or the process of competition as such might yield results detrimental to efficiency of a market. Fox example, it makes perfect sense to ban resale price maintenance (a producer setting contractual boundaries on the prices of its products resold by the distributor)[57] in general, insofar the protection of competition as a process is based on an economic freedom rationale. Nonetheless, it is often argued by economists that this will not necessarily lead to the best possible outcome in terms of efficiency.[58] Particularly, an empirical study supporting this argument in context of US competition regulation was conducted by Pauline Ippolito.[59]

More generally, as noted above, there can be cases in which competition has been completely wiped out on a given market, but the market is nonetheless allocatively efficient. In this respect, the goals of protecting competition as a process can be better aligned with the goal of protecting consumers. Of course, protection of competition as such cannot be confused with the notion of direct and immediate consumer harm. As noted by Václav Šmejkal,[60] there are cases when the protection of competition might be even considered to be harmful at least in the short run. On the other hand, in the light of the abovementioned, protection of competition of a process seems to be a better tool to ensure that consumers should not be deprived from the benefits of conducting exchange, unlike focusing on a similar looking criterion, like efficiency as such.

1.3.3. Consumers?

Another widespread claim about competition law is that it protects consumers. This idea is widespread in political statements of EU officials[61] as well as in soft law materials of the

[56] VERHAERT, Joyce. The challenges involved with the application of article 102 TFEU to the New Economy: A case study of Google. *European Competition Law Review*. 2014, **35**(6), 265. ISSN 01443054.

[57] For a more precise definition for the purposes of vertical agreements between undertakings, see Art. 4(a) of Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, pp. 1-7.

[58] MOTTA, Massimo. *Competition Policy: Theory and Practice*. B.m.: Cambridge University Press, 2004, p. 24. ISBN 978-0-521-01691-9.

[59] IPPOLITO, Pauline M. Resale Price Maintenance: Empirical Evidence from Litigation. *The Journal of Law and Economics* [online]. 1991, **34**(2, Part 1), 263–294. ISSN 0022-2186. Available from: doi:10.1086/467226

[60] ŠMEJKAL, Václav. Ochrana spotřebitele a jeho blahobytu v soutěžním právu EU. *Acta Universitatis Carolinae. Iuridica*. 2012, 31–65. ISSN 0323-0619.

[61] ŠMEJKAL, Václav. Ochrana spotřebitele a jeho blahobytu v soutěžním právu EU. *Acta Universitatis Carolinae. Iuridica*. 2012, 31–65. ISSN 0323-0619.

Commission.[62] On the other hand, while acknowledged by the Court of Justice, it also expressly noted that it is not the only goal of competition policy in relation to Art. 101 TFEU.[63] There is no reason to believe that such a conclusion would not apply to Art. 102 TFEU as well. Nevertheless, the goal of consumer protection seems to be accepted by many at least as a declaration of one of the main purposes of competition law.

One must note, however, that the concept of a 'consumer' is not to be interpreted as restrictively as in consumer protection law. Indeed, the Commission itself notes that the notion of a consumer as a subject of protection of competition law encompass intermediate producers, distributors as well as final consumers[64] (one could thus think of consumers as downstream customers of a given undertaking rather than just consumers in the narrow legal sense). Thus, according to the statements considering consumers to be the main subject of protection in competition law (or one of the main ones), the direct and indirect customers of a given industry seem to be the ones that are the protected group, the intended beneficiaries of well-functioning competitive markets.

This is a statement departing from the simple question concerning allocative efficiency. It deals with justice of the system of allocation instead. It is more in line with the lawyer's approach to competition policy because it has a clearer ideological foundation, it gives a clearer *telos* to the concrete measures which have to be justified before the members of a community. That easily explains the way the goal of consumer protection is often mentioned in political statements.[65] Being value driven, it also departs from the notion of positive economics where the more universal measure of reduction of total welfare (surplus) is more accepted by economists.[66] This might not present that much of a problem in itself, but there are other practical issues of this criterion that have to be addressed.

For example, not only that consumer welfare is not a value-neutral criterion, it does not tend to be (and probably even should not be) interpreted as a purely technical and quantitative

[62] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01)., para 5.

[63] See the Court's ruling in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services and Others v Commission and Others, EU:C:2009:610, para 62.

[64] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01), para 19.

[65] ŠMEJKAL, Václav. Ochrana spotřebitele a jeho blahobytu v soutěžním právu EU. *Acta Universitatis Carolinae. Iuridica*. 2012, 31–65. ISSN 0323-0619.

[66] MONTI, Giorgio. *EC Competition Law*. B.m.: Cambridge University Press, 2007, p. 83. ISBN 978-0-521-70075-7.

test of consumer surplus reduction.[67] This however results in the criterion becoming vaguer than would be desirable.

Perhaps for this reason, the consumer in EU competition law often figures as an ultimate subject of protection who has to be kept in mind rather than a litmus paper, the direct harm to which would imply anti-competitive behaviour. This can be be seen on some of the definitions of theories of anti-competitive harm mentioned above, according to which one an anti-competitive conduct is harmful to competition and *ultimately* to consumers.

1.3.4. Market integration?

Following Art. 3(3) TEU, the Union shall establish an internal market. This is promoted by various rules against barriers to free movement of production inputs, outputs and capital (in the financial sense). Following Protocol No 27 to the Treaties,[68] the internal market includes a system ensuring that competition is not distorted.

This particular subject of protection is typical for EU law. The result of the application of this goal is e.g. the prohibition of price discrimination across borders.[69] Forbidding exclusive distribution agreements for the territory of one Member State[70] follows a similar rationale.

The intellectual basis for this protection is legal/political (as can be seen above) and, in fact, apparently cannot be based on any economic rationale related to efficiency or welfare maximization.[71] Indeed, one of the cited examples where the pursuit of market integration ultimately trumped efficiency of the economy overall is the case of *United Distillers (Red Label)*,[72] where a special charge was added to the price of purchases of whisky which was supposed to be exported from the UK to other Member States. Eventually, the Commission's opposition to this dual pricing scheme led to an increase of the price of some of the distillates sold in the UK and the Johnny Walker Red Label whisky has been withdrawn from sale in the UK while other products were no longer promoted in other Member States, which can hardly be

[67] ŠMEJKAL, Václav. Ochrana spotřebitele a jeho blahobytu v soutěžním právu EU. *Acta Universitatis Carolinae. Iuridica*. 2012, 31–65, p. 37. ISSN 0323-0619.

[68] Protocol (No 27), On the Internal Market and Competition, annexed to the Treaty on European Union and Treaty on the Functionning of the European Union.

[69] MOTTA, Massimo. *Competition Policy: Theory and Practice*. B.m.: Cambridge University Press, 2004, p. 23. ISBN 978-0-521-01691-9.

[70] Joined Cases C-56/64 and C-58/64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, ECLI:EU:C:1966:41.

[71] MOTTA, Massimo. *Competition Policy: Theory and Practice*. B.m.: Cambridge University Press, 2004, p. 23. ISBN 978-0-521-01691-9.

[72] Notice pursuant to Article 19 (3) of Council Regulation • No 17 concerning notification No IV/30.228 (The Distillers Company p.l.c.), document JOC_1983_245_R_0003_01, OJ C245/3, 14.9.1983, pp 3-4.

consistent with any consumer or other welfare standard.[73] Admittedly, the lesson of this (quite old) case can be that the market integration criterion cannot be applied blindly. Nonetheless, as a criterion, it stands largely independent and separate from the more 'economic' criteria and should be understood this way.

1.3.5. Other subjects of protection?

Aside the most common subjects mentioned above, other values can be protected by competition law. Under the header of 'other public policy factors', Massimo Motta lists social reasons, political reasons, environmental reasons and strategic reasons.[74]

While political reasons will always be hard to identify, as a competition authority or a court would hardly admit to factoring in political considerations in their evaluation, other considerations are more pronounced. E.g. environmental protection is accepted more explicitly. In the *CECED*[75] decision, for example, where a vast majority of washing machine manufacturers decided to stop importing and producing the least energy efficient category of machines. While the Commission found this agreement to clearly restrict competition by object, the reduction in electricity consumption and other environmental considerations led the Commission to clear the agreement as legal.

There is a certain political push to factor considerations such as environmental or social harm more into the competition policy decisions. For example, the European Parliament criticized the Commission as recently as in early 2019[76] for not taking environmental and climate considerations into account in the *Bayer/Monsanto* merger.[77]

The strategic considerations, on the other hand, are more linked to trade policies. The push for 'national champions' or the US law allowing for export cartels are a manifestation of this thinking. Nevertheless, competition policy is usually not considered to be the proper tool to protect the country's position in international trade. These will more likely be governed by trade policies and, on the EU level, state aid rules.[78]

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[73] BISHOP, Simon and Mike WALKER. *The Economics of EC Competition Law: Concepts, Application and Measurement*. B.m.: Sweet & Maxwell, 2010, p. 8. ISBN 978-0-421-93190-9.

[74] MOTTA, Massimo. *Competition Policy: Theory and Practice*. B.m.: Cambridge University Press, 2004, p. 24. ISBN 978-0-521-01691-9.

[75] Commission Decision of 24 January 1999 in Case IV.F.1/36.718, CECED, CELEX 32000D0475, OJ L187/47, 26.7.2000, pp. 47-54.

[76] European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy (2018/2102(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0062+0+DOC+PDF+V0//EN.

[77] Summary of Commission Decision of 21 March 2018 in Case COMP/M.8084, Bayer/Monsanto, OJ C 459/10, 20.12.2018, pp. 10-23.

[78] MOTTA, Massimo. *Competition Policy: Theory and Practice*. B.m.: Cambridge University Press, 2004, p. 29. ISBN 978-0-521-01691-9.

1.4. How to determine anti-competitive effects?

1.4.1. Actual harm? Probable harm? Possible harm?

Having discussed what is there to be harmed, the next logical question seems to be whether this protected group/values has in fact been harmed? First, it already follows from established case law that it does not have to be shown that the actual effects have taken place to determine that a conduct is anti-competitive.[79] This is a logical conclusion. It makes no sense to wait and observe the anti-competitive effects of a conduct to take place if we have already established their restrictive nature. Moreover, and as will be shown further, it would not help all that much with the determination of anti-competitiveness at the first place.

What seems more problematic in this respect is the standard of assessment as to the probability of the effects taking place. Indeed, while it is not contested that the harm caused by the conduct cannot be purely hypothetical,[80] there is no clear answer about the actual likelihood of this *non-hypothetical* harm materializing.[81]

In fact, there are two terms that seem to be used to identify a standard for probability of the conduct leading to an anti-competitive effect, *capability* and *likelihood*.[82] From the natural meaning of the words itself, *likelihood* appears to signify a stricter threshold to be fulfilled.

The question of the probabilistic standard in the assessment of dominant undertakings' conduct regarding Art. 102 TFEU has been explicitly addressed by AG Kokott in *Post Danmark II*[83] and by AG Wahl in *Intel*,[84] two cases concerning allegedly exclusionary rebate schemes (the latter dealt with the question of loyalty-inducing rebates that are considered presumptively unlawful since the decision in *Hoffmann-La Roche*).[85] AG Kokott seems to set the standard to be that the exclusionary effect must be more likely than not[86] – far from being effectively certain but still the most likely outcome. This has been explicitly rejected by AG Wahl, who (not accepting a material difference between the criteria of likelihood and capability) advocates to set

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[79] See e.g. Case T-203/01, Manufacture française des pneumatiques Michelin v Commission, EU:T:2003:250, para 239 (*Michelin II)*, or Case C-23/14 Post Danmark A/S v Konkurrencerådet, EU:C:2015:651, para 66.

[80] Case C-23/14 Post Danmark A/S v Konkurrencerådet, EU:C:2015:651, para 65.

[81] IBÁÑEZ COLOMO, Pablo and Alfonso LAMADRID. *On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know* [online], p. 34. SSRN Scholarly Paper. ID 2849831. Rochester, NY: Social Science Research Network. 2016 [Accessed 2018-10-17]. Available from: https://papers.ssrn.com/abstract=2849831

[82] Ibid, p. 34.

[83] Opinion of Advocate General Kokott in Case C-23/14, Post Danmark A/S v Konkurrencerådet, EU:C:2015:343.

[84] Opinion of Advocate General Wahl in Case C-413/14 P, Intel Corporation Inc. v European Commission, EU:C:2016:788.

[85] Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, EU:C:1979:36, paras 89-90.

[86] Opinion of Advocate General Kokott in Case C-23/14, Post Danmark A/S v Konkurrencerådet, EU:C:2015:34., para 82.

the threshold to the question if the contested conduct would lead to a foreclosure effect *in all likelihood*.

Setting the test to merely prevailing likelihood, as done by AG Kokott, might otherwise lead to a high proportion of type I errors.[87] Following such a criterion can lead to a rate of error hypothetically approaching up to a good half of the cases if we accept the interpretation by Pablo Colomo and Alfonso Lamadrid,[88] who claim that AG Kokott's criterion can be interpreted as requiring a likelihood (probability) over 50%. Considering such a test too lenient, AG Wahl proposes to ascertain at least that the effects of the conduct will not be ambivalent or ancillary even in cases of presumptively unlawful conduct. Otherwise, a more thorough analysis should be conducted.[89]

Another proposed solution to the likelihood benchmark rests on the division of Art. 102 TFEU abuses on 'by object' and 'by effect' abuses. Taking inspiration from Art. 101(1) TFEU, it is sometimes argued that certain conducts that are presumptively unlawful under Art. 102 TFEU (as the loyalty rebates mentioned above) can be, practically speaking, compared to 'by object' restrictions for the purposes of Art. 101(1) TFEU, while other restrictions that are not deemed abusive by their very nature could be treated as 'by effect' restrictions.[90] Then the 'by object' (presumptively unlawful) restrictions would be tested against the *capability* benchmark, i.e. the conduct in question *can* plausibly lead to anti-competitive effects. On the other hand, 'by effect' restrictions (ambivalent or neutral) would have to be tested against the *likelihood* benchmark – the conduct in question *probably will* restrict (say) competition. Pablo Colomo and Alfonso Lamadrid argue that this distinction has been already hinted by the Court of Justice in the wording it standardly uses in abuse of dominance cases.[91]

It must be noted that this approach, although perhaps accepted even by some members of the Commission's staff,[92] has been subject to some critique. Notably, Nicolas Petit argues that establishing an Art. 101(1) TFEU 'by object' restriction leads to a shift in the burden of proof,

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[87] Opinion of Advocate General Wahl in Case C-413/14 P, Intel Corporation Inc. v European Commission, EU:C:2016:788, paras 117 and 119.

[88] IBÁÑEZ COLOMO, Pablo and Alfonso LAMADRID. *On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know* [online], p. 36. SSRN Scholarly Paper. ID 2849831. Rochester, NY: Social Science Research Network. 2016 [Accessed 2018-10-17]. Available from: https://papers.ssrn.com/abstract=2849831

[89] Opinion of Advocate General Wahl in Case C-413/14 P, Intel Corporation Inc. v European Commission, EU:C:2016:788., para 120.

[90] IBÁÑEZ COLOMO, Pablo and Alfonso LAMADRID. *On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know* [online]. SSRN Scholarly Paper. ID 2849831. Rochester, NY: Social Science Research Network. 2016 [Accessed 2018-10-17]. Available from: https://papers.ssrn.com/abstract=2849831

[91] Ibid, pp. 35-36.

[92] LAITENBERGER Johannes, *Accuracy and administrability go hand in hand*, CRA Conference Brussels, 12 December 2017 available at: http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf.

which leaves the defendant the only option to rely on an Art. 101(3) TFEU efficiency justification. On the contrary, even when a presumptively unlawful conduct under Art. 102 TFEU is established, the defendant should be able to argue that it did not have any anti-competitive effect. [93]

Nevertheless, I would argue that even if we reject to equate 'by object' Art. 101(1) TFEU restrictions to presumptively unlawful conduct under Art. 102 TFEU in all of their substantive and procedural aspects, subdividing conduct under Art. 102 TFEU to presumptively unlawful and 'neutral' can find footing in the case law of the Court of Justice and can serve a practical purpose. First, a presumption of unlawfulness does not necessarily have to contradict the requirement of having a likelihood threshold. In principle, certain categories can prove to have likely anti-competitive effects by their very nature and running a costly and painstaking analysis of the effects would be redundant.[94]

As a perhaps not that forcible synthesis of the approach of AG Wahl and that of Pablo Colomo and Alfonso Lamadrid, it can be argued that one can propose to split the likelihood criterion into two different tests. When dealing with presumptively abusive conduct which is likely to have anti-competitive effects *by its very nature*, one should at least verify that the conduct's effect is not apparently ancillary and/or ambivalent, given the legal and economic circumstances of the case. If doubts about the effects arise or the conduct is 'neutral' by its nature, a broader and costlier analysis would have to be carried out to establish whether the anti-competitive effect was to occur *in all likelihood*. This could use the benefit of legal presumptions allowing to avoid an expensive analysis where it is not necessary,[95] and, at the same time, lower the probability of over-enforcement.

In any event, when talking about the threshold of likelihood, I agree with AG Wahl on the point that the test should be stricter than merely stating that the effect should be *more likely than not*. If such a test were followed to the letter, even quite ambivalent cases could result in a declared breach of Art. 102 TFEU – this could lead to quite a staggering rate of overenforcement, as explained above.

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[93] PETIT, Nicolas. The case of the European Commission's curious interpretation of the Intel judgment. *Competition Law & Policy Debate*. 2018, **4**(1), 98–101. ISSN 2405481X.

[94] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online], p. 13. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

[95] Ibid, p. 13.

1.4.2. What extent does the harm have to have to establish a breach of Art. 102 TFEU?

While comparing Art. 101 TFEU to Art. 102 TFEU, another question that might arise is the one of what extent should the harm have. When applying Art. 101 TFEU, the *de minimis* rule applies: if the effects of a cartel under Art. 101 TFEU are negligible, the cartel does not fall into the scope of Art. 101 TFEU.[96] Should the same rule apply to Art. 102 TFEU?

The simple answer is no. The Court of Justice rejected this idea by arguing that competition on a market is already weakened by the simple fact there is dominant undertaking. Any further restrictions, however negligible, shall thus be prohibited.[97]

It may have been unclear whether the same held for the effects of an abuse that did occur on a market where the undertaking in question did not hold a dominant position. Obviously, the argument of further restriction/further strengthening of dominant position does not hold in this case. Before *Post Danmark II*, the unwillingness to accept an appreciability threshold was criticized e.g. by Richard Whish and David Bailey[98] because it did not seem to fit in the context of the remaining body of EU competition law, where the appreciability criterion is considered in one way or another.

If the *de minimis* doctrine was accepted as a general principle of EU competition law and the argument raised in *Post Danmark II* was an exception to this principle, one could agree with the claim of Justice Roth made in the UK case *Streetmap v Google*,[99] that an effect of an anti-competitive conduct has to pass the appreciability benchmark, if it takes place on a market where the undertaking in question does not hold a dominant position.

This approach seems to have been invalidated by the recent *MEO* ruling of the Court of Justice at latest, though. There,[100] the Court addressed and rejected the question of applying the *de minimis* threshold in the context of possible anti-competitive effects on the downstream market of the dominant undertaking. Thus, the application of a *de minimis* rule for cases of abuse of dominance can be rejected as a matter of principle.

1.4.3. How to test for harm in the first place?

As mentioned in the previous section, there is in many ways not that much of a theoretical difference between testing for actual harm and likely harm. Abuse of dominant

[96] See Case C-5/69, Franz Völk v Établissements J. Vervaecke, ECLI:EU:C:1969:35, paras 5/7.
[97] Case C-23/14 Post Danmark A/S v Konkurrencerådet, EU:C:2015:651, paras 70-73.
[98] WHISH, Richard and David BAILEY. *Competition Law*. B.m.: Oxford University Press, 2015, p. 212. ISBN 978-0-19-966037-7.
[99] Streetmap.eu Ltd v Google Inc and others [2016] EWHC 253 (Ch).
[100] Case C-525/16, MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, EU:C:2018:270, para 29.

position is illegal by the very abusiveness of the conduct, not by the result observed on the market. Thus, an undertaking will be unsuccessful if it claims in its defence that its competitors have in fact performed well during the period of the allegedly abusive conduct.[101] Similarly, the mere fact that and undertaking was driven out of business is not proof that its dominant rival has done something wrong.[102]

If we want to move beyond the application of purely form-based rules (certain types of conduct would be abusive without any regard to their effect whatsoever), a proper analysis of the conduct's actual effects (at least in the light of the considerations above) has to answer the following question: how were the conditions of competition changed in result of the abusive conduct? In other words, the conduct has to be compared with the hypothetical scenario of the same market where the allegedly abusive conduct did not occur. This hypothetical scenario is called a counterfactual. More specifically, an *ex post* counterfactual, because it is 'looking back': what would the world look like if the conduct did not occur? This method is mostly relevant for Art. 101 TFEU and Art. 102 TFEU investigations. Conversely, the *ex ante* counterfactual asks the question, how will the world change if a certain event (usually a transaction) occurs. This approach is used in merger cases as well as in the undertaking's own analysis done to refrain of a potentially anti-competitive behaviour [103]. It must be noted that this distinction is not perfectly clear cut. There are scenarios where Art. 102 TFEU cases have to be effectively based on an *ex ante* analysis while some merger cases have to be at least partly based on a backwards looking inquiry.[104]

The need to use counterfactuals in the assessment of Art. 102 TFEU cases has been acknowledged by the Commission in its soft law.[105] In fact, setting up a benchmark situation

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[101] See Case T-286/09, Intel Corp. v Commission, EU:T:2014:547, para 186, where AMD (Intel's most relevant competitor in fact economically thrived during the impugned conduct). This decision was set aside by the Court of Justice decision in Case C-413/14 P, Intel Corporation Inc. v European Commission, EU:C:2017:632. Nevertheless, I believe that this particular point was not weakened by the decision on appeal and the argument that the competitor of the dominant undertaking is actually thriving cannot be applied in this simple manner.

[102] An interesting example can be foud in Streetmap.eu Ltd v Google Inc and others [2016] EWHC 253 (Ch).

[103] GERADIN, Damien and Ianis GIRGENSON. *The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach* [online]. SSRN Scholarly Paper. ID 1970917. Rochester, NY: Social Science Research Network. 2011 [Accessed 2019-03-07]. Available from: https://papers.ssrn.com/abstract=1970917

[104] BISHOP, Simon and Mike WALKER. *The Economics of EC Competition Law: Concepts, Application and Measurement*. B.m.: Sweet & Maxwell, 2010, p. 110. ISBN 978-0-421-93190-9.

[105] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01), para 19. Moreover, the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ C 167/19, 13.6.2013, pp. 19–21, CELEX 52013XC0613(04), para 3, stresses the necessity to compare the current state to the state in the event of the infringment not occurring for the purposes of estimation of harm in actions for damages.

which compares the world influenced by the dominant undertaking's conduct with a world devoid of it can provide a clearer explanation of the otherwise nebulous term *abuse* contained in Art. 102 TFEU. Indeed, it allows a competition authority to analyse *all the circumstances of the case*.[106]

This being said, even after issuing its *Guidance Paper*, the Commission's use of counterfactuals in its analysis in Art. 102 TFEU investigations was not devoid of critique. Even if present, in some cases the counterfactuals were claimed to be too simplistic or underdeveloped.[107]

1.5. Criteria of assessment

Based on the discussion above, the description of each of the cases in the analytical part provides an answer as to (1) whether the Commission applied a consumer welfare standard and (2) whether the Commission analysed the effects of the conduct as to the protected value. If the Commission claims multiple breaches and only some rely on the given criterion, the case will be counted as not fulfilling the criterion in general in the final discussion. This approach seems reasonable to me. It does not appear that the Commission felt the necessity to prove effects of a conduct aiming at consumers to act if it merely uses it as a supportive argument in a broader context of a given case.

[106] See e.g. Case C-52/09, Konkurrensverket v TeliaSonera Sverige AB, EU:C:2011:83, para 28 (*TeliaSonera*). Thus maintaining a proper degree of complexity when addressing a problem so difficult as estimating the repercussions of a specific conduct within the economy.

[107] GERADIN, Damien and Ianis GIRGENSON. *The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach* [online]. SSRN Scholarly Paper. ID 1970917. Rochester, NY: Social Science Research Network. 2011 [Accessed 2019-03-07]. Available from: https://papers.ssrn.com/abstract=1970917

2. Article 102 TFEU Modernisation

In this chapter, the development of the basic ideas underlying the modernisation of EU competition law will be laid out briefly to explain the heading of competition policy that was declared by the Commission. The chapter is split into two parts, the first one discussing the development of the idea of and reasoning underlying the wave of EU competition law modernisation and the second one talking about the question of modernisation in relation to abuse of dominance under Art. 102 TFEU specifically.

2.1. Evolving ideas underlying competition law

When talking about the modernisation of EU competition law, there are two notions to be distinguished:[108] (1) the overhaul of the procedural application of EU competition law linked to the adoption of *Regulation 1/2003*[109] ('the modernisation regulation') and (2) the Commission's gradual shift to a 'more economic approach' to the enforcement of substantive provisions of EU law. While the former notion is certainly an important milestone in the development of EU competition law with many important repercussions, this chapter focuses on the latter notion of the shift in the approach to the substantive provisions of EU competition law that market shift to a 'more economic approach'.

In this sense, modernisation is an era that is usually claimed to begin during the mid to late 1990s in form of a run up to the adoption of the modernisation regulation.[110] Some place the milestone at the very beginning of this decade, on the other hand,[111] linking the change to the adoption of the fist merger control regulation.[112] Besides this regulation, the beginning of the epoch is marked by the Commission issuing documents like the *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*.[113] This document served mainly as a manifesto putting forward reasons for the change of procedural rules governing EU

[108] MUNKOVÁ, Jindřiška. *Soutěžní právo*. B.m.: C.H. Beck, 2012, p. 65–66. ISBN 978-80-7400-424-7.
[109] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25.
[110] WHISH, Richard and David BAILEY. *Competition Law*. B.m.: OUP Oxford, 2012, p. 52. ISBN 978-0-19-958655-4. , JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 37. ISBN 978-0-19-872342-4.
[111] WEITBRECHT, Andreas. From Freiburg to Chicago and beyond-The first 50 years of European competition law. *RRDE*. 2011, 79.
[112] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395 30.12.1989, pp. 1-12.
[113] White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, O.J. C 132/1, 12.5.1999, p. 1-33. CELEX 51999DC0101.

competition law. Nonetheless, the Commission has also voiced its intention to *adopt a more economic approach*, at least in relation to the application of today's Art. 101(1) TFEU.[114]

As for the changes that were brought by the era of modernisation, it would be misleading to claim that the Commission's approach simply lacked proper economic reasoning before and therefore started to take economic thinking more into account.[115] Rather, the Commission's reasoning was formed by the ordoliberal approach to competition policy in the early years of its decision making.[116] This led to the result that competition policy in the EU was largely aimed at protection of the economic freedom of market participants and reductions of this freedom were often understood to be anti-competitive. The 'more economic approach' to the application of substantive provisions of EU law was thus more of shift of attention from the *process* of competition to its *result*.[117] In this case, the result deserving protection was consumer welfare, as declared by the Commission in its soft law documents as well as through its high-profile representatives.[118]

The reasons to undertake this change might have been linked to change in the underlying reasoning of competition policy but it can be also be better understood in the context of cooperation between the Commission and the government of the USA in this area. On 23 September 1991, an agreement regarding the application of competition law was signed between the Commission and the United States government.[119] Article IV of this agreement talks about coordination of enforcement activities while deals with avoidance of conflicts over enforcement activities. Moreover, the first merger control regulation was the first instance when the Commission invited American experts to help with its preparation.[120] The modernisation of competition law can thus be also understood as a way to reconcile the differences between US

[114] Ibid, para 78.
[115] MUNKOVÁ, Jindřiška. *Soutěžní právo*. B.m.: C.H. Beck, 2012, p. 31. ISBN 978-80-7400-424-7.
[116] ŠMEJKAL, Václav. *On Periodization of EU Antitrust Development: Are We in a New Phase?* [online]. SSRN Scholarly Paper. ID 2596769. Rochester, NY: Social Science Research Network. 2015 [Accessed 2019-04-17]. Available from: https://papers.ssrn.com/abstract=2596769, WEITBRECHT, Andreas. From Freiburg to Chicago and beyond-The first 50 years of European competition law. *RRDE*. 2011, 79.
[117] MUNKOVÁ, Jindřiška. *Soutěžní právo*. B.m.: C.H. Beck, 2012, p. 38. ISBN 978-80-7400-424-7.
[118] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 37–38. ISBN 978-0-19-872342-4.
[119] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, OJ L 95, 27.4.1995, p. 47–52, CELEX 21995A0427(01). The Court of Justice later held that the Commisison was not competent to conclude this agreement but this was solved by the Council concluding the agreement on behalf of the European Communities.
[120] WEITBRECHT, Andreas. From Freiburg to Chicago and beyond-The first 50 years of European competition law. *RRDE*. 2011, 79.

and EU antitrust law. Both sets of rules regulate large economies and divergent results in high-profile cases did bring their own set of problems, as remarked by Andre Fiebig.[121]

As a final remark, while consumer welfare as the value protected by competition law was largely championed by the Commission in relation to modernisation of EU competition law, the related question of the effects-based approach to some areas of competition law was strongly influenced by EU courts. This holds specifically for the case of merger control. As noted by Mike Walker and Hans Zenger, the Commission lost a number of merger cases 2002 because they lacked a proper theory of harm.[122] Thus, while the shift to the consumer welfare standard was not endorsed by EU courts as a necessary criterion in antitrust case law, they have played a role in forcing the Commission to set a higher standard for assessment of anti-competitive effects in some areas of competition regulation.

2.2. Evolving ideas underlying the application of Article 102 TFEU

The area of application and enforcement of Art. 102 TFEU was for long a notable exception to the development described above. Still heavily influenced by the ordoliberal approach to competition regulation, it has comparatively seen the least progress in this respect. Indeed, in the words of a paper co-authored by a former member of the Chief Economist Team in DG Competition, [*m*]*ost of the established case law on unilateral conduct is economic wasteland*.[123]

A formal review of Art. 102 was essentially started by the Commission in 2003[124] and its results were opened to public scrutiny when the Commission published the *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*.[125] This eventually led, after a public debate containing some mixed reactions,[126] to the Commission publishing the *Guidance on the Commission's enforcement priorities in applying Article 82 of*

[121] FIEBIG, Andre. Modernization of European Competition Law as a Form of Convergence. Jean Monnet/Robert Schuman Paper Series, Vol. 4 No. 6, July 2004. 2004.

[122] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online], p. 2. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

[123] Ibid, p. 22.

[124] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 274. ISBN 978-0-19-872342-4.

[125] Ibid, p. 275. The document itself being the *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005; available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf (Accessed 2018-08-20).

[126] PETR, Michal. *Zakázané dohody a zneužívání dominantního postavení v ČR*. Vyd. 1. V Praze: C. H. Beck, 2010, p. 304. Beckova edice právní instituty. ISBN 978-80-7400-307-3.

the EC Treaty to abusive exclusionary conduct by dominant undertakings[127] in 2009, a new soft law document bringing forward a new approach to the application of Art. 102 TFEU (at least in the area of exclusionary conduct). It proposed new approaches like focusing on types of conduct most harmful to consumers.[128] Perhaps most importantly, the Commission distinguishes foreclosure and anti-competitive foreclosure. While many kinds of conduct can lead to e.g. a restriction of access of competitors to the market (foreclosure), the Commission has vouched to focus on such cases of foreclosure, where the conduct is likely to be detrimental to consumers (anti-competitive foreclosure).[129]

A simple case of foreclosure would be likely enough to establish a breach of Art. 102 TFEU under a theory of harm based on the ordoliberal school of thought. The Commission's focus on anti-competitive foreclosure thus departs from the ordoliberal approach to embrace a consumer welfare standard. Perhaps just somewhat belated, as a similar document aimed at the application of Art. 101(3) TFEU (that introduced a new conceptual background for Art. 101 TFEU as a whole) was issued years earlier, in 2004.[130]

The situation is nevertheless somewhat more peculiar. The Commission's attempts to shift to (1) a more effects-based approach, and (2) a consumer welfare standard, are a bottom to top effort. The consumer welfare standard was never endorsed as a necessary criterion by EU courts. Even concerning the relevant standard for establishing anti-competitive effects in general, the Commission was not forced into the position by EU courts as in merger control cases.

Moreover, the general rule contained in Art. 102 TFEU contains no mention of effects of the conduct. It does not follow explicitly from the wording of the provision that one should examine the effects of the dominant undertaking's conduct. This can be compared to the wording of Art. 101(1) TFEU, which clearly distinguishes between *by object* and *by effect* infringements.

Thus, it did not directly follow from the letter of the law as such or the case law applying it, that the Commission should change its approach to abuse of dominance by subjecting the effects of the conduct to closer scrutiny or focusing consumer welfare.

On the contrary, the Commission has been very successful in Art. 102 TFEU lawsuits, at least until recently. It was able to successfully defend a vast majority (as much as 98% according

[127] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01).
[128] Ibid, para 5.
[129] Ibid, para 19.
[130] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, pp. 97–118, CELEX 52004XC0427(07).

to Damien Neven's claim made in 2006)[131] of its Art. 102 TFEU decisions the way they were, leaving little incentive to active change in the actual case law of EU courts.

Also, the *Guidance Paper* being a soft law document devised by an EU administrative body, it's acceptance by the EU courts has been reluctant to say the least.[132] It is thus largely a question of how the Commission decides to enforce Art. 102 TFEU, as many ideas proposed in *Guidance Paper* are certainly not contrary to EU competition law *per se* but they are also usually not the only way Art. 102 TFEU could be applied. The EU courts' guidance on the matter of theories of harm in Art. 102 TFEU decision making still leaves space for various degrees of scrutiny. This underlines the importance of analysing the approach of the Commission as such.

[131] GERADIN, Damien. Is the guidance paper on the commission's enforcement priorities in applying article 102 TFEU to abusive exclusionary conduct useful? *Available at SSRN 1569502*. 2010.

[132] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 278. ISBN 978-0-19-872342-4.

3. Case Law Analysis

The selection of the case law subjected to analysis was based on all the Commissions decisions on infringement of Art. 102 TFEU issued in the year 2000 or later (if a version of the decision is publicly available). This criterion is based on the following considerations.

First, the selection of case law provides samples from three distinct periods in the Commission's practice: (1) the decisions made before the introduction of *Regulation 1/2003*,[133] (2) the decisions made under the new procedural regime and (3) the decisions made after the introduction of the Commission's *Guidance Paper*. As the selection spans over almost twenty years, any trends and developments in the Commission's approach should be clearly visible.

Second, only prohibition decisions[134] have been selected because other decisions, such as e.g. acceptance of commitments following Art. 9 of the regulation do not usually contain as detailed an analysis of the undertaking's conduct as prohibition decisions.

Third, and finally, this selection makes the analysis manageable in terms of sheer volume of the decisions to be analysed. As of the date of finishing the manuscript of this master's thesis, 21 reasoned Commission decisions fulfilling the set criteria were publicly available on the DG Competition's webpage. This ensures both a good degree of representativeness and the possibility to address the decisions one by one.

On a practical note regarding the selection of the decisions, the search tool in the database of DG Competition's decisions is unfortunately not quite user friendly. Even a clear search query for 'Art. 102 TFEU' (including 'Art. 82 EC Treaty') decisions does not seem to yield the intuitively expected results. The search results combine Art. 102 TFEU decisions with Art. 101 TFEU cartel prohibitions etc. The selection of the decisions discussed in this master's thesis has thus been made with help of cross-reference to DG Competition's annual reports that fortunately include a statistic on Art. 102 TFEU prohibition decisions made every year.

3.1. Year 2001

The first year that yielded decisions fitting the set criteria was 2001. The Commission has issued four decisions in total. Two concerned Deutsche Post, the German provider of mail

[133] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25.

[134] On a terminological note, prohibition decisions are Commission decisions on finding and termination of infringements pursuant to Art. 7 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25. The term 'prohibiton decision' is used because the Commission seems to regularly use it to describe Art. 7 decisions.

services, the other concerned the Belgian provider of postal services La Poste and the French tire producer Michelin.

3.1.1. Deutsche Post (international mail charges)

The first decision in proceedings against the dominant German provider of postal services Deutsche Post was based on a complaint brought forward by the British Post Office, the UK's public postal operator. Deutsche Post had higher charges for the processing and delivery of domestic mail as compared to the charges incoming international mail. In the case of so-called A-B-A remail (mail sent from country A back to country A via country B), Deutsche Post charged domestic prices to A-B-A remail. It claimed this was necessary to stop circumvention of domestic tariffs. It identified incoming mail as A-B-A remail based on any reference to the sender being located in Germany (typically by the contact address for answers). Deutsche Post enforced surcharges on incoming international mail, intercepted it and delayed it.

The Commission found the conduct to be an abuse of Deutsche Post's dominant position on the relevant market of forwarding and delivery of incoming cross border mail in Germany. According to the Commission, Deutsche Post's conduct was abusive in four ways. It amounted to discrimination, a refusal to supply, excessive pricing and limitation of markets. The conclusions concerning discrimination and excessive pricing were based on the finding that Deutsche Post provided the same kind of service in cases of international mail in general and incoming mail incorrectly identified as A-B-A remail based on Deutsche Post's broad definition.[135]

Regarding the theory of harm spelled out in the decision, the Commission relies on both economic and societal considerations of the impact of the abuse, namely competition as a process and consumer welfare. Competition as a process is argued to be compromised because Deutsche Post's competitors on the UK's outbound international mail market were supposed to be subject to a competitive disadvantage. The impact on consumers is stated quite clearly in the decision, the Commission goes so far to say actual harm to both senders and addressees has occurred by enforcing surcharges.[136] This implies a reduction in consumer welfare.

Moreover, although not argued explicitly, the decision is coherent with the objective market integration, as the prohibited conduct seemed to impede centralised mail distribution of

[135] Commission Decision of 25 July 2001 in Case COMP/C-1/36.915, Deutsche Post AG, OJ L 331/40, 15.12.2001, pp. 40-78.
[136] Ibid, recital 133.

transnational companies – having one centre for sending bulk mail for across the Union in a single Member State (and possibly having national contact points for responses to this mail).[137]

As concerns the methods implemented, the Commission's assessment is prevailingly form based. One of the central points is that *the different tariffs charged by [Deutsche Post] cannot be justified on the basis of objective economic factors*.[138] A brief empirical analysis can be found in the argumentation concerning the imposition of unfair selling prices (to roughly infer Deutsche Post's costs on the basis of some European comparators)[139] but the decision does not seem to stand and fall on this analysis. It is merely one strand of the Commission's arguments, where the other ones do not rely on such considerations.

3.1.2. Deutsche Post (parcel services)

The second Deutsche Post decision considered its commercial parcel delivery services. Two aspects of its conduct were questioned by the Commission: the possibility of predatory pricing (allowed for by the undertaking's profits earned in its other activities) and the rebates stipulated in its contracts. The Commission concluded that Deutsche Post abused its dominant position on the relevant market for domestic parcel services in Germany both by implementing predatory pricing strategies and introducing loyalty rebates.[140]

The object of harm induced by the conduct in question seems to be societal, based on ordoliberal notions. The theory of harm focuses on a likely reduction of access of new competitors to the relevant market.[141]

The test for the abuse in question is effects-based as regards the issue of restriction of competition by predatory pricing and purely formal in relation to the loyalty rebates. It took merely to find that Deutsche Post's rebates were loyalty rebates for the purposes of the case law of the Court of Justice to conclude that they are supposed to have an anti-competitive effect.[142] The question of predatory pricing, on the other hand, was addressed by conducting an AEC test, benchmarking the revenues from the undertaking's parcel services to their incremental costs (additional costs solely stemming from the provision of the service in question).[143] The AEC test

[137] Ibid, recitals 15 and 16.
[138] Ibid, recital 127.
[139] Ibid, recitals 155 to 167.
[140] Commission Decision of 20 March 2001 in Case COMP/35.141, Deutsche Post AG, OJ L 125/27, 5.5.2001, pp. 27–44.
[141] Ibid, recital 37.
[142] Ibid, recitals 38 and 39.
[143] Ibid, recitals 11 to 17.

in the question of predatory pricing had to be implemented as it was established on the level of EU courts since the *AKZO*[144] decision.

3.1.3. La Poste

La Poste, a Belgian public undertaking performing postal services, held a statutory postal monopoly in Belgium. The case in question deals with La Poste using its dominant position on the market of general mail services to wager a stronger foothold on the market of business-to-business professional courier services. La Poste granted preferential tariffs in the area of business-to-private mail (where it was dominant) to one of its customers in return for a commitment amounting to a specified number of letters a year. The preferential tariffs have been cancelled by La Poste, this cancellation was revoked only after the customer in question signed an additional agreement of using a business-to-business service provided by La Poste. Based on the evidence available, the Commission concluded that La Poste abused its dominant position by using tying practices in the sense of Art. 102(d) TFEU – making the preferential tariffs in business-to-private mail conditional on entering supplementary obligations regarding business-to-business mail.[145]

The theory of harm seems to have held that the exclusionary practice of tying succeeded in reducing the market shares of its competitor the business-to-business services,[146] thus weakening competition on the tied market. The main object of protection in this case thus seems to be competition as a process.

As to the question of causal nexus, the Commission's approach is form based in its essence. The headline above recital 73 of the decision goes so far as to say that *tying between services covered by a monopoly and services open to competition always have repercussions on competition*. The Commission does mention consistently dropping market shares of La Poste's competitor as an effect of the dominant undertaking's conduct, but this analysis lacks the use of an appropriate counterfactual that would show that there would be no such effect observable in the absence of the dominant undertaking's conduct.

3.1.4. Michelin

Perhaps the most influential infringement decision issued in 2001 was the one in the case of the tyre manufacturer Michelin. The relevant product markets in question were the ones for

[144] Case C-62/86, AKZO Chemie BV v Commission, EU:C:1991:286, para 71.
[145] Commission Decision of 5 December 2001 in Case COMP/37.859, De Post-La Poste, OJ L 61/32, 2.3.2002, pp. 32-53.
[146] Ibid, recital 87.

replacement tyres and retreaded tyres (the latter refers to worn off tyres whose casing is good enough to allow them to be refurbished). Michelin has put into place an intricate system of rebates applicable to its distributors on the given markets. Its three main components under investigation were (1) the general price conditions for France for professional dealers, (2) the agreement for optimum use of Michelin truck tyres and (3) the agreement on business cooperation and assistance services. After analysis of the rebate scheme in question, the Commission found Michelin to have abused its dominant position by applying loyalty inducing rebates to dealers in new replacement tyres and retreaded tyres for trucks and buses in France.[147]

The discussion of the conduct's possible effects seems to point to two objects of protection: market integration and competition as a process. The market integration is claimed to be compromised by the conduct's market partitioning effect.[148] Competition as a process is supposed to be compromised by restricting the buyers' freedom to choose their sources of supply and thus hamper market entry of other competitors.[149]

The method of assessment seems to be purely form based. The Commission claims that the scrutinised conduct has anti-competitive effects (see above). Nonetheless, the Commission's reasoning refrains to a hypothetical discussion of possible incentives without much backing in empirical findings or economic theory.

The Commission's decision was contested by Michelin before the General Court. The General Court upheld the Commission's decision.[150] Perhaps most importantly (in relation to the seriousness of the abuse and the related fine), the General Court agreed that the Commission did not substantiate existence of any *specific effects* of the abusive practices, while the ones mentioned appeared rather speculative. This was not considered necessary by the General Court, as the *seriousness of the infringement was established by reference to the nature and the object of the abusive conduct*.[151]

The General Court's decision was not well accepted, Hans Zenger and Mike Walker point to the fact that although the rebates in question could have arguably some loyalty inducing effect, the fact that the scale of rebates consisted of 47 steps[152] meant that missing one step

[147] Commission Decision of 20 June 2001 in Case COMP/E-2/36.041/PO, Michelin, OJ L 143/1, 30.5.2002, pp. 1-53.
[148] Ibid, recital 240.
[149] Ibid, recital 226.
[150] Case T-203/01, Manufacture française des pneumatiques Michelin v Commission, EU:T:2003:250.
[151] Ibid, para 258.
[152] Ibid, para 8.

would generally lead to a loss of about 0.06% of the distributor's expenditures, on its own hardly being able to lead to the detrimental effects as grave as hinted by the Commission.[153]

3.2. Year 2003

In 2003, there were three cases concerning infringement of Art. 102 TFEU. They were held against Deutsche Telekom, the German telecommunications operator, Ferovie dello Stato, the Italian railway operator, and Wanadoo, a French internet company.

3.2.1. Deutsche Telekom

Deutsche Telekom was the German telecommunications operator providing both wholesale access to local loops (the physical circuits connecting end users to the network)[154] and retail services facilitating access to both narrowband (phone and ISDN connections) and broadband (ADSL connections). According to the Commission's findings, Deutsche Telekom was dominant on all of these markets. After comparing the prices set for wholesale and retail customers, the Commission concluded that Deutsche Telekom has abused its dominant position on the relevant markets for direct access to its fixed telephone network in form of a margin squeeze.[155]

The object of protection in this case seems to fall out of the consumer welfare criterion by claiming to defend competition as a process. In the section concerning effect on competition,[156] although the Commission contends that it is not bound to do so, it nonetheless argues that the dominant undertaking's margin squeeze barred potential competitors from entering the market. It neither explicitly tests for *anti-competitive* foreclosure, nor it seems to apply any other kind of welfare standard.

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[153] ZENGER, Hans and Mike WALKER. *Theories of Harm in European Competition Law: A Progress Report* [online], p. 23. SSRN Scholarly Paper. ID 2009296. Rochester, NY: Social Science Research Network. 2012 [Accessed 2018-05-27]. Available from: https://papers.ssrn.com/abstract=2009296.

[154] For a precise definition on the EU level, see Art. 2(e) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.4.2002, pp. 7–20, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance) OJ L 337, 18.12.2009, pp. 37–69.

[155] Commission Decision of 21 May 2003 in Cases COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, OJ L 263/9, 14.10.2003, pp. 9-41.

[156] Ibid, recitals 176 to 183.

Method wise, the Commission has undertaken to test whether the conduct in question was capable to foreclose an as-efficient-competitor.[157] The Commission has compared a weighted average of retail prices to Deutsche Telekom's wholesale charges to come to a conclusion that it would not be able to earn a profit on its retail services if it had to incur the costs of its own retail charges.[158] As to the declared foreclosure, the Commission has thus used empirical methods based on price data to test a relevant counterfactual. It also concludes that the conduct barred access to the market. Although the appealingly looking findings about falling market shares of competitors and sluggish development of competition on the relevant markets are not methodologically rigorous (the do not pay much attention to proof of causality), the decision can be considered to generally apply a very simple effects-based benchmark.

This decision was contested in court. The General Court has upheld the Commission's decision. Regarding the question of effects, it explored the Commission's assessment to come to the conclusion, that although the Commission erroneously claimed it was not necessary to demonstrate existence of an anti-competitive effect, it correctly identified barriers to entry to be the relevant effect for a newly liberalised market. It agreed with the Commission's market analysis concerning the development of market shares and rejected Deutsche Telekom's argument using the comparison to less competitive markets in other Member States.[159]

Deutsche Telekom appealed to the Court of Justice, but to no effect.[160] Regarding the question of the conduct's effects, the Court of Justice upheld the General Court's conclusion that an anti-competitive effect has to be demonstrated.[161] The apparent lack of a counterfactual in relation to the Commission's (and the General Court's) finding concerning the barriers to entry was perhaps the reason why Deutsche Telekom argued that the General Court did not conclude that there was a causal relation between the margin squeeze and the competitors' low market shares. The Court of Justice rejected this interpretation of the General Court's judgement and, perhaps more importantly, relied on the fact that Deutsche Telekom did not provide evidence to the contrary.[162] It would thus seem that a theory of anti-competitive harm in margin squeeze cases (without evidence to the contrary) merely requires establishment of a margin squeeze and a simultaneous deterioration of competition on the relevant market. It is worth mentioning that, as pointed out by AG Mazák's opinion in this case, it was enough to establish potential effect on competition. This was also supposed to be done by the General Court's conclusion that the

[157] Ibid, recital 108.
[158] Ibid, namely recitals 152 to 162.
[159] Case T-271/08 Deutsche Telekom AG v Commission, EU:T:2008:101, paras 233 to 245.
[160] Case C-280/08 P Deutsche Telekom AG v Commission, EU:C:2010:603.
[161] Ibid, para 250.
[162] Ibid, paras 257 and 258.

margin squeeze would, in principle, hamper competition because of the indispensability of Deutsche Telekom's services.[163] I would argue that this, while correct at least as to the sufficiency of proving possible/likely effects, should still enable the alleged perpetrator to defend itself by impugning the question of a causal link between the conduct and its alleged actual effects. A correct analysis based on an appropriate counterfactual should be able to disperse concerns about both actual and likely harm, if none is present.

Furthermore, if the Commission opts to use evidence of growing market shares of the dominant undertaking as evidence supporting its position, it should put forward evidence as to a causal link between the growth and the conduct. Otherwise it seems hard to claim that actual effect has been proven on the basis of a faithful and correct analysis.

3.2.2. Ferrovie dello Stato

The German railway company Georg Verkehrsorganisation GmbH has filed a complaint against the Italian national railway carrier Ferrovie dello Stato for not allowing it to access Italian infrastructure and to form an international grouping. This prevented the complainant from providing international railway transport between Germany and Italy, as so called 'international groupings' were under then-effective provisions of EU law the only way for a railway undertaking to be able to access to passenger railway transport in another Member State. The Commission has concluded that Ferrovie dello Stato has thus abused its dominant position on the Italian market for passenger rail transport by denying the complainant the formation of an international grouping for the purposes of establishing an international rail passenger service (and thus denied access to its essential facility in form of the Italian national railway system).[164]

The decision in question is clearly consistent with the object of market integration, where the conduct in question clearly restricted international railway passenger services between Germany and Italy. In this respect, the Commission concluded in general that Ferrovie dello Stato foreclosed competition in international rail passenger transport,[165] competition as a process thus also appears to be pertinent in the Commission's reasoning. Method wise, the assessment is purely form-based, devoid of any specific analysis of the actual and/or likely effects of the dominant undertaking's conduct. This makes sense in relation to the clear result of barring potential competitors by not allowing access to an essential facility, one cannot infer the impact

[163] Opinion of AG Mazák in Case C-280/08 P Deutsche Telekom AG v Commission, EU:C:2010:212, para 64.
[164] Commission Decision of 27 August 2003 in Case COMP/37.685, Ferrovie dello Stato S.p.A.
[165] Ibid, recital 117.

on welfare or any more general repercussions within the economy of the internal market on the basis of such an analysis, though.

3.2.3. Wanadoo

Wanadoo was a subsidiary of France Télécom, a French telecommunications company, and functioned *inter alia* as an internet service provider in France. Its provision of ADSL is pertinent to this decision. In the early 2000s, Wanadoo was introducing ADSL internet on the French market while sustaining heavy losses amounting to tens of percent of its yearly turnover. The Commission found that Wanadoo's revenues were far below its adjusted variable costs in part of 2001 (the cost issues continuing as far as into 2002), thus failing the *AKZO* predation test. Thus, it abused its dominant position on the French market of high-speed internet access.[166]

In the entirety of the (relatively robust) section on the repercussions of the abuse in question,[167] the main concern seems to be the elimination of competitors and securing a dominant position on a market with a new service. The Commission thus openly protects competition as a process without explicitly considering consumer welfare considerations.

As to the Commission's method of identifying an abuse, the approach is clearly effects-based. In the lengthy section on the effects of the conduct, it describes the evolution of the number of subscribers of Wanadoo and its competitors and the development of market shares of the market participants. Throughout the assessment, the Commission relies heavily on economic literature to substantiate its points. Crucially, the empirical analysis of the market trends is accompanied by an interpretation of these market trends.[168] Here, the Commission explains at some length why the observed trends could not be explained by factors other than the dominant undertaking's abusive conduct. By doing this, it openly addressed the question of causality between the conduct and its actual effects. Indeed, as far as an effects-based analysis goes, the Commission's *Wanadoo* case is one of the most advanced cases of its period in this respect.

The decision was unsuccessfully challenged in court.[169] As regards the question of effects, the General Court addresses them in paragraphs 259 to 267 of its judgement, although it mainly only reiterates the arguments put forward by the Commission and agrees with its conclusions. The General Court's decision was further challenged before the Court of Justice,

[166] Commission Decision in Case COMP/38.233, Wanadoo Interactive.
[167] Ibid, recitals 369 to 385.
[168] Ibid, recitals 377 to 385.
[169] Case T-340/03 France Télécom SA v Commission, EU:T:2007:22.

also unsuccessfully.[170] The decision does not further deliberate on the question of the conduct's effects.

3.3. Year 2004

In 2004, there were two Art. 102 TFEU prohibition decisions. One against the Clearstream group, the German provider of clearing and settlement regarding securities. The other one was held against Microsoft, the US based IT company.

3.3.1. Clearstream

Clearstream group was responsible for clearing, settlement and custody services related to securities on the German market, having the function of a so called 'Central Securities Depository.' It ran the CASCADE system, a computerised platform for entry and matching of settlement instructions for stock exchange and over-the-counter transactions. CASCADE RS was part of this system, designed for handling registered shares (shares held by the issuer, as opposed to bearer shares). According to the Commission, Clearstream has abused its dominant position on the market of provision of primary clearing and settlement services for securities issued according to German law by refusing to provide direct access to the CASCADE RS system and by applying discriminatory prices for these services.[171]

In the Clearstream case, the Commission claims that consumers were harmed by the conduct in question.[172] The barring of access to primary clearing and settlement services was claimed to have resulted in competitors' inability to provide efficient and innovative services on the downstream market.[173] From harm to efficiency, one can infer reduction of welfare, the case thus falls into the group of welfare justifications. The conduct in question was also supposed to restrain cross-border trade, the prohibition was therefore also consistent with the goal of market integration.[174]

The decision's method of establishing an abuse is largely form-based. Both the refusal to supply and the price discrimination seem to be established by virtue of their very nature. The Commission does claim the dominant undertaking's conduct had an anti-competitive nature. This is mainly substantiated by the observation that intermediaries (Clearstream's downstream competitors) cannot opt for indirect access as a viable alternative. For these purposes, it lists reasons why it is harder/costlier to access the downstream market of intermediation without

[170] Case C-202/07 P France Télécom SA v Commission, EU:C:2009:214.
[171] Commission Decision of 2 June in Case COMP/38.096, Clearstream Internatinoal SA and Clearstream Banking AG.
[172] Ibid, recital 226.
[173] Ibid, recital 236.
[174] Ibid, recital 229.

direct access to the CASCADE RS system.[175] I would argue that this suffices to show that the conduct made access to the downstream market *more difficult*, the actual or potential welfare loss (the existence of which the Commission opted to claim in this case) on the downstream market then seems to be considered to implicitly follow from the above finding. As the Commission states itself, though, it is not efficient for *certain* intermediaries to use local agents (indirect access) to provide their services. A more thorough explanation of the actual or potential effects on the market as such, not only some of Clearstream's competitors, would seem in place to conclude, that the Commission's analysis was truly effects-based.

The *Clearstream* decision was challenged in court.[176] As to the abuse and its effects, the General Court took the then-common approach of stating that its review of the Commission's complex economic appraisals had to be limited.[177] When assessing the question of effect as such, the General Court mainly repeats the arguments made by the Commission. Interestingly, it refutes Clearstream's argument that the relatively small volume of shares and, disputedly, the volume of transactions carried out with respect to its competitor, should play a role in establishing a possible anti-competitive effect. *Even a small number of transactions in registered shares can justify direct access to* [Clearstream's] *system of processing*.[178] The General Court links this to the importance to be able to trade with German registered shares. In my opinion, the pertinent part of the judgement can also be read as the General Court's rejection to apply an appreciability threshold to the effect of an abuse where Clearstream probably was not dominant (the market of intermediaries).

3.3.2. Microsoft

Microsoft, an IT company producing operating systems and other software, was selling its client PC operating systems accompanied by its product Windows Media Player, a software designed for playing media content. The Commission held that Microsoft has abused its dominant position on the market for client PC operating systems by not providing interoperability information for work group networks to other group server operating system vendors and making the availability of its client PC operating system conditional on simultaneously obtaining Windows Media Player.[179]

[175] Ibid, recitals 138 to 148.
[176] Case T-301/04, Clearstream Banking AG and Clearstream International SA v Commission, EU:T:2009:317.
[177] Ibid, paras 94 and 95.
[178] Ibid, para 154.
[179] Commission Decision of 24 March 2004 in Case COMP/C-3/37.792, Microsoft Cooperation.

The Commission claimed that Microsoft's conduct regarding the refusal to supply interoperability information[180] and tying of Windows Media Player[181] hampers innovation and diminishes consumers' choice. The theory of harm in the decision thus clearly aims at protection of consumers, albeit rather in the long run, having dynamic efficiency of the market in mind.

The Commission also has at least undertaken to prove that there are potential detrimental effects of Microsoft's conduct. This follows from the abovementioned, as well as from the fact that the Commission claimed to have found a causal link between the dominant undertaking's conduct and its increasing market share[182] or that it found a *reasonable likelihood* that tying Windows Media Player with the Windows operating system would lead to a reduction in the degree of competition even though it acknowledges that it, and the EU courts, understood tying to have a foreclosing effect by its very nature in classical cases.[183]

When contested before the General Court, the decision on the existence of an abuse of dominant position as such was upheld.[184] Regarding Microsoft's refusal to supply, the General Court ruled that the Commission should rely on *accurate, reliable and coherent evidence which comprises all the relevant data that must be taken into consideration in order to assess a complex situation and which are capable of substantiating the conclusions drawn from them*. This finding is essentially substantiated by a reference to the General Court's earlier case that brought a more effects-based approach into the area of merger regulation.[185] Its analysis of the conduct's effects was quite lengthy, spanning over paras 565 to 620 and 976 to 1090 of the decision. Thus, the General Court's review of anti-competitive effects was comparably quite thorough in the case at hand.

3.4. Year 2005

The single Art. 102 TFEU prohibition decision issued in 2005 was the one against Astra, a pharmaceutical company involved in the invention and development of new drugs, *inter alia* Losec, a proprietary medicinal product devised to treat gastrointestinal acid-related conditions. According to the Commission, it has acted in breach of Art. 102 TFEU by (1) providing misleading representation before patent offices in various EU and EEA Member States and (2) by requesting surrender of market authorisations for Losec capsules and replacing Losec capsules by Losec MUPS tablets on the markets of some of the EU and EEA Member States. Put

[180] Ibid, recital 782.
[181] Ibid, recitals 981 and 982.
[182] Ibid, recital 781.
[183] Ibid, recitals 984 and 841 respectivelly.
[184] Case T-201/04, Microsoft Corp. v Commission, ECLI:EU:T:2007:289.
[185] Ibid, para 564 read in conjuction with para 482.

shortly, Astra abused mechanisms of intellectual property law to prevent and/or hamper entry of generic producers who would compete against Losec after the expiry of the patent that protected it.[186]

In relation to the first abuse (misleading patent offices to prolong the period of protection), the Commission clearly spells out the claim that providing national patent offices with misleading information in order to prolong the period of protection for Losec prevented market entry and, what is more, delayed the market preparations of generic medicament producers.[187] The existence of a foreclosing effect of a legal barrier is quite clear, as well as the causality established by the Commission. Therefore, the analysis in this case seems to take the effect of the conduct sufficiently into consideration.

Moreover, the Commission establishes the existence of effects on national health systems as well as direct harm to consumers. The conduct was supposed to lead to higher prices of the drug in question, thus increasing the costs incurred by consumers both indirectly as taxpayers and directly as participants in national co-payment medical systems.[188] A similar conclusion was achieved by the Commission in relation to the second abuse (withdrawal of registration foreclosing and/or slowing down entry of generics and parallel imports), where this also was supposed to have the effect of increasing costs of national health systems and consumers.[189]

3.5. Year 2006

In 2006, there was also only one prohibition decision issued by the Commission. It was taken against Tomra, an undertaking in the business of beverage container collection. Specifically, Tomra produced so called reverse vending machines – devices used to accept empty beverage containers. Suspicions arose in connection to some of the agreements it entered with its customers. The problematic agreements contained clauses (1) making Tomra an exclusive supplier, (2) imposing individual quantity thresholds for customers and (3) loyalty inducing rebates. The Commission concluded that Tomra has abused its dominant position on the national reverse vending machine markets by following an exclusionary strategy consisting of exclusivity agreements, individualized quantity commitments and individualized retroactive rebate schemes.[190]

[186] Commission Decision of 15 June 2005 in Case COMP/A. 37.507/F3, AstraZeneca.
[187] Ibid, recital 762.
[188] Ibid, recitals 771 and 772.
[189] Ibid, recital 859.
[190] Commission Decision of 29 March 2006 in Case COMP/E-1/38.113, Prokent-Tomra.

The Commission builds its case on the restriction of market access after conducting a detailed analysis of Tomra's agreements, it also puts forward some arguments against the counterfactual scenario proposed by Tomra, according to which the competitors would be in the same situation regardless of the conduct in question.[191] Thus, the Commission certainly attempted to establish causality based on the evidence it had, at least in relation to market foreclosure. The decision thus contains an analysis of the effects, but it seems to aim only at establishing foreclosure as such. In the entire decision, the question of harm to consumers is mentioned only the context of repeating the basic case law of EU case law on the notion of abuse of dominant position.[192] Even though the Commission's economic analysis was present, it was subject to considerable critique for effectively establishing a criterion nearly impossible to pass by any kind of loyalty rebate scheme.[193] In any event, it may be concluded that some, perhaps faulty, economic analysis was present in the decision.

The decision was unsuccessfully contested both before the General Court[194] and the Court of Justice.[195] The question of the conduct's capability to foreclose competition (effect) and, specifically, the alleged *per se* nature of the rule applied by the Commission was addressed in paragraphs 206 to 230 of the General Court's decision. The General Court agreed that *all the circumstances* of the case had to be taken into account[196] (not just the contractual provisions *per se*). This was done by the Commission showing how the conduct could and, going beyond what was required of it, did affect and foreclose competition.[197] Thus, the General Court upheld the substance of the Commission's reasoning with all of its possible faults and shortcomings.

The Court of Justice, too, upheld the decision in its entirety. Interestingly, it rejected Tomra's arguments about the General Court's failure to identify a threshold of affected market share that should lead to a conclusion about an abuse.[198] This can be viewed as one of the instances, where the Court of Justice rejected application of a *de minimis* criterion to abuse of dominance, followed later by *Post Danmark II*.[199] Another possible way to take into account the effect's magnitude would be to have it addressed in a distinction between (in itself

[191] Ibid, recital 272.
[192] See ibid, recital 57.
[193] SAMA, Danilo. The antitrust treatment of loyalty discounts and rebates in the EU competition law: in search of an economic approach and a theory of consumer harm. *Available at SSRN 2425100*. 2012.
[194] Case T-155/06, Tomra Systems ASA and Others v Commission, EU:T:2010:370.
[195] Case C-549/10 P, Tomra Systems ASA and Others v Commission, EU:C:2012:221.
[196] Case T-155/06, Tomra Systems ASA and Others v Commission, EU:T:2010:370., para 215.
[197] Ibid, paras 218 and 219.
[198] Case C-549/10 P, Tomra Systems ASA and Others v Commission, EU:C:2012:221, para 46.
[199] Case C-23/14 Post Danmark A/S v Konkurrencerådet, EU:C:2015:651.

unproblematic) direct harm to some competitors and (unlawful) harm to competition and/or consumers. The Court did not choose to follow this line of reasoning, however.

Interestingly, while the Court of Justice refrained from making stronger statements on the question of anti-competitive effects as such, *AG Mazák* provided a strong endorsement for this approach to analysis of competition cases in his opinion.[200] The *reference to negative (anti-competitive) effects should clearly not be mechanical*.[201]

3.6. Year 2007

In 2007, there was also only one Art. 102 TFEU prohibition decision. It targeted Telefónica, a Spanish telecommunications operator. Telefónica provided both broadband internet to end-users and wholesale access for broadband internet suppliers. The Commission has found that Telefónica's retail prices and wholesale access prices on the regional level were not sufficient to cover the costs that an operator as efficient as itself would incur. Consequently, the Commission concluded that it has infringed Art. 102 TFEU by applying unfair tariffs in the form of disproportion between its wholesale and retail broadband access prices between September 2001 and December 2006.[202]

Based on an analysis of the prices and costs of Telefónica, the Commission claimed that it was likely that the conduct would provide an obstacle to the continued presence of equally efficient competitors on the market,[203] openly relying on economic theory to some extent.[204] Moreover, it puts forward empirical evidence of actual harm that was caused by the conduct. It does not confine itself to a simple description of the market trends (that could be caused both by the conduct as well as by other factors) but attempts to explain the causality between the conduct and its effect, for example by showing how narrowband presence did translate into higher broadband revenues for Telefónica but not for its competitor France Telecom which was dependant on its wholesale access. A competitor called ONO was not dependant on Telefónica in this respect and did not suffer of this effect.[205] The analysis was thus clearly effects-based. Moreover, the Commission argues that the conduct led to direct harm to consumers by increasing

[200] As pointed out by ŠMEJKAL, V. and B. DUFKOVÁ. *Průvodce aktuální judikaturou Soudního dvora EU k ochraně hospodářské soutěže: 77 rozsudků z let 2006-2015* [online]. 2015, p. 222. ISBN 978-80-87975-26-8. Available from: https://books.google.cz/books?id=XyA2jwEACAAJ.

[201] Opinion of Advocate General Mazák in Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:55, para 44.

[202] Commission Decision of 4 July 2007 in Case COMP/38.784, Telefónica, Art. 1.

[203] Ibid, recital 549.

[204] Ibid, recital 554.

[205] Ibid, recital 578.

retail prices while simultaneously lowering broadband penetration.[206] Protection was thus clearly aimed at consumers, applying a consumer welfare standard.

Telefónica contested the Commission's decision before the General Court to no success.[207] The question of the assessment of effects and the relevant benchmark is addressed in paragraphs 266 to 284. In relation to the probability of effects taking place, the General Court refused to apply the *in all likelihood* standard that it applied in merger cases with the argument, that the *a posteriori* analysis of abuse of dominance has usually more evidence available for assessment. The *a priori* analysis in merger cases should be, on the contrary, carried out with greater care because of its intrinsically uncertain nature.[208] Thus, the Commission's decision was tested against a lower benchmark of tendency to restrict competition and found sufficient in this respect.[209]

Telefónica's appeal against the General Court's decision was dismissed by the Court of Justice.[210] Paragraphs 102 to 125 of the judgement are dedicated to the question of effects of the conduct. The Court of Justice mostly simply agrees with the General Court's assessment. Notably, it addresses the question of whether the General Court's analysis of the margin squeeze should have encompassed the question of (non-)essentiality of the inputs, as supposedly followed from the judgement of the Court of Justice in *TeliaSonera*. The Court of Justice made clear, that essentiality may certainly be relevant but does not form an obligatory part of the analysis.[211]

3.7. Year 2009

In 2009, the only Art. 102 TFEU prohibition decision issued by the Commission was the one against Intel. The case of Intel was the first one issued after the Commission's *Guidance Paper* has been published, supposedly aimed to follow the Commission's newly declared enforcement methods and priorities. Intel is a major American producer of computer processors (CPUs). In that case, the alleged abuse in question was the application of, often exclusivity based, or *de facto* exclusivity based, loyalty inducing rebates as well as payments to customers in the area of x86 CPUs. The Commission has concluded, that Intel has indeed abused its dominant position by applying the rebates in question.[212]

[206] Ibid, recitals 592 to 603.
[207] Case T-336/07, Telefónica, SA, and Telefónica de España, SA, v Commission, EU:T:2012:172.
[208] Ibid, para 273.
[209] Ibid, para 283.
[210] Case C-295/12 P, Telefónica SA and Telefónica de España SAU v Commission, EU:C:2014:2062.
[211] Ibid, para 118.
[212] Commission Decision of 13 May 2009 in Case COMP/37.990, Intel.

The Commission's position in the case is a peculiar one. Loyalty inducing rebates have been historically quite strictly regulated in EU competition law, effectively seen presumptively unlawful, following the judgement in *Hoffmann-La Roche*.[213] The Commission opens its analysis by claiming, that it does not have to prove that the conduct is capable of or likely to cause anti-competitive foreclosure.[214] Then, nonetheless, it follows by running an as-efficient-competitor test to demonstrate the likelihood of foreclosure.[215] It even includes a passage on the question of restriction of consumer choice and an explanation of how this restriction actually results in consumer harm, followed by arguments as to how would the competitive landscape be distorted in the future because of Intel's conduct.[216] Thus, the Commission has applied an effects-based analysis focused on consumers, though criticized by some for being flawed methodologically and being merely theoretical in some parts,[217] while simultaneously claiming it was not in fact necessary.

Intel brought an action for annulment against this decision to no success.[218] The General Court put forward several contentious arguments in its assessment. To focus on two, it argued that (1) the Commission did not have to take all the circumstances of the case into account and (2) that it would not review the as-efficient-competitor test carried out in the case. First, it splits rebate systems into three categories: *prima facie* neutral quantity rebates,[219] forbidden exclusivity rebates[220] and a third category of rebates with a fidelity building effect.[221] From an analysis of relevant case law it then comes to the conclusion that it is not necessary to take all the circumstances of the case into account, when it comes to exclusivity rebates, like the ones in the case at hand.[222] Second, the question of the relevance of the as-efficient-competitor test for the case was addressed in paragraphs 140 to 166. The General Court argues, relying heavily on its judgement in the case of Tomra, that an as-efficient-competitor test is not necessary to demonstrate anti-competitive effects, even if assessment of all the circumstances of the case was to be carried out.[223] One of the General Court's arguments was that an as-efficient-competitor test is important for price based abuses (like margin squeezes or predatory pricing) because,

[213] Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, EU:C:1979:36.
[214] Commission Decision of 13 May 2009 in Case COMP/37.990, Intel, recital 925.
[215] Ibid, recitals 1002 et seq.
[216] Ibid, recitals 1597 to 1616.
[217] GERADIN, Damien. The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm? *Journal of European Competition Law & Practice*. 2010, **1**(2), 112–122.
[218] Case T-286/09, Intel Corp. v Commission, EU:T:2014:547.
[219] Ibid, para 75.
[220] Ibid, para 76.
[221] Ibid, para 78.
[222] Ibid, para 84.
[223] Ibid, para 146.

unlike loyalty inducing incentives, a pricing strategy has to be compared to a relevant benchmark to determine its abusiveness.[224]

The General Court's decision was subject to considerable critique,[225] it applied a very strict and formal approach to the analysis of the rebate scheme, stretching the contemporary case law toward a very form-based interpretation, at least as regards the question of rebate schemes of dominant undertakings. Indeed, the Court of Justice set aside the General Court's decision in its 2017 grand chamber judgement.[226] The Court of Justice, stating that the old case law on loyalty rebates had to be *further clarified*, came to the conclusion that the conducts capability to produce anti-competitive effects has to be examined by the Commission when this argument is put forward in the administrative procedure by the dominant undertaking if backed by credible evidence (thus refuting the inescapable *per se* unlawfulness of 'exclusivity' rebates, as put forward by the General Court).[227] Moreover, the General Court erred by not examining the Commission's as-efficient-competitor test, as it formed an important part of the Commission's analysis of capability to produce anti-competitive effects.[228] The case was referred back to the General Court where it is currently pending.[229] The judgement seems to be a confirmation of the Court's acceptance of a more effects-based approach in an area that has been one of the most resiliently focused on form. Some caution is in place though. As explained e.g. by James Venit, the judgement can be read in a purely procedural sense: The General Court erred when it did not address the applicant's arguments concerning the as-efficient-competitor test. The substantive meaning of the outcome of the as-efficient-competitor test can still have little to no relevance to the decision on the abusiveness of the conduct as such, if we accept this reasoning.[230]

As demonstrated above, the Court of Justice otherwise makes explicit reference to the question of capability of producing anti-competitive effects and implicitly rejects many of the General Court's positions as a matter of principle by doing so. I would argue that if the error of the General Court was indeed purely procedural, the Court of Justice would treat its positions more charitably. Nonetheless, it is a valid reading of the judgement that cannot be disregarded at this point in time.

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[224] Ibid, para 152.
[225] JONES, Alison and Brenda SUFRIN. *EU Competition Law: Text, Cases, and Materials*. B.m.: Oxford University Press, 2016, p. 440. ISBN 978-0-19-872342-4.
[226] Case C-413/14 P, Intel Corporation Inc. v European Commission, EU:C:2017:632, operative part.
[227] Ibid, para 138.
[228] Ibid, paras 143 and 144.
[229] Case T-286/09 RENV, Intel Corp. v Commission.
[230] VENIT, James S. The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question? *European Competition Journal*. 2017, **13**(2–3), 172–198. .

3.8. Year 2011

In 2011, the Commission issued one prohibition decision against the Polish telecommunications operator Telekomunikacja Polska, the only one that had a nation-wide fixed telephone network at the time of the decision. As was the case for other telecommunication companies after 2000, the conduct under scrutiny involved broadband internet access. But unlike the pricing issues that were problematic in the cases of Deutsche Telekom, Wanadoo or Telefónica, the Commission contended that Telekomunikacja Polska infringed Art. 102 TFEU by a refusal to supply its wholesale broadband products between 2005 and 2009.[231]

The Commission's analysis does pay attention to the effects of the conduct, dedicating a significant amount of attention to the impact on consumers, in both cases heavily relying on empirical data. It thus falls into the group of effects-based analyses and its analysis is focused on consumers. The refusal to supply in the present case consists of a multifaceted strategy of hampering access to the wholesale broadband access market,[232] namely proposing unreasonable conditions in draft contracts, delaying negotiations, refusing network and subscriber line access and refusing access to information necessary for entry. The analysis of foreclosure effects as such consists *inter alia* of behavioural evidence, describing cases of providers who successfully entered the necessary agreements but did not act on them because the conditions/information obtained from Telekomunikacja Polska implied it would not be profitable.[233] In the quantitative analysis, the Commission relies on the fact that Telekomunikacja Polska had high market shares but there were very low penetration rates of competitors in the relevant wholesale markets.[234] As a matter of harm to consumers, the Commission claims that the conduct resulted in slower internet for higher prices in comparison to other member states.[235] As noted by Damien Geradin and Ianis Girgenson, the Commission's analysis in this case is rather simplistic and comparator based, lacking the work with more elaborate counterfactuals incorporated in models going beyond simple comparators.[236] Despite this critique, it has to be noted that the Commission does argue in favour of causality between the market situation of the time and Telekomunikacja

[231] Commission Decision of 22 June 2011 in Case COMP/39.525, Telekomunikacja Polska.
[232] Concerning the question of a conscious strategy and relevant evidence, see *Telekomunikacja Polska COM*, recitals 148 to 155.
[233] Commission Decision of 22 June 2011 in Case COMP/39.525, Telekomunikacja Polska, recital 819 paragraphs b) and c).
[234] Ibid, recitals 820 to 828.
[235] Ibid, recitals 847 to 863.
[236] GERADIN, Damien and Ianis GIRGENSON. *The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach* [online]. SSRN Scholarly Paper. ID 1970917. Rochester, NY: Social Science Research Network. 2011 [Accessed 2019-03-07]. Available from: https://papers.ssrn.com/abstract=1970917

Polska's conduct. This distinguishes it e.g. form the Commission's *Deutsche Telekom* decision which was described above.

Telekomunikacja Polska did file an action for annulment against the Commission's decision with the General Court only to withdraw it later on.[237] The Commission's decision thus remained uncontested.

3.9. Year 2014

There were four prohibition decisions concerning abuse of dominant position in 2014. They were taken against Servier, a pharmaceutical company, Motorola, an American telecommunications company and mobile phone producer, Slovak Telekom, a Slovak telecommunications company and Operatorul Pieței de Energie Electrică și de Gaze Naturale "OPCOM" S.A. (OPCOM), the single Romanian power exchange operator. The decision against Servier[238] will not be addressed in detail in this work as it deals with a combined breach of Art. 101 TFEU and Art. 102 TFEU and the requisite legal standard for the analysis of effects in Art. 101 TFEU cases is outside the scope of this master's thesis.

3.9.1. Slovak Telekom

Slovak Telekom was an incumbent telecommunications operator on the Slovak market. The Commission argued that, between mid-2005 and late 2010, Slovak Telekom (or, more precisely, an undertaking consisting of Slovak Telekom and Deutsche Telekom) (1) withheld information necessary for alternative operators for the purposes of local loop unbundling, (2) reduced its obligations concerning unbundled loops, (3) set unfair terms in its unbundling offers and (4) applied unfair tariffs, thus excluding equally efficient competitors from wholesale access to its unbundled local loops. For these reasons, the Commission concluded that Slovak Telekom infringed on Art. 102 TFEU.[239]

The Commission ran an as-efficient-competitor test to determine that a margin squeeze has taken place in the case at hand. Notably, it found that there was a period of about four months in 2005 where the margins were found actually positive (i.e. an equally efficient competitor would turn a profit). The Commission argued that these four months nonetheless constituted a breach, as no lasting entry can be made for such a short period of time.[240] Further, the Commission's assessment of quantitative and qualitative evidence proving the potential anti-

[237] See the Order in Case T-533/08, Telekomunikacja Polska v Commission, EU:T:2010:105.
[238] Commission Decision of 9 July 2014 in Case AT.39612, Perindopril (Servier).
[239] Commission Decision of 15 October 2014 in Case AT.39523, Slovak Telekom.
[240] Ibid, recital 998.

competitive effects of the conduct is located in recitals 1110 to 1183 of the decision. It generally follows a similar pattern of comparing market shares and penetration rates as in against Telekomunikacja Polska. Commendably, it works more with general European trends instead of comparisons to selected Member States. The comparably more thorough analysis was probably caused by a more active defendant who proposed its own counterfactual analysis[241] and claimed absence of prejudice to consumers,[242] which the Commission both refuted in the decision. Consumer harm was established by the Commission using external international comparisons from sources like the OECD[243] or Van Dijk Management Consultants.[244] The analysis is thus does work with the effects of the conduct and does claim that direct consumer harm occurred.

Slovak Telekom has filed an action for annulment against this decision and has been partially successful.[245] In paragraphs 240 to 268 of the judgement, the General Court comes to the conclusion that the Commission has not proven an anti-competitive margin squeeze for the four months in 2005 where the period by period as-efficient-competitor test did not reveal any negative margins, as mentioned above. The reasoning is simple. Between August and December 2005 (the contentious period), an equally efficient competitor was in principle able to compete against Slovak Telekom.[246] The Commission bears the burden of proof as relates to potential anti-competitive effect, pursuant to Art. 2 of *Regulation 1/2003*.[247] Although it certainly follows from EU competition law, that a conduct can be abusive even in the event of positive margins, the Commission has failed to demonstrate that this was the case in its decision.[248] It does not happen that often for the General Court to find that the Commission failed to prove likely anti-competitive effects to the requisite standard, be it only in such restricted scope. As the remainder of the action was dismissed, Slovak Telekom appealed to the Court of Justice.[249] The case is currently pending. It will be interesting to see how the Court of Justice will approach the issue.

3.9.2. OPCOM

OPCOM is a market operator of the Romanian power exchange who facilitates short-term trading of electricity between producers and wholesale providers. In the Day-Ahead and Intraday markets, OPCOM required all the participants to be registered for VAT in Romania (and

[241] Ibid, recital 1124.
[242] Ibid, recital 1125.
[243] Ibid, recital 1149.
[244] Ibid, recital 1138.
[245] Case T-851/14, Slovak Telekom, a.s., v Commission, EU:T:2018:929.
[246] *Slovak Telekom T*, para 258.
[247] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25.
[248] *Slovak Telekom T*, paras 259 to 261.
[249] Case C-165/19 P, Slovak Telekom, a.s., v Commission.

consequently have to establish business premises in the country). This was discriminatory treatment that has, according to the Commission, amounted to a breach of Art. 102 TFEU committed by an undertaking consisting of OPCOM and its parent company, *Compania Națională de Transport al Energiei Electrice "Transelectrica" S.A.*[250]

The theory of harm put forward by the Commission[251] is relatively simple. As the requirement of VAT registration constitutes a barrier to entry, it reduces liquidity on the wholesale electricity market. The Commission substantiates this by examples of traders who were barred from joining the power exchange.[252] Inefficient pricing will result in an increased risk of inefficient investment and a related risk of unnecessarily high prices for consumers.[253] To establish a benchmark for possible entry in the event of dropping the VAT requirement, the Commission made a simple comparator-based analysis of 'comparable' markets. Thus, the Commission does infer likely effects of the conduct as well as its repercussions for consumer welfare, even though the analysis as such is rather simple in the present case. It must be noted that the goal of market integration also strongly resonates in this case as the conduct presents a clear restriction of access for entities from other Member States.

3.9.3. Motorola

In this case, the contentious conduct was Motorola enforcing one of its standard essential patents related to the General Packet Radio Service (GPRS) standard used in mobile telephony. Interestingly, Motorola simply sought for and later enforced a court injunction against Apple who made use of its patent on the German market, generally a legitimate instrument of protection of intellectual property rights. The Commission's contention was that while Motorola has vouched to license the patent on fair, reasonable and non-discriminatory (FRAND) terms and Apple was willing to be a licensee, its otherwise legitimate behaviour was not compatible with Art. 102 TFEU. Because of the specific nature of the infringement, however, the Commission did not impose a fine on Motorola and simply ordered it to bring the anti-competitive conduct to an end.[254]

The basis of the Commission's theory of harm consists of two main considerations: (1) the worsening of Apple's position as such and (2) the negative effect on future standard setting. As for the first consideration, the Commission underlines the fact that Apple was temporarily

[250] Commission Decision of 5 March 2014 in Case AT.39984, Romanian Power Exchange / OPCOM.
[251] Which can be found in recitals 171 to 185 of the decision.
[252] Commission Decision of 5 March 2014 in Case AT.39984, Romanian Power Exchange / OPCOM, recital 175.
[253] Ibid, recital 178.
[254] Commission Decision of 29 April 2014 in Case AT.39985, Motorola.

barred from online sales of its GPRS compatible products on the German market and forced to accept disadvantageous licensing terms.[255] The Commission's logic seems to be that Motorola used the indispensability of its patent to significantly worsen the competitive position of its rival. This did not constitute competition on the merits (and was thus unlawful) because Motorola did not act in accordance with its commitment to license its patent under FRAND terms. More generally, the Commission states that it is beneficial for the industry and consumers to be able to successfully contest the validity of the patent (which was not possible pursuant to the conditions in the case at hand). Otherwise, unnecessarily high prices may be passed on to consumers.[256] Concerning the second consideration, standards are key for technical development in hi-tech industries like telephony.[257] Therefore, access to the essential patents is necessary for a healthy competitive landscape in such industries. The Commission thus does examine the effective repercussions of the conduct and bares consumer welfare in mind.

The theory of harm in this case is relatively abstract. As follows from the Commission's reasoning, one of the key questions will be to determine if the dominant undertaking's terms were FRAND – this may leave quite a broad interpretative margin. This issue was not challenged in an action for annulment, but it was further clarified by the Court of Justice by means of a preliminary ruling.[258] There, it was made clear that a dominant undertaking, holding a standard essential patent, can bring and action against alleged infringers of its intellectual property rights if (1) it first resorts to prior notice or consultation. If the alleged infringer is willing to cooperate, it (2) presents a specific written offer of a licensing agreement under FRAND terms. If the alleged infringer disputes the fairness of the proposed agreement and still wants to rely on the abusive nature of the action, (3) it has to promptly submit a written and specific counter-offer to the proprietor of the patent.[259] Moreover, the Court of Justice specifies, in line with the Commission's abovementioned theory of harm, that the alleged infringer *cannot be criticised* for challenging the validity of the patents in question.[260] This sets quite clear procedural conditions reconciling patent protection and requirements of competition law. The question of assessment of anti-competitive harm in similar future cases seems to be confined to the estimation of fairness ('FRANDness', to be more specific) supposing compliance with the abovementioned criteria by both parties in question.

[255] Ibid, recitals 316 and 320.
[256] Ibid, recitals 377 and 378.
[257] Ibid, recital 416.
[258] Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH, EU:C:2015:477.
[259] Ibid, paras 59 to 66.
[260] Ibid, para 69.

3.10. Year 2016

The Commission has issued one prohibition decision in 2016. It was aimed at Altstoff Recycling Austria Aktiengesellschaft (ARA), an Austrian company that collects and recycles packaging of goods on behalf of other companies, thus fulfilling their regulatory responsibilities under Austrian law on their behalf. ARA as such controlled and partly owned the household collection infrastructure for lightweight and metal packaging waste. According to the Commission, ARA has abused its dominant position on the relevant market for the exemption of household packaging waste by barring access to this infrastructure for potential competitors.[261]

One of the key remarks of the Commission is the fact that the infrastructure controlled by ARA cannot be duplicated.[262] It is thus an indispensable input.[263] Therefore, having concluded that a refusal to supply has occurred,[264] the refusal has led to a likely elimination of competition, as ARA's agreement to supply was a necessary condition for market entry, given the circumstances.[265] The decision's argumentation concerning anti-competitive effects is quite sparse, the Commission explicitly mentions that it is not necessary to establish causality between ARA's conduct and the inability to enter the market on part of some potential competitors in response to ARA's claims, that they were not able to enter the market regardless of its conduct.[266] Thus it does not seem to fulfil the Commission's usual benchmark of an effects-based analysis in a prohibition decision. The question of consumer harm is not addressed at all.

The sparseness of the analysis of effects and the short length of the decision as such can be possibly explained by the fact that ARA has decided to cooperate and acknowledge the infringement, even propose structural remedies. This has led the Commission to reduce the fine imposed by 30%.[267] As remarked by Peter Thyri,[268] the decision seems to present a strange hybrid between an Art. 7 prohibition decision and an Art. 9 settlement (talking in terms of *Regulation 1/2003*[269]). While going beyond a simple decision on commitments, the Commission seems to have concluded that the bar of the requisite legal standard (for establishing likely effects, *inter alia*) was set lower than usual.

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[261] Commission Decision of 20 September 2016 in Case AT.39759, ARA.
[262] Ibid, recitals 28 to 38.
[263] Ibid, recital 78 et seq.
[264] Ibid, recital 111.
[265] Ibid, recitals 112 and 113.
[266] Ibid, recital 113.
[267] Ibid, recitals 161 and 162.
[268] The ARA "consent decree" – a new enforcement tool for abuse cases ante portas? *Chillin'Competition* [online]. 18. October 2016 [Accessed 2019-05-14]. Available from: https://chillingcompetition.com/2016/10/18/the-ara-consent-decree-a-new-enforcement-tool-for-abuse-cases-ante-portas/
[269] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25.

3.11. Year 2017

There were two Art. 102 TFEU prohibition decisions issued by the Commission in 2017. The first one was aimed at AB Lietuvos geležinkeliai (LG), a Lithuanian railway undertaking and infrastructure manager, while the second one was the first of the three decisions aimed at Google, the American IT company.

3.11.1. Baltic rail

In the case of LG, the abusive conduct was based on a seemingly innocuous behaviour of the undertaking. In September 2008, it claimed to have detected a deformation of a segment of a railway track used to transport oil from a Lithuanian refinery to Latvia. According to the Commission, LG's conduct led to an abuse of its dominant position on the Lithuanian market for management of railway, having potential anti-competitive effects on the downstream market of provision of rail transport services for oil products to the seaports of Klaipeda, Riga and Ventils.[270]

The basic premise of the case is the Commission's conclusion that it was not necessary and/or common practice to remove the track in question.[271] Some of LG's competitors were a credible alternative to LG's services before the removal of the track,[272] but lost their capacity to provide competitive constraints to LG after the removal of the track.[273] This conduct has thus led to foreclosure of competitors.[274] The Commission shows that the alternative route after the removal of the track is not a cost efficient alternative.[275] Moreover, LG could benefit of information asymmetry stemming from the fact that it knew its national tracks very well, unlike potential competitors from abroad whose uncertainty as to the costs of transport has increased.[276] The Commission further corroborates these findings with evidence of actual failed negotiations that were most probably unsuccessful only because of the removal of the track.[277] The analysis of both the scenario ensuing from the removal of the track as well as the counterfactual hypothetical position of a competitor able to make use of the track are analysed quite painstakingly. The analysis is thus effects-based even in face of a conduct that could be tempting to be condemned based on, at least apparently, malicious intent. The Commission does not

[270] Commission Decision of 2 October 2017 in Case AT.39813, Baltic rail.
[271] Ibid, recitals 179 to 201.
[272] Ibid, recitals 205 to 284.
[273] Ibid, recitals 285 to 316.
[274] Ibid, recitals 317 to 324.
[275] Ibid, recitals 309 to 314.
[276] Ibid, recitals 306 o 308.
[277] Ibid, recitals 320 and 321.

directly address the question of consumer harm, though, the assessment is thus confined to the foreclosure effect. LP has filed an action for annulment that is currently pending.[278]

3.11.2. Google Shopping

In the first of its three prohibition decisions against Google, the Commission focuses on Google's comparison-shopping service and its placement next to the results of its general search engine. According to the Commission, Google holds a dominant position in the national markets for general search services. Allegedly using this dominant position to its advantage on a separate market, Google was found to act in breach of Art. 102 TFEU by positioning and displaying its comparison-shopping service more favourably than the competing services in the general search results.[279]

As noticed by Giorgio Monti,[280] one of the (perhaps contentious) assumptions underpinning the theory of harm in this concrete case is the claim that competitors should be able to compete for the entire market, not just for a part of it.[281] Although such a claim certainly strengthens the Commission's position later on, it remains questionable why this should be the case, especially when decisions such as the one against Intel normally operate with the distinctions of contestable and non-contestable shares of the market. Departing from this general consideration, the Commission contends that the combination of ranking of comparison-shopping services in the general search results, the position and the graphical presentation of the Google shopping results together lead to a decrease of traffic from Google's general search results page to competing comparison shopping services. Simultaneously, the conduct increases traffic to Google's own comparison-shopping service.[282] Subsequently, the Commission contends that the diversion caused by the conduct affects a 'large proportion' of traffic which cannot be effectively replaced by other means,[283] without going so far to call the traffic from the general search results indispensable.

Building on the above findings, the Commission concludes that the conduct has a potential to foreclose competing comparison-shopping services because of their artificially worsened position, while consumers will have a reduced ability to access the most relevant

[278] Case T-814/17, Lietuvos geležinkeliai v Commission.
[279] Commission decision of 27 June 2017 in case AT.39740, Google Search (Shopping).
[280] MONTI, Giorgio. Abuse of a Dominant Position: A Post-Intel Calm? [online]. [Accessed 2019-03-24]. Available from: https://www.competitionpolicyinternational.com/abuse-of-a-dominant-position-a-post-intel-calm/
[281] Commission decision of 27 June 2017 in case AT.39740, Google Search (Shopping), recital 339.
[282] Ibid, recital 452.
[283] Ibid, recital 539.

comparison-shopping services.[284] Even if the relevant market was found to include merchant platforms, the conduct would still be likely to produce anti-competitive effects.[285] Finally, the preferential positioning of Google Shopping results should lead to higher revenues generated on general search services, thus producing likely anti-competitive effects on the markets for general search services.[286] The Commission thus certainly does look at the effects and does take consumer welfare into account.

Nonetheless, the decision was subjected to considerable critique. I would argue that most of it can be summed up in the contention that the Commission made little effort to spell out a legal standard for what constituted a breach in that case. In other words, what is the legal test? We can learn that the *Bronner*[287] test should not be applied, according to the Commission.[288] But can it be compared to tying in the case of Microsoft's Windows Media Player by virtue of its similar effects?[289] Or maybe anti-competitive discrimination against comparison shopping services?[290] Or, has the Commission erred by failing to directly address the question of indispensability in a case of self-preferencing?[291]

I believe the much of the current controversy is linked to the 'legalistic' leg of the theory of harm ('the test') which was discussed in Chapter 1. The Commission has shown that there has been some, probably quite significant, effect detrimental to competitors which was certainly not achieved by the quality of the product in question (i.e. not by competition on the merits). Therefore, I do not think it failed to run an analysis of the effects of conduct as such. On the contrary, it has done plenty of it. It failed to set a clear legal benchmark – many things a dominant undertaking can do will result in *some* harm to *competitors*. It is worth mentioning, that the Court of Justice has recently rules in a case of Art. 102(c) TFEU discrimination that *the mere presence of an immediate disadvantage … does not mean that competition is distorted or is capable of being distorted*.[292] Even without a *de minimis* threshold, we need some way of telling,

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[284] Ibid, recitals 591 to 600.
[285] Ibid, recital 609.
[286] Ibid, recital 642.
[287] Case C-7/97, Bronner, EU:C:1998:569.
[288] Commission decision of 27 June 2017 in case AT.39740, Google Search (Shopping), recital 651.
[289] Ibid, footnote 715.
[290] BERGQVIST, Christian. Google and the search for a theory of harm: The Commission has published its June 2017 Google decision, thus exposing it to scrutiny. While the work undertaken by the EU Commission is impressive and bold, much of the legal dimension of the decision bears discussion. Moreover, the case has been redacted significantly, thus leaving open the door for additional cases and fines. *ECLR: European Competition Law Review*. 2018, **2018**(4), 149–151.
[291] Self-Preferencing: Yet Another Epithet in Need of Limiting Principles. *Chillin'Competition* [online]. 24. April 2019 [Accessed 2019-05-16]. Available from: https://chillingcompetition.com/2019/04/24/self-preferencing-yet-another-epithet-in-need-of-limiting-principles/
[292] Case C-525/16, MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, EU:C:2018:270, para 26.

where a worsened position of a competitor translates into a likely distortion of competition. The question of the requisite legal standard will likely be one of the issues solved by the General Court in the action for annulment filed by Google against this decision.[293]

[293] Case T-612/17, Google Inc. and Alphabet Inc. v Commission.

4. Discussion of the Results

4.1. General results

There are several general tendencies that can be seen from the analysis of the Commission's post-2000 case law. Remaining on the general methodological level described in Chapter 1, there is a clear trend in reasoning the decisions in a way that takes into account the conduct's (likely) effects and explains how it impacts consumers.

Only a quarter of decisions before 2009 (the year the *Guidance Paper*[294] was published) contained a more serious analysis of effects and simultaneously took the consumer welfare standard into account. On contrary, three quarters of the prohibition decisions issued in 2009 or later did contain both. The Commission thus generally follows its soft law on unilateral conduct in some form. There are, of course, some notable exceptions. As late as in 2016 and 2017, the Commission did not adhere to it in its decisions *ARA*[295] and *Baltic Rail*.[296] Further, some of the cases did both focus on a value different than consumer welfare and did not seriously analyse the effects of the conduct. These cases fall almost exclusively[297] into the early years of the new millennium. Their general focus often tends to be market integration rather than competition. The following table presents a brief overview of the results of the analysis of previous chapter.

Case (year)	Consumer welfare?	Effects-based?
Deutsche Post – mail (2001)	YES	NO
Deutsche Post – parcel (2001)	NO	NO
Michelin (2001)	NO	NO
La Poste (2001)	NO	NO
Deutsche Telekom (2003)	NO	YES
Ferrovie dello Stato (2003)	NO	NO
Wanadoo (2003)	NO	YES
Clearstream (2004)	YES	NO
Microsoft (2004)	YES	YES
Astra (2005)	YES	YES

[294] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01).

[295] Commission Decision of 20 September 2016 in Case AT.39759, ARA.

[296] Commission Decision of 2 October 2017 in Case AT.39813, Baltic rail.

[297] With a notable exception of the already mentioned Commission Decision of 20 September 2016 in Case AT.39759, ARA.

Tomra (2006)	NO	YES
Telefónica (2007)	YES	YES
Intel (2009)	YES	YES
Telekomunikacja Polska (2011)	YES	YES
Motorola (2014)	YES	YES
Slovak Telekom (2014)	YES	YES
Romanian Power Exchange (2014)	YES	YES
ARA (2016)	NO	NO
Baltic Rail (2017)	NO	YES
Google Shopping (2017)	YES	YES

The simple answer would thus be that the Commission does *generally* apply a consumer welfare standard tested against the likely effects of a conduct. This does not capture the whole picture, however. One question is, how thorough the Commission has to be? As early as in 2003, the Commission conducted a surprisingly in-depth analysis explicitly relying on economic reasoning applied to empiric data in *Wanadoo*.[298] In the same year in a very similar case (problematic pricing practices in relation to broadband internet) the Commission explained the likely effects of the conduct in several recitals on a much more superficial level in *Deutsche Telekom*.[299] Both decisions were contested in court and both were upheld. The takeaway seems to be, that while EU courts do agree that the Commission has to show likely anti-competitive effects of a conduct, the current threshold seems to be rather low. This is not improved by the fact that the question of degree of certainty required to prove likely anti-competitive effects in abuse of dominance cases has never been fully clarified by EU courts.[300]

Thus, the Commission seems to currently have a significant margin of discretion in which it can and does chose how to perform the analysis of the effects of the conduct in question. In some cases, it is relatively thorough. In some it is not. One of the possible determinants that seem to play a role is how much of a fight is the dominant undertaking willing to put up. In high-profile cases like *Microsoft*[301] or *Google Shopping*,[302] the Commission (despite the critique of some) seems to make an effort to explain the anti-competitive effects more thoroughly than usual. On the other hand, it can be very brief when the undertaking in question admits the anti-

[298] Commission Decision in Case COMP/38.233, Wanadoo Interactive.
[299] Case C-280/08 P Deutsche Telekom AG v Commission, EU:C:2010:603.
[300] As discussed in subsection 1.4.1. of this master's thesis.
[301] Commission Decision of 24 March 2004 in Case COMP/C-3/37.792, Microsoft Cooperation.
[302] Commission Decision of 27 June 2017 in case AT.39740, Google Search (Shopping).

competitive nature of its conduct and decides to cooperate, as seen in *ARA*.[303] While this approach seems sane on a procedurally-tactical level, such an approach can be problematic in the light of Art. 2 of *Regulation 1/2003*: It is the Commission who bears the burden of proof in relation to anti-competitive effects when issuing a prohibition decision. It makes little sense to conclude that some cases require 'more proof' than others based on factors other than the complexness of the subject matter.

4.2. Specific questions

There are several more specific areas that deserve to be addressed separately. This section provides a brief overview of some of these issues that can be seen in the Commission's case law.

4.2.1. Asymmetric counterfactuals

The issue of asymmetric counterfactuals is linked to the question of the Commission's burden of proof in relation to the conduct's effects addressed in the previous section. As described in the first chapter, the proof of actual (or likely) abuse of dominance does implicitly rely on the idea of a counterfactual – if it was not for the abusive conduct, the competitive landscape and/or consumer welfare would be in a better condition (or less endangered). This idea also goes both ways as explained above. A thriving competitor of a dominant undertaking is not *per se* proof that the dominant undertaking's conduct does not produce likely anti-competitive effects. Equally, growing sales and market shares of a dominant undertaking are not immediate proof of the abusiveness of the dominant undertaking's conduct. In line with the first example, EU courts readily apply this counterfactual argument when dismissing the dominant undertaking's claims. This happened in the General Court's *Intel* judgement, where the growth of Intel's competitor AMD during the alleged abuse was not considered as proof of a lack of likely anti-competitive effects.[304] On the other hand, as discussed above in the case of *Deutsche Telekom*,[305] the Commission can put forward evidence growing market shares (or dwindling competition) with little to no arguments concerning the causal relation between the conduct and the alleged effects without having this practice questioned by EU courts. A similar approach to the question of actual effects can be found in the *ARA*[306] decision.

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[303] Commission Decision of 20 September 2016 in Case AT.39759, ARA.

[304] Case T-286/09, Intel Corp. v Commission, EU:T:2014:547, para 186. Similarly (in a decision that was not quashed), see Case T-203/01, Manufacture française des pneumatiques Michelin v Commisson, EU:T:2003:250, para 245.

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

[306] Commission Decision of 20 September 2016 in Case AT.39759, ARA.

It is true that the Commission merely has to prove *likely* effects. This being said, the alleged *actual* effects do not seem to be immaterial. The Commission itself identifies them as a relevant factor for its decision making.[307] Thus, at the current state of affairs, it seems that a growing market share of the dominant undertaking is a factor that can be used *ipso facto* as evidence against it, if present. If this factor is absent, the undertaking cannot rely on it, though. This is not to argue that the dominant undertaking should be able to build its defence on the mere fact that its conduct was not effective. Rather, it would seem reasonable in the light of Art. 2 of *Regulation 1/2003*[308] to require the Commission to present arguments why the further decline of the competitive fringe was indeed caused by the dominant undertaking's conduct, if it chooses to rely on such a finding.[309]

4.2.2. The continuing tension between legal certainty and precision

It is a delicate exercise to strike a balance between the requirement of legal certainty and accuracy in the enforcement of competition law. As explained by Jan Broulík, there is tension between the two values.[310] In the analysed cases, there can be seen both those that seemed to err on the side of legal certainty as well as those that contained an abundant analysis of the practical repercussions of the conduct without establishing a tangible legal standard. The first category certainly contains the decisions on loyalty-inducing rebates like *Michelin*,[311] or *Tomra*,[312] a formal rule the future enforcement of which may evolve in the light of recent case law, as indicated above. The second category certainly entails cases like *Motorola*[313] or *Google Shopping*.[314] Both decisions do discuss the effects of the conduct without establishing much guidance for the future enforcement of similar situations. While it is commendable that the Commission can be quite thorough in its analysis of the conduct's effects, I would argue that establishing a benchmark for a breach and why it was fulfilled is a necessity in order to provide future guidance, even if the decision presents a novel theory of harm. This is not to be interpreted as a retreat to a more form-based approach. Some of the better-established areas of abuse of

[307] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7–20, CELEX 52009XC0224(01), para 20.
[308] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003, pp. 1-25.
[309] As it has in fact done in a number of cases, see e.g. *Wanadoo*.
[310] BROULÍK, Jan. Preventing anti-competitive conduct directly and indirectly: accuracy versus predictability. *The Antitrust Bulletin*. 2019, **64**(1), 115–127.
[311] Commission Decision of 20 June 2001 in Case COMP/E-2/36.041/PO, Michelin, OJ L 143/1, 30.5.2002, pp. 1-53.
[312] Commission Decision of 29 March 2006 in Case COMP/E-1/38.113, Prokent-Tomra.
[313] Commission Decision of 29 April 2014 in Case AT.39985, Motorola.
[314] Commission Decision of 27 June 2017 in case AT.39740, Google Search (Shopping).

dominance, like predatory pricing or margin squeezes, regularly comprise of a generally accepted legal criterion (e.g. economically irrational pricing) and an explanation of the conduct's likely effects.

Another issue is the question of legal certainty with regards to the fine. In novel cases, the Commission has often decided not to impose a fine (or to impose a symbolic fine). This happened e.g. in *Deutsche Post*[315] or *Motorola*.[316] The Commission does not seem to be bound to do so in every case, as can be seen in the case of *Google Shopping*.[317]

4.2.3. The Commission's sporadic use of economic theory

Next to empiric analyses, reliance on economic theory can be another way of increasing the persuasiveness of the Commission's theory of harm. The Commission does not seem to rely on it in a consistent manner. Or less consistently and often, for that matter. Some of the cases that relied more heavily on the findings of economic theory were *Wanadoo*[318] and *Deutsche Post* (parcel services).[319] Both cases were based on theories of harm that were not particularly novel either legally or economically speaking. It may be harder to look for economic literature to underpin a theory of harm that is novel (though it may prove even more useful if it exists). Nonetheless, the Commission seems to refer to economic literature in exceptional cases regardless of the complexness or novelty of the theory of harm. More often, it employs common sense arguments concerning incentives and likely effects.

Perhaps the Commission opts for its own arguments in favour of existence of likely anti-competitive effects not to undermine the fact that the decision presents an authoritative interpretation of the law, not an academic text. Nonetheless, identifying economic ideas the decision relies on more explicitly could bring more transparency into the Commission's theories of harm. If the economic theory relied upon is uncontroversial, it should not be problematic. If it is controversial, the Commission should even more so avoid shying away of that fact.

[315] Commission Decision of 25 July 2001 in Case COMP/C-1/36.915, Deutsche Post AG, OJ L 331/40, 15.12.2001, pp. 40-78.
[316] Commission Decision of 29 April 2014 in Case AT.39985, Motorola.
[317] Commission Decision of 27 June 2017 in case AT.39740, Google Search (Shopping).
[318] Commission Decision in Case COMP/38.233, Wanadoo Interactive.
[319] Commission Decision of 20 March 2001 in Case COMP/35.141, Deutsche Post AG, OJ L 125/27, 5.5.2001, pp. 27–44.

Conclusion

This master's thesis undertook to analyse the Commission's case law on unilateral anti-competitive conduct from the last twenty years. Its goal was to examine how the Commission adhered to the application of the consumer welfare standard and effects-based approach before and after it formally vouched to build its theories of harm (in cases of exclusionary conduct) based on these two aspects. Moreover, it lined out the boundaries to the Commission's theories of harm enacted by the case law of the General Court and the Court of Justice and pointed out some of the important decisions linked to the analysed Commission's decisions.

As a result, we can conclude that the Commission's case law did shift to a more effects-based approach over time and that the Commission does attempt to take the consumer welfare standard into account in some way in most of its decisions. Beyond this superficial result, there are some remaining issues, though.

First, the EU courts have been historically lenient as to the standard the Commission has to adhere to in order to prove likely anti-competitive effects to the requisite legal standard. The courts' review lacking a disciplining effect on the Commission, its depth and quality of analysis seems to differ case to case without any clear, legally or factually relevant reason. Similarly, the EU courts seem to readily accept alleged effects of a dominant undertaking's conduct without having very high requirements for arguments in support of causality between the conducts and the perceived effect. On contrary, the courts can readily apply a counterfactual argument to a dominant undertaking's argument *vice versa*. Thus, as the law stands, the Commission seems to have to provide relatively little proof as to the likely anti-competitive effects and it does make use of this fact on some occasions.

Second, there is room for improvement in the clarity and transparency in the theories of harm advanced by the Commission. This could be done by relying more on economic theory when addressing anti-competitive effects and by always addressing the legal standard that was applied in the given case.

I would argue that the analysis has also shown that, at the current state of affairs, it is indeed the Commission who has to push consistently for a more effects-based approach and the application of a consumer welfare standard in order to achieve tangible results. As can be seen above, some of the recent decisions of both the Court of Justice and the General Court provide some hints that the EU courts might begin to exercise some pressure on the Commission in

relation to the application of a more effects-based approach, but it is too soon to make any far-reaching conclusions.

A possibility of a more sophisticated analysis of the Commission's Art. 102 TFEU case law lies open for future research. A wider scope of Commission decisions can be taken into account, e.g. commitment decisions. On a methodological note, apart from the two general criteria applied in this master's thesis, more specific questions can be asked. For example, if the Commission does examine the actual or likely effects of a given conduct, what was the underlying economic reasoning, what school of thought could it be attributed to? What economic school is it consistent with? A comparative analysis with case law from the USA could also be quite insightful, especially in cases that have been dealt with on both sides of the Atlantic Ocean. Indeed, the application of Art. 102 TFEU seems to be constantly in flux. Its developmental possibilities and tendencies deserve to be thoroughly studied, especially in the ever-evolving digital era, a challenge for numerous areas of law and regulation.

List of Abbreviations and Acronyms

AEC test	as-efficient-competitor test
AG	Advocate General
Commission	European Commission
EU	European Union
EU courts	The Court of Justice and the General Court
TEU	Consolidated version of the Treaty on European Union, OJ C 202, 7.6.2016, p. 13–388.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47-390
UK	United Kingdom
US	United States
USA	United States of America

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Užití teorií újmy při aplikaci článku 102 SFEU

Abstrakt

Předmětem této diplomové práce je studie dopadu modernizace soutěžního práva Evropské unie v oblasti zneužití dominantního postavení. Mapuje využití analýzy efektů protisoutěžního jednání a standardu spotřebitelského blahobytu v případech zneužití dominantního postavení ve smyslu článku 102 Smlouvy of fungování Evropské unie. Studie je vedena formou rozboru teorií újmy prezentovaných v rozhodovací praxi Evropské komise v rozhodnutích o zneužití dominance za posledních dvacet let.

Práce začíná teoretickou diskuzí a vymezením mantinelů diskrece Komise stanovených judikaturou unijních soudů. Poté následuje krátký popis procesu modernizace unijního soutěžního práva. V analytické části práce jsou potom rozhodnutí Komise posuzována vzhledem ke dvěma kritériím. V návaznosti na první kritérium je kladena otázka, zda Komise při svém posuzování provedla analýzu efektu zkoumaného jednání. Druhým kritériem je, zda Komise ve svém rozhodnutí vzala v potaz standard spotřebitelského blahobytu. Poslední kapitola pak obsahuje diskuzi výsledků této analýzy.

Závěrem této práce je, že v průběhu času začala Komise častěji přistupovat k analýze efektů protisoutěžního jednání, přičemž se zpravidla pokouší vzít v nějaké formě v potaz standard spotřebitelského blahobytu. Nad rámec tohoto obecného závěru je třeba zmínit některé konkrétnější závěry ohledně teorií újmy prezentovaných Komisí.

V první řadě jde o skutečnost, že hloubka a kvalita analýzy efektů provedené Komisí je proměnlivá případ od případu bez jasného, právně a fakticky relevantního důvodu. Prostor pro zlepšení lze vysledovat i v otázce jasnosti a transparentnosti teorií újmy formulovaných v rozhodnutích Komise. V některých případech není příliš zřetelně identifikován právní standard, který vedl Komisi k jejímu rozhodnutí. Podle takového standardu by bylo možné ve prospěch právní jistoty určit jasnější hranici, kde začíná protiprávnost daného jednání.

Klíčová slova:

zneužití dominantního postavení, teorie újmy, analýza efektů

Use of Theories of Harm in the Application of Art. 102 TFEU

Abstract

This master's thesis presents a study of the impact of European Union competition law on the area of abuse of dominance. It maps the usage of the effects-based approach and consumer welfare standard in abuse of dominance cases pursuant to Article 102 of the Treaty on the Functioning of the European Union. This is done by an analysis of the theories of harm advanced in the case law of the European Commission in prohibition decisions from the last twenty years.

The thesis begins by a theoretical discussion and outline of the boundaries to the Commission's discretion in this area, as set by Union courts. Then, a short description of the process of competition law modernisation in Europe continues. In the subsequent analytical part, the cases are tested against two criteria. The first criterion is whether the Commission has analysed the actual or likely effects of a dominant undertaking's conduct. The second criterion is whether the Commission tested the pertinent conduct against a consumer welfare standard. In the final chapter, the results of the analysis are discussed.

The conclusion of this thesis is that the Commission's case law did shift to a more effects-based approach over time and that the Commission does attempt to take the consumer welfare standard into account in some way in most of its decisions. Beyond this general result, there are some remaining issues, though.

First, the depth and quality of the Commission's analysis seems to differ case to case without any clear, legally or factually relevant reason. Second, there is room for improvement in the clarity and transparency in the theories of harm advanced by the Commission. Some cases do not identify clear legal standards that led the Commission to its decision. Such a standard could provide better guidance for future conduct and its penalisation to the benefit of overall legal certainty.

Keywords:

abuse of dominance, theory of harm, effects-based approach