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Course of Eu Competition Law

The evolution of Article 102 of the Treaty on the Functioning of the European Union

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INDEX

CHAPTER 3: THE CATEGORIES OF ABUSE OF DOMINANT POSITION

1. INTRODUCTION

1.1 Background

Competition is the archetypal element of a free market economy, it is a rivalry in which every player tries to get what other competitors are seeking, indeed, Merriam-Webster[1] defines competition as *"the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms"*.

On top of that, Antitrust Law has recently seen staggering global growth, as more than one hundred and twenty distinct Competition Law systems and approximately one hundred different antitrust authorities can be isolated[2]. Its scope has been increasing as well, as it now applies to many markets which were previously considered exclusive States' prerogatives, such as the energy sector.

On that regard, there is a widespread consensus over the desirability of antitrust rules, because fair competition ensures a better allocation of resources, by stimulating traders to constantly monitor the link between incomes and expenses, as well as by motivating undertakings to offer their goods/services at the most advantageous conditions[3]. In other words, undistorted competition leads to efficiency, innovation and consumer welfare.

Obviously, one player cannot influence the market alone, however, its business strategies condition other traders, which, in turn, have an identical impact on their competitors. These mechanisms will generate decrease in prices and market growth, which will ultimately result in what we generally refer to as "effective competitive process"[4].

In order to attract more potential clients, market players may use a variety of illegal practices that have, as a consequence, adverse environmental effects, which generally result in harm to other competitors and consumers, as well as the competitive structure as a whole. Abuse of dominance is one of the most deplorable forms of prohibited practice.

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[1] The oldest and foremost dictionary publisher in America.
[2] Whish, Richard. Bailey, David. *Competition Law*, Oxford University Press, 2021, pages 1-10.
[3] Fox, Eleanor. *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, Notre Dame Law Review, 1986, pages 981-982.
[4] Marginean, Mihai. *Positive and negative effects analysis in abuse of dominance*, Munich Personal RePEc Archive, 2017, page 2.

Therefore, the European Union (hereinafter the "EU" or the "Union") established an articulate legislative framework concerning competition. On that regard, the Treaty on the European Union[5] (hereinafter the "TEU") makes the establishment and preservation of the internal market one of its primary goals. Moreover, Protocol 27[6], which, under Article 51 TEU, forms an integral part of the Treaty's provisions, further explains that the *"internal market"* includes *"a system ensuring that competition is not distorted"*. This system comprises the following fundamental features: the prohibition of cartels[7], the prohibition of abuse of dominant position[8], the prohibition of anticompetitive concentrations between undertakings[9] and the prohibition of state aid[10].

Therefore, European Competition Law (hereinafter "ECL") should be primarily seen in the context of the predominant purpose of achieving single market integration. If this is true, within the European legal framework, the essential objective of antitrust rules is to protect the competitive process, in order for the whole Union to benefit from this, as expressly declared by the European Commission (hereinafter the "Commission") in its Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty establishing the European Community[11] (hereinafter the "TEC" or the "EC Treaty") to abusive exclusionary conduct by dominant undertakings[12] (hereinafter the "2009 Guidance Paper").

On that regard, the social rather than pure technical role of ECL is testified by Article 109 of the Treaty on the Functioning of the European Union[13] (hereinafter the "TFEU"), which emphasizes the public interest enshrined in competition rules, by stating that:

"In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the

[5] Article 3(3), *Consolidated version of the Treaty on European Union*, OJ C 326, 2012.
[6] Consolidated version of the Treaty on European Union, *Protocol (n 27) on the internal market and competition*, OJ C 115, 2008.
[7] Article 101 TFUE.
[8] Article 102 TFUE.
[9] Article 2(3), *Regulation 139/2004*, OJ L 24, 2004.
[10] Article 107 TFUE.
[11] *Consolidated version of the Treaty establishing the European Community*, OJ C 325, 2002.
[12] 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, 2009, paragraph 6.
[13] *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326, 2012.

guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health"[14].

Indeed, antitrust provisions are also aimed at the redistribution of wealth and economic parity, as they protect democracy, individual freedom of choice and economic opportunity[15].

At the same time, the centrality of Competition Law within the Union should not be taken for granted because it is the result of a heated debate, which comprises unexpected turns, such as the former French President Nicolas Sarkozy's announcement questioning the place of competition rules within the EU legislative framework[16], but culminated in the declaration by the Court of Justice of the European Union (hereinafter the "ECJ" or the "CJEU") that *"Competition Law is a fundamental objective of the Community"*[17].

On that regard, in order to provide a solid legal basis for the affirmation of the latter principle, the ECJ referred to Article 119(1) TFUE, which obliges both the EU and its Member States (hereinafter the "MSs") to align their activities *"in accordance with the principle of an open market economy with free competition"*.

Regarding the prevalent characteristics of competition provisions, they are normally drafted as general and abstract prohibitions[18], for instance, Article 102 TFUE prohibits the abuse of dominant position without further defining the core concepts involved. These elements determine the malleability of Antitrust Law, which, in turn, entails its capacity to be subject to structural developments and broad interpretations without any legislative amendment of the substantive provisions[19].

However, frictions with the principle of legality and the rule of law may arise, considering not only that a given discipline could be potentially shaped in infinite ways, but also that,

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[14] Layfield, Christopher. *Competition Law: Abuse of Market Position in the EU*, Seton Hall University, 2023, page 6.
[15] See *supra* (n 2), page 21.
[16] Gow, David. *EU commissioner takes on Sarkozy over competition rules*, The Guardian, [June 25, 2007].
[17] Judgment of 29 June 2006, *Showa Denko KK vs Commission*, Case C-289/04 P, EU:C:2006:431, paragraph 55.
[18] Within the European framework such features are even more stressed by the teleological approach of the ECJ towards substantive competition rules; on that regard, see Nazzini, Renato. *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, Oxford University Press, 2009, pages 1-10, in which the latter approach is defined as *"the only possible one"*.
[19] Colombo, Ibáñez, Pablo. Kalintiri, Andriani. *The Evolution of EU Antitrust Policy: 1966–2017*, The Modern Law Review, 2020, pages 1-3.

approximately in every legal system which prescribes competition rules, the latter are enforced by public administrative agencies[20] which, unlike judicial authorities, enjoy a wide margin of discretion. This background also explains the pivotal role played by judicial review in defining, interpreting and shaping the limits of competition rules[21].

Focusing on the European legislative framework, Article 105 TFUE, which puts the Commission in charge of formulating and implementing competition policy and Article 263 TFUE, which entrusts the CJEU with the task of reviewing the legality of the Commission's acts, as well as Article 261 TFEU in respect to fines, perfectly embody the ongoing constitutional framework of ECL.

Moreover, considering that the ECJ has jurisdiction to interpret substantive competition rules in the context of a reference for a preliminary ruling, Article 267 TFUE is another significant provision to bear in mind.

The action for annulment and the preliminary reference procedure represent the dual role of the CJEU when dealing with Competition Law: overseeing the legality of decision-making and ensuring the uniform interpretation and the effective application of the relevant provisions.

At the same time, public administrative institutions are known for dominating the landscape of competition rules[22], thus, it is undeniable that the political and technical choices made by the Commission have a substantial impact on the shape and development of ECL.

Finally, Antitrust Law is a powerful tool to model the market and condition its players' behaviors, characterized by a trivalent nature: the pure legal sphere is sustained by an

[20] For a complete analysis of the constitutional characteristics of the several antitrust authorities around the world, see Fox, Eleanor. Trebilcock, Michael. *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, Oxford University Press, 2012.
[21] Colombo, Ibáñez, Pablo. *Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law*, Cambridge University Press, 2022, pages 1-3.
[22] For an exhaustive examination of the role of administrative agencies within the international competition framework, see Lianos Ioannis. Geradin, Damien. *Handbook on European Competition Law: Enforcement and Procedure*, Edward Elgard, 2013.

economic dimension, which are, in turn, both influenced by indispensable political operational decisions[23].

This complexity imposes a prudent approach when dealing with such discipline, as direct intervention in the market and subsequent price regulation are far-reaching measures that may end up distorting the very assets they are meant to protect, indeed, within the European context, Competition law levels the playing field of the Union.

1.2 Topic and relevance

Against this background, this thesis will focus exclusively on one of the various anti-competitive practices prohibited under EU law: the so-called unilateral conducts, enshrined in Article 102 TFUE, which is the central competition provision established to protect the internal market from abuses of undertakings holding a dominant position.

Article 102(1) TFUE stipulates the following:

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

Based on its wording, it is undisputable that this provision requires at least four indispensable conditions for a violation to occur:

- The existence of a dominant position on the relevant market, held by one or more undertakings;
- The relevant undertaking/s must hold the dominant position within the internal market or a substantial part of it;
- The existence of the abuse of dominance must be proved; and
- There must be actual or potential effects on trade between Member States[24].

Although all the requirements raise challenging points of reflection, only the third element will be fleshed out in this work.

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[23] Maican, Ovidiu. *Some Considerations on Abuse of Dominant Position*, Romanian Journal of European Affairs, 2007, pages 1-4.
[24] Lorenz, Mortiz. *An Introduction to EU Competition Law*, Cambridge University Press, 2013, pages 188-241.

An example can illustrate the rationale behind such a choice. In 2022, the Italian administrative Court of last instance (*Consiglio di Stato*), in its request for a preliminary ruling in *Servizio Elettrico Nazionale*[25], asked the CJEU whether an abuse of dominance inevitably requires the use of conducts that depart from fair and undistorted competition[26]. In other words, more than half a century after the first enforcement of Article 102 TFUE[27], the highest administrative Court of a MS expressed its perplexities on what really amounts to an abuse of dominant position.

On that regard, a recent study[28] has shown that more than eighty percent of all cases submitted to the ECJ[29] concerning Article 102 TFUE and about ninety percent of the challenges brought against decisions made by the Commission, engaged the ECJ with the difficult task of defining what constitutes an abuse of dominant position.

If this is not enough, last August, the Commission published the draft of the new Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings[30] (hereinafter the "2025 draft Guidelines"), which will be officially published somewhen during this year, in order to put an end, or at least mitigate, the uncertainties that have been characterizing the notion of abuse of dominance for the past six decades.

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[25] Judgment of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others vs Autorità Garante della Concorrenza e del Mercato and Others*, Case C-377/20, EU:C:2022:379.

[26] More precisely, the first question reads as follows: *"May conduct that constitutes an abuse of a dominant position be completely lawful in and of itself and be classified as an abuse solely because of the (potentially) restrictive effect created in the reference market, or must that conduct also be characterised by a specific unlawful component, represented by the use of competitive methods (or means) that are different from those that are normal? In the latter case, what criteria should be used to establish the boundary between normal and distorted competition?".*

[27] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. vs Commission*, Case 6/72, EU:C:1973:22 was the first case that dealt directly with the content and application of Article 86 EEC Treaty, however, judgment of 29 February 1968, *Parke, Davis and Co. vs Probel, Reese, Beintema-Interpharm and Centrafarm*, Case 24-67, EU:C:1968:11 can be considered to be one of the first precedents, even if the ECJ did not directly analyze Article 86 of the Treaty of Rome, but the application of its requirements to a case revolving around the exclusive use of intellectual property rights.

[28] Colombo, Ibáñez, Pablo. *The Shaping of EU Competition Law*, Cambridge University Press, 2018, pages 152-218.

[29] Considering both the annulment proceedings and the references for preliminary ruling.

[30] Communication from the Commission, *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*, 2024.

On top of that, for many years, Competition Law has been the only instrument to regulate the digital market sector and supervise its players[31], hence, defining and shaping the limits of the concept of abuse of dominant position has become even more impellent because, of all the available legislative tools within the European framework, Article 102 TFUE has been considered the first line of defense to confront the unavoidable ascent of Big Tech Titans, such as Google[32].

There are many factors that have contributed, over the years, to make the concept of abuse of dominance the center of one of the most heated debates in the history of ECL, some of them are endogenous, thus, unavoidable because intrinsic in the very nature of the notion, others exogenous, meaning that they depend on the structure of the legislative and institutional framework of the Union, which, in turn, is the outcome of upstream political choices.

Regarding the first, the line between legitimate and illicit exercise of market power is as blurred as they can be, because Article 102 TFUE comes into play in scenarios where effective competition is intrinsically weakened by the mere presence of one or more dominant undertakings[33].

At the same time, it is undisputed that holding a dominant position in a given market does not constitute by itself a violation of EU law, to the contrary, the ECJ has clarified on many occasions[34] that acquiring a dominant position, as consequence of fair and undistorted competitive processes, is the epitome of the free market economy, on which the Union was built.

As a result, conducts that would otherwise be unproblematic may be subject to scrutiny under Article 102 TFUE. In this sense, as stated by Colomo, "*there is by definition an element of exceptionality"*[35] about the circumstances concerning the abuse of dominance.

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[31] Akman, Pinar. *A Critical Inquiry into 'Abuse' in EU Competition Law*, Oxford Journal of Legal Studies, 2024, pages 1-4.
[32] However, as it will be examined in detail in the following chapters, this scenario has partially changed since the entry into force of the Digital Market Act.
[33] Chirita, Anca. *The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU*, Durham University, 2011, pages 82-103.
[34] Among others, judgment of 4 March 1999, *Ufex and Others vs Commission*, Case C-119/97 P, EU:C:1999:116, paragraphs 88-89.
[35] Colombo, Ibáñez, Pablo. *What is an Abuse of a Dominant Position? Deconstructing the Prohibition and Categorizing Practices*, 2022, in Akman, Pinar. Brook, Or. Stylianou, Konstantinos. *Research Handbook on Abuse of Dominance and Monopolization*, Edward Elgard, 2022, page 1.

This peculiar aspect is enshrined in the idea of "special responsibility" of dominant firms[36].

On the external elements of complexity, in the previous description of the European institutional balance between competition policies and their enforcement, on one hand, and judicial review, on the other, it appeared that only the ECJ is entitled to have the last say on what constitutes an abuse of dominance, however, the reality is much more intricate.

Firstly, as the Commission acts both as prosecutor and decision-maker[37] in relation to cases it opens, over the years, it has been capable of shaping an autonomous body of decisions that, particularly in the last few decades, have not always been in line with the jurisprudence of the CJEU.

Secondly, more than once[38], the CJEU itself has declared that, absent manifest errors, it is absolutely prohibited for EU courts to substitute their assessment for that of the administrative authority, thus the Commission must be granted leeway to decide how and where to place its limited resources.

Considering that any given policy is formulated through law, which is, by contrast, subject to the scrutiny of the ECJ, when it comes to the definition of abuse of dominance, the latter has the constitutional duty to adequately navigate the evanescent line between law and policy, a burden that has often opened the CJEU to harsh criticism on its failure to deliver a coherent set of case-law concerning matters dealing with Article 102 TFU[39].

Truthfully, the ECJ is not the only institution exacerbated by the complexity revolving around the indefinite boundaries of the latter provision. Indeed, considering that many relevant abusive conducts lead to pro-competitive gains and do not necessarily have anti-competitive effects, defining if and in which cases practices implemented by dominant

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[36] The meaning of this concept will be scrutinized in detail in the following chapter, meanwhile, it is essential to point out that it is largely mentioned by the CJEU in its jurisprudence. Among many, see judgment of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin vs Commission*, Case 322/81, EU:C:1983:313, paragraph 10.
[37] See *supra* (n 21), page 2.
[38] *Ex multis*, judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited and Others vs Commission*, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraphs 86 and 88.
[39] Colombo, Ibáñez, Pablo. *The Law on Abuses of Dominance and the System of Judicial Remedies*, LSE Law, Society and Economy Working Papers, 2013, pages 1-10.

firms are unlawful becomes even more complicated. If this is true, while enforcing Article 102 TFUE, it is firstly up to the Commission to draw the line between lawful competitive behavior and abusive anti-competitive conducts.

This choice has an enormous impact on the market itself, because powerful administrative action may have the consequence of depriving consumers and society of pro-competitive effects resulting from the practice, as well as penalizing firms for their success and favoring less efficient traders[40].

On the other hand, a weak intervention might further strengthen the position of dominant undertakings, eliminating the last counterbalancing constraints and harming both consumers and society as a whole[41].

In light of the foregoing, the notion of abuse of dominance has not only been systematically parceled out, with great harm to the principles of consistency and continuity, but also described in relation to cryptic concepts, such as "competition on the merits", which have worsened the level of understanding of the notion of abuse, instead of simplifying it, given that they were coined to explain the scope of the latter, but ended up requiring further definition themselves[42].

At the same time, the broad and vague notions on which Article 102 TFUE is based become meaningful only when applied to concrete factual scenarios, thus the definition of what constitutes an abuse can be explored solely by means of incremental decision-making. Therefore, keeping in mind the abovementioned features of ECL, even if extracting principles from the ECJ's case law and the Commission's administrative practice represents a challenging operation, it is the only option offered by the system.

This is just the tip of the iceberg, but it is more than enough to shed light on the relevance of the notion of abuse of dominance, as well as the difficulties and controversies that arise from Article 102 TFUE, a provision which, in the last few decades, has increasingly gained popularity and importance, due to the birth of digital markets and the acquirement of dominant positions by Big Tech companies within them.

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[40] The so-called type-I errors or false positives.
[41] The so-called type-II errors or false negatives.
[42] Piątkowska, Katarzyna. *Abuses of dominant position in the Commission's Guidance and the case-law of the Court of Justice and the General Court,* University of Wroclaw, 2021, pages 448-451.

1.3 Purpose and research questions

As the definition of abuse of dominant position is one of the most problematic issues within the European legal framework, much ink has been spilled regarding this topic[43]. However, most of the academic works on the notion of abuse tend to adopt a particular approach rather than a universal method, focusing on specific elements, instead of tackling the problem in its entirety. In other words, the fragmentation revolving around what constitutes an abuse of dominance is absolute, meaning that the doctrine is as indented as the CJEU's jurisprudence and the Commission's administrative practice.

To tell the truth, expecting from the scholars, representatives of a source of law that is, by definition, uneven and multifarious, what the public competent authorities, first and foremost the ECJ, has failed to accomplish, would be hypocritical at best. On that regard, some academics believe that parceling out the notion of abuse should not be considered neither as a failure nor as an insurmountable limit, quite the opposite, it is a clear reflection of the abstract nature of Article 102 TFUE[44].

As a matter of fact, many have tried over the years to come up with an innovative all-encompassing test to detect any possible form of abusive conduct[45], but the harsh reality suggests that undertakings will always implement, sometimes even unintentionally[46], new anti-competitive practices.

That is especially true if we consider the advent of digitalization, which paved the way to unimaginable and unexplored anticompetitive behaviors. To that extent, suffice it to mention the *Google (search)*[47] case, before which conducts amounting to abusive self-

[43] Suffice it to mention the most eminent works of the vast doctrinal commentary to which this dilemma has given rise: Akman, Pinar. *The Concept of Abuse in EU Competition Law*, Hart, 2012; Gormsen, Lovdahl, Liza. *A Principled Approach to Abuse of Dominance in European Competition Law*, Cambridge University Press, 2010; O'Donoghue, Robert. Padilla, Jorge. *The Law and Economics of Article 102 TFEU*, Hart, 2020.
[44] Ehlermann, Dieter-Claus. Marquis, Mel. *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart, 2008, pages 38-46.
[45] On that regard, see Matthew, Cole. *There is no 'more economic approach'*, 2022, pages 10-20.
[46] As it will be explained in the next chapter, the subjective element is not considered to be a fundamental requirement for a violation of Article 102 TFUE to occur. On that regard, see judgment of 13 February 1979, *Hoffmann-La Roche & Co. AG vs Commission*, Case 85/76, EU:C:1979:36, paragraph 91, in which the ECJ observed that *"the concept of abuse is an objective concept"*.
[47] Judgment of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc. vs Commission*, Case T-612/17, EU:T:2021:763.

preferencing had been neither detected nor prosecuted[48]. The Commission itself proved to be fully aware of that, as it has started to operate a case-by-case approach to abuse of dominance[49].

Therefore, as the 2025 official Guidelines are soon to be released with the sole purpose of turning the never-ending controversies around the abuse of dominant position off, the final aim of this thesis is to critically analyze the preliminary choices made by the Commission and to speculate on their potential consequences, particularly regarding the prospective reaction of the CJEU.

Prior to that, many knots will be untangled, several misconceptions will be overcome, and a considerable number of questions will be answered. Indeed, the forthcoming Commission's enforcement priorities are the result of decades of stratification of practices, principles, concepts, rights and terminologies created by the EU decision-makers and the doctrine, as well as the dominant undertakings themselves.

Trying to define, once and for all, the concept of abuse of dominance is an objective as ambitious as pointless, because there is no such thing as a universal definition of the latter notion, to the contrary, there are Commission's decisions that found an abuse in a specific case, with a precise factual scenario, as well as there are rulings delivered by the CJEU that have shaped, and then reshaped, the boundaries of that abuse.

This means that the only possible way to consciously analyze the most recent outcomes revolving around the notion of abuse of dominant position is to observe every single phase characterizing the history of such a notion, from the origins to its latest implementation in the digital markets, passing through the most essential landmarks, as the *Intel*[50] judgment and the Commission's 2009 Guidance Paper.

[48] Instead, now the so-called self-favoring has even been codified in the 2025 draft Guidelines. On that regard, see *supra* (n 30), paragraphs 156-166.
[49] The Commission's enforcement strategies will be examined in greater detail in the next chapter.
[50] Judgment of 6 September 2017, *Intel Corp. vs Commission*, Case C-413/14 P, EU:C:2017:632.

1.4 Methodology

The concept of abuse of dominant position has been fleshed out in any possible way over the years, both by institutional operators and by scholars, for instance, although the notion has a legal nature, the dominant undertakings' behaviors and their influence on the competitive structure have been studied from an economic perspective long before the Union had a solid legal framework defending the integrity of its internal market and assuring fair and undistorted competition within it[51].

On that regard, as far as ECL is concerned, the overlap between the legal and economic dimensions in Article 102 TFUE matters became official when the Commission entrusted the European Advisory Group on Competition Policy (hereinafter the "EAGCP"), a group directed by seven leading economists and advisors in competition policy issues, with the modernization of the prohibition of abuse of dominance. Their final Report, released in 2005, in which the EAGCP underlined the urgency of a more economic perspective that would consider the dominant firms' practices in an all-inclusive environment, with both anti-competitive effects and pro-competitive gains taken into consideration, represented the theoretical basis for the 2009 Guidance Paper[52].

Apart from this, the notion of abuse of dominance has been scrutinized under the lenses of comparative, constitutional and political investigations.

Regarding the first, as it will be vastly discussed in the next chapter, the European notion of abuse of dominance plunges its roots in the American approach towards monopolist and quasi-monopolist undertakings' behaviors, eloquently summarized in the 1890 Sherman Antitrust Act[53] (hereinafter the "Sherman Act").

[51] To that extent, see Eddy, Jerome, Arthur. *The new competition*, Cornell University Library, 1913.
[52] Flórez, Castañeda, Christian. *The historical origins of and influences on Article 102 and their implications for its interpretation and application today*, Freie Universität Berlin, 2016, pages 27-28.
[53] *The Sherman Antitrust Act*, 1890.

Hence, many academics[54] have compared what is now Article 102 TFUE with the US equivalent, Section 2 of the Sherman Act, to come up with the best possible definition of what constitutes an abuse of dominance[55].

On the constitutional layer of analysis, as shown before, the complicated institutional relationship between administrative practice and judicial review within the EU has always been intrinsically related to antitrust issues. Therefore, some scholars[56] have decided to focus their attention on the impact of such a connection on the notion of abuse, rather than tackling the latter directly.

Indeed, considering that the development of the concept of abuse has been primarily obtained through annulment proceedings, they believe that studying the boundaries between the two institutions mainly responsible for the definition of what constitutes an abuse amounts, automatically, to a scrutiny of the notion itself, because, according to them, there is no authentic definition, only several circumstances in which a conduct was deemed abusive by either the Commission or the ECJ and many others where they both found the presence of an abuse.

Finally, concerning the political examination, given that the Commission's competition policy in enforcing Article 102 TFUE determines the relevance of the notion of abuse in the first place, a part of the doctrine[57] has opted for facing the issue upstream, in order to discover the rationale behind the political choices of enforcement, which have had a direct and crucial impact on the development of the concept of abuse over the years.

This thesis will take into consideration and combine all the precedent methodologies because, to varying degrees, they have enriched both the interpretation and the knowledge of the notion of abuse of dominance as we intend it today.

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[54] *Ex multis*, see Etro, Federico. Kokkoris, Ioannis. *An Economic Approach to Abuse of Dominance*, University of Milan – Bicocca, 2010, pages 26-47.

[55] As it will be shown in the next chapters, this is a dangerous operation at best, because, differently from Article 102 TFUE, American Competition Law prohibits the mere acquisition and/or retention of a dominant position in a given market.

[56] Among many, see Etro, Federico. Kokkoris, Ioannis. *Competition Law and the Enforcement of Article 102*, Oxford University Press, 2010.

[57] See, for instance, Lang, Temple, John. *How Can the Problems of Exclusionary Abuses under Article 102 TFEU be resolved?*, European Law Review, 2012.

However, having the pivotal role of the CJEU in mind, its jurisprudence will be used as the leading benchmark, in other words, this work uses the dogmatic legal method, which aims at clarifying the meaning of the law by looking at all the available and significant legal sources, with a slight inclination for the case-law of the ECJ. Indeed, as the notion of abuse has been shaped *de sententia ferenda*, rather than *de lege ferenda*, a comprehensive approach is indispensable to achieve the purposes of this dissertation.

Moreover, given that the analysis will be conducted primarily outside the scope of the *lege lata*, apart from primary and secondary legislative sources[58], the thesis will heavily rely on what is generally referred to as soft law, a system of acts that, within the Union's legal order, are either found in several provisions of the Treaties or developed through institutional practice.

In antitrust matters, they generally take the form of Guidelines or Communications, normally released by the Commission[59], and are deemed of extraordinary importance because the CJEU established that they should be treated as ancillary instruments of interpretation of the relevant provisions[60].

1.5 Outline

In the following, the thesis is structured into three more chapters.

Chapter two illustrates the development of the notion of abuse of dominance in both the Commission's administrative practice and the CJEU's jurisprudence, from the origins to its most recent understanding. More precisely, after the description of the initial environment in which the legal concept of abuse has been theorized and codified in the European legal framework, three main phases of evolution will be identified.

For each "era", it will be provided a detailed analysis of both endogenous and exogenous elements of influence on the notion of abuse, as well as an accurate examination of all the relevant principles involved. Meanwhile, the uncertainties revolving around this concept

[58] Certainly still essential, bear in mind that the Commission's decisions in cases of violation of Article 102 TFUE are considered, under Article 288 TFUE, as secondary law.
[59] Their role must be underlined because the ECJ has held several times that the Commission may depart from them only for legitimate reasons, thus they might not be binding for the other professional operators, but they are indeed for the Commission itself. On that regard, see judgment of 25 October 2005, *Groupe Danone vs Commission*, Case T-38/02, EU:T:2005:367, paragraph 523.
[60] Peric, Gabriel. *EU Competition Law and Abuse of Dominance: A deep dive into Article 102 of the TFEU*, Örebro University, 2022, pages 1-5.

will be adequately scrutinized and overcome, for instance, the alleged essentiality of a link between dominance and abuse or the role of intent within Article 102 TFUE will be accordingly addressed.

In Chapter three, this dissertation meticulously examines the existent forms of abusive conduct, starting from the non-exhaustive list of abuses offered in Article 102(2) TFUE. Specifically, after an analysis of the criteria used to differentiate the various types of abusive practices, there is a precise description of the most detected and inspected abuses, mainly based on the ECJ's case law and the Commission's enforcement.

On that regard, there is a section dedicated to exploitative abuses, a topic basically left unexplored for too long, which is, to the contrary, crucial for the fight against digital abusive conducts.

The ultimate purpose of Chapters two and three is to provide the reader with the necessary understanding of the notion of abuse of dominant position before the discussion on its latest developments in Chapter four.

Indeed, in the last chapter, after an accurate description of the changes brought by the Digital Markets Act[61] (hereinafter the "DMA") on the pertinent legislative system of the Union, there will be a speculation on the impact of the most recent solutions provided by the EU to overcome the never-ending issues related to the enforcement of Article 102 TFUE and the notion of abuse enshrined in it.

This proactive exercise is primarily based on both the Commission's Amendments[62] to the 2009 Guidance Paper (hereinafter the "2023 Amendments") and the 2025 draft Guidelines.

Finally, concluding remarks take stock of the legal environment illustrated in the thesis.

[61] *Regulation 2022/1925*, OJ L 265, 2022.
[62] Communication from the Commission – *Amendments to the 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 116, 2023.

2. THE CONCEPT OF "ABUSE OF DOMINANCE"

2.1 Origins of the notion of "abuse of dominant position"

"Abuse of dominance" is a rather ambiguous expression that is easily suitable for controversies about its meaning. Even its origin is controversial, even more so its role and the way it should be conceptualized. Therefore, it is not at all surprising that it has been interpreted in very different ways.

Fighting the abuses from sellers and providers with enough market power to harm consumers has always been a pressing necessity within economic history.

For instance, both the ancient Greeks and Romans coined the concept of right price[63], which, during the Middle Ages, represented the theoretical basis of the condemnation of price abuse[64].

Nonetheless, the contemporary origins of the concept of abuse of dominance date back at the turn of the XIXth and XXth centuries, when, in USA, there was not only the publication of the Sherman Act but also the birth of heated debates between eminent scholars on the relationship between competition rules and the conducts of monopolist or quasi-monopolist undertakings[65].

On that regard, American Antitrust Law played an important role during the drafting of the first European competition rules and, in general, has always represented a source of inspiration for the MSs of the EU, as well as the institutions of the Union, indeed, during the negotiations that led to the Treaty establishing the European Coal and Steal Community[66] (hereinafter the "ECSC Treaty" or the "Treaty of Paris"), the American Government took part in the advisory committee.

Nevertheless, although the origins of ECL are deeply rooted in the US competition rules, the EU has been able to shape an independent and original legislative framework regarding the abuse of dominant position. For instance, as anticipated in the previous

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[63] The *"iustum pretium"* to be calculated in relation to the good offered.
[64] However, in that context, the disapproval of abusive prices had a consistent moral and religious background; on that regard, see Rothbard, Murray. *An Austrian perspective on the history of economic thought: Economic thought before Adam Smith,* Ludwig Von Mises Institute, Volume 1, 2010, pages 48-49.
[65] The essential elements of such a new interest in companies with huge market power and the impact of their practices are perfectly summarized in see *supra* (n 51).
[66] *Treaty establishing the European Coal and Steel Community*, 1951.

chapter, while Section 2 of the Sherman Act focuses on how the monopoly position on a certain market is acquired by the firm/s, Article 102 TFUE is not concerned about how the relevant undertaking has obtained the dominant position, but on the abusive conducts that the latter could potentially enforce to both retain and enlarge it. The terminology perfectly reflects such a diversity: while Section 2 uses the verb *"monopolize"*[67], what is now Article 102 TFUE solely mentions the dominant position and its subsequent abuse.

At the European level, the first attempt to regulate the abuse of dominant position is enshrined in Article 66(7) of the Treaty of Paris:

"(...) The High Authority is empowered to address to public or private enterprises which, in law or in fact, have or acquire on the market for one of the products subject to its jurisdiction a dominant position which protects them from effective competition in a substantial part of the common market, any recommendations required to prevent the use of such position for purposes contrary to those of the present Treaty. If such recommendations are not fulfilled satisfactorily (...), the High Authority will (...) fix the prices and conditions of sale to be applied by the enterprise in question or establish manufacturing or delivery programs to be executed by it".

This provision, which can be considered the remotest precedent of Article 102 TFEU, empowered the High Authority[68] to make recommendations, preventing enterprises with a dominant position from using their market power for purposes contrary to those of the ECSC Treaty, and, if necessary, to impose remedies required by the concrete scenario.

Finally, the wording of Article 66(7) ECSC Treaty sheds light on the founding fathers' choice to leave the monopoly principle outside the scope of EU law and it also testifies the originality of the concept of abuse of dominant position, a notion that, despite the abovementioned theoretical and cultural influences, is to be deemed an authentic product of the European legal system.

[67] See *supra* (n 53), page 1.
[68] The equivalent of what is now the Commission.

2.1.1 The negotiations of the Treaty of Rome

Following the entry into force of the Treaty of Paris, the European competition framework was further enriched by the Treaty establishing the European Economic Community[69] (hereinafter the "EEC Treaty" or the "Treaty of Rome").

Available records from the negotiations that led to the latter suggest that rules on competition were included in the new Treaty because both concerted and unilateral conducts were considered a threat sufficiently serious to jeopardize the accomplishment of the Community's basic foundations[70].

In 1955, an essential step forward was accomplished when the foreign ministers of the European Coal and Steal Community attended the Messina Conference to discuss common goals and main differences among the founding countries. The final Report of the summit meeting, commonly known as Spaak Report[71], which defined the principles and limits of the new Union, dedicated an entire title to *"the rules concerning competition"*[72].

Indeed, Competition Law was considered essential for the promotion of productivity and the economic expansion of the Common Market, as these goals required the absence of *"distortions"*[73]. On that regard, the Spaak Report's antitrust polices addressed as anti-competitive actions of undertakings amounting to *"discriminatory practices dividing markets, limiting production and controlling the market for a particular product"*[74]. As noticed by Nazzini, this idea is clearly reflected nowadays in letter (c) of Article 102(2) TFEU[75], as this provision stipulates that an abuse may consist *"in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*.

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[69] *Treaty establishing the European Economic Community*, 1957.
[70] Documents related to the EEC Treaty's competition rules were collected in Schulze, Reiner. Hoeren, Thomas. *Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis 1957)*, Springer, 2000.
[71] From the name of the Belgian minister who headed the discussion, Paul-Henry Spaak.
[72] Henri- Paul, Spaak. *Intergovernmental Committee on European Integration. The Brussels Report on the General Common Market*, Archive on European Integration, 1956, page 13.
[73] See *supra* (n 72), page 14.
[74] See *supra* (n 72), page 15.
[75] See *supra* (n 18), page 125.

Finally, in stating that *"the Treaty should contain general provisions ensuring that monopoly positions or abusive practices do not lead to frustration of the common market"*[76], the Report shows evidence of the American influence, which, however, was mitigated in the final version of Article 86 EEC Treaty[77].

In 1956, following the Messina Conference, experts continued discussions.

An August note declared that:

"The establishment and effective functioning of the common market require the elimination of (...) practices that distort competition as well as unfair competitive practices"[78].

Specifically, the latter note referred to "*practices that restrict competition and result from abuse of monopoly"*[79].

Moreover, an October note clearly anticipated Article 86 of the Treaty of Rome by recognizing the need to prohibit *"practices restricting competition resulting from the abuse of monopolistic positions"*[80].

The Spaak Report represented the basis of further negotiations at the 1956 Vienna Conference, as all available records show that the rules on antitrust had the protection of competition and the promotion of integration as ultimate objectives.

In the same year, the Intergovernmental Conference on the Common Market and Euratom[81] began in Brussels. On that regard, meeting notes suggest that the German delegation expressly requested the application of the *"abuse principle"*[82].

[76] See *supra* (n 72), page 16.
[77] Indeed, as will be specified in the following of this section, the expression *"monopoly positions"* was left out of the final drafting of the provision.
[78] Document 46 in see *supra* (n 70).
[79] See *supra* (n 78).
[80] Document 47 in see *supra* (n 70).
[81] Which drafted the EEC Treaty.
[82] Document 53 in see *supra* (n 70).

A few days later, Hans von der Groeben[83] released a proposal to prohibit unilateral conduct through which dominant enterprises could abuse their position, if such practices were able to impair trade between MSs[84].

Finally, although extrapolating the drafter's intentions from the available public documents is not simple, an accurate analysis of the *travaux préparatoires* suggests the existence of some fixed points on which most of the contemporary doctrine tends to agree:

- The rules on competition were perceived by the founding members as programmatic principles coined to guide the administrative decision-making of the newborn Commission[85];
- The delegates intended to prohibit specific uses of a dominant position rather than the mere detention of dominance within the market, however, there were no common grounds on which practices should have been prohibited[86]; and
- The original idea of the drafters was to sanction exclusively exploitative abuses[87].

In 1957, the Spaak Report's aims were channeled into the Treaty of Rome. To protect the infant Common Market, the EEC Treaty introduced better delineated competition rules and established institutions responsible for the achievement of the Community's designated goals concerning competition. On top of that, the birth of this new market resulted in expanded dimensions for antitrust policies, as well as new frontiers of effective enforcement.

Competition rules on abuse of dominant position, a matter previously reserved to MSs' national authorities, were developed, at the Communitarian level, in Article 86(1) EEC Treaty:

"To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the

[83] Who chaired the Common Market Committee of the Conference and then served as the first Commissioner for Competition until 1967.
[84] Document 49 in see *supra* (n 70).
[85] Gerber, David. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, page 346.
[86] Werden, Gregory. *Exploitative Abuse of a Dominant Position: A Bad Idea That Now Should Be Abandoned*, George Mason University, 2021, pages 3-6.
[87] Akman, Pinar. *Searching for the Long-Lost Soul of Article 82 EC*, Oxford Journal of Legal Studies, 2009, page 271.

Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited".

Its initial form was conceived in Article 42 of the 1956 *Projet d'articles*, the draft developed on the Spaak Report's basis. On that regard, the roles of France and Germany, as the two poles of discussion for the definition of the content of antitrust rules, must be underlined, because these two opposite approaches would later result in a doctrinal dispute over the correct interpretation of the provision, even if, after discussing the project, the parties' delegations adopted the German alternative draft.

Indeed, although the drafters were aware of the difference between protecting competitors, defending consumers and safeguarding the competitive process in its entirety, this issue was left mainly unexplored in the final version of the provision, giving rise to a debate over the nature of the interests enshrined in Article 86 EEC Treaty.

As Akman specified[88], the only certainty revolving around such a dispute is that the drafters' decision to cover exploitative abuses, rather than exclusionary conduct, shows an undeniable attention for the protection of consumers. The analysis of the wording of Article 86(2) EEC Treaty supports this view as it mentioned both *"the prejudice of consumers"* and the concept of *"inequitable (...) prices or (...) trading conditions"*.

On that regard, it is also interesting to notice how this provision presented almost the equivalent concepts and structure of the current Article 102 TFEU, indeed, it also encompassed a detailed list of possible abuses:

"Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(b) the limitation of production, markets or technical development to the prejudice of consumers;

(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

[88] See *supra* (n 87), pages 275-276.

(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract".

Although such a list was not conceived by the founding fathers as an exemplifying exercise, but as a sort of catalogue of abuses that could be committed by undertakings, this approach drastically changed through the consecutive drafts, up until the final version of Article 86(2) EEC Treaty, which, just like Article 102(2) TFUE, comprised a non-exhaustive list of potential abusive practices.

Finally, the abstractness of the Treaty's provision and the objective complexity revolving around the notion of abuse has been characterizing this discipline since the dawn of ECL, therefore, it is not at all surprising that the recent history of the concept started with a doctrinal debate, umpteenth testimony of the problematic nature of the subject of discussion of this thesis.

2.1.2 Early interpretations of article 86 EEC Treaty: the dispute between Joliet and Mestmäcker

Before the CJEU formulated its position on the nature of the interests protected by Article 86 EEC Treaty, a controversy arose in the doctrine between Professor Renè Joliet and Professor Ernst-Joachim Mestmäcker.

Even though the starting point of both scholars was the comparative analysis of Section 2 of the Sherman Act and Article 86 of the Treaty of Rome, they drew diametrically opposite conclusions.

Indeed, the first author, comparing the US concept of monopolization with the European notion of dominant position, envisaged two possible approaches to market power. Whereas the first method involved the protection of the competitive structure, tackling the creation, maintenance or expansion of market dominance, the second was based on government control over market power and its subsequent public regulation[89].

[89] Joliet, Renè. *Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power*, Université de Liège, 1970.

Assuming that the abovementioned approaches to the monopoly problem were mutually exclusive, the Belgian thinker concluded that Article 86 EEC Treaty could only be destined to regulate the exercise of market power for the consumers' benefit[90]. Indeed, he underlined that the behavioral approach enshrined in the Treaty of Rome's provision left no space for structural remedies, but only for the public supervision of dominant firms' market conducts.

In order to corroborate his position, he argued that, by leaving exclusionary abuses out of the scope of Article 86 EEC Treaty, the drafters showed no interest in the protection of the competitive market structure and its players. As evidence of the unquestionable intent of the founding fathers to cover exploitative abuses and protect consumers, Joliet referred to an October 1956 note[91] in which conducts *"having the purpose or effect of harming competition by allowing the enterprise or group to dominate a relevant market"* were considered outside the scope of the new Treaty's draft provision.

However, the narrow interpretation offered by the Belgian Professor, in the long run, would eventually harm the very asset it meant to defend, because exclusionary conducts leave consumers with less alternatives to choose from. Furthermore, a public utility model of control and regulation is, by definition, contrary to the basic principles enshrined in the EEC Treaty, as it inevitably results in the elimination of free competition, on which the new Community was built[92].

Therefore, the typical criticism moved to the approach suggested by Jolie revolved around his inability to see the bigger picture. Indeed, although his line of reasoning clearly reflected the knowledge of the structure/conduct/performance paradigm, he did not take into consideration the interdependence of these three fundamental elements of competition[93].

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[90] It is essential to specify that Joliet's concept of consumers included both final consumers and dominant undertaking's purchasers/suppliers.
[91] Document 60 in see *supra* (n 70).
[92] Schweitzer, Heike. *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in see *supra* (n 44), Hart, 2008, pages 119-164.
[93] Deringer, Arved. Armengaud, André. *The competition law of the European Economic Community; a commentary on the EEC rules of competition (articles 85 to 90) including the implementing regulations and directives*, Commerce Clearing House, 1968, pages 236-248.

More precisely, he did not place Article 86 EEC Treaty in the new context of the Community, first and foremost testified by Article 3(f) EEC Treaty, which demanded *"the institution of a system ensuring that competition in the common market is not distorted"*. As anticipated in the first chapter, the same principle still characterizes the relationship between Article 102 TFEU and Article 3(3) TEU, along with its annex Protocol 27.

This link, between competition and market integration, which determines the uniqueness of ECL, was exactly the starting point of Mestmäcker, as the EEC Treaty placed, for the first time, the concept of abuse in a new environment[94].

The German scholar understood the need to coordinate Article 86 EEC Treaty with the Community's fundamental goals enshrined in Article 2 EEC Treaty:

"The Community shall have as its task, by establishing a common market (...), to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it".

Thus, if competition must be interpreted as a dynamic interaction between producers choosing the best line of production and consumers deciding the most suitable source of supply, the notion of abuse must be conceptualized as a restriction of market participants' freedom to make such choices, which, in turn, is influenced by the market structure itself. Indeed, the more concentrated a market is, the less other producers and consumers get to decide independently.

Therefore, as market dominance is not prohibited *per se*, an increase of market concentration is to be deemed either legitimate or illicit exclusively in relation to how it is acquired. Hence, according to Mestmäcker, the concept of abuse amounts to an improper restriction of the residual competitive constraints in a market that is already concentrated, due to the very presence of a dominant undertaking.

This approach assumes that market structure, market conduct and market performance cannot be considered autonomously, as they are reciprocally interdependent. If this is true, anti-competitive practices of dominant firms, along with practices harmful to consumers,

[94] Mestmäcker, Joachim, Ernst. *Concentration and Competition in the EEC*, Journal of World Trade Law, Part I and Part II, 1972-1973.

must also comprise market conduct on the one hand, and market performance, on the other hand, that negatively affect the competitive process.

In other words, at the end of his analysis, the German Professor noticed that the two approaches to the monopoly problem, correctly identified by Joliet, are not mutually exclusive but intrinsically complementary. On that regard, a structural concept of abuse does not conflict with the protection of consumers, as competition is advantageous to them, because it protects their residual margin of choice.

Moreover, the immediate consequence of this method is the expansion of abusive scenarios, because exclusionary conducts are at least as harmful as exploitative ones. Thus, as we move across the interconnected elements of the structure/conduct/performance paradigm, an abuse can consist in:

- Suppressing actual or potential competition, by targeting competitors;
- Hampering market access of potential entrants; or
- Expanding the dominant position into neighboring or downstream markets.

Finally, Mestmäcker also suggested a way to detect the abuse[95]: normally, conducts that would not be possible under competitive conditions, thus, practices that are only possible due to market dominance, are to be considered abusive.

2.1.3 Influences on the concept of abuse: the ordoliberal thinking

The final resolution of the dispute over the scope covered by Article 86 EEC Treaty came from the ECJ. Indeed, in *Continental Can* the Luxembourg Court rejected Joliet's narrow view, espousing a systematic interpretation of the relevant Treaty's provisions, based on Mestmäcker's theories. This outcome is perfectly summarized in the ECJ's consideration that *"Article 86 EEC Treaty pursues the purpose of maintaining workable competition in the Common market"*[96].

As Professor Mestmäcker's line of reasoning heavily influenced the early interpretations of what constitutes an abuse of dominant position, an analysis of his theoretical background is indispensable. Indeed, he was the most eminent representative of the

[95] A sort of test, to use the modern academic language.
[96] See *supra* (n 27), paragraph 25.

second generation of ordoliberals. Starting with the founding fathers of the Freiburg School[97], at least five generations of ordoliberal thinkers can be identified.

Although they have contributed to the evolution of the ordoliberal theories to different degrees, concerning competition matters, they have all relied on the following common grounds:

- Competition is exactly in the middle of two complementary legal rights: the freedom of producers to decide what to offer and the freedom of consumers to choose what they prefer;
- Competition must be interpreted as the result of a constant interaction between dynamic mechanisms; and
- Legal systems must guarantee both the producers' and consumers' freedom of choice to provide the market participants with the adequate level playing field of competition[98].

Regarding the notion of abuse, at the time the Treaty of Rome was negotiated, the ordoliberals did not have a precise idea of what could possibly constitute an abusive practice. Indeed, available records of the negotiations that led to the EEC Treaty show that the German delegation proposed the *"abuse principle"* without further investigating its concrete meaning[99].

Thus, an ordoliberal approach to abuse was developed after the entry into force of Article 86 EEC Treaty, because, as the provision established a directly applicable prohibition, it became indispensable to come up with a practical interpretation to facilitate its enforcement.

After the entry into force of the Treaty of Rome in 1958, it took another 15 years before a case directly concerning the application of Article 86 EEC Treaty was decided, firstly by the Commission and finally by the CJEU. Meanwhile, the theoretical dispute revolving

[97] The economist Walter Eucken and the lawyer Franz Böhm, both professors at the University of Freiburg, Germany, in the 1930s.
[98] Behrens, Peter. *The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU*, Edward Elgar, 2018, pages 4-8.
[99] See *supra* (n 82).

around the concept of abuse represented a perfect occasion to test the suitability of the ordoliberal principles to the Treaty's provision.

Hence, from the previous analysis of Mestmäcker's approach, the main features of the ordoliberal idea of abuse can be reconstructed as follows:

- Exclusionary abuse represents the real threat[100];
- The discipline of abuse of dominance revolves around the protection of residual competition;
- Article 86 EEC Treaty must be interpreted in light of the Common Market integration goal; and
- The prohibition of exploitative abuse should be limited to exceptional circumstances, as it triggers public utility intervention[101].

As anticipated before, the early judgments of the ECJ are imbued with ordoliberal ideals.

Firstly, in *Continental Can* the CJEU started its reasoning pointing out that Article 86 EEC Treaty, and the prohibition of abuse enshrined in it, must be interpreted as elements contributing to the establishment of a *"system of undistorted competition"*[102].

Moreover, by stipulating that *"the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure"*[103], the CJEU unequivocally recognized that exclusionary practices are covered under the Treaty's provision. On that regard, in order to detect the exclusionary nature of the conduct at stake in the case, the ECJ employed the ordoliberal idea of residual competition to conceptualize the related notion of *"workable competition"*[104].

[100] Indeed, even if the German draft of the EEC Treaty prevailed, the pressure from the French delegation during the negotiations determined the centrality recognized to exploitative abuses, as the concern of the German delegation has always been focused on exclusionary practices.
[101] On that regard, it is important to underline that ordoliberal thinkers had the free market economy as their theoretical basis.
[102] See *supra* (n 96).
[103] See *supra* (n 27), paragraph 26.
[104] Although this concept will be scrutinized in the following of this chapter, it is important to underline the abovementioned tendency of the ECJ to create additional abstract concepts, which need, in turn, further clarification.

Secondly, some years later, in *Michelin I* the ECJ further enriched the concept of abuse, holding that a dominant firm has *"a special responsibility not to allow its conduct to impair undistorted competition in the common market"*[105]. Although this principle will be discussed in greater detail later, it is essential to notice how, underlining that this peculiarity derives directly from the detention of a dominant position, in order to coin the concept of special responsibility, the CJEU clearly used Mestmäcker's ordoliberal idea that a dominant firm must not engage in conducts that are only possible due to market dominance.

Finally, the preliminary examination of these two landmarks is more than sufficient to shed light on the indispensable contribution of Ordoliberalism to the initial development of the notion of abuse of dominant position within the EU legal order.

2.2 Textual analysis of article 102 TFEU: is there a link between dominance and abuse?

Following the entry into force of Article 86 EEC Treaty, another unresolved controversy appeared in relation to the alleged existence of an additional requirement, hidden in the words of the Treaty's provision.

On that regard, as observed in the first chapter, one of the fundamental elements for an abuse to occur is dominance. Indeed, as the wording of Article 102 TFUE recites *"abuse of dominant position"*, it is commonly accepted that the Treaty's provision qualifies the term "abuse" with the further requisite of the dominant position.

To that extent, if an abuse is conceptualized as a conduct capable of determining certain negative consequences, it does not need a dominant position to exist and perform its effects. Therefore, it is more than plausible that the European legislator intended to circumscribe the scope of Article 86 EEC Treaty solely to instances in which the abuse is perpetrated by undertakings holding a dominant position. Consequently, the latter provision is generally considered to imply a link between dominance and abuse.

[105] See *supra* (n 36).

However, it is not entirely clear how these two elements must be connected to give rise to infringement. Hence, the purpose of this section is not only to speculate on the practical existence of such a link but also to define its nature, if any.

Finally, it is important to point out that this is not a mere theoretical problem, indeed, although the practical utility of this relation has always been questioned, it will be proved how the very lawful enforcement of Article 102 TFUE may depend on the correct interpretation of the connection between abuse and dominance.

2.2.1 The possible categories of relation

When dealing with matters related to the abuse of dominant position, two possible circumstances can occur.

Firstly, there are cases where conduct can be performed exclusively by enterprises holding a dominant position. Here, the typical example is represented by monopoly prices, as monopolists are, by definition, the only entities capable of imposing prices of such an inequitable nature. In these scenarios, the link between dominance and abuse is particularly solid, as there is a causal relation.

Secondly, there can be practices which, although they could be potentially performed by any undertaking, if carried out by a dominant firm, cause serious anti-competitive effects, due to the very presence of dominance. For instance, according to the freedom of economic initiative, any entity has the right to deny its products to a competitor, nevertheless, if a dominant undertaking, thus, a player with significant market power, refuses to sell, this denial may cause detrimental effects to that rival, as well as to the entire competitive process. In such cases, even though there is no proper link between dominance and abuse, it can be argued that there is still a connection between the first and the effects of the latter.

Regarding this second scenario, some scholars[106] make a further distinction between cases in which the effects are an immediate consequence of the dominant position, hence, they would not have occurred at all, without a huge concentration of the market, and

[106] Vogelenzang, Pierre. *Abuse of a dominant position in Article 86; The problem of causality and some applications*, Common Market Law Review, 1976, pages 66-72.

circumstances where the harmful effects would have manifested anyhow, but their anti-competitive nature is reinforced by the dominant position.

Practices of unfair competition are a suitable example of the latter case, as these conducts are regularly performed by all enterprises, but could have catastrophic consequences when a dominant firm carries them out.

Moreover, while all the abovementioned scenarios involve, somehow, the presence of a dominant position, there are, obviously, cases of abuse totally disconnected, in terms of performance and/or effects, from market dominance. In this circumstance, there is neither a link between dominance and abuse nor another sort of connection between the first and the latter's effects.

In order to understand the kind of relation that Article 102 TFUE requires, is it essential to proceed with the textual analysis of its second paragraph, indeed, as it contains examples of practices generally recognized as abusive, investigating the type of link they encompass will result in discovering the connection that the European legislator itself deemed acceptable.

- *"(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"*

As the ability to impose and maintain unfair prices and/or trading conditions can characterize exclusively a dominant firm, in this circumstance, there is a real causal relation between dominance and abusive imposition.

- *"(b) limiting production, markets or technical development to the prejudice of consumers"*

As this sort of limitation can be imposed by any undertaking, the element of dominance can only implement prejudice to consumers. Hence, here, the connection between dominance and abuse, the act of limiting, is solely in relation to consumer harm, thus, to the anti-competitive effect.

- *"(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*

In theory, considering that the conduct of price discrimination requires a noticeable level of freedom to set the price policy independently, this abuse could be deemed as intrinsically linked to the dominant market power enjoyed by a firm. However, in practice, the specific characteristics of a market could hugely influence such freedom, thus, it is also possible to find a less strong connection between abusive discrimination and the dominant position. Indeed, in such cases, there is no doubt that the effect, hence, the competitive disadvantage, has a strong link with the market power held by the enterprise.

- *"(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"*

Finally, this scenario is quite like the one under scrutiny in letter (a). Indeed, the capacity of a firm to carry out such a conduct can only depend on its market power, therefore, there is a causal link between the imposition of the supplementary obligations and the dominant position.

From this examination, we may conclude that Article 102 TFUE surely enshrines both the causal link and the effects-related connection between dominance and abuse. However, as the Treaty's provision offers only examples of possible sorts of abuse, investigating the ECJ's jurisprudence becomes indispensable to see how this issue is tackled in practice.

2.2.2 Where does the ECJ stand?

In *Continental Can*, the Commission found a violation of Article 86 EEC Treaty, as a merger was considered an abuse of dominant position. During the appeal, the plaintiff argued before the ECJ that an infringement of the Treaty's provision was not to be found as *"Article 86 requires that there at least be a causal connection with the dominant position"*.

In other words, the undertaking claimed that the merger could not possibly constitute an abuse, as it bore no causal link with its position of dominance. Unfortunately, on the first occasion it had to clarify this issue, the ECJ circumvented the merits of this question by

dismissing the firm's arguments on grounds of systemic considerations[107] and by appealing to the alleged irrelevance of the plaintiff's claim[108].

Nonetheless, stipulating that *" (...) the question of the link of causality raised by the applicants which in their opinion has to question exist between the dominant position and its abuse, is of no consequence (...), regardless of the means and procedure by which it is achieved , if it has the effects mentioned above"*[109], the CJEU clarified how, at least for mergers, a causal link between dominance and abuse is not at all required.

Indeed, in the whole judgment, the ECJ showed no interest whatsoever in the dominant position held by the applicant prior to the merger, as is mentioned solely because, as observed afterwords, Article 102 TFUE seems to demand the presence of this element. Hence, market power appears almost as an implied element which plays no part either in the legal or in the factual analysis conducted. If, in the logic of the ruling, the dominance previously possessed by the company is totally absent, it goes without saying why, *a fortiori*, little to no relevance was given to the supposed causal relation.

Even if this case concerned a merger, most of the doctrine concluded that the CJEU not only universally rejected the essentiality of a causal link but also deemed unnecessary any sort of connection between abuse and dominance.

However, one year later, in *Commercial Solvents*[110], a case concerning a refusal to sell perpetrated by a dominant undertaking, the ECJ recognized that the harmful effects of the abusive conduct directly depended on the circumstance that the competitors were unable to purchase from somewhere else, due to the dominant position held by the plaintiff[111]. In other words, the CJEU identified a clear connection between the anti-competitive effects and dominance, without which the conduct could not have been detected under Article 86 EEC Treaty.

[107] See *supra* (n 103).
[108] See *supra* (n 27), paragraph 27.
[109] See *supra* (108).
[110] Judgment of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation vs Commission*, Joined Cases 6 and 7-73, EU:C:1974:18.
[111] See *supra* (n 110), paragraph 25.

Although the ECJ showed no interest in further investigating the issue, as it was only a prerequisite, we may conclude that the second type of category of relation mentioned above, at least in some scenarios, is, in practice, deemed necessary.

Indeed, this precedent has normally been used to exclude the drastic consequences that could derive from an extensive interpretation of *Continental Can*, as declaring the total inexistence of whichever sort of link between dominance and abuse means disregarding the wording of Article 102 TFUE, which clearly poses the preposition *"of"* next to the term *"abuse"* for a reason.

Finally, as anticipated before, an accurate analysis of the case law suggests that the ECJ has, overall, demonstrated to be reluctant to shed light on the issue under examination. What matters is that, within all the several decades of enforcement of Article 102 TFUE, no Commission's decision has ever been struck down because of a failure to provide evidence supporting the existence of such a link.

2.2.3 Artificial product differentiation and the rules on unfair competition as proof of the essentiality of the link

Economists generally define the market structure in relation to three interconnected dimensions:

- Concentration;
- Product differentiation; and
- Entry barriers.

The first depends on the number of players operating in the market and their respective shares in it. Thus, as observed before, a market is considered concentrated if one or more undertakings hold a significant quantity of shares. In other words, the market concentration is inversely proportional to its level of competition.

The second can be described as the buyers' perception of the difference between sellers' products. This perceived difference can be either genuine or artificial. Whereas the first scenario occurs when there is an actual and concrete variance between the products offered by the companies to the purchasers, the second materializes when the difference is the result of a distorted image of the sellers' outputs, instilled in the consumers by the

companies themselves so that essentially identical products[112] can still be considered diverse.

On that regard, it is believed that the phenomenon of product differentiation stimulates in consumers a tendency to be faithful to a certain product, hence, to the company that produces it, even in cases of price increase. To tell the truth, it surely strengthens the relevant firm's market position, by raising its degree of freedom to set prices independently, as it knows that a reasonable rise in prices will not break the acquired loyalty. Hence, the market is considered to have a solid product differentiation when its participants' consumers show a great level of fidelity.

Finally, an entry barrier into a given market is represented by its level of unattractiveness for would-be entrants. Thus, entry barriers occur when it is established that potential entrants will have to operate, for a considerable period, less profitably than the undertakings that are already part of the market.

On that regard, there are various possible sources of entry barriers, as an irregular variety of conducts and circumstances could cause such an effect. For instance, digital markets are usually characterized by economies of scale enjoyed by their players, thus, as economies of scale are known to create entry barriers, in this case, their source is an inevitable consequence of the intrinsic features of the market itself.

However, entry barriers are generally the outcome of companies' strategies to keep potential competitors out of the market they participate in.

A typical example is artificial product differentiation. As advertising is the most widespread technique through which firms can create an altered image of their products, advertising campaigns have been used by enterprises to manipulate the consumers' perception of their products' difference. Being massive advertising an optimal tool for artificial product differentiation, if perpetrated over a consistent period, it can certainly guarantee the fidelity bond mentioned before. In such a scenario, as any outsider company will face difficulties in subtracting enough customers to establish its position in the

[112] Products that serve the same needs.

market, even with a superior product in terms of quality, a barrier of entry is likely to occur.

Considering that it is largely accepted that most of the contemporary markets are characterized by artificial product differentiation, obtained with massive advertising, it is interesting to notice how and, if so, to what extent such a practice can be detected under Article 102 TFUE.

Firstly, it was observed that entry barriers can be direct consequences of artificial product differentiation. Moreover, as they preclude the competitive process in its entirety, if they are the result of undertakings' behaviors aimed at preventing the entry of another participant in the market, there is no doubt that they can represent an anti-competitive effect.

Secondly, as Article 102 TFUE is an abstract provision, it is undisputed that any market leaders' conduct could potentially amount to abuse. Hence, artificial product differentiation by means of massive and aggressive advertising can be considered abusive.

However, in order to create an efficient entry barrier, capable of keeping any potential competitor out, this practice must be implemented by a participant undertaking holding a dominant position in the market. That explains the rationale behind the choice of describing such a scenario while illustrating the relation between dominance and abuse.

In this particular circumstance, apart from the objective difficulty to show how advertising leads to product differentiation, which, in turn, causes an entry barrier capable of hampering the competitive process, the Commission would have to prove that the dominant position is the *condicio sine qua non* of the abuse.

In other words, even though the ECJ deemed unnecessary a causal link under Article 86 EEC Treaty, there are cases where the relation of causality is indispensable for the enforcement of the latter provision itself.

The application of the rules on unfair competition to Article 102 TFUE is another instance in which the link between dominance and abuse can be considered essential.

On that regard, both Antitrust Law and the law of unfair competition regulate the competitive behaviors of undertakings, as they are aimed at prosecuting and containing the prohibited practices carried out by competitors. However, while competition rules are generally considered to ensure the proper functioning of the market, safeguarding competition rather than competitors, the law of unfair competition regulates the relationships between individual enterprises, without looking at the protection of the global market mechanism. In other words, they have the same subject, but different purposes and diverse approaches to realize them.

It is clear that, by definition, unfair competition is harmful to competitors, even in cases of no concentration of the market, nevertheless, if perpetrated by a dominant undertaking, it could be detected under Article 86 EEC Treaty as abuse of dominance.

Considering that the law of unfair competition is generally something different from abuse of dominance, not every act of unfair competition, executed by a dominant undertaking, can amount to a violation of the Treaty's provision. Only those cases where it is established that unfair competition had anti-competitive effects because of the dominance of the firms that perpetrated the conduct can be lawfully detected by the Commission under Article 102 TFUE.

Therefore, in order to prosecute an action that would normally amount to unfair competition under the scope of the Treaty's provision, it must be proved that the detention of dominance made the conduct something more deplorable, as its effects were worsened by the huge market power detained.

In such a scenario, there is a clear necessity of the link between abuse and dominance, however, a causal relation is still not indispensable, because, without dominance, the harmful effects of the practice would have occurred the same, but the dominant position made them enough to be detected and prosecuted under Article 102 TFUE.

Finally, these examples show that, in certain circumstances, the relevant scenario can be much more intricate than the ECJ has offered on such a relation, hence, they brilliantly demonstrate the practical implications depending on a correct interpretation of the Treaty's provision.

2.2.4 The economic solution

The advent of the economic approach to the abuse of dominant position has further reduced the interest of the ECJ in recognizing the existence of a link between abuse and dominance, as well as evaluating its nature.

The analysis of Article 82 TEC conducted by the EAGCP in its 2005 final Report perfectly summarizes this outcome and the rationale behind it. The group of economists argued that a more effects-based approach towards the Treaty's provision automatically eliminates the preliminary and separate assessment of dominance from the Commission's burdens.

On that regard, they suggested that, if a significant competitive harm is established, the proof of dominance is already implied in that evidence, as a non-dominant undertaking would not have been capable of creating such a serious anti-competitive effect.

As pointed out in the Report, Article 82 EC Treaty itself was open to such an interpretation:

"In proposing (...) to integrate the substantive assessment of dominance with the procedure for establishing competitive harm itself, we depart from the tradition of case law concerning Art. 82 of the Treaty, but not, we believe, from the legal norm itself. Article 82 of the Treaty is concerned not just with dominance as such, but with abuses of dominance. The case law tradition of having separate assessments of dominance and of abusiveness of behavior simplifies procedures, but this simplification involves a loss of precision in the implementation of the legal norm (...). Given that the Treaty itself does not provide a separate definition of dominance, let alone call for any of the traditionally used indicators as such, it seems more appropriate to have the implementation of the Treaty itself focus on the abuses and to treat the assessment of dominance in this context"[113].

[113] Gual, Jordi. Hellwig, Martin. Perrot, Anne. Polo, Michele. Rey, Patrick. Schmidt, Klaus. Stenbacka, Rune. *Report by the EAGCP "An economic approach to Article 82"*, 2005, pages 14-15.

It goes without saying that, in this renovated environment, the examination of the link between dominance and abuse is, *a fortiori*, of no interest, because already enshrined in the assessment of harmful effects.

Having previously observed the disinterested approach of the CJEU on this issue, it is not at all surprising that, following the success of the more economic method of examination of abuse of dominance, such a relation has totally disappeared from both the ECJ's rulings and the Commission's decisions.

However, both the textual analysis of Article 102 TFUE and the examples described above are an irrefutable testimony of the existence of some sort of relation, which, in some cases can amount to a real causal link, in some others to a mere connection of effects.

Therefore, even if it is often implied or forgotten, it is still crucial to keep the existence of such a correlation in mind for the purposes of this thesis.

2.3 Objective vs subjective concept of abuse: the role of intention in Article 102 TFUE

At this point, it is evident that Article 102 TFUE must be interpreted as the *summa* of its constituent components. Indeed, under EU law, a legal provision is generally conceptualized as a puzzle that needs a certain number of pieces to be completed. The subjective element could be one of them, nevertheless, not every legal prohibition must include the intention as a necessary requirement of the offence.

Moreover, traditionally, the concept of intent refers to the different mental conditions under which an entity perpetrates a certain conduct, as it encompasses a variety of states of mind[114] that characterize the degree of awareness of the relevant subject. However, it will be noticed how, in cases concerning abuse of dominant position, the subjective element is scrutinized from a different perspective.

Considering that Article 102 TFUE is totally silent on the undertakings' intent, delignating its scope and role has always been a priority for the professional operators involved. Indeed, the lack of any reference to such a factor in the Treaty's provision makes the

[114] From fault to negligence, passing through recklessness and knowledge.

relevance of intention in the assessment of what constitutes an abuse entirely dependent on the interpretation offered by the EU decision-makers.

Hence, the purpose of this section is to analyze how the subjective element has been understood and treated by the Commission and the ECJ, as they have shown a noticeable interest in it, while defining what can possibly amount to an abuse[115]. In particular, the case law of the CJEU is inspiring in this context, as it contains the answers to all the questions raised by the doctrine, from the correct interpretation of what constitutes the dominant companies' intention to its practical use within the examination of abusive practices.

On that regard, as anticipated in the first chapter[116], the CJEU has repeatedly and constantly affirmed the objective nature of the concept of abuse[117]. Therefore, it has always been accepted that, as intent is not a constituent element of the prohibition[118], the Commission does not have the burden of proving the defendant's intention to show the occurrence of an abuse.

Based on these findings, Article 86 EEC Treaty has been largely interpreted as implying a regime of absolute liability[119]. However, certain administrative and judicial practices developed over the years have questioned the unconditional domain of the objectivity allegedly enshrined in the notion of abuse of dominance.

Firstly, regarding predatory pricing, for almost forty years, the ECJ used an intent-based test to distinguish between legitimate and abusive pricing conducts. Indeed, differently from cases where undertakings set prices below their average variable cost[120] (hereinafter

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[115] In comparison with what was observed regarding the link between dominance and abuse, this tendency seems slightly paradoxical: while an element that has no connection whatsoever with the wording of the relevant provision has been constantly discussed and renovated by the ECJ, a relation with a solid legal basis in Article 102 TFUE has often been superficially dismissed.

[116] See *supra* (n 46).

[117] On that regard, see judgment of 3 July 1991, *AKZO Chemie BV vs Commission*, Case C-62/86, EU:C:1991:286, paragraph 69; judgment of 16 July 2015, *Huawei Technologies Co. Ltd vs ZTE Corp. and ZTE Deutschland GmbH*, Case C-170/13, EU:C:2015:477, paragraph 45; judgment of 25 March 2021, *Slovak Telekom vs Commission*, Case C-165/19 P, EU:C:2021:239, paragraph 41.

[118] Bravasso, Antonio. *The Role of Intent under Article 82 EU: From "Flushing the Turkeys" to "Spotting Lionesses in Regent's Park"*, European Competition Law Review, 2005, pages 1-11.

[119] To that extent, see Akman, Pinar. *The role of intent in the EU case law on abuse of dominance*, European Law Review, 2014, pages 316-340 and Melicias, Maria. *The use and abuse of intent evidence in antitrust analysis*, World Competition, 2010, pages 569-582.

[120] These scenarios will be further discussed in the following sections; for now, it is sufficient to observe that such practices are presumptively prohibited.

"AVC"), when dominant firms charge prices between their AVC and their average total costs (hereinafter "ATC"), the CJEU used to consider necessary for the Commission to show evidence of the predatory intent, making the subjective element an essential factor in determining the abuse itself.

Based on this surpassed trend, some scholars[121] have returned to the starting point, claiming that, by spousing this kind of assessment, the ECJ has not only withdrawn its previous position on the objective nature of abuse but also introduced the dominant firms' intent as one of the *building blocks*[122] of Article 102 TFEU.

Nonetheless, these theories have become inconsistent with the further evolution of the CJEU's jurisprudence, which has continued to categorically deny the interpretation of intention as one of the fundamental requirements of abuse of dominance.

At the same time, although the relevance of the intent-based test has gradually declined, as, after the advent of the more economic approach, the most recent cases involving price-based conducts have been dealt by the EU decision-makers using other proxies and different tests, like the "as efficient competitor" test (hereinafter the "AEC test"), it is undeniable that the ECJ, at least in three rulings[123], has attributed a crucial role to the defendants' intention.

Secondly, the CJEU has often referred to enterprises' intent while addressing the abusive nature of their conduct, creating a sort of equivalence between the defendants' intentions and the final aim of their actions.

For instance, in *United Brands*[124] and *Irish Sugar*[125], the ECJ respectively held that a practice cannot be allowed *"if its purpose is to strengthen the firm's dominant position*

[121] O'Grady, Colm. *The role of exclusionary intent in the enforcement of Article 102 TFEU*, World Competition, 2014, pages 459-471.
[122] Maggiolino, Mariateresa. *The role of intent in abuse of dominance and monopolization*, in see *supra* (n 35), 2021, page 7.
[123] See *supra* (n 115), *AKZO,* paragraphs 71-72, 79, 99, 102 and 115; judgment of 14 November 1996, *Tetra Pak International SA vs Commission*, Case C-333/94 P, EU:C:1996:436, paragraphs 41-42; judgment of 2 April 2009, *France Télécom SA vs Commission*, Case C-202/07 P, EU:C:2009:214, paragraph 110.
[124] Judgment of 14 February 1978, *United Brands Company and United Brands Continentaal BV vs Commission*, Case 27/76, EU:C:1978:22.
[125] Judgment of 7 October 1999, *Irish Sugar plc vs Commission*, Case T-228/97, EU:T:1999:246.

and thereby abuse it"[126] and *"if the practice in question takes place in the context of a plan by the dominant undertaking aimed at eliminating a competitor"*[127].

In other rulings, the rationale underpinning the decision is equivalent, but the CJEU refers to the dominant firm's anti-competitive *"object"*[128] or *"goal"*[129].

Moreover, in *Promedia*[130], the ECJ went even beyond by recognizing the conduct at stake, precisely, the practice of undertaking vexatious lawsuits, as abusive, solely because it was part of a broader strategy to harm competition.

However, the assessment of the scheme behind the dominant companies' actions, even when there is an express reference to their intent, has always been based on the economic rationality of the practices, as their intention is investigated by looking at objective elements[131], such as prices, costs and sometimes even the relevant firms' internal documents. Thus, the only concern of the EU decision-makers has always been the competitive impact of the conduct subject to scrutiny.

Thirdly, the ECJ has also maintained that the Commission may use firms' intent as an argument to corroborate the harmful effects procured by their practices. Thus, *"while (...) there is no requirement to establish that the dominant undertaking has an anticompetitive intent, evidence of such an intent, while it cannot be sufficient in itself, constitutes a fact that may be taken into account in order to determine that a dominant position has been abused"*[132].

Therefore, given that the analysis of the abusive nature of a certain conduct must cover all the specific circumstances of the case[133], and having the ECJ clearly stipulated, in

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[126] See *supra* (n 124), paragraph 189.
[127] See *supra* (n 125), paragraph 114.
[128] Judgment of 1 April 1993, *BPB Industries and British Gypsum vs Commission*, Case T-65/89, EU:T:1993:31, paragraph 69.
[129] Judgment of 8 October 1996, *Compagnie Maritime Belge Transports and Others vs Commission*, Joined cases T-24/93, T-25/93, T-26/93 and T/28/93, EU:T:1996:139, paragraphs 107 and 147-148.
[130] Judgment of 17 July 1998, *ITT Promedia NV vs Commission*, Case T-111/96, EU:T:1998:183, paragraph 55.
[131] Perinetto, Patrick. *Intent and competition law assessment: useless or useful tool in the quest for legal certainty?*, European Competition Journal, 2019, page 145-153.
[132] Judgment of 23 October 2017, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) vs Commission*, Case T-712/14, EU:T:2017:748, paragraph 102.
[133] Judgment of 15 March 2007, *British Airways plc vs Commission*, Case C-95/04 P, EU:C:2007:166, paragraph 67.

Tomra[134], that firms' intent is one of them, the Commission can support its findings by referring to the subjective element.

Nevertheless, also in these scenarios, the EU decision-makers have never investigated the culpability of the enterprises involved. On the contrary, quite recently, the CJEU has made it clear that the intent to compete legally, even if established, cannot be relied upon by the Commission to exclude the abusive nature of a conduct[135].

What transpires from this analysis is that, after the advent of the more economic approach, in matters concerning abuse of dominance, the notion of intent seems to have acquired an objective meaning. From this perspective, undertakings must be understood as economic entities that make rational choices about their conduct, based on the expected consequences a certain action may produce. Their awareness is taken out of the picture, as they are presumed to consciously and voluntarily decide in every possible scenario.

This idea seems to be well established in the reasoning of the opinion[136] delivered by Advocate General (hereinafter "AG") Mazàk in *Tomra*, as he stipulated that *"the evidence of intent is not altogether irrelevant insofar as it may actually be relevant to the assessment of the behavior of a dominant undertaking, which requires an understanding of the economic rationale of that behavior, its strategic aspects and its likely effects"*[137].

Considering this sort of *fictio iuris*, based on which the economic rationality of undertakings' practices corresponds to their intent, it is commonly accepted that the traditional concept of subjective element must be placed outside the scope of Article 102 TFUE, disregarding any focus on mental states or attitudes.

Finally, the analysis of the ECJ's jurisprudence unequivocally suggests that the regime of absolute liability and the absence of intent within the fundamental requirements of abuse of dominance must be seen as inflexible pillars.

In addition, even when what we generally refer to as the subjective dimension may be taken into account, its nature and further assessment is rooted in the examination of

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[134] Judgment 19 April 2012, *Tomra Systems ASA and Others vs Commission*, Case C-549/10 P, EU:C:2012:221, paragraphs 20-21.
[135] See *supra* (n 134), paragraphs 22-24.
[136] Opinion of AG Mazàk of 2 February 2012, in see *supra* (n 134), EU:C:2012:55.
[137] See *supra* (n 136), paragraph 10.

objective proxies and factual characteristics. Therefore, when dealing with cases of abuse of dominance, the uniqueness of the notion of dominant undertaking's intent must always be borne in mind.

2.4 The definition of abuse: norms as governing standards

The previous analysis of the subjective element unequivocally suggests that what constitutes an abuse under Article 102 TFUE must be defined in relation to norms. Without investigating the case-law of the CJEU, as well as the Commission's administrative practice, the notion of abuse of dominant position lacks any practical meaning. For instance, competition on the merits and fairness, which, as it will be observed, are the key concepts concerning exclusionary and exploitative practices, have been totally coined and developed by the EU decision-makers.

Hence, before further examining the multiform facets of which the notion of abuse is composed, it is essential to analyze the main institutional features characterizing the two main players involved in the process of defining and shaping the boundaries of this concept. Indeed, their peculiar constitutional roles and relationship have largely impinged on the correct interpretation and implementation of Article 102 TFUE.

For instance, as anticipated in the first chapter, the CJEU has a dual role in cases of abuse of dominant position. While, with the action of annulment, it ensures the effectiveness of judicial review, with the preliminary ruling procedure, it guarantees the uniform interpretation and application of Article 102 TFUE. On that regard, whereas the first legal avenue has often aggravated the clearness of the definition of abuse, the second has been used to reconcile the fractures of the system.

Indeed, the relationship between judicial review and administrative decision-making becomes problematic when the expression of a policy choice and the interpretation of a legal provision are fused together.

As shown before, the law is the vehicle through which policies are formulated, thus, this scenario is likely to occur in cases concerning abuse of dominant position[138].

[138] Geradin, Damien. Petit, Nicolas. *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, Tilburg University, 2010, pages 5-12.

On the contrary, the preliminary ruling proceedings have often represented an opportunity for the ECJ to iron out inconsistencies generated by the conflicting dialogue between itself and the Commission[139].

Moreover, many scholars have attributed the irregular evolution of the contentious notion of abuse of dominance to the intrinsic characteristics of the European judicial and administrative framework[140]. As it will be observed in the last chapter, this view has also represented the starting point for part of the doctrine to maintain that revisiting the standards of judicial review is the only permanent solution to the controversies revolving around Article 102 TFUE[141].

Therefore, analyzing the mechanisms underpinning the EU decision-makers' choices is equivalent to investigating the causes of the complexities which mark out the notion of abuse of dominance, as the paths undertaken by these institutions are the result of different necessities that are very often in contradiction with one another.

2.4.1 Characteristics and evolution of the Commission's enforcement policy

A preliminary analysis of the Commission's policy stance is essential to explain the rationale behind its choices of enforcement. On that regard, every antitrust authority is influenced by a variety of heterogeneous factors while taking its operative decisions.

These elements can be divided into two main categories. On the one hand, there are technical influences, which, considering their pure legal nature, determine the focus of the agency's limited resources on the most harmful infringements. On the other hand, a series of external factors conditions the nature and scope of enforcement, as they set the ultimate objectives of the administrative authority. For instance, the EU political agenda must be taken into consideration by the Commission, when delineating its priorities.

In general, within the European framework, two major policy shifts have characterized the application of antitrust rules.

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[139] Setari, Alice. *The Standard of Judicial Review in EU Competition Cases: the Possibility of Introducing a System of More Intense or Full Judicial Review by the EU Courts*, Università degli Studi di Milano, 2014, pages 12-17.
[140] See *supra* (n 39), pages 18-30.
[141] Gerard, Damien. *EU Antitrust Enforcement in 2025: 'Why Wait? Full Appellate Jurisdiction, Now'*, CPI Antitrust Journal, 2010, pages 1-9.

Firstly, as will be shown in greater detail afterwords, in the first decade of the new century, the Commission decided to use economic principles while formulating its policy positions[142].

Secondly, the administrative authority has gradually moved away from a centralized method of enforcement to a decentralized system, which relies on both the self-assessment of undertakings and the application of competition rules by MSs' national authorities[143].

The most relevant outcomes of such a change of course are enshrined in Regulation 1/2003[144], which also encapsulates the new principles of implementation of Article 102 TFEU.

When defining its priorities, the Commission is called to decide between focusing on fact-intensive or law-intensive cases. While the first are characterized by an uncontroversial legal basis, which makes unproblematic the comparison of the relevant facts to the requisite legal standard, the second force the authority to find an amount of evidence sufficient to prove a violation.

Hence, fact-intensive cases normally concern practices that are prohibited irrespective of their effects, as firms are perfectly aware of the type of conduct that constitutes an infringement. This is why, regarding Article 102 TFUE, only two practices are generally deemed evidence of pure fact-intensive cases: tying and exclusive dealing[145].

On the contrary, law-intensive cases present facts that do not constitute *ex se* a violation. Indeed, whereas in fact-intensive scenarios undertakings tend to conceal the facts, in law-intensive circumstances they are usually at the relevant public agency's disposal.

In addition, while law-intensive cases generally procure pro-competitive gains, fact-intensive cases generate gross infringements that are very rarely justifiable. For this

[142] Concerning Article 102 TFUE, this is eloquently testified by the 2009 Guidance Paper.
[143] On that regard, the situation is much more intricate in matters related to the implementation of Article 102 TFUE. Indeed, one of the main issues revolving around the notion of abuse of dominance is exactly the evanescent nature of what is prohibited. As the European institutions have always been accused of being incapable of solving such a problem, the decentralized method is still far from being totally functional in this sector of ECL.
[144] *Regulation 1/2003*, OJ L 1, 2003.
[145] These types of abuses will be examined in detail in the next chapter; for now, suffice it to say that they are generally presumed conducts *prima facie* unlawful.

reason, differently from the fact-intensive scenarios, where the assessment is normally systematic, the law-intensive circumstances require a case-by-case evaluation that encompasses every relevant element.

Therefore, in matters concerning abuse of dominance, law-intensive cases are the rule[146].

The second choice faced by the Commission revolves around the distinction between inter-brand and intra-brand competition. The first refers to the rivalry that exists among the producers/providers of a certain good/service. The second describes the rivalry that exists for the sale of a specific brand of goods/services.

Finally, the typology of cases that the Commission may prosecute usually depends on the nature of the remedies required to stop the infringement. Therefore, a distinction between reactive and proactive enforcement is essential. On that regard, a negative obligation is presumed to be reactive, whereas the essence of proactive enforcement is the imposition of positive obligations, thus, to end the violation, there must be active participation from the firm/s involved.

The combination of these factors creates a variety of possible *"enforcement paradigms"*[147], which are at the heart of every Commission's policy choice. Although there are conspicuous potential mixtures that give rise to different models, only the most common will be mentioned and scrutinized here.

For instance, many cases encompass fact-intensive scenarios, in which the enforcement is reactive in nature and the rivalry is limited to inter-brand competition. In such circumstances, the main concern for the Commission is discovering the infringement itself and preventing future violations through effective deterrents.

Cases of law-intensive scenarios, which necessitate reactive enforcement and regard inter-brand competition, are also quite popular. Nevertheless, here, the difficulties revolve around the presence of conduct with conflicting effects on competition.

The most complicated scenario is represented by law-intensive cases, which presuppose proactive remedial action and can occur both within inter and intra-brand competition.

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[146] De la Torre, Castillo, Fernando. Fournier, Gippini, Eric. *Evidence, Proof and Judicial Review in EU Competition Law*, Edward Elgar, 2024, pages 50-60.
[147] See *supra* (n 19), pages 7-11.

Indeed, proactive intervention is always problematic, because the Commission must not only come up with the appropriate remedy but also constantly monitor its correct implementation, in addition, proactive remedies are also likely to generate undesired anti-competitive effects in the long run.

Moreover, as observed before, market integration is to be considered an autonomous and crucial objective of ECL. Therefore, there are practices, which would otherwise be totally unproblematic, that are considered prohibited under Article 102 TFEU. For instance, it would be abusive for a dominant undertaking to prevent parallel trade[148]. On that regard, as the overlap between undistorted competition and market integration is almost perfect, only in a reduced percentage of cases the two may require conflicting remedies. Hence, practices aimed at restricting cross-border trade, which concern fact-intensive cases that relate exclusively to intra-brand competition and presuppose reactive measures, form a paradigm of their own, as they are considered *prima facie* prohibited[149].

Based on these features, it can be further established if the Commission's enforcement is law-driven, when its purpose is to offer an interpretation of the law and provide legal certainty to stakeholders, or policy-driven, thus, primarily concerned with the outcome prospected upstream. For instance, regarding matters related to the abuse of dominant position, a relatively recent study[150] conducted by Colombo has offered objective evidence of a significant shift of the Commission's implementation from law-driven to policy-driven.

In addition, as observed in the first chapter, policymaking is not subject to full judicial review. Indeed, its control is confined to manifest errors of assessment. In other words, the Commission's choice to devote its limited resources to certain infringements is almost unquestionable.

For instance, in *CEAHR*[151], the Court annulled a decision in which the Commission declared the absence of interest in continuing the investigation, as the decision was

[148] See *supra* (n 19), page 12.
[149] Geradin, Damien. Nicolas, Petit. *Judicial Remedies Under EC Competition Law: Complex Issues Arising from the Modernization Process*, Fordham Corporate Law, 2005, pages 18-24.
[150] See *supra* (n 19), pages 41-48.
[151] Judgment of 15 December 2010, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) vs European Commission*, Case T-427/08, EU:T:2010:517, paragraphs 157-178.

characterized by insufficient reasoning, the failure to take account of a relevant factual element raised in the complaint, and manifest errors of assessment.

On top of that, within the European framework, enforcement priorities are generally defined both positively and negatively.

Regarding the former method, the Commission may, expressly or indirectly, declare the markets and/or practices on which it will focus its resources. For example, the decision to initiate an investigation already implies policy direction. Soft law instruments are another important announcement mechanism.

Moreover, as the margin of discretion enjoyed by the administrative authority in deciding which cases to pursue also encompasses the power to leave certain infractions outside the scope of its enforcement, the negative definition of policy choices is carried out mainly by complaint rejections. If the Commission cannot be compelled to initiate investigations, such decisions, as long as they remain within the boundaries of policymaking, are almost intangible, thus, only subject to scrutiny for manifest errors of assessment.

Since the adoption of Regulation 1/2003, another example of negative manifestations of policy choices is encapsulated in the so-called commitment decisions[152]. Indeed, Article 9 of the latter Regulation enables the Commission to close proceedings, without establishing whether Article 102 TFEU has been infringed. As an expression of the Commission's discretion, commitments decisions are subject to limited control as well. Considering that they allow the authority to bypass the points of law, without sacrificing the concrete punishment of the identities involved, the Commission has made great use of them in the last decade.

Finally, in order to understand the boundaries of the Commission's discretionary powers in cases of abuse of dominance, it is essential to evaluate the counterbalancing role of the judiciary branch. Hence, this is where the discussion will turn to.

[152] Wils, Wouter. *Ten Years of Regulation 1/2003 - A Retrospective*, Journal of European Competition Law and Practice, 2013, pages 1-6.

2.4.2 Main features of effective judicial review in cases of abuse of dominance

As a rule, the ECJ must review the legality of the Commission's decisions under the scope delignated by Article 263 TFEU, thus, for "*lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*".

However, pursuant to Article 261 TFEU and Article 31 of Regulation 1/2003, it enjoys *"unlimited jurisdiction with regard to the penalties"*. Hence, in the latter context, the CJEU is not only allowed to annul the contested decision, but also to reduce or increase the fine imposed.

The first issue arising from this background is the actual extent of the "*unlimited jurisdiction"*. On that regard, as the last sentence of Article 31 of Regulation 1/2003 stipulates that the CJEU has the power to *"cancel, reduce or increase the fine or periodic penalty payment imposed"*, many scholars have noticed how this adjustment is impossible without reviewing the reasoning of the decision itself[153]. On the other hand, espousing such an interpretation means supporting the inclusion of cases of abuse of dominance under the scope of this *"unlimited jurisdiction"*. As the first consequence of this theory is the drastic reduction of the Commission's margin of appreciation, a difference between the two types of control must be accordingly recognized.

At this point, the second issue becomes identifying what *"control of legality"* exactly entails. Although its definition is controverted, it is pacific that it does not amount to a *"light judicial review"*[154]. Indeed, as the ultimate purpose of Article 263 TFUE is to counterbalance the Commission's powers, a system of effective judicial control is as essential here as it is in cases falling within the *"unlimited jurisdiction"* of the ECJ.

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[153] Schweitzer, Heike. *The European Competition Law Enforcement System and the Evolution of Judicial Review* in Marquis, Mel. Ehlermann, Dieter, Claus. *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart, 2011, pages 79-146.
[154] Forrester, Ian. *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, in see *supra* (n 153), 2009, pages 408-452.

At the same time, as the wording of Articles 261 and 263 TFUE clearly suggests some sort of distinction, it is generally accepted that the differences are to be found in the length of the margin of discretion and appraisal entrusted to the Commission[155].

Therefore, as the scope of the review does not differ, defining the control enshrined in Article 263 TFUE as "limited", in contradiction to Article 261 TFUE, is utterly misleading[156]. Indeed, both *"unlimited jurisdiction"* and *"control of legality"* imply a comprehensive judicial review.

More precisely, the ECJ must ascertain in both scenarios:

- Whether the decision-maker had the power to act;
- Whether the Commission committed errors of law;
- Whether the public authority misinterpreted any point of law; and
- Whether the agency misused its powers[157].

Moreover, the combination of the Commission's investigative, prosecutorial and decision-making competences is counterbalanced by procedural guarantees, which fall under the scope of the ECJ's scrutiny.

On that regard, although the right to an effective defense is a fundamental principle of the Union, in cases concerning Article 102 TFUE, the Commission is forced to balance its need to carry out an efficient enforcement with the protection of the dominant undertakings' involved rights. When striking this equilibrium, the public agency enjoys a broad margin of discretion.

In addition, although Article 263 TFEU does not explicitly mention any review over the assessment of the facts, it is pacific that the "*control of legality"* also extends to the facts on which the administrative decision is based, to their appraisal and to the evidence provided for by the Commission to support its findings.

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[155] Kalintiri, Andriani. *What's in a Name? The Marginal Standard of Review of "Complex Economic Assessments" in EU Competition Enforcement*, Common Market Law Review, 2016, pages 1-4.
[156] De Paz, Laguna, Carlos, Josè. *Judicial Review in European Competition Law*, Journal of Antitrust Enforcement, 2013, pages 2-6.
[157] A misuse of power occurs when a measure is taken with the exclusive or main purpose of achieving an end other than the one stated by the law. For instance, in judgment of 10 April 2008, *Deutsche Telekom AG vs Commission*, Case T-271/03, EU:T:2008:101, paragraph 271, the ECJ denied that, when acting against the undertaking for anticompetitive behavior, the Commission covertly intended to act against the German authorities.

On that regard, according to Article 2 Regulation 1/2003, the public agency must offer enough evidence to prove the infringements and to underpin the conclusions drawn from it, as its decision can be made void when based on insufficient, incomplete, insignificant and inconsistent evidence.

Moreover, the advent of a more economic approach elevated the threshold of standard of proof, because, as will be shown after, it is necessary to give evidence of the anti-competitive effects of the dominant firms' conduct. For instance, in *Hellenic Republic*[158], the ECJ annulled the Commission's decision, since it had not sufficiently proved the abuse of dominant position.

At the same time, as clarified in *Deutsche Telekom*[159], the administrative authority must provide evidence only as far as it is necessary to prove the infringement.

However, the prohibition enshrined in Article 102 TFEU often entails complex economic and/or technical assessments. In such circumstances, as the ECJ recognizes a broader margin of appreciation, the Commission's appraisal of facts is subject to mere control over manifest errors of assessment[160].

The concept of complex economic assessment has always been evanescent and problematic. To begin with, there is no definition of the elements of complexity. In addition, as it is very difficult to separate facts and their appraisal from the interpretation of the law, limiting the review of the first may have an impact on the scope of the *"control of legality"*. What is certain is that complex assessments are still guaranteed by effective judicial review, as the appraisal of facts and evidence *"falls within the Court's complete discretion"*[161].

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[158] Judgment of 20 September 2012, *Hellenic Republic vs Commission*, Case T-169/08, EU:T:2012:448, paragraph 105.
[159] See *supra* (n 157), paragraphs 166-168.
[160] It is important to underline that, here, the ECJ is not required by EU law to concede this level of deference, however, this practice is quite common within the CJEU's jurisprudence. For example, having said that the Commission's policymaking power is firstly expressed by means of individual decisions, the annulment of each one of them may have an undesirable impact on the effectiveness of the enforcement. For this reason, every time the ECJ recognized that a strict judicial review would have had such a systemic undesirable consequence, it showed a great level of deference. For a complete examination of this peculiarity, see Colombo, Ibáñez, Pablo. *The (Second) Modernisation of Article 102 TFEU:Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review*, Journal of European Competition Law, 2023, pages 1-6.
[161] Judgment of 20 September 2012, *French Republic vs Commission*, Case T-154/10, EU:T:2012:452, paragraph 65.

In other words, given that this deference is granted solely by the ECJ, the latter is absolutely entitled to question the Commission's interpretation of economic information coming from third parties, first and foremost experts.

For instance, in *Deutsche Telekom*, the CJEU stated that, as the method used to establish a margin squeeze was based on a complex economic assessment, its judicial review was limited[162]. Nevertheless, this consideration did not prevent the ECJ from ascertaining whether the abusive practices had been properly determined by the Commission. Indeed, the analysis of the latter, which was based on the economic evaluation of the dominant undertaking's charges and costs, as well as its revenues from the access services, was deemed correctly conducted by the CJEU.

It is also noteworthy that a higher margin of appraisal does not amount to a lower standard of proof[163].

Finally, under Article 296 TFUE, the Commission must describe the legal and factual rationale behind its decisions. On that regard, the administrative authority must not depart from its own para-legislative sources of law without giving reasonable explanations for doing so. Indeed, it is true that soft law has no binding effects, but it was already pointed out how, according to the principle of equal treatment, the Commission is required to be consistent with its own codified findings.

Considering the foregoing, what are the fundamental features that qualify the judicial review of complex economic and technical appraisal is still partially unclear. It was suggested that, when the ECJ refers to the limits of its control, in relation to complex assessments, it only reaffirms the natural outcome of the principle of separation of powers, which necessarily attributes a certain margin of appreciation in the Commission's hands when it comes to the legal characterization of facts[164].

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[162] See *supra* (n 157), paragraph 185.
[163] Jaeger, Michael. *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, Journal of Competition Law and Practice, 2011, pages 13-18.
[164] Wils, Wouter. *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, World Competition, 2003, pages 215-216.

As the appraisal of the factual elements is the most subjective parameter within the public agency's examination, in these circumstances, there is a window for technical discretion that cannot be closed by the ECJ. Filling that gap would amount to replacing the Commission's discretionary choices, instead of reviewing them.

In these cases, the ECJ can only evaluate the existence of a manifest error of appraisal, but the methodology underpinning that appraisal remains outside the scope of its judicial review. For instance, the Commission enjoys a certain level of operational independence in choosing the instruments and the appropriate economic approach to the analysis of the facts, thus, as long as they are not evidently contrary to the accepted principles of economics and are applied consistently, the CJEU has little to no margin of review on them. However, the way these economic tools are used by the administrative authority, to determine the existence of an abuse, must be scrutinized by the ECJ.

Moreover, if this is the correct way of interpreting the notion of manifest errors of assessment, in the last example, the burden of proving that the Commission's decision is not based on sound economic principles is upon the dominant firm/s involved. Hence, the traditional distinction between the Commission's margin of discretion in policymaking and its margin of appraisal of facts is to be deemed relative at best, since the latter is one of the possible manifestations of the former.

After having scrutinized how the EU decision-makers operate and interact between them in matters concerning the abuse of dominant position, it is possible to observe the existence of certain fundamental motives underpinning their activities.

2.4.3 Patterns in the jurisprudence of the CJEU and the Commission's administrative practice

As the prohibition enshrined in Article 102 TFUE is built on broad and vague concepts, its content and scope can only be defined through case-by-case administration of the law. However, this type of approach inevitably entails a higher probability of committing mistakes in the legal assessment of abuse. Hence, avoiding enforcement errors has always been a central issue in matters regarding abuse of dominant position.

For instance, the gradual shift towards a more economic approach, which culminated in the adoption of the 2009 Guidance Paper, was mainly the result of the stakeholders' concern about the Commission's tendency to detect false positive abuses[165].

However, the individual evaluation of actual or potential effects of practices has now placed the swings of the pendulum in the opposite direction, as it has been observed how a systematic analysis of the anti-competitive effects of dominant undertakings' conduct has increased the number of false negative errors of enforcement[166].

The risk of Type I and Type II errors has been a priority for the ECJ as well. However, recognizing that they are an inevitable consequence of the never-ending conflict between administrability and legal certainty, the CJEU has tried to counterbalance the quest for predictability and accuracy, on the one hand, and effective enforcement, on the other, with substantive legal standards.

On that regard, the most suitable instrument used by the EU decision-makers to define and shape the boundaries of what constitutes an abuse is the so-called legal test. Indeed, crafting legal tests means categorizing the relevant practices and defining the conditions under which they give rise to an infringement. Thus, once formed, they become the benchmark against which the lawfulness of dominant undertakings' behaviors is evaluated.

In cases concerning the violation of Article 102 TFUE, the craft of such tests implies the analysis of the interactions between the Commission and ECJ, as it suggests the patterns followed by each of these institutions when dealing with abusive practices.

On that regard, while the CJEU has always tried to draw a systematic and consistent line of rulings, the Commission has shown a tendency to deliver decisions tailored exclusively for a particular legal and factual environment[167]. In other words, the Commission has come up with unstructured legal tests, which leave a huge maneuver area and a high level

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[165] Bailey, David. *Scope of Judicial review under Article 81 CE*, Common Market Law Review, 2004, pages 1327-1333.

[166] Wils, Wouter. *The Reform of Competition Law Enforcement—Will it Work?*, in Cahill, Dermot. *The Modernisation of EU Competition Law Enforcement in the EU*, Cambridge University Press, 2004, pages 671-736.

[167] Tridimas, Takis. *Precedent and the Court of Justice: A Jurisprudence of Doubt?*, in Dickson, Julie. Eleftheriadis, Pavlos. *Philosophical Foundations of European Union Law*, Oxford University Press, 2012, pages 307-330.

of administrability, whereas the ECJ has had consistency and continuity as its final purposes, when shaping its tests.

For instance, in *AKZO*, the first case addressing the legal status of predatory pricing, the Commission used a variable legal test based on several heterogeneous considerations[168]. On the other hand, the ECJ precisely described two circumstances in which an aggressive pricing strategy may lead to abuse, coining a reliable legal test. Under the latter, evidence of pricing below AVC is a necessary precondition for the application of Article 102 TFUE[169].

However, legal tests, no matter how structured and attached to well-defined criteria they can be, are only valuable if long-lasting, so that the players of the market have a precise idea of the abusive conduct to avoid. Thus, effective judicial intervention is guaranteed only by *"inter-temporal consistency in the definition and administration of legal tests"*[170].

Therefore, an indispensable prerequisite for a valuable legal definition of abuse is the coherence between administrative enforcement and judicial decision-making. Unfortunately, evidence of lack of coordination between the findings of the EU decision-makers is all over the place.

For instance, the ECJ has always specified that a limitation of a competitor's freedom of action is *ex se* insufficient to prove a restriction of competition[171], as the anti-competitive effects of a conduct must be assessed in relation to the relevant market, rather than to individual competitors. Although the case law has always been solid on this point, the Commission has repeatedly used the limitation of the freedom of action as the only proxy to find an abuse.

Moreover, an example of the consequences of this discrepancy can be extrapolated by the saga concerning predatory pricing. As mentioned before, the fundamental finding of *AKZO* is that the practice of setting prices above AVC, no matter how aggressive, is to be deemed *prima facie* lawful. Nevertheless, in *Irish Sugar* and *Compagnie Maritime Belge*, the Commission concluded that this pricing policy amounted to a violation of Article 102

[168] Commission Decision of 14 December 1985, in *AKZO*, Case IV/30.698, OJ L 374, paragraph 73.
[169] See *supra* (n 117), *AKZO*, paragraphs 71-72.
[170] See *supra* (n 21), page 14.
[171] *Ex multis*, judgment of 28 February 1991, *Stergios Delimitis vs Henninger Bräu AG*, C-234/89, EU:C:1991:91, paragraph 15.

TFUE. Although AG Fennelly referred to this legal uncertainty in his opinion[172] in *Compagnie Maritime Belge*, the CJEU did not address this topic. The unpredictability generated by this inconsistency ultimately resulted in another case*, Post Danmark I*[173], in which a MS's national judicial authority sought clarifications from the ECJ on whether pricing above AVC, but below ATC, could amount to an abuse.

Based on this evidence, it can be safely maintained that, in matters concerning the abuse of dominance, the ECJ has always had continuity as the most compelling outcome of its jurisprudence. For this reason, it has always been reluctant to overrule its past interpretations of such a notion. This tendency to favor incremental refinements is eloquently testified by the *Intel* judgment, to the extent that the CJEU did not abruptly expunge the findings of *Hoffmann-LaRoche*, according to which loyalty rebates must be considered *prima facie* abusive. Indeed, by declaring that its precedent remains good law[174], instead of presenting *Intel* as a departure from its own jurisprudence, the ECJ described its new findings as *"a clarification that filled a gap in the case law"*[175].

On that regard, apart from the respect of the general principles of equality and non-discrimination, the ECJ has shown to be aware that the Commission's policy shift towards undertakings' self-assessment and decentralized enforcement by national authorities can only be pursued by a homogenized interpretation and application of Article 102 TFUE. For the exact same reason, since the adoption of Regulation 1/2003, the preliminary rulings have been used by the CJEU to overcome inconsistencies revolving around the concept of abuse of dominance[176].

The strategic use of the powers conferred upon the ECJ by Article 267 TFUE is eloquently summarized in the abovementioned evolution of approach towards predatory pricing practices, as the question raised by the national judge in *Post Danmark I* helped the ECJ dissipate the tensions between *AKZO*, on the one hand, and *Irish Sugar* and *Compagnie Maritime Belge*, on the other hand.

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[172] Opinion of AG Fennelly of 29 October 1998, [in judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others vs Commission*, Joined cases C-395/96 P and C-396/96 P, EU:C:2000:132], EU:C:1998:518, paragraphs 124-126.
[173] Judgment of 27 March 2012, *Post Danmark A/S vs Konkurrencerådet*, Case C-209/10, EU:C:2012:172.
[174] See *supra* (n 50), paragraph 137.
[175] See *supra* (n 50), paragraph 138.
[176] See *supra* (n 156), pages 14-20.

In the same vein, a higher degree of legal certainty has always been requested by the dominant undertakings as well, which have a right to reasonably anticipate whether a certain practice will be found to violate Article 102 TFUE. In other words, consistency cannot be considered an exclusive priority of the ECJ, as the Commission must also take it into consideration.

For instance, the rationale behind the CJEU's choice to create a legitimate expectation from the stakeholders that the public authority, once manifested a policy stance, will condition its behavior in accordance with it[177], is a direct reflection of this generalized need for continuity.

On that regard, even if the 2009 Guidance Paper's role is limited to the definition of the Commission's enforcement priorities, as the orientation provided therein can offer clarification to dominant undertakings, the ECJ secured the principle of legal certainty by stipulating that an unreasonable deviation from a stated policy position may be voided[178]. This means that the scope of the Commission's margin of operation depends on how much the ECJ decides to constrain it, as it can confine the administrative authority's behavior in several ways.

Indeed, as defining the substance of Article 102 TFUE falls under the scope of the ECJ's exclusive jurisdiction, it is the only one entitled to outline what the agency needs to prove for an abuse to occur. If this is true, the definition of the standard of proof that the Commission needs to meet can only be imposed by the ECJ itself.

At the same time, if the evidentiary standards required by the CJEU are not sufficiently flexible, they may impinge on the effective implementation of competition policy. On that regard, the Policy Brief that the public agency published in March 2023[179] refers to the need of a dynamic and workable approach to the interpretation of Article 102 TFEU.

Such a regime of administrability must not necessarily be at odds with legal certainty. For instance, recognizing that a certain practice is presumptively unlawful ensures

[177] See *supra* (n 50), paragraph 142.
[178] See *supra* (n 50), paragraph 143.
[179] McCallum, Linsey and Others. *A dynamic and workable effects-based approach to abuse of dominance*, Competition Policy Brief No 1/2023.

manageable enforcement, on the one hand, and clarity to the stakeholders, on the other hand.

However, in other circumstances, frictions between administrability and legal certainty may arise, as the dynamism demanded by the Commission could alter the level of reliability of the system, making the ultimate outcome less predictable for the dominant undertakings. On top of that, their defenses could have a negative impact on administrability as well, to the extent that the stakeholders' arguments may be demanding in terms of resources, aggravating the Commission's burden of proof[180].

Finally, what transpires from this analysis is that, while defining the notion of abuse of dominance, several conflicting interests are at stake. From the Commission's perspective, the absolute value is represented by effective enforcement, in the shape of dynamic administrability, whereas the most compelling requirement for stakeholders is legal certainty, which materializes in the quest for predictability.

The pivotal role attributed to the CJEU by the system is to synthesize these legitimate necessities in its jurisprudence, in the name of meaningful judicial review and consistent interpretation of Article 102 TFUE.

Therefore, in the following, the thesis will describe all the methodologies used by the ECJ to fulfill this constitutional duty, dividing its approach into three main periods of evolution, from the early judgments to its latest interpretations, like the one offered in *Unilever*[181]. Indeed, it is primarily through the examination of the development of the jurisprudence on Article 102 TFUE that the legal requirements to establish abuse must be recognized.

[180] See *supra* (n 160), pages 4-6.
[181] Judgment of 19 January 2023, *Unilever Italia Mkt. Operations Srl vs Autorità Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33.

2.5 The traditional era

Although the shaping of the notion of abuse of dominance by the ECJ has been irregular, the scholars have generally divided its jurisprudence into two main periods of evolution[182].

On that regard, while the expression *"traditional era"*[183] represents the time span in which the CJEU followed a formalistic approach, the *"modern era"*[184] refers to the rise of the more economic method of assessment.

However, it is essential to point out that this categorization is only the result of an attempt to simplify the analysis of the concept of abuse. For instance, as the ultimate purpose of the ECJ is guaranteeing consistency and continuity, it cannot be maintained that one period starts where the other ends, because the CJEU has used certain across-the-board principles to build up its case law.

In the name of this sort of legacy, the CJEU has delivered rulings falling under the formalistic era, right after having used the effects-based approach to find an abuse in another judgment. To that extent, an eloquent example is represented by *Post Denmark I* and *Tomra*, which, although published almost simultaneously, encapsulate different methods of assessment. Therefore, as Akman suggested, identifying the evolution of the case law means *"establishing the preponderance of the more or less formalistic approach by determining the dominant trend in the jurisprudence at a given time"*[185].

Moreover, this classification is normally expanded by the doctrine to the Commission's administrative practice as well. Indeed, as observed before, it is possible to identify a pre-modernization period and an economic approach also within the decisions of the administrative authority.

However, although during the traditional era the ECJ upheld the Commission's formalistic approach in virtually all annulment proceedings, it is noteworthy that the overlap between the cycles of decision-making of these two institutions does not amount

[182] See *supra* (n 31), pages 7-28.
[183] See *supra* (n 31), page 7.
[184] See *supra* (n 31), 12.
[185] See *supra* (n 31), page 8.

to a total equivalence of methodology in assessing the abusive nature of the dominant undertakings' practices.

Hence, while the Commission has always favored a soft trigger as benchmark of evaluation, in order to guarantee a high level of administrability, the CJEU has tried to maintain a holistic approach[186].

Finally, in the next sections an accurate analysis of the most relevant characteristics and issues revolving around the traditional era will be conducted.

2.5.1 The rise of the general formalistic principles

As observed before, the early judgments of the CJEU, which encapsulated the first interpretations of the general concept of abuse, were imbued with the ordoliberal thinking. That explains why the formalistic approach did not encompass economic principles to any significant degree.

Indeed, in *Hoffmann-La Roche*, the ECJ stipulated that a dominant undertaking's behavior is to be considered abusive if *"is such as to influence the structure of the market where, (...) the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of such competition"*[187]. As the last sentence of the paragraph indirectly refers to the relevant market's residual competition, the influence of the ordoliberal notion of abuse is undeniable. More precisely, the ECJ used the principle of the concentration of the market as benchmark to assess the abusive conduct of the dominant firm.

However, this passage shows how the conceptualization of abuse is also grounded in another abstract element: the concept of normal competition. Unfortunately, as the latter is not expressly defined by the CJEU, the definition of abuse offered by *Hoffmann-La Roche* generates a different question, instead of answering the one it was supposed to clarify.

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[186] Wardhaugh, Bruce. *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition*, Hart, 2020, pages 40-55.
[187] See *supra* (n 46).

Before this ruling, in *Continental Can*, the ECJ referred to the notion of *"workable competition"*[188] to define the abusive nature of the conduct at stake. Few years later *Hoffmann-La Roche*, in *Michelin I*, the concept of *"undistorted competition"*[189] was used by the CJEU to describe the relevant abuse. Moreover, as *Deutsche Telekom I*[190] and *AstraZeneca*[191] show, in more recent judgments, these previous expressions were gathered under the sole concept of *"competition on the merits"*[192].

However, the vicious circle has not stopped, since the latter notion needs further definition and interpretation as well. On that regard, in his opinion in *Servizio Elettrico Nazionale*, AG Rantos maintained that *"the concept of competition on the merits is abstract (...) and cannot be defined in such a way as to make it possible to determine in advance whether or not particular conduct comes within the scope of such competition"*[193]. Thus, none of these notions, to which the concept of abuse has been repeatedly defined and explained by the ECJ during the traditional era, represents a useful addendum to ascertain what practically constitutes an abuse.

In addition, as anticipated before, the CJEU has also placed upon dominant undertakings a special responsibility not to impair genuine competition in the internal market[194], nevertheless, similarly to the abovementioned expressions, this concept has become a sort of mantra for the ECJ without tangibly contributing to the evolution of the definition of abuse of dominance in any possible way. On that regard, as Article 102 TFUE imposes a legal obligation exclusively on dominant undertakings, the concept of special responsibility adds nothing to further distinguish or qualify the prohibition enshrined in the provision.

Obviously, as correctly pointed out by AG Rantos, the inconsistency revolving around such expressions is indicative of the difficulties encountered by the ECJ in establishing what practically constitutes an abusive conduct[195].

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[188] See *supra* (n 96).
[189] See *supra* (n 36).
[190] Judgment of 14 October 2010, *Deutsche Telekom AG vs Commission*, Case C-280/08 P, EU:C:2010:603.
[191] Judgment of 6 December 2012, *AstraZeneca AB and AstraZeneca plc vs European Commission*, Case C-457/10 P, EU:C:2012:770.
[192] See *supra* (n 190), paragraph 177 and see *supra* (n 191), paragraph 75.
[193] Opinion of AG Rantos of 9 December 2021, in see *supra* (n 25), EU:C:2021:998, paragraph 55.
[194] See *supra* (n 36).
[195] See *supra* (n 193), paragraph 53.

However, filling these apparent empty concepts with meaning is a fundamental starting point for a comprehensive scrutiny of the discipline enshrined in Article 102 TFUE. Hence, this is where this work turns to, beginning with the notion of special responsibility and its further implications.

2.5.2 The "special responsibility" of dominant undertakings and the notion of "super-dominance"

At this point, it is established that, since *Michelin I*, the ECJ has constantly interpreted Article 102 TFUE as placing upon dominant undertakings a special responsibility not to undermine the competitive functioning of the market. It is also clear how the specialty lies in the fact that non-dominant firms are excluded from the prohibition enshrined in the Treaty's provision, thus, the same abusive conduct, perpetrated by a "normal" operator, would be of no interest for the system[196].

In *Compagnie Maritime Belge*, a further distinction was introduced by the ECJ, as it coined the concept of "super-dominance". The latter notion seems to imply that a practice may infringe Article 102 TFUE when performed by a super-dominant market player, but not if the perpetrator is a "regular" dominant enterprise. If this is true, according to the CJEU, the scope of the special responsibility would depend on the degree of the relevant firm's dominance. Hence, some dominant undertakings would have more extended obligations than others[197].

Therefore, the special responsibility of each dominant market player must be taken into consideration individually. The latter consideration was confirmed in *Tetra Pak II*, as the ECJ observed how *"the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case"*[198].

Although this further differentiation might be seen as flowing from Article 102 TFUE, as a sort of natural evolution of the basic distinction between dominant and non-dominant undertakings, the concept of super-dominance is highly problematic. Indeed, it could be used to impose obligations that are rooted in the companies' market position, rather than

[196] At least not the one encapsulated in Article 102 TFUE, because the practice could still be relevant for the law of unfair competition.
[197] Rousseva, Ekaterina. Monti, Giorgio. *The Special Responsibility of Dominant Undertakings*, in see *supra* (n 35), 2022, pages 239-258.
[198] See *supra* (n 123), *Tetra Pak II*, paragraph 24.

in their actual conduct[199]. However, it was already observed how holding a dominant position, even a super-dominant one, is not *ex se* prohibited under ECL.

In *Tetra Pak II*, by holding that *"the quasi-monopoly enjoyed by Tetra Pak on the aseptic markets and its leading position on the distinct, though closely associated, non-aseptic markets placed it in a situation comparable to that of holding a dominant position on the markets in question as a whole"*[200], the CJEU used the undertaking's super-dominance in the aseptic packaging market to assert its special responsibility in a neighboring one, the non-aseptic packaging market. Hence, if Tetra Pak had a "regular" dominant position in in the first market, it would have not been considered dominant in the other one, eliminating *ab origine* any possibility to be prosecuted under Article 102 TFUE. Therefore, here, it seems like the CJEU has established a presumption for which a quasi-monopolistic position in a market can generate dominance in an adjacent one.

Moreover, as anticipated before, the first express reference to super-dominance appeared in *Compagnie Maritime Belge*, as AG Fennelly claimed, in his opinion, that Article 102 TFUE *"cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their super-dominance confers so as to preclude the emergence either of a new or additional competitor"*[201].

Firstly, based on this passage, only monopolistic or quasi-monopolistic positions are to be deemed valid representations of super-dominance. Secondly, as the AG continues to point out how undertakings with this degree of dominance have a *"particularly onerous special obligation"*[202] not to distort competition, it seems that the ECJ's findings in *Tetra Pak II*, according to which the special responsibility is directly proportional to the degree of dominance, are espoused by the AG Fennelly.

A year later, in *Irish Sugar*, the CJEU referred to the defendant's *"extensive"*[203] dominant position, while arguing that a conduct of an undertaking with a high degree of dominance *"must, at the very least, in order to be lawful, be based on criteria of economic efficiency*

[199] Szyszczak, Erika. *Controlling Dominance in European Markets*, Fordham International Law Journal, 2011, pages 1755-1759.
[200] See *supra* (n 198), paragraph 31.
[201] See *supra* (n 172), paragraph 137.
[202] See *supra* (n 201).
[203] See *supra* (n 125), paragraph 189.

and consistent with the interests of consumers"[204]. Here, it can be observed how the ECJ made a step forward, associating huge market power with a responsibility towards consumers.

The Commission has given evidence of its interest in the degree of an undertaking's dominance as well. For instance, in *Football World Cup*[205] and *Deutsche Post*[206], the public authority recognized how the concept of special responsibility must be considered in relation to the level of dominance possessed by the relevant dominant firm.

Moreover, in *Microsoft*[207], considering that the Commission referred to the *"overwhelmingly dominant"*[208] position of the company, testified by a market share of over 90%, as evidence of the existence of a quasi-monopoly, the administrative agency showed how the anti-competitive effects of the enterprise's refusal to give access to interoperability information depended on its special responsibility, derived, in turn, from the super-dominance of the Big Tech. On that regard, the ECJ maintained that the Commission was *"correct to state (...) that that particular responsibility derived from Microsoft's 'quasi-monopoly'"*[209].

The analysis of these cases has unequivocally shown that the concept of super-dominance stems from a formalistic approach, in light of which it is almost like *"the high degree of dominance lowers the threshold for intervention in Article 102 cases"*[210]. This sort of presumption is clearly enshrined in the Commission's decision in *Deutsche Post*, where the agency placed upon the super-dominant player *"a prima facie obligation to ensure that service is provided in a non discriminatory manner"*[211].

Hence, as already anticipated by AG Fennelly in *Tetra Pak II*, *"the risks of being found to be acting abusively are higher due to the effects of a 'super-dominant' firm's conduct*

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[204] See *supra* (n 203).
[205] Commission Decision of 20 July 1999, in *Football World Cup*, Case IV/36.888, OJ L 5, paragraph 86.
[206] Commission Decision of 25 July 2001, in *Deutsche Post*, Case COMP/C-1/36.915, OJ L 331, paragraph 103.
[207] Commission Decision of 24 March 2004, in *Microsoft*, Case COMP/C-3/37.792, OJ L 32.
[208] See *supra* (n 207), paragraph 22.
[209] Judgment of 17 September 2007, *Microsoft Corp. vs Commission*, Case T-201/04, EU:T:2007:289, paragraph 775.
[210] D'Amico, Sophia, Alessia. Balasingham, Baskaran. *Super-dominant and super-problematic? The degree of dominance in the Google Shopping judgement*, European Competition Journal, 2022, page 621.
[211] See *supra* (n 206), paragraph 124.

on the market"[212]. However, market power alone, no matter how vast it is, is not a sufficient indicator of the presence of an abuse.

The incompatibility of the concept of super-dominance under the formalistic era was partially overcome by the transition towards a more economic approach. Indeed, in *TeliaSonera*[213], the AG Mazák and the CJEU contributed to the redefinition of the role of super-dominance.

Firstly, in his opinion[214], AG Mazàk, after having underlined how there is no reference to the concept of super-dominance in the Treaty, stipulated that *"(...) the degree of market power of the dominant undertaking should not be decisive for the existence of the abuse. Indeed, the concept of a dominant position arguably already implies a high threshold so that it is not necessary to grade market power on the basis of its degree"*[215].

Secondly, on the basis of the AG's findings, the ECJ observed how, although the market power of an enterprise is relevant when assessing the lawfulness of conduct under Article 102 TFUE, *"the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists"*[216].

Nevertheless, the irrefutable restriction of the scope and role of super-dominance, operated by the CJEU, was mitigated by the expression *"as a general rule"*, which, according to Jones, Sufrin and Dunne, *"created a caveat that leaves open the possibility for super-dominance to play a role when assessing whether an abuse exists"*[217]. This theory was corroborated by the ECJ itself in *Post Danmark II*[218], as it specified how *"(...) it is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market"*[219].

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[212] See *supra* (n 2), page 193.
[213] Judgment of 17 February 2011, *Konkurrensverket vs TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83.
[214] Opinion of AG Mazàk of 2 September 2010, in see *supra* (n 213), EU:C:2010:483.
[215] See *supra* (n 214), paragraph 41.
[216] See *supra* (n 213), paragraph 81.
[217] Jones, Alison. Sufrin, Brenda, Elizabeth. Dunne, Niamh. *EU Competition Law: Text, Cases, And Materials*, Oxford University Press, 2019, page 369.
[218] Judgment of October 2015, *Post Danmark A/S vs Konkurrencerådet*, Case C-23/14, EU:C:2015:651.
[219] See *supra* (n 218), paragraph 30.

Hence, with the advent of the effects-based approach, the presumption for which a dominant undertaking's special responsibility increases with the degree of its dominance was rejected. The absence of such an association is confirmed by O'Donoghue and Padilla in their economic examination of Article 102 TFUE[220], as they claim how, given that the Treaty's provision makes no reference to varying degrees of dominance and corresponding levels of responsibility, *"there is no obvious or identifiable reason why companies with especially high market shares should have additional duties not applicable to other dominant companies"*[221].

Therefore, at least the two following conclusions can be drawn from the abovementioned change of course:

- Super-dominance cannot be used as a presumption of illegality, but merely as a useful indicator; and
- The notion of special responsibility is a static rather than dynamic concept, as it is intrinsic to the detention of any kind of dominant position and its length is not associated with the degree of dominance.

Some years after *Post Denmark II*, the link between super-dominance and special responsibility was scrutinized by the ECJ in *Google (search)*. On that regard, the ECJ showed an ambivalent approach to these concepts, which is worth mentioning as evidence of a recent trend within the CJEU's jurisprudence to combine formalistic principles with the more economic method of assessment. The result of this latter tendency is what Akman refers to as *"hybrid era"*[222] of the ECJ's case law.

Hence, although the analysis of this expression will be conducted in the following sections, the third main period of evolution of the ECJ's jurisprudence concerning Article 102 TFUE has been accordingly isolated.

Going back to the *Google (search)* ruling, while the ECJ and the Commission did not use Google's super-dominance to prove the existence of the abuse, as it was assessed looking

[220] See *supra* (n 43).
[221] See *supra* (n 43), page 168.
[222] See *supra* (n 31), page 25.

at the economic impact of the anti-competitive effects of the relevant practice, they both referred to the Big Tech's responsibilities deriving from its *"gatekeeper position"*[223].

Considering that the DMA was redacted by the Commission based on the CJEU's findings in *Google (search)*, many scholars have suggested that the notion of Gatekeepers, as well as the peculiar obligations imposed upon them by the Regulation[224], are nothing more than the latest evolution of the concepts of super-dominance and special responsibility in digital markets[225].

If this is true, given that, as it will be examined in the next chapters, the DMA encompasses an *ex ante* typology of regulatory control, the formalistic idea, for which the detention of a super-dominant position can be used as a presumption of illegality, is far from being surpassed[226], quite the opposite, it has been taken to its extreme consequences, at least in digital markets.

Finally, the analysis conducted on the evolution of the concepts of super-dominance and special responsibility perfectly summarizes the tripartition of the EU decision-makers' approach towards the notion of abuse. Therefore, they represent two of the most important leitmotivs of the discipline enshrined in Article 102 TFUE, the comprehension of which is indispensable for a correct interpretation of what amounts to an abusive practice.

As another fundamental *fil rouge* is represented by the traditional dichotomy between by-object and by-effect restrictions, this is where this thesis turns to.

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[223] Hoppner, Thomas. *EU Shopping Judgment: What Does Equal Access to Google's General Results Pages Mean?*, Hausfeld Competition Bulletin, 2021, page 11.
[224] Sauter, Wolf. *A duty of care to prevent online exploitation of consumers? Digital dominance and special responsibility in EU competition law*, Journal of Antitrust Enforcement, 2019, pages 406-414.
[225] Monti, Giorgio. *The General Court's Google Shopping Judgment and the scope of Article 102 TFEU*, Tilburg University, 2021, pages 5-11.
[226] Appeldoorn, Joran. *He Who Spareth his Rod, Hateth his Son? Microsoft, Super-dominance and Article 82 EC*, European Competition Law Review, 2005, pages 653-657.

2.5.3 The absence of by-object restrictions as trigger to the holistic approach of the CJEU

During the traditional era, the ECJ demonstrated to be particularly fluctuating on whether evidence of anti-competitive effects of the dominant undertakings' practices was necessary to establish an abuse. Indeed, while in some judgments the CJEU required their assessment, in others it found an abuse solely because of the specific form of conduct.

For instance, in *Deutsche Telekom I* and *TeliaSonera*, the ECJ held that margin squeeze practices cannot be deemed abusive without proving their anti-competitive effects[227].

Moreover, in *Bronner*[228], the CJEU maintained that, in order for a refusal to deal to amount to an abuse, it must be demonstrated the indispensability of the denied input[229]. Considering that this characteristic can only be shown by proving that the conduct at stake has, at least, the potential to eliminate the market's residual competitive constraints, namely the dominant undertaking's competitors, also in this circumstance the ECJ required evidence of the anti-competitive effects to prove the infringement of Article 102 TFUE.

On the contrary, in *Hoffmann-La Roche*, the CJEU deemed exclusivity agreements and conditional rebates abusive by their very nature[230]. Likewise, in *Michelin I*, the ECJ found a rebate practice to be prohibited solely emphasizing how it constrained the freedom of choice of the dominant undertaking's competitors and customers[231].

On that regard, part of the doctrine has used this line of jurisprudence, in which the benchmark of assessment is totally disconnected from any kind of effect of the conduct, as evidence of an introduction by the CJEU of by-object restrictions[232].

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[227] See *supra* (n 190), paragraph 234 and see *supra* (n 196), paragraphs 61-63.
[228] Judgment of 26 November 1998, *Oscar Bronner GmbH & Co. KG vs Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Case C-7/97, EU:C:1998:569.
[229] See *supra* (n 41), paragraph 41.
[230] See *supra* (n 46), paragraphs 89-90.
[231] See *supra* (n 36), paragraph 73.
[232] *Ex multis*, Witt, Anne. *The More Economic Approach to EU Antitrust Law*, Hart, 2016, pages 310-340 and Colombo, Ibáñez, Pablo. *Beyond the 'more economics-based approach': a legal perspective on Article 102 TFEU case law*, Common Market law Review, 2016, pages 709-710.

Another fundamental ruling, which, *grosso modo*, corroborates this theory, is represented by *British Airways*, as the ECJ expressly held that *"in the Hoffmann-La Roche and Michelin judgments, the Court of Justice found that certain discounts granted by two undertakings in a dominant position were abusive in character"*[233]. Indeed, although the expression *"in character"* is susceptible to many possible interpretations, it appears that the ECJ described the rebate practices in *Hoffmann-La Roche* and *Michelin I* as abusive in and of themselves. Therefore, as Akman suggested, *"this is perhaps the closest the Court came to expressing that certain practices by dominant undertakings are presumptively (i.e. by-object) abusive"*[234]. At the same time, although being more than familiar with the dichotomy between by-object and by-effect prohibitions due to Article 101 TFUE, here, the ECJ refrained from using this kind of lexicon.

Actually, prior to *British Airways*, the CJEU expressly referred to the alleged existence of such a distinction in Article 102 TFUE in a series of rulings. For instance, in *Irish Sugar*, by stipulating that *"(...) the arguments which the applicant draws from the confusion between the object and the effect of the practice in question must be rejected, since, as the Commission emphasizes, Article 86 does not distinguish between the object and the effect and reference is made both to the anti-competitive object and to the anti-competitive effect of that practice in the contested decision"*[235], the CJEU clearly denied this division.

Few years later, based on this finding, in *Michelin II*[236], the ECJ reaffirmed its position, even if in a rather cryptic formula, holding that *"(...) establishing the anti-competitive object and the anti-competitive effect are one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect"*[237].

On that regard, many scholars have observed how the wording of Article 102 TFUE already suggests the absence of such a dichotomy, as there is no reference whatsoever to

[233] See *supra* (n 133), paragraph 61.
[234] See *supra* (n 31), page 10.
[235] See *supra* (n 125), paragraph 170.
[236] Judgment of 30 September 2003, *Manufacture française des pneumatiques Michelin vs Commission*, Case T-203/01, EU:T:2003:250.
[237] See *supra* (n 236), paragraph 241.

either by-object or by-effect restrictions[238]. Hence, if the European legislator intended to differentiate between conduct intrinsically abusive and practices that need an accurate evaluation of their effects to be deemed prohibited, it would have specified it in the letter of the provision, as it did for Article 101 TFUE.

Ascertaining whether the concept of abuse of dominant position encompasses this kind of division is far from being a mere theoretical exercise, as the establishment of the essential legal requirements for a violation to occur under Article 102 TFUE is heavily influenced by this preliminary bifurcation. For instance, the most noticeable implication of the absence of such a dichotomy is that the CJEU can endorse any kind of approach, while shaping the legal boundaries of the notion of abuse, as there is no residual by-object category of violations to be taken into account. To that extent, the progressive departure of the ECJ from the formalistic method of assessment can be considered as a natural consequence of this legal framework.

If this is true, the holistic approach of the ECJ would be triggered exactly by this background, as any new methodology promulgated by the CJEU must be interpreted as the relevant legal assessment of abuse, subject only to the limits that the ECJ itself may deem necessary.

At the same time, it is also important to point out how recognizing the absence of such a dichotomy in the wording of Article 102 TFUE does not mean that the ECJ is prevented from considering certain types of practices *prima facie* abusive, as the CJEU has a wide margin of discretion in the legal definition of abuse of dominance. This line of reasoning is essential to shed light on the rationale behind the abovementioned rulings where the CJEU has deemed a series of dominant undertakings' behaviors presumptively abusive.

Finally, as the ECJ has often employed the notion of competition on the merits to determine if a certain conduct inherently amounts to an abuse, the analysis of the dichotomy between by-object and by-effect restrictions must evolve in the examination of this further concept.

[238] Ezrachi, Ariel. *Article 82 EC: Reflections on its Recent Evolution*, Hart, 2009, pages 130-140.

2.5.4 The concept of "competition on the merits"

As anticipated before, when addressing the notion of abuse, the CJEU has often referred to the concept of competition on the merits as a guide to distinguish between lawful and unlawful conduct.

The rationale behind such a legal assessment is that legitimate expressions of normal competition can be neatly distinguished from violations of Article 102 TFUE. Hence, the context-specific evaluation of a practice is considered unnecessary, as the abuse of dominance represents *"an act that is inherently mischievous or wrongful"*[239].

For instance, in *Hoffmann-La Roche*, the ECJ deemed exclusive dealing and loyalty rebates practices abusive solely because they were found to be intrinsically at odds with normal competition[240]. On the contrary, quantity rebates were identified as a valid expression of competition on the merits[241].

In other words, a method of assessment based on the notion of competition on the merits as benchmark is rooted in the assumption that there is an upstream dichotomy between inherently anti-competitive behaviors and legitimate manifestations of rivalry. If this is true, in order for practice to fall under the first category, it must be shown how its ultimate objective is harmful to competition. In *Hoffmann-La Roche*, for example, exclusive dealing and loyalty rebates were found by the CJEU to be *"designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market"*[242].

Nevertheless, an accurate examination of the jurisprudence shows how the ECJ has progressively moved away from such a neat approach. For instance, in *Magill*[243], a case concerning the alleged obligation upon dominant undertakings to license an intellectual property right, the legal assessment of abuse did not revolve around ascertaining whether the practice could be deemed an illegitimate method of competition. Indeed, the analysis was solely focused on the impact that the refusal would generate on the relevant adjacent

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[239] Colombo, Ibáñez, Pablo. *Competition on the merits*, Common Market Law Review, 2024, page 396.
[240] See *supra* (n 46), paragraph 89.
[241] See *supra* (n 46), paragraph 90.
[242] See *supra* (n 240).
[243] Judgment of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) vs Commission*, Joined cases C-241/91 P and C-242/91 P, EU:C:1995:98.

market[244], as it was proved how conduct would impinge on the emergence of a new product[245].

Likewise, in *Deutsche Telekom*, the decisive factor to consider a margin squeeze conduct abusive was verifying whether it led to exclusionary effects in the relevant environment[246]. Finally, in *Post Danmark I* and *MEO*[247], the CJEU unequivocally held that selective discounts are not inherently abusive, even if they discriminate among purchasers[248], thus, they can only be scrutinized under Article 102 TFEU where they lead to the exclusion of a competitor[249].

The legal uncertainty caused by this friction in the ECJ's case law was finally exposed in *Servizio Elettrico Nazionale*. Indeed, as the Italian *Consiglio di Stato* asked, in essence, whether the concept of abuse should be interpreted as encompassing only practices that are inherently anti-competitive or also normal manifestations of rivalry, it clearly appeared that, after decades of enforcement, it was still unclear what was the role, if any, of competition on the merits in the assessment of abuse of dominance.

Moreover, it is also interesting to observe how *Servizio Elettrico Nazionale* is another example of the systemic use of preliminary references by the ECJ in matters concerning Article 102 TFUE.

Before looking at the solution offered by the CJEU to the inconsistency exposed by this case, an analysis of the relevant background is indispensable. On that regard, if a narrow interpretation of the concept of abuse is to be followed, methods of legitimate competition cannot be caught by the prohibition. On the contrary, under a broad interpretation, normal expressions of competition could still fall within the scope of Article 102 TFEU, if their anti-competitive effects are proven.

Many arguments in support of a narrow understanding of the concept of abuse have been proposed over the years.

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[244] See *supra* (n 243), paragraph 56.
[245] See *supra* (n 243), paragraph 54.
[246] See *supra* (n 190), paragraphs 250-252.
[247] Judgment of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia SA vs Autoridade Tributária e Aduaneira*, Case C-295/17, EU:C:2018:942.
[248] See *supra* (n 173), paragraph 30.
[249] See *supra* (n 247), paragraph 39.

Firstly, it was suggested that prohibiting valid expressions of competition on the merits unfairly penalizes dominant undertakings, as the outperformance of competitors is what the free market is all about.

Secondly, as normal manifestations of rivalry characterize every competitive market, they are constantly perpetrated by both non-dominant and dominant companies. If this is true, prohibiting them as abusive under Article 102 TFUE would discriminate against firms with huge market power, since they would be prevented from using practices that are, instead, open to their rivals, only because of their dominant position. However, dominance is not *ex se* a violation and the special responsibility placed by the ECJ upon dominant firms cannot amount to neat and unjustifiable discrimination.

Finally, the prohibition of a practice which, being a normal expression of competition, envisages pro-competitive gains, is detrimental for both consumers and the whole competitive process. In light of the foregoing, embracing a narrow interpretation of abuse is automatically equivalent to focusing the center of the legal inquiry on whether the behavior is inherently wrongful or abnormal, meaning that it departs from legitimate expressions of competition on the merits.

Therefore, the doctrine has come up with numerous expedients to draw the line between proper manifestations of competition on the merits and improper methods of rivalry.

On that regard, the "no economic sense" test (also known as the "only plausible explanation" argument or the "OPE argument") is a perfect example. Under the latter theory, a dominant firm's behavior is at odds with competition on the merits when it would be irrational, except for its anticompetitive effects[250]. To that extent, the typical circumstance is pricing below AVC, considering that, as explained by Areeda and Turner[251], it is, in principle, irrational for a firm to set prices at that level, unless it has an exclusionary purpose.

Actually, the CJEU seemed to espouse such an approach in *AKZO*, as it stipulated how a *"dominant undertaking has no interest in applying such prices except that of eliminating*

[250] Werden, Gregory. *Identifying exclusionary conduct under Section 2: The 'no economic sense' test*, Antitrust Law Journal, 2006, pages 413-433.
[251] Areeda, Phillip. Turner, Donald. *Predatory pricing and related practices under Section 2 of the Sherman Act*, Harward Law Review, 1975, pages 697-733.

competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss"[252], as well as in *Tetra Pak II*, in so far as it explained how *"prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking"*[253].

The last sentences of these two paragraphs also encompass another important test that has been used as benchmark to distinguish between abnormal and normal expressions of competition, given that they mention the dominant undertakings' losses. Indeed, according to the "profit sacrifice" test, a practice is outside the scope of competition on the merits where it implies a profit sacrifice that is economically justifiable only in light of its anti-competitive effects[254].

Normally, this assessment is based on the comparison of the alleged abusive behavior with another conduct which, although it would entail less sacrifice or no sacrifice at all, does not have the same exclusionary effects[255].

Another way would be establishing that the undertaking has engaged in an anti-competitive strategy with the sole purpose of benefiting from it in the long run, however, here the burden of proof is aggravated by the necessity to show objective evidence of such a scheme[256].

The Commission's decision in *Lithuanian Railways*[257] provides an eloquent example of a successful application of the "profit sacrifice" test, as it concerned a railway operator's strategy to dismantle approximately nineteen kilometers of its network only to prevent one of its customers from changing to a rival. Considering that the conduct at stake, namely the destruction of the tracks, was considered part of a bigger strategy to exclude

[252] See *supra* (n 117), paragraph 71.
[253] See *supra* (n 123), paragraph 41.
[254] Salop, Steven. *Exclusionary Conduct, Effect on Consumers, And the Flawed Profit-Sacrifice Standard*, Antitrust Law Journal, 2006, pages 311-325.
[255] See *supra* (n 254), pages 340-350.
[256] For a complete examination of the necessary requirements to correctly discharge the burden of proof in such peculiar circumstances, see *supra* (n 122), pages 10-15.
[257] Commission Decision of 2 October 2017, in *Baltic Rail*, Case AT.39813, OJ C 383.

a competitor, based on the economic sacrifices undergone by the dominant firm to leave the rival company out, the Commission found a violation of Article 102 TFUE.

Moreover, it is interesting to notice how the common element of these two tests is that, in order to establish the normal or abnormal nature of the relevant conduct, they both use the anti-competitive purpose as a proxy. In other words, in this scenario, the subjective element of abuse, thus, the exclusionary purpose of the practice, is qualifying.

On the contrary, under a broad understanding of the concept of abuse, even if a certain conduct is *prima facie* a legitimate expression of competition on the merits, it can still be deemed abusive. Hence, assessing the normality of a practice is of little to no use for abuse to be detected, as most of the anti-competitive actions perpetrated by dominant undertakings have nothing abnormal or wrongful in and of itself.

If this is true, this broad interpretation entails a total shift in the focus of the legal assessment, as the intrinsic nature of abusive conduct is abandoned to make way for the analysis of its actual or potential effects. Indeed, as most of the practices potentially falling under the scope of Article 102 TFEU do not necessarily have an upstream anti-competitive object and/or effect, a specific evaluation of *"all the circumstances"*[258] becomes indispensable. Obviously, the flip side of the coin is the fact that conduct with pro-competitive effects is not necessarily excluded from the prohibition.

Based on the ECJ's case law, it is safe to say that the narrow interpretation of the concept of abuse belongs to the past, because, particularly in the most recent judgments, the circumstance for which a practice remains inside the boundaries of competition on the merits does not automatically rule out its potential to generate anti-competitive effects.

Thus, considering that, as observed before, under the broad understanding of abuse, the lenses of analysis are pointed at the impact of the practice, the contemporary role of competition on the merits is highly debated.

On that regard, in *Slovak Telekom*, after having specified how a refusal to deal with rivals is *"generally favorable to the development of competition and in the interest of consumers"*[259], the ECJ concluded that such a practice amounts to an abuse of dominant

[258] See *supra* (n 133).
[259] See *supra* (n 117), paragraph 47.

position only in *"exceptional circumstances"*[260], which have nothing to do with its normality, as they revolve around the effects of the conduct on the other players' ability to compete[261]. Here, it is noteworthy that, although the ECJ did not use the concept of competition on the merits as benchmark of legal assessment, it still felt the need to specify how refusals to deal are, at least typically, valid expressions of normal competition.

Against this background, the rationale underpinning the Italian administrative Court's preliminary reference in *Servizio Elettrico Nazionale* is evident. The coexistence of these two methodologies in the CJEU's jurisprudence had caused tensions long enough, thus, it needed to be directly addressed by the ECJ.

Unfortunately, although this ruling solved certain points of law, it provided ambiguous clarifications for others, leaving some issues open to interpretation.

Starting with the fixed points, the ECJ specified that at least two types of conduct are inherently at odds with competition on the merits.

Firstly, specifying that *"any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits"*[262], the ECJ noticed how practices analogous those at stake in *AKZO* are in and by themselves abnormal.

Secondly, as the CJEU went on holding that *"the same applies, as observed by the Advocate General (...), to a practice that a hypothetical competitor– which, although it is as efficient, does not occupy a dominant position on the market in question– is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position"*[263], it can be safely maintained that both the CJEU and AG Rantos observed how practices unavailable to non-dominant competitors are, by definition, outside the scope of competition on the merits, because they represent an exclusive prerogative of the dominant undertaking.

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[260] See *supra* (n 117), paragraph 49.
[261] See *supra* (n 260).
[262] See *supra* (n 25), paragraph 77.
[263] See *supra* (n 25), paragraph 78.

However, as anticipated before, the key question that the ruling was expected to answer is whether the concept of competition on the merits implies an additional burden of proving, in every instance, that the alleged abusive conduct is at odds with normal competition. Although the CJEU did not directly address this issue, it is still possible to extrapolate the correct interpretation from the wording of the ruling.

On that regard, just before describing the two abovementioned scenarios in which there is no doubt that an infringement of Article 102 TFUE occurs, the ECJ pointed out that "*although undertakings in a dominant position can defend themselves against their competitors, they must do so by using means which come within the scope of 'normal' competition, that is to say, competition on the merits"*[264]. Consequently, *"those undertakings cannot make it more difficult for competitors which are as efficient to enter or remain on the market in question by using means other than those which come within the scope of competition on the merits"*[265].

Apparently, one could think that the CJEU stated the obvious, repeating its mantra without enriching in any possible way the notion of abuse, just as it was accused of doing in the early rulings like *Hoffmann-La Roche*. In reality, by strategically placing this specification right before providing two examples of gross and undisputed infringements of Article 102 TFUE, the CJEU intended to show that any conduct that is found abusive is, in and by itself, outside the scope of competition on the merits.

This concept cannot be used as either an exclusive or a cumulative benchmark of legal assessment of abuse, because, taken alone, it is empty. It is a tool used by the ECJ to conceptualize the opposite end of the spectrum of abuse. Thus, when the latter is present, there is automatically no competition on the merits.

If this is true, there is no need to additionally prove that abusive conduct exceeds the boundaries of normal competition, because such a conclusion is implied in the fact that an abuse was actually found. Hence, borrowing the words of Colombo, *"in the current legal landscape, the notion of competition on the merits is, more than anything, an irritant in the case law"*[266].

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[264] See *supra* (n 25), paragraph 75.
[265] See *supra* (n 25), paragraph 76.
[266] See *supra* (n 239), page 395.

However, if this is true, what is an abuse of dominant position still remains highly unclear. The same goes for the correct placement of by-object restrictions within the spectrum of legal assessment.

That is essentially the rationale underpinning the sudden birth of the more economic approach: offering a method of assessment rooted in empirical evidence and irrefutable conclusions. Therefore, the effects-based evaluation of dominant undertakings' practices is what this thesis discusses next.

2.6 The modern era

It was already observed how, since 1990, the Commission started a modernization process towards the enforcement of competition rules. After having completed the renovation of its policy on horizontal and vertical coordination, the focus turned to Article 102 TFEU.

The initial efforts of the administrative authority to renew its approach towards abuse of dominant position are testified by the 2005 policy speech of the former Commissioner Neelie Kroes at the Fordham Corporate Law Institute [267], as she declared that the public agency *"simply want to develop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behavior to make it easier to understand our policy"*[268]. Moreover, having added that the implementation of Article 102 TFUE *"should focus on real competition problems: in other words, behavior that has actual or likely restrictive effects on the market"*[269], it transpires how economic principles have progressively become a valuable instrument to guide the Commission in determining its enforcement policies.

Prior to that, in 2003, the Commission created the post of Chief Competition Economist to have permanent economic expertise within its ranks, while implementing antitrust rules.

However, the most significant feature of this paradigm shift is represented by the swing from the protection of market structure and competitors to the focus on consumer welfare.

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[267] Kroes, Neelie. *Preliminary Thoughts on Policy Review of Article 102*, Fordham Corporate Law Institute, 2005.
[268] The words of the former Commissioner Kroes were taken from Mullin, Sheppard. *Neelie Kroes Speech on Article 82 Policy Review*, Antitrust Law Blog, [November 7, 2005].
[269] See *supra* (n 268).

On that regard, during the abovementioned 2005 Fordham Conference, former Commissioner Kroes maintained that *"the objective of Article 102 is the protection of competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources"*[270]. One year later, the former Director General of DG Competition Philip Lowe noticed how *"competition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare"*[271].

Although the concept of consumer welfare will be meticulously scrutinized in the next sections, it is important to specify that recognizing its central role does not amount to disregarding the protection of the competitive process and its players, as the latter are still functional to the achievement of the first objective. At the same time, the change of course from the formalistic approach is undeniable, because, according to ordoliberal thinking, consumer surplus is a natural consequence of fair and undistorted competition, not the ultimate goal that antitrust rules must pursue.

In other words, going back to the dispute between Joliet and Mestmäcker, it appears that, during the modern era, the theories of the first have, somehow, prevailed over the ordoliberal ideas of the German Professor.

Moreover, regarding the jurisprudence of the CJEU, the Commission itself recognized how the rulings of the ECJ have gone even further than the administrative practice in endorsing an economic approach towards abuse of dominance[272]. Indeed, an accurate overview of the case law shows that, since *Post Danmark I*, the Luxembourg Court has gradually developed an original economically orientated approach to matters concerning Article 102 TFUE.

On that regard, as the interpretation offered by the CJEU in its landmark *Intel* is considered to summarize better than any other judgment this inexorable paradigm shift, the modern era is generally divided into two more sub-categories of evolution of the jurisprudence. While the pre-Intel arc perfectly illustrates how the ECJ has progressively moved away from the pure formalistic benchmarks of assessment, the post-Intel period comprises a series of cases in which the CJEU has clarified the actual range of its findings

[270] See *supra* (n 268).
[271] Lowe, Philip. *Preserving and Promoting Competition: A European Response*, EC Competition Policy Newsletter, 2006, Number 2, Summer.
[272] See *supra* (n 179).

in *Intel*. Indeed, as will be shown in the next sections, the ECJ has referred to the principles set out therein as general statements of the law, expressing the proper interpretation of abuse of dominance[273].

Finally, the analysis of the EU decision-makers' approach during the modern era presupposes a preliminary understanding of the economic theories underpinning such a change of course. For instance, the abovementioned Commission's interest in consumer welfare is the result of the influence of the various schools of thought on the proper economic approach to competition rules, which, even if diametrically opposite on many aspects, have all encompassed special attention for the protection of consumers.

However, as the role of economic analysis in antitrust matters has always been debated, before proceeding with the illustration of its theoretical foundations in cases of abuse of dominance, its correct contextualization within the European framework becomes indispensable.

2.6.1 The proper role of economic analysis

As a starting point, it is essential to observe how *"economic analysis is inescapable in competition law"*[274]. For instance, shaping the boundaries of the notion of abuse of dominant position implies, sometimes even implicitly, a line of reasoning that is economic in nature.

On that regard, a closer look at the overview conducted on the ECJ's jurisprudence up to this point, suggests that the CJEU has employed an economic way of thinking to define rules and standards, long before the rise and shine of the effects-based approach. If this is true, as the case law is imbued with economic arguments, conceptualizing them as an element intrinsically at odds with the legal assessment of the prohibition enshrined in Article 102 TFUE is utterly misleading.

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[273] *Ex multis*, judgment of 18 November 2020, *Lietuvos geležinkeliai AB vs Commission*, Case T-814/17, EU:T:2020:545, paragraph 76 and judgment of 13 December 2018, *Deutsche Telekom AG vs Commission*, Case T-827/14, EU:T:2018:930, paragraph 87.

[274] Colombo, Ibáñez, Pablo. *Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy*, LSE Law, Society and Economy Working Papers, 2014, page 5.

In this context, economics provides a body of knowledge upon which the EU decision-makers can rely while fleshing out antitrust rules, as this operation involves the use of assumptions and presumptions that are inherently economic.

For instance, the jurisprudence of the ECJ provides unequivocal evidence of how mainstream economic analysis has contributed to the shaping of abuse in, at least, three main areas:

- The development of valuable presumptions about the dominant undertakings' motives behind a certain practice;
- The definition of the conditions under which a given conduct is likely to be anti-competitive, irrespective of whether the legal assessment is carried out by reference to its object, its effects or a combination of the two; and
- The creation of benchmarks against which specific behaviors are found abusive.

Regarding the first, as it was already established that, in matters related to Article 102 TFUE, the subjective element must be interpreted objectively, the use of economic tools to ascertain the rationale behind a dominant firm's practice is not at all surprising. Indeed, while discussing the role of intent in cases of abuse of dominance, it was shown how, to a certain extent, there is a sort of overlap between a dominant firm's intention and the economic reasons underpinning its conduct.

Concerning the second, it was previously noticed how the "no economic sense" and the "profit sacrifice" tests share a common philosophy, for which they evaluate, by proxy, whether a given practice has an exclusionary aim[275]. Hence, they represent eloquent examples of the second category, as they have been employed in circumstances where the focus of assessment was far away from the evaluation of the effects of the relevant conduct[276]. To tell the truth, these tests are valuable instances of the first category as well, because the exclusion of a competitor is often the rationale behind the dominant undertakings' illicit practices.

[275] For this reason, they have often been presented as two manifestations of the same idea; on that regard, see *supra* (n 18), page 66.
[276] Indeed, in the previous section, these tests were categorized under the narrow approach towards the concept of abuse of dominance, which is famously disinterested in the effects produced by the relevant dominant undertaking's actions.

Finally, the ECJ's findings in *AKZO* offer evidence of the last main sphere of involvement of economic examination. On that regard, the presumption of illegality of pricing below AVC, as well as the opposite consideration that prices above AVC, but below ATC, are *prima facie* unproblematic, were formulated by the ECJ based on mainstream principles of economics. Moreover, as the common feature of the abovementioned examples is that they all pertain to the first period of evolution of the case law, namely the traditional era, where the focus of the EU decision-makers was not centered on the effects of the abusive practices, they confirm how economic analysis is intrinsically related to any basic assessment of abuse, not only to the so-called more economic approach.

What differs, instead, is the extent of such an analysis, as the weight that the EU decision-makers have attributed to it, while discerning abusive practices from valid manifestations of competition on the merits, has drastically changed over the years.

In addition, in the previous sections, accurate scrutiny of the relationship between the Commission's margin of appraisal and the ECJ's judicial review was conducted. On that regard, it was observed how the more fluctuating the administrative authority's activity is, the less dominant undertakings can predict the prohibited practices and adapt their behavior accordingly. In this context, mainstream economic principles may contribute to guarantee legal certainty, as the CJEU may rely on them to confine the boundaries of administrative intervention in advance, as long as this assessment does not result in limiting the Commission's margin of appreciation.

Once again, the analysis of predatory pricing policies conducted by the CJEU in *AKZO* is an essential source of inspiration. On that regard, while the Commission affirmed that costs were not a *"decisive criterion"*[277] for the application of Article 102 TFUE, the relevant dominant firm considered the public agency's substantive test "*nebulous or at least inapplicable"*[278]. In order to identify the correct legal assessment for predation, the ECJ, starting from the so-called Areeda-Turner test[279], an economic tool with widespread consensus among scholars, described a narrower spectrum of circumstances in which administrative intervention would be justified.

[277] See *supra* (n 117), paragraph 64.
[278] See *supra* (n 117), paragraph 66.
[279] See *supra* (n 251), page 697.

Finally, having in mind the pivotal role played by economic analysis in ECL, it is now possible to focus on the main doctrinal theories that have conditioned the evolution of the EU decision-makers' effects-based approach towards abuse of dominant position.

2.6.2 Main theoretical influences on the more economic approach

As anticipated in the first chapter, the academic debate on the proper role of competition rules in monopolistic or quasi-monopolistic markets initially took place in the USA.

On that regard, the American approach towards abuse of dominance has been heavily influenced by the theories of a group of scholars belonging to the University of Chicago. Indeed, what we generally refer to as the Chicago School is the result of academic theories on antitrust issues coined by professors associated with the economics and law departments of the University of Chicago. This school of thought started to form around the 1950s, reflecting the ideas of Professor Aaron Director.

Even though the Chicago School approach to antitrust is difficult to summarize, as the theories embraced by scholars associated with such a line of thinking are numerous and irregular, there are certain recurrent mechanisms that can be highlighted.

Indeed, rather than articulating a cohesive theory on competition, Professor Director suggested the use of microeconomics to challenge the traditional doctrines, as the starting point of analysis implied a drastic shift of perspective from the structure of the market to the economic entities playing in it[280]. This change of course directly challenged the so-called Harvard School, which endorsed a more structuralist approach, as the focus of its analysis was centered on the concentration of the market[281]. Hence, promoting a *laissez-faire* view of corporate conduct, the Chicago School espoused anti-interventionist ideas, based on the upstream conviction that markets would largely self-correct[282].

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[280] Chilton, Adam. Bradford, Anu. Lancieri, Maria, Filippo. *The Chicago School's Limited Influence on International Antitrust*, University of Chicago Law Review, 2020, page 303.
[281] On that regard, see Gavil, Andrew. Kovacic, William. Baker, Jonathan. Wright, Joshua. *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, West Academic Publishing, 2022, pages 65-73, in which there is an accurate description of how the Chicago School *"altered the terms of antitrust debate"* to include price theory and fundamental concepts such as market power, entry, and efficiency.
[282] Lancieri, Maria, Filippo. *Digital Protectionism? Antitrust, Data Protection and the EU/US Transatlantic Rift*, Journal of Antitrust Enforcement, 2018, pages 30-33.

In order to explain the basic arguments of this group of scholars, this thesis will refer to the ideas sustained by Judges Bork[283] and Posner[284], not only because their role allowed a concrete application of such an approach to competition cases, but also because they were able to formulate rather comprehensive theories.

According to the Chicago School, the primary objective of antitrust policy should be the protection of consumers[285] or, as Judge Bork renamed it, "*total welfare"*[286]*,* as opposed to the protection of *"competition for competition's sake"*[287] and *"small-business welfare"*[288]. In light of the foregoing, sound antitrust policymaking must not aim at redistributing surplus between dominant undertakings and consumers, on the one hand, and customer firms, on the other, as this process must be left for private bargaining[289]. Moreover, for these scholars, price theories are the only efficient proxy to evaluate the companies' competitive behaviors[290]. Hence, except for particularly considerable concentration levels, Courts should refrain from using market shares as benchmark of assessment of the enterprises' dominance[291]. In addition, this minimalist approach, according to which competition policy should solely focus on gross output restrictions that have no justification whatsoever[292] and cause serious harm to consumers by artificially increasing prices[293], was based on the enforcement philosophy for which Type I errors are costlier than Type II ones, given that a free market has strong incentives to self-correct[294].

The backbone of the latter consideration was the faith of these scholars in efficient business conduct and self-correcting markets[295]. This view translated into the central role

[283] Bork, Robert. *The Antitrust Paradox: A Policy at War with Itself*, The Free Press, 1978.
[284] Posner, Richard. *The Chicago School of Antitrust Analysis*, University of Pennsylvania Law Review, 1979 and Posner, Richard. *Antitrust Law: An Economic Perspective*, University of Chicago Press, 1976.
[285] See *supra* (n 284), Posner, Richard. *The Chicago School of Antitrust Analysis*, pages 933-948.
[286] See *supra* (n 283), page 7, in which Bork further specified how "*the only legitimate goal of antitrust is the maximization of consumer welfare"*.
[287] See *supra* (n 285), page 958.
[288] See *supra* (n 285), page 951.
[289] See *supra* (n 283), pages 55-56.
[290] See *supra* (n 281), pages 135-148.
[291] See *supra* (n 285), page 932 and see *supra* (n 283), page 117.
[292] See *supra* (n 283), page 133.
[293] See *supra* (n 284), Posner, Richard. *Antitrust Law: An Economic Perspective*, pages 216-224.
[294] See *supra* (n 285), pages 960-965 and see *supra* (n 283), pages 150-155.
[295] See *supra* (n 280), pages 310-312.

played by efficiency defenses, especially in cases of unilateral conduct[296], as they represent the pillar of the *"rule of reason"*[297] approach, based on which a business practice should never be deemed *ex se* illegal, as it can be justified, if it does not harm consumers and/or if it creates efficiencies[298].

That is also why the intent to exclude competitors must not be regarded as a valuable proxy to assess a violation of competition rules, as such an intention is intrinsic to the very principle of free market[299] and, on top of that, consumers benefit from the exclusion of inefficient rivals[300].

For the same reason, the Chicago School was prone to mitigate the issue of artificial entry barriers, emphasizing the ability of new potential players to face the anti-competitive behaviors of the established firms[301].

Specifically, as Judge Bork maintained that *"if everything that makes entry more difficult is viewed as a barrier, and if barriers are bad, then efficiency is evil. That conclusion is inconsistent with consumer-oriented policy. What must be proved to exist, therefore, is a class of barriers that do not reflect superior efficiency and can be erected by firms to inhibit rivals. I think it clear that no such class of artificial barriers exists"*[302], it can be safely assumed that, for most of the scholars of this school of thought, entry barriers cannot possibly exist[303].

Moreover, these scholars further believed that undertakings cannot obtain or enhance a dominant position through unilateral action, as such an outcome could only be attained at the expense of profits[304]. Hence, considering that monopolists and quasi-monopolists

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[296] Indeed, the Chicago School was responsible for bringing discussions on efficiency back to antitrust policy. For a complete analysis of the evolution of the role of efficiency defenses within global Competition Law, see Williamson, Oliver. *Economies as an Antitrust Defense: The Welfare Tradeoffs*, University of Pennsylvania Law Review, 1968.
[297] See *supra* (n 293), page 194.
[298] See *supra* (n 293), pages 192-198.
[299] See *supra* (n 283), page 39.
[300] See *supra* (n 285), page 968.
[301] See *supra* (n 283), pages 310-329.
[302] See *supra* (n 283), page 319.
[303] For instance, the Chicago School argued that both economies of scale and product differentiation do not give rise to entry barriers.
[304] See *supra* (n 285), page 928.

usually acquire and maintain market power through efficient internal growth, antitrust rules should not obstruct this legitimate process[305].

On that regard, Judge Bork went as far as concluding that exclusionary conduct by dominant firms is a traditional category that does not exist in reality[306]. For instance, according to the Chicago School, there is no such thing as predatory pricing, because, if the predator firm can sustain the initial losses to drive a competitor out, the rival company can also tolerate the induced losses[307]. In addition, predation is generally pro-competitive, as the relevant dominant undertaking's attempt to recuperate its losses, suffered due to the profit sacrifice strategy, will inevitably erode its monopoly position, opening the doors to would-be entrants[308].

At the same time, even if a certain behavior could actually lead to predatory pricing, the considerable number of resources necessary to separate legitimate conduct, such as discounts, from predation, should prevent administrative authorities from focusing their enforcement on this type of practice[309].

The *laissez-faire* view on exclusionary practices also characterizes the approach of the Chicago School on bundling[310], price discrimination and exclusive dealing. Here, the upstream idea is that, when there are potential rivals providing a strong competitive constraint in a given market, aggressive strategies have an efficiency rationale[311].

In light of the foregoing, firstly, bundling is generally employed for price discrimination purposes, rather than exclusionary ones[312]. Secondly, according to the so-called single-monopoly profit theorem[313], an undertaking holding a dominant position in one market

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[305] See *supra* (n 283), page 178.
[306] Moreover, he was also against the so-called "*incipiency"* theories, according to which judicial authorities may be able to identify anti-competitive conduct before it takes place through the analysis of a number of relevant indicators.
[307] See *supra* (n 54), pages 10-12.
[308] See *supra* (n 293), pages 170-180.
[309] See *supra* (n 285), pages 939-940.
[310] This type of practice will be scrutinized in the next chapter; for now, suffice it to say that it consists in selling different items together as a package.
[311] See *supra* (n 281), pages 190-200.
[312] See *supra* (n 283), pages 300-306.
[313] For a complete analysis of this economic theory, see Krattenmaker, Thomas. Salop, Steven. *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, Yale Law Journal, 1986; Elhauge, Einer. *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, Harvard Law Review, 2009 and Hovenkamp, Herbert. *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, 2008.

cannot use discriminatory practice to leverage its position in a secondary market where entry is free[314]. Thirdly, exclusive dealing cannot be employed to drive an efficient competitor out of the market, because, in such a scenario, given that the other companies would need compensation to sign an exclusivity agreement, the output generated by an efficient rival would be too high to be matched[315].

Ironically, even though the Chicago School suggested a paradigm shift, claiming the centrality of the analysis of economic entities' behaviors, these scholars are generally criticized for their lack of understanding of the real mechanisms underpinning the dominant players' actions[316]. Thus, having perfectly competitive markets in mind, they have failed to capture the majority of potential abusive practices that occur in real-life scenarios, characterized by imperfect competition and external conditions[317]. The immediate consequence is that the Chicago School had a biased approach to exclusionary conduct.

On that regard, to a certain extent, even Posner recognized the validity of the abovementioned criticisms, as he proposed a less extreme standard of review of supposedly exclusionary practices that is worth mentioning:

"(...) in every case in which such a practice is alleged, the plaintiff must prove first that the defendant has monopoly power and second that the challenged practice is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor. The defendant can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient"[318].

During the last decades of the XXth Century, while the Chicago School was succeeding in raising the threshold of intervention in American Competition Law, another approach started to catch on among economists and antitrust scholars. These new theories, in line

[314] See *supra* (n 293), pages 76-82.
[315] See *supra* (n 285), pages 942-947.
[316] Hovenkamp, Herbert. *Antitrust Policy After Chicago*, Michigan Law Review, 1985, pages 260-264.
[317] Kovacic, William. *The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, Columbia Business Law Review, 2007, pages 72-80.
[318] See *supra* (n 293), page 195.

with the Chicago School's ultimate purpose of maximizing consumer surplus, suggested new economic perspectives to evaluate the impact of undertakings' behaviors[319].

At the same time, even though we generally refer to this innovative thinking as post-Chicago approach, it is important to underline how, particularly regarding unilateral conduct, its findings significantly differ from the Chicago School's ones. The latter consideration is perfectly testified by the centrality that this new group of thinkers recognized to artificial entry barriers, as the Chicago School denied their very existence.

Concerning exclusionary practices, the post-Chicago approach has shown how, under certain circumstances, such as asymmetric information between firms, predatory pricing can be a strategy aimed at deterring entry, causing serious harm to consumers[320]. Likewise, it has shown that bundling can be employed to exclude a rival from a secondary market, exacerbating price competition[321].

Nevertheless, the post-Chicago approach was based on a series of restrictive presumptions that mitigated the reach of its conclusions. For example, the anti-competitive nature of predation has been accepted only under extreme conditions, and, even when the exclusionary effect of predatory pricing was recognized under more plausible circumstances, it was not associated with setting prices below AVC, which is what really matters in competition cases[322].

Moreover, another crucial limitation is that, when dealing with exclusionary conduct, the post-Chicago scholars have solely considered an elementary scenario in which monopolists and quasi-monopolists face a fixed number of potential entrants or competitors[323], thus, their results on the behavior of dominant firms were extrapolated from simplistic models.

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[319] Hence, also for this group of scholars the focus remained centered on the players of the market, rather than its structure.
[320] Miligrom, Paul. Roberts, John. *Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis*, Econometrica, 1982, pages 443-459.
[321] Whinston, Michael. *Tying, Foreclosure, and Exclusion*, American Economic Review, 1990, pages 837-859.
[322] See *supra* (n 251), pages 725-733.
[323] To that extent, see Avinash, Dixit. *The Role of Investment in Entry-Deterrence*, The Economic Journal, 1980, pages 95-106, on entry deterrence; see *supra* (n 320), on predatory pricing; see *supra* (n 321), on bundling for entry deterrence purposes; see Fumagalli, Chiara. Motta, Massimo. *Exclusive Dealing and Entry When Buyers Compete*, American Economic Review, 2006, pages 785-795 and Abito, Miguel, Jose.

At the same time, they have significantly contributed to the development of mainstream economic analysis in matters concerning Article 102 TFUE, because they were the first to attribute a central role to entry barriers, even though their simplification of the interactions between incumbents and would-be rivals is utterly misleading, as it implies the exclusive existence of exogenous market conditions[324]. However, as most of the current markets are unregulated, endogenous competition represents the real core of economic analysis of abuse of dominance[325].

In addition, as the difference between exogenous and endogenous competition prevalently depends on the notion of barriers of entry, their accurate analysis becomes indispensable. To that extent, it has already been observed how entry barriers represent one of the three dimensions of market structure. Moreover, it was also pointed out that these barriers become problematic for Competition Law only when artificially created or enlarged by the established undertakings.

Against this background, the definition of barrier to entry has been highly debated over the years.

Some scholars have associated this concept with a situation in which firms established in a given market raise their prices above minimal average costs[326], as this circumstance, which generally results in exogenous competition, impedes the entry of potential followers, even if positive gains could still be obtained by new undertakings. On the contrary, other academics defined entry barriers in relation to the costs that must be sustained by would-be entrants, but not by the incumbents[327].

Considering that the second approach has recently prevailed, for the purposes of this section, entry barriers will be defined as the totality of sunk costs that potential competitors must suffer[328], which, as shown before, are above the corresponding costs of

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Wright, Julian. *Exclusive Dealing with Imperfect Downstream Competition*, International Journal of Industrial Organization, 2008, pages 227-246, on exclusive dealing.

[324] See *supra* (n 54), pages 11-13.

[325] Etro, Federico. *Endogenous Market Structures and Antitrust Policy,* International Review of Economics, 2010, pages 9-46.

[326] Bain, Staten, Joe. *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries*, Harvard University Press, 1956, pages 20-60.

[327] Stigler, George. *The Organization of Industry*, University of Chicago Press, 1983, pages 160-190.

[328] Sutton, John. *Sunk Costs and Market Structure: Price Competition, Advertising, and the Evolution of Concentration*, MIT Press, 2007, pages 327-350.

the established enterprises. At the same time, there are the so-called simple fixed costs of entry, which are equally held up by incumbents and followers[329].

The current economic assessment towards abuse of dominance is prevalently based on the analysis of the effects of endogenous competition on market structure, namely its entry barriers, to further verify the impact of undertakings' practices on consumer welfare. Therefore, we generally refer to this recent line of thinking as the endogenous entry approach.

According to the latter, entry should be regarded as endogenous when sunk or fixed costs constrain, endogenously, the relevant firm's position in a certain market, as whether entry is exogenous or endogenous characterizes the way market leaders behave[330].

The typical situation where goods differ in quality and firms compete in price represents the perfect environment to offer evidence of this peculiar link. Indeed, the analysis conducted by Stackelberg[331] on oligopolies with a fixed number of competitors, based on the post-Chicago approach, shows that, when entry is independent from profitability conditions of the market, dominant firms carry out either accommodating[332] or aggressive[333] pricing conducts.

The first scenario occurs when the fixed costs of entry are small, thus, predation would represent an unsustainable sacrifice for any firm, even a dominant one. In this context, prices become a "*strategic complement"*[334], hence, if one company raises them, the other firms will inevitably play along. Moreover, the positive response from the latter undertakings will further push the market leader to increase its prices again, creating a sort of endless circle, based on which, due to this strategic complementarity, the result of the accommodating conduct is aggravated by the rival enterprises' further adaptation[335]. That is also why accommodation is extremely harmful to consumers, considering that

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[329] Baumol, William. Panzar, John. Willig, Robert. *Contestable Markets and the Theory of Industry Structure*, Harcourt College Pub, 1988, pages 10-30.
[330] See *supra* (n 325), pages 13-18.
[331] Etro, Federico. *Stackelberg Competition with Endogenous Entry*, Economic Journal, 2008, pages 1670-1697.
[332] Meaning that they strategically increase their prices to influence their rivals' pricing policies.
[333] Meaning that they set prices that are low enough to drive their competitors out of the market.
[334] Bulow, Jeremy. Geanakoplos, John. Klemperer, Paul. *Multimarket Oligopoly: Strategic Substitutes and Complements*, Journal of Political Economy, 1985, pages 488-511.
[335] Etro, Federico. *Endogenous market structures and the optimal financial structure*, Canadian Journal of Economics, 2010, pages 1333-1352.

competitors are driven to increase their prices as well, rather than compensating for this disequilibrium[336].

The alternative case, instead, occurs when fixed costs are quite high, thus, low prices can drive followers out, given that they are unable to cover their fixed costs. Although predation is initially beneficial for consumers, as it encompasses lower prices, in the long run, after having obtained a monopoly position, the predator will drastically increase its prices to recuperate the losses suffered to exclude the rivals, inevitably jeopardizing consumer welfare[337].

However, the endogenous entry approach has highlighted how not every aggressive pricing policy amounts to predatory conduct. Therefore, the inclination of the post-Chicago approach to see aggressive prices as equivalent to predatory ones generates a distorted association between market leaders' aggressive pricing strategies and abuse of dominance[338].

More precisely, a dominant undertaking faced with the endogenous entry of competitors can only adopt aggressive prices without exclusionary purposes, thus, without harm to consumers, because entry is dependent on profitability conditions of the market[339].

Indeed, it is true that, in endogenous markets, dominant undertakings implement aggressive pricing to increase their position and obtain positive gains, nevertheless, as long as product differentiation remains effective, these practices will mildly restrict entry, rather than driving all rivals out[340]. On top of that, consumers will also benefit from a significant price reduction.

Hence, in this case, the association between aggressive pricing and predation is misleading: if predatory strategies are traditionally considered anti-competitive in nature because they aim to eliminate competition, eventually allowing the dominant firm to impose monopoly prices once competitors have been forced to exit the market, here, it was shown how low-price polices could have limited effects in terms of exclusion, but a

[336] See *supra* (n 331), pages 1675-1680.
[337] See *supra* (n 251), pages 705-712.
[338] Etro, Federico. *Aggressive Leaders*, RAND Journal of Economics, 2006, pages 146-154.
[339] See *supra* (n 338), pages 150-153.
[340] See *supra* (n 335), pages 1342-1348.

significant positive impact on consumers. If the ultimate goal of competition rules is guaranteeing consumer welfare, this efficiency cannot be ignored[341].

A practical example may be useful to test the abovementioned findings. The abusive nature of a monopolist's or quasi-monopolist's behavior competing in a secondary related market prevalently depends on whether competition in the latter is exogenous or endogenous.

Indeed, in the first scenario, bundling will very likely cause the strengthening of the dominant firm's position in the secondary market, driving rivals out. Therefore, the consumers will be harmed because, having monopolized both markets, the dominant firm will presumably trade at monopolistic bundle price.

However, in the second scenario, bundling can only enhance price competition in the secondary market, without inducing the exit of competitors or creating a monopoly or quasi-monopoly position. As competition in prices is generally positive for consumers, here, there are neither exclusionary effects nor harm to consumer welfare.

Moreover, the focus on pro-competitive effects of potential anti-competitive behaviors clearly resembles the Chicago School of thought. At the same time, considering that the starting point of analysis is entry barriers, in line with the post-Chicago thinking, the endogenous entry approach has been considered as the synthesis of the two[342].

Regarding the influences of these theories on policymaking, as it is generally accepted that, in most markets, entry can be considered as endogenous in the medium/long run, but exogenous in the short run[343], the findings of the endogenous entry approach are relevant if antitrust policy is aimed at correcting medium and long run distortions[344].

On the contrary, if policymakers are also interested in correcting short run distortions, the traditional post-Chicago analysis, based on exogenous entry, applies[345]. Nevertheless, in this fundamental upstream decision, the competent authorities should remember the

[341] See *supra* (n 325), pages 37-39.
[342] See *supra* (n 54), pages 14-26.
[343] See *supra* (n 331), pages 1690-1697.
[344] Etro, Federico. *Competition Policy: Toward A New Approach*, European Competition Journal, 2006, pages 45-55.
[345] See *supra* (n 344), pages 29-35.

Chicago School's theories for which market mechanisms are self-correcting in nature, especially when it comes to short run distortions.

Finally, the analysis of mainstream economics has revealed the pivotal role played by the protection of consumers in cases of abuse of dominant position. Therefore, defining what we generally refer to as consumer welfare becomes indispensable.

2.6.3 The notion of "consumer welfare"

Apart from the abovementioned economic theories, the protection of consumers has always formed an integral part of the European debate on competition policy.

For instance, the first Commission's Report on competition policy[346], stated that *"competition policy endeavors to maintain or create effective conditions of competition (…). Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the consumer"*[347].

Nevertheless, as observed before, the EU decision-makers' early interpretation of abuse associated protection of competition exclusively with the protection of economic freedom of market actors. Hence, as the protection of competitors could only be achieved by preventing dominant undertakings from using their market power to undermine the competitive process, during the traditional era, consumer welfare was mainly neglected.

At the same time, in one of its first landmarks, namely *Continental Can*, the ECJ concluded that Article 102 TFUE is undoubtedly aimed at practices which may directly cause damage to consumers[348].

The idea that consumer protection must be conceptualized as an absolute value of ECL is also reflected in AG's Jacobs opinion[349] in *Bronner*, as he observed how *"it is important not to lose sight of the fact that the primary purpose of article 102 is to prevent distortion*

[346] European Commission, *First Report on Competition Policy (annexed to the "Fifth General report on the Activities of the Communities")*, Archive of European Integration, 1971-1972.
[347] See *supra* (n 346), page 18.
[348] See *supra* (n 27), paragraph 26.
[349] Opinion of AG Jacobs of 28 May 1998, in see *supra* (n 228), EU:C:1998:264.

of competition - and in particular to safeguard the interest of consumers - rather than to protect the position of particular competitors"[350].

However, in *British Airways*[351], the CJEU clarified that *"Article 102 EC does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected"*[352]. The same perspective was proposed by AG Kokott as well, indeed, in her opinion[353] in the latter case, she pointed out how protecting competition as such is indispensable, because, when it is damaged, disadvantages for the consumers are inevitable[354].

On the contrary, during the same years, the EAGCP, underling how the protection of consumers *"(...) is all the more important because, in the actual proceedings on a given case, competitors are usually much better organized than consumers. The competition authority receives more complaints and more material from competitors, so the procedure tends to be biased towards the protection of competitors. Developing a routine for assessing consumer welfare effects provides a counterweight to this bias"*[355], offered evidence of the practical necessity of an autonomous assessment of consumer harm.

The brief description of the legal environment revolving around the correct positioning of consumer protection conducted up to this point suggests an ambivalent approach towards the role of consumer welfare. This ambiguity is the result of persistent debates over the correct interpretation of the latter concept.

On that regard, consumer welfare is generally considered the *summa* of three interrelated components[356]:

- *"Value for money"*[357];

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[350] See *supra* (n 349), paragraph 231.
[351] Judgment of 17 December 2003, *British Airways plc vs Commission*, Case T-219/99, EU:T:2003:343.
[352] See *supra* (n 351), paragraph 264.
[353] Opinion of AG Kokott of 23 February 2006, in see *supra* (n 133), EU:C:2006:133.
[354] See *supra* (n 353), paragraph 69.
[355] See *supra* (n 113), page 9.
[356] Cseres, Kati. *The Controversies of the Consumer Welfare Standard*, Competition Law Review, 2007, pages 121-173.
[357] Lindsay, Alistar. *EC Merger Regulation: Substantive Issues*, Sweet & Maxwell, 2003, page 66.

- Consumer choice; and
- Innovation.

Concerning the first, consumer welfare is enhanced if the price of goods/services is reduced, or their quality increased, without any subsequent price increment.

Regarding the second, choice is not valuable in and of itself, however, as consumers have different tastes, consumer welfare grows if they can choose from a larger variety of products/services. Moreover, as this outcome is intrinsically connected to the entry of new competitors and to genuine product differentiation within the market, here, the link with the protection of market structure is evident[358].

Finally, given that consumers may benefit if new products/services are developed, technological innovations are directly proportional to consumer welfare.

Hence, the promotion of consumer welfare has always been one of the aims of ECL. What has drastically changed over the years is the role that the EU decision-makers have attributed to it. Therefore, its examination is exactly where this thesis turns next.

2.6.4 Landmarks of evolution of the Commission's modernization process

As anticipated before, the modernization of Article 102 TFEU represented *"the last frontier"*[359] of renovation for the Commission.

On that regard, in order to guarantee an economic foundation to the innovation process, DG Competition's first Chief Economist, Lars-Hendrik Röller, commissioned a preliminary Report from the EAGCP, in which the group of economists was called to bring the interpretation of abuse of dominance in line with mainstream economics.

As anticipated in the first chapter, the 2005 Report suggested an entirely effects-based approach, rooted in the upstream balance between anti-competitive and pro-competitive effects of dominant undertakings' conducts, to determine an abuse[360]. Moreover, as

[358] Malinauskaite, Jurgita. *The Development of 'Consumer Welfare' And its Application in the Competition Law of the European Community and Lithuania*, International Company and Commercial Law Review, 2007, pages 354-364.
[359] Witt, Anne. *The Commission's Guidance Paper on Abusive Exclusionary Conduct – More Radical Than It Appears?*, European Law Review, 2010, page 219.
[360] See *supra* (n 113), pages 1-8.

enlightened in the previous section, in line with the conventional economic theories, it demanded a paradigm shift towards consumer welfare.

Four months later, the Commission published a Staff Discussion Paper[361], where it suggested new principles for a revised analysis of market leaders' behaviors that may have constituted an exclusionary abuse.

Indeed, although the Paper did not go as far as the EAGCP's proposals, in line with the former Commissioner Kroes's speech at the 2005 Fordham Conference, it encompassed a move towards a more economic approach, rooted in consumer welfare and economic efficiency considerations.

Unfortunately, the document was heavily criticized for its reluctance to abandon freedom-based principles of assessment[362]. In other words, the Paper was deemed to pay lip-service to the protection of consumer welfare[363], as, apart from empty references to the need to evaluate whether a certain conduct harmed consumers, the real emphasis remained on demonstrating harm to competitors and to the market structure they played in.

For instance, it is true that the document mentioned how *"the central concern of Article 82 is foreclosure that hinders competition and thereby harms consumers"*[364], nevertheless, by stipulating that the definition of abuse *"implies that the conduct in question must in the first place have the capability, by its nature, to foreclose competitors from the market"*[365], the Commission unequivocally linked foreclosure effects with harm to competitors, rather than consumers.

More precisely, it is almost like the public authority created a presumption for which harm to competitors necessarily translates into harm to competition, hence, to consumers[366].

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[361] DG Competition, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, 2005.
[362] Akman, Pinar. *Article 82 Reformed? The EC Discussion Paper on Exclusionary Abuses*, Journal of Business Law, 2006, pages 816-829.
[363] Spector, David. *From Harm to Competitors to Harm to Competition: One More Effort, Please!*, European Competition Journal, 2006, pages 145-162.
[364] See *supra* (n 361), paragraph 56.
[365] See *supra* (n 361), paragraph 58.
[366] Korah, Valentine. *An Introductory Guide to EC Competition Law and Practice*, Hart, 2007, pages 140-152.

However, as underlined by Bishop and Marsden, *"that does not constitute an effects-based system"*[367].

Moreover, analogously to what is now Article 101(3) TFUE, the Discussion Paper introduced a system whereby, during the second stage of assessment, the relevant dominant firm/s could provide evidence of valuable efficiency gains to show how there was no adverse impact on competition[368]. Unfortunately, even though it was the first time the Commission accepted the possibility of pro-competitive defenses, its position in the logic of the Paper is an additional confirmation of the mere apparent nature of the abovementioned shift of perspective[369].

On that regard, adopting a consumer welfare standard as principal benchmark of assessment means that a certain conduct can be either pro-competitive or anti-competitive. As, in such a context, the latter scenario occurs when practice is detrimental to consumers, the notion of foreclosure effects must be equated with consumer harm. However, if this is true, having the Commission offered sufficient evidence of detriment to consumers in the first stage of assessment, there would be no place for any sort of efficiency defense by dominant undertakings.

That is also why the Discussion Paper was unable to provide guidance as to the types of pro-competitive gains that may be considered relevant and, on top of that, it ignored the key efficiency arising from a system that revolves around consumer protection, namely, lower prices as final outcome of the dominant companies' actions.

Considering the foregoing, paradoxically, the introduction of efficiency arguments is *per se* sufficient to underline how the document still adopted a concept of exclusionary conduct imbued with traditional principles.

At the same time, although the approach envisaged in the Discussion Paper proved ineffective at best, its role should not be totally diminished, as it represented a

[367] Bishop, Simon. Marsden, Philip. *Editorial: The Article 82 Discussion Paper: A Missed Opportunity*, European Competition Journal, 2006, page 5.
[368] See *supra* (n 361), paragraphs 77-81.
[369] Kokkoris, Ioannis. *A Gap in the Enforcement of Article 82*, British Institute of International and Comparative Law, 2009, pages 90-112.

fundamental step in the recognition of the pro-competitive potential of allegedly abusive conducts[370].

Furthermore, one would be excused to expect that the abovementioned inconsistencies were, *grosso modo*, overcome by the Commission with the 2009 Guidance Paper, as this long-awaited document constituted the last step of the public agency's modernization process of Article 102 TFUE. After all, borrowing the words of Judge Bork, *"antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the point of the law – what are its goals? Everything else follows from the answer we give"*[371].

However, an accurate examination of the Guidelines, as well as the description of the further events revolving around the notion of abuse of dominance, will suggest otherwise.

The Commission presented its findings in the form of a Communication, a soft law instrument such as previously used to introduce the more economic approach to Article 101 TFEU and the Merger Regulation.

Formally, the new document merely spelled out the public agency's enforcement priorities, as it did not explicitly aim either at laying down its understanding of the law or at guiding the MSs' national authorities in their interpretation of Article 102 TFEU[372].

The structure of the Guidance Paper seems to confirm the latter consideration, as, after a series of opening statements on its purpose, it describes and explains the general principles underpinning the rationale behind the Commission's approach to exclusionary conduct. Moreover, the remainder of the Communication describes the application of these principles to common types of abuse, such as exclusive dealing, tying and bundling, predation, as well as refusal to supply and margin squeeze.

At the same time, its importance must not be underestimated, as its scope was not limited to the introduction of econometric analysis within the Commission's decision-making. On that regard, it will be shown how, reducing the range of abuse of dominance, in so far as it declared that the administrative authority shall no longer focus on practices that are

[370] See *supra* (n 367), page 6.
[371] See *supra* (n 283), page 50.
[372] Chirita, Anca. *The EC Commission's Guidance Paper on the Application of Article 82 EC: An Efficient Means of Compliance for Germany?*, European Competition Journal, 2009, pages 677-700.

unlikely to result in direct harm to consumers, it amounted to a significant reinterpretation of the substantive law.

Nevertheless, whereas the document clearly identifies the cases in which the Commission is most likely to intervene as *"those types of conduct that are most harmful to consumers"*[373], it does not specifically enlighten the legal purpose of Article 102 TFEU.

For instance, stipulating that *"article 82 is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers"*[374], the opening statement clarifies how the maximization of consumer welfare must not be deemed as the exclusive objective of the Commission, because the interests of individual companies are relevant as well.

Subsequently, the administrative authority observes how its emphasis *"(...) is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors (...). In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors"*[375].

Hence, if it is true that the public agency refers to the competitive process alongside the mere protection of competitors, consumer welfare is neither mentioned nor depicted as the exclusive goal of Article 102 TFEU. On that regard, the difference with the Discussion Paper is evident, in so far as the latter clearly envisaged consumer protection in its introductory remarks[376].

Therefore, although the fundamental question underlying the reform process was whether consumer harm should be an essential component of the legal assessment of abuse of dominance, the Guidance Paper's opening statements are much less welfare-oriented than expected.

[373] See *supra* (n 12), paragraph 5.
[374] See *supra* (n 12), paragraph 1.
[375] See *supra* (n 12), paragraph 6.
[376] See *supra* (n 361), paragraph 4.

According to the Commission's traditional approach towards abuse, evidence of direct consumer harm was unnecessary[377], as the CJEU had consistently stipulated that the scope of Article 102 TFUE comprised both practices which cause damage to consumers directly and conducts detrimental to them through their impact on *"effective competitive structure"*[378].

Nevertheless, in the first decade of the XXIth Century, this stance was heavily criticized by the doctrine, arguing that a welfare-based competition policy should only target behaviors likely to result in direct consumer detriment[379]. Consequently, in addition to the likelihood of foreclosure effects, the Commission started to provide evidence of consumer harm[380], *"for the sake of completeness"*[381]. At the same time, the ECJ continued to reaffirm its traditional position on the matter[382].

According to the Guidance Paper, *"the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare"*[383]. Hence, given that the notion of anti-competitive foreclosure also embraces consumer harm[384], it can be concluded that the Commission is bound by the Guidelines to enforce the Treaty's provision in a way that ensures that dominant undertakings do not impair effective competition by foreclosing their competitors, which, in turn, would have an adverse impact on consumers.

If this is true, as the absence of an explicit reference to a separate assessment of consumer harm can be reconducted to the reluctance of the CJEU to recognize the necessity of such

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[377] To that extent, see Commission Decision of 20 June 2001, in *Michelin II*, Case COMP/E-2/36.041/PO, OJ L 143, paragraphs 21-24 and Commission Decision of 29 March 2006, in *Tomra*, Case COMP/E-1/38.113, OJ C 219, paragraphs 33-35.
[378] See *supra* (n 46), paragraph 125.
[379] Gormsen, Lovdahl, Liza. *Article 82 EC: Where are we coming from and where are we going to?*, Competition Law Review, 2006, pages 5-25.
[380] To that extent, see Commission Decision of 16 July 2003, in *Wanadoo Interactive*, Case COMP/38.233, paragraphs 332-337 and see *supra* (n 207), paragraphs 702-710.
[381] See *supra* (n 123), paragraph 116.
[382] See *supra* (n 123), paragraph 105.
[383] See *supra* (n 12), paragraph 19.
[384] As the Commission clarifies in the Communication itself, stipulating that *"in this document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers"*.

an autonomous evaluation, the abovementioned dichotomy between the Communication and the preliminary Discussion Paper can be somehow reconciled.

To that extent, the existence of an independent analysis of consumer harm is corroborated by the wording of the Guidelines, which, specifying how *"the identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence"*[385], seem to imply the autonomous nature of such an assessment.

Therefore, although the Commission did not formally reject the interpretation of Article 102 TFEU offered by the CJEU, one cannot ignore the fact that, since the Communication, the public authority has no longer focused its resources on unilateral conduct that is unlikely to result in direct consumer harm.

On the contrary, the Commission has fully retained the Luxembourg Court's concept of dominant undertakings' special responsibility, as it used such an expression in the Communication's opening sentence[386].

However, considering that, as observed in the previous sections, the notion of special responsibility is a product of the ordoliberal thinking, it is generally deemed to be at odds with neo-classical economic theories[387], as it suggests that ethics should play, somehow, a role in the assessment of abuse[388].

Moreover, although the Guidance Paper does not draw remarkable conclusions from this concept, its strategic placement confirms how the document is less welfare-based than expected.

Another fundamental issue addressed by the Communication concerns whether abuse should be established by individually analyzing actual or potential effects, or by reference to general rules and presumptions based on the conduct in question.

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[385] See *supra* (n 383).
[386] See *supra* (n 374).
[387] Amato, Giuliano. *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*, Hart, 1997, pages 65-75.
[388] This argument is based on the centrality recognized by the ordoliberals to the concept of fairness; for a complete analysis of its position within Ordoliberalism, see Deutscher, Elias. Makris, Stavros. *Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus*, Competition Law Review, 2016, pages 181-214.

On that regard, it was observed how, whereas the EAGCP Report undisputably favored the investigation of the relevant practice's effects in every single case, the Discussion Paper, even if it formally espoused the idea of an effects-based approach, was rather ambiguous on the matter.

By contrast, the new Guidelines have practically embraced the philosophy enshrined in the 2005 Report, stating that, as a rule, the Commission is bound to establish the likelihood of anti-competitive foreclosure, by comparing the specific context with an appropriate counterfactual[389].

In order to conduct this analysis, the public authority may rely on the following factors:

- The position of the dominant undertaking;
- The conditions on the relevant market;
- The position of the dominant undertaking's competitors;
- The position of the customers or input suppliers;
- The extent of the allegedly abusive conduct;
- Possible evidence of actual foreclosure; and
- Direct evidence of any exclusionary strategy[390].

At the same time, the document also contains a fundamental exception to this general rule, according to which the Commission will presume the presence of anti-competitive effects, without any economic assessment, *"if it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies"*[391].

Nevertheless, the vagueness of this wording has made it impossible for an undertaking to successfully anticipate the circumstances in which *"anti-competitive effect may be inferred"*[392]. On that regard, if it is true that the administrative authority further specifies how *"this could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a*

[389] See *supra* (n 12), paragraph 20; specifically, the Guidance Paper stipulates that *"the Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure"*.
[390] See *supra* (n 389).
[391] See *supra* (n 12), paragraph 22.
[392] See *supra* (n 391).

customer to delay the introduction of a competitor's product"[393], it is generally accepted that the latter scenarios are not exhaustive[394].

Moreover, as it is totally unclear whether these presumptively abusive practices can be justified, while some scholars have suggested that the Commission introduced the so-called "quick look" test[395] within the European antitrust system[396], others have believed that the public authority had finally recognized the dichotomy between by-object and by-effect prohibitions under Article 102 TFUE[397].

However, as it is impossible to reconduct these instances of intrinsic abusiveness to the categories of conduct that ECJ has found to be abusive *per se*, espousing the latter approach becomes problematic, because the main feature of by-object restrictions is that they are universally recognized as such.

In light of the foregoing, here, if anything, we could observe how there are conducts that the Commission considers presumptively illicit and others that are deemed so by the CJEU, without suggesting any sort of equivalence between the two. An example is indispensable. Although tying has been generally considered by the ECJ as *prima facie* unlawful[398], there is no evidence in the Guidance Paper suggesting that such conduct is so inherently dangerous that the Commission presumes its abusive character, without assessing its likely anti-competitive effects. If this is true, tying cannot be considered a proper by-object restriction, as it is not universally deemed so by all the EU decision-makers[399].

Unfortunately, the Communication's clarifications concerning particular types of practices cannot compensate for this legal uncertainty, as they merely identify a number

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[393] See *supra* (n 391).
[394] More precisely, in see *supra* (n 359), page 228, Witt goes even further suggesting that their presence does not automatically trigger such a presumption.
[395] The American version of the abovementioned *"rule of reason"*, according to which if the defendant offers a legitimate justification for inherently suspect behavior before a court, a more comprehensive (hence costlier) competitive analysis becomes mandatory.
[396] Bourgeois, Jacques. *Ten years of effects-based approach in EU competition law: State of play and perspectives*, BRUILANT, 2012, pages 117-130.
[397] Peeperkorn, Lucas. Viertiö, Katja. *Implementing an effects-based approach to Article 82*, Competition Policy Newsletter, Number 1, 2009, pages 220-245.
[398] *Ex multis*, see *supra* (n 209), paragraph 1353.
[399] This argument is based on the essential premise that, as observed in the previous sections, the wording of Article 102 TFUE does not comprise by-object prohibitions.

of indicators that, in the Commission's view, may make a specific category of conduct more or less likely to produce anti-competitive effects[400].

Furthermore, it appears from the Guidance Paper that the administrative authority shall enforce Article 102 TFUE against price-based behaviors, exclusively if they obstruct competitors that are as efficient as the dominant undertaking[401]. According to the document, this scenario occurs when the dominant undertaking engages in below-cost pricing, as it indicates a profit sacrifice strategy aimed at excluding an equally efficient competitor, which, in turn, cannot supply the targeted customers without incurring a significant loss.

The flip side of the coin is that, if the analysis of the data suggests that equally efficient competitors can compete effectively with the pricing conduct of the market leader, the Commission will presume that the latter is not likely to have an adverse impact on effective competition, thus, it will not intervene.

According to the new Communication, the cost benchmarks that the Commission is likely to use are average avoidable cost (hereinafter "AAC") and long-run average incremental cost (hereinafter "LRAIC")[402].

This new approach, generally referred to as "as efficient competitor" test (hereinafter "AEC test"), is a logical consequence of the welfare-based philosophy underpinning the Guidelines, as it implies the idea that inefficient rivals do not represent competitive constraints worth protecting.

However, after having provided undisputable evidence of the abandon of freedom-orientated principles with the AEC test, *"a brainchild of the Commission"*[403] which represents a great novelty within the European legal framework, the public agency specifies how it *"recognizes that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure"*[404].

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[400] On that regard, see *supra* (n 12), paragraph 45.
[401] See *supra* (n 12), paragraph 23.
[402] See *supra* (n 12), paragraph 26.
[403] See *supra* (n 359), page 235.
[404] See *supra* (n 12), paragraph 24.

According to the majority of the doctrine, this broad dispensation deeply restricted the scope of the AEC test[405], as well as the rationale behind it[406]. At the same time, the Commission justified the exception by recognizing that calculating these cost benchmarks requires a considerable amount of economic expertise and resources. In other words, when there is enough evidence to suggest that a less efficient competitor is also relevant for the assessment, the Commission will gladly refrain from using the AEC test[407].

Furthermore, during the modernization process, the Commission started to consider whether efficiencies could constitute a defense for abusive conduct[408]. On that regard, as observed before, the Discussion Paper made it clear that the public authority began to take pro-competitive effects and objective justifications into account, while implementing Article 102 TFUE, even if in an unsystematic manner. In *Microsoft*, the ECJ espoused this interpretation of the Treaty's provision[409].

Hence, one would be excused to consider that the understanding of efficiency defenses would further progress under the new Communication, nevertheless, the Commission has failed to present a coherent and comprehensive approach towards pro-competitive gains of allegedly abusive practices.

Indeed, according to the new Guidelines, a dominant undertaking may justify its anti-competitive conduct on the ground of efficiencies, if *"the following cumulative conditions are fulfilled"*[410]:

- The efficiencies have been, or are likely to be, realized as a result of the conduct;
- The conduct is indispensable for the realization of those efficiencies;
- The likely efficiencies brought about by the conduct outweigh any likely negative effect on competition and consumer welfare in the affected markets; and

[405] A scope that the Commission itself already limited by providing its necessity only for price-based behaviors.
[406] Fumagalli, Chiara. Motta, Massimo. *Economic Principles for the Enforcement of Abuse of Dominance Provisions*, BSE Barcelona School of Economics Working Papers, 2024, pages 16-19.
[407] At this point, one could question the actual utility of such a costly test. The answer is suggested by the public authority itself, in so far as it specifies that *"vigorous price competition is generally beneficial to consumers"*. Hence, it is indispensable to ascertain whether a pricing conduct is really abusive because, in such a scenario, a false positive decision will be detrimental to consumer welfare, the very goal behind the renovated Commission's enforcement activity.
[408] That was the case in see *supra* (n 380), *Wanadoo Interactive*, paragraphs 305-310; see *supra* (n 207), paragraphs 955-1000 and see *supra* (n 377), *Tomra*, paragraphs 349-355.
[409] See *supra* (n 209), paragraphs 1091- 1096.
[410] See *supra* (n 12), paragraph 30.

- The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition[411].

Differently from the Discussion Paper, in which, similarly to Article 101(3) TFEU, the Commission specified how a dominant undertaking proposing an efficiency defense must be able to provide evidence *"that the efficiencies benefit consumers"*[412], the Guidance Paper does not explicitly require that pro-competitive gains are passed on to consumers.

Likewise, whereas the Discussion Paper, based on the findings of the ECJ in *Irish Sugar*[413], laid down precise coordinates as to how *"the efficiencies generated by the conduct are likely to enhance the ability and incentive of the dominant company to act pro-competitively for the benefit of consumers"*[414], the Communication does not contain any reference to the assessment of the likelihood of efficiencies being passed on.

However, a closer look at the new Guidelines' comments on individual practices suggests that the Commission deemed necessary a certain degree of pass-on, in order to admit an efficiency defense in cases of practices that amount to rebate schemes[415], as well as tying and bundling[416].

Moreover, while spelling out the administrative authority's understanding of the length of the dominant undertakings' burden of proof, the Guidance Paper stipulates that *"it falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, (...), is likely to result in consumer harm"*[417]. Thus, as effects that do not increase or diminish consumer welfare are irrelevant, it can be concluded that the Commission has compensated for the pass-on requirement by stipulating that pro-competitive gains unlikely to be passed on to consumers can never outweigh anti-competitive effects.

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[411] See *supra* (n 410).
[412] See *supra* (n 361), paragraph 84.
[413] See *supra* (n 125), paragraph 189.
[414] See *supra* (n 361), paragraph 87.
[415] See *supra* (n 12), paragraph 46, in which the public agency holds that it *"will consider claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to customers"*.
[416] See *supra* (n 12), paragraph 62, where the administrative authority specifies how it *"will look into claims by dominant undertakings that their tying and bundling practices may lead to savings in production or distribution that would benefit customers"*.
[417] See *supra* (n 12), paragraph 31.

Nevertheless, as the threshold of efficiencies for consumers in individual cases remains a mystery, even though the new Communication represented a further step forward in the evolution of market leaders' efficiency defenses, it cannot be maintained that the document has completely satisfied the pressing quest for legal certainty on the matter[418].

Finally, as argued before, the 2009 Guidance Paper has made it clear how the Commission intends to apply Article 102 TFEU only in cases where the likelihood of direct consumer harm, in addition to the likelihood of foreclosure, can be proved. For this reason, many scholars have considered the document as partially incompatible with the case law[419].

However, as already observed, the Commission was smart enough not to formally describe its understanding of the law with this document. Indeed, although the Guidelines, *de facto*, have substantially reinterpreted the boundaries of Article 102 TFEU, the public authority was strategically careful not to expressly state that the Treaty's provision requires the presence of consumer harm.

In other words, without explicitly challenging the CJEU's interpretation of abuse, the Commission has practically reduced its scope, to bring its approach towards abusive unilateral conduct in line with mainstream economics.

At this point, an accurate analysis of the response of the ECJ to this welfare-orientated process of evolution becomes indispensable, thus, the next section of this thesis tackles this fundamental issue.

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[418] Borlini, Leonardo. *Methodological Issues of the 'More Economic Approach' to Unilateral Exclusionary Conduct. Proposal of Analysis Starting from the Treatment of Retroactive Rebates*, European Competition Journal, 2009, pages 409-420.

[419] On that regard, see Gormsen, Lovdahl, Liza. *Why the European Commission's Enforcement Priorities on Article 82 EC Should Be Withdrawn*, European Competition Law Review, 2010, pages 300-308 and Borlini, Leonardo. *Legal and Economic Appraisal of the 'More Economic Approach' to Unilateral Exclusionary Conduct: Regulation of Loyalty-Inducing Rebates (Case C-95/04p)*, Yearbook of European Law, 2008, pages 445-518.

2.6.5 The effects-based approach of the CJEU

It is generally accepted that the effects-based approach of the CJEU towards abuse of dominance is intrinsically related to the so-called "as efficient competitor" principle (hereinafter the "AEC principle" or the "AEC standard").

On that regard, in *AKZO*[420], *Deutsche Telekom I*[421] and *TeliaSonera*[422], the ECJ has repeatedly employed the impact of the relevant dominant undertakings' practices on *"competitors who are at least as efficient as"*[423] the market leaders, as benchmark of assessment.

Although the abovementioned rulings eloquently testify the early interest of the CJEU in arguments based on the efficiency of the other market players as competitive constraints worth protecting, the AEC standard was effectively formulated by the ECJ in *Post Danmark I*.

To that extent, prefacing that *"competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation"*[424], the CJEU observed how *"Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits"*[425].

Therefore, by acknowledging that the exclusion of less efficient competitors is a normal, if not desirable, expression of the competitive process, as it would be contrary to the very rationale underpinning Article 102 TFEU to penalize market players, even if dominant, which get ahead of their rivals with legitimate manifestations of competition, the ECJ

[420] See *supra* (n 117), paragraph 72.
[421] See *supra* (n 190), paragraphs 177 and 183.
[422] See *supra* (n 213), paragraphs 31-33, 39-40, 43, 63-64, 67, 70 and 73.
[423] *Ex multis,* see *supra* (n 420); see *supra* (n 421), paragraph 183 and see *supra* (n 422), paragraph 31.
[424] See *supra* (n 173), paragraph 22.
[425] See *supra* (n 173), paragraph 25.

espoused the idea that conduct cannot be found to constitute an abuse without an assessment of its exclusionary effects on equally efficient competitors[426].

In other words, the CJEU embraced the more economic approach to Article 102 TFUE, coining the AEC principle and recognizing it as the relevant standard for the detection of abuse. In comparison with the traditional era, the most remarkable consequence of adopting this new methodology is that practices cannot be found abusive merely because of their form or type.

At the same time, part of the doctrine has properly pointed out how the AEC standard can be deemed as a natural evolution of the ECJ's findings prior to *Post Danmark I*[427]. For instance, having the CJEU consistently held that the mere possession of dominance is not an abuse in and by itself, any actual or potential effect must be attributable to a specific conduct [428], for Article 102 TFEU to come into play. In other words, there must be a link between the contentious behavior or strategy and the anti-competitive result. However, when the foreclosure effect is determined by the fact that a rival is less efficient, the latter connection is absent.

Furthermore, the AEC principle is also a pivotal element of a system that elects legal certainty as one of its fundamental values. Indeed, as underlined by the ECJ in *Deutsche Telekom I*, *"while a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are"*[429]. Hence, if it is true that a dominant firm's special responsibility cannot go as far as obliging the market leader to adjust its behavior to a situation, namely the one of its rivals, which cannot be possibly known, the status of competitors cannot constitute the basis for the detection of abuse. To that extent, the AEC standard represents an indispensable safety valve of the system.

In addition to its practical utility as a guide in concrete scenarios, the AEC principle is also a fundamental reminder of the rationale behind Article 102 TFEU, as it presupposes

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[426] Marquis, Mel. Rousseva, Ekaterina. *Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct Under Article 102 TFEU*, Journal of European Competition Law and Practice, 2012, pages 32-50.
[427] Witt, Anne. *The Enforcement of Article 101 TFEU - What Has Happened to the Effects Analysis?*, Common Market Law Review, 2018, pages 417-448.
[428] Or, as observed before, to a set of practices that demonstrate an exclusionary scheme.
[429] See *supra* (n 190), paragraph 202.

the idea that the goal of the prohibition enshrined in the Treaty's provision is the protection of the competitive process, rather than the artificial shaping of markets.

On that regard, as ECL is imbued with free market theories, the proper role of Article 102 TFUE can never amount to selecting which players are worth operating on a certain market, as its ultimate purpose is limited to creating and maintaining genuine competitive conditions for all the entities involved, from the dominant undertakings' rivals to the final consumers.

Although the centrality of the AEC principle in contemporary case law is undisputed, there has been some confusion around it, as it tends to be conflated with the abovementioned AEC test. Nevertheless, being the latter just a manifestation of the former, it has a narrower scope of application.

As observed before, the AEC test is aimed at ascertaining whether a competitor that is as efficient as the dominant firm would be forced to incur a loss as a direct result of the market leader's price-based conduct. For instance, in *TeliaSonera*, in the context of a margin squeeze practice, the ECJ maintained that an abuse of such a typology materializes when *"the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as-efficient as that undertaking to compete for the supply of those services to end users"*[430].

Nonetheless, since *Post Danmark II*[431], the CJEU has consistently noticed how the Commission is not bound to rely on the AEC test as benchmark of assessment of abuse[432]. Indeed, according to the CJEU, anti-competitive effects must be evaluated and established in relation to the relevant factors laid down in *Intel*, which will be scrutinized in the following of this section.

[430] See *supra* (n 213), paragraph 32.
[431] See *supra* (n 218), paragraph 57.
[432] The ECJ has recently reaffirmed this rule in see *supra* (n 181), paragraph 58.

Moreover, as pointed out by Colombo, the AEC test is not sufficient in itself *"to trigger the application of Article 102 TFEU"*[433]. For instance, even when this test offers evidence that a given practice would force an equally efficient rival to sell at a loss, if the scope of the conduct is not significant enough, an abuse will still not be found.

In other words, the AEC test is neither necessary nor sufficient for Article 102 TFUE to come into play.

To the same extent, regarding the concrete application of the AEC principle, the latter has been erroneously confined by part of the doctrine within the mere evaluation of the competitors' efficiency[434].

However, as the fundamental lesson underpinning the AEC standard is the need to establish a proper causal link between the practice and its actual or potential foreclosure effects, such an interpretation unduly reduces its coverage. This argument seems to be corroborated by the so-called counterfactual, one of the possible concrete manifestations of the AEC principle, based on which, without assessing the efficiency of other rivals, it is possible to establish whether the dominant firm itself, fictitiously subject to its own contentious practice, would still be able to compete. Hence, when it is possible to conduct the assessment of abuse of dominance according to a counterfactual analysis, the link requirement is met without engaging in any sort of evaluation of competitors' efficiency.

Furthermore, although the abovementioned case law has represented a fundamental step towards the effects-based approach of the CJEU, the real paradigm shift was triggered by the *Intel* ruling, a watershed in the jurisprudence of the ECJ that *"hit the European competition law community like a bombshell"*[435].

On that regard, sitting as the Grand Chamber, the CJEU quashed the appealed ruling[436], in which the General Court (hereinafter the "GC") had applied settled principles of the case law. Moreover, considering that, as previously observed, up until *Intel*, the Commission had registered a *"staggering"*[437] success rate in Article 102 TFUE, the

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[433] See *supra* (n 160), page 10.
[434] Witt, Anne. *The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?*, Antitrust Bulletin, 2018, pages 172-213.
[435] See *supra* (n 434), page 208.
[436] Judgment of 12 June 2014, *Intel Corp. vs Commission*, Case T-286/09, EU:T:2014:547.
[437] See *supra* (n 43), page 94.

significance of this ruling, as the real turning point of the modern era, is even more remarkable.

On the merits of the judgment, although it has clarified many fundamental points about the actual scope of the prohibition enshrined in Article 102 TFEU, four main lessons can be drawn from its accurate analysis:

- As a matter of principle, Article 102 TFEU is solely concerned with the exclusion of rivals that are as efficient as the relevant dominant firm/s, indeed, the departure of less attractive players from the market is an intrinsic feature of competition on the merits[438];
- For a conduct to be detected under Article 102 TFEU, it is essential to prove its capability to restrict competition. Consequently, if, in the relevant economic, legal and factual context, the latter requirement is not met, a certain practice cannot amount to an abuse of dominance[439];
- Regarding practices *prima facie* unlawful[440], the Commission is not required to prove that they are capable of producing anti-competitive effects, as the threshold of capability is presumed. In other words, in line with Article 101 TFUE, in such cases, the administrative authority can effectively discharge its burden of proof by establishing, to the requisite legal standard, that the conduct has been actually implemented[441]; and
- Dominant undertakings can demonstrate that, in the specific economic, legal and factual scenario, the relevant presumptively abusive behavior is not capable of restricting competition and/or generating foreclosure effects. Therefore, when they successfully rebut the abovementioned presumption of capability, the Commission is automatically compelled to establish that the practice at stake is capable of having anti-competitive effects[442].

[438] See *supra* (n 50), paragraphs 133-134.
[439] See *supra* (n 50), paragraph 138.
[440] Such as exclusive dealing, loyalty rebates, pricing below AVC or tying.
[441] See *supra* (n 50), paragraphs 130-132.
[442] See *supra* (n 50), paragraphs 139-141.

Concerning the first point, after the formulation of the AEC standard in *Post Danmark I*, in *Intel*, the ECJ has made it clear how the latter principle must be understood as the general legal standard of all abuses[443].

This consideration shall not be underestimated, because, only two years before, in *Post Danmark II*, the CJEU held that, due to the specific circumstances of the case, the AEC standard was not to be deemed the relevant benchmark for the assessment of the abusive nature of the practice. Within the logic of the judgment, this was justified by the fact that the regulatory environment *"made the emergence of an as-efficient competitor practically impossible"*[444]. At the same time, the coverage of the ECJ's findings in *Post Danmark II* must be accordingly mitigated by the special scenario underpinning the situation at stake, which the CJEU itself described as *"characterized by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market"*[445].

Moreover, although *Post Danmark II* clearly suggests that exceptions to the application of the AEC principle, as well as of the AEC test, can be recognized, considering that the ECJ has not further addressed this issue, their actual range is still highly debated. On that regard, two possible interpretations may be advanced.

Espousing a narrow understanding of the ruling, one could conclude that departing from the AEC standard is accepted by the CJEU solely due to the existence of a sector specific regime.

On the contrary, as the ECJ underlined how *"in a market such as that at issue in the main proceedings"*[446], the access of would-be rivals *"is protected by high barriers"*[447], one could assume that, irrespective of the regulatory framework, exceptions may be justified by other case-specific factors, first and foremost the features of the relevant market

[443] Wils, Wouter. *The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance*, World Competition: Law and Economics Review, 2014, pages 405-434.
[444] See *supra* (n 218), paragraph 59.
[445] See *supra* (n 444).
[446] See *supra* (n 218), paragraph 60.
[447] See *supra* (n 446).

structure, because, as previously observed, there are several irregular sources of entry barriers.

Regarding the second point, as, in *Intel,* the notion of capability has not been sufficiently tackled[448], the examination of preceding cases becomes indispensable to shed light on the ECJ's findings.

On that regard, although the latter concept had never been precisely defined, the EU-decision makers, sometimes even indirectly or implicitly, had occasionally referred to it. For instance, in *AKZO*, the CJEU observed how prices below AVC *"can drive"*[449] equally efficient rivals out of the market.

Moreover, in its decision in *Tomra*, the Commission drew a neat line between capability, which was considered the relevant threshold required by the ECJ's jurisprudence, and likelihood, a higher standard that the public agency has imposed upon itself to prioritize the most harmful manifestations of abuse[450].

The approach employed by the CJEU in *British Airways* seems to corroborate the administrative authority's view, in so far as, although there were several factors suggesting that an exclusionary effect was unlikely against the specific background at stake, for instance, there was evidence showing how the relevant dominant undertaking's market share had declined during the implementation of the allegedly abusive strategy[451], the CJEU, endorsing the capability standard, completely disregarded them[452].

Conversely, in his opinion[453] in *Intel*, AG Wahl, arguing that more than one judgment of the ECJ gives the impression that the notion of capability had been used interchangeably with the one of likelihood, concluded that the two concepts must be understood as synonymous[454]. More precisely, pointing out how *"the aim of the assessment of capability is to ascertain whether, in all likelihood, the impugned conduct has an anticompetitive*

[448] More precisely, it is almost like the ECJ has taken it for granted.
[449] See *supra* (n 420).
[450] See *supra* (n 377), paragraphs 318-322. Moreover, as observed before, the employment of likelihood by the Commission as the relevant standard for the enforcement of Article 102 TFUE is also testified by the 2009 Guidance Paper.
[451] See *supra* (n 351), paragraph 298.
[452] See *supra* (n 351), paragraphs 316-320.
[453] Opinion of AG Wahl of 20 October 2016, in see *supra* (n 50), EU:C:2016:788.
[454] See *supra* (n 453), paragraph 115.

foreclosure effect. For that reason, likelihood must be considerably more than a mere possibility that certain behavior may restrict competition"[455], AG Wahl linked both capability and likelihood to situations of virtual certainty of foreclosure effects.

However, as the CJEU, in *Intel,* has not conflated the two notions in any way, solely referring to the one of capability, the latter must be distinguished from that of likelihood. Indeed, the threshold of the former being significantly lower than the one suggested by AG Wahl, it can be assumed that the concept of capability can be equated with plausibility, rather than likelihood[456].

Following this line of reasoning, part of the doctrine has gone as far as proposing that, according to the CJEU, it is sufficient to show evidence that the prospected anti-competitive outcome is *"not contrary to logic and experience"*[457] to trigger the application of Article 102 TFUE. Perhaps, the latter consideration is purposely irritating, nevertheless, what is certain is that the standard of capability is met when a foreclosure outcome becomes possible to imagine.

For instance, when a dominant firm sets prices below AVC, the exclusion of rivals is certainly plausible, because, even if the probability of such an outcome may be unlikely in a particular scenario, anti-competitive effects are not implausible in principle.

Furthermore, this interpretation of the notion of capability is also compatible with that line of case law in which the CJEU recognized how *"for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition"*[458].

On the third point, it was already observed how, prior to *Intel*, the CJEU had considered certain practices as presumptively abusive. For instance, in *Hoffmann-La Roche* and

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[455] See *supra* (n 453), paragraph 117.
[456] Venit, James. *The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question?*, European Competition Journal, 2018, pages 172-198.
[457] Kokkoris, Ioannis. Lianos, Ioannis. *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, 2009, page 211.
[458] See *supra* (n 134), paragraph 68; the "tendency" of abusive practices to restrict competition was used by the ECJ as relevant threshold of intervention in *Hoffmann-La Roche* as well: *"these practices by an undertaking in a dominant position (...) tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted"*.

AKZO, the ECJ deemed exclusive dealing and loyalty rebates, on the one hand, and pricing below AVC, on the other hand, as *prima facie* abusive.

Against this background, as, in such cases, it is only logical to presume that the dominant undertakings' practices are, at least, capable of having restrictive effects, the CJEU found unnecessary to require, at least in the first stage of assessment, evidence of the abovementioned effects[459]. In other words, if the presumption of illegality is based on the premise that the only plausible explanation for specific conduct is the restriction of competition or the exclusion of an equally efficient rival, it is only natural to conclude that such outcomes are, at least, plausible.

At the same time, if it is apparent that the practice is incapable of procuring anti-competitive effects, for instance, there is evidence indicating how the relevant dominant firm cannot materially restrict competition, the explanation for the behavior lies somewhere else, namely in the pro-competitive rationale underpinning the practice. In the latter scenario, the presumption laid down in, *inter alia, Hoffmann-La Roche*, according to which the behavior had an anti-competitive purpose, would not hold.

Therefore, coming to the last point, it is not only reasonable, but also necessary, to attribute to the dominant firms the right to prove that foreclosure effects are implausible in the specific environment in which the behavior takes place.

On that regard, *Intel* suggests valuable hints about the type of evidence that dominant undertakings may provide to challenge their conduct's apparent capability to procure anti-competitive effects.

Firstly, the presumption that a practice is capable of having restrictive effects can be rebutted when market leaders, by means of a counterfactual analysis, show how the conditions of competition would have been unaltered with and without the contentious behavior[460].

Secondly, dominant firms may prove that the causal link between their conduct and its restrictive effects is implausible. In other words, according to what has been observed

[459] Peeperkorn, Lucas. *Conditional Pricing: Why the General Court Is Wrong in Intel and What the Court of Justice Can Do To Rebalance the Assessment of Rebates*, Concurrences, 2015, pages 43-66.

[460] See *supra* (n 50), paragraphs 142-144.

before concerning the AEC principle, they can attempt to rebut the presumption of capability by claiming that their practices would not drive equally efficient competitors out of the market[461].

However, it is important to point out how, in both scenarios, the abovementioned defensive arguments do not exclude altogether a finding of infringement, as they merely compel the Commission to investigate other factors which prove to the requisite legal standard that anti-competitive effects remain, at least, conceivable.

For instance, in *TeliaSonera*, the ECJ specified that the abusive nature of margin squeeze practices cannot be completely ruled out when downstream rivals would have positive margins[462]. Likewise, in *Post Danmark II*, the CJEU suggested that, in special circumstances such as the ones at stake in the relevant case, namely when the market position of the operator is both protected and strengthened by exclusive rights granted in a recently liberalized industry, the exclusion of less efficient rivals may still justify intervention under Article 102 TFUE[463].

For this reason, the CJEU has identified additional proxies to be considered in the analysis of the capability of allegedly abusive practices, such as, *inter alia*, the coverage of the practice, the extent of the dominant position and the length of the obligations imposed[464].

Unfortunately, the judgment sheds little to no light on the role of these factors within the market leaders' defensive arguments, however, it is generally accepted that they are not sufficient, in and of themselves, to rebut the presumption of capability.

Indeed, if, as observed above, neither the counterfactual analysis nor the implausibility of a causal relation between the conduct and its restrictive effects are sufficient to automatically rule out the capability, as the Commission would still be entitled to continue its assessment, providing further evidence of foreclosure effects, *a fortiori*, these proxies can never be enough *per se*.

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[461] See *supra* (n 50), paragraphs 145-147.
[462] See *supra* (n 213), paragraphs 96-100.
[463] See *supra* (n 218), paragraphs 72-74.
[464] Nihoul, Paul. *The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?*, Journal of European Competition Law and Practice, 2014, pages 521-530.

Finally, after *Intel*, anti-competitive effects have become a fundamental element of the substantive legal tests shaped by the EU decision-makers to detect abusive practices. Indeed, irrespective of the various expressions that have been employed over the years to refer to the effects generated by an abusive conduct[465], their role in the correct implementation of Article 102 TFUE is crucial. Considering the foregoing, their analysis is where this thesis turns to.

2.6.6 The definition of "anti-competitive effects"

As the effects-based approach towards Article 102 TFUE has been widely implemented for more than two decades, one would be excused to assume that the meaning and scope of the notion of foreclosure effects have been fully teased out.

Unfortunately, this is not exactly the case. Indeed, even though the ECJ has provided seminal clarifications over the years, some aspects, concerning the specific evaluation of effects in concrete scenarios, remain highly debated.

On that regard, the uncertainty surrounding the concept of anti-competitive effects is generally attributed to several interrelated elements.

Firstly, an accurate analysis of the Commission's administrative practice suggests that the public agency has prioritized clear-cut infringements in a significant number of investigations[466]. As such practices are considered *prima facie* unlawful, leaving little to no margin to the evaluation of their impact on competition, their effects play a secondary role in these circumstances.

Secondly, as only a small fraction of the Commission's decisions reaches the CJEU[467], even if the specific context demands a structured analysis of effects, the latter may not be ultimately subject to meaningful judicial review. On that regard, as observed before, in the last few decades, a considerable amount of non-cartel cases has been dealt by the administrative authority through commitment decisions. However, as they do not formally declare that there has been an infringement of Article 102 TFUE, they are

[465] On that regard, both the ECJ and the Commission have interchangeably used the terminologies "anti-competitive effects", "exclusionary effects" and "foreclosure effects" to describe an almost identical outcome.
[466] See *supra* (n 19), pages 30-52.
[467] See *supra* (n 21), pages 10-17.

infrequently challenged before the ECJ[468]. Moreover, as correctly pointed out by Dunne, the use of settlements has progressively grown over the years[469], making the scope of judicial intervention even smaller.

At the same time, as previously examined, since the adoption of Regulation 1/2003, there has been a progressive stream of preliminary references on the interpretation of Article 102 TFUE. Nevertheless, even though they have proved to be a valuable instrument to shed light on the proper meaning of restrictive effects, their very constitutional nature reduces the coverage of their substantial assessment. On that regard, it is important to keep in mind that, as the analysis of the CJEU cannot exceed the relevant factors required by the national judicial authority to solve the concrete case, the extent of the ECJ's findings is, by definition, limited.

Against this background, the notion of foreclosure effects is fragmented at best.

However, as it is still possible to reconstruct it from the case law, which, even if unsystematically, provides the necessary tools to comprehend how effects must be evaluated, an accurate analysis of the ECJ's jurisprudence will suggest that the concept of anti-competitive effects has reached a steady level of understanding.

The notion of foreclosure effects is usually broken down into four interrelated components:

- The time variable;
- The dimensions of competition;
- The meaning of effects; and
- The probability of effects.

Regarding the first component, the evaluation of effects can be based on either the actual or the potential impact of a dominant undertaking's practice on competition. While, in the first scenario, intervention must wait for the conduct to be implemented, in the second case, the Commission can intervene before the manifestation of its consequences.

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[468] Stones, Ryan. *Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law*, Yearbook of European Law, 2019, pages 361-399.
[469] Dunne, Niamh. *From Coercion to Cooperation: Settlement within EU Competition Law*, LSE Law, Society and Economy Working Papers, 2019, pages 20-35.

Hence, whereas the assessment of actual effects is typically retrospective, assessing potential effects normally requires a prospective analysis. However, when the behavior has already been implemented by the market leader, but the effects of its conduct have not been totally expressed, for instance, if the practice is ongoing during the intervention, the Commission may favor a prospective evaluation as well.

On that regard, the ECJ has consistently held that, under Article 102 TFUE, both actual and potential effects are relevant[470]. More precisely, the Commission's failure to establish the actual impact of a practice on competition does not automatically rule out the detection of abuse of dominance, particularly when the evaluation of potential effects is relevant due to the prospective nature of the analysis to be conducted.

In addition, it is noteworthy that there is always a time delay between the adoption of a decision by the public agency and the review of its legality by the CJEU. Consequently, when the ECJ delivers its rulings, it is generally possible to assess whether the potential effects prospected by the administrative authority in its decision are in line with the subsequent developments of reality.

This is extremely important because the new material evidence at disposal of the CJEU may rebut the previsions laid down by the Commission. For instance, in *Michelin II*, although the Commission's assessment showed how the relevant dominant undertaking's practices would have prevented both the entry of would-be rivals and the expansion of established competitors, the latter findings were proven to be false by the subsequent course of events[471].

At this point, the real issue becomes ascertaining whether the review of legality of the public agency's decision by the ECJ can encompass the actual developments following its adoption. On that regard, as, according to the case law, the legality of a Commission's decision must be assessed on the basis of the evidence that is available when adopted[472], the ECJ has excluded the subsequent evolution of the market from the scope of its judicial review.

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[470] On that regard, see *supra* (n 213), paragraph 64 and see *supra* (n 218), paragraph 66.
[471] See *supra* (n 236), paragraphs 235-246.
[472] See *supra* (n 209), paragraph 260.

Actually, in *Microsoft*, the CJEU has gone even further as, specifying how the circumstance for which the events did not unfold as predicted by the administrative authority was irrelevant[473], it concluded that the failed materialization of anti-competitive effects was not determinant for the detection of abuse, in so far as they were still capable to occur[474].

To the same extent, concerning the retrospective analysis, the fundamental issue is ascertaining whether it can be solely based on the practice's potential effects, or it must also consider its actual effects. In other words, here, the relevant question becomes establishing whether evidence concerning the evolution of markets, after the implementation of the practice, can be disregarded by the Commission while adopting its decision.

Indeed, exclusively relying on potential effects means that what we generally refer to as the ex-post counterfactual analysis would be based on hypothetical outcomes, irrespective of material events, instead, if actual effects must be taken into consideration as well, the assessment is confined to the tangible evolution of market conditions.

This issue has been sporadically tackled by the ECJ when providing guidance to national judicial authorities on the analysis of effects in the context of preliminary ruling procedures. On that regard, in *Generics*[475], the CJEU has recently reiterated how *"it is necessary to take into consideration the actual context in which that practice occurs"*[476].

The idea that the observable market developments, at the time of the implementation of the relevant practice, cannot be ignored by the Commission clearly transpires from *Post Danmark I* as well. Indeed, providing clarifications to the domestic court, the ECJ explained how, without evidence of an exclusionary strategy, pricing *"at a level covering the great bulk of the costs attributable to the supply of the goods or services"*[477] must be generally deemed lawful, in so far as it is *"possible for a competitor as efficient as that*

[473] See *supra* (n 209), paragraph 943.
[474] See *supra* (n 209), paragraphs 560-564.
[475] Judgment of 30 January 2020, *Generics (UK) Ltd and Others vs Competition and Markets Authority*, Case C-307/18, EU:C:2020:52.
[476] See *supra* (n 475), paragraph 116.
[477] See *supra* (n 173), paragraph 38.

undertaking to compete with those prices without suffering losses that are unsustainable in the long term"[478].

Hence, engaging in a retrospective analysis of the impact of the conduct at stake, the ECJ observed how the dominant firm's competitor had not been excluded from the market, quite the opposite, it was able not only to maintain its distribution network but also to win two customers back[479]. On that regard, even though the CJEU correctly left the evaluation of further potential anti-competitive effects to the court making the reference, it noted how the latter evidence constituted a strong indicator that the practice did not display exclusionary effects.

Therefore, the abovementioned jurisprudence dealing with the prospective analysis of potential effects is inapplicable to instances in which the evaluation is retrospective in nature.

Furthermore, as anticipated before, the impact of a certain conduct on competition must be practically assessed against a benchmark. In other words, as the allegedly affected competition needs to be given a concrete meaning, the most widespread tool to establish anti-competitive effects is the so-called counterfactual, which is generally defined as the hypothetical evaluation of the conditions of competition that would have existed, without the implementation of the allegedly abusive practice by the market leader/s.

Considering its characteristics, the counterfactual comprises an analysis of the relevant economic and legal context, including factors such as the features of the relevant market or the regulatory conditions, if any, in which firms operate. Such an assessment entails two main implications: on the one hand, as anticipated before, it is necessary to establish a causal link between the practice and any actual or potential effect, on the other hand, a conduct that is necessary to attain a pro-competitive aim may not be considered to restrict competition.

[478] See *supra* (n 477).
[479] See *supra* (n 173), paragraph 39.

The first consequence is clearly enshrined in *Post Danmark II*, as the ECJ maintained that anti-competitive effects *"must not be of purely hypothetical"*[480] nature and must be *"attributable to Post Danmark"*[481], namely the dominant undertaking involved.

Concerning the second consequence, arguing that if the counterfactual shows how the practice in question is objectively necessary to attain a pro-competitive aim, the latter will not amount to a restriction of competition, is quite an impactful consideration, as it implies the expansion of the range of defensive arguments at disposal of dominant undertakings. Indeed, the notion of objective necessity normally pertains to Article 101(1) TFUE rather than Article 102 TFUE.

Nevertheless, the relevance of the objective necessity test in cases of abuse of dominance can be drawn from at least two elements:

- Since the early interpretations of the concept of abuse, express references to objective necessity can be found in the case law of the CJEU[482]; and
- As Colombo observed, given that there are a significant number of instances where the same conduct has been subject to both Articles 101 and 102 TFEU[483], it would be odd to imagine that the same practice could be justified under the first provision and considered abusive under the second at the same time[484].

In light of the foregoing, if the outcome of the counterfactual proves that the conditions of competition would have improved because of the dominant firm's practice, the latter will avoid the finding of abuse on objective necessity grounds.

This is even more remarkable if one considers that the possibility to invoke objective necessity is distinct from objective justification and/or efficiency arguments, as the former

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[480] See *supra* (n 218), paragraph 65.
[481] See *supra* (n 218), paragraph 47.
[482] In particular, see judgment of 3 October 1985, *SA Centre belge d'études de marché - télémarketing (CBEM) vs SA Compagnie luxembourgeoise de télédiffusion (CLT) and SA Information publicité Benelux (IPB)*, Case 311/84, EU:C:1985:394, paragraph 27, in which, observing how *"an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition from such undertaking"*, the CJEU has made it clear that an abuse can be justified on objective necessity grounds.
[483] For instance, see *supra* (n 129), paragraph 33 and see *supra* (n 475), paragraph 146.
[484] Colombo, Ibáñez, Pablo. *Anticompetitive Effects in EU Competition Law*, Journal of Competition Law and Economics, 2020, pages 27-29.

concerns the first stage of assessment. In other words, whereas the latter two can come into play only after the initial finding of abuse by the Commission, namely the first stage of assessment, defenses based on objective necessity can inhibit the investigation upstream.

Furthermore, as the counterfactual has both an ex-ante and an ex-post dimension, it is essential to understand whether they are both relevant for the assessment of abuse. On that regard, when conducting such an examination, one must proceed from the assumption that most of the dominant undertakings' practices both create and restrict competition, as they generally procure both pro-competitive and foreclosure effects.

For instance, the invention of innovative technology may create a new market or, at least, intensify competition in an existing one, hence, it can surely be deemed pro-competitive. However, if the dominant firm responsible for its development refuses to share its innovation with would-be rivals, from a purely ex-post perspective, it would restrict competition, in so far as it would generate an entry barrier.

At this point, deciding whether both the ex-ante and the ex-post dimensions are relevant for the counterfactual evaluation of effects becomes indispensable for the proper detection of abuse of dominance. Indeed, if only the ex-post dimension is relevant, the abovementioned behavior certainly creates anti-competitive effects. Nevertheless, when the ex-ante dimension is also considered, the pro-competitive gains resulting from the counterfactual may outweigh the exclusionary effects.

On that regard, the ECJ's jurisprudence on refusals to deal perfectly summarizes the role that ex-ante considerations play under Article 102 TFUE. Indeed, evaluated ex-post, any refusal by a vertically-integrated enterprise to deal with a would-be entrant has anti-competitive effects. Nonetheless, in *Magill*[485], *Bronner*[486] and *IMS Health*[487], the CJEU has consistently deemed such a conduct abusive solely in exceptional circumstances, as imposing a generalized obligation upon market leaders to give access to their innovations would hinder their incentives to invest.

[485] See *supra* (n 243), paragraphs 74-77.
[486] See *supra* (n 228), paragraphs 39-42.
[487] Judgment of 29 April 2004, *IMS Health GmbH & Co. OHG vs NDC Health GmbH & Co. KG.*, Case C-418/01, EU:C:2004:257, paragraphs 34-43.

The latter consideration seems to be espoused by AG Jacobs in his opinion in *Bronner*, as he stipulated that, in such cases, concentrating on the observable ex-post analysis alone, disregarding the pro-competitive rationale underpinning refusals to deal, ultimately leads to less competition, as innovation is generally understood as one of its fundamental elements[488].

Therefore, according to the CJEU, both the ex-ante and the ex-post dimensions of the counterfactual are relevant for the assessment of abuse.

Concerning the second component, it has already been observed how inter-brand and intra-brand levels are the two possible dimensions of competition. On that regard, while inter-brand competition refers to the rivalry that exists among enterprises at a given level of the value chain, thus, between the different suppliers of a given product/service, intra-brand competition is the rivalry that exists among the distributors or retailers of a particular brand of a given product/service.

As specified before, every competition system is based on an upstream decision on whether both dimensions of competition are relevant. In addition, if the two are both taken into consideration, a choice concerning their hierarchy is essential as well. On that regard, as inter-brand competition is universally deemed more important, it can be expected that, even when both are relevant, the focus will be on the rivalry that exists among the producers/providers of a certain good/service.

In *Consten-Grundig*[489], the CJEU has unambiguously held that ECL is not only concerned with inter-brand competition, but also with the intra-brand dimension[490].

About the third component, the assessment of the impact of a practice on competition is intrinsically related to the very definition of effects. On that regard, when analyzing the possible meanings of effects, it is helpful to imagine a horizontal spectrum with two opposite ends.

Indeed, while conceptualizing effects as a mere competitive disadvantage or a simple limitation of a firm's freedom of action would make the establishment of abuse

[488] See *supra* (n 349), paragraphs 63-67.
[489] Judgment of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH vs Commission*, Joined cases 56 and 58/64, EU:C:1966:41.
[490] See *supra* (n 489), paragraph 342.

omnipresent, equating them with harm to consumer welfare would significantly raise the bar of intervention. Hence, whereas virtually every practice that captures the attention of the Commission places rivals at a competitive disadvantage and/or restricts their freedom of action, proving consumer harm requires evidence that the practice has been detrimental to consumers in terms of prices, output, quality of products/services or innovation, an exercise that is particularly costly.

Furthermore, between these two ends, it is possible to isolate, at least, two other points along the spectrum.

Firstly, next to the competitive disadvantage and/or the restriction of competitors' freedom of action, effects can be equated with harm to the market structure in which the conduct is implemented. In this case, the evaluation of effects will focus on their impact on the dominant undertaking's rivals. Secondly, if the analysis is further refined, effects can be associated with their impact on equally efficient firms.

On the first end of the spectrum, an accurate overview of the case law leads to the conclusion that the exclusionary effects of a market leader's practice cannot be deduced from a competitive disadvantage and/or a limitation of a firm's freedom of action, as the CJEU has consistently observed how, in order to establish anti-competitive effects, it is indispensable to ascertain whether a practice makes it *"more difficult or impossible"*[491] for would-be rivals to enter the market and/or for established undertakings to compete. For instance, in *Deutsche Telekom I*, after having specified how margin squeeze practices, which automatically place rivals at a competitive disadvantage by forcing them to set prices below AVC, are not abusive in nature[492], the ECJ maintained that their exclusionary effects must be established in light of their impact on the relevant market[493].

Likewise, in *Generics*, the CJEU observed how a pay-for-delay agreement falls under the scope of Article 102 TFUE only when its effects go beyond the mere impact it has on the other market players' freedom of action[494]. Moreover, in *MEO*, the ECJ unequivocally

[491] *Ex multis*, this expression was used by the ECJ in see *supra* (n 133), paragraph 68; see *supra* (n 190), paragraph 177; see *supra* (n 213), paragraph 63 and see *supra* (n 218), paragraph 31.
[492] See *supra* (n 190), paragraph 250.
[493] See *supra* (n 190), paragraph 254.
[494] See *supra* (n 475), paragraphs 161 and 172.

held that *"the mere presence of an immediate disadvantage (...) does not, however, mean that competition is distorted or is capable of being distorted"*[495].

In the same vein, about the second end of the spectrum, the ECJ's jurisprudence suggests that, as a matter of principle, evidence of direct harm to consumers is not a necessary requirement for foreclosure effects to exist.

On that regard, it was already observed how arguments revolving around consumer welfare tend to consider that the elimination of competitive pressure, namely a source of rivalry, is insufficient to trigger intervention under Article 102 TFUE, in so far as it would be necessary to provide additional evidence that the reduction of the competitive constraint is detrimental to consumers[496].

Nevertheless, the CJEU has repeatedly clarified that ECL is also concerned with *"competition as such"*[497], thus, the market structure alone. For instance, in *British Airways*, the ECJ has reiterated that, in order to be deemed abusive under Article 102 TFUE, there is no need for a practice or a strategy to harm consumers[498].

At the same time, an accurate analysis of the case law suggests that there is at least one circumstance in which direct evidence of consumer harm is required by the ECJ to establish an abuse of a dominant position.

Indeed, in *Magill* and *IMS Health*, regarding a refusal to license an intellectual property right (hereinafter "IPR"), the CJEU has directly linked the finding of abuse to the circumstance for which *"that refusal is preventing the emergence of a new product for which there is a potential consumer demand"*[499]. However, as will be examined in the next chapter, these cases represent an exception to the general rule of assessment, as they demand a further qualified requirement for an abuse to be found.

On the last component, during the analysis of *Intel*, the probability threshold has already been mentioned as a crucial factor in the definition of anti-competitive effects, as antitrust

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[495] See *supra* (n 247), paragraph 26.
[496] Akman, Pinar. *'Consumer' Versus 'Customer': The Devil in the Detail*, Journal of Law and Society, 2010, pages 315-344.
[497] See *supra* (n 38), paragraph 63.
[498] See *supra* (n 133), paragraphs 105-108.
[499] See *supra* (n 243), paragraph 54 and see *supra* (n 487), paragraph 38.

rules are triggered by practices that have, at least, some sort of probability of affecting competition.

Once again, it is useful to imagine the existence of a spectrum with two opposite ends, however, this time vertical. While setting the probability threshold at a low level results in finding foreclosure effects in virtually every scenario, positioning the bar at a high level amounts to finding the lawfulness of practices in almost any circumstance. In other words, whereas, in the first case, the necessity to show restrictive effects would become a formality, in the second case, the Commission would be required to offer irrefutable evidence of the practice's negative impact on competition.

At the low end of the spectrum, there is what we generally refer to as plausibility[500], given that *"this threshold is met as soon as one can identify a credible mechanism through which the impact on competition can be manifested"*[501]. On the contrary, at the high end of the spectrum, the threshold of certainty, or quasi certainty, of effects can be found.

Between these two ends, it is also possible to identify an intermediate level that is widely known as likelihood, which is met every time there is evidence that the impact on competition is more likely than not to occur.

As already pointed out above, extrapolating the relevant threshold from the case law is complicated, because the ECJ has employed several expressions over the years to refer to it.

Indeed, apart from the abovementioned apparent overlap between capability and likelihood, the CJEU has also referred to the *"risk of elimination of competition"*[502] and the *"liability"*[503] of exclusionary effects.

This inconsistency clearly transpires from the opinions of the AGs as well, indeed, while, as noticed before, AG Wahl, in his opinion in *Intel,* has favored a certainty or quasi

[500] Which, as observed in the previous section, corresponds to the notion of capability implemented by the ECJ.
[501] Colomo, Pablo, Ibáñez. *The future of Article 102 TFEU after Intel*, Journal of European Competition Law and Practice, 2018, page 298.
[502] See *supra* (n 209), paragraphs 560-564.
[503] Judgment of 4 October 2011, *Football Association Premier League Ltd and Others vs QC Leisure and Others and Karen Murphy vs Media Protection Services Ltd*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 140.

certainty threshold[504], only two years before, in her opinion[505] in *Post Danmark II*, AG Kokott had suggested that anti-competitive effects would be established when their presence *"appears more likely than its absence"*[506], thus, espousing the likelihood threshold.

In any case, it was already observed how, according to the ECJ, in principle, the plausibility of restrictive effects is sufficient to trigger the application of Article 102 TFUE.

In addition, a different but interrelated issue to anti-competitive effects concerns the notion of appreciability. On that regard, if a threshold of appreciability is introduced, apart from showing that the dominant undertaking's practice would have a negative impact on competition, the Commission would be additionally required to prove how the latter is so serious to trigger the enforcement of the Treaty's provision.

The concept of appreciability is intrinsically related to the meaning that is attached to the concept of effects, for instance, if effects are equated with consumer harm, an appreciable practice is one that hinders, above a certain level, the elements of which consumer welfare is composed of. Nevertheless, according to a solid line of case law, the appreciability requirement depends on the market power enjoyed by the undertaking/s involved[507].

Against this background, in *Post Danmark II*, the CJEU has unequivocally ruled that, in the name of the principle of dominant undertakings' special responsibility, under Article 102 TFUE, *"fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified"*[508].

More precisely, using the words of the ECJ, *"since the structure of competition on the market has already been weakened by the presence of the dominant undertaking"*[509], as a fundamental precondition for an abuse of dominance to be detected is the substantial

[504] See *supra* (n 453), paragraphs 112-121.
[505] Opinion of AG Kokott of 21 May 2015, in see *supra* (n 218), EU:C:2015:343.
[506] See *supra* (n 505), paragraph 82.
[507] On that regard, see judgment of 9 July 1969, *Franz Völk vs S.P.R.L. Ets J. Vervaecke*, Case 5-69, EU:C:1969:35, paragraphs 5-7, in which, exclusively for matters concerning Article 101 TFUE, the ECJ has coined the *de minimis* doctrine, linking the appreciability of the relevant agreement's effects with their significant impact on competition, on the basis of the market position of the entities involved.
[508] See *supra* (n 218), paragraph 73.
[509] See *supra* (n 218), paragraph 72.

market power enjoyed by its perpetrator, *"any further weakening of the structure of competition may constitute an abuse of a dominant position"*[510], because, in such a scenario, any *"anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition"*[511].

Hence, under Article 102 TFUE, any anti-competitive effect is appreciable. If it is true, it is not necessary for the Commission to additionally prove that foreclosure effects are significant, as, in matters concerning abuse of dominance, once shown, they are appreciable by definition[512].

Finally, the shaping of the notion of anti-competitive effects has represented a real revolution for the definition of abuse, indeed, as previously observed, the ECJ has employed the general statements of the law enshrined in *Intel* to refine the scope of the necessary legal assessment of allegedly abusive practices.

Considering that the latter operation was conducted by means of the judgments delivered after this watershed of the modern era, their accurate analysis becomes indispensable for the purposes of this thesis.

2.6.7 The post-Intel rulings

As anticipated before, the paradigm shift in the approach of the ECJ towards abuse of dominance, legitimized by *Intel*, has continued in cases following this landmark, as they have established the true significance of the principles enshrined therein. More precisely, what transpires from an accurate analysis of the subsequent case law is that the findings of the ECJ in its watershed of the modern era have been employed to deal with all types of practices that trigger the application of Article 102 TFUE[513].

For instance, in *Generics*, the ECJ maintained that if a conduct *"is to be characterized as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects (...) and that assessment must be*

[510] See *supra* (n 509).
[511] See *supra* (n 508).
[512] For a complete examination of the appreciability requirement and the implications of its absence in matters concerning abuse of dominant position, see Colombo, Ibáñez, Pablo. *Appreciability and de minimis in Article 102 TFEU*, Journal of European Competition Law and Practice, 2016, pages 1-22.
[513] This is particularly evident in see *supra* (n 247), paragraph 31, in which the CJEU has transposed the general statements of the law enshrined in *Intel* even to a case concerning an exploitative abuse, recognizing their universal application to all practices that fall under the scope of Article 102 TFUE.

undertaken having regard to all the relevant facts surrounding that conduct"[514]. This argument is even more remarkable if one considers that, although the case concerned a non-price-based behavior, namely a pharmaceutical pay-for-delay agreement, in order to corroborate its conclusions, the CJEU has cited its previous jurisprudence on pricing conduct[515], unequivocally testifying how the approach enshrined in *Intel* is a valuable guide for all sorts of abuse.

Likewise, in *Slovak Telekom*, the ECJ has reiterated how dominant undertakings' practices *"can constitute a form of abuse where they are able to give rise to at least potentially anticompetitive effects, or exclusionary effects, on the markets concerned"*[516].

Moreover, in *Servizio Elettrico Nazionale*, specifying how *"given that the abusive nature of a practice does not depend on the form it takes or took, but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts"*[517], the ECJ has gone even further, by openly rejecting a form-based approach in favor of an effects-based analysis, conducted in light of *Intel*.

In addition, in its preliminary ruling, the CJEU has, once again, reaffirmed not only that the relevant effects are those *"capable of producing an exclusionary effect in respect of competitors that were at least as efficient as the undertaking in a dominant position"*[518], but also that *"such effects must not be purely hypothetical"*[519].

Furthermore, in *Unilever*, confirming how the *"clarification"*[520] offered in *Intel* applies to exclusive dealing conducts, hence, by implication, to non-pricing practices[521], the ECJ has demonstrated, even if indirectly, how the effects-based approach must be adopted for all exclusionary abuses[522].

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[514] See *supra* (n 475), paragraph 154.
[515] Specifically, its findings in see *supra* (n 213), paragraphs 64, 66 and 68, in relation to a margin squeeze practice.
[516] See *supra* (n 117), paragraph 51.
[517] See *supra* (n 25), paragraph 72.
[518] See *supra* (n 25), paragraph 71.
[519] See *supra* (n 25), paragraph 70.
[520] See *supra* (n 181), paragraph 50.
[521] See *supra* (n 181), paragraphs 49 and 52.
[522] See *supra* (n 181), paragraph 59.

Moreover, in the latter judgment, by stipulating that *"a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition"*[523], the CJEU has reiterated that, under Article 102 TFUE, the relevant threshold of probability of anti-competitive effects is the one of capability.

Another example that brilliantly testifies the total incorporation of the ECJ's findings in *Intel* within the subsequent case law concerning abuse of dominance is represented by the *Google (Search)* judgment, as the CJEU has repeatedly held that *"in order to find that Google had abused its dominant position, the Commission had to demonstrate the – at least potential – effects attributable to the impugned conduct of restricting or eliminating competition on the relevant markets, taking into account all the relevant circumstances, particularly in the light of the arguments advanced by Google to contest the notion that its conduct had been capable of restricting competition"*[524]. Based on the latter assessment, the ECJ partially annulled the Commission's decision[525], as it had failed to show how the specific conduct *"has had – at least potential – anticompetitive effects in the relevant market or markets"*[526].

Similarly, in *Intel RENV*[527], the GC, following the ECJ's *Intel* ruling, after having conducted a substantive legal assessment of the Commission's decision[528], found that the administrative authority had failed to adequately prove the foreclosure effects of the

[523] See *supra* (n 181), paragraph 62.
[524] See *supra* (n 47), paragraphs 441 and 518.
[525] See *supra* (n 47), paragraph 459.
[526] See *supra* (n 47), paragraph 438.
[527] Judgment of 26 January 2022, *Intel Corporation Inc. vs Commission*, Case T-286/09 RENV, EU:T:2022:19.
[528] See *supra* (n 527), paragraphs 507, 512 and 521, according to which the public authority did not properly consider the relevant criterion relating to the share of the market and, additionally, did not correctly analyze either the duration or the amount of the contested rebates.

contested conduct[529]. For that reason, the public agency's decision was ultimately overturned by the GC[530].

Less than one year later, in *Qualcomm*[531], another Commission's decision on Article 102 TFEU was quashed on appeal by the ECJ. To that extent, after having repeated how for a conduct *"(...) to be characterized as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects, and that assessment must be undertaken having regard to all the relevant facts surrounding that conduct"*[532], the CJEU has found that, although the Commission had analyzed the dominant undertaking's practice's foreclosure capability[533], its examination failed to take certain fundamental factual elements into consideration[534], ultimately providing an insufficient evidentiary basis for an abuse to be properly detected[535].

Likewise, in both *Google (Android)*[536] and *Bulgarian Energy Holding*[537], the principles enshrined in *Intel* were applied by the CJEU to set aside the respective Commission's decisions, as they had failed to establish the anti-competitive effects of the relevant allegedly abusive conducts on equally efficient competitors to the sufficient requisite legal standard[538].

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[529] See *supra* (n 527), paragraph 526, in which, specifically, the GC observed how *"(...) the Commission is not in a position to determine that the applicant's rebates and payments at issue were capable of having or likely to have anticompetitive effects and that they therefore constituted an infringement of Article 102 TFEU"*.

[530] See *supra* (n 527), paragraphs 527 and 529-530; in reality, although the GC annulled the entire fine, the part of the decision involving Intel's behaviors consisting in making payments to Original Equipment Manufacturers to delay, cancel or restrict the launch of products with AMD chips was not quashed, as the dominant undertaking's practices were considered naked abuses, thus, gross violations of Article 102 TFUE. Moreover, as the Commission has appealed the GC's ruling in *Intel RENV* and has, subsequently, delivered another decision, reimposing a fine for the abovementioned naked restrictions of competition, which, in turn, Intel has appealed, this saga is far from being concluded. On that regard, as the two appeals are still pending, it will be interesting to see the future developments of this never-ending case, in order to monitor its impact on the effects-based approach, as well as its implications for the notion of abuse of dominance itself.

[531] Judgment of 15 June 2022, *Qualcomm, Inc. vs Commission*, Case T-235/18, EU:T:2022:358.

[532] See *supra* (n 531), paragraph 355.

[533] See *supra* (n 531), paragraphs 344-345, 368 and 411.

[534] See *supra* (n 531), paragraphs 415, 417 and 450.

[535] See *supra* (n 531), paragraphs 462, 505, 507 and 511.

[536] Judgment of 14 September 2022, *Google LLC and Alphabet, Inc. vs Commission*, Case T-604/18, EU:T:2022:541.

[537] Judgment of 25 October 2023, *Bulgarian Energy Holding and Others vs Commission*, Case T-136/19, EU:T:2023:669.

[538] On that regard, see *supra* (n 536), paragraphs 795-802, from which it transpires how the ECJ has partially annulled the Commission's decision and see *supra* (n 537), paragraphs 952-953 and 1259-1260, where it is apparent that the ECJ has totally demolished the administrative authority's decision.

Finally, from an accurate overview of ECJ's jurisprudence subsequent to *Intel*, the three following conclusions can be drawn:

- The *Intel* ruling has irreversibly transformed the substantive legal assessment of abuse of dominant position;
- Through the principles enshrined in *Intel*, the ECJ has progressively promulgated a uniform approach to Article 102 TFUE that must be applied to all types of abuse, even exploitative ones; and
- The new notion of anti-competitive effects has significantly aggravated the Commission's burden of proof, consistently raising the minimum threshold of detection[539].

Nevertheless, the post-Intel judgments present a hidden systemic ambiguity that testifies how, even in contemporary times, the definition of abuse of dominant position is far from being unproblematic.

Therefore, the critical analysis of this new ambivalent approach of the ECJ towards Article 102 TFUE is where this thesis turns to.

2.7 The hybrid era

In her opinion in *Post Danmark II*, AG Kokott suggested that *"(...) the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law"*[540].

On the contrary, in his opinion in *Intel*, AG Wahl noticed how *"given its economic character, competition law aims, in the final analysis, to enhance efficiency"*[541].

The tension between these two conflicting views on the proper interpretation of Article 102 TFUE perfectly summarizes the expression *"hybrid era"*[542], coined by Akman in

[539] Indeed, in the last decade, thus, since *Intel*, the ECJ has overturned more Commission's decisions than in the first forty years of application of Article 102 TFUE.
[540] See *supra* (n 505), paragraph 4.
[541] See *supra* (n 453), paragraph 41.
[542] See *supra* (n 222).

reference to the latest developments of the ECJ's jurisprudence in cases concerning abuse of dominance.

Indeed, although, in *Intel*, the CJEU has clearly espoused a more economic approach, mainly disregarding AG's Kokott suggestions in *Post Danmark II*, it did not go as far as legitimizing AG's Wahl perspective either.

This peculiar scenario seems to be corroborated by the post-Intel judgments, in which the ECJ, remaining loyal to the effects-based analysis of allegedly abusive conducts, has frequently referred to many principles of the traditional era, such as competition on the merits[543] and dominant undertakings' special responsibility[544]. More specifically, it is almost like the CJEU has unified the form-based and the effects-based approaches, mixing its findings during the formalistic era with the ones of the case law's modern period of evolution.

For instance, in *Servizio Elettrico Nazionale*, by stipulating that *"any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits"*[545], the CJEU has defined what does not constitute competition on the merits on the basis of an economic description[546].

On that regard, one year later, this position has appeared to be taken to its extreme consequences by the ECJ, in so far as, in *Unilever*, it observed how an *"abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, or*

[543] *Ex multis*, see *supra* (n 25), paragraph 41 (more precisely, in this preliminary ruling, the concept of competition on the merits is mentioned more than sixteen times in a total of twenty-three pages) and see *supra* (n 181), paragraph 36.
[544] Among many, see *supra* (n 117), paragraph 40 and see *supra* (n 527), paragraph 116.
[545] See *supra* (n 25), paragraph 77.
[546] For the sake of completeness, it is also noteworthy that the understanding of the notion of competition on the merits proposed by the ECJ in its preliminary ruling very much resembles the rationale underpinning the abovementioned "no economic sense" test.

where that conduct was based on the use of means other than those which come within the scope of 'normal' competition, that is to say, competition on the merits"[547].

In other words, in this preliminary ruling, the CJEU seems to accept the peaceful coexistence of formalistic principles of assessment and mainstream economic analysis under the umbrella of Article 102 TFUE. However, as correctly pointed out by Akman, *"many of these 'legacy' rules and concepts make awkward bedfellows with an economic, effects-based approach"*[548].

At the same time, the actual range of the ECJ's findings in *Unilever* must be accordingly mitigated, as, less than one year later, in *European Superleague Company*[549], although the CJEU has recognized how the renovated economic description of competition on the merits has a general scope[550], hence, can be applied to both pricing and non-pricing conducts, it has mostly abandoned that openness towards the old-fashioned form-based approach[551].

Moreover, it is also interesting to observe how, in *Servizio Elettrico Nazionale*, maintaining that *"the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalize abuse of a dominant position within the internal market or a substantial part*

[547] See *supra* (n 181), paragraph 39.
[548] See *supra* (n 31), page 25.
[549] Judgment of 21 December 2023, *European Superleague Company, S.L. vs Unión de Federaciones Europeas de Fútbol (UEFA) e Fédération internationale de football association (FIFA)*, Case C-333/21, EU:C:2023:1011.
[550] See *supra* (n 549), paragraphs 123-128.
[551] See *supra* (n 549), paragraph 129, in which, specifically, the ECJ held that *"in order to find, in a given case, that conduct must be categorized as 'abuse of a dominant position', it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market(s) concerned (…), or by hindering their growth on those markets, although the latter may be either the dominated markets or related or neighboring markets, where that conduct is liable to produce its actual or potential effects"* and paragraph 130, where the CJEU has subsequently pointed out how *"that demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must however be made in the light of all the relevant factual circumstances (…), irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects"*.

of that market"[552], the CJEU has addressed the protection of consumer welfare[553] as the final goal of the prohibition enshrined in Article 102 TFUE.

On that regard, although this statement clearly demonstrates the adhesion of the ECJ to a more economic approach towards abuse, interestingly enough, the CJEU has, immediately after, specified that *"a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could impair (…), an effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers"*[554]. Hence, here, the ECJ appears to mix its effects-based approach with the mantra of safeguarding an effective competitive market structure[555].

At the same time, given that the protection of consumers must be regarded as the ultimate objective of Article 102 TFUE, *"the dominant undertaking concerned may nevertheless escape the prohibition laid down in Article 102 TFEU by showing that the exclusionary effect that could result from the practice at issue is counterbalanced or even outweighed by positive effects for consumers"*[556].

Thus, the CJEU has envisaged an objective justification, namely pro-competitive gains for consumers, which is clearly inspired by the principles of the modern era, to exclude the application of Article 102 TFUE in cases of practices that impair the effective competitive process of the market, an idea of abuse that is imbued with formalistic legacy concepts.

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[552] See *supra* (n 25), paragraph 46.

[553] In reality, the understanding of consumer welfare in *Servizio Elettrico Nazionale* must be correctly interpreted as referring to customer welfare, since it includes the well-being of both intermediary and final consumers. For an in-depth examination of the main implications of such a distinction, see *supra* (n 496), pages 325-337.

[554] See *supra* (n 25), paragraph 47.

[555] Indeed, as previously analyzed, the protection of the competitive process has long resided in the jurisprudence of the ECJ, as it unequivocally indicates a formalistic approach that, irrespective of the final outcome of the practice, such as lower prices or higher outputs, solely focuses on the structure of the market; to that extent, see *supra* (n 46), paragraph 91; see *supra* (n 117), paragraph 69 and see *supra* (n 218), paragraph 26.

[556] See *supra* (n 554). More specifically, as the ECJ, in see *supra* (n 552), held that *"an undertaking in such a position may show that an exclusionary practice escapes the prohibition laid down in Article 102 TFEU by, inter alia, demonstrating that the effects that could result from the practice at issue are counterbalanced or even outweighed by advantages in terms of efficiency which also benefit the consumer in terms of, specifically, price, choice, quality or innovation"*, this is only one of the possible objective justifications permitted under Article 102 TFUE.

Furthermore, apart from providing clear evidence of the ECJ's latest tendency to conflate the traditional with the modern and vice versa, as mentioned above, the abovementioned passages of *Servizio Elettrico Nazionale* also shed light on both the CJEU's understanding of consumer welfare and its correct positioning within the assessment of abuse. On that regard, it cannot be denied that, as the Commission in its 2009 Guidance Paper, the CJEU has unequivocally observed how consumer protection must be regarded as the ultimate purpose of Article 102 TFUE, as well as of ECL in general.

Nevertheless, the ECJ has also made it clear that evidence of harm to consumers is not an indispensable requirement for an abuse to be found. If it is true, then the so-called "consumer welfare" test, according to which a conduct would be abusive every time its net impact on consumers is negative, can be employed, if at all, as a benchmark of assessment, rather than as an all-encompassing test.

In addition, although the main advantage of such an approach is that the lawfulness of conduct would be evaluated against a concept that, as already observed, has solid roots in mainstream economic literature, it is not simple to administrate. Indeed, as it requires the case-by-case balancing of exclusionary and pro-competitive effects of the relevant dominant undertaking's practice at stake, it intrinsically demands a costly exercise, in terms of resources[557].

In other words, according to the ECJ, more than a valuable criterion to evaluate whether a specific conduct amounts to an abuse, the protection of consumers must be regarded as a subtended aim that all institutions involved, including the CJEU itself, shall have in mind while interpreting and implementing Article 102 TFUE.

In addition, the latest developments of the ECJ's approach towards by-object restrictions, in matters concerning abuse of dominance, provide a further valuable indicator of the main characteristics of the case law's hybrid era.

On that regard, in *Google (Search)*, the ECJ has unequivocally held that *"(...) unlike Article 101 TFEU, Article 102 TFEU does not distinguish forms of conduct that have as*

[557] These can be considered to be the main features of such an approach to abuse of dominance, however, for a detailed analysis of this topic, see Salop, Steven. *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, Loyola Consumer Law Review, 2010, pages 336-353.

their object the prevention, restriction or distortion of competition from those which do not have that object but nevertheless have that effect"[558].

Starting from the latter premise, the CJEU has further inferred that *"(...) a practice cannot be categorized as abuse of a dominant position unless it is demonstrated that there is an anticompetitive effect, or at the very least a potential anticompetitive effect, although, in the absence of any effect on the competitive situation of competitors, an exclusionary practice cannot be classified as abusive vis-à-vis those competitors"*[559].

Similarly, in *Intel RENV*, by specifying how *"(...) although a system of rebates set up by an undertaking in a dominant position on the market may be characterized as a restriction of competition, since, given its nature, it may be presumed to have restrictive effects on competition, the fact remains that what is involved is, in that regard, a mere presumption and not a per se infringement of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to examine whether there were anticompetitive effects"*[560], the ECJ has reiterated that by-object restrictions are to be placed outside the scope of Article 102 TFUE.

The latter position was further corroborated by the ECJ in *Unilever*, as, affirming that *"(...) although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic, as, moreover, is illustrated by the Communication from the Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings"*[561], it has clarified how no conduct, irrespective of its apparent abusive nature, must be deemed automatically prohibited, thus, considered as a by-object restriction.

Nevertheless, quite shockingly, in *European Superleague Company*, the ECJ maintained that a *"conduct may be categorized as 'abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding*

[558] See *supra* (n 47), paragraph 435.
[559] See *supra* (n 526).
[560] See *supra* (n 527), paragraph 522.
[561] See *supra* (n 181), paragraph 51.

potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation"[562]. On top of that, in the following passages, the CJEU has also referred to *"(...) conduct which (...), by its very nature infringes Article 102 TFEU"*[563].

Although the ECJ's findings must be accordingly mitigated, as an accurate analysis of the whole judgment suggests that, in its logic, there is no place for an authentic dichotomy between by-object and by-effect violations[564], this unexpected reference to the existence of by-object restrictions cannot be blatantly ignored. Indeed, it represents an additional testimony of the ambivalent approach of the ECJ towards Article 102 TFUE during the contemporary hybrid era.

Finally, as observed before, the CJEU has undoubtedly become more economically orientated in its approach, thus, more demanding of the Commission, in terms of evidence triggering the finding of abuse of dominance. On that regard, if it is true that, considering the abovementioned constitutional framework surrounding Article 102 TFUE, this trend is theoretically reversible, there have simply been too many pronunciations of an effects-based nature and too many losses for the Commission over the last decade to hypothesize a comeback to the formalistic era.

Consequently, having in mind that, as previously analyzed, the ECJ has always aimed at consistency and continuity in its approach towards abuse of dominance, the tendency to

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[562] See *supra* (n 549), paragraph 131. However, for the sake of completeness, it is essential to point out how part of the doctrine has suggested that, here, the ECJ was not referring to the concept "of anti-competitive object", as distinguished from the one of "anti-competitive effect", but to the dominant undertaking's purpose of preventing the entry of new potential competitors, hence, to the subjective element of abuse; on that regard, see *supra* (n 31), page 20.

[563] See *supra* (n 549), paragraph 185.

[564] On that regard, in see *supra* (n 549), paragraphs 201-209, the ECJ stipulated that the relevant dominant undertaking could justify its conduct by offering evidence of how efficiency gains from the contentious conduct had counteracted its *"likely harmful effects"* on *"competition and consumer welfare"*. However, if the specific practice must be deemed as by-object abusive, the market leader could not possibly expect to rebut the Commission's findings, as by-object violations can never be disproved by demonstrating their lack of harmful effects. On top of that, the mere reference to *"likely harmful effects"* is intrinsically incompatible with a by-object restriction, in so far as, in such a scenario, the administrative authority is not bound to prove any sort of effect, because the mere proof of the existence of the conduct is sufficient to trigger the finding of an infringement.

reinterpret the traditional legacy principles in light of mainstream economic analysis, even if ambiguous, must be accordingly understood as an additional effort of the CJEU to offer a more systematic and methodological definition of abuse, based on where the case law currently stands, as well as on where it started.

These can be considered to be the general coordinates on the concept of abuse of dominant position, which, *grosso modo*, apply to every exclusionary infringement of the prohibition enshrined in Article 102 TFUE. Bearing the foregoing in mind, in the next chapter, an accurate examination of the individual features of the main categories of abuse of dominance will be accordingly conducted.

3. THE CATEGORIES OF ABUSE OF DOMINANT POSITION

3.1 Relevant criteria to differentiate between the various typologies of abuse of dominance

As the analysis of dominant undertakings' potentially abusive conducts typically involves the establishment of categories, identifying the relevant parameters against which one can recognize the distinctive characteristics of each practice becomes an indispensable operation when dealing with cases concerning the application of Article 102 TFUE. The utility of such an exercise can be summarized in the three following points:

- It helps visualizing not only the differences but also the similarities between the various types of abuse;
- It allows the identification of the rationale underpinning the unequal treatment of abusive practices from the EU decision-makers; and
- It is a useful tool to choose the best approach towards those conducts that, escaping easy categorization, represent a sort of "grey area".

To that extent, although one can categorize dominant undertakings' abusive practices in virtually infinite ways, there are a series of parameters that have proved to be particularly helpful while conducting such an operation. In addition, whereas some of these are applicable across-the-board, others have a narrower range, as they solely apply to potentially exclusionary behaviors.

Regarding the first type of parameters, the most widespread criterion is represented by the *summa divisio* between exclusionary and exploitative conducts.

Another generalized standard revolves around the difference between price-based and non-price-based practices. On that regard, as the element of distinction is centered on whether the instrument through which anti-competitive effects would be manifested includes the usage of prices, while a typical example of price-based abuses is represented by a scheme of loyalty-inducing rebates, an exclusive dealing obligation is non-price-based in nature.

Thirdly, one can also distinguish the so-called "naked restrictions"[565], thus, those practices that have no plausible rationale other than the restriction of competition[566], from violations that may potentially represent plausible means to attain pro-competitive gains. To that extent, in line with what has already been explained above, whereas pricing below AVC is the archetype of naked abuses, as it can only have an exclusionary objective, most of the practices that fall under the scope of Article 102 TFUE, such as exclusive dealing, tying or refusal to deal, may have a pro-competitive justification.

Finally, another all-encompassing criterion, based on the upstream nature of the remedy required to end the infringement, differentiates between abuses that need a reactive remedy and violations that require a proactive one. On that regard, as already mentioned above, as reactive remedies amount to a negative obligation that is imposed on a single basis, antitrust authorities tend to favor this type of intervention. On the other hand, as proactive remedies heavily rely on behavioral correction, they normally result in positive obligations that need constant monitoring, for example, the Commission may oblige a dominant firm to deal with rivals on fair, reasonable and non-discriminatory terms and conditions[567]. At the same time, given that proactive remedies may also encompass structural intervention, in the latter scenario, the market leader may be additionally compelled to divest some of its assets[568].

Concerning the second type of parameters, one can identify a *summa divisio* between practices that aim at strengthening a dominant position in the market they are implemented and behaviors that lead to the extension of such a position to a neighboring market. In the first scenario, only the market in which the firm enjoys substantial power

[565] In other words, the kind of practices described by the Commission in its 2009 Guidance Paper in see *supra* (n 391).
[566] However, it is important to point out that not even naked restrictions are to be deemed by-object violations. On that regard, as observed before, the right conferred upon dominant firms to demonstrate that the contested practice is not capable of having anti-competitive effects on as efficient competitors applies to all allegedly exclusionary abusive practices, including the ones that are presumptively considered so. Therefore, as the mere possibility of demonstrating the absence of effects automatically annihilates the by-object framework within the scope of Article 102 TFUE, any presumption revolving around naked restrictions must be conceptually distinguished from the approach towards by-object violations enshrined in Article 101 TFUE.
[567] That is exactly what happened in see *supra* (n 207).
[568] For instance, that was the case in Commission Decision of 26 November 2008, in *German Electricity Wholesale/Balancing Market*, Cases COMP/39.388 and COMP/39.389, OJ C 36, where a vertically-integrated electricity company was forced by the Commission to sell its transmission network to a third party.

would be involved, for instance, a dominant supplier on a given market may expand its dominance setting predatory prices. On the contrary, in the second scenario, which is generally referred to as leveraging, the practice would require at least two markets, a primary one, where the abuse takes place, and a secondary one, in which the effects of the conduct implemented in the primary market are manifested. For instance, a dominant supplier of a certain product may condition its sale to the acquisition of another good for which there is a distinct market[569].

Moreover, leveraging practices are further distinguished, in so far as they can have either an "offensive" or a "defensive" object/effect. Indeed, the aim of the conduct may be either the extension of a dominant position to a neighboring market, in which case the practice would qualify as "offensive", or the protection of the dominant position on the market where the conduct is implemented, in which case the practice would qualify as "defensive". Regarding the latter, a defensive scenario is likely to occur in circumstances where the players of the secondary market represent a potential threat to the position of the dominant firm in the primary market. At the same time, irrespective of the "offensive" or "defensive" rationale underpinning such behaviors, abusive leveraging will be implemented by means of the exclusion of a competitor operating on the secondary market[570].

Furthermore, as far as leveraging conduct is concerned, one may also isolate two additional scenarios, based on the relationship between the markets involved.

On that regard, in some circumstances, such a relationship may be vertical, as there is an upstream market, in which the practice is implemented, and a downstream level of competition, where the effects of the practice are manifested. For instance, the upstream market revolves around an input that is incorporated into a finished product which undertakings sell within the downstream market. Here, the dominant firms' rivals are likely to have a dual status, as they can also be its customers and/or suppliers. For example, they may receive, as customers, input from a vertically-integrated supplier with which they compete downstream or, alternatively, they may compete upstream with the

[569] To that extent, see Commission Decision of 22 June 2005, in *Coca-Cola*, Case COMP/A.39.116/B2, OJ L 253, in which the dominant supplier conditioned the sale of cola-flavored carbonated drinks to the acquisition of tonic water by its customers.
[570] This argument is based on see *supra* (n 12), paragraph 52.

same firm that operates a platform on which they are forced to depend on. As a consequence of such a dual status, as both rivals and customers/suppliers, intervention from antitrust authorities will often result in regulating the terms and conditions under which dominant undertakings deal with their competitors. Refusal to deal and margin squeeze abuses normally present the abovementioned features, as they involve vertically-integrated activities.

In other circumstances, the relationship between markets may be horizontal, as they are placed at the same level of the value chain, because, for instance, the products involved are complements[571]. Here, the typical example is represented by two separate goods that have the same pool of customers, hence, there is strong competition between them, even if their markets are distinct[572]. In the latter scenario, in general, competitors are not customers and/or suppliers of the dominant firm, thus, the dual status is normally absent. Tying and mixed bundling practices generally have such characteristics, as they involve horizontally-integrated activities.

Furthermore, it is also possible to differentiate between leveraging practices based on the nature of the remedy required. For instance, in cases of refusal to deal, the only possible form of intervention amounts to a proactive remedy, namely the imposition upon the dominant undertaking/s involved to deal with third parties. Irrespective of the issues arising from such an obligation in relation to the principle of economic freedom, forcing a firm to conclude a contract with a would-be rival or an established competitor cannot be equated with, for instance, a ban of the joint sale of two products, which represents the traditional remedy for tying abuses[573].

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[571] According to mainstream economics, complementary goods are those that customers typically consume or use together, so that a change in the price or availability of one good can affect the demand for the other as well.

[572] That was the factual background revolving around the *Hilti* case, where nails and nail guns, being complements, were tied together by the relevant dominant undertaking, as, despite representing two distinct markets, they shared a common pool of customers; to that extent, see judgment of 12 December 1991, *Hilti AG vs Commission*, Case T-30/89, EU:T:1991:70.

[573] On that regard, such a serious limitation of the contractual freedom could be likened with the typical remedy for margin squeeze conducts, namely the imposition upon the dominant firm involved of specific conditions under which it must deal with third parties. However, there is still a considerable divergence, in so far as while, in the latter scenario, before the implementation of the remedy, the market player was already dealing with the rival/s, in cases of refusal to deal, it is almost like the Commission takes the market leader's place, because, prior to the remedy, there was no contact whatsoever with the relevant competitor/s (even though this is true exclusively for refusals to start dealing).

However, as anticipated before, it is essential to keep in mind that, based on the criteria described above, it is only possible to reconstruct the most frequent categories of potentially abusive conduct. For instance, focusing on exclusionary practices, according to the parameters laid down before, predatory pricing is generally understood as an abuse that:

- Is, by definition, price-based;
- Does not possibly entail any pro-competitive gain;
- Is aimed at strengthening the dominant position in the market in which it is implemented; and
- Can be ended by means of a reactive remedy, namely a cease and-desist order.

In the same vein, the latter practice can also be differentiated from other abuses that pursue the objective of strengthening a dominant position in a given market, such as rebate schemes and exclusive dealing, as they are known to be a source of pro-competitive benefits for consumers.

Having the abovementioned general coordinates in mind, it is now possible to proceed with the specific examination of the most relevant categories of abuse, starting from exclusionary practices.

3.2 Exclusionary abuses

Exclusionary abuses aim at driving dominant undertakings' competitors out of the market, as they make their products/services less attractive and/or less available, limiting rivals' abilities to compete. Their legal basis is generally recognized in letter (b) of Article 102(2) TFUE, as it prohibits the limitation *"of production, markets or technical development to the prejudice of consumers"*.

Moreover, as already mentioned, the Commission provided a comprehensive framework for the assessment of exclusionary practices with its 2009 Guidance Paper. Indeed, considering that, apart from the public agency's previous decisional practice, the Communication also reflects the jurisprudence of the ECJ, it can be deemed as a valuable collection of the EU decision-makers' approach towards exclusionary practices. On that regard, after having stressed out the centrality of foreclosure effects for the assessment of exclusionary abuses, in its Guidance Paper, the Commission observes that *"in this*

document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers"[574]. In other words, as suggested by former Commissioner Kroes, according to the Communication, the administrative authority only intervenes when there is evidence of a *"coherent narrative"*[575] that explains how an allegedly abusive conduct is likely to generate anti-competitive foreclosure.

Finally, as exclusionary conducts have proved to be the most frequent and widespread form of infringement of the prohibition of abuse of dominance, their fight has represented a priority for the EU decision-makers since the early decades of implementation of Article 102 TFUE. On that regard, given that many of the general principles that have been analyzed in the previous chapter were developed in the context of exclusionary abuses perpetrated by market leaders, the accurate examination of the main categories in which they are traditionally divided into is an indispensable component of any comprehensive work on the concept of abuse of dominant position. Therefore, the latter exercise is where this thesis turns next.

3.2.1 Predatory pricing

As mentioned before, price rivalry between market players is universally considered healthy for the competitive process, as it allows consumers to obtain the lowest profitable price possible. Nevertheless, when it gives rise to what is generally referred to as predation, it hinders competition and harms consumer welfare.

On that regard, Ezrachi has defined predatory pricing as follows:

"The deliberate lowering of prices by the dominant undertaking in the short term to a loss-making level, in an attempt to drive competitors out of the market or to prevent competitors from entering the market. Then, having eliminated the competition through

[574] See *supra* (n 383).
[575] Kroes, Neelie. *The European Commission's Enforcement Priorities as Regards Exclusionary Abuses of Dominance – Current Thinking*, Competition Law International, 2008, page 6.

predation, the dominant undertaking is capable of raising prices above competitive levels, ultimately harming future consumers by charging higher prices"[576].

Concerning the case law, as already mentioned above, in *AKZO*, the ECJ has developed a two-limbed test to distinguish between competitive and anti-competitive pricing schemes:

- When a dominant undertaking sets prices below AVC, such a pricing policy is presumed to be predatory, thus, abusive; and
- When a market leader charges prices above AVC but below ATC, such a conduct is considered predatory in so far as there is additional evidence according to which the latter is part of a strategy aimed at eliminating one or more competitors[577].

Some years later, in *Wanadoo*, the CJEU has added another fundamental element to its case law on predatory pricing, as it specified how Article 102 TFUE does not require the Commission to prove that the perpetrator would recoup the losses incurred due to the abusive pricing scheme[578].

Moreover, more recently, in *Post Danmark I*, introducing a new parameter, namely the average incremental cost (hereinafter "AIC"), the ECJ has further stipulated that when a dominant undertaking sets its prices above AIC, hence, those prices that do not entirely cover the AVC of the market leader but are above the rivals' AVC, it will, as a general rule, still be possible for an as efficient competitor to remain on the market, without suffering insurmountable long-term losses[579].

To that extent, as anticipated before, in its 2009 Guidance Paper, the Commission has mainly endorsed the ECJ's approach, even if it favors the use of LRAIC as benchmark of assessment, on the assumption that, as current markets are largely populated by multi-

[576] Ezrachi, Ariel. *Eu Competition Law: An Analytical Guide to the Leading Cases*, Hart, 2018, page 214.
[577] This additional requirement is far from being accidental, indeed, in its assessment of the relevant dominant undertaking's abuse, the Commission also relied on documentary evidence found during an inspection, in which it was clearly stated that AKZO had the intention to force certain competitors out of the market.
[578] See *supra* (n 123), paragraphs 37-44 and 103-114. On that regard, the statement of the ECJ should not be underestimated, as the recoupment of the losses sustained by the market leader had always represented an indispensable requirement for a predatory pricing strategy to occur; to that extent, see Glöckner, Jochen. Bruttel, Lisa. *Predatory pricing and recoupment under EU competition law: per se rules, underlying assumptions and the reality: results of an experimental study*, European Competition Law Review, 2010, pages 423-431.
[579] See *supra* (n 173), paragraph 38.

product undertakings that usually have economies of scope, the latter is a more reliable indicator[580].

Finally, as already pointed out, as predatory pricing is considered the archetype of naked restrictions, it surely represents one of the gross violations of the prohibition of abuse of dominance.

3.2.2 Rebate schemes

Rebates can be relevant under Article 102 TFEU in two different circumstances:

- When they create foreclosure effects, *"limiting production, markets or technical development to the prejudice of consumers"*, they may be prohibited pursuant to letter (b) of Article 102(2) TFEU, since the dominant undertaking's rivals may find it difficult, if not impossible, to sell their products due to the relevant rebate scheme; and
- When they amount to the application of *"dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*, they may be caught under letter (c) of Article 102(2) TFEU, as they are applied by the market leader in a discriminatory manner.

Furthermore, one may additionally distinguish between:

- Loyalty-inducing rebates (also referred to as fidelity rebates);
- Quantity rebates; and
- Target rebates (also known as standardized rebates).

Regarding the first, as such discounts encourage customers to purchase a certain product solely from one supplier, they create a fidelity bond that generates *de facto* exclusivity. However, if that supplier is dominant, hence, a significant percentage of customers is already supplied by the market leader on a regular basis, competitors will find it difficult, if not impossible, to sell their products. If this is true, loyalty-inducing rebates are problematic only if applied by dominant undertakings, as other companies are not limited in their discount policies.

[580] See *supra* (n 12), paragraph 26.

In its landmark *Hoffmann-La Roche*, the ECJ unequivocally held that *"the fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply. Finally these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted"*[581]. Therefore, apart from delineating a clear legal framework around the prohibition of loyalty-inducing rebates, by setting out their detrimental effects on both competitors and customers of the dominant firm involved, the CJEU has also placed quantity rebates, those connected with the volume of purchases, outside the scope of Article 102 TFUE, in so far as they are generally justified by transaction cost savings.

Moreover, in *Irish Sugar*, specifying how *"the Court must therefore appraise all the circumstances, and in particular the criteria and detailed rules for granting rebates, and determine whether there is a tendency, through an advantage not justified by any economic service, to remove or restrict the buyer's choice as to his sources of supply, to block competitors' access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to reinforce the dominant position by distorting competition"*[582], the ECJ has further added that fidelity rebates may be deemed abusive when they restrict the economic freedom, such as the freedom to choose supplier, of the dominant undertaking's counterparts.

Concerning the third, target rebates may share a common rationale with fidelity rebates, as they can be conceptualized as an additional tool to reach *de facto* exclusivity. Indeed, in such scenarios, there generally is an agreement between the dominant undertaking and its customers on a certain number of sales, namely target sales, to be met in a given period

[581] See *supra* (n 46), paragraph 90.
[582] See *supra* (n 125), paragraph 197.

of time. As soon as the customer reaches the predetermined target, a rebate will be automatically granted. On top of that, one may isolate a particular type of target discount, generally referred to as incremental target rebate, in which the reward will be granted only on quantities that exceed the target sales. In any case, irrespective of the typology, target sales may be arranged in such a way that they cover a large part, thus creating a quasi-exclusivity, or all, hence, generating a proper exclusivity, of the customers' purchases.

On that regard, in *British Airways*, one of the leading cases relating to target rebates, starting from its findings in *Michelin I*[583], the ECJ laid down two general cumulative criteria for the assessment of rebate schemes that do not fall into the category of loyalty-inducing rebates discussed in *Hoffmann-La Roche*, by stipulating that *"(...) it first has to be determined whether those discounts or bonuses can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners. It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted"*[584].

Finally, in light of the foregoing, based on the necessary legal assessment, rebate practices may be further distinguished in the three following categories:

- Those that are presumptively abusive (loyalty-inducing rebates);
- Those that must be subject to an effects-based analysis (target rebates); and
- Those that are presumptively lawful (quantity rebates).

[583] Where, for the first time, the CJEU confirmed that goal-related rebates, such as standardized rebates, are capable of having exclusionary effects as well. On that regard, see *supra* (n 36), paragraphs 70-74.
[584] See *supra* (n 351), paragraphs 68-69.

3.2.3 Tying and bundling

Although tying and bundling are typically likened, as they both concern the combined sale of two or more products, they represent distinct abusive practices.

On that regard, tying specifically refers to a scenario where dominant undertakings link the purchase of one product, namely the tying product, to the purchase of an additional product, generally referred to as tied product, without which customers are unable to buy the primary product, hence, their product of interest.

Moreover, as far as tying is concerned, the following alternative circumstances may occur:

- Technological tie, when the products are tied physically; or
- Contract tie, when the goods are tied through a contract stipulating joint sale.

The *Microsoft* case is considered the archetypal example of tying, in so far as the Tech Giant was jointly selling its Windows operating system with the Windows Media Player, without any option for consumers to buy the first separately from the second[585].

Similarly, bundling amounts to a joint sale of different products in fixed proportions. More precisely, there are two main categories of such a conduct:

- Pure bundling, when products are only offered together and none of them can be bought separately; and

[585] To the same extent, less than five years later, in Commission Decision of 16 December 2009, in *Microsoft (tying)*, Case COMP/C-3/39.530, the Commission found that the dominant undertaking was tying its Internet Explorer web browser with its operating system, placing its rivals at a serious competitive disadvantage. At the same time, differently from *Microsoft*, *Microsoft (tying)* exposed a friction between the boundaries of tying and refusal to deal practices, in so far as the administrative authority questioned, *inter alia*, the legality of the market leader's behavior amounting to the joint licensing of its operating system (that may be also conceptualized as a platform) and its web browser (which might be also understood as an input operating within the platform). For a comprehensive analysis of this peculiar aspect, as well as, in general, of the so-called Microsoft saga, see Petit, Nicolas. Neyrinck, Norman. *Back to Microsoft I and II: Tying and the Art of Secret Magic*, Journal of European Competition Law and Practice, 2011, pages 117-121, where the author correctly notices how, in some specific circumstances, it is quite difficult to draw the line between tying and refusals to deal/supply, particularly when the factual scenario comprises the abovementioned technological tie, hence, in cases where the two products are combined through a technical mechanism rather than a contractual one.

- Mixed bundling, when the goods are available separately but, purchased together, they are offered at a discounted price[586].

The legal basis of tying and bundling is normally deemed to be letter (d) of Article 102 TFUE, as they would allegedly refer to a situation where two distinct products, which have no connection by their nature or according to commercial usage, are sold jointly. Nevertheless, part of the doctrine has correctly pointed out how this idea appears to be refuted by the material reality, given that, as mentioned above, most of the cases concerning such conducts deal with goods that, even if distinct, are to be conceptualized as complements[587]. The latter consideration seems to be espoused by the Commission as well, in so far as the public agency, in its 2009 Guidance Paper, does not require that the goods involved belong to different product markets[588].

As far as the case law is concerned, in *Hilti*, for the first time, the ECJ has recognized the capability of tying practices to limit or eliminate competition, causing the exclusion of the perpetrator's competitors from the market[589].

Furthermore, in *Tetra Pak II*, by acknowledging the abstract possibility of the presence of objective justifications in individual cases[590], the ECJ has taken a step forward towards a comprehensive legal assessment of tying, even if, in the case to be decided, the dominant undertaking's defensive argument was overlooked[591].

On that regard, one of the arguments laid down by the ECJ to reject the relevant market leader's claims offers clarifications on the correct placement of tying and bundling in the logic of the prohibition enshrined in Article 102 TFUE. Indeed, providing the correct interpretation of the concept of *"commercial usage"*, encapsulated in letter (d) of the Treaty's provision, the CJEU stated that *"(...) in any event, even if such a usage were shown to exist, it would not be sufficient to justify recourse to a system of tied sales by an*

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[586] In other words, even if products may be sold both as a package and individually, the price for the package is significantly lower than the sum of the individual prices.
[587] Maziarz, Aleksander. *Tying and bundling: Applying EU competition rules for best practices*, International Journal of Public Law and Policy, 2013, pages 263-275.
[588] See *supra* (n 12), paragraph 51.
[589] See *supra* (n 572), paragraphs 99-101.
[590] For instance, see *supra* (n 123), paragraphs 138-143, in which the ECJ, speculating on plausible objective justifications pursuant to the concrete factual background, has identified the scenario "*where the proper functioning of a machine requires the use of specific consumables"* as a hypothetical acceptable defensive argument.
[591] See *supra* (n 123), paragraphs 219-223.

undertaking in a dominant position. Even a usage which is acceptable in a normal situation, on a competitive market, cannot be accepted in the case of a market where competition is already restricted"[592].

However, the wording of letter (d), namely, *"making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"*, does not appear to prohibit dominant undertakings from selling products together, as far as such a behavior is in line with commercial usage, quite the opposite, being exclusively addressed to market leaders, the Treaty's provision seems to suggest that an abuse must be excluded if the joint sale of products is in conformity with commercial usage.

In light of the foregoing, if tying and bundling were to be placed under letter (d), by pointing out how, in markets characterized by the presence of one or more dominant players, a practice that is generally acceptable becomes prohibited, the CJEU would have exceeded the boundaries of its power to interpret the Treaties, rewriting, *de facto*, the law.

On top of that, if letter (d) is to be understood as placing dominant undertakings' practices amounting to the tying of products, conducted according to commercial usage, outside the scope of Article 102 TFUE, virtually every abusive behavior of such a nature would be considered lawful nevertheless, because, as already observed, tying cases are traditionally characterized by complementary goods, which, by their very nature, if not for commercial usage, can certainly be sold jointly.

Therefore, tying and bundling practices must be correctly interpreted as abuses that do not fall into the non-exhaustive list enshrined in Article 102(2) TFUE, as their legal basis is to be found in the first paragraph of the Treaty's provision, which encompasses a general prohibition of abuse of dominance.

Finally, as will be explained in greater detail below, although tying and bundling were initially considered by the ECJ as presumptively abusive, they now represent the most relevant examples of practices that, in order to be deemed prohibited, must be subject to a light assessment of their foreclosure effects.

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[592] See *supra* (n 123), paragraph 137.

3.2.4 Margin squeeze

In its 2009 Guidance Paper, the Commission defines behaviors that amount to margin squeeze as follows:

"(...) a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze')"[593].

Hence, generally speaking, such a conduct refers to a scenario in which a vertically-integrated dominant undertaking engages in a pricing strategy that aims at favoring its own downstream operations[594]. More precisely, as margin squeeze practices have started to occur after the liberalization of the telecommunication sector, it can be maintained that such abuses typically materialize when the previous monopolist still enjoys a *de facto* monopoly for strategic assets of the telecommunication infrastructure but, due to the liberalization, also competes downstream with would-be entrants. In the latter scenario, while, on the one hand, the market leader's rivals are compelled to use certain services from the dominant firm at the wholesale level, on the other hand, they compete with the ex-monopolist at the retail level. Therefore, a pricing strategy of the dominant undertaking that squeezes the competitors' margin at the retail level out may be caught under Article 102 TFEU.

Concerning the case law, in *TeliaSonera*, the ECJ has clarified that margin squeeze must be conceptualized as a standalone abuse, rather than a sub-category of refusal to supply[595]. In doing so, the CJEU has implicitly pointed out how the preconditions for the finding of an abuse amounting to a refusal to supply are outside the scope of the relevant legal assessment of margin squeeze conducts[596]. On that regard, the ECJ has gone even further by stipulating that, if, in every circumstance concerning a margin squeeze, the Commission had to establish, in advance, the existence of a refusal to supply, this

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[593] See *supra* (n 12), paragraph 80. Prior to that, in its 2005 Discussion Paper, the public authority defined margin squeeze practices as follows: *"an insufficient spread between a vertically integrated dominant operator's wholesale and retail charges (...) especially where other providers are excluded from competition on the downstream market even if they are at least as efficient as the established operator"*.
[594] That is also why margin squeeze is sometimes called price-squeeze.
[595] See *supra* (n 213), paragraph 56.
[596] See *supra* (n 213), paragraphs 54-55.

aggravated burden of proof *"would unduly reduce the effectiveness of Article 102 TFEU"*[597].

The latter consideration seems to be at odds with the approach undertaken by the administrative authority in its 2009 Guidance Paper, where, as margin squeeze and refusal to supply practices are analyzed under the same section, it appears that the first is sub-categorized under the second[598].

Nevertheless, the archetypal case of margin squeeze abuses is represented by *Telefónica*[599], as the relevant undertaking was a former state-owned telecommunication operator, which detained a monopoly position. After the liberalization of the market, in order to provide broadband internet access to their customers at the retail level, the dominant undertaking's competitors were still bound to use Telefónica's internet access at the wholesale level, as it was the exclusive operator of the local landline telephone networks. Considering that, at the upstream level, the ex-monopolist charged its rivals at the downstream level a tariff that would not even allow them to cover their costs[600], the ECJ has correctly upheld the Commission's decision, establishing the undeniable presence of an abuse of dominance.

Furthermore, as correctly pointed out by the doctrine, even though virtually every case concerning margin squeezes presented the abovementioned factual background[601], in which the undertaking's dominant position at the upstream level depended on the peculiar regulatory environment, there is no reason to believe that, under normal circumstances, an enterprise would not be able to acquire such a status at the wholesale level[602].

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[597] See *supra* (n 213), paragraph 58.
[598] On that regard, see *supra* (n 12), paragraphs 75-90.
[599] Judgment of 29 March 2012, *Telefónica, SA and Telefónica de España, SA vs Commission*, Case T-336/07, EU:T:2012:172.
[600] See *supra* (n 599), paragraphs 276-284.
[601] To that extent, as correctly pointed out in Bay, Matteo. De Stefano, Gianni. *ECJ Rules on Margin Squeeze Appeal*, Journal of European Competition Law and Practice, 2011, pages 120-40, the *Deutsche Telekom I* case represents a further suitable example.
[602] See, for instance, Hou, Liyang. *Some aspects of Price Squeeze within the European Union: A Case Law Analysis*, European Competition Law Review, 2011, pages 243-258, where the author suggests the case in which the incumbent charges higher prices to its competitors at the wholesale level than to its customers at the retail level, in order to frustrate any efforts to compete with itself on the downstream market, as an hypothetical suitable example.

If this is true, even though, for the time being, only hypothetically, margin squeeze practices must be understood as a general type of abuse that may also occur under unaltered competitive conditions[603].

Finally, as already anticipated, in order to be detected under Article 102 TFUE, margin squeeze conducts must be subject to an effects-based analysis.

3.2.5 Vexatious litigation

A dominant undertaking may infringe Article 102 TFUE by initiating legal procedures against its competitors to either drive them out of the market, if they are already established, or create a barrier of entry, if they are would-be rivals. On that regard, as market leaders enjoy the right of access to a judge like any other enterprise, here, the key legal issue becomes determining whether a certain litigation commenced by the dominant operator is abusive or not. In other words, in this slippery scenario, the legal assessment of abuse revolves around the correct distinction between normal litigation, thus admitted, irrespective of the applicant involved, and vexatious litigation, which is caught under the prohibition of abuse of dominance.

In its leading case on the issue, namely *Promedia*, the ECJ has singled out a two-limbed test to detect this sort of infringement, by highlighting how for a legal procedure initiated by a dominant firm to be abusive *"(...) it is necessary that the action:*

- *(i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party; and*
- *(ii) it is conceived in the framework of a plan whose goal is to eliminate competition"*[604].

However, as these two cumulative criteria are highly problematic, it is generally accepted that, here, the Commission's burden of proof is significantly aggravated[605].

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[603] To that extent, in judgment of 30 November 2000, *Industrie des Poudres Sphériques SA vs Commission*, Case T-5/97, EU:T:2000:278, paragraphs 177-185, the CJEU seems to espouse, at least partially, such an argument.
[604] See *supra* (n 130), paragraph 55.
[605] Van Damme, Eric. Larouche, Pierre. Müller, Wieland. *Abuse of a Dominant Position: Cases and Experiments*, Tilburg University, 2006, pages 1-19.

Indeed, regarding the first layer of the test, as this pillar is erected on vague concepts that leave a huge margin of appreciation, its practical utility is, to be generous, scarce.

Moreover, concerning the second parameter, it is apparent from the wording of the passage that the ECJ expressly requires the subjective element of abuse to be met, in order for the dominant undertaking's behavior to fall under the scope of Article 102 TFUE.

On that regard, it was already observed that, as far as abuse of dominant position is concerned, the market leader's intention must be understood objectively, hence, as amounting to the economic rationale underpinning the abusive scheme, namely the anti-competitive foreclosure of an equally efficient rival or a would-be entrant.

Nevertheless, providing sufficient evidence of such a strategy is particularly costly for the administrative authority, especially in terms of resources necessary to obtain valuable proof. For instance, as the Commission has sporadically been able to obtain this type of evidence through documents found during the inspections of the market leaders' offices, one can assume that such an expensive operation will be indispensable for vexatious litigation to be proved to the requisite legal standard.

Finally, from the analysis conducted up to this point, what clearly transpires is that vexatious litigation is one of those practices that become relevant under Article 102 TFUE only in exceptional circumstances.

3.2.6 Abuse of regulatory procedures

Similarly to what has been examined above regarding vexatious litigations, Article 102 TFUE is generally interpreted as prohibiting dominant undertakings from abusing regulatory procedures as well. In other words, market leaders cannot use a specific regulatory process in such a manner that it would become more difficult, if not impossible, for established rivals to compete or for would-be competitors to enter the market.

In this peculiar scenario, the leading case is represented by *AstraZeneca*[606], as the dominant firm was found by the Commission to manipulate the necessary procedure to obtain the Supplementary Protection Certificates connected to one of its patented drugs

[606] Judgment of 1 July 2010, *AstraZeneca AB and AstraZeneca plc vs Commission*, Case T-321/05, EU:T:2010:266.

and, on top of that, to fraudulently misuse the regulatory procedure governing the withdrawal of the related market authorizations[607]. As the latter conduct prevented generic drug producers from entering the market, it was *"capable of harming both rivals and short-run consumer welfare"*[608].

Moreover, while delineating the relevant legal assessment for this typology of abuse, the ECJ unequivocally held that *"(...) although proof of the deliberate nature of conduct liable to deceive the public authorities is not necessary for the purposes of identifying an abuse of a dominant position, intention none the less also constitutes a relevant factor which may, should the case arise, be taken into consideration by the Commission. The fact (...) that the concept of abuse of a dominant position is an objective concept and implies no intention to cause harm does not lead to the conclusion that the intention to resort to practices falling outside the scope of competition on the merits is in all events irrelevant, since that intention can still be taken into account to support the conclusion that the undertaking concerned abused a dominant position, even if that conclusion should primarily be based on an objective finding that the abusive conduct actually took place"*[609].

The latter consideration is of extreme importance, not only because it sheds light on the correct positioning of the subjective element in cases concerning the abusive usage of regulatory procedures, but also because it confirms the special nature of the necessary legal assessment of abuses amounting to vexatious litigation mentioned above[610].

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[607] For a complete analysis of this ruling and its implications, see Maggiolino, Mariateresa. Montagnani, Lillà, Maria. *AstraZeneca's Abuse of IPR-Related Procedures - A Hypothesis of Antitrust Offence, Abuse of Rights, and IPR Misuse*, World Competition: Law and Economics Review, 2011, pages 1-24.

[608] See *supra* (n 606), paragraph 902.

[609] See *supra* (n 606), paragraph 359.

[610] This is even more true if one considers that, as correctly pointed out in Bernard, Kent. *The AstraZeneca Decision in the General Court: Some Basic Observations and a Few Interesting Questions*, Competition Policy International, 2013, pages 170-180, without providing sufficient evidence of the dominant undertaking's subjective intentions, it is undoubtedly more difficult to prove the abuse of regulatory procedure to the requisite legal standard. On that regard, specifically concerning the *AstraZeneca* case, the author correctly observed how *"it is difficult to establish that the dominant undertaking abused its dominant position by withdrawing and obtaining regulatory approvals without any false statement or other misrepresentation towards the regulatory body"*. Nevertheless, the ECJ has refrained from making such a finding mandatory in the case at stake, implicitly recognizing the peculiar, if not exceptional, role of the subjective element in matters concerning the application of Article 102 TFUE.

Finally, in light of the foregoing, although the abuse of regulatory procedure shares a noticeable number of features with vexatious litigation abuses, differently from the latter, the first can be caught under Article 102 TFUE with a "normal" legal assessment, which, however, must always encompass the analysis of the relevant practice's anti-competitive effects.

3.2.7 Refusal to deal/supply

As freedom of contract is typically considered the backbone of free market economies, in general, enterprises, even those holding a dominant position, enjoy the right to independently select their business partners. Nevertheless, according to the well-established principle of market leaders' special responsibility, in cases concerning the application of Article 102 TFUE, the abovementioned freedom may be overridden, in so far as a refusal to deal/supply perpetrated by a dominant operator is capable of harming competition to a significant extent.

On that regard, leveraging practices amounting to an abusive refusal to deal/supply are generally divided into two sub-categories:

- Refusal to start dealing, which occurs when a vertically-integrated dominant firm refuses to enter a business relationship with its competitors[611]; and
- Termination of a course of dealing, which materializes every time a vertically-integrated market leader, after having started a business relationship with one or more of its rivals, stops interacting with them[612].

Whereas, in the first case, the dominant market player does not alter its pattern of conduct, in the second scenario, ceasing to supply its competitors, it evidently does so. At the same time, although, based on this undeniable divergence, there have been conspicuous attempts from the doctrine to differentiate between the legal assessments of the two abovementioned practices[613], since its early judgments, the ECJ has unequivocally identified a uniform test to detect this sort of abuses.

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[611] Such a scenario is generally referred to as "refusal to deal".
[612] This circumstance is normally described as "refusal to supply".
[613] For instance, as far as refusals to supply are concerned, considering the previous business partnership, which provides irrefutable evidence of the deal's profitability, it has been argued that the subjective element of abuse, namely the exclusionary rationale underpinning the dominant undertaking's decision to terminate

Indeed, regarding refusals to supply, in *Commercial Solvents*, the CJEU maintained that *"(...) an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market. (...) it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which itself is a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86"*[614]. In other words, applying a very strict approach to the refusal to continue to supply an existing customer perpetrated by a dominant operator, this ruling has established the so-called *"secondary market requirement"*[615], according to which refusals to supply violate Article 102 TFUE in so far as there is a downstream market, connected to an upstream market, which is, in turn, dominated by one or more undertakings, characterized by a relation of dependence between its players and their rival dominant firm/s.

In the same vein, a decade later, in *CBEM Telemarketing*, by stipulating that *"that ruling also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market"*[616], the CJEU expanded its findings in *Commercial Solvents* to a practice resulting in a refusal to deal, as the factual background of the case concerned an enterprise which,

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the business relationship, would be implied in the disruption itself. To that extent, see Geradin, Damien. *Refusal to Supply and Margin Squeeze: A Discussion of Why the 'Telefonica Exceptions' are Wrong*, Tilburg University, 2011, pages 1-12.

[614] See *supra* (n 110), paragraph 25.

[615] Lamping, Matthias. *Refusal to License as an Abuse of Market Dominance: From Commercial Solvents to Microsoft* in Liu, Kung-Chung. Hilty, Reto. *Compulsory Licensing: Practical Experiences and Ways Forward*, Springer, 2014, pages 315-345.

[616] See *supra* (n 482), paragraph 26.

in spite of being dominant on the broadcasting market for TV advertising, refused to accept advertisers that did not use its telephone lines and team of telephonists[617].

Moreover, in *Lelos*[618], the ECJ took an additional step towards a comprehensive legal assessment of refusals to deal/supply, in so far as it established the abstract possibility of an infringement of Article 102 TFUE in a case presenting a hybrid factual scenario that can be placed right in between the two abovementioned sub-categories.

More specifically, as the relevant background concerned a refusal from a subsidiary of GlaxoSmithKline, a company holding a dominant position in the Greek market of manufacturing of drugs, to satisfy the complete orders demanded by pharmaceutical retailers, this conduct can be placed right in the middle of refusal to start dealing and refusal to continue to supply, given that the disruption solely regarded the surplus of product requested by the wholesalers. Indeed, the pharmaceutical retailers had significantly increased their orders, demanding far above the amount of product required to cover the Greek market, in order to sell the surplus to MSs in which the prices for the same drug were much higher, due to the absence of harmonizing measures on pricing of pharmaceuticals within the Union.

As this issue arose in the context of a procedure for a preliminary ruling, after having pointed out how even a dominant undertaking has the right to refuse to fulfill orders that can be considered *"out of the ordinary"*[619] and, subsequently, having correctly specified how it was for the referring court to establish whether the specific practice had such an exceptional nature[620], the ECJ suggested that, at least apparently, the conduct at stake had

[617] More precisely, the ECJ stipulated the following: *"If, as the national court has already held in its order for reference, telemarketing activities constitute a separate market from that of the chosen advertising medium, although closely associated with it, and if those activities mainly consist in making available to advertisers the telephone lines and team of telephonists of the telemarketing undertaking, to subject the sale of broadcasting time to the condition that the telephone lines of an advertising agent belonging to the same group as the television station should be used amounts in practice to a refusal to supply the services of that station to any other telemarketing undertaking. If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by article 86"*.
[618] Judgment of 16 September 2008, *Lelos et al. vs GlaxoSmithKline*, Joined cases C-468/06 to C-478/06, EU:C:2008:504.
[619] See *supra* (n 618), paragraph 70.
[620] See *supra* (n 618), paragraphs 71-72.

all the necessary requirements to be interpreted as falling under the scope of the prohibition of abuse of dominance[621].

Furthermore, apart from the relevant legal test applied by the ECJ, the cases mentioned above share an additional common feature, as they all encompass a blatant refusal. This consideration sheds light on a further distinction that is generally operated when analyzing leveraging practices resulting in abusive refusals to deal/supply, which has to do with the manifestation of the conduct, rather than its intrinsic nature.

On that regard, one can differentiate between:

- Outright refusals, those occurred in the cases previously examined; and
- Constructive refusals.

While, in the first scenario, as anticipated before, the abuse is openly perpetrated, the second circumstance is characterized by dominant undertakings' behaviors that, despite being carried out by other means, have an equivalent object and/or effect compared to the one at stake in outright refusals.

The archetypal example of constructive refusals is represented by the conduct at stake in *Slovak Telekom*, in so far as, imposing unfair trading conditions, such as denying the necessary information that rivals needed to effectively use the infrastructure to which the dominant undertaking had exclusive access due to sector-specific regulations, the market leader, *de facto*, refused to deal with its competitors.

Regarding the relevant legal test, in order to balance the protection of dominant companies' freedom of contract with the principle of their special responsibility, the CJEU has come up with a peculiar legal assessment, based on the concept of "indispensability", which makes leveraging practices resulting in refusals to deal/supply abusive exclusively in exceptional circumstances.

In his opinion in *Bronner*, AG Jacobs has directly tackled the issue of the indispensability requirement and the rationale underpinning its imposition. For instance, he noticed how *"(...) the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting*

[621] See *supra* (n 618), paragraph 73-75.

considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus, while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus, the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it"[622].

From a careful examination of the logic behind AG's Jacobs opinion, the three following lessons can be drawn:

- Overall, the imposition of access obligations has a negative impact on lung-run competition;
- Access obligations reduce undertakings' incentives to invest and to innovate; and
- As a rule, the short-run pro-competitive advantages generated by access obligations cannot outweigh the long term anti-competitive outcome.

On top of that, as correctly pointed out by Areeda, considering that demanding from a dominant firm to give access to an input or a platform normally requires the administration of proactive remedies, imposing access obligations is particularly costly in terms of necessary administrative resources[623]. The latter observation is corroborated, *inter alia*, by *Commercial Solvents*, in so far as the Commission, after having set the mandatory prices and quantities to be supplied, had to monitor the subsequent compliance from the market leader involved on a daily basis[624].

In light of the foregoing, refusals to deal/supply are abusive solely when there is evidence that the input to which access is requested is indispensable to compete in the downstream and/or upstream market.

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[622] See *supra* (n 349), paragraph 57.
[623] Areeda, Phillip. *Essential Facilities: An Epithet in Need of Limiting Principles*, Antitrust Law Journal, 1989, pages 841-927.
[624] See *supra* (n 110), paragraph 42.

On that regard, the specific instances in which the indispensability condition is required were largely reviewed by the ECJ in *Bronner*:

- Firstly, explicitly citing *Commercial Solvents*[625], the ECJ has made it clear that every time a vertically-integrated dominant enterprise terminates a course of dealing with its rivals on the upstream and/or downstream market, the latter requirement must be met.
- Secondly, expressly mentioning *CBEM Telemarketing*, the CJEU has further extended its latter findings to cases where a vertically-integrated firm refuses to start dealing with a would-be rival on the upstream and/or downstream market.

Finally, even though, as of today, the ECJ has never addressed the issue of whether the indispensability condition must be required also in hybrid factual scenarios, such as the one at stake in *Lelos*, in the author's view, the frequent citations of the two abovementioned rulings, which can be found in the latter judgment, are sufficient to propose an extensive interpretation, according to which, in cases that can be positioned right in between refusals to deal and refusals to supply, evidence of the indispensable nature of the input denied is an integral part of the Commission's requisite legal standard of assessment[626].

[625] To that extent, even though indispensability was not expressly mentioned as an element of the legal test laid down therein, considering that, in *CBEM Telemarketing*, in which, instead, the latter requirement was clearly encompassed in the legal assessment of abuse, the CJEU directly relied on *Commercial Solvents* as relevant precedent, the doctrine is unanimous in maintaining that indispensability, even if only implicitly, was already taken into account by the ECJ in its first ruling on refusals to supply, hence, in *Commercial Solvents*; to that extent, see Faul, Jonathan. Nikpay, Ali. *The EU Law of Competition*, Oxford University Press, 2014, pages 465-470.

[626] These can be considered to be the general coordinates revolving around the complex issue of indispensability; for an in-depth analysis of its proper placement within the assessment of abuse of dominance, see Colombo, Ibáñez, Pablo. *Indispensability and abuse of dominance: from Commercial Solvents to Slovak Telekom and Google Shopping*, Journal of European Competition Law and Practice, 2019, pages 1-47.

3.2.8 Refusal to grant a license for an intellectual property right

Similarly to what has been established regarding refusals to deal/supply, the essential starting point for the proper examination of abusive practices amounting to a refusal to grant a license for an IPR is acknowledging that, in principle, enterprises, even if dominant, enjoy the right to refuse to grant such a license, since MSs' patent laws, as well as European law, clearly envisage the sole enjoyment by the owner, namely the exclusive right of reproduction, as one of the possible outcomes of such a peculiar discipline.

This specific background was unequivocally confirmed by the ECJ in *IMS Health*, in so far as it confirmed how *"according to settled case-law, the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right, so that refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position"*[627].

Nevertheless, in exceptional circumstances, the ECJ has managed to place practices resulting in refusals to grant a license for an IPR under the scope of the prohibition of abuse of dominance, requiring, *de facto*, a compulsory license from the market leader/s involved.

At the same time, when navigating this slippery territory, one of the most widespread errors is conflating the compulsory licensing generated by European antitrust rules with the national laws governing IPRs. This misunderstanding, which is typically reconducted to the circumstance for which the patent laws of many MSs encompass instances of compulsory licensing as well, must be absolutely avoided.

On that regard, there are at least two different scenarios in which the relationship between national disciplines on IPRs and ECL may become relevant under Article 102 TFUE:

- Firstly, patenting an IPR may confer upon the right holder a dominant position, providing a significant advantage on its rivals. However, given that, as previously observed, the mere detention of huge market power by one or more undertakings, as long as it has been lawfully acquired, is not abusive in and of itself, this circumstance does not automatically trigger the application of the prohibition of

[627] See *supra* (n 487), paragraph 34.

abuse of dominant position. At the same time, having obtained the status of market leader due to the IPR, the subsequent behavior of the right holder, including the abusive usage of the exclusive rights granted by the IPR itself, may be caught under Article 102 TFUE.

- Secondly, when competition involves vertically-integrated activities, in cases where the right holder, apart from detaining a dominant position in the upstream market, irrespective of whether it was obtained through the patenting of the IPR itself or by any other lawful means, also competes at the downstream level, to be part of which it is necessary to use the patented product, Article 102 TFUE may be infringed, in so far as a refusal to grant access may completely obliterate competition in the downstream market.

Against this background, in *Magill*, by stipulating that *"the appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand"*[628], the ECJ has singled out a qualified legal assessment of refusals to license a copyright or a patent, according to which such practices are abusive not only when the relevant input is indispensable, withing the meaning analyzed before in relation to refusals to deal/supply, but also when, in addition, they prevent the emergence of a new product for which there is potential consumer demand.

On that regard, even though the boundaries of this cumulative requirement remain mainly blurred, as the ECJ has not sufficiently tackled the so-called new product condition, what transpires from *Magill* is that the latter requirement is met every time the emergence of the new good/service is capable of placing a competitive constraint on the already existing product/s[629]. Moreover, in ascertaining whether a product/service can be considered as "new", the consumers' perception certainly plays an essential role[630].

Almost a decade later, in *IMS Health*, the CJEU has further refined the relevant legal test for abuses amounting to a refusal to grant a license for an IPR, in so far as it maintained

[628] See *supra* (n 243), paragraph 54.
[629] See *supra* (n 243), paragraphs 55-58.
[630] Monti, Giorgio. *EC Competition Law*, Cambridge University Press, 2007, pages 220-235.

that *"the refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled:*

- *the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand;*
- *the refusal is not justified by objective considerations;*
- *the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market"*[631].

As these necessary requirements must be understood as cumulative[632], one can safely assume that, by laying down such an aggravated assessment, the ECJ has tried, once again, to strike a balance between the dominant undertakings' rights originating from the IPR and their special responsibility under Article 102 TFUE. The individual examination of the abovementioned conditions appears to corroborate this idea.

Indeed, as far as the first layer of the test is concerned, it is deemed to be made of two distinct but interrelated parts:

- The introduction of a new product/service; and
- A potential demand from consumers for that new product/service.

As anticipated before, these elements, although different, are likely to move simultaneously, as no rational undertaking would launch a new product/service if there was no foreseeable consumer demand[633].

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[631] See *supra* (n 487), paragraph 52.
[632] See *supra* (n 487), paragraph 38.
[633] Houdijk, Joost. *The IMS Health Ruling: Some Thoughts on its Significance for Legal Practice and its Consequences for Future Cases such as Microsoft*, European Business Organization Law Review, 2005, pages 467-495.

Regarding the second level, unfortunately, no example has been offered by the ECJ as to what could amount to an objective justification in such circumstances. Nevertheless, as the CJEU has envisaged the abstract possibility of objective considerations, one must deduce that if legitimate commercial or technical reasons, as well as an efficiency rationale underpinning the practice, were to be found, these could theoretically constitute a justification. For instance, there is no reason to believe that, *in abstracto*, the protection of piracy could not qualify as an objective consideration[634].

On the third requirement, the wording *"by eliminating all competition"* unequivocally suggests that, in such instances, intervention under Article 102 TFUE is only admissible when it can be provided sufficient evidence that anti-competitive effects are certain or quasi-certain to occur in the event of a refusal to grant a license. If this is true, what was observed before about the minimum threshold of probability of foreclosure effects, implemented by the ECJ, namely the capability standard, here, does not apply.

Finally, in light of the foregoing, practices amounting to a refusal to grant a license for an IPR are subject to a legal assessment that is even stricter than the one required for refusals to deal/supply.

3.2.9 Refusal to grant access to an essential facility

In its decision in *Sea Containers*[635], the Commission defined an "essential facility" as "*a facility or infrastructure, without access to which competitors cannot provide services to their customers"*[636].

On that regard, undertakings can lawfully acquire a dominant position in a given market through exclusive access to certain infrastructures or facilities, as it is, in principle, not prohibited for companies to operate them in such a manner that third parties would be excluded from their fruition.

Nevertheless, in exceptional circumstances, a refusal to provide access to an essential facility perpetrated by a dominant operator, irrespective of whether its market power

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[634] Govaere, Inge. *The Use and Abuse of Intellectual Property Rights in EC Law*, Sweet & Maxwell, 1996, pages 257-273.
[635] Commission Decision of 21 December 1993, in *Sea Containers vs Stena Sealink - Interim measures*, Case IV/34.689, OJ L 15.
[636] See *supra* (n 635), paragraph 66.

derives from its exclusive rights on the facility/infrastructure or from any other lawful means, can be caught under the scope of Article 102 TFUE.

In his opinion in *Bronner*, AG Jacobs, after having correctly recognized how there is no clear-cut definition of what constitutes an essential facility, described the latter in the following terms:

"An essential facility can be a product such as a raw material or a service, including provision of access to a place such as a harbor or airport or to a distribution system such as a telecommunications network. In many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favor of, its own downstream operation at the expense of competitors on the downstream market. It may however also be horizontal in the sense of tying sales of related but distinct products or services"[637].

Totally in line with the abovementioned description, in *Bronner*, the CJEU clarified that a nationwide home-delivery scheme, developed and operated by a newspaper publishing firm, did not qualify as an "essential facility", in so far as it could be not only duplicated by the undertaking's competitors, but also bypassed by means of other forms of delivery, namely by post and through sale in shops and at kiosks[638].

Even though this judgment could not provide a valuable example of what constitutes an abusive refusal to grant access to an essential facility, as the latter was ruled out of the relevant factual scenario, in its preliminary ruling, the ECJ seized the opportunity to make three fundamental clarifications on the legal assessment of such a peculiar form of abuse:

- The access to the essential facility/infrastructure must be indispensable to the dominant firm's competitors[639];
- There must not be any actual or potential substitute that could allow rivals to efficiently compete on the market[640]; and

[637] See *supra* (n 349), paragraph 50.
[638] See *supra* (n 228), paragraphs 43-44.
[639] See *supra* (n 228), paragraph 45.
[640] See *supra* (n 228), paragraphs 40-41.

- As far as this conduct is concerned, the indispensability requirement is automatically met when it is not economically viable for other players of the market to duplicate the facility/infrastructure on their own[641].

Moreover, as of today, the only established instance of such an abuse is represented by *Sea Containers*[642]. However, as Sealink, the market leader involved, did not blatantly deny access to Sea Containers, the applicant, but, instead, gave the third-party access to its port on less favorable terms than those enjoyed by itself while operating on the downstream market, hence, as direct rival of the company seeking access to the essential infrastructure, the factual background of the case must be reconducted to a constructive refusal to grant access, rather than an outright one.

In any case, the Commission stipulated the following:

"An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (...) and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favorable than those which it gives its own services, infringes Article 86 (...). An undertaking in a dominant position may not discriminate in favor of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favorable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 86"[643].

Based on the administrative authority's findings in the latter decision, the doctrine has further inferred the two following conclusions:

- For the time being, a refusal to grant access to an essential facility infringes Article 102 TFEU exclusively when it is proved that such a conduct hinders the entry on the downstream market[644]; and

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[641] See *supra* (n 228), paragraph 46.
[642] At the same time, it is noteworthy that, as the case did not reach the ECJ, the public agency's findings have not been subject to any judicial scrutiny.
[643] See *supra* (n 636).
[644] Müller, Ulf. Rodenhausen, Anselm. *The rise and Fall of the Essential Facility Doctrine*, European Competition Law Review, 2008, pages 300-325.

- If the owner of an essential facility denies access for objective reasons, such as capacity constraints, compatibility problems or other technical issues, the refusal may be justified on objective grounds[645].

Finally, what transpires from the analysis conduct up to this point is that, although abuses amounting to a refusal to provide access to an essential facility have been insufficiently explored by the EU decision-makers, in line with the abovementioned types of abusive refusals, in order to be caught under Article 102 TFUE, they require a qualified legal assessment.

3.2.10 Grey areas

As anticipated in the previous sections, to complicate matters, there is a consistent number of conducts that, escaping an easy categorization, do not neatly fall into pre-existing types.

On that regard, this "grey area" is generally understood to encompass at least the two following groups of practices:

- Those that, although clearly different from one another, may require the application of cumulative legal tests for the detection of abuse of dominance, as they share the same nature; and
- Those which, sharing features with two or more established categories, create uncertainty on the relevant legal assessment applicable to them.

Regarding the first, in *Tomra*, the ECJ was called to reconcile its jurisprudence on rebate schemes with its findings on predatory pricing, hence, according to what has been described above, two practices that, although distinct, only differ in regard to their intrinsic ability to generate pro-competitive gains[646].

Although the case concerned rebates applied by Tomra, which were deemed by the Commission capable of creating its *de facto* exclusivity for the supply of certain products, the dominant undertaking involved claimed that its fidelity rebates could not possibly be

[645] Cole, Matthew. *Does the EU Commission really hate the US? Understanding the Google decision through competition theory*, European Law Review, 2019, pages 340-382.
[646] Indeed, they both are: price-based, aimed at strengthening the dominant position in the market in which they are implemented and stoppable by means of a reactive remedy.

abusive in so far as the prices resulting from them were above ATC, therefore not predatory in the meaning of *AKZO*[647]. In other words, Tomra demanded the extension of the relevant legal test of predation to assess the abusive nature of loyalty-inducing rebates.

On that regard, by stipulating that *"The General Court added (...) that the exclusionary mechanism represented by retroactive rebates does not require the dominant undertaking to sacrifice profits, since the cost of the rebate is spread across a large number of units. If retroactive rebates are given, the average price obtained by the dominant undertaking may well be far above costs and ensure a high average profit margin. However, retroactive rebate schemes ensure that, from the point of view of the customer, the effective price for the last units is very low because of the 'suction effect'. The General Court therefore rejected as ineffective the claims made by Tomra that there were errors of fact in the analysis within the contested decision of the level of prices charged by them"*[648], the CJEU observed how, as far as rebate schemes are concerned, the examination of the relation of prices and costs is totally unnecessary.

Nevertheless, the defensive arguments raised by Tomra clearly exposed a friction in the case law of the ECJ, in so far as whereas it is presumed that market leaders' rivals are able to compete with its above ATC pricing policies, it is assumed that, if a dominant company grants discounts above ATC, which are not justified otherwise, its competitors will be unable to match them. Even though it is totally within the CJEU's prerogatives to arbitrarily differentiate between distinct categories of abuse, as correctly pointed out by part of the doctrine, paradoxically, from the dominant undertakings' point of view, it would be better to *"disguise"* their rebate schemes as a predatory pricing practice[649].

Concerning the second, in *Slovak Telekom*, the ECJ had to establish the relevant legal test for conducts that can be placed right in between outright refusals to deal and margin squeeze practices.

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[647] See *supra* (n 134), paragraphs 73-77.
[648] See *supra* (n 134), paragraph 78.
[649] Federico, Giulio. *Tomra v Commission of the European Communities: Reversing Progress on Rebates?*, European Competition Law Review, 2011, pages 125-150. More precisely, the paradox resides in the fact that, as previously observed, while predatory pricing is *prima facie* unlawful, some types of rebates are not automatically presumed abusive by the ECJ.

More precisely, in its decision on the matter[650], the Commission was able to isolate a series of irregular practices which, in spite of having as their ultimate object and/or effect the exclusion of the dominant undertaking's rivals from the downstream market, could be categorized either as a price squeeze or as a refusal to supply. On that regard, if it is true that the conducts were implemented by degrading the access's quality provided to downstream competitors, a typical feature of constructive refusals to supply, it is also important to point out how *Slovak Telekom* represents one of a long line of cases where the EU decision-makers had to face the abusive behaviors of vertically-integrated dominant operators within the telecommunication sector, an element that, as previously observed, typically characterizes margin squeeze cases.

In light of the analysis conducted up to this point, one may be excused to conclude that, even if both perpetrated by the same dominant undertaking, the two sets of practices had to be subject to a different legal assessment, in so far as, *inter alia*, the indispensability condition is exclusively required in cases of refusal to deal/supply.

Nevertheless, the administrative authority, blatantly disregarding the previous case law, followed a uniform approach to assess the abusive nature of the practices at stake, based on the upstream idea for which providing evidence of the indispensability of the input constructively denied was unnecessary. To support its claim, the public agency referred to the factual background of *Slovak Telekom*, arguing that, as it only concerned the imposition of less favorable trading conditions, rather than a proper refusal to access the dominant firm's input, the criteria applied by the ECJ in *Bronner* could not operate therein[651].

In reality, it is not at all surprising that the Commission tried to bypass the indispensability requirement, because, as pointed out before, it significantly aggravates its burden of proof. What is, on the contrary, quite shocking is that the ECJ has legitimized the substantive analysis singled out by the public authority, in so far as it ruled out the indispensability as well[652].

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[650] Commission Decision of 15 October 2010, in *Slovak Telekom*, Case AT.39523.
[651] See *supra* (n 650), paragraphs 364-365.
[652] Judgment of 13 December 2018, *Slovak Telekom vs Commission*, Case T-851/14, EU:T:2018:929, paragraphs 117-121.

At the same time, the rationale underpinning the ruling is different from the one behind the Commission's decision, as the primary argument employed by the CJEU to exclude the necessity of the indispensability condition revolved around the peculiar regulatory framework characterizing the case at stake.

If this is true, by stipulating that *"as the Commission correctly points out, the conditions referred (...) above were laid down and applied in the context of cases dealing with the question whether Article 102 TFEU could be such as to require the undertaking in a dominant position to supply to other undertakings access to a product or service, in the absence of any regulatory obligation to that end"*[653], the ECJ has further refined the test singled out in *Bronner*, as it introduced a new rule, according to which indispensability can only be required in instances where there is no regulatory regime compelling the vertically-integrated dominant firm to deal with its rivals[654].

Therefore, although many other examples may be offered, these two are more than sufficient to understand that, irrespective of the quality of the categorization effort, there will always be new circumstances that require additional balancing and/or a further case-by-case legal assessment. At the same time, the latter consideration does not amount to the total diminishing of the criteria laid down above, as they represent a valuable guide to navigate the notion of abuse of dominance.

Finally, at this point, it is crystal clear that, in cases concerning the application of Article 102 TFUE, there is no such thing as an all-encompassing test, that is to say a unique legal assessment of abuse of dominant position. If this is true, an accurate examination of the possible legal tests of exclusionary abuses becomes indispensable to shed light on what constitutes an abuse of dominance in individual scenarios. Hence, that is exactly where this thesis turns next.

[653] See *supra* (n 652), paragraph 118.

[654] The idea underlying this finding is quite logical: if national laws have made the input already indispensable, by compelling the dominant operator to grant its competitors access to it, a qualified assessment that encompasses indispensability is superfluous, because, to a certain extent, it is already implied in the existent regulatory framework itself.

3.3 The taxonomy of legal tests for exclusionary abuses: between rules and standards

The most efficient approach towards the description of the variety of legal tests that the EU decision-makers, as well as the doctrine, have come up with over decades of implementation and interpretation of Article 102 TFUE is conceptualizing these legal assessments and the allegedly abusive conducts to which they are applied as points along a vertical spectrum.

On that regard, the most basic method that one can adopt in such a context is identifying the three following points on the spectrum:

- Conducts *prima facie* unlawful, which represent the left end of the spectrum;
- Practices subject to an effects-based analysis, to be positioned right in the middle of the spectrum; and
- Conducts *prima facie* lawful, which must be understood as the right extremity of the spectrum.

Moreover, a closer look at the jurisprudence on the prohibition of abuse of dominance shows that, in principle, the ECJ's judgments can be grouped into two sub-categories:

- Rulings where the allegedly abusive conduct is subject to a rule, which comprise the two abovementioned extremities of the spectrum; and
- Rulings in which allegedly abusive practices are subject to a standard, which encompass the middle point of the spectrum mentioned above.

Indeed, whereas the concept of "rule" refers to instances in which a practice is presumed to be either prohibited or legal, irrespective of its effects, the concept of "standard" immediately evokes those situations where the abusive nature of the conduct depends on a case-by-case analysis of an unfixed number of determining factors.

As a matter of fact, this rule/standard dichotomy, which is a real mantra of worldwide Competition Law, both for legal operators[655] and for economists[656], has found fertile land in ECL, particularly in cases concerning the application of Article 102 TFUE. For

[655] Among many others, Crane, Daniel. *Rules Versus Standards in Antitrust Adjudication*, Washington and Lee Law Review, 2007, pages 1-63.
[656] *Ex multis*, Kaplow, Louis. *Rules Versus Standards: An Economic Analysis*, Duke Law Journal, 1992, pages 557-628.

instance, going back to the two opposite ends of the spectrum, namely, practices inherently unlawful and conducts presumptively lawful, Colombo has repeatedly referred to them as, respectively, *"practices that are subject to a qualified prohibition rule"* and *"practices that are subject to a qualified legality rule"*[657].

At the same time, one must not conflate this rule/standard divide with the *summa divisio* between by-object and by-effects restrictions, because the latter, as already pointed out, must be placed outside the scope of the prohibition of abuse of dominance, even in cases of gross violations, such as naked abuses[658].

To complicate matters, if the specific factual background requires so, legal tests can be accordingly calibrated by EU decision-makers to move a certain practice or set of practices closer to one of the two ends of the abovementioned spectrum.

On that regard, when the legal assessment of effects is required, hence, as far as the middle point of the spectrum is concerned, both the Commission and the ECJ may either demand that additional conditions must be met for an abuse to occur or use fixed benchmarks that substitute, to a certain extent, the establishment of anti-competitive effects. Whereas, in the first scenario, going beyond the "ordinary" examination of effects, providing evidence of the conduct's foreclosure capability would no longer trigger the prohibition of abuse, in the second case, the use of proxies would lighten the burden of proof, reducing the threshold of intervention.

Therefore, partially borrowing the categorization mechanism coined by Colombo, regarding the effects-based analysis, one can isolate three distinct methods of assessment:

- The *"standard effects test"*[659], that is to say the "normal" analysis of exclusionary effects;

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[657] Among many, Colombo, Ibáñez, Pablo. *Post Danmark II, or the Quest for Administrability and Coherence in Article 102 TFEU*, LSE Law, Society and Economy Working Papers, 2015, pages 1-20.

[658] More precisely, this thesis espouses an approach that is right in between the ones respectively suggested by Akman and Colombo. On that regard, while the first has taken the absence of by-object violations to its extreme consequences, in so far as she denies the current operation of presumptions of abuse within the ECJ's jurisprudence, the second strongly believes that, irrespective of the absence of clear references to such a dichotomy in the wording of Article 102 TFUE, the prohibition of abuse is nevertheless characterized by it, just like the one enshrined in Article 101 TFUE. However, as it will be explained in greater detail in the following of this section, in the author's view, mitigating these diametrically opposite positions, coming up with a synthesis of the two, is more respectful of the case law.

[659] Colombo, Ibáñez, Pablo. *Legal Tests in EU Competition Law: Taxonomy and Operation*, Journal of European Competition Law and Practice, 2019, pages 424-438.

- The *"enhanced effects test"*[660], which requires a qualified analysis that places conduct subject to it closer to the right extremity of the spectrum, namely, practices *prima facie* lawful; and
- The light effects test, which demands a simplified examination that makes the abusive nature of certain practices easier to prove, moving them towards conduct *prima facie* unlawful, hence, nearer the left extremity of the spectrum.

On top of that, in line with the analysis of the single categories of exclusionary abuses previously conducted, as far as the *"enhanced effects test"* is concerned, the following additional bifurcation must be highlighted:

- Firstly, there are conducts that, in order to be considered abusive, must be subject to a "normal" *"enhanced effects test"*, such as refusals to deal/supply; and
- Secondly, there are practices that, in order to be caught under Article 102 TFUE, must be subject to a "special" *"enhanced effects test"*, such as refusals to grant a license for an IPR.

In light of all the foregoing, further enriching the basic method described at the beginning of this section, based on the legal assessment applicable to them, one can isolate the following typologies of allegedly abusive practices along the spectrum:

- Presumptively unlawful conducts, subject to a *"qualified prohibition rule"*;
- Conducts that need a reduced analysis of their anti-competitive effects, subject to a light effects test;
- Conducts that demand an average assessment of their foreclosure effects, subject to a *"standard effects test"*;
- Conducts that require an aggravated examination of their exclusionary effects, which can be subject to an either "normal" or "special" *"enhanced effects test"*; and
- Presumptively lawful conducts, subject to a *"qualified legality rule"*.

Regarding the first category, the application of the prohibition rule is justified every time a specific conduct is deemed to have no plausible pro-competitive gain, as the restriction of competition represents its sole foreseeable rationale. Indeed, against this background,

[660] See *supra* (n 659).

it is only natural to presume that the dominant undertaking's behavior is at least capable of having anti-competitive effects. Hence, cases involving these practices can be considered to be fact-intensive, in so far as intervention does not require evidence of their impact on competition.

At the same time, it is essential to point out, once again, that, even for these conducts, the assessment of effects is not at all absent, as it is simply implied, thus taken for granted. As observed in the previous chapter, this unique feature, which makes allegedly abusive practices subject to the *"qualified prohibition rule"* a real peculiarity of Article 102 TFUE, was clearly confirmed by the ECJ in *Intel*, in so far as it recognized the abstract possibility to rebut the presumption of illegality.

On that regard, going back to the abovementioned dispute between Akman and Colombo on the presence of by-object restrictions within the legal framework of abuse of dominance, it is the case law itself to suggest that the correct interpretation is right in the middle between their positions. Indeed, if, on the one hand, it cannot be argued that by-object violations are to be associated with presumptively abusive conducts, because, *inter alia*, the CJEU has expressly granted upon market leaders a right to prove the presumption wrong, on the other hand, blatantly disregarding the peculiar nature of such conducts, especially in comparison to the other categories of allegedly abusive practices, is equally misleading. If this is true, as anticipated before, the only solution that respects both the ECJ's jurisprudence and the letter of Article 102(1) TFUE is acknowledging the uniqueness of such a category, without trying to either assimilate it with other pre-existing concepts and/or types of violations or diminish its exceptional nature.

To conclude, the following individual exclusionary abuses are typically considered to be part of the dominant undertakings' presumptively abusive conducts:

- The imposition of exclusivity or quasi-exclusivity obligations upon customers (generally referred to as exclusive dealing);
- Fidelity rebates and any other form of discount that has an equivalent object and/or effect, thus, generating *de facto* exclusivity;
- Predatory pricing policies; and
- Tying and bundling.

However, switching to the second category, between the abovementioned presumptively abusive practices, there is a conduct, namely tying, that, being capable of having pro-competitive gains, does not appear to be at odds with competition on the merits, at least not inherently, in so far as it does not invariably generate exclusionary effects.

In other words, as suggested by Nazzini, as far as tying is concerned, it is almost like *"there is a mismatch between its nature and anticompetitive potential and its legal status"*[661]. As a matter of fact, during the previous examination of the relevant criteria to differentiate between the various types of abuse, the efficiency rationale that may be underpinned by tying conducts was accordingly highlighted.

Assuming that this inconsistency, which is normally attributed to the paradigm shift undergone by the EU decision-makers in their approach towards Article 102 TFUE, was real, one must conclude that it would only be natural to require a case-by-case assessment of tying practices. After all, as observed in the previous chapter, one of the most remarkable consequences of the introduction of mainstream economic analysis within the assessment of abuse of dominance has been the adjustment, *de iure* and/or *de facto*, of the applicable legal tests to the new principles of the modern era[662].

Nevertheless, as far as tying is concerned, the situation seems to be more complicated than that, because the EU decision-makers have proved to endorse an ambivalent approach towards this conduct, which, whereas, in some cases, requires evidence of its negative impact on competition, that is to say its anti-competitive effects, in other scenarios, takes them for granted, treating the conduct at stake as a presumptively abusive one.

For instance, while in its decision in *Hilti*[663], the Commission has clearly treated the dominant undertaking's practices as inherently abusive[664], an approach that, in turn, was

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[661] Nazzini, Renato. *The Evolution of the Law and Policy on Tying: A European Perspective From Classic Leveraging to the Challenges of Online Platforms*, Journal of Transnational Law and Policy, 2016, page 267.

[662] To that extent, see Waelbroeck, Denis. *Michelin II: A Per Se Rule Against Rebates by Dominant Companies?*, Journal of Competition Law and Economics, 2005, pages 149-171, in which the author correctly reconducts the innovative legal status of standardized rebates, in comparison with the traditional assessment of loyalty-inducing rebates, exactly to the abovementioned paradigm shift.

[663] Commission Decision of 22 December 1987, in *Eurofix-Bauco vs Hilti*, Case IV/30.787 and 31.488, OJ L 65.

[664] See *supra* (n 663), paragraphs 74-86.

totally upheld by the ECJ as well[665], in its decisions in *Microsoft* and *Google (Android)*[666], the administrative authority, conducting an effects-based analysis of the respective practices' effects, has implicitly acknowledged that, at least in digital markets, a case-by-case evaluation of the anti-competitive effects of tying is an indispensable requirement for intervention under Article 102 TFUE[667].

Bearing the foregoing in mind, considering this hybrid status, tying practices, when they are not conceptualized as *prima facie* abusive, can be deemed to be subject to a simplified legal test, that is to say a light effects test which, in the author's opinion, is solely applicable to this form of abuse[668].

Concerning the third category, the three following exclusionary abuses are typically considered to require an "ordinary" analysis of their foreclosure effects:

- Target rebates, as long as they are not purely conditional on exclusivity;
- Margin squeeze; and
- Abuse of regulatory procedures.

Nevertheless, it is important to specify that, although every *"standard effects test"* automatically encompasses a general examination of the economic and legal context in which a certain practice is implemented, the actual length of the analysis *"of all the circumstances involved"*[669] may vary from conduct to conduct.

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[665] See *supra* (n 572), paragraphs 96-102.
[666] Commission Decision of 18 July 2018, in *Google Android*, Case AT.40099.
[667] On that regard, see *supra* (n 207), paragraphs 840-845 and see *supra* (n 666), paragraphs 1303-1307. Moreover, similarly to what has been observed on the Commission's findings in *Hilti*, the CJEU has mainly legitimized the approach endorsed by the public agency.
[668] Indeed, properly noticing how tying practices are not the only presumptively abusive conducts capable of generating pro-competitive gains, part of the doctrine has incorrectly concluded that the arguments suggested above must be expanded, at least, to exclusive dealing and fidelity rebate schemes as well; to that extent, see Motta, Massimo. *Michelin II: The Treatment of Rebates*, in Lyons, Bruce. *Cases in European Competition Policy: The Economic Analysis*, Cambridge University Press, 2009, pages 1-22. However, these scholars have failed to take a fundamental aspect into consideration: while, according to the EU decision-makers, the pro-competitive gains of the other inherently abusive practices can only be enlightened by dominant undertakings, as they can merely represent a defensive argument, in the two cases mentioned above, the Commission, with the subsequent approval of the ECJ, has undergone an autonomous assessment of the effects of the tying practices at stake. In other words, whereas, in the first scenario, the effects-based analysis depends on the rebuttal of presumption of illegality, as far as tying is concerned, the examination of its effects, at least in some circumstances such as digital markets, seems to be intrinsic, meaning that it is individually operated by the EU decision-makers.
[669] As repeatedly observed in the previous chapter, this expression is particularly recurrent in the case law, so much so that, in the author's view, it can be conceptualized as a formulation through which the ECJ refers to the *"standard effects test"*.

More precisely, based on the specific factual background of the individual case, as well as the intrinsic nature of the practice at stake, the focus of the test can be accordingly calibrated. For instance, whereas, for standardized rebates, factors such as the coverage of the practice and the length of the obligations acquire a special relevance[670], margin squeeze practices demand a peculiar attention to elements such as the extent of the dominant position, as well as the features of the relevant market and its correlated product[671].

Therefore, far from corresponding to a flat assessment of the relevant economic and legal context, the *"standard effects test"* must be understood as a dynamic tool that, despite having a fixed basis, can be easily tailored to the peculiar circumstances of each autonomous case.

As far as the fourth category is concerned, a "normal" *"enhanced effects test"* is required for the two following individual exclusionary abuses:

- Practices amounting to vexatious litigation; and
- Refusals to deal/supply.

On the contrary, the two following conducts are generally considered to demand an even more advanced *"enhanced effects test"*, hence, a "special" one:

- Refusals to grant a license for an IPR; and
- Refusals to provide access to an essential facility/infrastructure[672].

At this point, it is essential to ascertain whether there is a subtended mechanism underpinning the application of such a *"enhanced effects test"*, irrespective of its "normal" or "special" nature. In other words, here, the issue, which has represented one of the most controversial objects of discussion for matters concerning the prohibition of abuse of dominance, is understanding if a qualified legal assessment of dominant undertakings' allegedly abusive conducts can be conceptualized as a general tool that will be triggered every time a certain factual scenario occurs.

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[670] See *supra* (n 218), paragraphs 39-46.
[671] See *supra* (n 190), paragraphs 250-255.
[672] In reality, given the totally insufficient material on the issue, particularly as far as the judicial scrutiny is concerned, any attempt to place this form of abuse under a specific legal test must be accordingly understood as nothing more than a mere doctrinal speculation.

Answering this question is far from being a mere theoretical exercise, in so far as it provides indispensable clarifications in relation to the abovementioned "grey area" existing between certain individual categories of exclusionary abuses, which, in spite of presenting some sort of similarities, are subject to a different legal test.

In order to speculate on which factors, if any, may determine the applicability of the *"enhanced effects test"*, the tension between margin squeeze conducts and refusals to deal/supply, which was already discussed to a greater extent above, will be taken into consideration as starting point of analysis. On that regard, a closer look at the two lines of case law on these abuses suggests that, above all, they significantly differ on the remedy applied by the Commission to put an end to the violations at stake[673].

Indeed, as far as refusals to deal/supply are concerned, in its decisions in, *inter alia*, *Commercial Solvents*[674] and *Magill*[675], the administrative authority respectively imposed a fixed amount of quantities to be supplied to a downstream rival at a maximum price[676], on the one hand, and an obligation upon three broadcasters to license their information on a non-discriminatory basis, both to each other and to any requesting third party[677], on the other hand. Hence, it can be safely concluded that, in scenarios like those at stake in these cases, thus of refusals to deal/supply, the finding of abuse automatically triggers the imposition of positive obligations.

On the contrary, concerning margin squeeze, it was previously observed how such a practice normally encompasses nothing more than a cease-and-desist order on the market leader involved, hence, a mere negative obligation[678].

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[673] Vane, Henry. *Margin squeeze proof requires effects, says ECJ official*, Global Competition Review, [October 30, 2014]. However, the general applicability of this intuition to all types of exclusionary abuses must be accordingly recognized to Colombo. On that regard, *inter alia*, see *supra* (n 626) and (n 659).
[674] Commission Decision of 14 December 1972, in *ZOJA/CSC – ICI*, Case IV/26.911, OJ L 299.
[675] Commission Decision of 21 December 1988, in *Magill TV Guide/ITP, BBC and RTE*, Case IV/31.851, OJ L 78.
[676] See *supra* (n 674), Article 2.
[677] See *supra* (n 675), Article 2.
[678] *Ex multis*, see Commission Decision of 21 May 2003, in *Deutsche Telekom AG*, Case COMP/C-1/37.451, 37.578 and 37.579, OJ L 263, Article 3. Moreover, as anticipated before, another fundamental difference between margin squeeze cases and refusals to deal/supply is the relevant factual background in relation to the regulatory context. Indeed, every instance of margin squeeze abuse analyzed by the EU decision-makers up to this point has comprised the existence of a regulatory regime granting access to the infrastructure on fair, reasonable and non-discriminatory conditions. For instance, in *Deutsche Telekom AG*, paragraphs 15-25, the Commission expressly excluded the utility of positive obligations, as they already

Against this background, what seems to trigger the application of an *"enhanced effects test"*, as opposed to a *"standard effects test"*, is the remedy to bring the individual infringement to an end, rather than the "label" attributed to a certain conduct, that is to say its categorization as margin squeeze or as refusal to deal/supply.

Therefore, making these findings a principle applicable across-the-board, one can assume that a qualified legal assessment would become appropriate whenever intervention requires the imposition of positive obligations on market leaders. In the same vein, it can additionally be inferred that an "ordinary" legal test would be sufficient every time remedial action does not exceed the boundaries of negative obligations.

The consequences of such an approach must not be underestimated, in so far as, according to this argument, irrespective of being labeled as a margin squeeze, a conduct that shows all the features of the latter category but demands a proactive remedy to be stopped will be subject to an *"enhanced effects test"* nevertheless.

Moreover, as a testimony of the validity of such a perspective, considering that, when dealing with margin squeeze practices in the previous sections, it was observed how, at least in theory, the typical factual scenario of price squeezes may occur also under unaltered circumstances, hence, in the absence of a peculiar regulatory framework, the abstract possibility of the necessity of positive obligations within the framework of abuses amounting to margin squeeze cannot be denied in principle.

On top of that, in light of this argument, the abovementioned friction in the case law exposed by *Slovak Telekom* would not even exist, in so far as its factual background could not possibly involve a proactive remedy, given that positive obligations were already required by the sector-specific regime. Indeed, exactly like in *Deutsche Telekom I*, the national regulatory framework laid down a detailed description of the conditions under

existed in light of the sector-specific context in place. Therefore, while, in refusals to deal/supply, there is usually the need to create a positive obligatory environment through the application of Article 102 TFUE, in margin squeeze cases, the negative remedy is normally sufficient to bring the dominant firm's behavior in line with the prohibition of abuse.

which the relevant dominant telecommunication operator had to share its facilities with downstream rivals[679].

To conclude, the general applicability of the approach described above seems to be corroborated by the so-called Microsoft-saga as well. On that regard, although the set of infringements perpetrated by the Tech Giant in *Microsoft* has always been labeled as tying, the imposition of negative obligations by the Commission[680] was not sufficient to extinguish the anti-competitive effects of the abusive conduct. That inefficiency has given rise to additional litigation between the administrative authority and the relevant dominant undertaking that has been concluded with the final employment of proactive remedies by the public agency[681].

Therefore, this example clearly suggests that how a certain allegedly abusive behavior is labelled upstream can have significant consequences on the applicable legal test, which, if not interpreted correctly, may give life to inconsistencies, that is to say frictions in the case law, that, in reality, do not even exist.

To that extent, going back to the real value to be attributed to the categorization efforts, it is now clear that the typologies of exclusionary abuses, irrespective of the mechanism employed to tell one practice apart from another, cannot be conceptualized as static containers in which allegedly abusive conducts are encapsulated[682].

Regarding the fifth category, as already pointed out in the previous chapter, within the European framework, the CJEU is the only institution entitled to definitively ascertain whether a specific dominant undertaking's conduct really amounts to an abuse in the meaning of Article 102 TFUE.

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[679] That is even more true if one considers that, in see *supra* (n 650), paragraphs 36-49, the Commission makes express reference to the context-specific features that were accurately analyzed by the public agency beforehand in see *supra* (n 678).

[680] See *supra* (n 207), Article 5.

[681] On that regard, see judgment of 27 June 2012, *Microsoft Corp. vs European Commission*, Case T-167/08, EU:T:2012:323, with which this endless saga has finally come to an end. This ruling is quite interesting in so far as it explains how the real concerns for Article 102 TFUE were intrinsic in the very design of the operating system, rather than being related to the combined sale of the two products, because the first had a negative impact on the access conditions of rival software providers to Microsoft's operating system.

[682] This idea is eloquently summarized by Colombo in see *supra* (n 659), page 445, in so far as he maintained that *"Any refusal to deal, for instance, can be reasonably seen as a form of tying. After all, a dominant firm that denies access to an input or platform conditions the sale of one product to the acquisition of another one"*.

If this is true, when it comes to presumptively lawful practices, the starting point of analysis becomes the description of every allegedly abusive behavior that the ECJ has ultimately deemed a lawful manifestation of competition on the merits.

Proceeding from this indispensable precondition, over decades of judicial scrutiny and interpretation in the context of preliminary ruling procedures, the CJEU has considered the following individual conducts as *prima facie* legal:

- The combined analysis of *Hoffmann-La Roche* and *Post Danmark II* suggests that quantity rebates, those based on volume, are presumptively lawful. More precisely, every time a rebate scheme (i) depends on the quantity supplied and (ii) is granted in respect of individual orders[683], it is, at least in principle, compatible with the prohibition of abuse of dominance;
- The joint examination of *Post Danmark I* and *Post Danmark II* shows that aggressive pricing campaigns perpetrated by market leaders, which are normally carried out through the application of selective price cuts to the customers of a rival but may also be implemented across-the-board, are outside the scope of Article 102 TFUE when the prices charged remain above ATC[684], in so far as they are, in theory, incapable of driving an equally efficient rival out of the market[685]; and
- The comprehensive analysis of the case law on practices amounting to margin squeeze provides sufficient evidence to maintain that, as long as the price squeeze perpetrated by the upstream market leader is incapable of forcing equally efficient rivals to sell at a loss in the downstream market, the dominant undertaking's behavior is presumed to be a valid expression of competition on the merits.

Nevertheless, diametrically opposite to what has been established for presumptively abusive practices, it is still possible for the Commission to prove how a dominant firm's

[683] See (n 218), paragraphs 27-28, where the ECJ clearly held that when rebates reflect the cost savings made by the market leader in the context of a particular transaction, any further gain resulting from the discount can be safely presumed to be justified by efficiency arguments alone.
[684] Apart from being implied in *AKZO*, this rule is expressly singled out in see *supra* (n 173), paragraphs 22, 30 and 33.
[685] See *supra* (n 218), paragraph 66.

conduct that is in principle lawful can be caught under the scope of the prohibition of abuse of dominance, due to its peculiar economic and legal context.

A closer look at the jurisprudence, as well as at the administrative practice, suggests that, as of today, there are at least two main areas in which the latter scenario may occur:

- Firstly, in light of the context-specific analysis of a certain practice, the public agency may argue that some of the general principles enshrined in the case law on Article 102 TFUE must be accordingly disregarded; and
- Secondly, as the status of *prima facie* lawful practices is inferred from a variety of presumptions[686], it is always possible for the Commission to provide evidence showing how the latter cannot be applied against the background of a particular case;

On that regard, whereas the first scenario encompasses exogenous factors that may alter the legal status of the presumptively lawful conduct at stake[687], the second circumstance generally concerns endogenous elements that have to do with the intrinsic nature of the individual practice.

More specifically, as far as the first area is concerned, as extensively analyzed in the previous chapter, the CJEU has clearly recognized that, in certain circumstances, the effects-based approach must not be conducted on the basis of the AEC principle, for instance, as mentioned above, in *Post Danmark II*, it specified how the economic and legal context of that case required to take also less efficient competitors into consideration, in order to properly evaluate the lawfulness of the relevant practice. In doing so, the ECJ has implicitly confirmed the abstract possibility to depart from the principles established in its jurisprudence, as far as there is evidence showing how the specific characteristics of the case at stake require so.

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[686] For instance, as observed before, the presumptive compatibility of quantity rebates with Article 102 TFUE is based on the upstream idea that, in the context of an individual transaction, such discounts can solely reflect the cost savings made by the dominant supplier.

[687] To that extent, see judgment of 25 October 1977, *Metro SB-Großmärkte GmbH & Co. KG vs Commission*, Case 26-76, EU:C:1977:167, paragraphs 14-18, where the ECJ has unequivocally held that the Commission is entitled to advance arguments that, rather than being inherent in the conduct itself, are based, *inter alia*, on the structure of the relevant market, thus leading the *prima facie* legal practice to have anti-competitive effects in the specific circumstances of the case.

Moreover, prior to that, in its 2009 Guidance Paper, apart from mentioning that a less efficient competitor may also exert a constraint worth protecting, the Commission had expressly noticed how aggressive pricing policies, even if above ATC, might result problematic all the same, when the dominant undertaking *"may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency"*[688]. Indeed, in this peculiar context, as any competitive advantage procured by the market leader may significantly affect its rivals, including those less efficient, the implementation of a strategy that is normally deemed as a valid manifestation of competition on the merits may still be caught under the scope of Article 102 TFUE[689].

Regarding the second area, the leading case on the matter is represented by *Commission vs Portugal*[690], in so far as the administrative authority was able to successfully prove that, although the rebate schemes granted by the State-owned dominant airport operator apparently amounted to quantity rebates, as they were formally contingent on volume, they had been strategically designed in such a way that only the incumbent market leader itself could benefit from them, without any justification based on the existence of an economy of scale.

More precisely, given that, in the case at hand, the ECJ observed how *"(...) where as a result of the thresholds of the various discount bands, and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors, a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions"*[691], and additionally considering that, in *Michelin II*, an almost identical argument was advanced[692], it is almost like the ECJ has made the relationship

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[688] See *supra* (n 12), paragraph 24.
[689] These are only the tangible instances in which, setting aside the AEC principle, the EU decision-makers have encompassed, even if only abstractly, the possibility to rebut the presumption of legality of inherently lawful conducts. For an accurate description of hypothetical scenarios shaped by the doctrine, see Edlin, Aaron. *Stopping Above-Cost Predatory Pricing*, Yale Law Journal, 2002, pages 1-41.
[690] Judgment of 29 March 2001, *Portuguese Republic vs Commission*, Case C-163/99, EU:C:2001:189.
[691] See *supra* (n 690), paragraph 52.
[692] On that regard, see *supra* (n 236), paragraphs 58-60, in which the ECJ, by express reference to *Portugal vs Commission*, stipulated, *inter alia*, the following: *"Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC (...). If increasing the quantity supplied results in*

between the quantity rebates and the economy of scale enjoyed by the relevant dominant firm an essential element of the Commission's rebuttal, in so far as this sort of discounts can be detected under Article 102 TFUE solely when it is established that such a relationship is absent.

Furthermore, it is important to keep in mind that, as noticed during the analysis of *Intel* conducted in the previous chapter, if practice is indispensable to achieve certain pro-competitive purposes, it can be justified on objective necessity grounds. On that regard, even if these instances go beyond the boundaries of conducts subject to *"a qualified legality rule"*, in so far as the evidence of such justifications needs to be brought forward by the relevant dominant undertaking/s, the outcome may be identical, because objective necessity, being evaluated by the Commission in the first stage of assessment, has the potential to stop the finding of abuse upstream.

Finally, above all, what transpires from this analysis of exclusionary abuses is that the EU decision-makers have created a complex legal framework which must be carefully navigated, in so far as only a comprehensive approach to matters concerning Article 102 TFUE is capable of shedding light on the rationale underpinning their choices, irrespective of whether one deems them embraceable or not. Consider, for instance, loyalty-inducing and quantity rebates, two functionally equivalent practices that have been subject to diametrically opposite legal tests, with all the illustrated implications that such a decision entails.

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lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favorable tariff (...). Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position. It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors".

3.4 Exploitative abuses

Although there is no clear-cut definition of what constitutes an exploitative abuse, in principle, exploitation can be found every time a market leader takes advantage of its dominant position to gain benefits that it could not otherwise obtain[693].

The legal basis of this category of abusive practices are letters (a) and (c) of Article 102(2) TFUE, in so far as they respectively place upon dominant undertakings a prohibition to impose *"unfair purchase or selling prices or other unfair trading conditions"*, on the one hand, and to apply discriminatory conditions, first and foremost discriminatory prices, to their competitors, on the other hand.

On that regard, the Treaty's provision allows us to isolate the three following types of conducts resulting in exploitative abuse:

- Excessive pricing;
- The open category of *"unfair trading conditions"*; and
- Discrimination.

Furthermore, as a closer look at them unequivocally shows how they are all capable of being directly detrimental to consumers, it can be safely maintained that, unlike exclusionary abuses, exploitation directly impinges on consumer welfare.

Against this background, considering the abovementioned current centrality recognized by the Commission to the protection of final consumers, one would be excused to assume that the detection of exploitative abuses has been representing a priority for the administrative authority. However, the reality is extremely different, in so far as, during the almost seven decades of implementation of Article 102 TFUE, the Commission has investigated and prosecuted allegedly abusive practices amounting to exploitation in extremely rare circumstances.

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[693] This definition is directly extrapolated from see *supra* (n 124), paragraph 249, where the ECJ maintained the following: *"It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition"*. However, as correctly pointed out by Werden in see *supra* (n 86), page 17, the fact that, in the latter passage, differently from, *inter alia*, *Parke, Davis & Co*, the CJEU employed the verb "use", rather than "abuse", testifies how not every instance of exploitation amounts to an infringement of Article 102 TFUE.

In other words, although the prohibition of exploitative abuses forms an integral part of the European legal framework, the administrative authority, right within its discretionary powers to dictate the Union's competition policy, has mainly disregarded it, focusing its limited resources on exclusionary abuses. This tendency is testified, *inter alia*, by the fact that, as mentioned above, the Commission has recently published the 2025 draft Guidelines on dominant undertaking's exclusionary abuses, placing, once again, exploitation outside the scope of its priorities.

The negative trend followed by the public agency, which is generally referred to as *"non-enforcement paradigm"*[694], as well as the rationale underpinning it, are perfectly encapsulated in the words pronounced by the now former Commissioner for Competition Margrethe Vestager during her speech at the 2018 Global Competition Law Centre's annual conference:

"We're still bound to come across cases where competition hasn't been enough to provide a real choice. Where dominant businesses are exploiting their customers, by charging excessive prices or imposing unfair terms. We have to be careful in the way we deal with those situations. Because sometimes, a company is dominant simply because it's better than its competitors. And when that's the case, it's only fair that it should get the rewards of its efforts. But we also need to be careful that we don't end up with competition authorities taking the place of the market. The last thing we should be doing is to set ourselves up as a regulator, deciding on the right price. But there can still be times when we need to intervene"[695].

What clearly transpires from this extract is that the prohibition of exploitative abuses enshrined in Article 102 TFUE requires an almost impossible balancing operation between the protection of consumer welfare, on the one hand, and the very principles underlying the free market economy, on the other hand. On that regard, one could argue that, as observed during the individual examination of exclusionary abuses conducted in the previous sections, this complex exercise is intrinsically related to the prohibition of abuse of dominance itself, irrespective of the nature of the violation. However, as far as exploitation is concerned, this territory becomes even more slippery, because the

[694] Gal, Michal. *Abuse of Dominance - Exploitative Abuses*, in see *supra* (n 22), 2013, pages 385-422.
[695] Vestager, Margrethe. *Fairness and Competition*, GCLC Annual Conference, Brussels, 25 January 2018.

boundaries of the principle of dominant undertakings' special responsibility become as blurred as they can get.

An example is indispensable to shed light on the reason behind the latter statement. In essence, the concept of excessive prices, by far the most relevant exploitative abuse within the European legal framework, can be likened with the notion of monopoly prices, those prices that can only be charged by a market leader and are generally deemed detrimental to consumers, in so far as they represent an "excessive" sacrifice for them. Nevertheless, as mentioned above, one of the mantras related to the discipline encapsulated in Article 102 TFUE is the idea that the mere detention of huge market power by one or more undertakings is not sufficient in and of itself to trigger the application of the prohibition of abuse of dominance.

Therefore, as monopoly prices can be conceptualized as a natural consequence of the acquisition by an enterprise of the status of market leader[696], which, in turn, is not unlawful under any European measure, let alone Article 102 TFUE, drawing the line between genuine manifestations of competition on the merits, even if carried out by dominant operators, on the one hand, and exploitative abuses amounting to excessive pricing, on the other hand, is, in practice, extremely difficult, if not impossible.

The complexities revolving around such a balancing exercise, which have mainly determined the Commission's *"non-enforcement paradigm"*, are perfectly summarized by the Competition Committee of the Organization for Economic Co-operation and Development (hereinafter the "OECD"), in one of its most important Competition Policy Roundtables:

"(...) Like many other competition authorities, the Commission claims that the central goal of competition policy is to protect consumer welfare. In this light it would be strange to protect consumers only indirectly, i.e. by intervention against exclusionary conduct to protect the competitive process, and not also directly by intervening against too high or unfair prices. Where there are two types of intervention possible to achieve a certain aim – in this case protecting consumer welfare - it is highly unlikely that under all circumstances one type of intervention is superior to achieve the aim. In other words, the

[696] Ezrachi, Ariel. Gilo, David. *Are Excessive Prices Really Self-Correcting?*, Journal of Competition Law and Economics, 2009, pages 249-268.

relevant question seems to be how to find the right balance in allocating enforcement resources between prohibiting exclusionary conduct and prohibiting exploitative conduct"[697].

That is even more true if one considers that, within American Antitrust Law, which is much more consumer-oriented than ECL, at least in its foundations, there is no evidence whatsoever, neither under Section 2 of the Sherman Act nor under Section 5 of the Federal Trade Commission Act[698], of the criminalization of exploitation. The latter observation is even more remarkable if one deems that this absence is deeply rooted in the wording of the abovementioned relevant US competition provisions, which accordingly place exploitative abuses outside their scope by refraining from mentioning them, rather than being the result of policy choices of the Department of Justice and/or of the Federal Trade Commission, similarly to what seems to occur on this side of the Atlantic.

Moreover, the dichotomy between the American and the European approach towards practices amounting to abusive exploitation has been brilliantly portrayed by the former Italian Prime Minister Guliano Amato, in so far as, by noticing how the European Union has a *"culture much more prepared than the American one to trust the State as a deus ex machina"*[699], he has unveiled the cultural reasons underpinning such a gulf. At the same time, apart from correctly recognizing how the prohibition of exploitative abuses enshrined in Article 102 TFUE is a peculiarity of the European legal framework, by associating the prosecution of exploitation with a *"deus ex machina"*, hence, as a sort of ultimate decisive act, Amato has also suggested that, even if, as noticed before, such a discipline forms an integral part of ECL, its employment by the Commission should remain merely exceptional.

Furthermore, the idea that exploitative abuses must be conceptualized, if at all, as a last resort of enforcement of Article 102 TFUE is totally in line with the effects-based approach recently undertaken by the EU decision-makers, when dealing with infringements amounting to an abuse of dominance. For instance, as far as monopoly prices are concerned, mainstream economic analysis is almost granitic in limiting the

[697] Competition Committee of OECD, *Excessive Prices*, Series Roundtables on Competition Policy n. 121, 2011, page 310.
[698] *The Federal Trade Commission Act*, 1914.
[699] See *supra* (n 387), page 98.

prosecution of dominant undertakings' conducts resulting in excessive pricing to special circumstances only.

More precisely, the three following arguments have been advanced over the years:

- Firstly, even if prices set by dominant firms for certain goods/services are indeed "excessive", in unaltered competitive scenarios, the market will likely self-adjust, as either consumers will eventually stop purchasing the products/services in question or would-be rivals will enter the market, forcing the monopolists or quasi-monopolists involved to lower their prices[700]. In both cases, in the long-run, intervention would be unnecessary[701];
- Secondly, in close connection with the first consideration, especially in technological markets such as the pharmaceutical industry, private enterprises develop innovative products/services if they can benefit from short-term monopoly prices[702]. If this is true, at least in the short run, sanctioning excessive prices will inhibit market leaders' incentives to invest[703]; and
- Thirdly, as most of the MSs' network industries, such as electricity, gas, railway and telecommunication markets, are characterized by sector-specific regimes that typically encompass price regulation, monopoly prices are already significantly constrained in a vast number of areas of interest[704], making intervention superfluous[705].

[700] Davies, John. Padilla, Jorge. *Another Look at the Role of Barriers to Entry in Excessive Pricing Cases*, Social Science Research Network, 2019, pages 1-13.
[701] Monti, Giorgio. De Streel, Alexandre. *Exploitative Abuses: The Scope and the Limits of Article 102 TFEU*, European University Institute, 2023, pages 1-14.
[702] Monti, Giorgio. *Excessive pricing: Competition Law in Shared Regulatory Space*, Tilburg University, 2019, pages 1-28.
[703] Motta, Massimo. De Streel, Alexandre. *Excessive Pricing in Competition Law: Never Say Never?*, in Konkurrensverket (Swedish Competition Authority), *The Pros and Cons of High Prices*, Lenanders Grafiska, 2007, pages 14-46.
[704] Combet, Marie-Laure. Hubert, Patrick. *Exploitative abuse: The end of the Paradox ?*, Concurrences, 2011, pages 44-51.
[705] Therefore, according to mainstream economy, in most of the cases, administrative action is useless; in a smaller percentage of circumstances, it appears to be even detrimental to consumers; finally, in regulated markets, it is redundant. Moreover, these are only the general coordinates of the implications of the more economic approach on monopoly pricing; for an in-depth analysis of the actual range of the space left to exploitative abuses amounting to excessive prices within the renovated more economic framework of ECL, see Botta, Marco. *Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!*, European Competition Journal, 2021, pages 156-187.

In addition, as far as the case law is concerned, the early interpretations of Article 86 EEC Treaty, offered by the ECJ in the context of three preliminary ruling procedures referred to the CJEU by the MSs' judicial authorities in less than five years, perfectly testify the enormous difficulties encountered by legal operators, both at the national and at the European level, to draw the line between abusive exploitation and valid expressions of competition on the merits[706].

On that regard, in *Parke, Davis & Co*, in which the CJEU engaged in an accurate analysis of the boundaries of lawful enforcement of patent rights by dominant undertakings, the ECJ unequivocally held that *"higher sale price for the patented product as compared with that of the unpatented product coining from another Member State does not necessarily constitute an abuse"*[707].

Three years later, in *Sirena*[708], while delineating the limits of lawful enforcement of trademark rights by market leaders, the CJEU noticed how *"although the price level of a product may not, of itself, necessarily suffice to disclose the abuse of a dominant position within the meaning of the said article, it may, however, if unjustified by any objective criteria, and if it is particularly high, be a determining factor"*[709].

Almost simultaneously, in *Deutsche Grammophon*[710], which concerned the relevant dominant undertaking's allegedly abusive usage of its copyrights to enforce resale price maintenance, when confronted with parallel imports, on the basis of *Parke, Davis & Co* and in exactly the same way of *Sirena*, the ECJ reiterated that *"the difference between the controlled price and the price of the product reimported from another Member State does not necessarily suffice to disclose an abuse of a dominant position; it may, however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse"*[711].

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[706] At the same time, it is important to observe how these preliminary rulings did not directly tackle the issue of exploitative abuses, nevertheless, a closer look at them provides valuable hints on the first approach undertaken by the ECJ on the imposition by dominant undertakings of "high" prices.
[707] See *supra* (n 27), pages 72-73.
[708] Judgment of 18 February 1971, *Sirena S.r.l. vs Eda S.r.l. and others*, Case 40/70, EU:C:1971:18.
[709] See *supra* (n 708), paragraph 17.
[710] Judgment of 8 June 1971, *Deutsche Grammophon Gesellschaft mbH vs Metro-SB-Großmärkte GmbH & Co. KG.*, Case 78/70, EU:C:1971:59.
[711] See *supra* (n 710), paragraph 19.

As none of the latter arguments convincingly shows how, according to the ECJ, high prices alone could infringe Article 86 EEC Treaty, one could presume that, at least initially, monopoly prices were not deemed to be sufficient to trigger the application of the prohibition of abuse of dominance by the CJEU.

Finally, bearing in mind the general characteristics of exploitative abuses, as well as the complexities to which they give rise, it is now possible to proceed with the individual examination of the three abovementioned categories of abusive exploitation.

3.4.1 Excessive pricing

In *General Motors*[712], the ECJ squarely addressed, for the first time, the allegedly abusive nature of monopoly pricing, in so far as it offered direct clarifications on the correct meaning to be attributed to letter (a) of Article 102(2) TFUE. Specifically, the case concerned the imposition by the relevant dominant undertaking, to which Belgian authorities delegated the duty to inspect and issue certificates of conformity of vehicles manufactured in other MSs, of unusually high fees for such mandatory inspections.

Although the CJEU quashed the Commission's decision on appeal, because, *inter alia*, even before the initiation of the administrative authority's investigation, the market leader had significantly lowered its fees and refunded most of what it had previously charged[713], it did not exclude the abstract possibility that an undertaking holding a dominant position may infringe Article 102 TFUE through the imposition of excessive prices.

More precisely, by stipulating that *"such an abuse might lie, inter alia, in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favorable level of prices applying in other sales areas in the Community, or by leading to unfair trade in the sense of Article 86(2)(a)"*[714], the ECJ has made it clear how the legal assessment of monopoly pricing practices amounting to an exploitative abuse must comprise, first and foremost, an economic comparison between the price charged by the market leader for the product/service at stake and its intrinsic value.

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[712] Judgment of 13 November 1975, *General Motors Continental NV vs Commission*, Case 26/75, EU:C:1975:150.
[713] See *supra* (n 712), paragraphs 19-22.
[714] See *supra* (n 712), paragraph 12.

However, given that, as mentioned above, based on the relevant factual scenario, the CJEU did not find the presence of an abuse of dominance, it could not offer any additional indication as to the necessary benchmarks, if any, to conduct such an operation, particularly in relation to the calculation of the value of the market leader's good/service.

Therefore, only three years later, in *United Brands*, providing more detailed insights into the nature of the prohibition enshrined in letter (a) of Article 102(2) TFUE and developing a sort of methodology for its application, the ECJ came up with a test to assess the abusive nature of excessive prices imposed by market leaders, generally referred to as the "*United Brands* test".

The factual background of the case concerned the imposition by the relevant dominant undertaking of allegedly excessive prices for the distribution of Chiquita bananas in several MSs of the Union. More specifically, in its decision on the matter[715], the Commission observed, *inter alia*, how the prices charged by United Brands Company had to be considered unfair, in so far as they significantly differed across the various MSs involved[716].

On that regard, it is interesting to notice how the public agency, which isolated four distinct infringements of Article 86 EEC Treaty in the market leader's distribution practices at stake, by recognizing an autonomous abusive nature to the dominant undertaking's unfair pricing policies, unequivocally likened excessive prices with unfair prices.

This association was clearly espoused by AG Mayras, in so far as, in his opinion on the case[717], he maintained that *"(...) the infringement arises when an undertaking or the group in a dominant position turns its position to account, in particular by imposing on its customers unfair prices, that is to say prices which are excessive and bear no reasonable relation to the consideration"*[718]. However, as it will be highlighted in greater detail in the final section on exploitative abuses, this connection, which has been

[715] Commission Decision of 17 December 1975, in *Chiquita*, Case IV/26699, OJ L 95.
[716] See *supra* (n 715), paragraphs 15-16.
[717] Opinion of AG Mayras of 8 November 1977, in see *supra* (n 124), EU:C:1977:173.
[718] See *supra* (n 717), page 338.

sporadically upheld by the ECJ as well, is extremely problematic due to the moral, rather than technical, nature of the rationale underpinning the notion of "unfairness"[719].

As far as the judicial review is concerned, the CJEU ultimately annulled the Commission's decision. More precisely, the ECJ found that the public authority had failed to meet the requisite burden of proof for two main reasons:

- Firstly, the Commission did not consider all the plausible objective justifications for price discrepancies across MSs[720]; and
- Secondly, the administrative authority did not engage in the analysis of the dominant undertaking's production costs[721].

Nevertheless, as anticipated before, differently from *General Motors*, by stipulating that *"the questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products"*[722], the ECJ, engaging in *"quasi-legislative activism"*[723], identified, for the first time, the requisite legal standard for excessive pricing to be caught under the scope of Article 102 TFUE, in far as it laid down a two-prong test for the detection of this sort of abuses.

Therefore, further expanding its findings in *General Motors*, according to which a price is excessive if it bears no reasonable relation to the economic value of the product/service

[719] For a complete examination of the historical foundations of such an association, as well as its latest implications, see Lyons, Bruce. *The paradox of the exclusion of exploitative abuse*, in see *supra* (n 703), 2007, pages 65-87.
[720] See *supra* (n 124), paragraph 258, where the ECJ observed how the public agency solely based *"(...) its view that prices are excessive on an analysis of the differences—in its view excessive—between the prices charged in the different Member States and on the policy of discriminatory prices (...)"*. Furthermore, this consideration, combined with the abovementioned ECJ's remarks in both *Sirena* and *Deutsche Grammophone*, testifies how, according to the CJEU, in cases concerning monopoly pricing, dominant firms are entitled to put forward defensive arguments based on objective justification grounds.
[721] See *supra* (n 124), paragraph 251. This argument is particularly important, as it implies that the finding of excessive pricing abuses, at least in some scenarios, requires a comparison between the sale price of the product/service and its production/distribution costs, irrespective of the difficulties that may arise while determining such cost-price differences, which, in turn, were properly acknowledged by the ECJ.
[722] See *supra* (n 124), paragraph 252.
[723] Cini, Michelle. McGowan, Lee. *Competition Policy in the European Union*, Palgrave Macmillan, 1998, page 25.

on which it is imposed, the ECJ held that a violation of letter (a) of Article 102(2) TFUE will occur every time:

- The price/cost gap is "excessive"; and
- The price at stake is unfair, either inherently or in comparison to the products/services offered by the market leader's competitors.

However, although the wording of the passage leaves no margin of appreciation as of the cumulative nature of these two limbs of the test, it is highly uncertain whether these prongs can be actually conceptualized as requiring distinct operations, that is to say as being different from one another, because, as anticipated before, the EU decision-makers, including the CJEU, has often conflated "excessive" and "unfair" prices.

For instance, part of the doctrine, being loyal to the letter of the abovementioned passage, has maintained that while the first layer is generally understood as setting the relevant benchmark against which allegedly abusive prices must be compared, in this sense, filling the gap left opened by the ECJ in *General Motors*, the second layer restricts the scope of intervention to those circumstances where, apart from being "excessive", prices are additionally "unfair"[724].

However, as the analysis of the following case law on the matter will unequivocally reveal, even though, in theory, the latter approach is correct, as the ECJ has seldom differentiated these two prongs, the *"United Brands* test" must be intended as a comprehensive cost-price, rather than two-limb, test.

On top of that, indirectly confirming the general complexities surrounding abusive exploitation, the legal assessment proposed by the CJEU in the case at stake is extremely difficult to apply in practice, at least for the two following reasons:

- Firstly, it is based on a variety of rather vague concepts, which need, in turn, further clarification. For instance, *inter alia*, the ECJ, as of today, has never navigated cases where prices are purely "*unfair in itself"*; and

[724] Furse, Mark. *Excessive Prices, Unfair Prices and Economic Value: The Law of Excessive Pricing Under Article 82 EC and the Chapter II Prohibition*, European Competition Journal, 2008, pages 59-83.

- Secondly, determining cost-price differences is very costly for administrative authorities[725].

At the same, it is essential to keep in mind that, immediately after having singled out the main characteristics of its test, the ECJ specified how *"(...) other ways may be devised—and economic theorists have not failed to think up several—of selecting the rules for determining whether the price of a product is unfair"*[726]. The case law following *United Brands* is totally in line with such a statement.

To that extent, in *British Leyland*[727], the first case in which, upholding the Commission's decision on the matter, the CJEU recognized the actual existence, rather than its mere virtual possibility, of a monopoly pricing conduct amounting to abusive exploitation, the ECJ used an intra-firm comparison to determine the excessiveness of the prices imposed by the market leader involved.

More precisely, as the factual scenario, similarly to *General Motors*, concerned high fees charged by the relevant dominant undertaking for the issuance of certificates of conformity of vehicles manufactured outside the United Kingdoms, for which British Layland enjoyed an administrative monopoly, the CJEU, engaging in a comparative analysis of the prices charged to left-hand-driven cars with those imposed by the same market leader to right-hand-driven cars, concluded that *"(...) an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided"*[728]. In other words, here, the relevant benchmark of the excessive, thus abusive, nature of the pricing policy is represented by the prices that the monopolist charged to different customers for the exact same service.

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[725] On top of that, as the ECJ provided no guidance on the acceptable margin of profit that market leaders are allowed to charge, drawing the line between "high" and "excessive" prices is a complicated task. For instance, it is uncertain whether the Commission, in order to assess the excessiveness, should take into consideration the economic value of the product from the consumers' perspective. After all, exploitative abuses were criminalized for their capability to directly impinge on consumer welfare.
[726] See *supra* (n 124), paragraph 253.
[727] Judgment of 11 November 1986, *British Leyland Public Limited Company vs Commission*, Case 226/84, EU:C:1986:421.
[728] See *supra* (n 727), paragraph 27.

Moreover, in *Bodson*[729], a preliminary ruling where the ECJ was called to establish whether a dominant undertaking that had been granted a legal monopoly over funeral-related services could infringe Article 102 TFUE by charging excessive prices in a particular town, the CJEU coined the so-called "comparative market test", according to which the excessiveness must be evaluated through the comparison of the relevant market leader's performance with that of another dominant firm operating in a different geographic market[730].

One year later, in *SACEM*[731], by stipulating that *"when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other member states and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of dominant position"*[732], the ECJ, apart from unequivocally legitimizing the autonomous nature of the "comparative market test"[733], coined a sort of presumption according to which, every time the price discrepancy between markets is appreciable, the market leader's pricing policy is, in principle, abusive.

This argument is clearly corroborated by the ECJ itself, in so far as, concluding the abovementioned remark, it observed how *"in such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States"*[734]. In other words, when there is evidence of a noticeable difference in the prices imposed by other comparable dominant operators for the same product/service across distinct geographic markets, the burden of proof appears to be, somehow, reversed,

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[729] Judgment of 4 May 1988, *Corinne Bodson vs SA Pompes funèbres des régions libérées*, Case 30/87, EU:C:1988:225.
[730] See *supra* (n 729), paragraphs 27-34.
[731] Judgment of 13 July 1989, *François Lucazeau and others vs Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, Joined cases 110/88, 241/88 and 242/88, EU:C:1989:326.
[732] See *supra* (n 731), paragraph 25.
[733] Indeed, while, in *Bodson*, the abovementioned test could still be considered as a cumulative legal assessment to be added to the "*United Brands* test", as the latter, even if not conducted, was still theoretically applicable, in *SACEM*, given the relevant factual background, a price-cost analysis was intrinsically impossible. Therefore, in the latter preliminary ruling, the ECJ automatically conceptualized the "comparative market test" as alternative to the one laid down in *United Brands*.
[734] See *supra* (n 732).

thus, it is for the dominant undertaking involved to demonstrate how the discrepancy can be objectively justified.

Accordingly, as *"Article 86 of the Treaty must be interpreted as meaning that a national copyright management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States"*[735], a consistent comparison of price levels between comparable markets can serve as autonomous benchmark of assessment of monopoly pricing.

Although the abovementioned jurisprudence testifies that the CJEU has established some methodological tools to evaluate the excessiveness of prices imposed by market leaders, many aspects of the legal tests singled out over the years remain highly blurred. This uncertainty is generally reconducted to the fact that most of the cases concerning monopoly pricing have been preliminary rulings in which, even if the ECJ has acknowledged the abstract possibility that such an exploitative abuse could be found, it was not compelled to set a minimum threshold for its assessment[736].

On that regard, the incapacity of the ECJ to lay down a sufficiently predictable and concrete definition of what constitutes an "unfair" price, combined with the objective complexities revolving around the legal assessment of exploitation, that are, in turn, clearly manifested in the costly nature of the tests with which the CJEU has come up over the years, have certainly played a central role in the Commission's *"non-enforcement paradigm"*.

To that extent, one should consider that, as observed before, during the early decades of implementation of Article 102 TFUE, the CJEU annulled almost every decision of the administrative authority on excessive pricing, based on the inability of the latter to meet the burden of proof to the requisite legal standard. Indeed, *British Leyland* represents the only instance, among the cases cited above, where the ECJ has confirmed the findings of the public agency.

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[735] See *supra* (n 732), paragraph 33.
[736] Evans, David. Padilla, Jorge. *Excessive Prices: Using Economics to Define Administrable Legal Rules*, Journal of Competition Law and Economics, 2004, pages 97-122.

At the same time, a closer look at the abovementioned case law provides an additional valuable hint on the reason why, generally speaking, exploitative abuses have not been prioritized by the Commission. Indeed, by analogy with exclusionary abuses, one could observe how exploitation gives rise to the almost identical challenges that the administrative authority faces when dealing with abuses of dominance that require proactive remedial action. From that, one could additionally infer that the public agency's upstream policy choice of limiting the prosecution of exploitative conduct to exceptional circumstances shares a common rationale with those exclusionary abuses that, being subject to an *"enhanced effects"* test, are caught by Article 102 TFUE exclusively in "special" scenarios.

Nevertheless, more recently, in *AKKA/LAA*[737], the legal status of dominant undertakings' excessive pricing was subject to thorough scrutiny by the ECJ, even if, once again, in the context of a preliminary ruling procedure.

As far as the factual background is concerned, the case involved the imposition by the relevant dominant undertaking, namely the Latvian music copyright collective, of excessive licensing fees. As a testimony of the current inconsistencies on abusive exploitation, in the context of the review of the Latvian competition agency's decision, the national judicial authority referred seven questions to the CJEU.

Before examining the findings of the ECJ, a preliminary analysis of the AG's Wahl opinion[738] on the matter is indispensable, not only because the CJEU espoused the vast majority of his remarks, but also because he conducted an in-depth investigation of the current law on unfair pricing under Article 102 TFEU, which is worth mentioning to present, as far as possible, a comprehensive approach towards the most important category of exploitative abuses.

[737] Judgment of 14 September 2017, *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība vs Konkurences padome*, Case C-177/16, EU:C:2017:689.
[738] Opinion of AG Wahl of 6 April 2017, in see *supra* (n 737), EU:C:2017:286.

On that regard, the AG's Wahl review can be summarized as follows:

- According to the case law, antitrust authorities, both at the national and at the Communitarian level, enjoy *"a certain margin of maneuver with respect to the methodology that may be followed to determine an excessive price"*[739];
- Benchmarking does not automatically entail a cost-based assessment[740];
- Observing how *"(...) the economic value of the goods or service supplied by a dominant undertaking may, in the eyes of the customers, be higher than the benchmark price"*[741], AG Whal has implicitly recognized that, when a cost-price test is necessary, the value attributed to the goods/services by the customers must be taken into consideration in the assessment of the excessive nature of the price imposed on them; and
- By stipulating that *"(...) unfair prices under Article 102 TFEU can only exist in regulated markets, where the public authorities exert some form of control over the forces of supply and, consequently, the scope for free and open competition is reduced"*[742], AG Wahl appears to embrace a more economic approach towards monopoly pricing, according to which, as mentioned above, under unaltered competitive circumstances, excessive prices are unproblematic.

Furthermore, as far as the "*United Brands* test" is concerned, AG Wahl has provided punctual clarifications on the correct interpretation of what constitutes an inherently unfair price that must be quoted in full, as, although, according to EU constitutional law, an AG's opinion does reflect the ECJ's perspective, here, it represents the only noteworthy instance in which this topic has been extensively addressed:

"(...) a price unfair in itself is meant to cover those instances in which the unfairness of a price can be determined without the need to make any comparison with similar or competing products. The particularly high price in itself reveals the abuse;

that may be the case, for example, of prices which are charged to customers which, however, do not receive any product or service in return (...);

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[739] See *supra* (n 738), paragraph 35.
[740] See *supra* (n 738), paragraphs 36-45.
[741] See *supra* (n 738), paragraph 128.
[742] See *supra* (n 738), paragraph 48.

it may also be the case of situations in which a dominant undertaking sets a price particularly high because, in reality, it is not interested in selling the product or service in question but intends to pursue a different, anticompetitive, aim (…)"[743].

Regarding the ECJ's findings, although the CJEU was largely in agreement with the AG's Wahl opinion, the two following observations must be highlighted:

- Firstly, when benchmarking is required, the difference between the dominant undertaking's prices and those used to make the comparative analysis must be *"both significant and persistent on the facts"*[744], irrespective of the typology of the test implemented to conduct the legal assessment of excessiveness; and
- Secondly, differently from the perspective advocated by AG Wahl, reaffirming how *"the abuse of a dominant position within the meaning of that article might lie in the imposition of a price which is excessive in relation to the economic value of the service provided"*[745], the ECJ has placed the value attributed by the customers to the good/service provided by the dominant firm outside the evaluation of the excessiveness of prices, limiting the boundaries of the relevant assessment to *"objective factors"*[746] only.

At the same time, recognizing how *"there is in fact no minimum threshold above which a rate must be regarded as ' appreciably higher', given that the circumstances specific to each case are decisive in that regard"*[747], the CJEU has made it clear that, as far as exploitative abuses amounting to monopoly pricing are concerned, there is no such thing as a minimum standard of excessiveness.

On that regard, one could correctly argue that, as mentioned in the previous sections, the same is true for exclusionary abuses, however, here, the relative scarcity of cases addressing excessive pricing makes it almost impossible to draw meaningful conclusions about the rationale and operation of the relevant legal tests. The latter statement is even more impactful if one considers that, as far as abusive exploitation is concerned, in

[743] See *supra* (n 738), respectively, paragraphs 121, 122 and 123.
[744] See *supra* (n 737), paragraph 55.
[745] See *supra* (n 737), paragraph 35.
[746] See *supra* (n 737), paragraph 59.
[747] See *supra* (n 744).

general, excessive pricing cases represent the majority of scenarios where at least one of the EU decision-makers has intervened.

Finally, as, in *AKKA/LAA*, the ECJ ruled that the dominant undertaking's unfair fees could be potentially justified by the circumstance for which the market leader secured a higher royalty rate for its copyright holders, bearing more expensive administrative costs in comparison to the corresponding dominant operators of other MSs[748], perfectly in line with other precedents such as, *inter alia*, *Sirena* and *Deutsche Grammophon*, the CJEU is considered to accept the abstract possibility of defensive arguments advanced by market leaders, even if, in practice, it has never had the chance to uphold one.

3.4.2 Unfair trading conditions

As anticipated before, besides sanctioning monopoly pricing, letter (a) of Article 102(2) TFUE encapsulates a general prohibition according to which market leaders must refrain from imposing on their customers *"unfair trading conditions"*.

On that regard, considering that excessive prices are expressly mentioned in the Treaty's provision, the opened category of *"unfair trading conditions"* must be correctly understood as solely comprising non-price-based dominant undertakings' conducts.

The leading case on the matter is represented by *SABAM*[749], a preliminary ruling where the CJEU was called to evaluate the lawfulness of a series of restrictions imposed by a copyright cooperative on its members, through which the market leader limited their rights, by requiring them to assign to itself the sole fruition of, *inter alia*, those copyrights that were not even necessary to further the goals of the association.

Indeed, for the first time, the ECJ highlighted how the typical expedient through which dominant firms may violate the general prohibition enshrined in the second half of letter (a) of Article 102(2) TFUE is the imposition of abusive contractual clauses on their customers[750].

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[748] See *supra* (n 737), paragraphs 58-61.
[749] Judgment of 27 March 1974, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs vs SV SABAM and NV Fonior*, Case C-127/73, EU:C:1974:25.
[750] See *supra* (n 749), paragraphs 11-13.

In his opinion[751] on the referred questions, AG Mayras, attempting to come up with a general definition of *"unfair tradition conditions"*, suggested the following:

"The abuse (...) consists in the fact that SABAM is thereby imposing on its members obligations which are not absolutely necessary for the attainment of its object and which encroach unfairly on a member's ability to move from one association to another"[752].

Although the CJEU agreed with AG Mayras on the abusive potentiality of the market leader's activities at stake, opting for a case-by-case approach, it unequivocally maintained that the unfair nature of contractual clauses must be individually evaluated *in concreto*, rather than being predetermined upstream[753]. That is even more true, according to the CJEU, if one considers that the wording of Article 102 TFUE refers both to the direct and to the indirect nature of the imposition, hence, particularly for indirect instances, its legal assessment amounts to an operation that demands the appraisal of all the relevant circumstances revolving around the relevant dominant undertaking's behavior.

At the same time, even if the CJEU clearly established that, in principle, *"(...) the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse"*[754], being in the context of a preliminary ruling procedure, the ECJ could merely recognize the abstract possibility of the abusive nature of contractual clauses.

That is why, almost two decades later, in *Atlantic Container Line*[755], by reiterating how *"(...) conduct cannot cease to be abusive merely because it is the standard practice in a particular sector; to hold otherwise would deprive Article 86 of the Treaty of any effect. (...) that responsibility* [the dominant undertakings' special responsibility] *is not limited solely to conduct likely to reinforce the dominance of the undertaking concerned or reduce*

[751] Opinion of AG Mayras of 12 February 1974, in see *supra* (n 749), EU:C:1974:11.
[752] See *supra* (n 751), paragraph II B1.
[753] See *supra* (n 749), paragraphs 6-10.
[754] See *supra* (n 749), paragraph 15.
[755] Judgment of 30 September 2003, *Atlantic Container Line AB and Others vs Commission*, Joined cases T-191/98, T-212/98 to T-214/98, EU:T:2003:245.

the level of competition on the market, since Article 86 of the Treaty concerns not only practices which hinder effective competition but also those which, as in this case, may cause damage to consumers directly"[756], the ECJ has made it clear, this time in the context of its judicial review, that the imposition of contractual clauses perpetrated by market leaders is a conduct liable to be caught under the scope of Article 102 TFUE.

On top of that, the abovementioned remarks of the ECJ further testify how the fact that a certain clause forms an integral part of the commercial usage of a specific industry is not, in and by itself, a justification for its capability of resulting in exploitative abuse.

Nevertheless, the latter observation does not amount to insinuating that, as far as *"unfair trading conditions"* are concerned, the CJEU does not allow dominant undertakings to advance defensive arguments based on objective justification grounds.

Indeed, in *AAMS*[757], although the CJEU established that the legal monopolist *"has not proved to the requisite legal standard that the clauses mentioned above were necessary to protect its commercial interests and to avoid both the risk of its distribution network becoming overloaded and the financial risk of cigarettes not ordered by retailers remaining in storage for lengthy periods"*[758], it unequivocally envisaged the abstract existence of this sort of objective criteria[759].

In light of the foregoing, a closer look at the case law shows that, in almost seventy years of interpretation and application of the prohibition of abuse of dominance, the ECJ has sporadically considered a steady number of contractual clauses imposed by dominant firms on their customers to be in breach of letter (a) of Article 102(2) TFUE.

On that regard, some examples are indispensable:

- In *Alsatel*[760], the CJEU recognized the abstract abusive nature of clauses that established the automatic increase of the tariff after the contract's expiration;

[756] See *supra* (n 755), paragraph 1124.
[757] Judgment of 22 November 2001, *Amministrazione Autonoma dei Monopoli di Stato (AAMS) vs Commission*, Case T-139/98, EU:T:2001:272.
[758] See *supra* (n 757), paragraph 79.
[759] See *supra* (n 757), paragraphs 73-77.
[760] Judgment of 5 October 1988, *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) vs SA Novasam*, Case 247/86, EU:C:1988:469, paragraphs 13-18.

- In *Porto di Genova*[761], the ECJ held that the imposition by a legal monopolist of clauses which force customers to purchase services not requested amounts to an abuse of dominance; and
- In *SABAM II*[762], clauses that compelled the relevant market leader's customers to pay a flat tariff, irrespective of the service received, were deemed incompatible with the prohibition of abuse of dominant position.

Finally, on the basis of the latter jurisprudence, O'Donoghue and Padilla, proceeding from the correct observation that, within these scenarios, the ECJ has never evaluated the anti-competitive effects of abusive contractual clauses on the downstream market[763], that is to say the level of competition among the dominant undertakings' customers, have grouped the following categories of *"unfair trading conditions"*:

- Restrictions on export of goods;
- Restrictions on resale of goods;
- Restrictions on the freedom to innovate;
- Restrictions on the provision of guarantees; and
- Restrictive terms of a license of intellectual property rights[764].

3.4.3 Discrimination

As anticipated before, letter (c) of Article 102(2) TFUE prohibits market leaders from *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*. Although this wording unequivocally stipulates that abusive discrimination can take virtually infinite forms, as it generally refers to *"dissimilar conditions"*, a closer look at the case law, as well as at the Commission's administrative practices, revels that, as of today, only discriminatory prices have been capable of triggering the application of such a prohibition.

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[761] Judgment of 10 December 1991, *Merci convenzionali porto di Genova SpA vs Siderurgica Gabrielli SpA*, Case C-179/90, EU:C:1991:464, paragraphs 17-24.
[762] Judgment of 25 November 2020, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) vs Weareone.World BVBA and Wecandance NV*, Case C-372/19, EU:C:2020:959, paragraphs 49-60.
[763] Indeed, similarly to what has been highlighted in relation to exclusionary abuses subject to a qualified rule, after having established a certain *"unfair trading condition"* in its judgments, the ECJ, if the contractual clause is considered to fall within one of the predetermined categories, automatically finds an abuse of dominance pursuant to letter (a) of Article 102(2) TFUE.
[764] See *supra* (n 43), pages 648-798.

On that regard, in line with what has been observed above regarding exploitative abuses in general, price discrimination represents a particularly slippery territory to navigate, because, as correctly pointed out by AG Wahl in his opinion[765] in *MEO*, *"(...) discrimination, including discrimination in the charging of prices, is not in itself problematic from the point of view of competition law. The reason for that is that price discrimination is not always harmful to competition. On the contrary, (...) purely and simply prohibiting price discrimination may prove injurious to economic efficiency and the well-being of consumers. Indeed, it is well established that a practice of discrimination, and a differential pricing practice in particular, is ambivalent in terms of its effects on competition. Such a practice may have the consequence of increasing economic efficiency and thus the well-being of consumers"*[766].

Nevertheless, in *Clearstream*[767], its leading case on the matter, the ECJ maintained that *"according to the case-law, an undertaking may not apply artificial price differences such as to place its customers at a disadvantage and to distort competition"*[768].

Therefore, for the purposes of this section, *"dissimilar conditions"* and the imposition of discriminatory prices will be interchangeably addressed.

The textual analysis of the Treaty's provision clearly suggests that, in order for a discriminatory conduct perpetrated by a dominant undertaking to be caught under the prohibition of abuse of dominance, the two following conditions must be cumulatively met:

- The presence of equivalent transactions to be compared; and
- The presence of a competitive disadvantage.

Regarding the first element, the concept of "equivalent transactions", even if implicitly, was tackled by the CJEU, for the first time, in *United Brands*, in so far as, navigating the actual length of the necessary comparative analysis of the different prices charged by the relevant market leader for the exact same product, it specified how the Commission had to take into consideration the *"(...) differences in transport costs, taxation, customs*

[765] Opinion of AG Wahl of 20 December 2017, in see *supra* (n 247), EU:C:2017:1020.
[766] See *supra* (n 765), paragraphs 61-62.
[767] Judgment of 9 September 2009, *Clearstream Banking AG and Clearstream International SA vs Commission*, Case T-301/04, EU:T:2009:317.
[768] See *supra* (n 767), paragraph 170.

duties, the wages of the labor force, the conditions of marketing, the differences in the parity of currencies, the density of competition (...)"[769]. In other words, the assessment of equivalent transactions entails the scrutiny of both endogenous and exogenous factors revolving around the application of a certain discriminatory condition.

From this ruling, in order to assess, *in concreto*, the equivalence of transactions, the ECJ has consistently looked at the nature of the good/service offered, on the one hand, and at the eventual discrepancy in supply costs, on the other hand. For instance, according to the latter approach, in *British Airways*, although the airline tickets obviously encompassed disparate destinations, the CJEU recognized that the services provided by the relevant dominant operator to different travel agents represented equivalent transactions[770].

Concerning the second requirement, the correct meaning to be attributed to the notion of "competitive disadvantage" has been equally scrutinized by the ECJ on several occasions. On that regard, a superficial look at the case law may lead to the inaccurate conclusion that the CJEU has developed an ambivalent approach towards the indispensability of such an element within the legal assessment of abusive discrimination.

Nevertheless, it will be shown how the latter has always been conceptualized as an essential part of the test for discriminatory prices by the CJEU, in so far as its absence determines the inevitable exclusion of market leaders' discriminatory actions from the scope of letter (c) of Article 102(2) TFUE.

To that extent, in some rulings, somehow presuming that discriminatory prices automatically place the market leader's customer, which pays more for the same product/service compared to its *"other trading partners"*, hence, its competitors, at a competitive disadvantage, the ECJ has not demanded from the Commission strong evidence of the impact of the abusive practice. For instance, *inter alia*, in *British Airways*, the administrative authority was not required to prove an *"(...) actual quantifiable deterioration in the competitive position of the business partners taken individually"*[771].

In *Clearstream*, apparently in contrast to the abovementioned line of jurisprudence, although the ECJ did not ascertain whether the relevant dominant undertaking's

[769] See *supra* (n 124), paragraph 228.
[770] See *supra* (n 351), paragraphs 136-141.
[771] See *supra* (n 351), paragraph 145.

discriminatory pricing strategy had caused a loss of market share for its discriminated customers[772], it held that *"in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behavior of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words, to hinder the competitive position of some of the business partners of that undertaking in relation to the others"*[773].

However, immediately after, by express reference to the first half of the passage of *British Airways* cited above[774], the CJEU clarified how *"(...) there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as abusive as soon as the behavior of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners"*[775].

In saying so, in both judgments, clearly undertaking an effects-based approach to the matter, the ECJ has simply extended its findings on exclusionary abuses to price discrimination, in so far as, instead of requiring evidence of the actual anti-competitive impact of the market leaders' behaviors, it held that evidence of the tendency to generate a competitive disadvantage, the equivalent of the capability to have foreclosure effects in exclusionary scenarios, when obtained by the Commission in light of all the circumstances of the case, is sufficient to trigger the application of Article 102 TFUE. Therefore, as far as discrimination is concerned, a competitive disadvantage, that is to say the anti-competitive effect of the dominant undertaking's conduct, must always be present.

That is even more true if one considers that its absence normally places discriminatory prices outside the scope of the prohibition of abuse of dominance. Think, for instance, of available airplane tickets sold to last-minute travelers at a significantly lower price. Although they generate a significant output for the enterprise charging lower prices,

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[772] See *supra* (n 767), paragraph 194
[773] See *supra* (n 767), paragraph 192.
[774] Which is totally identical to the argument advanced in *Clearstream*: *"In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behavior of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners"*.
[775] See *supra* (n 767), paragraph 193.

irrespective of its dominant status, they are generally deemed lawful in so far as they do not generate any competitive disadvantage[776].

In any case, in *MEO*, revising its case law on price discrimination, the ECJ has eliminated any possible source of inconsistency on the matter, by reiterating that, even if a quantification of the competitive disadvantage suffered by the relevant market leader's discriminated customer/s is not necessary[777], the Commission is bound to engage in a context-specific analysis, namely to take all the relevant circumstances into consideration, such as *"the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors"*[778], to ascertain whether the dominant undertaking's discriminatory practice can lead to a competitive disadvantage[779].

As the criteria mentioned above are practically identical to those laid down by the CJEU in *Intel* for the evaluation of exclusionary conducts' foreclosure capability, one can safely assume that, after *MEO*, the legal assessment of abusive discrimination is subject to the same effects-based approach espoused by the EU decision-makers for exclusionary abuses.

In addition, as far as price discrimination is concerned, although, as of today, the ECJ has never accepted market leaders' defensive arguments based on objective justification grounds, in *MEO*, totally in line with mainstream economic analysis, it has unequivocally recognized their abstract possibility[780].

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[776] Hordijk, Pijnacker, Erik. *Excessive Pricing Under EC Competition Law; An Update in the Light of Dutch Developments*, in Hawk, Barry. *International Antitrust Law & Policy*, Juris Publishing, 2008, pages 260-294.

[777] See *supra* (n 247), paragraph 27, where the CJEU expressly mentioned both *British Airways* and *Clearstream*. This reference is noteworthy in so far as it testifies that a friction in the case law has never been present, therefore, if at all, it can be maintained that the ECJ, before *MEO*, had employed an ambiguous language to scrutinize the role of such a requirement within the legal assessment of price discrimination.

[778] See *supra* (n 247), paragraph 31.

[779] See *supra* (n 247), paragraph 28.

[780] See *supra* (n 247), paragraphs 32-35.

Finally, on top of all the foregoing, abuses of dominance amounting to price discrimination are particularly noteworthy in so far as they represent a perfect scenario where exclusionary and exploitative abuses may be coupled together.

This sort of overlap can occur in two different scenarios:

- Firstly, in the abovementioned *Clearstream* case, the relevant dominant undertaking abused its dominant position twice: by refusing to provide its indispensable services to another bank, a typical refusal to deal/supply resulting in exclusionary abuse, and, cumulatively, by applying discriminatory prices to the very bank it denied its services, a classic instance of abusive discrimination. Against this background, one can assume that, here, even if "coupled together", in so far as they were perpetrated to the same bank, the two categories of abuse of dominance can be separately isolated and/or assessed.
- Secondly, in *Rambus*[781], as the relevant market leader's behaviors were extremely tangled, the Commission, being incapable of discerning the boundaries of the two types of abuse of dominant position[782], appeared to conflate them. Therefore, here, one can safely maintain that the dominant undertaking's behaviors at stake were properly "coupled together".

Nevertheless, irrespective of the evident difference existing in these two circumstances, when both exclusionary and exploitative practices are perpetrated by the same dominant undertaking, the latter are tagged-on to the first, meaning that, as far as the legal assessment is concerned, the discipline on exploitation is, somehow, absorbed in the one on exclusionary abuses.

On that regard, proceeding from the particularities revolving around cases of price discrimination, a significant part of the doctrine has concluded that, generally speaking, every instance of exclusionary abuse automatically encompasses exploitative effects enjoyed by the dominant perpetrator[783]. To a certain extent, this idea seems to be

[781] Commission Decision of 9 December 2009, in *Rambus*, Case COMP/38.636.
[782] See *supra* (n 781), paragraphs 27-47; for an in-depth examination of the complexities surrounding this case, see Drexl, Josef. *Anti-Competitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, Journal of Competition Law and Economics, 2012, pages 507-542.
[783] *Ex multis*, Bergemann, Dirk. Morris, Stephen. Brooks, Benjamin. *The Limits of Price Discrimination*, American Economic Review, 2015, pages 921-957.

corroborated by the recent tendency, developed by the Commission within its administrative practice, to use exploitation allegations in the so-called "gap cases", those scenarios in which the relevant market leader's conduct does not exactly amount to an exclusionary abuse, hence, prosecuting it under the umbrella of exploitative abuses is the only alternative to guarantee the effective protection of consumers[784].

However, the main objection that can be made to such an approach, which essentially highlights how successfully perpetrated exclusionary conduct ultimately leads to exploitation, is the fact that, if this was true, every exclusionary abuse would directly impinge on consumers, instead, as mentioned above, they typically harm consumer welfare only indirectly.

3.4.4 Frictions with the rule of law

After the entry into force of the EEC Treaty, the expression "exploitative abuse" was coined by the doctrine to conceptually categorize those infringements of what is now Article 102 TFUE that involved no harm to competition, that is to say the competitive process as opposed to consumer welfare[785].

However, a closer look at the literal meaning of this formula reveals that it is not at all descriptive of a possible dominant undertaking's abusive behavior. That is even more true if one considers that, within more than six decades of enforcement of the Treaty's provision, the ECJ has expressly referred to the term "exploitative abuse" just once[786].

Indeed, according to mainstream economics, the term "exploitation" refers to the extraction of an advantage, such as wealth, from something and/or someone, in this sense, for instance, a monopolist exploits its customers, even if, from its perspective, charging monopoly prices is a mere consequence of its status, which, in turn, may have been

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[784] Botta, Marco. *Exploitative abuse: recent trends and comparative perspectives*, in see *supra* (n 35), pages 345-364.
[785] Lang, Temple, John. *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, Fordham International Law Journal, 1979, pages 20-35.
[786] Judgment of 16 July 2009, *Der Grüne Punkt - Duales System Deutschland GmbH vs Commission*, Case C-385/07 P, EU:C:2009:456 , paragraph 32, where, specifically, the CJEU observed the following: *"(...) First, by making the license fee dependent solely on the use of the DGP logo, DSD imposes unreasonable prices and unfair commercial terms on undertakings which do not use its service or which use it in respect of only some of their packaging. The excessive difference between the cost of supplying the service and the price charged gives rise to the exploitative abuse of a dominant position within the meaning of point (a) of the second paragraph of Article 82 EC"*.

lawfully acquired by the market player with normal manifestations of competition on the merits. Yet, as observed before, excessive pricing is the first example of abusive exploitation that comes to mind[787]. That is so because, at least within the European framework, this conduct amounts to the unlawful usage of the position of dominance and/or of the power stemming from it. Hence, in providing so, the European legislator has transformed what is typically "use" into "abuse", either of power or of market position, in the name of the principle of dominant undertakings' special responsibility[788].

Nevertheless, more than sixty years since the first applications and interpretations of the prohibitions enshrined in letters (a) and (c) of Article 102(2) TFUE, one can safely maintain that neither rules nor norms define exploitative abuses to the requisite legal standard, as the only recurrent theme has been the juxtaposition of this sort of infringements with the concept of "unfairness".

Unfortunately, as eloquently summarized by AG Pitruzzella in his recent opinion[789] in *SABAM II*, *"(...) the identification of a price as unfair and thus contrary to competition law is an extremely difficult process and one that is fraught with the risk of false positives (which occur when a price is mistakenly considered to be above the competitive price), or worse, the distortion of competition law in a form of dirigisme that replaces market dynamics with a framework of economic relations corresponding to the regulator's subjective preferences. In addition, the erosion of profit margins may be a disincentive to improving the quality of the product or service, to innovation and to the entry of new competitors. Ultimately, therefore, it is consumer welfare — the main (and some would say the only) objective of competition law — that suffers"*[790].

In other words, every time the prohibition of exploitative abuse is enforced by the Commission, pursuant to Article 102 TFUE, there is an intrinsic risk of supplanting the competitive mechanisms of the market involved. Indeed, as this form of intervention automatically encompasses the imposition by the EU decision-makers of the conditions under which market leaders are allowed to trade with their rivals and/or customers,

[787] See *supra* (n 785), pages 17-19.
[788] On that regard, see Lang, Temple, John. *The Common Market and Common Law*, University of Chicago Press, 1966, pages 400-426, in which the author brilliantly anticipated the latter conclusion.
[789] Opinion of AG Pitruzzella of 16 July 2020, in see *supra* (n 762), EU:C:2020:598.
[790] See *supra* (n 789), paragraph 22.

exceeding the boundaries of the mere protection of the competitive process, so that markets can function efficiently, is a danger as deplorable as likely to occur.

That is even more true if one considers that, due to its association with the notion of "unfairness", *"(...) exploitative abuse of a dominant position is at least ironic and perhaps even tragic: the infringement is unfairness, yet punishment is meted out without fair notice"*[791].

Indeed, even if the ECJ has neither sufficiently described when the imposition of a certain price or condition by a market leader is "unfair" nor singled out how "fairness" will be judged, the Commission occasionally announces fines for charging the wrong prices or imposing the incorrect conditions.

Against this background, if *"the law must be capable of guiding the behavior of its subjects"* and *"should conform to standards designed to enable it effectively to guide action"*[792], the enforcement of Article 102 TFUE in relation to exploitative abuses perilously weakens the rule of law, in so far as dominant undertakings, deprived of their right to anticipate when and how they will be punished for this sort of infringements, are forced to be subject to *"wide discretionary authority on the part of government"*[793].

At this point, one could argue that, in light of the abovementioned *"non-enforcement paradigm"* of the Commission, irrespective of the rationale underpinning it, as well as of the limitation of the finding of abusive exploitation to exceptional circumstances operated by the CJEU, the actual impact of this undeniable friction with the rule of law must be accordingly mitigated.

If, in principle, this is true, the two following considerations must be borne in mind nevertheless:

- Firstly, as Article 102 TFUE continues to envisage a general and extended prohibition of exploitative abuses, the Commission is always entitled to change its policy towards such infringements, making them an enforcement priority. That

[791] See *supra* (n 86), page 23.
[792] Raz, Joseph. *The Authority of Law: Essays on Law and Morality*, Oxford University Press, 2009, respectively, pages 214 and 218.
[793] Dicey, Venn, Albert. *Introduction to the Study of the Law of the Constitution*, Macmillan, 1915, page 198.

is even more true if one considers that, as previously observed, exploitation directly impinges on consumer welfare, which, in turn, after the abovementioned paradigm shift undertaken by the EU decision-makers, must be understood as the ultimate objective of ECL. That does not amount to proposing that such an outcome is likely to occur, quite the opposite, a revival of exploitative abuse, at least at the Communitarian level, is improbable. Nevertheless, even the abstract possibility of this change of course is sufficient to represent a noticeable threat to the rule of law; and

- Secondly, as neither the CJEU nor the Commission have provided valuable criteria for identifying the exceptional cases in which abusive exploitation would constitute a sufficiently serious danger according to ECL, there is still undisputable evidence of legal uncertainty. Given that the principle of legal certainty represents an indispensable corollary of the rule of law, it can be safely maintained that the current legal status of exploitative abuses clashes with the latter.

In light of all the foregoing, there have been numerous calls to refine the current law, so as to confine the administrative authority's action against exploitative conduct to truly exceptional circumstances.

On that regard, part of the doctrine, proceeding from the upstream idea that that the Treaties have conferred upon the ECJ the power to shape *"an integral and perfected legal order"*[794] and further observing how, despite attempting to offer a consistent body of case law, the ECJ is not bound by the *stare decisis* doctrine[795], has arrived to the point of suggesting that the CJEU should engage in the teleological reduction of Article 102 TFUE.

In other words, following this line of reasoning, without the need to amend the Treaty's provision *de iure*, the ECJ should declare that the prohibition of abuse of dominant

[794] Kutscher, Hans. *Methods of Interpretation as Seen by a Judge at the Court of Justice*, in Court of Justice of the European Communities, *Reports: Judicial and Academic Conference, 27-28 September 1976*, 1976, pages I-10.

[795] On that regard, *ex multis*, see Opinion of AG La Pergola of 12 February 1998, in *Sema Sürül vs Bundesanstalt für Arbeit*, Case C-262/96, EU:C:1998:55, paragraph 36 and Opinion of AG Trstenjak of 28 March 2007, in *Internationaler Hilfsfonds eV vs Commission*, Case C-331/05 P, EU:C:2007:191, paragraph 85, where the reasons for such an absence within the European legal system are accurately explained.

position is confined to market leaders' behaviors that are capable of harming competition, by relying on its own findings in, *inter alia*, *Continental Can*, according to which *"Article 86* [now Article 102 TFUE] *is part of the chapter devoted to the common rules on the Community's policy in the field of competition. This policy is based on Article 3 (f) of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted. (...) Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim mentioned in (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive"*[796].

Finally, without going into the merits of the systemic implications of such an idea[797], it cannot be denied that it perfectly illustrates, perhaps even provocatively, how there is an objective necessity for intervention on exploitative abuses.

[796] See *supra* (n 27), paragraph 23.
[797] For an in-depth analysis of which, see Lenaerts, Koen. Fons-Gutiérrez, José. *The constitutional allocation of powers and general principles of EU law*, Common Market Law Review, 2010, pages 1629-1669.

4. THE LATEST FRONTIERS OF THE FIGHT AGAINST ABUSE OF DOMINANCE

4.1 Digital markets

In digital markets such as high-tech industries, the legal assessment of abuse of dominance is heavily aggravated by the intrinsic features of their very structure. For instance, it was already observed how such markets are "naturally" concentrated due to the presence of high technological and/or financial entry barriers, which, in turn, are generated, *inter alia*, by the typical existence of economies of scale within their context-specific environment.

At the same time, they are normally characterized by a dynamic level of competition that is based on innovation rather than prices. Indeed, as dynamic markets are constantly in evolution, in order not only to enter them but also to maintain and/or expand a significant position within them, their players need to come up with a steady flow of new products/services.

More precisely, although the digital sector comprises a multitude of distinct markets, the following can be considered to be the main components of which every high-technology industry, even if to a different extent, is made of:

- They require rapid innovation;
- They generate network effects;
- They facilitate the creation of economies of scale;
- They are multi-sided;
- They need interoperability to function properly;
- They demand high fixed costs but low marginal costs; and
- They have zero lock-in effects and switching costs.

Regarding the first characteristic, as anticipated before, digital undertakings essentially compete on technological advancements. Hence, because of such continuous and fast-paced innovation, new platforms, as well as any other product offered by digital operators, are invented and/or renovated on a regular basis.

At the same time, given that all firms involved in the digital process allocate a significant number of investments and resources to their respective research and development branches, this innovative stream is, somehow, evanescent. In other words, it is almost like this sort of wild dynamism creates an endless vicious circle of innovation, which, in turn, makes both the establishment of new rivals and the entrance of would-be competitors more difficult[798].

This idea was perfectly highlighted by the Commission in its decision in *Microsoft/Skype*[799], as the administrative authority observed how *"the innovation cycles in these markets are short. As a result, software and platforms are constantly being redeveloped. Innovators generally enjoy a short lead in the market"*[800].

Concerning the second characteristic, Mancini defined network effects as *"the gains enjoyed by consumers of a product when more consumers use that product"*[801]. Simultaneously, the positive output enjoyed by consumers accordingly increases the profit margin of the enterprise providing the relevant good/service.

Moreover, long before the rise of digital markets, the anti-competitive potentiality of networks effects had been accurately examined by mainstream economists[802]. On that regard, their findings are quite remarkable, in so far as they observed that, although network effects may undoubtedly lead to the emergence of a dominant position, sometimes even of a monopoly, they do not necessarily tip the scales in favor of one player[803].

In any case, differently from traditional business models, where the value of a certain good/service is generated by suppliers, in digital markets, such a parameter is calculated in relation to the other users of the relevant online platform.

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[798] Rato, Miguel. Petit, Nicolas. *Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?*, European Competition Journal, 2013, pages 1-65.
[799] Commission Decision of 7 October 2011, in *Microsoft/Skype*, Case COMP/M.6281.
[800] See *supra* (n 799), paragraph 83.
[801] Mancini, James. *Abuse of Dominance in Digital Markets*, Background note by the Secretariat of the Organization for Economic Co-operation and Development - Session II - 19th Global Forum on Competition, 2020, page 5.
[802] *Ex multis*, see Katz, Michael. Shapiro, Carl. *Systems Competition and Network Effects*, Journal of Economic Perspectives, 1994, pages 93-115.
[803] Tirole, Jean. *Economics for the Common Good*, Princeton University Press, 2017, pages 390-205.

In other words, here, network effects are directly proportional to the usage of a certain good/service by final consumers, because of which its economic value is accordingly increased, further producing positive gains for the undertaking that has launched the new product.

On top of that, as these effects normally create a high level of concentration in the market they manifest, they are deemed to be a powerful source of entry barriers. For instance, such an outcome is likely to occur when, within a new industry, a firm successfully develops a platform that generates, in turn, high levels of network effects. Indeed, here, the innovator will enjoy the so-called "first-mover advantage", in so far as, once it has established its dominant position, which is, in turn, the result of the innovative product/service, network effects will ultimately make the entrance for would-be competitors extremely difficult, if not impossible[804].

As far as the third characteristic is concerned, economies of scale are, at least in digital markets, closely linked to network effects, as the presence of the latter makes increasing returns extremely easy to scale. In other words, the higher the output and sales, which, as mentioned above, mainly depend on the level of network effects, the lower the average cost per unit[805].

To that extent, as economies of scale undoubtedly lead to a reduction in production costs, it can be safely maintained that they contribute to consumer welfare, if the lowering enjoyed by the firm is passed on to consumers, meaning that they will eventually benefit from price cuts.

At the same time, as previously mentioned, economies of scale represent a typical source of entry barriers. On that regard, if one considers that online platforms comprise both network effects and increasing scalable returns, this combination is enough to make the tendency towards market concentration extremely exacerbated.

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[804] Farrell, Joseph. Klemperer, Paul. *Co-ordination and Lock-in: Competition with Switching Costs and Network Effects*, in Armstrong, Mark. Porter, Robert. *Handbook of Industrial Organization: Volume 3*, North-Holland, 2007, pages 1967-2072.

[805] Yousufzai, Nasir. *THE GOOGLE ANDROID CASE: Article 102 TFEU and the Abuse of Dominance in the (EU) Digital Sector: Is the Google Android Case a Wake-Up Call for a Different Approach by the EU Commission and the CJEU?*, Utrecht University, 2016, pages 21-25.

On the fourth characteristic, it is noteworthy that, even before the advent of online platforms, the concept of multi-sided markets, as well as the economic rationale underpinning them, had already been fleshed out, in order to explain the mechanisms underlying certain non-digital industries, namely those related to newspapers/magazines and payment cards, which, exactly for this reason, are nowadays referred to as offline multi-sided markets[806].

In the same vein, the EU decision-makers had acknowledged the peculiar nature of multi-sided markets even before the advent of modern digitalization. For instance, in *Groupement des cartes bancaires*[807], highlighting how the two-sided nature of the allegedly anti-competitive payment system created by the group of undertakings should have been accordingly taken into consideration[808], the ECJ set aside the judgment of the GC primarily because of the absence of such an assessment[809].

Against this background, a variety of definitions have been proposed for multi-sided markets over the years.

To that extent, in their seminal work on the matter[810], Rochet and Tirole, having offline two-sided markets in mind, affirmed that *"a market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount"*[811]. Hence, according to this definition, the focus of economic analysis must be on the pricing structure of the platforms involved. However, as, in most cases concerning digital markets, consumers do not even pay a price to use the online service, such a description is of little to no help for technology-enabled industries.

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[806] Evans, David. Schmalensee, Richard. *The Industrial Organization of Markets with Two-Sided Platforms*, Competition Policy International Journal, 2007, pages 1-37.
[807] Judgment of 11 September 2014, *Groupement des cartes bancaires (CB) vs Commission*, Case C-67/13 P, EU:C:2014:2204.
[808] See *supra* (n 806), paragraphs 83-87.
[809] See *supra* (n 806), paragraphs 94-98.
[810] Rochet, Jean. Tirole, Jean. *Two-sided Markets: A Progress Report*, The RAND Journal of Economics, 2006, pages 645-667.
[811] See *supra* (n 810), page 655.

Therefore, for the purposes of this section, the following more recent definition, employed by the OECD in one of its competition reports, will be espoused:

"(…) a market in which a firm acts as a platform and sells different products to different groups of consumers, while recognizing that the demand from one group of customer depends on the demand from the other group(s)"[812].

If this is true, one can safely assume that the digital sector's intrinsic dynamism heavily depends on the multi-sided nature of its markets, as, within them, competition between rival enterprises takes place in integrated digital platforms which are, in turn, interlinked through, *inter alia*, users' data[813].

Moreover, the latter interconnection further creates mutual interdependence between all parties involved, from competitors themselves to final consumers. This particularity of multi-sided markets brings the discussion to the fifth characteristic, in so far as it mainly determines the extraordinary compatibility of online platforms, as well as any other digital product, with one another.

On that regard, Rouse described interoperability as *"the ability of a system or product to work with other systems or products, without special effort on the part of the customer"*[814]. Indeed, as the digital sector can be conceptualized as a perfect equilibrium between multiple layers of systems, platforms and products, every one of which with a high degree of technical complexities, their compatibility is the sole element capable of effectively ensuring the smooth management of the whole industry[815].

In addition, apart from representing the systemic keystone of the digital mechanism, interoperability plays a significant role in regulating the competitive process of the individual markets involved, so much so that, as mentioned in the previous chapters, dominant undertakings may be even required to supply their rivals with interoperability

[812] OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018, page 10.
[813] Gündoğar, Meltem. *EU's Approach to Abuse of Dominance Concerning Online Platforms: A New Era for EU Competition Policy?*, Europa-Kolleg Hamburg – Institute for European Integration – Study Paper No 2, 2023, pages 9-14.
[814] Rouse, Margaret. *Definition of Interoperability*, Informa TechTarget Network, [April 19, 2006].
[815] European Parliament - Directorate General for Internal Policies - Policy Department A: Economic and Scientific Policy, *Challenges for Competition Policy in a Digitalized Economy*, 2015, pages 20-35.

information, as a refusal to do so, pursuant to Article 102 TFUE, might amount to either vertical or horizontal interoperability abuse of dominance.

On top of that, the need for interoperability in digital markets was accordingly recognized by the CJEU as well, in so far as, in both *Microsoft* and *Google (Android)*, it linked its essential role within the digital sector with the abovementioned concept of indispensability[816], a connection that clearly indicates how without interoperability, at least in certain context-specific digital scenarios, competition would be drastically harmed.

Regarding the sixth characteristic, according to mainstream economics, fixed costs are those that firms must always suffer for the production/provision of a certain good/service. Hence, they are invariable, irrespective of the number of goods/services produced/provided. On the contrary, marginal costs are those that enterprises incur for the production/provision of additional units of a specific product.

Considering that, as already pointed out, in the digital sector, undertakings are bound to undergo heavy research and development expenses in order to come up with innovative products/services, fixed costs are particularly high. At the same time, given that the additional reproduction costs of the new good/service are basically negligible, marginal costs are insignificant.

If this is true, holding that such markets typically have high fixed but low marginal costs is basically equivalent to maintaining that digital products are expensive to produce but cheap to reproduce[817].

About the seventh characteristic, end users can simply switch from one digital platform to another, without incurring any loss. Consider, for instance, mobile applications: consumers constantly change to different providers with virtually zero switching costs.

This feature further indicates that lock-in effects are totally absent in the digital sector, because users can freely access different platforms, networks and search engines, either cumulatively or alternatively and even simultaneously.

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[816] On that regard, see *supra* (n 209), paragraphs 330-333 and see *supra* (n 536), paragraphs 276-283.
[817] Martens, Bertin. *An economic perspective on data and platform market power*, European Commission - Joint Research Centre Technical Report - JRC Digital Economy Working Paper No 9, 2020, pages 7-23.

That is even more true if one considers that, as mentioned above, prices have little to no space in digital markets, as their players mainly generate revenue from advertisements, generally offering their products to end users for free.

In addition, exclusively looking at these two final elements, one could be tempted to argue that they significantly reduce the possibility of entry barriers, even though it was previously highlighted how, in general, the digital sector is typically associated with high levels of market concentration.

Indeed, from a mere economic perspective, it is undeniable that the absence of switching costs and lock-in effects for consumers makes the entrance of potential competitors easier, as, in order to establish themselves on the market, they would simply need to attract end users with superior products.

As a matter of fact, these are not the only characteristics that may be understood as valuable indicators of the absence of entry barriers within technology-enabled industries. Think, for instance, of the dynamic nature of such markets, which, in turn, is the result of rapid innovation: as, in abstract, new products may be invented by any undertaking that is willing to sustain the research and development expenses, dynamic competition is generally optimal for would-be entrants.

Nevertheless, the material reality clearly suggests that, overall, high-tech industries are much less crowded than markets which do not even disclose the abovementioned features, as they are dominated by few firms with huge market power.

That is, in a nutshell, the infamous paradox of digital platforms, as, although some of their intrinsic components clearly discourage the establishment of barriers to entry, they are still largely perceived as almost impenetrable industries by would-be competitors[818].

A closer look at the material reality reveals that this paradoxical outcome, hence, the discrepancy between what should happen according to mainstream economics and what occurs in practice in the digital sector, is mainly the result of the status and power that some key players, namely the so-called Big Tech companies, have acquired within the

[818] Akman, Pinar. *A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets*, Virginia Law and Business Review, 2022, pages 217-292.

industry. Indeed, their dominant position is so powerful that, within specific markets, their mere presence is sufficient to entirely obliterate competition.

Against this background, since the advent of modern digitalization, Antitrust Law has played a pivotal role in technology-enabled industries, as they pose substantial threats for consumer welfare, as well as for the whole competitive process of the EU internal market.

As anticipated in the first chapter, within the European legal framework, these challenges have been mainly faced through Article 102 TFUE, which, for many years, had represented the only one bastion of legality of the system.

However, without diminishing in any possible way its central role in such scenarios, what the prohibition of abuse of dominance can achieve in digital markets is intrinsically limited by the constitutional/institutional boundaries that the European legislator, initially, and the EU decision-makers, subsequently, have imposed on what is now Article 102 TFUE, as well as, in general, on ECL.

On that regard, although an accurate analysis of the complex relationship between the context-specific characteristics of high-tech industries and the EU competition rules exceeds the scope of this thesis, the following can be safely deemed to be the innate limits of ECL, first and foremost of the prohibition of abuse of dominance, when dealing with digital markets:

- European antitrust measures cannot dictate the structure of markets, as they merely aim at the preservation of the competitive process and the protection of consumers;
- The idea that "big is not bad" is a well-established principle of ECL, particularly when it comes to the implementation of the prohibition enshrined in Article 102 TFUE;
- EU competition rules are typically agnostic about the business models chosen by undertakings; and
- As the scope of the ECJ's scrutiny is accordingly delimited by the Treaties, modifying the standard of judicial review, specifically, through the relaxation of

its intensity, is a complex operation that requires, *inter alia*, a new constituent power[819].

Finally, although the analysis conducted in the previous chapters clearly highlights how these fundamental principles can and have been subject to exceptions, overall, the antitrust framework of the Union proved to be inadequate to face most of the anti-competitive challenges brought by the advent of digitalization.

For instance, if it is true that the detention of huge market power by one or more undertakings is not sufficient in and of itself to trigger the application of any European competition measure, let alone Article 102 TFUE, as far as the digital sector is concerned, the relevant scenario is rather unique, because its dominant players have so much influence on online platforms that they are rightly considered to hold the keys of the whole system in their hands.

On that regard, as will be accurately described in the next sections, that is, essentially, the rationale behind the DMA, with which the European legislator has recently answered the numerous calls for consistency and legal certainty coming from all the stakeholders involved in high-tech industries, from end users to market leaders themselves.

At the same time, as far as Article 102 TFUE is concerned, the adaptation of existing tools, developed by the EU decision-makers in the context of static competition, to assess abuse of dominant position in digital markets had represented the only viable alternative for many years, as both the Commission and the ECJ had been called to engage in the analysis of market leaders' behaviors within the so-called "new economy" long before the entry into force of the DMA.

Therefore, in order to understand the rationale behind such Regulation, as well as its extremely complicated relationship with the prohibition enshrined in Article 102 TFUE, a preliminary examination of the most relevant cases on the matter, which have been subject to the scrutiny of at least one of the EU decision-makers, becomes absolutely indispensable, not only because they have brilliantly revealed the peculiarities of digital

[819] For an in-depth examination of this relationship, as well as its contemporary implications on the legal framework of the Union, see Colombo, Ibáñez, Pablo. *What can competition law achieve in digital markets? An analysis of the reforms proposed*, Social Science Research Network, 2020, pages 1-36.

markets, but also because they have evidently exposed the limits of the preceding discipline, further stimulating intervention from the competent authorities.

4.1.1 Google (Search) and Amazon Marketplace/BuyBox: self-preferencing as a standalone violation of Article 102 TFUE

In 2017, the Commission issued one of the most controversial decisions in the history of Article 102 TFUE[820], in so far as it heavily sanctioned Google for designing the result pages of its general search engine, namely the relevant upstream market, in such a way as to favor its own comparison-shopping service over those provided by its downstream rivals, automatically placing them at a consequential competitive disadvantage.

On that regard, it is well established that Google's main product is the general search engine named "Google Search", with which the undertaking has acquired a dominant position on the relevant market. However, in 2004, the Big Tech company entered the comparison-shopping industry with "Froogle", which, in turn, was renamed as "Google Product Search" in 2008 and, finally, as "Google Shopping" in 2013[821].

In a nutshell, a comparison-shopping service allows end users to compare the quality and/or prices of all sorts of products offered by a vast variety of online retailers.

As far as the finding of the infringement of the prohibition of abuse of dominance is concerned, at the heart of the administrative authority's decision there was a novel approach that, quite surprisingly, also comprised an accurate assessment of Google's business model.

More precisely, according to the Commission, the functioning of Google Search was to be deemed atypical, especially in comparison to other general search machines, as it was, somehow, biased in relation to its output on comparison-shopping services[822].

In general, search engines enable their users to navigate the Internet based on a variable number of keywords, that allow, in turn, the restriction of a certain digital research to a fixed number of areas of interest.

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[820] Commission Decision of 27 June 2017, in *Google Search (Shopping)*, Case AT.39740.
[821] See *supra* (n 820), paragraphs 26-35.
[822] See *supra* (n 820), paragraphs 12-17.

Hence, as the initial input of consumers produces additional results, which, in turn, are generated through specialized algorithms designed by the owner of the platform, general search engines are also referred to as vertical search machines[823].

As far as Competition Law is concerned, this background can easily result in the typical scenario where a vertically-integrated operator, despite being dominant in the upstream market, competes downstream with other undertakings, which must rely, in turn, on the vertically-integrated provider, in order to be able to conduct their business.

At the same time, even if the latter situation appeared to be the one at stake in *Google (Search)*, the abovementioned peculiarities of the digital sector significantly aggravated the Commission's legal assessment, in so far as it was highly unclear whether the set of allegedly abusive behaviors perpetrated by the market leader could be traced back to one of the preexisting categories of exclusionary abuse.

On that regard, Google was accused by the public agency of designing the specialized programs that determined the ranking of the final research's output, namely the pages of the general search results, in such a way as to cause, at least in the long run, the exclusion of downstream competitors from the comparison-shopping market, of which the Big Tech company, despite being the upstream provider of the general search engine, was also a player[824].

In doing so, the Commission specifically addressed the market leader's business model, as it questioned the lawfulness of Google's operative decision to design the abovementioned specialized algorithms in such a manner that they ended up favoring itself over its downstream rivals[825].

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[823] Körber, Torsten. *Common errors regarding search engine regulation — and how to avoid them*, European Competition Law Review, 2015, pages 239-244.
[824] See *supra* (n 820), paragraphs 118-122.
[825] This kind of invasive analysis is testified, *inter alia*, by the fact that, during its investigation, the administrative authority discovered that Google, after having used its dominant status to steal valuable data from its customers, forcing them to provide such information to get access to its general search engine, employed such data to update its own search results in the comparison-shopping market, where it competed with the same undertakings from which it forcibly obtained the relevant information; to that extent, see *supra* (n 820), paragraphs 631-635. Moreover, this conduct is particularly relevant because, as will be described in greater detail in the following of this section, it is very similar to the one at stake in the so-called Amazon saga.

Consequently, Google's practices were found to be in breach of Article 102 TFUE, as they were deemed to leverage its dominant position on the general Internet search market into the distinct, but interdependent, comparison-shopping industry.

However, as anticipated before, at least in principle, European competition measures are agnostic about a certain undertaking's business model, as, representing the core of its entrepreneurial ability, it generally exceeds their scope of implementation.

At the same time, as correctly pointed out by the Commission itself[826], against the factual background at stake, including the abovementioned particularities of digital platforms, this kind of operation was essential to shed light on the abusive nature of self-preferencing behaviors.

As will be accurately pointed out later, the indispensability of such an assessment directly derived from the fact that the administrative authority supported the idea that Google's conduct amounted to an original infringement of Article 102 TFUE, meaning a standalone violation which has its legal basis in the general prohibition of abuse of dominance encapsulated in the first paragraph of the Treaty's provision.

Therefore, going back to the previous section, this essential exercise, carried out by the public agency for the first time in *Google (Search)*, perfectly testifies how high-tech industries often require unconventional assessments that, apart from possibly aggravating the Commission's burden of proof, may even force the administrative authority to go beyond the powers placed upon it by the Treaties themselves, consistently stretching the boundaries of Article 102 TFUE to provide evidence of abuse of dominance to the requisite legal standard[827].

In light of the foregoing, the administrative authority found that the following self-favoring practices implemented by the Big Tech company cumulatively amounted to exclusionary abuse:

- Google gave prominent placement to its own comparison-shopping service, by consistently affording it greater visibility on the result pages of its vertical search

[826] See *supra* (n 820), paragraphs 306-309.
[827] Nazzini, Renato. *Google and the (Ever-Stretching) Boundaries of Article 102*, Journal of Competition Law and Practice, 2015, pages 301-313.

machine, in such a way that the favored final research's output was displayed in dedicated eye-catching boxes and positioned among the highest ranked comparison-shopping services exhibited on the online platform[828];

- Simultaneously, the market leader actively demoted competing comparison-shopping services on its general search engine to lower-ranked pages, as their results could only appear through typical blue links, which, in addition, started at least from the fourth page[829]; and
- On top of that, the dominant undertaking artificially redirected end users' visits of rival comparison websites to its own[830].

Consequently, after an accurate examination of the effects of such artificial positioning, the Commission discovered that it had significantly diverted the volume of traffic, as consumers tend to click on links that are not only more visible, but also in the first pages of the general search results[831].

The latter consideration is extremely noteworthy in so far as it testifies how, in line with the more economic approach, in order to determine the abusive nature of self-preferencing, the public agency carried out an accurate effects-based analysis[832].

Hence, underlying how Google's self-preferencing amounted to a standalone abuse of dominance, the Commission has, somehow, pushed the limits of Article 102 TFEU, in so far as it sent the shocking message that the Treaty's provision can be used to interfere with the way dominant undertakings, especially Big Tech companies, design their products/services, imposing a penetrating obligation of equal treatment upon their operative choices[833].

In order to do so, the administrative authority relied on two distinct, but interlinked, theories of harm. Indeed, whereas, on the one hand, it advanced a theory of harm based on discrimination, as the market leader applied dissimilar conditions to its downstream

[828] See *supra* (n 820), paragraphs 341-349.
[829] See *supra* (n 820), paragraphs 379-385.
[830] See *supra* (n 820), paragraphs 417-423.
[831] See *supra* (n 820), paragraphs 469-476.
[832] Jurczyk-Kostecka, Daria. *Abuse of Dominant Position on Digital Market: Is the European Commission Going back to the Old Paradigm*?, European Research Studies Journal, 2021, pages 120-132.
[833] Hoppner, Thomas. *Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse*, European Competition and Regulatory Law Review, 2017, pages 208-221.

competitors' comparison-shopping services, on the other hand, arguing that, through self-favoring, Google leveraged its dominant position on the general Internet search engine into the adjacent comparison-shopping market, it used the typical abusive leveraging's theory of harm[834].

However, the Commission failed to single out a clear legal assessment for either of these approaches, in so far as it did not articulate any alternative test in support of its findings[835]. To that extent, the only aspect repeatedly stressed by the public agency was that, as far as self-preferencing is concerned, the burden of proof does not comprise the so-called *Bronner* criteria[836].

In other words, according to the administrative authority, differently from other instances of vertical exclusion mentioned in the previous chapter, here, the indispensability requirement, let alone what was referred to, in this thesis, as the "special" *"enhanced effects"* test, is not necessary for an infringement of Article 102 TFUE to occur.

At the same time, as the public agency carried out an accurate evaluation of the anti-competitive effects of the conduct at stake, it can be safely maintained that Google's self-favoring was not treated as a presumptively abusive practice either.

Against this background, the Commission's decision in *Google (Search)* fueled an intense academic debate on the appropriate legal test for dominant undertakings' actions amounting to self-preferencing[837].

That is even more remarkable if one considers that Google's main point of appeal of the decision, as well as the key defensive argument during the investigation itself, was exactly in relation to the issue of whether the administrative authority had erred in law by

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[834] Kokkoris, Ioannis. *The Google Saga: episode I*, European Competition Journal, 2018, pages 462-490.
[835] Eben, Magali. *Fining Google: a missed opportunity for legal certainty?*, European Competition Journal, 2018, pages 129-151.
[836] See *supra* (820), paragraphs 331-340.
[837] On that regard, for a comprehensive examination of the various alternatives proposed by the scholars, see Deutscher, Elias. *Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU*, European Papers, 2021, pages 1345-1361. In addition, this work is quite interesting because the author advanced an original legal assessment of self-favoring, referred to in his piece as the *"route not taken"* by the EU decision-makers, based on the so-called *MEO* test. Hence, stressing the importance of the discrimination theory of harm, he suggested to employ the ECJ's latest findings on exploitative abuse to iron out the inconsistencies revolving around self-preferencing.

disregarding the ECJ's well-established line of case law on the necessity to prove the indispensability of the input provided by a vertically-integrated dominant operator[838].

In 2021, the GC delivered its long-awaited ruling on the matter. One would be excused to presume that this judgment has, at least to a significant extent, offered valuable clarification on the relevant legal test for abusive self-preferencing.

Unfortunately, its content suggests otherwise, in so far as, missing a great opportunity to provide legal certainty, the GC has mainly refrained from openly establishing which criteria must be met for market leaders' favoring behaviors to qualify as abuse of dominance.

Indeed, the GC has neither clearly delineated the new boundaries of Article 102 TFEU nor come up with a general rule and/or principle to determine the actual length of the obligation imposed upon digital dominant undertakings to guarantee equal treatment, when designing their products/services.

More precisely, if it is true that this judgment upheld most of the Commission's arguments, based on which its finding of an infringement of the prohibition of abuse of dominance was sustained, the GC has not sufficiently ironed out the systemic inconsistencies that only a judicial authority, equipped with power of review, could overcome.

At the same time, although such a ruling has not significantly improved the general understanding of dominant firms' self-favoring practices, its role should not be totally diminished. Indeed, largely endorsing the Commission's assessment, the GC has certainly confirmed that, as a matter of principle, self-preferencing is a conduct liable to constitute an independent type of violation of Article 102 TFUE[839].

Therefore, as the most important takeaway brought about by this judgment is that Google's set of practices could constitute, overall, a standalone infringement, one can safely assume that this form of exclusionary abuse, irrespective of its undeniable similarities with other behaviors that result in vertical exclusion of downstream competitors, first and foremost refusals to deal/supply, must not be subject to a qualified

[838] To that extent, see *supra* (n 820), paragraphs 644-652 and see *supra* (n 47), paragraphs 358-365.
[839] See *supra* (n 47), paragraphs 160-197.

legal assessment of its effects, which typically comprises, *inter alia*, evidence of the abovementioned indispensability requirement[840].

More precisely, the GC's endorsement of the Commission's expansion of the prohibitive scope of Article 102 TFUE was mainly based on the two following elements:

- Firstly, a far-reaching reading of the principle of dominant undertakings' special responsibility, according to which the prohibition of abuse of dominance can encompass the imposition of certain limits on the market leaders' discretion to choose the design of their products/services[841]; and
- Secondly, a reaffirmation of the *"openness"*[842] of Article 102 TFUE[843].

Regarding the first argument, as extensively analyzed in the second chapter, the rationale underpinning the GC's perspective is that companies holding huge market power, in this thesis referred to as "super-dominant" firms, may be subject to exceptional obligations in light of their unique status.

Hence, as Google is undoubtedly part of the latter category of enterprises, its business model could be certainly caught under the scope of the administrative authority's assessment of abuse of dominance.

Concerning the second argument, highlighting how the mere fact that self-preferencing, constituting a new form of abuse, is not expressly mentioned by Article 102 TFUE is not sufficient, in and of itself, to rule out the possibility of its original legal assessment, the GC has clearly reaffirmed the open-textured nature of the prohibition of abuse of dominance.

Thus, because of this versatility, in order for a certain market leader's conduct to be abusive, there is no need to fall within a well-established legal category and/or a predetermined theory of harm.

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[840] The relevance of this conclusion should not be underestimated, indeed, far from being totally predictable, before the publication of the GC's judgment, this outcome was ruled out by most of the doctrine; on that regard, see, *inter alia*, Lang, Temple, John. *Comparing Microsoft and Google: The Concept of Exclusionary Abuse*, World Competition, 2016, pages 5-28.
[841] See *supra* (n 47), paragraphs 150, 188 and 612.
[842] Makris, Stavros. *Openness and Integrity in Antitrust*, Journal of Competition Law and Economics, 2021, page 1-62.
[843] See *supra* (n 47), paragraphs 435-445.

On that regard, as the ECJ has consistently observed how Article 102 TFEU must be interpreted as empowering the Commission to prosecute any form of dominant undertakings' unilateral conduct that, irrespective of its practical manifestation, is outside the scope of competition on the merits, first and foremost because it drives equally efficient competitors out of the market by any means other than better quality or performance[844], one may be tempted to wrongfully conclude that such a reaffirmation is a futile rhetorical exercise.

On the contrary, what Makris defined as the *"conceptual elasticity of Article 102 TFUE"*[845], enabling the antitrust framework of the Union to fight novel typologies of harms to competition, such as digital abuses of dominant position, has been strategically identified by the GC, in *Google (Search)*, as a fundamental final stand of the system.

If this is true, the latter ruling must be correctly understood as a reminder that, even in fast-moving environments such as high-tech industries, the flexibility of Article 102 TFUE, which allows this provision to be responsive to any form of anti-competitive threat, adapting its scope to changing circumstances, can still guarantee the preservation of both the competitive process and consumer welfare.

At the same time, openness can properly function as a safety valve of the European antitrust framework only when it is, somehow, circumscribed, in so far as, without any sort of limitation, it transforms into unpredictability and uncertainty.

Thus, here, as in any other instance revolving around the prohibition of abuse of dominance, striking a balance between the openness and the integrity of Article 102 TFUE becomes essential to discern lawful manifestations of competition on the merits from prohibited practices.

As far as self-favoring is concerned, this constitutional task was not sufficiently fulfilled by the GC, as, despite acknowledging its existence, as well as its independent status, it provided neither limiting rules nor guiding principles on its general assessment.

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[844] To that extent, *ex multis*, see *supra* (n 191), paragraph 75 and see *supra* (n 50), paragraphs 133-134 and 136.
[845] See *supra* (n 842), page 3.

As, in many other circumstances related to Article 102 TFUE, the CJEU, engaging in pure legislative activism, has not refrained from completing this onerous duty, the approach undertaken by the GC may be explained as an admonishment to the European legislator to take the matter in its hands, providing a generalized and effective legal framework for digital markets and their players. This idea seems to be corroborated by the subsequent entry into force of the DMA.

Furthermore, the Google saga has recently come to an end, as the ECJ has ultimately upheld the GC's ruling, confirming that, implementing the abovementioned self-preferencing conduct, the Big Tech company has infringed the prohibition of abuse of dominance[846].

On that regard, the fact that the CJEU has, once again, neglected the legal test for self-favoring must be partially mitigated. Indeed, as will be extensively examined in the next sections, placing an *ex ante* set of obligations/prohibitions over certain digital dominant undertakings, the DMA has automatically criminalized self-preferencing behaviors stemming from them, without any need for subsequent legal assessments.

At the same time, as Article 102 TFUE coexists with the discipline of the DMA and further considering that there are many firms which are not subject to the latter Regulation, generally referred to as "non-Gatekeepers" digital enterprises, the *ex post* legal test of self-preferencing may still be necessary in some specific scenarios.

If this is true, it cannot be maintained that the inconsistencies revolving around such exclusionary abuse have been totally rectified. However, as will be accurately analyzed in the following of this chapter, with its 2025 draft Guidelines, the Commission has proven not only to be aware of this additional gap, but also its willingness to fill it.

Overall, what can be drawn from the Google saga is that, when digital undertakings both own the online platform, acting as the content provider, and perform the interdependent service, being one of the downstream players, they tend to favor themselves at the expense of their competitors, treating them unequally.

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[846] Judgment of 10 September 2024, *Google LLC and Alphabet Inc. vs Commission*, Case C-48/22 P, EU:C:2024:726, paragraphs 260-271.

To that extent, *Google (Search)* does not constitute the sole registered instance of self-preferencing. Indeed, although the ECJ was not called to exercise its power of judicial review on the matter, in its commitment decision in *Amazon Marketplace/ BuyBox*[847], the Commission found that Amazon, leveraging its dominant position on the upstream online marketplace into multiple downstream markets, favored its own affiliated retail service, due to its ability to amass vast amounts of competitors' sensitive data, which, in turn, directly derived from its status of owner of the digital platform.

More precisely, in order to assess whether the market leader's collection and use of third-party sellers' data, namely the independent retailers that must operate on Amazon's marketplace to conduct their business, could constitute an abuse of dominance, the administrative authority, once again, had to directly address the business model of the Big Tech company involved.

On that regard, it is well-established that Amazon provides a general platform through which firms can directly sell their products to final consumers. At the same time, being a retailer operating on the platform itself, the market leader competes with them as a downstream player[848].

Similarly to what was observed in relation to Google's business model, based on its dual role of provider/competitor, and as far as antitrust rules are concerned, it can be safely maintained that Amazon functions as a vertically-integrated dominant enterprise.

On top of that, the following conduct forming an integral part of its business plan, Amazon monitored the independent sellers' activities within its platform, collecting data about their products and transactions on the online marketplace.

However, rather than the mere collection, the Commission's competitive concerns were centered on the abusive usage of this commercially sensitive data, in so far as the dominant undertaking, in light of its status, was the only entity to have access to them[849].

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[847] Commission Decision of 20 December 2022, in *Amazon Marketplace/Amazon Buy Box*, Cases AT.40462 and AT.40703.
[848] See *supra* (n 847), paragraphs 24-26.
[849] See *supra* (n 847), paragraphs 98-105.

Therefore, what can be immediately highlighted, in comparison to *Google (Search)*, is that, despite being both labeled as self-favoring, the two Big Tech companies' sets of behaviors are extremely different from one another, mainly due to their original ways of doing business and making it profitable.

As far as the public agency's findings of abuse of dominant position are concerned, the Commission observed that Amazon, using non-public information of independent sellers, from their orders to their revenues, passing through their number of visits, benefited its own retail business, as it generated an undue competitive advantage, which, in place of being the result of its entrepreneurial ability, was a direct consequence of its dominant position on the online marketplace[850].

Specifically, as this data was at the disposal of Amazon's retail branch, its very business plan was accordingly tailored to such information, including the most important strategic decisions[851]. Organizing its model as such, the market leader was able to effectively eliminate any entrepreneurial risk in relation to its downstream retail activity, as one of its fundamental components is represented by undistorted competition, meaning that valid expressions of competition on the merits stemming from rivals may significantly increase another firm's risk.

Hence, an additional fundamental difference with *Google (Search)* is that, here, there is no discriminatory behavior, as the self-favoring effect is the sole result of the abusive leveraging of Amazon's upstream dominant position in the adjacent online retail market. In other words, here, downstream competitors were unlawfully used by the Big Tech company, rather than being treated unfairly[852]. The latter consideration should be underestimated, in so far as it implies that a theory of harm based on discrimination, as well as a legal assessment such as the abovementioned *MEO* test, would have been of little to no help in the case at stake.

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[850] See *supra* (n 847), paragraphs 116-123.
[851] See *supra* (n 847), paragraphs 106-114.
[852] Reverdin, Vladya. *Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU*, Journal of European Competition Law and Practice, 2021, pages 181-199.

Consequently, one could further infer that, due to the sector-specific peculiarities of digital markets, especially when it comes to online platforms, self-preferencing practices cannot be subject to a generalized approach, that is to say a unique legal test, irrespective of the material manifestation of the favoring conduct.

This idea may be also helpful to explain the rationale behind the ECJ's reluctance to lay down general rules/principles of assessment for such exclusionary abuse, apart from correctly recognizing its abstract possibility and its virtual capability to produce anti-competitive effects.

Furthermore, it is common knowledge that Amazon offers its end users a Buy Box, which, allowing them to easily add items of interest from specific retailers to their "shopping carts", represents a fundamental tool of the platform, that, additionally, plays a remarkable role for the success of downstream retailers.

As this Buy Box is prominently displayed on the market leader's websites, generating an eye-catching effect on consumers, the Commission accordingly investigated the selection criteria employed by Amazon to choose which seller to exhibit. Unsurprisingly, the abovementioned data formed an integral part of the dominant undertaking's decision-making process[853].

In the same vein, the administrative authority addressed the accessibility of the Prime customers from the independent resellers' perspective. On that regard, as these users are significantly more active than non-Prime members, first and foremost because they generally purchase more products, being able to effectively reach them is essential for third-party sellers. Unfortunately, the Commission discovered that their access to such customers was also determined by the dominant undertaking on the basis of the sensitive information obtained through its superior status[854].

Finally, as anticipated before, the Amazon saga can have a limited impact on the general understanding of abusive self-preferencing, in so far as, ending with a commitment decision of the administrative authority, it was not scrutinized by the ECJ.

[853] See *supra* (n 847), paragraphs 215-222.
[854] See *supra* (n 847), paragraphs 167-171.

On top of that, as this type of remedy does not encompass the actual finding of an abuse of dominance, the Commission mainly refrained from laying down a proper legal test for the conduct at stake.

Nevertheless, from the analysis of its relevant factual background, it clearly transpires how favoring practices represent a real threat to competition, which, due to its intrinsic characteristics, clearly escapes a generalized approach aimed at categorizing its constituent elements.

On that regard, if it is true that, as abundantly described in the previous chapters, this peculiar environment marks out basically every exclusionary abuse of dominance, the context-specific features of digital markets endlessly exacerbate this "natural" fragmentation revolving around Article 102 TFUE, creating a legal vacuum that is incompatible with the very principle of legality.

Hence, as the European legislator has recently intervened to restore certainty and predictability within online platforms, the next section of this thesis will be dedicated to the examination of the innovative approach undertaken by the EU in this regard.

4.2 The Digital Markets Act: *ex ante* control over "Gatekeepers"

As anticipated before, the DMA represents an additional tool with which the European legislator has provided an effective response to the harsh criticisms moved against Competition Law, when it comes to the threats posed by technology-enabled industries to the internal market of the Union.

To that extent, it is not a coincidence that the legal basis designated for this innovative Regulation is Article 114 TFUE, which enables the EU institutions to *"(...) adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market"*.

At the same time, it cannot be ignored how the new instrument will be enforced by the Commission's DG Competition, rather than its DG Internal Market, Industry, Entrepreneurship and SMEs or its DG for Communications Networks, Content and Technology.

On that regard, as will be extensively described in the next section, this operative decision must be accordingly understood in light of the impelling necessity to coordinate the DMA's enforcement with the implementation of antitrust measures, first and foremost the prohibition of abuse of dominance.

After all, it was already observed how *"a system ensuring that competition is not distorted"*[855] is the quintessential element of the EU internal market, so much so that, since its creation, the Union's competition framework has always aimed at its protection and proper functioning. Indeed, long before the entry into force of the DMA, the EU internal market had represented *"the pre-eminent objective"*[856] of ECL.

If this is true, despite a clear difference regarding their respective anchoring in EU primary law, it cannot be maintained that Article 102 TFUE, on the one hand, and the DMA, on the other hand, either serve diametrically opposite purposes or protect totally different legal interests.

Therefore, even if references to classical antitrust concepts, such as "protection of competition", "undistorted competition", "consumer welfare" or "efficiency" are nowhere to be found in the text of the Regulation at stake, it will be accordingly demonstrated how there is tangible evidence supporting the idea that the European legislator intended to create a relation of complementarity between the abovementioned disciplines, based on which old and new instruments in the Commission's toolbox should coexist, rather than conflict with each other.

However, it will be also illustrated how, in practice, such coordination is far from being straightforward, because, differently from the application of the prohibition of abuse of dominant position, which, as extensively analyzed up to this point, lies on an *ex post* assessment of specific behaviors perpetrated by market leaders, the DMA establishes a uniform *ex ante* regulatory control over certain predetermined enterprises.

After all, it is essential to keep in mind how the fact that the DMA is, typologically, a sectoral *ex ante* Regulation is mainly the result of the registered inadequacy of antitrust measures to effectively address large digital undertakings' anti-competitive practices.

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[855] See *supra* (6).
[856] Sauter, Wolf. *Coherence in EU Competition Law*, Oxford University Press, 2016, page 142.

To that extent, apart from the evident dissimilarity in the imposition of the relevant obligations/prohibitions, the renovated *ex ante* legal framework provided by the DMA must be correctly understood as a generalized approach that comprehends every aspect of the discipline enshrined therein, up to the very designation of the status of "Gatekeeper", which significantly differs from the determination of market dominance.

Even the name of the Regulation clearly testifies a remarkable change of course, in so far as it identifies *"contestable and fair markets"* as final goals of the European legislator. In the same vein, its extensive preamble is full of new concepts, such as "fairness of commercial relationship" or "fair economic outcomes", that, apart from the *sui generis* prohibition of dominant undertakings' exploitative abuses, are mainly alien to Article 102 TFUE, as well as ECL in general.

For instance, one of the opening recitals of the DMA reads as follows:

"(...) the objective of this Regulation, namely to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector (...)"[857].

In other words, emphasizing the indispensability of the Gatekeepers' neutrality towards both business and end users of their online platforms, the DMA has added the notion of "fairness" amongst the core values of the Union's fight against anti-competitive behaviors, at least as far as the digital sector is concerned.

At the same time, the actual impact of such an unexpected inclusion, first and foremost testified by the renovated terminology employed by the European legislator, must be accordingly mitigated, in so far as a comprehensive analysis of the logic underpinning the Regulation clearly suggests that it aims at nothing more than restoring the competitive process in markets where, due to the very presence of Big Tech companies, it has been almost wiped out.

[857] See *supra* (n 61), Recital (107).

Indeed, even if the DMA explicitly aims at keeping the digital world, along with the various markets of which it is composed, open, fair and contestable, by guaranteeing business/end users of online platforms access to a wide choice of services, there is no doubt that such an outcome can only be obtained through the preservation of competition[858].

The latter consideration seems to be corroborated, *inter alia*, by Chapter III of the DMA. Indeed, although it is titled *"practices of gatekeepers that limit contestability or are unfair"*, most of the ordered or prohibited Gatekeepers' actions enshrined therein, being based on the EU decision-makers' findings that have been gradually embedded over decades of implementation/interpretation of Article 102 TFUE, clearly have a typical competitive rationale[859].

Likewise, Chapter V of the Regulation, which addresses the scope of the Commission's authority by meticulously regulating the extent of its investigative, enforcement and monitoring powers, is undoubtedly inspired by the consolidated *modus operandi* of the public agency in cases revolving around the prohibition of abuse of dominance.

For instance, according to the DMA, the administrative authority is entitled to carry out physical inspections[860], as well as, after the establishment of an infringement of the obligations/prohibitions dictated by Articles 5 to 7, to impose fines[861].

Going into the merits of the discipline enshrined in the Regulation, concerning the definition of the relevant digital undertakings that are subject to it, according to one of the opening recitals of the DMA, *"a small number of large undertakings providing core platform services have emerged with considerable economic power that could qualify them to be designated as gatekeepers (...)"*[862].

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[858] Colangelo, Giuseppe. *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*, European Law Review, 2022, pages 597-621.
[859] Cremer, Jacques. Dinielli, David. Heidhues, Paul. Kimmelman, Gene. Monti, Giorgio. Podszun, Rupprecht. Schnitzer, Monika. Morton, Scott, Fiona. De Streel, Alexandre. *Enforcing the Digital Markets Act: Institutional Choices, Compliance and Antitrust*, Tobin Center for Economic Policy at Yale - Policy Discussion Paper No. 7, 2022, pages 1-34.
[860] See *supra* (n 61), Articles 21 and 23.
[861] See *supra* (n 61), Article 30.
[862] See *supra* (n 61), Recital (3).

On that regard, within the European legal framework, the expression "Gatekeepers" is nothing more than an original way to refer to large digital platforms such as Meta, Alphabet, Apple, Microsoft and Amazon, which are generally described, altogether, under the acronym "MAAMA" or, pertaining to Meta's Facebook and Alphabet's Google, as "GAFAM".

However, the term coined by the European legislator is particularly evocative of the pivotal role played by these operators within the digital sector, in so far as, according to the DMA, Internet Gatekeepers, irrespective of their dominant status on specific online markets, are those digital companies that control the so-called core platform services[863], which, in turn, being irreplaceable components of any platform-to business model, are to be considered the nerve center of the new economy.

Specifically, the DMA stipulates that *"an undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future"*[864].

On that regard, according to the DMA, labelling a certain digital undertaking as Gatekeeper of one or more of the abovementioned core platform services is an exclusive prerogative of the Commission.

To that extent, such designation can occur in the two following alternative scenarios:

- Firstly, every time a digital operator meets the quantitative thresholds accurately specified in the Regulation itself[865], it is presumed to act as a Gatekeeper. Therefore, after a mandatory notification, with which the firm involved informs the administrative authority of the fact that it has met the pre-established

[863] That is to say essential online intermediation services; more precisely, see *supra* (n 61), Article 2(2), which reads as follows: *"'core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)"*.
[864] See *supra* (n 61), Article 3(1).
[865] See *supra* (n 61), Article 3(2).

requirements, the public agency, absent exceptional circumstances[866], will designate the relevant provider as Gatekeeper; or

- Secondly, when the presumption cannot apply, as some of the quantitative thresholds are not met in practice, the Commission is still entitled to label a certain undertaking providing core platform services as Gatekeeper, following an individual market investigation[867]. This operation, far from being left to the administrative authority's discretion, must be conducted in accordance with the strict parameters laid down by the European legislator itself, such as, *inter alia*, *"(b) the number of business users using the core platform service to reach end users and the number of end users"*[868].

Moreover, as anticipated before, digital Gatekeepers are required to comply with the obligations/prohibitions laid down by Articles 5 to 7. To that extent, if it is true that most of them are, somehow, reminiscent of both the Commission's decision-making practice and the ECJ's case law on matters concerning the implementation of Article 102 TFUE, certain transparency obligations/prohibitions contained in the DMA must be correctly understood as a fine product of the European legislator's innovative effort.

For instance, Articles 5(9)-(10) and 6(8)-(10), as well as some advanced obligations on the interoperability of number-independent interpersonal communications services enshrined in Article 7, do not appear to have any sort of anchoring in the EU decision-makers' precedent antitrust practice[869].

Regardless, the DMA stipulates the following fundamental tripartition:

- Article 5 contains self-executing obligations/prohibitions, such as the prohibition to lock-in final consumers[870];
- Article 6 enshrines obligations/prohibitions that are expressly qualified, by the title itself, as *"susceptible of being further specified"*, for instance, the prohibition to mine data obtained from third party sales[871]; and

[866] See *supra* (n 61), Article 3(5).
[867] See *supra* (n 61), Article 3(8).
[868] See *supra* (n 864), paragraph 2.
[869] Blockx, Jan. *The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices*, Journal of European Competition Law and Practice, 2023, pages 325-337.
[870] See *supra* (n 61), Article 5(6).
[871] See *supra* (n 61), Article 6(3).

- Article 7 encapsulates interoperability obligations/prohibitions, like the obligation to eliminate any possible source of incompatibility between applications[872].

However, irrespective of their categorization in the text of the Regulation, a closer look at them clearly reveals that they all share the three following common denominators:

- They aim at guaranteeing access of competing undertakings to the relevant online platforms, or, if one prefers to use the innovative terminology of the DMA, the market's contestability for other service providers;
- They preserve both business and end users' choice; and
- All ordered or prohibited practices described in the DMA, even those that, pursuant to Article 6, may need further qualification, are unlawful *per se*, thus without any need to prove their anti-competitive impact.

On top of that, the European legislator has transformed the prohibition, pursuant to Article 102 TFUE, of abusive self-preferencing, a term that does not appear as such in the text of the Regulation, into a sort of universal rule of conduct which Gatekeepers must always respect, when dealing with business users of their online platforms.

Indeed, the DMA stipulates that when a Gatekeeper is, simultaneously, the creator of a certain core platform service, such as search engines [*Google (Search)*] or marketplaces [*Amazon Marketplace/Buybox*], its administrator, and, in addition, one of the business users of the platform, hence, competing with other downstream operators, it must share with the latter rivals any valuable source of information in its possession, first and foremost the accumulated data, so that they may be able to conduct their business efficiently through its platform.

In other words, a Gatekeeper must deal with its competitors *"on fair, reasonable and non-discriminatory terms and conditions"*[873], in order not to procure itself an inevitable advantage over them.

Thus, in stipulating so, as the European legislator has consciously refrained from further qualifying such an undue advantage as "competitive", it is almost like the DMA places upon Gatekeepers a generalized imposition of neutrality of their conduct, which, in

[872] See *supra* (n 61), Article 7(7).
[873] *Ex multis*, see *supra* (n 61), Article 6(11)-(12).

comparison with the discipline contained in Article 102 TFUE, goes even beyond the typical understanding of the well-established principle of dominant undertakings' special responsibility.

To that extent, as self-favoring *"has come to embody the zeitgeist of competition policy in digital markets"*[874], the approach undertaken by the European legislator with the DMA very much resembles a public utility type of regulation, which certainly exceeds the boundaries of classic antitrust enforcement.

If this is true, the idea that *"what is legal offline should also be legal online"*[875], supported by a consistent part of the doctrine[876], especially before the entry into force of the DMA, has been totally disregarded.

In fact, the DMA is generally considered to be much more akin to sector-specific regulations, such as the one provided for the telecommunication sector, than to typical competition tools, like the prohibition of abuse of dominance[877].

Indeed, as already mentioned in the previous chapters, both European and national authorities have created a multitude of sectoral regimes that, without prejudice to antitrust measures, have demonstrated to tackle the anti-competitive threats of certain peculiar markets more efficiently. In addition, this parallelism appears to be even more suitable if one considers that most, if not all, of the so-called Regulated Network Industries encompass an *ex ante* form of control[878].

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[874] Colangelo, Giuseppe. *The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy*, International Center for Law & Economics, ICLE White Paper, 2022, page 13.
[875] Reyna, Agustín. *How to ensure consumers get a fair share of the benefits of the digital economy?*, in Šmejkal, Václav. *EU Antitrust: Hot Topics & Next Steps, Proceedings of the International Conference held in Prague on January 24–25, 2022*, Charles University Faculty of Law, 2022, pages 30-38.
[876] To that extent, see, *inter alia*, Petit, Nicolas. *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, Journal of European Competition Law and Practice, 2021, pages 529-541.
[877] At the same time, this similarity does not amount to blatant equivalence; to that extent, see Colombo, Ibáñez, Pablo. *The Draft Digital Markets Act: A Legal and Institutional Analysis*, Journal of European Competition Law and Practice, 2021, pages 561-575, where, in contrast to the telecommunication regime, the author carries out an accurate examination of the main particularities of the DMA. On top of that, this assimilation must be correctly understood as without prejudice to the evident influence of Article 102 TFUE on the Regulation at stake.
[878] On that regard, see Colombo, Ibáñez, Pablo. *EU Competition Law in the Regulated Network Industries*, LSE Law, Society and Economy Working Papers, 2016, pages 1-23, in which the author, apart from providing an in-depth analysis of the most remarkable structural features of their legal regulatory framework, accurately describes the main implications of such an *ex ante* regime from an antitrust perspective, first and foremost the intended relationship between the two disciplines, as well as the main areas of influence on one another.

Against this background, as will be accurately described in the next section, the key element of the comparative analysis between the DMA and Article 102 TFUE becomes ascertaining whether the two instruments envisage different objectives or a prevailing relation of continuity, irrespective of their clearly diverse ways of achieving a common goal, namely the protection of competition.

Furthermore, regarding the beneficiaries of the DMA, as already anticipated, the European legislator has placed final consumers and business users of all sizes at the forefront of this innovative instrument.

Indeed, although part of the doctrine has incorrectly criticized the Regulation for paying lip service to end users' interests[879], especially compared with those of business users, the DMA treats them with the same importance.

More precisely, as the ultimate purpose of the Regulation is the creation of an open environment within the whole digital sector, its recipients' interests are equally safeguarded, in so far as the accomplishment of the upstream objectives of the DMA, namely contestability and fairness of online markets, is capable, in and of itself, of satisfying their needs, first and foremost the ability to choose between a wide range of products/services, as well as, specifically for business users, a vast variety of platform providers.

However, the European legislator has not targeted such interests from an economic perspective, as typical welfare-based terms, such as "surplus" or "lower prices", are replaced by a new terminology that focuses, *inter alia*, on original concepts, like "non-discrimination", "freedom to download" and "multi-homing". Similarly, their protection is obtained through "data security" and "interoperability", rather than "efficiency".

In addition, in the author's view, what is quite shocking is that, after the previously described victory, at least formally, of consumer welfare over the protection of undertakings' freedom to compete, as final goal of antitrust measures, business users are treated by the DMA in the exact same way as end users, regardless.

[879] On that regard, *ex multis*, see Geradin, Damien. Huijts, Stijn. *Abuse of dominance: Has the effects-based analysis gone too far?*, Oxford Review of Economic Policy, 2025, pages 776-786.

Indeed, if it is true that, long before the entry into force of the Regulation, the notion of consumer welfare had theoretically encompassed both final consumers and dominant firms' customers, it was already observed in the previous chapters how it is undeniable that the first has much less bargaining power than the second.

Nevertheless, here, it is almost like the European legislator started from the upstream assumption that, as far as the digital sector is concerned, business users have the same need to be shielded from Big Tech companies as end users, hence, their equal treatment within the discipline of the DMA.

This idea seems to be corroborated by the words of the now former Commission's Executive Vice-President Vestager:

"The two proposals [apart from the DMA, here, the former Commissioner is referring to the Digital Services Act[880], which, however, is outside the scope of this thesis] *serve one purpose: to make sure that we, as users, as customers, as businesses, have access to a wide choice of safe products and services online, just as well as we do in the physical world. And that all businesses operating in Europe, that can be big ones, that can be small ones, that they can freely and fairly compete online, just as they do offline. Because this is one world. Whether from our streets or from our screens, we should be able to do shopping in a safe manner (...)"*[881].

On top of that, as she goes on saying that *"and of course, what is illegal offline is equally illegal online"*[882], in comparison with what has already been highlighted in this section, it can be safely concluded that the European legislator has shaped a peculiar legal framework revolving around the digital sector, according to which what is unlawful offline must be surely unlawful also online, however, what is legal offline could still be illegal online.

Moreover, the text of the DMA makes no explicit mention of the temporal range of its rules, meaning a long-term perspective of protection of its beneficiaries' interests or *vice versa*, hence, a mere short-term impact.

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[880] *Regulation 2022/2065*, OJ L 277, 2022.
[881] Vestager, Margrethe. *Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms*, Statement 20/2450, [Brussels, December 15, 2020].
[882] See *supra* (n 881).

After the entry into force of the Regulation, this undeniable absence has given rise to an interesting doctrinal debate over the correct interpretation to be espoused on the matter[883], which, taking a closer look at it, goes way beyond this particular aspect.

Indeed, hidden behind the idea that, absent additional specifications, the DMA's rules should be interpreted narrowly, automatically recognizing to the Regulation a short-term nature, there are the theories of those scholars who strongly believe that intervention on digital markets was unnecessary in the first place, in so far as, in their opinion, Article 102 TFUE, due to its abovementioned intrinsic openness, has proved to be well up to the task of safeguarding competition within the new economy[884].

In any case, this textual absence must be accordingly mitigated, in so far as, in the author's view, there is no doubt that, with the DMA, the European legislator intended to create a long-lasting safe digital environment.

That is so, at least for the two following reasons:

- Firstly, an *ex ante* form of regulation does not need to expressly specify the actual extent of its temporal range, as, being intrinsically susceptible to generating enduring effects, it can be certainly applied permanently; and
- Secondly, some of the core values illustrated by the abovementioned Recital (107), such as "fair and competitive prices" and "high quality products" for end users, are clearly indicative of the long-term rationale underpinning the Regulation.

If this is not enough, there is no logical explanation for which the DMA should restore, in certain online markets even recreate, competition within the digital sector, without further maintaining it viable.

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[883] On that regard, see Šmejkal, Václav. *Abuse of Dominance and the DMA – Differing Objectives or Prevailing Continuity?*, Acta Universitatis Carolinae – Iuridica, 2023, pages 33-51.

[884] Without going too deep into the merits of this approach, as the DMA is, after all, the will of the European legislator itself, they are convinced that the capacity demonstrated by the prohibition of abuse of dominance to tailor its flexible framework to the various forms of abusive self-preferencing is an irrefutable proof of the fact that Article 102 TFUE is more than sufficient to tackle any sort of anti-competitive threat stemming from Big Tech companies; to that extent, see, *inter alia*, Radic, Lazar. *Final DMA: Now We Know Where We're Going, but We Still Don't Know Why*, Truth on the Market, [March 25, 2022] and Monti, Giorgio. *The digital markets act: Improving its institutional design*, European Competition and Regulatory Law Review, 2021, pages 90-101.

Furthermore, concerning the required standard of proof, unlike the prohibition of abuse of dominant position, the DMA's *ex ante* approach is totally agnostic about anti-competitive effects, in so far as they are neither demanded nor demonstrated in advance.

Indeed, the obligations/prohibitions encapsulated in Chapter III of the Regulation are based on the upstream idea that certain Gatekeepers' practices are automatically presumed to jeopardize fairness and contestability of the digital world, or, if one prefers to use the words of former Commissioner Vestager, to be *"bad for fair and open markets"*[885], without any additional case-specific evaluation.

Speaking in terms of classic antitrust enforcement, specifically as far as Article 102 TFUE is concerned, one could argue that the discipline contained in Articles 5 to 7 of the Regulation vaguely resembles what was referred to in this thesis as the dominant undertakings' presumptively abusive behaviors.

If this is true, one could further maintain that the DMA represents a clear victory of rules over standards, as the European legislator has left little to no room for subsequent interpretation, drastically reducing the Commission's margin of maneuver, on the one hand, and the Gatekeepers' ability to rebut the presumption of illegality, on the other hand.

At the same time, the analogy between naked restrictions and DMA-regulated practices must be accordingly confined to a mere doctrinal effort, aimed at nothing more than facilitating those with a mainstream antitrust mindset, imbued with classic legal categories, to become familiar with an unprecedented discipline.

To that extent, even if the prohibition of abuse of dominance is not at all alien to conduct that is to be deemed harmful in and of itself, the starting point of such discipline is, and will always be, represented by context-specific circumstances of individual scenarios, due to the *ex post* dimension that typically characterizes competition measures.

The latter consideration seems to be corroborated, *inter alia*, by the exemption regime encapsulated in the DMA. On that regard, if it is true that Article 10 of the Regulation enables Gatekeepers to advance both mitigating circumstances, aimed at suspending the application of certain specific obligations, and defensive arguments, through which they

[885] See *supra* (n 881).

may avoid penalties for non-compliance in full, the European legislator has expressly stipulated that *"an exemption (...) may only be granted on grounds of public health or public security"*[886].

In the same vein, although Article 9 empowers the Commission to suspend some of the obligations/prohibitions laid down in Chapter III of the DMA, a Gatekeeper may only cite, in its defense, the need not to endanger *"the economic viability of its operation in the Union"*[887], that is to say the integrity, security, and privacy of its core platform services, or the fact that some impositions may ultimately result in detrimental effects to third parties, first and foremost SMEs (Small and Medium Enterprises) and/or final consumers[888].

Therefore, in neither case there is space for economic-orientated defensive arguments, such as evidence of outweighing efficiency for consumer welfare or, more generally, the competitive process[889].

For the sake of completeness, it is important to underline how virtually every scholar who has endorsed the idea that, differently from Article 102 TFUE, Articles 5 to 7 of the DMA do not admit any sort of efficiency defense, has drawn such a conclusion from the Regulation's Recital (23)[890].

However, as this provision solely stipulates that *"any justification on economic grounds seeking (...) to demonstrate efficiencies deriving from a specific type of behavior by the undertaking providing core platform services should be discarded, as it is not relevant to*

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[886] See *supra* (n 61), Article 10(3).
[887] See *supra* (n 61), Article 9(1).
[888] See *supra* (n 61), Article 9(4).
[889] On top of that, even though a comprehensive analysis of the Regulation suggests that there are additional scattered provisions which reduce, somehow, the intensity of the DMA's prohibitive scope, they do not possess any competitive rationale. For instance, Article 5(2) envisages the relaxation of certain obligations/prohibitions pending on Gatekeepers, while handling their clients' sensitive data: on condition that they have previously obtained the consent of end users, they can mine, process and cross-use their personal information. However, this specification, which was inserted to facilitate the coordination with the infamous General Data Protection Regulation (largely known under the acronym "GDPR"), has nothing to do with antitrust measures, in so far as, in principle, the consent of a third party is judicially irrelevant for the determination of liability stemming from violations of competition rules.
[890] To that extent, *ex multis*, see Cabral, Luís. Haucap, Justus. Parker, Geoffrey. Petropoulos, Georgios. Valletti, Tommaso. Van Alstyne, Marshall. *The EU Digital Markets Act A Report from a Panel of Economic Experts*, Joint Research Centre - European Commission - Publications Office of the European Union, 2021, pages 10-15 and Witt, Anne. *Platform Regulation in Europe – Per Se Rules to the Rescue?*, Journal of Competition Law and Economics, 2022, pages 670-708.

the designation as a gatekeeper"[891], it does not specify the role of efficiencies within the obligations/prohibitions laid down in Chapter III of the DMA, in so far as it only excludes them from the scope of the Commission's designation of Gatekeepers.

At this point, one may argue that if the European legislator intended to include such defensive arguments, it would have expressly mentioned them in the text of the Regulation, just like it did for, *inter alia*, the abovementioned exemption based on public health or public security grounds. On the contrary, there is no reference whatsoever to them.

Nevertheless, one should also keep in mind that, although Article 102 TFUE is equally silent on the matter, as extensively analyzed in the previous chapters, the ECJ has consistently interpreted the Treaty's provision as allowing for the abstract possibility of dominant undertakings' efficiency considerations, which may ultimately eliminate the abusiveness of their unilateral conduct.

Against this background, one may be tempted to conclude that, as the European legislator has left some room for maneuver in this regard, the Commission might apply, in the future, the Regulation in such a way as to encompass these sorts of defensive arguments.

Regardless, even though the latter is, in principle, an acceptable perspective, the rationale underpinning the DMA, as well as the innovative methodology singled out for its achievement, seem to be at odds with such an outcome, first and foremost because efficiency defenses would compel the administrative authority to operate an individual *ex post* assessment that is mainly alien to the discipline of the Regulation at stake.

Yet, as the abovementioned interpretation is theoretically conceivable, only time will provide further clarifications about this open issue.

Finally, from the analysis of the DMA conducted up to this point, in neat contrast with the prohibition of abuse of dominant position, the following fundamental conclusions can be drawn:

- There is no need for the determination of dominance on one or more geographical markets;

[891] See *supra* (n 61), Recital (23), paragraph 2.

- The definition of a specific theory of harm is not required; and
- The capability of DMA-regulated practices to generate actual or potential anti-competitive effects is always presumed, making its assessment superfluous.

Consequently, in terms of speed of the relevant procedure, one of the main areas of criticism of the suitability of antitrust measures within the digital sector, the DMA unequivocally provides that *"the Commission shall endeavor to adopt its non-compliance decision within 12 months from the opening of proceedings (...)"*[892].

Unfortunately, just like the implementation of the prohibition of abuse of dominance, one should keep in mind that a timely and effective enforcement of the Regulation will probably be jeopardized by the typical lack of resources that intrinsically characterizes the Commission. To that extent, the administrative authority will likely have to make upstream policy decisions, setting priorities for the application of the relevant obligations/prohibitions.

After all, the very text of the DMA seems to, somehow, predict such an outcome, in so far as Article 47 expressly stipulates that *"the Commission may adopt guidelines on any of the aspects of this Regulation in order to facilitate its effective implementation and enforcement"*.

Considering the foregoing, it can be safely maintained that this Regulation is diametrically opposed to the effects-based approach. At the same time, the latter divergence must be accordingly reconciled, as, far from being an evolution of Article 102 TFUE, the DMA is to be conceptualized as an evident regulatory departure from classic Competition Law, irrespective of whether this paradigm shift is deemed desirable or not.

Against this background, the next section of this thesis will be dedicated to the accurate investigation of the institutional nature of the systemic relations between Article 102 TFUE and the newborn DMA.

[892] See *supra* (n 61), Article 29(2).

4.2.1 Article 102 TFUE and the Digital Markets Act: the coordination dilemma

Recital (10) of the DMA reads as follows:

"(...) since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, (...) that are based on an individualized assessment of market positions and behavior, including its actual or potential effects and the precise scope of the prohibited behavior, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behavior in question (...). However, the application of those rules should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market".

Subsequently, Recital (11) specifies the following:

"Articles 101 and 102 TFEU (...) have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application".

On top of that, the European legislator has reiterated its position in Article 1(6) of the DMA, in so far as it stipulates that *"this Regulation is without prejudice to the application of Articles 101 and 102 TFEU (...)"*.

At the same time, in the previous section, it was already pointed out that the doctrine is basically unanimous in highlighting how most of the obligations/prohibitions covered by Chapter III of the DMA have a grounded anchoring in the consolidated practice of the EU decision-makers revolving around Article 102 TFUE[893].

[893] To that extent, see, *inter alia*, Akman, Pinar. *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, European Law Review,

More precisely, even if to different extents, all academic contributions on the matter suggest the following similarities:

- Article 5(3) of the DMA corresponds to the Commission's commitment decision in *E-book MFNs and related matters (Amazon)*[894];
- Articles 5(7) and 6(3) of the DMA correspond to the Commission's decision in *Google Android*, as well as the consecutive judgment delivered by the CJEU;
- Article 6(4) of the DMA has a clear parallel in the *Apple* case[895];
- Article 6(5) of the DMA reflects the ECJ's findings in *Google (Search)*; and
- Article 6(7) of the DMA is heavily influenced by the so-called *Microsoft* saga.

Against this intricate background, ascertaining whether the relationship between Article 102 TFUE and the DMA is characterized by prevailing continuity or differing objectives is essential to shed light on the scope of the future enforcement of the prohibition of abuse of dominant position.

In other words, to the extent that the same anti-competitive conduct may be subject, simultaneously, to both disciplines, determining the impact of the newborn Regulation on classic antitrust measures and their subsequent implementation has become an exercise as fundamental as complicated.

For instance, blatantly maintaining, as the European legislator did, that the DMA and Article 102 TFUE protect different legal interests automatically raises the issue of whether the juxtaposition of such disciplines may amount to a violation of the well-established principle of *ne bis in idem*.

2022, pages 90-96; De Streel, Alexandre. Liebhaberg, Bruno. Fletcher, Amelia. Feasey, Richard. Krämer, Jan. Monti, Giorgio. *The European proposal for a digital markets act: a first assessment*, CERRE, Centre on Regulation in Europe, 2021, pages 14-20 and OECD, *Competition Enforcement and Regulatory Alternatives*, OECD Competition Committee Discussion Paper, 2021, pages 30-37.

[894] Commission Decision of 4 May 2017, in *E-book MFNs and related matters (Amazon)*, Case AT.40153.

[895] On that regard, even if the Commission's infringement decision was delivered after the entry into force of the DMA [to that extent, see Commission Decision of 4 March 2024, in *Apple – App Store Practices (music streaming)*, Case AT.40437], the investigation had started long before the official publication of the Regulation, making such an influence more than plausible.

In order to mitigate these open gaps, the Commission has recently underlined how the Regulation, far from merely addressing practices that are already covered by classic competition rules, has an original and unique content[896]. Unfortunately, even though, as observed in the previous section, the latter consideration appears to be acceptable, it is surely not sufficient to iron out the inconsistencies generated by this coordination dilemma.

In the same vein, suggesting that the provisions laid down in Articles 5 to 7 of DMA, despite being clearly reminiscent of Article 102 TFUE, should be interpreted differently from the prohibition of abuse of dominance, due to the peculiarity of the subtended rationale inspiring the Regulation[897], is equally misleading and certainly not enough to provide clarity and consistency to the legal system of the Union.

In light of the foregoing, this section will try to answer the three following inescapable questions:

- Firstly, do the disciplines respectively encapsulated in Article 102 TFUE, on the one hand, and the DMA, on the other hand, really protect distinct legal interests?;
- Secondly, what is the influence, if any, of the Regulation on the "typical" enforcement of Article 102 TFUE?; and
- Finally, is the present EU legal framework at odds with the prohibition of double jeopardy?

Regarding the first point of reflection, the previous section has clearly illustrated how, due to the particularities characterizing its methodology, the DMA can be genuinely conceptualized as an unprecedented instrument in the Commission's toolbox.

However, it has been also accordingly highlighted how the preservation of the competitive process of the EU internal market, typically obtained by safeguarding rivalry and counterbalancing pressures, is inherent in the new Regulation as well, particularly, in one of its ultimate goals, namely digital markets' contestability, the achievement of which automatically encompasses the protection of core platform services' accessibility.

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[896] European Commission, *Note for the 71st OECD Working Party* – Second meeting on Competition Enforcement and Regulatory Alternatives, [June 7, 2021], pages 6-20.
[897] Van Den Boom, Jasper. *What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws*, European Competition Journal, 2023, pages 57-85.

Furthermore, as anticipated before, even after the formal victory of the more economic approach, the concept of "consumer welfare" has never been truly narrowed down to the well-being of final consumers[898], or, speaking in the DMA's terms, of end users, in so far as antitrust measures have always additionally protected the so-called intermediate addressees, that is to say buyers, customers or, as the Regulation specifically refers to them, business users.

For instance, as far as Article 102 TFUE is concerned, the in-depth examination of the EU decision-makers' approach carried out in the precedent chapters has clearly demonstrated that the preservation of equally efficient rivals, as key competitive constraint of dominant undertakings, has, *de facto*, often preceded the protection of final consumers as such.

This idea is perfectly summarized in the ECJ's findings in *TeliaSonera*, in so far as it held that *"(...) the function of those rules* [antitrust rules] *is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings, and consumers, thereby ensuring the well-being of the European Union"*[899].

Hence, the definition of the logic underlying the implementation of ECL offered by the CJEU does not appear to be incompatible with the mechanisms subtended to the DMA's provisions.

Likewise, if the notion of fairness enshrined in the Regulation is to be conceptualized as equivalent to good prices and wide choice, generated, in turn, through quality and innovation, in other words, what Behrens, the father of Neo-Ordoliberalism, has referred to as *"the scope of alternatives among which consumers may freely choose"*[900], the very understanding of fair markets, one of the mantras of the DMA, does not seem to be at odds with classic antitrust enforcement, first and foremost the prohibition of abuse of dominance.

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[898] Ezrachi, Ariel. *EU Competition Law Goals and the Digital Economy*, Oxford Legal Studies - Research Paper No. 17/2018, 2018, pages 1-27.
[899] See *supra* (n 213), paragraph 22.
[900] Behrens, Peter. *The 'Consumer Choice' Paradigm in German Ordoliberalism and its Impact Upon EU Competition Law*, Europa-Kolleg Hamburg - Institute for European Integration - Discussion Paper No. 1/14, 2014, pages 4-33.

Against this background, as these sorts of overlaps are all over the place, it cannot be maintained that the DMA aims/protects something fundamentally different from what Article 102 TFEU pursues/safeguards, even if the methods of achievement of the first are diametrically opposed to those of the second.

After all, as repeatedly mentioned, the basic rationale underpinning the new Commission's tool is filling the gaps left open by the classic prohibition of abuse of dominance.

In other words, sharing common values and objectives, first and foremost the promotion of competition, these two disciplines provide a comprehensive legal framework revolving around technology-enabled industries, allowing the Commission's DC Competition to reach virtually any form of anti-competitive behavior, from those that require a classic *ex post* assessment to those which demand an *ex ante* regulatory control.

At the same time, the fact that, due to their inextricable link, the *"DNA of the DMA is competition law"*[901], does not suffice to label the newborn Regulation as Antitrust Law itself, in so far as its very nature precludes such a simplistic categorization.

Moreover, regarding the alleged frictions with the principle of *ne bis in idem*, irrespective of the abovementioned DMA's own assertions, implicit in this identity of legal interests is that, in light of the latest findings of the ECJ on the matter, which, in turn, will be extensively examined at a later time, the apparent infringement of the prohibition of double jeopardy would not materialize *in concreto*[902], automatically making the answer to the first question posed in this section the starting point of analysis of the third one.

In addition, once established that the disciplines of the DMA, on the one hand, and abuse of dominant position, on the other hand, must be accordingly understood as characterized by a prevailing continuity, notwithstanding what the European legislator itself has superficially stipulated, speculating on their future respective scope of enforcement by the Commission's DG Competition becomes a compelling exercise.

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[901] Komninos, Assimakis. *The Digital Markets Act: How Does it Compare with Competition Law?*, Social Science Research Network, 2022, page 7.
[902] Martínez, Ribera, Alba. *An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement*, European Competition Journal, 2023, pages 86-115.

On that regard, in so far as the DMA is without prejudice to the application of Article 102 TFUE, there is no reason to believe that the newborn Regulation would prevent the administrative authority from treating a case that falls under the scope of enforcement of both instruments as an abuse of dominant position, rather than a violation of the obligations/prohibitions enshrined in Articles 5 to 7 of the DMA.

Nevertheless, one should bear in mind how the logic underlying this unprecedented tool is exactly the fact that Antitrust Law is not only too slow but also intrinsically unable to properly address certain Gatekeepers' anti-competitive conduct. Against this background, at least in those scenarios where there is an actual overlap of enforcement, the Commission will likely favor the implementation of the DMA's provisions.

The latter circumstance is what the doctrine has typically referred to as the phenomenon of the Regulation's cannibalization of the prohibition of abuse of dominance[903].

At the same time, as the flip side of the coin of every *ex ante* approach is the inflexibility of its operative model, it cannot be ignored that, in order to be caught under the umbrella of the Regulation, further generating the abovementioned preferential effect on the DG Competition's choice to use the new instrument instead of its classic tools, the relevant conduct must not only be specifically attributable to a previously designated Gatekeeper, but also clearly fall within one or more of the obligations/prohibitions laid down in Chapter III of the DMA.

To that extent, a closer look at the latest Commission's investigations, conducted pursuant to both Articles 101 and 102 TFUE, reveals that solely a small fraction of them would have seen the actual fulfillment of these two cumulative conditions, first and foremost because most of the problematic cases at stake did not relate to core platform services.

For instance:

- *International Skating Union's Eligibility rules*[904] concerned sport associations;
- *BEH Gas*[905] regarded the energy sector;

[903] Stolton, Samuel. *EU braces for Big Tech's legal backlash against new digital rulebook*, Politico, [August 10, 2022].
[904] Commission Decision of 8 December 2017, in *International Skating Union's Eligibility rules*, Case AT. 40208.
[905] Commission Decision of 17 December 2018, in *BEH Gas*, Case AT.39849.

- *Qualcomm (predation)*[906] was in relation to telecommunication chips; and
- *Aspen*[907] pertained to the pharmaceutical industry.

On top of that, even when, *in concreto*, a case concerns digital undertakings that can surely qualify as Gatekeepers of core platform services, the perpetrated practice may still exceed the boundaries of the DMA, in so far as it could escape an easy categorization within one of the obligations/prohibitions encapsulated in Articles 5 to 7 of the Regulation.

For example, the Commission's decision in *Google Search (AdSense)*[908] revolved around the abusive imposition by the Big Tech company of exclusivity clauses, based on which publishers, the relevant business users, were inhibited from showing any advertisement of Google's competitors on their search results pages. On that regard, if it is true that some of the DMA's provisions safeguard business users' access to competing core platform services, they do not specifically tackle exclusivity clauses.

Hence, in light of the abovementioned rigidity of *ex ante* regulatory frameworks, one could further infer that infringements of this sort will presumably still require intervention under Article 102 TFUE.

Against this background, the future enforcement of old and new instruments in the Commission's toolbox will probably encompass the following alternative scenarios:

- Cases where the DG Competition can apply both disciplines (here, it will very likely favor the DMA)[909];
- Cases where the DG Competition can solely implement the sector-specific Regulation's provisions (considering the open nature of the prohibition of abuse of dominance, they represent extremely rare scenarios); or
- Cases where the DG Competition is forced to rely on Article 102 TFUE (given the narrow scope of the DMA and further taking into account the abovementioned

[906] Commission Decision of 18 July 2019, in *Qualcomm (predation)*, Case AT.39711.
[907] Commission Decision of 10 February 2021, in *Aspen*, Case AT.40394.
[908] Commission Decision of 20 March 2019, in *Google Search (AdSense)*, Case AT.40411.
[909] Obviously, these are also the instances in which frictions with the principle of double jeopardy may arise in practice, particularly in possible future scenarios where Gatekeepers will engage in unlawful conduct that falls partially within Articles 5 to 7 of the DMA and partly under the more general scope of Article 102 TFUE; to that extent, see Katsifis, Dimitrios. *Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II*, The Platform Law Blog, [March 29, 2022].

Commission's trend of enforcement, these will prospectively constitute the majority of instances).

However, only time will offer unequivocal additional clarifications on the matter.

Concerning the second point of reflection, although the text of the DMA is totally silent on the issue, the doctrine has extensively speculated on whether the newborn Regulation may influence the enforcement of Article 102 TFUE[910], even when the latter represents the only viable instrument provided by the system to prosecute anti-competitive behaviors.

On that regard, there are at least two possible scenarios in which the DMA may condition, even if only indirectly, the interpretation of the concept of abuse of dominance:

- Firstly, the Regulation may be included in the *ex post* assessment of the EU decision-makers, as a regulatory standard to which Gatekeepers remain always subject; and
- Secondly, the DMA's provisions may have spillover effects for non-Gatekeepers digital operators, the conduct of which is, by definition, solely susceptible to being scrutinized under Article 102 TFUE.

Regarding the first circumstance, in the previous chapters, it has accordingly been underlined how a violation of regulatory obligations by dominant undertakings has been often perceived by both the Commission and the ECJ as a valuable indicator of an infringement of Article 102 TFUE.

For instance, in *AstraZeneca*, as already mentioned in the previous chapter, against the peculiar factual background at stake in the case, the CJEU stipulated that the pharmaceutical company's misleading and artificial submission to national patent offices, perpetrated by the relevant market leader in order to unduly procure supplementary protection certificates, a conduct that clearly violated the regulatory regime of the MS involved, could rightly constitute a determinant factor in the Commission's finding of an abuse of dominance[911].

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[910] Dunne, Niamh. *The Role of Regulation in EU Competition Law Assessment*, World Competition, 2021, pages 287-306.
[911] To that extent, see *supra* (n 606), paragraph 355 and see *supra* (n 191), paragraph 99.

Likewise, more recently, in his opinion in *Meta Platforms Inc*[912], AG Rantos highlighted how *"(...) the compliance or non-compliance of that conduct with the provisions of the GDPR, not taken in isolation but considering all the circumstances of the case, may be a vital clue as to whether that conduct entails resorting to methods prevailing under merit-based competition, it being stated that the lawful or unlawful nature of conduct under Article 102 TFEU is not apparent from its compliance or lack of compliance with the GDPR or other legal rules"*[913].

Moreover, as far as the telecommunication sector is concerned, in *Orange Polska SA*[914], by ultimately upholding the Commission's decision on the matter[915], where the administrative authority found the relevant market leader to be in breach of Article 102 TFUE mainly due to its non-compliance with the national regulatory requirements, the ECJ has gone even further, sending the quite shocking message that, at least for Telecom companies, the sole violation of their national sector-specific regimes could amount to an infringement of the prohibition of abuse of dominance.

At the same time, some years later, in *Slovak Telecom*, the ECJ has, somehow, mitigated its approach on the matter, in so far as it specified how the very presence of national regulatory obligations to grant access to downstream competitors, as well as its subsequent violation, can only make the indispensability of the input, normally required for refusals to deal/supply to constitute an abuse of dominance, implied in the Commission's assessment, hence, no longer necessary to demonstrate in practice[916].

In any case, although it is still highly unclear whether an assessment of abuse of dominance can solely encompass evidence of the relevant market leader's violation of sector-specific regulations, as the CJEU has not further clarified this particular issue, neither for the telecommunication industry nor in general, it seems preferable to interpret Article 102 TFUE as requiring something more than the mere evidence of a dominant

[912] Judgment of 4 July 2023, *Meta Platforms Inc and Others vs Bundeskartellamt*, Case C-252/21, EU:C:2023:537.
[913] Opinion of AG Rantos of 20 September 2022, in see *supra* (n 912), EU:C:2022:704, paragraph 22.
[914] Judgment of 25 July 2018, *Orange Polska SA vs European Commission*, Case C-123/16 P, EU:C:2018:590.
[915] Commission Decision of 22 June 2011, in *Telekomunikacja Polska*, Case COMP/39.525.
[916] See *supra* (n 117), paragraphs 57 and 60.

undertaking's breach of the pertinent regulatory framework to which it is subject, irrespective of its national or Communitarian nature.

Based on the foregoing, one may further infer that the failure of Gatekeepers to respect the obligations/prohibitions laid down in the newborn Regulation could become a determinant factor in the assessment of abuse of dominance, even if, as of today, it cannot be maintained that its infringement amounts, in and of itself, to an abuse of dominant position.

At the same time, one should bear in mind how, since many of the provisions singled out in Chapter III of the DMA are clearly inspired by Article 102 TFUE itself, this peculiar indirect influence of the first on the second can easily transform into a proper overlap, with all the abovementioned consequences of such an outcome. If this is true, the practical relevance of this sort of external conditioning must be accordingly mitigated.

Concerning the second circumstance, part of the doctrine has argued that the obligations/prohibitions enshrined in Articles 5 to 7 of the DMA, even if accordingly tailored by the European legislator to Gatekeepers, may spill over their effects on the assessment of non-Gatekeepers' allegedly abusive conduct as well, meaning that they could unduly influence the Commission's trend of enforcement of Article 102 TFUE towards digital companies that are outside the scope of the newborn Regulation's implementation[917].

To that extent, speaking in terms of classic Competition Law, the risk would reside, so these theories continue, in treating non-Gatekeepers as super-dominant undertakings, on which, as extensively described before, is placed an enhanced special responsibility, even though, in practice, they have not acquired, for whatever reason, the Gatekeeper status in accordance with the provisions laid down in the DMA.

That is even more true, in the opinion of these scholars, if one considers that, as mentioned above, it is well established how the violation of regulatory regimes, when the latter are relevant in the factual scenario at stake, can form an integral part of the EU decision-

[917] De Ugarte, Cisnal, Salomé. Perez, Melanie. Pico, Ivan. *The Digital Markets Act Per Se Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms*, King & Spalding LLP - for the Computer and Communications Industry Association, [February 9, 2022].

makers' assessment of market leaders' abuse of dominance, a circumstance that would automatically increase such a spillover risk.

As a matter of fact, this idea seems to be corroborated by the ECJ itself, in so far as, in its landmark *Google (Search)*, it advanced, for the sake of completeness, a peculiar argument, which is worth mentioning in full for its undeniable similarity to the theory under examination:

"(...) even in a situation that differs from that of the present case, the Court of Justice has ruled, with regard to internet access providers, that the EU legislature had intended (...) to impose on those operators a general obligation of equal treatment (...). The fact that the legislature made that choice and the legal obligation of non-discrimination that follows from it for internet access providers on the upstream market cannot be disregarded when analyzing the practices of an operator like Google on the downstream market, given the undisputed ultra-dominant position of Google on the market for general search services and its special responsibility not to allow its behavior to impair genuine, undistorted competition in the internal market. It is of no relevance in that regard whether or not legislation calls, in general terms, for such non-discriminatory access to online search results, since, as is clear from the case-law, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (...) which is consistent with the possibility that certain differences in treatment may be considered contrary to Article 102 TFEU when what is at issue are favoring practices established by operators in a dominant position in the internet sector"[918].

At the same time, although the abstract nature of the prohibition of abuse of dominant position may very well constitute fertile land for the proliferation of this sort of spillover effects, any influence that the DMA's Articles 5 to 7 might have on Article 102 TFUE is intrinsically limited by the specific nature of the obligations/prohibitions contained in Chapter III of the Regulation.

[918] See *supra* (n 47), paragraph 180.

For instance, as most of these provisions specifically address certain core platform services, their side effects may occur solely during the assessment of allegedly abusive conduct perpetrated by other digital providers of such services which, for whatever reason, have not met the relevant criteria to be designated by the Commission as Gatekeepers under the Regulation.

Regarding the third point of reflection, long before the entry into force of the DMA, the application of the principle of *ne bis in idem* to legal proceedings initiated under EU competition rules had been extensively discussed by the doctrine[919], first and foremost due to the peculiar interpretation offered by the CJEU on that regard.

Indeed, while the typical understanding of the prohibition of double jeopardy, apart from being tried/punished twice, requires a twofold condition, namely identity of the defendant and identity of the facts, as far as ECL is concerned, the ECJ had consistently endorsed an original approach, based on the necessity of the so-called *"threefold identity"*[920], according to which, in addition to the two abovementioned requirements, an infringement of such principle may have occurred solely in the presence of a third indispensable prerequisite: a further identity of the legal interests protected by the specific antitrust measures involved[921].

In other words, for decades, the CJEU had uniformly interpreted the prohibition of double jeopardy within the competition framework of the Union as limited to instances where the applied antitrust provisions had equivalent ultimate objectives.

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[919] *Ex multis*, see Di Federico, Giacomo. *EU Competition Law and the Principle of Ne Bis in Idem*, European Public Law, 2011, pages 241-260; Petr, Michal. *Twice about ne bis in idem: Conflicting Approach of European Courts to the Same Principle*, Czech Yearbook of Public and Private International Law, 2017, pages 210-222 and Nazzini, Renato. *Parallel Proceedings in EU Competition Law: Ne Bis in Idem as a Limiting Principle*, in Van Bockel, Bas. *Ne Bis in Idem in EU Law*, Cambridge University Press, 2018, pages 131-166.

[920] Harta, Lukas. *Abuse of Dominance and the Digital Markets Act: Big Tech companies at risk of double jeopardy*, Centre for European Policy Network – cepInput No. 12/2021, 2021, pages 3-12.

[921] *Inter alia*, see judgment of 14 February 2012, *Toshiba Corporation and Others vs Úřad pro ochranu hospodářské soutěže*, Case C-17/10, EU:C:2012:72, paragraph 97 and judgment of 25 February 2021, *Slovak Telekom a.s. vs Protimonopolný úrad Slovenskej republiky*, Case C-857/19, EU:C:2021:139, paragraph 43.

According to a significant part of the academic commentators, this would be the main reason why, in the text of the DMA, the European legislator has repeatedly specified how the Regulation pursues a different, yet complementary, legal interest from that protected, *inter alia*, by Article 102 TFUE[922].

However, in *Nordzucker*[923] and *bpost*[924], two preliminary rulings simultaneously delivered, the ECJ has surprisingly overcome its own precedent line of case law, in so far as, highlighting how *"(...) it is apparent from the case-law of the Court that the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another (...). The same is true of the application of the non bis in idem principle (...) in the field of EU competition law, inasmuch as (...) the scope of the protection conferred by that provision cannot, unless otherwise provided by EU law, vary from one field of EU law to another"*[925], it has eliminated the identity of legal interests from the fundamental operational requirements of the application of the prohibition of double jeopardy to competition measures.

After this unexpected change of course, the doctrine has been intensively speculating on the impact of these unprecedented findings on the parallel implementation of the DMA and Article 102 TFEU by the Commission's DG Competition[926].

Nevertheless, in the author's view, this exercise must be understood as nothing more than a moot academic conjecture, in so far as, every time a certain anti-competitive scenario will allow the simultaneous enforcement of the prohibition of abuse of dominance, on the

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[922] Among others, see Cappai, Marco. Colangelo, Giuseppe. *A Unified Test for the European Ne Bis in Idem Principle: The Case Study of Digital Markets Regulation*, Social Science Research Network, 2021, pages 1-29 and Zelger, Bernadette. *The Principle of ne bis in idem in EU competition law: The beginning of a new era after the ECJ's decisions in bpost and Nordzucker?*, Common Market Law Review, 2023, pages 239-261.
[923] Judgment of 22 March 2022, *Bundeswettbewerbsbehörde vs Nordzucker AG and Others*, Case C-151/20, EU:C:2022:203.
[924] Judgment of 22 March 2022, *bpost SA vs Autorité belge de la concurrence*, Case C-117/20, EU:C:2022:202.
[925] See *supra* (n 924), paragraphs 34-35.
[926] *Ex multis*, see Cappai, Marco. Colangelo, Giuseppe. *Applying ne bis in idem in the Aftermath of bpost and Nordzucker: The Case of EU Competition Policy in Digital Markets*, Common Market Law Review, 2023, pages 431-456 and Petr, Michal. *Digital Markets Act and Competition Law: Is There an Issue of ne bis in idem?*, Yearbook of Antitrust and Regulatory Studies, 2024, pages 155-170.

one hand, and the newborn Regulation, on the other hand, the administrative authority will very likely favor the second over the first, automatically removing, *ab origine*, any possible infringement of the principle of *ne bis in idem*.

Even if the subject of discussion of the contribution was not the prohibition of double jeopardy, the latter idea seems to be perfectly summarized by Monti in one of his works:

"(...) since the design of the DMA facilitates the Commission's enforcement considerably, it would be ill-advised for it to resort to Article 102 TFEU in order to address conduct which it has regulated under the DMA"[927].

After all, there is no logical reason to believe that the Commission will waste its already limited resources to duplicate proceedings which, at the end of the day, generate quite similar outcomes, namely the imposition of a fine and, more importantly, at least from a systemic perspective, the termination of the anti-competitive and/or unfair relevant undertaking's conduct[928].

Finally, as far as the prohibition of abuse of dominant position is concerned, the innovative approach undertaken by the European legislator with the DMA appears to have represented a sort of wake-up call for the Commission.

Indeed, after the entry into force of the Regulation, the administrative authority has embarked on a journey of renovation of its enforcement of Article 102 TFUE, which, overall, seems to be, somehow, inspired by the unprecedented provisions of the new instrument at its disposal.

Therefore, the next section of this thesis will be dedicated to the description of the public agency's 2023 Amendments to its previous Guidance Paper, in so far as they must be conceptualized as the early stage of this new restorative path.

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[927] See *supra* (n 884), page 98.
[928] Kozak, Malgorzata. Peters, Veerle. *Double jeopardy of Article 102 TFEU and the DMA -the challenges of a multi-level enforcement system*, Social Science Research Network, 2025, pages 1-18.

4.3 The first steps of the Commission towards the renovation process of Article 102 TFUE: the 2023 Amendments to the Guidance Paper

As anticipated before, in 2023, the Commission amended its 2009 Guidance Paper on Article 102 TFUE with immediate effect. Simultaneously, given that the prohibition of abuse of dominance has remained one of the few branches of ECL without official Guidelines, the administrative authority launched a consultation, namely a "Call for Evidence", seeking feedback from the stakeholders on the possibility to adopt "new Guidelines" on exclusionary abuses of dominant position.

On that regard, as will be accurately described in the next section, this fundamental policy initiative resulted in the publication, in 2024, of a draft of the final Guidelines, which, in turn, will be officially released somewhen during this year.

Focusing on the 2023 Amendments, although they are nothing more than an interim measure, aimed at, somehow, announcing the rationale underpinning the abovementioned renovation process, they still represent a remarkable testimony of the Commission's paradigm shift revolving around the enforcement of Article 102 TFUE, in so far as the changes brought by the administrative authority have strategically undermined the pre-eminence of the so-called more economic approach, which, as extensively analyzed in the previous chapters, was ultimately legitimized by the public agency with its 2009 Guidance Paper.

More precisely, the Amendments are structured as follows: while the Communication, the general part, illustrates the logic behind the redefinition of some of the provisions laid down in the Guidance Paper, the Annex to the Communication lists the actual amendments, punctually explaining, for each one of them, the subtended mechanisms underlying the restorative effort.

Regarding the general coordinates singled out in the Communication, highlighting how *"the Commission's enforcement priorities have evolved over time, thanks to the experience gained through the Commission's practice which took into account the evolution of the case law of the Union Courts as well as market developments"*[929], the administrative authority has made it clear not only that the primary source of inspiration

[929] See *supra* (n 62), Communication, paragraph 7.

of its renovation process is the case law of the ECJ, but also that its precedent *ex post* assessments of market leaders' anti-competitive behaviors within the digital sector, as well as the unprecedented legal treatment recently tailored by the European legislator specifically to it, namely the DMA, have significantly contributed to the realization of such an unexpected, yet appreciated, policy initiative.

As far as the individual amendments enshrined in the Annex to the Communication are concerned, their specific content can be briefly summarized as follows:

- Amendment one redefines the Commission's understanding of the concept of "anti-competitive foreclosure", on the one hand, and scales down the requirement of profitability of dominant undertakings' allegedly abusive conduct within the relevant public agency's legal assessment, on the other hand;
- Amendment two legitimizes, at least in certain circumstances, the protection of less efficient rivals under Article 102 TFUE, in so far as they may constitute key competitive constraints of dominant firms;
- Amendment three reshapes the role of the infamous AEC test, in regard to the administrative authority's legal appraisal of market leaders' price-based exclusionary abuses;
- Amendment four differentiates the legal test of constructive abusive refusals to deal/supply from that of outright abusive refusals to deal/supply; and
- Amendment five recognizes margin squeeze practices as a standalone violation of the prohibition of abuse of dominance, rather than a sub-category of refusals to deal/supply.

Concerning the first, providing that *"(…) anti-competitive foreclosure (…) refers not only to cases where the dominant undertaking's conduct can lead to the full exclusion or marginalization of competition but also to cases where it is capable of resulting in the weakening of competition, thereby hampering the competitive structure of the market to the advantage of the dominant undertaking and to the detriment of consumers"*[930], the Commission has significantly lowered the bar of its intervention under the Treaty's provision, in so far as, according to the redefined Guidance Paper, evidence of an adverse

[930] See *supra* (n 62), Annex to the Communication, paragraph 1.

impact of the relevant dominant undertaking's conduct on the competitive process of the market involved will be sufficient to trigger the implementation of Article 102 TFUE.

Moreover, highlighting how *"(...) it is not appropriate to use the element of profitability of the dominant undertaking's conduct in order to determine the Commission's enforcement priorities (...)"*[931], the administrative authority has eliminated the abusive behavior's profitability, irrespective of whether the latter would manifest on prices or any other parameter of competition, such as, *inter alia*, innovation, from the essential prerequisites of application of the prohibition of abuse of dominance, in so far as, prior to the 2023 Amendments, the absence of such profitable outcomes could have been strategically used by defendant enterprises to justify their otherwise abusive conduct.

Regarding the second, observing how *"(...) it is not appropriate, as regards price-based exclusionary conduct (...), to pursue as a matter of priority only conduct that may lead to the market exit or the marginalization of competitors that are as efficient as the dominant undertaking (...). Indeed, in certain circumstances genuine competition may also come from undertakings that are less efficient than the dominant firm (...)"*[932], the public agency has clarified, once and for all, that, in certain context-specific scenarios, it may intervene to safeguard rivals that are less efficient than the relevant dominant undertaking/s.

On that regard, although these special circumstances have remained unspecified in the revised Guidance Paper, in the complementary 2023 Policy Brief, with which the Commission further described the key ideas underpinning its initiative, the administrative authority expressly referred to *"(...) markets where barriers to entry and expansion are significant, such as in the presence of economies of scale or network effects (...)"*[933].

Hence, it can be safely assumed that the public agency intended to include technology-enabled industries under the umbrella of the abovementioned *sui generis* scenarios in which the protection of less efficient competitors may result essential.

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[931] See *supra* (n 930).
[932] See *supra* (n 62), Annex to the Communication, paragraph 2.
[933] See *supra* (n 179), page 5.

As far as the third is concerned, stipulating that *"(...) the price-cost 'as-efficient competitor test' is only one of a number of methods for assessing, together with all other relevant circumstances, whether a conduct is capable of producing exclusionary effects"*[934], the Commission has properly underlined how the AEC test, far from being susceptible to a generalized usage, must be conceptualized as an optional instrument in the public agency's toolbox, which may even result *"(...) inappropriate depending on the type of practice or the relevant market dynamics"*[935].

Apart from the fact that the AEC test is not legally required to provide evidence of an abuse of dominance, as such a mandatory condition may easily raise under-enforcement issues, the Commission additionally specifies how *"(...) if such test is carried out, its results should in any event be assessed together with all other relevant circumstances"*[936]. Unfortunately, as of today, the other quantitative and/or qualitative elements of such a broader assessment have remained indeterminate.

At the same time, the abovementioned Policy Brief has offered useful insights into the specific instances in which the administrative authority considers the AEC test still necessary for carrying out an evaluation of dominant undertakings' exclusionary abuses to the requisite legal standard[937].

To that extent, whereas, in predatory pricing and margin squeeze cases, this test is always deemed relevant, as far as rebate schemes are concerned, its suitability is intrinsically related to the final label attributed to the discount practice.

More precisely, the public agency has distinguished rebates that ultimately generate exclusivity from those that have a different rationale: while the first may demand the AEC test only in exceptional circumstances [unfortunately, the latter have not been further specified by the Commission], within the assessment of the second, it might play a significant role, as long as the context-specific environment allows for it and, more importantly, it merely represents one of the decisive factors in the finding of an abusive rebate of such a nature.

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[934] See *supra* (n 62), Annex to the Communication, paragraph 3.
[935] See *supra* (n 934).
[936] See *supra* (n 934).
[937] On that regard, see *supra* (n 179), pages 6-7.

On the fourth, highlighting how *"(...) it is important to distinguish situations of outright refusal to supply from situations where the dominant company makes access subject to unfair conditions ('constructive refusal to supply'). In situations of constructive refusal to supply, it is not appropriate to pursue as a matter of priority only cases concerning the provision of an indispensable input or the access to an essential facility"*[938], the public agency has excluded the operability of what was referred to in this thesis as the *"enhanced effects test"* to cases of constructive refusals to deal/supply.

In doing so, the Commission has, once again, lowered the bar of its intervention, in so far as, according to the amended Guidance Paper, when facing anti-competitive scenarios amounting to constructive refusals to deal/supply, it will no longer be bound to provide the so-called indispensability requirement, as well as any other qualified condition. In other words, from now on, these types of exclusionary abuse will be assessed by the public agency under a *"standard effects test"*.

Indeed, representing the latter category of abusive conduct one of the grey areas mentioned in the previous chapter, in *Lietuvos geležinkeliai AB*[939], the ECJ has very recently intervened to restore legal certainty and iron out inconsistencies in its own case law.

More precisely, observing how *"(...) the removal of the Track* [the abusive constructive refusal to deal/supply at stake] *cannot be understood as a refusal of access (...) but must be viewed, depending on the circumstances, as an independent form of abuse"*[940], the CJEU has clarified that the so-called *Bronner* criteria do not apply to the legal appraisal of constructive refusals to deal/supply[941].

Regarding the fifth, similarly to what has been described for the fourth amendment, specifying how *"(...) it is not appropriate to pursue as a matter of priority margin squeeze cases only where those cases involve a product or service that is objectively necessary to be able to compete effectively on the downstream market"*[942], the Commission has finally recognized that margin squeeze practices must be conceptualized as a standalone

[938] See *supra* (n 62), Annex to the Communication, paragraph 4.
[939] Judgment of 12 January 2023, *Lietuvos geležinkeliai AB vs Commission*, Case C-42/21 P, EU:C:2023:12.
[940] See *supra* (n 939), paragraph 91.
[941] See *supra* (n 939), paragraphs 81-86.
[942] See *supra* (n 62), Annex to the Communication, paragraph 5.

infringement of Article 102 TFUE *"(...) that is subject to different criteria of assessment"*[943], compared to those laid down by the EU decision-makers for refusals to deal/supply.

In providing so, the administrative authority has implicitly stipulated that, speaking in terms familiar with those employed in this thesis, dominant undertakings' conduct resulting in abusive margin squeeze requires a *"standard effects test"*, rather than an *"enhanced effects test"*.

Finally, against this background, one can safely maintain that, with the 2023 Amendments, the Commission has significantly transformed the characteristics of its more economic approach to cases concerning the application of Article 102 TFUE, in order to come up with *"a dynamic and workable effects-based approach to abuse of dominance"*[944].

At the same time, in so far as *"(...) the developments in the case law go significantly beyond the topics covered in the Amending Communication and further outlined in this Policy Brief"*[945], the administrative authority has recently published a draft of the new Guidelines on Article 102 TFUE, *"which would allow the Commission to fully take stock of these developments"*[946], as well as of the latest innovations brought by the DMA to the discipline of the prohibition of abuse of dominant position.

Therefore, the latter fundamental document is exactly where this thesis will turn next, in order not only to provide an accurate description of the provisions laid down therein, but also to critically analyze its content, bearing in mind, however, that the final official version of this soft law instrument is, as of today, yet to be published.

[943] See *supra* (n 942).
[944] See *supra* (n 179).
[945] See *supra* (n 179), page 8.
[946] See *supra* (n 945).

4.4 The Commission's 2025 draft Guidelines on the application of Article 102 TFUE to exclusionary abuses of dominance

As anticipated before, in August 2024, the Commission published a draft of the new Guidelines on Article 102 TFUE, with which the administrative authority *"(...) seeks to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU"*[947].

More precisely, highlighting how *"in view of growing market concentration in various industries and the digitization of the Union economy, which makes strong network effects and "winner-takes-all" dynamics increasingly widespread, it is important that Article 102 TFEU is applied vigorously and effectively"*[948], the Commission has made it clear that, considering the latest developments revolving around the competitive structure of the EU internal market, the new Guidelines must be accordingly understood as a policy initiative aimed at ensuring a more vigorous and incisive enforcement of the prohibition of abuse of dominance.

On top of that, further observing how *"it is equally important that Article 102 TFEU is applied in a predictable and transparent manner so that companies can operate freely in the internal market, within the limits laid down in Union legislation (...)"*[949], the administrative authority has implicitly recognized that, even after decades of implementation and interpretation of the prohibition of abuse of dominance by the EU decision-makers, the discipline enshrined in Article 102 TFUE still fails to meet, at least to a certain extent, some of the basic requirements of the very principle of the rule of law, from predictability to legal certainty, passing through transparency.

Against this background, it can be safely maintained that, above all, the new Guidelines are meant to overcome the never-ending open flanks of one of the most controversial issues in the history of ECL, providing updated information on the Commission's enforcement practice of Article 102 TFUE, as well as anticipating future litigation outcomes, by tacking stock of the "state of the art" of the discipline of the prohibition of abuse of dominance.

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[947] See *supra* (n 30), paragraph 8.
[948] See *supra* (n 30), paragraph 4.
[949] See *supra* (n 948).

Regarding the instruments employed by the administrative authority to achieve these noble goals, as the introduction of the draft Guidelines unequivocally specifies how *"these Guidelines are based on the case law of the Union Courts at the time of their adoption"*[950], one would be excused to presume that the path undertaken by the Commission is, overall, complaint with the relevant ECJ's case law.

Unfortunately, their content seems to suggest otherwise, in so far as the public agency, in line with its precedent 2023 Amendments to the Guidance Paper, has mainly departed from the so-called effects-based approach, even though the latter, as extensively described in the previous chapters, being progressively legitimized by the EU decision-makers, has, somehow, prevailed over the formalistic analysis of market leaders' abusive conduct.

If this is true, it is almost like the Commission has passed off its own repudiation of an economically oriented assessment of dominant undertakings' exclusionary abuses as the will of the ECJ, meaning the subtended rationale behind the latest interpretations of Article 102 TFUE offered by the CJEU[951].

At the same time, even if the draft Guidelines have certainly taken the public agency's policy initiative to its extreme consequences, it cannot be ignored that both the 2023 Amendments and the subsequent Policy Brief have given several hints of the historic paradigm shift undertaken by the administrative authority, making it as shocking as, somehow, predictable.

For instance, while delignating the main features of its intended *"dynamic and workable effects-based approach"* to exclusionary abuses of dominant position, in its 2023 Policy Brief, the Commission observed that "*the move towards an effects-based enforcement of Article 102 TFEU raises the question of whether the heightened substantive legal standard that the Union Courts have accorded to it may inadvertently lead to undesirable outcomes"*[952].

[950] See *supra* (n 30), paragraph 9.
[951] Manne, Geoffrey. Auer, Dirk. Radic, Lazar. Zúñiga, Mario. *Comments of International Center for Law & Economics on Art. 102 TFEU Draft Guidelines*, International Center for Law and Economics, 2024, pages 2-26.
[952] See *supra* (n 179), page 4.

To that extent, as, after having published the text of the draft Guidelines, the Commission opened an additional consultation period [which has now come to an end] in order to receive feedback from the stakeholders before delivering the official Guidelines, many academic scholars and legal practitioners have seized this opportunity to heavily criticize the path on which the Commission has decided to embark, hoping that at least some of their contributions will be accordingly incorporated by the administrative authority in the final version of this controversial new soft law instrument[953].

In light of the foregoing, the next two sections of this thesis will be respectively dedicated to the description, on the one hand, and the criticism, on the other hand, of the legal discipline encapsulated in the text of the draft Guidelines, first and foremost in relation to the precedent findings of the ECJ on the matter, as well as its prospective reaction to such an abrupt change of course.

4.4.1 Descriptive analysis

The draft Guidelines are structured as follows:

- Firstly, an introduction, to which the previous section has repeatedly referred, outlines the purpose, scope and structure of the document[954];
- Secondly, in Section 2, the Commission lays down an accurate description of the general principles applicable to the assessment of dominance [however, the analysis of this element of Article 102 TFUE is outside the scope of this thesis];

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[953] *Ex multis*, see Werden, Gregory. *Comments of Gregory J. Werden on Draft Article 102 Guidelines*, Social Science Research Network, 2024, pages 1-26; Monti, Giorgio. *Comments on Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings*, Social Science Research Network, 2024, pages 1-17; Killick, James. Komninos, Assimakis. Citron, Peter. *The European Commission moves away from economics and proposes a presumption-based approach in its draft guidelines on exclusionary abuses*, White & Case, [August 21, 2024]; Peeperkorn, Luc. *The Draft Article 102 Guidelines: A Somewhat Confused Attempt to Partly Roll Back the Effects-based Approach of the Union Courts*, Kluwer Competition Law Blog, [September 4, 2024]; Komninos, Assimakis. *"J'accuse!" – Four Deadly Sins of the Commission's Draft Guidelines on Exclusionary Abuses*, Network Law Review, [August 30, 2024]; CRA Europe Team, *CRA response to draft Article 102 guidelines*, Charles River Associates, [October 31, 2024]; Padilla, Jorge. Neven, Damien. *Guidelines without Guidance: Roundtable discussion on the draft Article 102 guidelines*, Compass Lexecon, [October 31, 2024] and Marinova, Miroslava. *The European Commission's Draft Article 102 Guidelines Under Fire: Examining the substance and the roots of the Criticism*, Social Science Research Network, 2024, pages 1-23.

[954] On that regard, see *supra* (n 30), paragraph 11, in which the public agency stipulates the following: "*while these Guidelines only concern exclusionary abuses, the principles relevant to the assessment of dominance (…) and the justifications based on objective necessity and efficiencies (…) are also relevant for the assessment of other forms of abusive conduct, such as exploitative abuses"*.

- Thirdly, in Section 3, the administrative authority singles out the general principles to determine if dominant undertakings' conduct is liable to constitute an exclusionary abuse;
- Fourthly, in Section 4, the public agency establishes specific principles to determine whether certain categories of market leaders' practices are liable to be abusive; and
- Finally, in Section 5, the Commission describes the general principles applicable to the assessment of objective justifications and/or efficiencies stemming from defendant enterprises.

As far as the legal assessment of allegedly abusive conduct perpetrated by dominant undertakings is concerned, according to the third Section of the draft Guidelines, in order to establish whether a certain practice can possibly constitute an abuse of dominance under Article 102 TFUE, the two following cumulative requirements must be proved by the Commission:

- Firstly, the relevant market leader's behavior departs from competition on the merits; and
- Secondly, the relevant dominant firm's practice is capable of generating exclusionary effects[955].

Hence, in providing so, the administrative authority has singled out a two-limbed test applicable to all sorts of exclusionary abuse, even though, as will be accurately described in the following of this section, in certain predetermined scenarios, its actual operability is deemed superfluous, in light of specific presumptions of illegality that automatically imply a certain practice's departure from competition on the merits, as well as its capability to produce exclusionary effects.

In other words, while, for some practices, the Commission is bound to conduct a legal assessment of abuse of dominance to the requisite legal standard, namely proving their departure from competition on the merits and, simultaneously, their capability to have exclusionary effects, for other behaviors, such an appraisal is unnecessary, in so far as, being the two abovementioned cumulative conditions presumed, the administrative

[955] See *supra* (n 30), paragraph 45.

authority will simply have to show the actual existence of one of the draft Guidelines' pre-established exclusionary abuses that trigger the operability of the presumption mechanism.

In any case, it must be borne in mind that even *"(...) where it is demonstrated that the conduct of an undertaking in a dominant position is liable to be abusive, it remains possible for that undertaking to show that the conduct is either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers"*[956].

At the same time, it will be accordingly shown how the actual range of these fundamental faculties, far from being uniformly recognized by the Commission, is not attributed to defendant dominant undertakings irrespective of the type of behavior perpetrated, as it can significantly differ based on the label attached by the draft Guidelines to the relevant abusive conduct.

Indeed, a closer look at the text of this document unequivocally reveals that the length of market leaders' defensive arguments, comprising both objective justifications and efficiencies, has become inversely proportional to the intensity of the specific presumption operated by the Commission: the stronger the latter is, the less defendants are able to rebut it, to the point that certain presumptively abusive behaviors do not seem to be rebuttable at all.

Going into the merits of the discipline enshrined in the draft Guidelines, the fundamental starting point of the legal assessment of abuse of dominance is represented by the idea that *"the case law of the Union Courts has developed specific analytical frameworks to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU (...). Therefore, when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects"*[957].

[956] See *supra* (n 30), paragraph 48.
[957] See *supra* (n 30), paragraph 47.

In other words, the Commission has differentiated the legal treatment of those practices that are subject to a uniform and specific legal test within the case law of the ECJ from *"(...) specific types of conduct for which no specific legal test has been developed (...), but for which the Union Courts have provided guidance as to how to apply the general legal principles (...)"*[958].

Indeed, as far as the first limb of the draft Guidelines' test is concerned, namely the assessment of the relevant conduct's compliance with competition on the merits, the administrative authority stipulates that *"conduct fulfilling the requirements of a specific legal test is deemed as falling outside the scope of competition on the merits. Notably, this is the case for (...) exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze, which satisfy the applicable specific legal test"*[959].

On top of that, as the Commission goes on specifying how *"(...) conduct that holds no economic interest for a dominant undertaking, except that of restricting competition (...) is also deemed as falling outside the scope of competition on the merits"*[960], this presumption of departure from competition on the merits further applies to what the public agency expressly calls *"naked restrictions"*[961].

If this is true, in the draft Guidelines, the administrative authority has strategically attached the presumption of compliance with the first limb of its test to detect abuse of dominance to the preexistence of *"specific legal tests"* previously singled out by the CJEU in its relevant case law.

On the contrary, for dominant undertakings' conduct that does not presumptively fall outside the scope of competition on the merits, hence, those practices which do not meet the conditions of a "specific legal test" as defined in the draft Guidelines, *"(...) it needs to be shown that the conduct departs from competition on the merits based on the specific circumstances of the case"*[962].

[958] See *supra* (n 30), paragraph 137.
[959] See *supra* (n 30), paragraph 53.
[960] See *supra* (n 30), paragraph 54.
[961] See *supra* (n 960).
[962] See *supra* (n 30), paragraph 55.

To that extent, according to the draft Guidelines, in order to conduct such an appraisal, the Commission may rely, either alternatively or cumulatively[963], on one or more of the following determining factors:

- Whether the dominant undertaking hinders consumer choice [*Microsoft I*];
- Whether the dominant undertaking misleads public authorities and/or misuses regulatory procedures, in order to create an artificial entry barrier [*AstraZeneca* and *Promedia*];
- Whether the dominant undertaking infringes other areas of law [*Meta Platforms Inc*];
- Whether the dominant undertaking discriminates against its competitors, in order to favor itself [*Google (Search)*];
- Whether the dominant undertaking abruptly and unjustifiably terminates a business relationship with one or more of its rivals [*Commercial Solvents*]; and
- Whether the market leader adopts a conduct that an equally efficient competitor would not be able to carry out, as it is entirely dependent on its dominant status [*Servizio Elettrico Nazionale*][964].

Furthermore, as far as the second limb of the draft Guidelines' test is concerned, namely the conduct's capability to produce exclusionary effects, assuming that *"the Union Courts have established rules regarding the evidentiary burden to show that a conduct is capable of producing exclusionary effects, which depend on the type of conduct, the likelihood that it will result in exclusionary effects and the relevant circumstances"*[965], the Commission has introduced an unprecedented tripartition of dominant undertakings' exclusionary abuses.

[963] However, on that regard, see *supra* (n 30), footnote 118, which, reads as follows: *"this should not be understood as an exhaustive list of all the factors that may be relevant to establish that a given conduct departs from competition on the merits. In addition, one factor may be sufficient to conclude that a given conduct departs from competition on the merits in light of the specific circumstances at hand"*.
[964] See *supra* (n 962).
[965] See *supra* (n 30), paragraph 59.

On that regard, as will be accurately described in the next section, this novel approach, if finally pursued in the official version of the Guidelines, will consistently affect the precedent understating of both the legal and the evidentiary burdens of proof, typically placed solely upon the administrative authority.

More precisely, in relation to the capability to produce exclusionary effects, the draft Guidelines identify the three following distinct categories:

- The first category includes allegedly abusive practices *"for which it is necessary to demonstrate a capability to produce exclusionary effects"*[966]. Hence, they correspond to those behaviors for which the ECJ has not come up with a specific and uniform legal test. Moreover, this group can be safely considered to have a residual scope, in so far as practices that are not clearly covered by the two additional categories must be incorporated into its operational orbit. This idea seems to be corroborated by the very words which the Commission has chosen to describe such category: *"as a general rule, in order to conclude that a conduct is liable to be abusive, it is necessary to demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects"*[967]. After all, under Article 102 TFUE, there is no such thing as an exhaustive list of abuses, because, due to its intrinsic openness, unprecedented practices, on which the EU decision-makers have not yet intervened, are naturally expected to appear. In any case, even if the draft Guidelines are silent on the specific behaviors that fall under this group, an accurate examination of the systemic logic underpinning the soft law instrument reveals that such category certainly encompasses the following conducts: (i) self-preferencing[968]; (ii) access restrictions different from refusals to supply[969]; (iii) conditional rebates that are not subject to exclusive purchase or supply requirements[970] and (iiii) multi-product rebates[971]. In other words, the types of

[966] See *supra* (n 30), paragraph 60(a).
[967] See *supra* (n 966).
[968] See *supra* (n 30), paragraphs 156-162.
[969] See *supra* (n 30), paragraphs 163-166.
[970] See *supra* (n 30), paragraphs 138-151.
[971] See *supra* (n 30), paragraphs 152-155.

exclusionary abuse analyzed by the Commission in Section 4(3) of the draft Guidelines, entitled *"conducts with no specific legal test"*;

- The second category includes dominant undertakings' practices that are presumed to procure exclusionary effects, in so far as they *"are generally recognized as having a high potential to produce exclusionary effects"*[972]. More precisely, the Commission explicitly envisages the following exclusionary abuses: (i) exclusive supply or purchasing agreements[973]; (ii) rebates conditional upon exclusivity[974]; (iii) predatory pricing[975]; (iiii) margin squeeze[976] and (iiiii) certain forms of tying[977]; and
- The third category includes the so-called *"naked restrictions"*, which, according to the draft Guidelines, must be conceptualized as those market leaders' practices that *"(...) have no economic interest for that undertaking, other than that of restricting competition"*[978]. Specifically, the Commission observes how *"examples of naked restrictions are: (i) payments by the dominant undertaking to customers that are conditional on the customers postponing or cancelling the launch of products that are based on products offered by the dominant undertaking's competitors* [one of the behaviors at stake in the *Intel* saga]*; (ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors* [the conduct at stake in *Irish Sugar*]*; or (iii) the dominant undertaking actively dismantling an infrastructure used by a competitor* [the practice at stake in *Lietuvos geležinkeliai*]*"*[979]. On that regard, although the

[972] See *supra* (n 30), paragraph 60(b).
[973] See *supra* (n 30), paragraphs 78-83.
[974] See *supra* (n 973).
[975] See *supra* (n 30), paragraphs 107-120.
[976] See *supra* (n 30), paragraphs 121-136.
[977] On that regard, in see *supra* (n 30), paragraph 95 and footnote 233, the Commission has further specified the instances where tying must be understood as presumptively abusive, in so far as the public agency stipulates the following: *"the depth of the analysis required to show that the tying is capable of having exclusionary effects depends on the specific circumstances of the case. In certain circumstances, it may be possible to conclude that, due to the specific characteristics of the markets and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed. This is notably the case in situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects (...)"*.
[978] See *supra* (n 30), paragraph 60(c).
[979] See *supra* (978).

wording of the draft Guidelines, first and foremost the mere reference to possible examples of naked restrictions, seems to suggest that this category may encompass other abusive practices, as the Commission has not further specified other instances to be connected to this group, in the author's view, the abovementioned list must be understood as exhaustive.

Moreover, even though some of the practices specifically addressed by the Commission in Section 4 of the draft Guidelines, namely the residual forms of tying [those that the public agency does not explicitly considers as presumptively abusive][980], bundling[981] and refusal to supply[982], are not clearly included in one of the three abovementioned categories, in the author's view, there is no doubt that the presumption operating for the second group of exclusionary abuses further applies to them, in so far as they are all dealt with by the administrative authority in Section 4(2) of the draft Guidelines, entitled *"conducts subject to specific legal tests"*.

Indeed, it was previously observed how, according to the soft law instrument, every time a conduct is characterized by a "specific legal test", with which the ECJ has previously come up, it must be understood as presumptively abusive in the meaning of the second category described above, or, if expressly provided by the Commission itself [a circumstance that does not occur for the practices at stake], as naked restrictions.

In addition, regarding the value to be attributed to the presumption mechanism described above, the public agency observes how *"while the Union Courts have not always made explicit use of the term "presumption" for each one of these practices* [here, the administrative authority is specifically referring to those presumptively abusive behaviors that form an integral part of the second abovementioned category, however, this elucidation is susceptible to being interpreted broadly, hence, as explaining the rationale underlying any sort of presumption employed in the draft Guidelines]*, the Commission considers that the case-law has developed tools which can be broadly described and conceptualized, for the purpose of these Guidelines, as "presumptions". Therefore, these Guidelines make use of the expression "presumption" (or "presumed") for allocating the*

[980] See *supra* (n 30), paragraphs 84-95.
[981] See *supra* (n 980).
[982] See *supra* (n 30), paragraphs 96-106.

evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts"[983].

To that extent, as anticipated before, introducing this unprecedented categorization, the Commission has consciously reallocated the relevant burden of proof, at least for those exclusionary abuses that, according to the draft Guidelines, must be navigated under the presumption of illegality.

Indeed, while, for the first category, the full burden of proof, meaning both the legal and the evidentiary burdens, rests upon the administrative authority, for the other two categories, the presumption mechanism will likely generate reversal effects, switching on dominant undertakings the burden to prove the lawfulness of their presumptively abusive conduct.

More precisely, as far as the first group of practices is concerned, the draft Guidelines provide that *"the assessment of whether a conduct is capable of having exclusionary effects must take into account all the facts and circumstances that are relevant to the conduct at issue. That assessment should aim to establish, on the basis of specific, tangible points of analysis and evidence, that the conduct is at least capable of producing exclusionary effects"*[984].

On that regard, in parallel with what has been highlighted for the first limb of the test, the Commission stipulates that, although "*the relevant facts and circumstances to be taken into account in the analysis and their relative importance may vary depending on the specific case"*[985], its assessment of the relevant conduct's capability to have exclusionary effects may include one or more of the following elements:

- The position of the dominant undertaking [*Tomra* and *TeliaSonera*];
- The conditions on the relevant market [*Google (Search)*];
- The position of the market leader's competitors [*Servizio Elettrico Nazionale*];
- The extent of the allegedly abusive conduct [*Post Danmark II* and *Unilever*];
- The position of the customers and/or input suppliers [*Microsoft I*];
- Evidence of an exclusionary strategy [*Generics* and *Slovak Telekom*]; and

[983] See *supra* (n 30), footnote 131.
[984] See *supra* (n 30), paragraph 69.
[985] See *supra* (n 30), paragraph 70.

- Evidence relating to actual market developments [*Telefónica* and *British Airways*][986].

Regarding the second group of behaviors, specifying how *"a dominant undertaking can seek to rebut the probative value of the presumption in the specific circumstances at hand by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects"*[987], the Commission has made it clear that the presumptions operating for dominant undertakings' practices included under the second category must be conceptualized as largely rebuttable.

Indeed, by stipulating that *"the submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation (...)"*[988], the public agency has implicitly recognized how, in these scenarios, the intensity and effectiveness of the market leader's defense is without restrictions, in so far as it is exclusively determined by *"(...) the arguments and supporting evidence submitted by the dominant undertaking (...)"*[989].

At the same time, it must be borne in mind that *"while it remains open to the dominant undertaking to justify any conduct that is liable to be abusive, whether the conduct has a high potential to produce exclusionary effects (...) must be given due weight in the balancing exercise to be carried out in this context"*[990].

Against this background, it can be safely maintained that, here, although the burden of proof is clearly reversed, the presumption mechanism singled out by the Commission leaves a wide margin of maneuver.

On top of that, *"a dominant undertaking may also seek to show that the conduct is justified on the basis of an objective justification* [however] *the fact that the conduct has a high potential to lead to exclusionary effects must be given due weight in the balancing exercise to be carried out in this context"*[991].

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[986] See *supra* (n 985).
[987] See *supra* (n 972).
[988] See *supra* (n 972).
[989] See *supra* (n 972).
[990] See *supra* (n 30), paragraph 170.
[991] See *supra* (n 972).

Concerning the third group of practices, namely naked restrictions, underlying how *"these types of conduct are by their very nature capable of restricting competition"*[992], the Commission has cut off to the root the possibility of their rebuttal by defendant enterprises.

Indeed, although the draft Guidelines stipulate that *"only in very exceptional cases will a dominant undertaking be able to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects"*[993], the administrative authority has not further specified these circumstances in any way, automatically making this fundamental exception nothing more than an empty box.

The same goes for possible objective justifications, in so far as, despite observing how *"while it is in principle open to the dominant undertaking to seek to show that the naked restriction is justified on the basis of an objective justification, it is highly unlikely that such behavior can be justified in this way"*[994], the public agency has not additionally clarified which scenarios, even if highly improbable, may practically exclude the abusiveness of naked restrictions.

Further elucidations on the role of defensive arguments within the Commission's assessment of abuse of dominance are provided, at least to a certain extent, in Section 5 of the draft Guidelines.

On that regard, the administrative authority stipulates that *"conduct that is liable to be abusive* [in other words, a market leader's practice for which its departure from competition on the merits and its capability to produce exclusionary effects have been accordingly established, irrespective of whether such an assessment has been operated through presumptions (second and third categories) or a proper effects-based analysis (first category)] *may escape the prohibition of Article 102 TFEU where the dominant undertaking can demonstrate to the requisite standard that such conduct is objectively justified. To be objectively justified, the conduct must be objectively necessary (so-called "objective necessity defense") or produce efficiencies that counterbalance, or even*

[992] See *supra* (n 978).
[993] See *supra* (n 978).
[994] See *supra* (n 978).

outweigh, the negative effect of the conduct on competition (so-called "efficiency defense")"[995].

To that extent, providing that they both operate on a certain market leader's conduct which has already been determined *"liable to be abusive"*, the Commission has, somehow, likened the target of these two distinct defensive arguments, further gathering them under the sole label of *"objective justifications"*, on the upstream assumption that the outcome to which they both aim is equivalent, namely excluding the abusiveness of the relevant dominant undertaking's behavior.

However, the means of achieving their common goal is quite different: whereas an objective necessity defense comes into play once the cumulative requirements of the two-limb test are met, irrespective of whether the latter circumstance has occurred due to a presumption or an actual effects-based analysis, an efficiency defense directly impinges on the second limb of the draft Guidelines' test, namely the capability to generate exclusionary effects, in so far as it may rebut the presumption of illegality.

If this is true, their temporal operability is significantly diverse, as the first becomes relevant only when the second has already failed to reach the goal for which it is meant. Hence, even though their prospective outcome is equivalent, the same cannot be said for their target, as, differently from objective necessity, efficiencies operate on dominant undertakings' practices that are only deemed, not determined, *"liable to be abusive"*.

In any case, as the draft Guidelines have finally legitimized dominant undertakings' defenses to the remarkable extent that the case law of the ECJ has been attributing to them for a long time, bringing the approach of the Commission in line with the continual findings of the CJEU on the matter, some scholars have recently argued that defensive arguments could be conceptualized as the third limb of the draft Guidelines' test to detect market leaders' abuse of dominance[996], even if *"the burden of proof for an objective necessity or efficiency defense is on the dominant undertaking"*[997].

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[995] See *supra* (n 30), paragraph 167.
[996] Akman, Pinar. Fumagalli, Chiara. Motta, Massimo. *The European Commission's Draft Guidelines on Exclusionary Abuses: A Law and Economics Critique and Recommendations*, Social Science Research Network, 2024, pages 1-21.
[997] See *supra* (n 30), paragraph 171.

Finally, these can be considered to be the general coordinates of the legal discipline encapsulated in the draft Guidelines, from which it is crystal clear that the Commission intends to dismantle the so-called more economic approach to the prohibition of abuse of dominance enshrined in Article 102 TFUE.

Therefore, the next section will be dedicated to the examination of the main areas of criticism of the draft Guidelines, as well as to the prospective analysis of the impact of this fundamental policy initiative of the legal framework revolving around the prohibition of abuse of dominance, obviously, on the condition that the provisions laid down therein will be confirmed in the official version of this soft law instrument.

4.4.2 Critical analysis

As anticipated before, it can be safely maintained that the draft Guidelines pay lip service to the typical economically oriented effects-based assessment of abuse of dominant position, in so far as, creating an articulated presumption mechanism, which, in turn, further generates several rebuttal thresholds for defendant enterprises, the Commission is attempting to reinstate a form-based approach to the prohibition of abuse of dominance enshrined in Article 102 TFEU.

A closer look at the content of the draft Guidelines reveals that the latter consideration is testified, *inter alia*, by the two following observations:

- Firstly, in the text of the soft law instrument, there is no reference whatsoever to the fundamental AEC principle, which, as extensively analyzed in the previous chapters, differently from one of its mere manifestations, namely the AEC test, must be correctly understood as a real conceptual framework that should constantly inspire the EU decision-makers' interpretation/implementation of Article 102 TFUE;
- Secondly, although, for more than two decades, the Commission has been conducting the legal appraisal of dominant undertakings' allegedly abusive conduct against clearly articulated theories of harm, making the latter an integral part of virtually every test to detect abuse of dominance under Article 102 TFUE, the administrative authority has totally refrained from formulating any sort of well-defined theory of harm in the draft Guidelines, neither as a general principle

to determine if a certain practice is liable to be abusive nor under the Section 4, dedicated to the description of the legals tests applicable to specific categories of exclusionary abuses.

On that regard, as mentioned above, according to the Commission itself, this epochal paradigm shift must be correctly understood in light of the compelling necessity to enhance legal certainty, on the one hand, and predictability, on the other hand, safeguarding, at the same time, a vigorous and accurate enforcement of Article 102 TFUE.

If this is true, considering what has been accurately highlighted in this thesis on the systemic issues that the prohibition of abuse of dominance continues to rise within the legal framework of the Union, first and foremost in relation to some of the most important corollaries of the very principle of legality, such as the transparency of the administrative authority's prosecutorial activity, one can safely argue that the draft Guidelines envisage, to say the least, an acceptable purpose.

Nevertheless, this policy initiative, irrespective of its commendable ultimate objective, has been fueling one of the most heated debates in the history of ECL, especially regarding the means employed by the Commission to achieve its prospective goals.

Against this background, the draft Guidelines are currently being critically scrutinized in virtually infinite ways, from focusing on the intolerable absence of the AEC principle, to the role, if any, attributed by the public agency to consumer welfare, passing through the correct positioning of mainstream economics within the subtended logic of the soft law instrument.

To that extent, as this thesis has always placed the case law of the ECJ at the core of its methodological analysis of the prohibition of abuse of dominance encapsulated in Article 102 TFUE and further considering that the Commission itself has repeatedly observed how its policy initiative is mainly inspired by the CJEU's findings, this section will carefully speculate on the practical compliance of the draft Guidelines with the embedded case law of the ECJ, irrespective of the abovementioned assertions stemming from the administrative authority.

More precisely, this section will try to answer the two following questions:

- Firstly, are the draft Guidelines really in line with the case law of the ECJ?; and
- Secondly, how will the CJEU prospectively react to the unprecedented approach undertaken by the Commission?

Regarding the answer to the first question, the comparative analysis between the CJEU's latest findings on the prohibition of abuse of dominance in *Intel II*[998] [generated by the Commission's appeal of the GC's ruling in *Intel RENV*] and the provisions laid down by the administrative authority in its soft law instrument reveals the existence of several unfortunate discrepancies.

To that extent, in the previous section it was accordingly illustrated how the introduction of presumptions of illegality arguably represents the most remarkable novelty encompassed by the draft Guidelines. Indeed, the so-called naked restrictions, on the one hand, and the partial reversal of the legal, as well as the evidentiary, burden of proof on dominant undertakings, on the other hand, directly stem from this upstream presumption mechanism.

If this is true, highlighting the most recent approach undertaken by the ECJ in regard to (i) the employment of "strong" presumptions within the assessment of exclusionary abuses, (ii) the possibility to conceptualize the so-called naked restrictions under Article 102 TFUE and (iii) the proper placement of both the legal and the evidentiary burdens of proof to assess market leaders' abuse of dominance, is sufficient, in and of itself, to determine the real consistency of the draft Guidelines with the CJEU's case law.

Therefore, regarding the first element, namely the presumption mechanism, in *Intel II*, the CJEU has punctually stipulated the following:

"(...) the demonstration that conduct has the actual or potential effect of restricting competition, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must be made, in all cases, in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market or markets in question or the functioning of competition on that market or

[998] Judgment of 24 October 2024, *Commission vs Intel Corporation Inc.*, Case C-240/22 P, EU:C:2024:915.

those markets. That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects"[999].

From the wording employed by the ECJ, especially the expression *"in all cases"*, it is quite apparent how these findings, even if subject to a restrictive interpretation, do not seem to be compatible with any of the types of presumption laid down by the Commission in the draft Guidelines, meaning neither the second nor the third category of presumptively abusive practices singled out therein.

If this is not enough, specifically focusing on the second element, namely naked restrictions, even if only incidentally, as the Commission's grounds of appeal in *Intel II* regarded distinct, yet interlinked, issues, the CJEU observed the following:

"In so far as the Commission relies on Intel's dominant position, on the conditional nature of the rebates and on the existence of a strategy aiming to exclude a competitor of Intel from the market, irrespective of whether that competitor is as efficient as Intel, the arguments thus relied on in support of that complaint are based, implicitly but necessarily, on the idea that the contested rebates are abusive per se [here, the ECJ is referring to the fact that, in its decision on the matter, the administrative authority advanced an argument (repeatedly quashed by both the GC and the CJEU itself) according to which the rebate schemes implemented by Intel were intrinsically abusive, just like the draft Guidelines' abovementioned third category of practices]*"*[1000].

Subsequently, the ECJ has specified how *"(...) in themselves, the criteria relied on by the Commission* [namely, the *per se* abusiveness of the relevant rebates offered by Intel] *do not appear to be sufficient to find an infringement of Article 102 TFEU"*[1001].

Hence, even though summarily, the CJEU has firmly reiterated how the operability of naked restrictions, or, if one prefers, by-object violations, within the legal assessment of dominant undertakings' exclusionary abuse must be categorically excluded.

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[999] See *supra* (n 998), paragraph 179.
[1000] See *supra* (n 998), paragraph 136.
[1001] See *supra* (n 998), paragraph 138.

Finally, concerning the third element, namely the entity upon which the burden of proof must be placed, in *Intel II*, the ECJ has unequivocally held that *"(...) it must be borne in mind that it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement"*[1002].

Therefore, the reversal of the burden of proof, not clearly legitimized by the Commission but certainly implied in the draft Guidelines, cannot possibly have a legal basis in any source of ECL, let alone the case law of the ECJ on the prohibition of abuse of dominance.

In light of the foregoing, it can be safely maintained that, irrespective of the Commission's own assertions on the matter, the draft Guidelines are mainly inconsistent with the latest interpretations of Article 102 TFUE offered by the ECJ, in so far as:

- The CJEU's case law neither creates nor allows for strict presumptions of illegality. Indeed, according to the ECJ, what may exist under Article 102 TFUE are merely soft presumptions, which, by definition, do not exempt the public agency from establishing the abusiveness of a certain market leader's conduct to the requisite legal standard;
- *A fortiori*, there is no space for naked restrictions under the ECJ's understanding of the prohibition of abuse of dominance; and
- According to the ECJ's case law, it is always up to the administrative authority to prove that dominant undertakings' practices are at least capable of foreclosing competition, without any possibility for the Commission to shift, irrespective of the actual extent of such a reversal, the burden of proof on defendant enterprises.

Concerning the answer to the second question, bearing in mind that the official version of the Guidelines is yet to be published by the administrative authority, it cannot be ignored how, as recently as less than one week ago, in *Alphabet Inc. and Others*[1003], the ECJ proved to be totally committed to an effects-based approach to Article 102 TFUE, in so far as, in the context of a preliminary ruling, it stipulated, *inter alia*, that *"(...) Article 102 TFEU must be interpreted as meaning that the fact that both the undertaking which*

[1002] See *supra* (n 988), paragraph 328.
[1003] Judgment of 25 February 2025*, Alphabet Inc. and Others vs Autorità Garante della Concorrenza e del Mercato (AGCM)*, Case C-233/23, EU:C:2025:110.

developed an app and requested an undertaking in a dominant position to ensure that the digital platform owned by such dominant undertaking is interoperable with its app, and competitors of the first undertaking continued to be active on the market to which that app belongs and grew their position on that market, even though they did not benefit from such interoperability, *does not in itself indicate that the refusal by the undertaking in a dominant position to act on that request was incapable of having anticompetitive effects. It is necessary to assess whether that conduct on the part of the undertaking in a dominant position was such as to hinder competition on the market concerned being maintained or to hinder its growth, taking into account all the relevant factual circumstances"*[1004].

Thus, waiting for the release of the final Guidelines by the Commission, it can be safely maintained that the ECJ will likely be, to say the least, reluctant to legitimize the revival of the formalistic approach undertaken by the administrative authority, on condition that the latter will be confirmed in the official version of the forthcoming soft law instrument.

Furthermore, apart from the draft Guidelines' evident frictions with the case law of the ECJ, which may very well suffice, in and of themselves, to impinge on their very legality, they must be analyzed from an additional, yet interconnected, perspective: whether or not they meet the clarity requirement, an indispensable feature that shall be subtended to any policy initiative of such nature.

On that regard, in chapter two, it has been extensively explained how, overall, the notion of competition on the merits is nothing more than an *"irritant in the case law"* of the ECJ, that is to say an empty box that adds nothing new to the understanding of the concept of abuse of dominance.

Indeed, it has been accordingly underlined how, in practice, the CJEU uses this expression without any legal meaning attached to it, as it is merely employed to differentiate what is prohibited under Article 102 TFUE, hence, outside the scope of competition on the merits, from what is deemed lawful, thus representing a valid manifestation of competition on the merits. In other words, it is simply a descriptive tool employed by the ECJ to categorize and draw the line between illicit and licit dominant undertakings' conduct.

[1004] See *supra* (n 1003), paragraph 61.

If this is true, making the departure from competition on the merits one of the limbs of the legal assessment to detect exclusionary abuses, as the Commission did in the draft Guidelines, must be deemed as a gross misinterpretation of the ECJ's case law.

The latter consideration is testified, *inter alia*, by the tautological definition of what constitutes competition on the merits enshrined in the soft law instrument:

"The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Article 102 TFEU does not preclude the departure from the market or the marginalization, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation"[1005].

Indeed, here, the Commission seems to link the definition of competition on the merits with that of consumer welfare provided, even if not explicitly, in the introduction of the draft Guidelines:

"While achieving a dominant position in the Union is not in itself unlawful, dominant undertakings may behave in ways that distort or impair effective competition, to the detriment of the public interest, other market players and consumers. The competitive harm generated by dominant undertakings' abusive conduct may take various forms, such as higher prices, a deterioration in the quality of goods and services, a reduction in innovation or a limitation of consumers' choice"[1006].

However, as what constitutes, *inter alia*, "a deterioration in the quality of goods and/or services" has not been further developed in any way in the subsequent provisions laid down by the Commission, this reference is to be deemed empty, automatically making the "definition" of competition on the merits redundant, if not entirely absent.

[1005] See *supra* (n 30), paragraph 51.
[1006] See *supra* (n 30), paragraph 2.

This vagueness, which, unfortunately, characterizes many other aspects of the draft Guidelines, is totally incompatible with the very rationale underpinning any policy initiative aimed at, literally, providing guidance to the stakeholders, while navigating a certain legal discipline, in so far as it fosters uncertainty, rather than offering clarification.

If this is true, the Commission's draft Guidelines are further inconsistent with the very mission they are meant to accomplish, namely enhancing legal certainty and predictability of litigation outcomes. In fact, being confirmed as such, this instrument will very likely exacerbate the already existent frictions of Article 102 TFUE with the principle of legality, rather than dispelling them once and for all.

Finally, the analysis conducted up to this point clearly suggests that the draft Guidelines bring alone a whole set of problems which, hopefully, will be overcome in the reworked version of the forthcoming soft law instrument, if not to bring them in line with the ECJ's case law, at least to guarantee their practical utility.

However, in the author's view, what is totally unacceptable is the fact that, irrespective of whether it has been done so purposely or unconsciously, the Commission has passed off its own policymaking as the rationale behind the ECJ's case law.

This idea seems to be corroborated by the very opening statement of the draft Guidelines:

"The Union rules on competition pursue the protection of genuine, undistorted competition ("effective competition") in the internal market. Effective competition drives market players to deliver the best products in terms of choice, quality and innovation, at the lowest prices for consumers. It ensures that markets remain open and dynamic, creating new opportunities for innovative players including small and medium sized enterprises ("SMEs") and start-ups to operate on a level playing field with other players. It also spurs innovation and ensures an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union's resilience and long-term prosperity"[1007].

[1007] See *supra* (n 30), paragraph 1.

Indeed, the concepts enshrined therein, first and foremost the notion of "open markets", very much resemble the logic behind the DMA, rather than the discipline of Article 102 TFUE. In the same vein, if one looks closer, the very draft Guidelines' form-based approach, characterized by a strict presumption mechanism that drastically lowers the standard of the Commission's *ex post* assessment of abuse of dominance, appears to be more inspired by the DMA's *ex ante* regulatory control than by the actual ECJ's findings.

If this is true, the draft Guidelines seem to be, somehow, more akin to a sort of policy roundtable, however, although policy statements are, in principle, welcomed, as they provide useful insights into the operational activity of the Commission, *"(...) conceptually, the role of guidelines is to codify the accepted knowledge in a particular area of antitrust for the sake of legal certainty"*[1008], rather than ratifying a certain administrative authority's own beliefs and preferences.

[1008] Manne, Geoffrey. Auer, Dirk. Albrecht, Brian. Fruits, Eric. Radic, Lazar. *Comments of the International Center for Law and Economics on the DOJ-FTC Request for Information on Merger Enforcement*, International Center for Law and Economics, 2022, page 2.

CONCLUSION

The analysis conducted in the previous chapters clearly reveals that, differently from other areas of ECL, the discipline enshrined in Article 102 TFUE is still largely perceived as highly problematic, not only by the stakeholders, comprising dominant undertakings, academic scholars and legal practitioners, but also by the EU decision-makers themselves.

A closer look at the evolution of the interpretation/implementation of the prohibition of abuse of dominance, from its origins to its latest developments, suggests that such an undesirable outcome is mainly the result of a lack of balance between effective enforcement, on the one hand, and legal certainty, on the other hand.

In other words, it seems that no EU institution, from administrative to judicial bodies, passing through the very European legislator, has been able to efficiently thread the needle between these two interconnected, yet conflicting, dimensions, that is to say to come up with a generalized expedient which satisfies the demands of all parties involved in every single instance that requires the application of Article 102 TFUE.

As a matter of fact, reconciling the Commission's need for administrability with the justifiable market leaders' calls for stability, far from being a simple task, is easier said than done, first and foremost because, due to the intrinsic openness of the prohibition encapsulated in Article 102 TFUE, the boundaries between abusive unilateral conduct and lawful manifestations of competition on the merits have always been as blurred as undefined.

At the same time, in this thesis, it has been repeatedly highlighted how the "natural" abstractness of the concept of abuse of dominance is a fundamental feature that allows Article 102 TFUE to keep up with the times, increasingly characterized, in turn, by a fast-paced level of competition within the EU internal market, which further requires a dynamic approach to the analysis of market leaders' allegedly abusive behaviors.

Against this background, the ECJ has always represented a systemic cornerstone of legality, in so far as, since the entry into force of what is now Article 102 TFUE, its case law has borne the load of operating this almost impossible balancing exercise, drawing the line between licit and illicit, permitted and prohibited, "use" or "abuse" of dominance.

Indeed, one should never forget that, differently from American Antitrust Law, the original EU principle of dominant undertakings' special responsibility not to allow their conduct to impair genuine undistorted competition on the common market does not go as far as criminalizing the mere detention of huge market power, making the legal assessment of what practically amounts to an abuse of dominance even more exacerbated.

However, as accordingly illustrated in the previous chapters, although the CJEU has always aimed at creating a continuous and consistent line of case law on Article 102 TFUE, it cannot be ignored how the ECJ's findings have not been totally exempted from reflecting, sometimes even giving rise to, inconsistencies of their own, automatically feeding, rather than dispelling, uncertainty and confusion.

Obviously, the latter consideration must be correctly understood as an additional testimony of the universal complexities revolving around the prohibition of abuse of dominant position, rather than an attempt to diminish the essential value of the judgments delivered by the ECJ.

After all, far from questioning the pivotal role played by the CJEU, the ultimate objective of this thesis is exactly to show how its case law, if properly investigated, must be conceptualized as arguably the one and only safe harbor that the antitrust framework of the Union encompasses when it comes to the definition of what constitutes a violation of Article 102 TFUE.

That is also why the academic contributions stemming from the doctrine, here more than any other area of ECL, certainly represent a fundamental starting point of analysis of the prohibition of abuse of dominance, both from a legal and an economic perspective, in so far as they provide the basic tools of the trade to properly navigate the otherwise cryptic findings of the ECJ.

At the same time, this thesis has accurately described that, in certain peculiar scenarios such as digital markets, not even the CJEU's judicial scrutiny has been able to sufficiently guarantee the respect of the principle of legality, mainly due to the constitutional/institutional constraints that enclose the judicial review of the ECJ, as well as its interpretational activity within preliminary ruling proceedings, into the well-established boundaries predetermined by the Treaties themselves.

Hence, the Commission's recent attempts to come up with alternative solutions meant to bypass the never-ending open flanks of the discipline enshrined in Article 102 TFUE, meanwhile, ensuring a broader margin of maneuver to its own administrative and/or prosecutorial activity.

On that regard, with the DMA, the European legislator has certainly legitimized the public agency's calls for the creation of a suitable legal environment that allows an incisive response to anti-competitive conduct stemming from "super-dominant" core platform services providers, simultaneously satisfying the stakeholders' need for predictability.

However, apart from the fact that it is clearly too early to evaluate the practical efficacy of the newborn Regulation, in order to obtain such a desirable outcome, the EU legislator has sacrificed the very antitrust nature of the DMA, that is to say its abstractness and openness, making it an *ex ante* sector-specific regime, which will certainly need to be constantly revised and expanded, in order to keep up with the forthcoming Gatekeepers' unprecedented unlawful practices.

Otherwise, even for the already narrow subject of the DMA, namely anti-competitive behaviors stemming from digital undertakings labeled as Gatekeepers, the focus will unavoidably switch right back on Article 102 TFUE, further generating a dangerous vicious circle that will ultimately undermine the very practical utility of the newborn Regulation.

That is even more true if one considers that, as accordingly described in the precedent chapter, the application of the prohibition of abuse of dominance will still be required in most of the cases of illicit unilateral practice, not only within the residual scope of the technology-enabled industries left unchecked by the DMA, first and foremost non-Gatekeepers digital dominant undertakings' abusive conduct, but also as far as markets characterized by static competition are concerned.

The latter idea can be further considered to be the unspoken rationale underpinning the latest Commission's policy initiatives, starting with the 2023 Amendments to the Guidance Paper and partially culminated in the publication of the draft Guidelines on Article 102 TFUE, in so far as ensuring that the discipline of the prohibition of abuse of dominance will deliver better results in the years to come, irrespective of any additional

regulatory control, or, if one prefers, in harmony with it, is still largely perceived as a compelling necessity.

Unfortunately, hiding behind the alleged will of the ECJ, the administrative authority is trying to pursue the noble objective of bringing the discipline of the prohibition of abuse of dominant position totally in line with the principle of legality through the dismantling of the so-called effects-based approach to Article 102 TFUE, even if such a drastic paradigm shift does not appear to be either justified or legitimized by the pertinent case law of the CJEU.

In the same vein, there is no consensus whatsoever amongst academic scholars and legal practitioners that an economically oriented analysis should be eliminated from the legal assessment of abuse of dominance[1009], as well as, more importantly, there is no support in any source of law relevant to Article 102 TFUE that the effects-based approach should be neglected to pave the way for a comeback of a formalistic presumption-based approach to dominant undertakings' unilateral conduct.

At the same time, the latter argument does not amount to maintaining that no progress should be made to speed up the Commission's investigative and decision-making process, on the one hand, and enhance transparency and predictability of litigation outcomes, on the other hand, meanwhile, ensuring, *de iure* and *de facto*, a true, rather than artificial, compliance with the embedded principles and/or rules enshrined in the case law of the ECJ. In other words, the realization of the abovementioned balance between administrability, legal certainty and meaningful judicial review[1010].

In light of the foregoing, the author suggests the three following possible interventions:

- Firstly, the introduction of time limits for antitrust investigations pursuant to Article 102 TFUE;
- Secondly, the partial renovation of the discipline on commitment procedures; and

[1009] Quite the opposite, since the draft Guidelines were disclosed by the Commission, several doctrinal contributions, published by both legal scholars and economists, have been steadily defending the *status quo* revolving around the appraisal of market leaders' unilateral abusive conduct; for a valuable example of a very recent work on Article 102 TFUE deeply rooted in mainstream economics, see Padilla, Jorge. Piccolo, Salvatore. Gal, Michal. *Optimal Legal Rules for the Assessment of Unilateral Conduct by Dominant Firms*, Social Science Research Network, 2025, pages 1-39.

[1010] The latter encompassing both the actual judicial scrutiny, in annulment procedures, and the interpretation of the Treaties offered by the ECJ in preliminary ruling proceedings.

- Thirdly, the enhancement of interim measures.

Regarding the first, as of today, the Commission's investigations of infringements of the prohibition of abuse of dominance can literally go without any time limitation, understandably leading to great frustration of defendant enterprises that rightfully feel a sword of Damocles constantly over their heads.

Therefore, although the Commission would very likely be contrary to the introduction of time limits, there are no legal constraints for which administrative procedures under Article 102 TFUE should not be subject to a limitation of such a nature.

After all, in the previous chapter, it has been accordingly described how the European legislator has recently introduced time limits for the investigations opened by the public agency under the legal framework provided by the DMA.

On top of that, these sorts of legal boundaries placed on the administrative and prosecutorial activity of the Commission have been already operating for a long time in merger control cases.

If this is not enough, the capability of the administrative authority to obtain fast results in narrow time intervals is testified, *inter alia*, by the fact that, at the end of political mandates, the Commission has repeatedly proved to be able to wrap up "popular" cases before the elections.

As far as the second is concerned, it was already mentioned that, in the last few years, the Commission has been largely employing commitment decisions not only to minimize the abusive conduct's damage on consumer welfare, but also to offer faster assistance to dominant undertakings' rivals, namely the direct "victims" of their anti-competitive behaviors.

Indeed, considering that, differently from interim measures, commitment procedures allow the administrative authority to deliver quicker "permanent" results, meanwhile, saving precious resources, in so far as they do not require the actual assessment of abuse of dominance, there has been a steady positive trend in their implementation by the administrative authority.

At the same time, in order to be effectively operational, hence, useful in practice, they demand the agreement of the defendant market leader to the prospective commitments, placing a sort of bargaining power upon dominant undertakings which is mainly alien to legal procedures under Article 102 TFUE[1011].

If this is true, the relevant defendant enterprise will likely push to offer exclusively those commitments that are economically viable for its business, generally excluding the applicability of more incisive remedies, such as structural and/or behavioral forms of remedial action.

Against this background, revisiting the discipline of commitment procedures, first and foremost focusing on the extent of defendants' bargaining power, when it comes to the agreement of the actual commitments to be respected, so that, *de facto*, the Commission will be able to implement efficient remedies that will both stop the infringement and prevent new violations, may be an additional important solution to be taken into consideration.

Concerning the third, Article 8(1) of Regulation 1/2003 reads as follows:

"In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures".

On that regard, if it is true that the latter provision has been constantly interpreted, both for Articles 101 and 102 TFUE, by the ECJ as encompassing strict requirements of admissibility[1012], a circumstance that has generally prevented the Commission from seeking interim measures, even when the latter would have actually been well-fitting and

[1011] In so far as it typically characterizes extrajudicial transactions; to that extent, see Geradin, Damien. Mattioli, Evi. *The Transactionalization of EU Competition Law: A Positive Development?*, Journal of European Competition Law and Practice, 2017, pages 634-643.

[1012] To that extent, see, *ex multis*, Order of the President of the General Court of 29 January 2020, *Silgan International Holdings BV and Silgan Closures GmbH vs Commission*, Case T-808/19 R, EU:T:2020:16, paragraphs 40-45; Order of the Vice-President of the Court of 10 September 2019, *Lantmännen ek för and Lantmännen Agroetanol AB vs Commission*, Case C-318/19 P(R), EU:C:2019:698, paragraphs 59-63; Order of the President of the General Court of 23 November 2017, *Nexans France and Nexans vs Commission*, Case T-423/17 R, EU:T:2017:835, paragraphs 29-33; Order of the President of the General Court of 12 July 2017, *Qualcomm, Inc. and Qualcomm Europe, Inc. vs Commission*, Case T-371/17 R, EU:T:2017:485, paragraphs 39-42 and Order of the Vice-President of the Court of 17 September 2015, *Alcogroup and Alcodis vs Commission*, Case C-386/15 P(R), EU:C:2015:623, paragraphs 19-24.

beneficial, the administrative authority should not refrain from demanding them, in so far as, in doing so, the CJEU may feel compelled to lower the standard of their admissibility.

Alternatively, the European legislator itself might autonomously intervene to lower the relevant bar of intervention, amending the abovementioned Regulation.

On top of all of that, although the analysis of the implementation of Article 102 TFUE by National Competition Authorities exceeds the scope of this thesis, considering the limited resources at disposal of the Commission's DG Competition, nowadays, further aggravated by the enforcement of the DMA's provisions, and additionally taking into account the vertical applicability of the prohibition of abuse of dominance enshrined in the TFUE, national antitrust agencies, sometimes even bigger and more structured than the Commission itself, may represent a valid, yet limited, alternative for dominant undertakings' rivals seeking justice.

Finally, the main conclusion that can be drawn from the accurate examination of the concept of abuse of dominance conducted in this thesis is that, differently from many other areas of ECL, Article 102 TFUE still screams for corrections on many fronts. Some countermeasures have already been taken, others are on the verge of being officialized, yet, in both scenarios, they seem to generate additional issues of their own.

Time will provide more clarification on the soon-to-be developments of the prohibition of abuse of dominant position, meanwhile, the European legislator should start getting ready to take matters into its own hands.

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