European Union competition law

Module B: Abuse of a dominant position

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Contents

Chapter 4: Abuse

Introduction

In this chapter we will deal with the 'target' of the prohibition contained in Article 102, namely 'abuse' of dominance. This is a highly controversial concept, since the same behaviour by a firm may be treated differently depending on whether or not is found to hold a dominant position under Article 102.

Learning outcomes

Having studied this chapter and the related readings, you should be able to:

- explain the concept of abuse
- identify the different types of abuse
- discuss the rationale for considering particular behaviours to be abusive.

Essential reading

Jones and Sufrin, Chapter 7.

4.1 The concept of special responsibility

It is perfectly legitimate for a firm to hold a dominant position under Article 102: the Article prohibits **abuse** of a dominant position, not the mere holding of that position. However, the ECJ has established very consistently in the case law that, regardless of the reasons why a firm holds a dominant position, it 'has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market' (see Case 322/81 *Michelin NV* v *Commission* [1983] ECR 3461, [1985] 1 CMLR 282, para. 57).

This view of the Court has led to confusion among competition lawyers, particularly with regard to the question of to whom a dominant firm is responsible. Logic would dictate that the existence of a 'special responsibility' should connote the existence of a 'special market relationship', or at least some form of 'market relationship', such as the relationship between the dominant firm and one of its customers.

The EU Courts and the Commission, however, have continued to use this concept of special responsibility without clarifying its ambit. Recent case law of the EU Courts and the decisional practice of the Commission give the impression that the special responsibility of a firm holding a dominant position is owed to the market and consumers, but EU law is still not absolutely clear on this point.

4.2 What is abuse?

When dealing with the concept of abuse, we must always start with the wording of Article 102, which contains a non-exhaustive list of examples of abuse in paras. (a)–(e). As we noted in Chapter 3 above, the list of examples of abuse has been expanded over the years by the EU Courts and the Commission in the case law.

An important tool used by the ECJ to expand the list is 'teleological reasoning'. According to this purposive method of interpretation, the ECJ does not limit itself to the specific wording of the Treaty Articles, but rather looks at the broader underlying objective: the building of a single market in the EU. Equally important has been the Commission's enthusiasm for extending the scope of Article 102 to adapt it to modern business and commercial practice, in which firms' commercial behaviour may have anti-competitive aims or effects.

A very important example to mention here is the Commission's decision in *Microsoft*, C(2004)900 final of 24 March 2004. As we noted in Chapter 2 above, the Commission imposed a fine of nearly half a billion euros on Microsoft. This decision was substantially upheld by the GCEU in a judgment delivered on 17 September 2007 – the Court upheld the decision of the Commission, save for annulling one Article (concerning the monitoring trustee).

The judgment has been seen as a victory for the Commission. It set a strong precedent in order to establish clear principles for the future conduct of very powerful firms.

The discussion of abuse in *Hoffmann-La Roche*

Abuse has not really been defined by the ECJ, but it did say the following at para. 91 of *Hoffmann-La Roche* v *Commission*:

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

The ECJ has repeated this statement throughout its case law. In stating that abuse is an objective concept, the ECJ makes it clear that the intention of the firm whose behaviour is under consideration is irrelevant.

Although the concept of abuse has not been defined as such, we can get a good idea by considering how it has been applied by the EU Courts and the Commission.

The Commission's own view on the meaning of the concept of abuse is that the concept refers to anti-competitive business behaviour of a dominant firm which is intended to maintain or increase its position. According to the Commission, such behaviour includes improper exploitation of customers or exclusion of competitors. The Commission has explained that such behaviour is prohibited under competition law because it:

- damages true competition between firms
- exploits consumers
- makes it unnecessary for dominant firms to compete with other firms on the merits.

Commission's Guidance on Article 102

In its Guidance on Article 102, the Commission focuses in relation to the concept of abuse on the issue of 'anticompetitive foreclosure'. This kind of situation arises where the conduct of the dominant firm hinders or prevents effective access by actual or potential competitors to supplies or markets, resulting in consumer harm. In its Guidance the Commission focuses on exclusionary conduct that causes such foreclosure. This kind of conduct – to distinguish it from exploitative conduct – is, according to the Commission, a top priority for it when enforcing Article 102.

Among the exclusionary practices which the Guidance deals with are: exclusive dealing (which covers exclusive purchasing and conditional rebates); tying and bundling between products; predatory pricing; and refusal to supply and margin squeeze cases. Make sure you read the account in the Guidance on the treatment of these different practices. Especially important to note is the Commission's view on how price-based exclusionary conduct such as rebates and predatory pricing should be evaluated. If you look at the Guidance, you will find that the Commission utilises the 'as efficient competitor' test. The Commission says that it will normally intervene in relation to these practices where the conduct of a dominant firm harms competition from rivals who are considered to be 'as efficient' as the dominant firm.

In this regard, you should note the cost benchmarks which the Commission says it is likely to use in its evaluation. These include the Average Avoidable Cost (AAC) and Long-Run Average Incremental Cost (LRAIC). The former is the average of the cost that in a given abuse of dominance case (such as predatory pricing) could have been avoided if the dominant firm had not produced a discrete amount of additional output. The LRAIC, on the other hand, is the average of all costs (whether fixed or variable) which the dominant firm incurs when producing a specific product. Please look at the application of these cost standards in relation to predatory pricing and rebates in particular, as set out in the Guidance. You should then link these points in the Guidance to the case law of the ECJ in relation to these practices, discussed below.

4.3 Examples of abuse

Let us consider some examples of abuse that have emerged in the case law over the years. But before we do that, note an important point which applies to almost all of these examples: they are highly controversial.

Looking at the different judgments and decisions under Article 102, you may well get the impression that the Commission and EU Courts have overstretched the scope of the Article. It is very arguable that in some cases a certain type of behaviour was regarded as an abuse of dominance simply because the firm in question was dominant, without sufficient analysis of the situation at hand. This is particularly a problem in relation to examples of abuse such as:

- tying practices
- rebates
- predatory pricing
- selective price-cutting.

We will deal with these practices below.

4.3.1 Requirement contracts

In a requirement contract situation, a dominant firm imposes an obligation on one or more of its customers to purchase their requirements, or a certain quantity of them, from it. This kind of behaviour is considered objectionable because:

- It is liable to create exclusivity.
- It may lead to foreclosure of the market to the firm's competitors.

With this exclusivity, the customer may have no choice but to accept trading terms and conditions that they do not particularly want.

Hoffmann-La Roche* v *Commission

In *Hoffmann-La Roche* v *Commission* the ECJ stated at para. 89:

> An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation to promise on their part to obtain **all or most** of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant or a rebate. [emphasis added]

The ECJ's reference to 'all or most' is interesting. It raises the question of what amounts to 'most' in this case. The ECJ has not really clarified this in its subsequent case law. However, in Regulation 330/2010[1] and the Commission's Guidelines on vertical restraints (2010)[2] (which you studied in Module A of this course), the Commission refers to the 'exclusivity' situation as a 'non-compete obligation'. This is defined in the Regulation as:

> any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and all their substitutes on the relevant market.

In the Guidelines on vertical restraints, the Commission clearly states that a dominant firm may not impose a non-compete obligation on its customers unless it can objectively justify such practice within the context of Article 102.

The burden of showing that there is objective justification rests with the firm concerned. What may amount to objective justification varies according to the situation at hand, but may include:

- the short duration of the contract
- the limited extent of its terms.

[1] *OJ [2010] L102/1.*
[2] *OJ [2010] C130/1.*

4.3.2 Tying

General

Tying (or bundling) situations are expressly mentioned in para. (d) of Article 102. They arise where, for example, the dominant firm informs a customer that is dependent on the dominant firm that it will supply it with one product (X: the tying product) only if the customer agrees also to buy another product (Y: the tied product) from it.

Tying may take different forms. In practice, firms use tying for different reasons, most notably perhaps to strengthen their position in the tied product market. You may find that this is sometimes called 'leveraging' because of the use of dominance in one market to gain a strong position in another.

The reason why such a practice is considered to be objectionable is because it allows the dominant firm to exploit its customers and also forecloses the market to its competitors. Tying has been condemned in several cases under Article 102. The following are representative examples of the case law.

Tetra Pak II

Tetra Pak held a very large market share of about 92 per cent of the market for aseptic carton packaging and about 50 per cent of the non-aseptic market. The Commission found that the firm abused its dominant position by tying non-aseptic filling machines to carton sales and by engaging in predatory pricing (see below on predatory pricing). The GCEU upheld this finding.

On appeal to the ECJ (Case C-333/94P *Tetra Pak International SA* v *Commission* [1996] ECR I-5951, [1997] 4 CMLR 662), Tetra Pak argued that the Commission was wrong to consider a firm's conduct in a market in which it held a dominant position, which was not intended to strengthen its position in the market in relation to which it did not hold a dominant position.

Furthermore, Tetra Pak claimed that there was a natural and commercial usage link between the tied and tying products, and so para. (d) of Article 102 (by its words) did not really apply. The ECJ dealt with these claims at paras. 34–37 of its judgment and concluded that they must be rejected.

Microsoft

In March 2004 the Commission delivered an important decision under Article 102 in *Microsoft*. The decision followed one of the longest and most important Article 102 investigations ever conducted by the Commission.

The Commission's investigation into the conduct of US-based Microsoft was started in the late 1990s following a complaint by another US firm, Sun Microsystems, that Microsoft has refused to supply it with interface information. This information is regarded as crucial to develop products that can 'talk' properly with the Microsoft's Windows operating system. According to the complaint, this refusal prevented Sun Microsystems from competing effectively in the market for work group server operating systems.

In the course of its investigation, which after two years was expanded to cover Microsoft's 'tying' of Windows Media Player with Windows 2000 operating systems, the Commission found that Microsoft's practices affected other firms and were part of a Microsoft strategy to keep competitors out of the market.

The Commission found that as a result of Microsoft's tying practices, consumers were harmed since competing products were placed at a disadvantage which was not related to their price or quality. In a landmark decision, it imposed a fine of €497.2 million on Microsoft, which it said reflected the seriousness of the abuse of dominance by Microsoft and its duration.

The Commission also ordered Microsoft to restore conditions of effective competition by disclosing, within 120 days of the decision, complete and accurate interface documentation which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. The Commission felt that such action would enable competitors of Microsoft to develop products that could compete on an equal footing in the work group server operating systems market. The Commission also ordered Microsoft to offer PC manufacturers a version of its Windows Client PC operating system without Windows Media Player. The purpose behind this was to facilitate configurations of 'bundles' by PC manufacturers which reflected what consumers desire as opposed to what Microsoft imposes.

The Commission's decision attracted a high level of publicity and interest, and was severely criticised in the United States. Microsoft decided to contest the decision before the GCEU, but as we have already noted, it was upheld.

Following this case, a further issue arose concerning Microsoft tying its Windows and web browser systems. However, this was settled between the Commission and Microsoft after Microsoft offered 'commitments' which were made enforceable by a Commission decision of December 2009. Following the implementation of the commitments demanded by the Commission, consumers in the EU now have the option of choosing among a variety of browsers to access and navigate the internet.

4.3.3 Cabinet or freezer exclusivity

The doctrine of cabinet (or freezer) exclusivity was developed by the Commission to condemn as an abuse of dominance the practice whereby firms offer a free cabinet (such as a freezer) to its customers on condition that the customers will stock in that cabinet only products made by the firm, not those made by its competitors. This doctrine is directly related to the tying situation you studied above.

The reason why such a practice is condemned is because the offer of a free cabinet in this case carries a strong form of inducement to certain customers at least and excludes new entrants from the market. The Commission relied on the doctrine in its decision in *Ven den Bergh Foods*, which was upheld by the GCEU in 2003 in Case T-65/98 *Van den Bergh Foods Ltd* (*formerly HB Ice Cream Ltd*) v *Commission* [2004] 4 CMLR 1 (see in particular paras. 159–60 of the judgment).

4.3.4 Refusal to supply

Refusal to supply refers to the situation where the dominant firm refuses to supply or deal with a customer. Of course caution is needed when considering whether such a practice is an abuse of dominance because firms generally have a fundamental freedom to choose their customers.

However, this does not mean that such a freedom extends to situations:

- where, as a result of such a practice, the process of competition as a whole may be harmed to the detriment of consumers or society generally, or
- where, as a result of the refusal, irreversible harm may be caused to a particular customer.

For this reason the Commission and EU Courts have held that such a practice may amount to an abuse of dominance in certain circumstances.

Commercial Solvents* v *Commission

Refusal to supply has been considered in a few cases under Article 102. A good example is Joined Cases 6/74 etc. *Commercial Solvents* v *Commission* [1974] ECR 223, [1974] 1 CMLR 309.

Between 1966 and 1970, an Italian chemical supplier (Instituto) provided large quantities of Chemical A to Zoja, a medical supplies manufacturer, which used it to make Chemical E, a tuberculosis drug. The Second Applicant (CSC), which was the majority owner of Instituto and a major manufacturer of Chemical A, decided that it would no longer supply Chemical A in the EC except to Instituto, which had begun producing Chemical E and other related chemicals. The Commission held that CSC was dominant in the European market for Chemical A and that the refusal to supply Zoja was an abuse of this dominant position contrary to Article 102. The Commission's finding was upheld by the ECJ.

***RTE and ITP* v *Commission* (*Magill*)**

Another notable example of a refusal to supply situation arose in the case of *Magill*.

This was an appeal against a ruling by the GCEU (upholding the Commission's decision in the matter) concerning rights to publish TV programming schedules in Ireland and Northern Ireland. At the material time, the applicants (a TV broadcaster and a publishing company) published their own separate weekly schedules and only allowed reproduction by other publishers one weekday in advance. This prevented the complainant, Magill, from compiling a comprehensive weekly guide.

The ECJ upheld the GCEU, ruling that the appellants held a monopoly in the subsidiary market of weekly listings and that national copyright provisions had to be restricted in order to reconcile their exercise with free movement of goods and effective competition. In particular, the manner of exercise of such rights must be 'legitimate' and not a manifest attempt to frustrate competition. Accordingly, the applicants were ordered to grant the rights at a reasonable price. A key point of the ECJ's judgment is para. 52:

> Among the circumstances taken into account by the Court of First Instance in concluding that such conduct was abusive was, first, the fact that there was, according to the findings of the Court of First Instance, no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead. On this point, the Court of First Instance confirmed the Commission's finding that the complete lists of programmes for a 24-hour period – and for a 48-hour period at weekends and before public holidays – published in certain daily and Sunday newspapers, and the television sections of certain magazines covering, in addition, 'highlights' of the week's programmes, were only to a limited extent substitutable for advance information to viewers on all the week's programmes. Only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly. The Court of First Instance also established that there was a specific, constant and regular potential demand on the part of consumers.

Microsoft* v *Commission

One of the issues in the *Microsoft* case concerned the question of refusal to supply on the part of Microsoft, which was triggered by the refusal of Microsoft to share interface information with rivals. Look at the judgment of the GCEU in order to see the changes that the Court introduced in relation to this ground (refusal to supply) as a basis for applying Article 102. Note that the GCEU has widened this ground, arguably thereby making it easier for the Commission to apply the Article in refusal to supply cases in the future.

GlaxoSmithKline

Another important case in relation to supply is the *GlaxoSmithKline* dispute in the Greek market. The ECJ delivered its judgment on 16 September 2008 (Cases C-468/06 etc. *Sot. Lelos kai Sia EE etc.* v *GlaxoSmithKline AEVE Farmakeftikon Proionton*). The judgment deals with the important issue of parallel imports and Article 102 TFEU in the context of refusal to supply, and is highly important because it makes a number of crucial points. On the whole, it can be said to be a pragmatic judgment. The ECJ has established that Article 102 will apply in cases where parallel imports will be prevented even if it is argued or is the case that allowing parallel imports will not lead to consumer benefit. The Article should also apply notwithstanding the involvement of Member States in the sector. With regard to objective justification, the ECJ seems to have acknowledged that a dominant firm is able to refuse to supply customers in cases where their orders are out of the ordinary. In other words, refusal to supply will be an abuse of a dominant position if there is no objective justification.

It is worth mentioning in this context that the pharmaceuticals sector has seen a number of important developments in the past two years. On 1 July 2010 the GCEU delivered its judgment in the case of *AstraZeneca*, upholding a Commission decision that there had been an abuse of dominance on the part of AstraZeneca for patent misuse and delay in the market entry of competing generic medicinal products. The judgment is significant, as it was the first case to deal with the use of patents by dominant firms.

4.3.5 Essential facilities

The doctrine of essential facilities under Article 102 has given rise to huge controversy. It is related to the refusal to supply situation which you have just studied. 'Essential facility' means a piece of infrastructure or an important raw material: pipeline, railway track, a port, a delivery service, a distribution network, and so on.

In other words, a facility is something that is essential for a firm to be able to operate or carry on a business activity. What happens where a dominant firm owns or controls an essential facility to which one of its competitors would like to gain access so that it can sell its goods or provide its services? The difficult question that has arisen in this situation is whether a refusal to grant such access could trigger the Article 102 prohibition on the basis that the refusal amounts to an abuse of dominance.

Oscar Bronner* v *Mediaprint

The ECJ dealt with this question in Case C-7/97 *Oscar Bronner* v *Mediaprint*.

Oscar Bronner was the publisher of *Der Standard* newspaper, which had 3.6 per cent of circulation and 6 per cent of advertising revenues in Austria. Mediaprint, also a publisher, had 46.8 per cent and 42 per cent respectively and reached 71 per cent of all newspaper readers through its control of the only nationwide early-morning home delivery service. Oscar Bronner alleged that, because its small circulation would not permit it profitably to set up such a service, Mediaprint's home delivery scheme was an 'essential facility' and Mediaprint's refusal to allow it to use the service was an abuse of a dominant position contrary to Article 102. An Article 234 reference was made to the ECJ by the Austrian court.

The ECJ's answer was that there was no such abuse. The ECJ felt that access by Oscar Bronner to Mediaprint's facility was not indispensable (i.e absolutely necessary) in the circumstances. At para. 46 of the judgment, it said:

> For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish… that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.

In this way, the ECJ in *Oscar Bronner* seems to have narrowed the scope for any finding of abuse through a refusal to allow use of a given facility. However, this does not mean that it is unlikely that the doctrine will be invoked by firms in future cases or that it may not give rise to difficult questions, especially in situations similar to that in *Magill* concerning intellectual property rights.

IMS Health* v *NDC Health

Indeed, Case C-418/01 *IMS Health* v *NDC Health* shows that this may happen. The parties to the dispute were competitors engaged in the collection, processing and interpretation of data concerning regional sales of pharmaceutical products in Germany. IMS had established a copyrighted system for dividing the country into research segments – a system which had become an industry standard essential for any competing company.

IMS refused to grant a licence to competitors to enable them to access its systems. Applying *Magill*, the Commission established interim measures against IMS, ordering the firm to license the use of its system so that competitors could access the market.

In the GCEU and later the ECJ, the Presidents of the Courts suspended the decision of the Commission pending a final determination of the matter by the Courts. In a separate (domestic) action, IMS sought to enforce its copyright against NDC. A preliminary ruling reference was made to the ECJ. At para. 52 of the judgment, the ECJ stated:

> [T]he refusal by an undertaking which holds a dominant position and is the owner of an intellectual property right over a brick structure which is indispensable for the presentation of data on regional sales of pharmaceutical products in a Member State, to grant a licence to use that structure to another undertaking which also wishes to supply such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article [102 TFEU] 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 copyright owner 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 copyright owner the market for the supply of data on sales of pharmaceutical products in the member state concerned by eliminating all competition on that market.

4.3.6 Margin squeeze

Margin squeeze may occur where a dominant firm charges two different prices: a higher price will be charged to a customer who competes downstream with the dominant firm. In this sense, the dominant firm is able to adversely affect competition downstream because the customer will not be able to compete effectively. Note the judgment of the ECJ in Case 280/08 *Deutsche Telecom*. In rejecting the firm's appeal and thus upholding the judgment of the GCEU, the Court confirmed the decision of the Commission from 2003, finding that the firm had abused its dominant position by charging its competitors abusive prices to access what is called the 'local loop' (in effect, accessing German homes). As a result of these practices, competition in the downstream market was harmed.

Note also the judgment of the ECJ in case C-52/09 *Konkurrensverket* v *TeliaSonera Sverige AB* (delivered on 17 February 2011). The case originated from an action by the Swedish Competition Authority against the Swedish telecoms operator TeliaSonera in 2004 on the ground that the firm abused its dominant position in the broadband market, ADSL. The Stockholm District Court, hearing the action, decided to make a preliminary ruling reference to the ECJ on the interpretation of Article 102 concerning the practice of margin squeeze.

In its judgment, the ECJ confirmed the position taken in *Deutsche Telekom* that margin squeeze is a 'standalone' type of abuse under Article 102, and in particular one that is independent from refusal to supply. Moreover, the Court held that margin squeeze may constitute an abuse even where a dominant company has no legal obligation to supply its downstream competitor. On that basis, it was irrelevant in the case that TeliaSonera was not subject to a regulatory duty to deal with competitors. Further, the ECJ stated that it is necessary to determine the level of margin squeeze of a competitor at least as efficient as the dominant undertaking itself.

The ECJ made some other interesting and important points:

- Determining that a pricing practice of a dominant firm amounts to a margin squeeze and is abusive requires taking into account, as a general rule, the prices and costs of the firm on the retail (downstream) market. If this is not possible, one may consider the prices and costs of its competitors on the same market.
- While the degree of dominance is not relevant in establishing that margin squeeze is abusive under Article 102, the degree of market strength is, as a general rule, significant in relation to establishing the extent of the effects of the conduct of the dominant firm.
- The question whether a pricing practice resulting in a margin squeeze is abusive does not depend on whether the firm in question (i.e. the vertically integrated dominant undertaking) is dominant in the retail (downstream) market. In other words, a dominant position in the wholesale (upstream) market is sufficient and it is not necessary to demonstrate that the dominant undertaking has a dominant position in the retail market.
- It is not relevant to the assessment of a margin squeeze situation under Article 102 whether the customers to whom the margin squeeze is applied are new or existing customers of the dominant firm.
- Finally, whether the dominant firm is able to recoup any losses suffered as a result of applying the pricing practice at issue has no relevance to establishing whether that pricing practice is abusive.

4.3.7 Discounts and rebates

The offering of discounts and rebates by a dominant firm has been condemned in several cases under Article 102 where such a practice acts as an incentive to customers to become tied to the dominant firm in terms of obtaining their requirements exclusively from it. Several types of such discounts and rebates have been condemned, including:

- loyalty or fidelity rebates (an obligation on the customer to purchase most or all of its requirements from the dominant firm as a condition for receiving the discount: see the case of *Hoffmann-La Roche* v *Commission*)
- target rebates (an obligation on the customer to meet or exceed a particular target, for example a particular turnover: see *Michelin NV* v *Commission*)
- across-the-board rebates (an obligation on a customer to purchase from a dominant firm the whole range of products made by the firm: see *Hoffmann-La Roche* v *Commission*).

Michelin [France] v Commission

The treatment of discounts and rebates under Article 102 was considered by the GCEU in Case T-203/01 *Manufacture française des pneumatiques Michelin* [*France*] v *Commission* [2003] ECR 1. This is an interesting judgment in which the GCEU explained in economic terms when rebates will be found to be abusive. The case concerned a complex graduated system of rebates on Michelin products with a reference period of one year which was operated by Michelin France, a manufacturer of new and retreaded tyres.

At paras. 58–60 of its judgment, the GCEU dealt with the issue of a quantity rebate linked solely to the volume of purchases made from a dominant firm. According to the Court, such a rebate is generally considered not to fall within Article 102 because it is deemed to reflect efficiency gains and economies of scale made by the dominant firm.

Thus, a rebate in which the rate of the discount increases according to the volume purchased will not fall within Article 102 unless the system for granting rebate reveals that it is not based on an economically justified countervailing benefit, but tends to prevent customers obtaining their requirements from competing sources. According to the GCEU, determining this requires an examination of the circumstances in question – in particular the criteria and rules governing the grant of the rebate.

In the instant case, the objectionable qualities of the terms in question were that Michelin France calculated the discounts not by tranche, but on the basis of turnover in Michelin products overall and with a reference period of one year (see paras. 81–111). In dismissing Michelin France's application, the GCEU made several important findings:

- Michelin's quantity rebate system was intended to tie customers (truck tyre dealers in France) to it by granting advantages which were not based on any economic justification.
- Michelin failed to establish that its rebates were based on actual cost savings.
- The system was loyalty inducing and so tended to restrict customers from choosing freely among suppliers.
- The system made access to the market more difficult for competitors.
- A system such as Michelin's is within the mischief of Article 102, regardless of whether it is transparent or not.

- The Commission was wrong to say that the ECJ had held that for a system of rebates to fall outside Article 102, the reference period in the system could not exceed three months: the ECJ did not expressly hold this.
- The loyalty-inducing nature of a system of rebates calculated on total turnover achieved increases in proportion to the length of the reference period.
- If a rebate is granted for purchases made during a reference period, the loyalty-inducing effect is less significant where the additional rebate applies only to the quantities exceeding a certain threshold than where the rebate applies to total turnover achieved during the reference period.

British Airways plc* v *Commission

The GCEU (upheld by the ECJ) also condemned rebates by dominant firms which encourage and induce loyalty from customers in Case C-95/04 P *British Airways plc* v *Commission*. In this case (which we shall consider in more detail presently) it was found that there was an abuse in the bonuses granted to travel agents on sales of British Airways tickets calculated on the overall volume for each target level met.

Intel

On 13 May 2009 the Commission delivered its decision in the *Intel* case. It found serious abuses of dominance on the part of Intel and as a result imposed fines on the firm totalling €1.06 billion.

Intel's problematic practices concerned the market for computer chips (known as x86 central processing units, CPUs). Among other things, the Commission condemned loyalty rebates offered by Intel to computer manufacturers, direct payments given to retailers who stocked computers with Intel x86 CPUs, and direct payments to computer manufacturers to halt or delay launch of products containing CPUs of competitors and to limit sales channels for these products.

4.3.8 Price discrimination

Discrimination is declared unlawful in Article 102(c) TFEU, which refers to 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

Note that the prohibition in the paragraph also applies to the situation of price discrimination. However, this is not an absolute prohibition and so there may be situations in the real world in which discrimination may be acceptable. You need to look closely at the particular situation in order to determine whether there is indeed discrimination within the meaning of Article 102.

United Brands* v *Commission

There are several cases under Article 102 in which price discrimination was condemned. A good example is *United Brands* v *Commission*, in which the ECJ condemned the price discrimination used by United Brands. Importantly, it found that this was operated with reference to geographical location in the EU. By paying close attention to the geographical dimension of United Brands' discrimination policy, the ECJ made clear the crucial importance of the single market objective in EC competition law.

British Airways plc* v *Commission

British Airways plc v *Commission* also concerned price discrimination within the meaning of Article 102. In this case, British Airways, the largest British airline, was found to hold a dominant position in the purchasing of travel agency services, with a market share of about 40 per cent compared to the five nearest competitors, which held shares ranging from about 3 to 7 per cent.

The Commission found, among other things, that BA had abused this position contrary to Article 102 with commission bonus agreements which unfairly discriminated between agents because they were based on meeting or improving upon certain sales targets rather than overall quantities or level of service. The Commission's finding of abuse was upheld by the GCEU and ultimately the ECJ.

4.3.9 Predatory pricing

Predatory pricing refers to the situation where a dominant firm lowers its price to below cost level for a period of time during which it will be able to eliminate or contain a competitive force. Following that, and once the firm considers it safe, it will raise its price to a level above the competitive price level in order to compensate itself for the losses it made during the period in which it sold its products below cost.

The concept of predatory pricing is very difficult to apply in practice. It has been used by the Community Courts and the Commission in a few cases under Article 102, most notably *AKZO* v *Commission* and *Tetra Pak* v *Commission* and most recently the Commission's decision in *Wanadoo* (2003). *Wanadoo* was appealed to the GCEU (Case T-340/03), which confirmed that it was not necessary to demonstrate recoupment on the part of the dominant firm, and later to the ECJ (Case C-202/07P). Looking at the decided cases, it seems that the following has been established with regard to predatory pricing:

- Predatory pricing will be presumed to exist where the firm reduces its prices below average variable cost.
- Where the firm reduces its prices below average total cost but above average variable cost, predatory pricing will be taken to exist if the practice is part of a policy aimed at eliminating a competitor. Evidence of such a policy includes threats made by the dominant firm towards such a competitor.

4.3.10 Selective price-cutting

Selective price-cutting is quite similar to predatory pricing in that it involves a reduction in the price charged by the dominant firm. However, there are important differences between the two concepts, most notably the fact that in selective price-cutting situations there is no selling below cost.

What selective price-cutting means is that the dominant firm selects a particular customer and reduces the price it charges to that customer. Of course, this may involve discrimination in the sense of para. (c) of Article 102. However, you should remember from our discussion above that to establish discrimination, we need to show that in the situation the dominant firm is 'applying dissimilar conditions to equivalent transactions'.

Thus, if customer A whom the dominant firm selects for price-cutting and customer B to whom the firm does not wish to extend the same offer are not on an equal footing (i.e. are different in size, such as a small kiosk and a large supermarket), then there will be no discrimination within the meaning of Article 102.

But this does not mean that selective price-cutting is not objectionable on other grounds. For example, it may be objectionable where harm is likely to be caused to an as-efficient competitor.

Compagnie Maritime Belge* v *Commission

A key case in which the ECJ dealt with selective price-cutting is Joined Cases C-395/96 P and C- 396/96 P *Compagnie Maritime Belge* v *Commission*. The Court found that there was selective price-cutting which amounted to an abuse of a dominant position. The factors relied on by the ECJ to establish this were very unusual:

- The case concerned a highly specialised sector: maritime transport.
- There was a very strong dominant position with a 90 per cent market share.
- There was only one competitor.
- There was evidence of threats against the only competitor.

So, selective price-cutting will not always be condemned as an abuse. This means that in a situation where the special factors present in the case of *Compagnie Maritime Belge* are absent and the dominant firm, through its practice of selective price-cutting, merely aims to 'meet competition' as opposed to 'defeat' it, then such a situation will not necessarily be one of 'abusive' selective price-cutting. In other words, selective price-cutting should be looked at in light of the particular circumstances of the case.

4.3.11 Excessive or unfair pricing

A dominant firm which charges excessive or unfair prices may risk infringing Article 102. Indeed, para. (a) of the Article provides that it is an abuse of a dominant position for a dominant firm to directly or indirectly impose unfair purchase or selling prices. A key judgment in which the ECJ condemned such a practice was *United Brands* v *Commission*. However, excessive pricing is not a priority matter for the Commission when applying Article 102 since, like many other competition authorities around the world, it is reluctant to intervene in such cases. There have been have been very few cases where there has been intervention on the ground that a dominant firm is charging a higher price, though they do exist in some regimes. Other than the EU, the South African and UK competition law regimes provide examples.

Useful further reading

Aitman, D. and A. Jones 'Competition law and copyright: has the copyright owner lost the ability to control his copyright?', (2004) 26 *European Intellectual Property Review* 137.

Capobianco, A. 'The essential facility doctrine: similarities and differences between the American and European approaches', (2001) 26 *European Law Review* 548.

Dabbah, M. 'Conduct, dominance and abuse in "market relationship": analysis of some conceptual issues under Article 82 EC', (2000) 21 *European Competition Law Review* 45.

Doherty, B. 'Just what are essential facilities?', (2001) 38 *Common Market Law Review*. 397.

Reminder of learning outcomes

By this stage you should be able to:

- explain the concept of abuse
- identify the different types of abuse
- discuss the rationale for considering particular behaviours to be abusive.

Self-assessment questions

Question 1 'The interpretation that has been given to the term "abuse" in Article 102 TFEU by the EU Courts and the European Commission is not satisfactory. There is a real risk that competitive responses on the part of dominant firms will be condemned as abusive, which can only be harmful to consumer welfare.' Discuss.

This is the sort of essay question that could well be set in an examination. You may wish to try writing an answer to it under examination conditions (that is, within 45 minutes and without referring to your notes.

Question 2 PM, a UK company, specialises in the production of printers. PM produces two main types of printers:

- PM 500, a large-size printer, suitable for the office, with a printing capacity of 120 pages per minute;
- PM 100, a considerably smaller printer, suitable for both office and home use but with a printing capacity of 10 pages per minute.

PM is the leading producer in the market for large-size printers in the EU, with a market share of approximately 53 per cent. There are three other major producers in that market operating throughout the EU, Alpha, Beta and Gamma, with market shares of 19 per cent, 14 per cent and 9 per cent respectively. There are many producers of small-size printers. The production of printers requires a considerable amount of commercial and technical know-how.

PM has recently acquired Portables, a Swedish company which specialises in the production of portable printers. Portable printers are not very popular among customers in the EU, but PM is confident that, with its technology and well-established system of advertising, it can make portable printers successful in the printers market generally.

PM seeks your advice on a variety of arrangements:

a. PM offers rebates off its list prices to customers if they purchase printers only from PM over a period of two years.

b. A further rebate is offered to customers by PM if they exceed the number of PM 500 printers sold in the preceding year.

c. PM has insisted that it will supply PM 500 printers to customers in Spain only if they also agree to purchase PM 100 and portable printers from it as well.

d. PM requires its UK customers to purchase most of their printers from it.

e. PM has refused to supply PM 500 printers to Epsilon, a customer with whom PM has been dealing for the last three years. PM claims that Epsilon has entered into an agreement to promote printers produced by one of PM's competitors and that it has not received the last two monthly payments from Epsilon.

f. PM has introduced a policy whereby it offers very favourable discounts to certain customers which PM believes are likely to place orders for printers with PM's competitors. PM is reluctant to make similar offers to its other customers.

Advise PM whether any of its arrangements might infringe EC competition law. What further information would you require from PM?

This is a good example of the sort of problem question that you might face in an examination. Again, you may wish to try answering it under exam conditions.

For advice on answering the questions, see overleaf

Advice on answering the questions

Question 1

An answer should:

- *Note that Article does not proscribe dominance as such; it is only the abuse of dominance that is proscribed. The definition of abuse is therefore crucial.*
- *Discuss the meaning of abuse.*
- *Refer to the various (controversial) examples of abuse that have emerged over the years.*
- *Make sure you reach a clear conclusion: do you agree with the statement in the question or not?*

Question 2

Key points to cover:

- *Discuss whether there is a dominant position held by PM. You will need to define the relevant product and geographic market(s) using the case law and the Commission's Notice on market definition, then look at PM's market share in the relevant market(s) and other factors in order to establish whether PM is dominant.*
- *If you think that PM has (or may have) a dominant position, consider whether this dominant position is held in the common market or a substantial part of it.*
- *Consider whether there is an abuse of dominance by PM in relation to the various arrangements and, if yes, whether there is an objective justification and whether PM's behaviour is proportionate:*
    - *Arrangement (a): Refer to and discuss* Hoffmann-La Roche. *Does the period of the discount mean that it is not an abuse of a dominant position? See* Michelin [France] *v* Commission.
    - *Arrangement (b): Discuss the issue of target rebate. See* Michelin *v* Commission.
    - *Arrangement (c): Discuss the issue of tying. You should refer to the relevant case law, most notably* Tetra Pak *v* Commission.
    - *Arrangement (d): Discuss the difficulty with the word 'most' and the need for clarification (indeed substitution) of the word. You should refer to* Hoffmann-La Roche *and the Commission's Guidelines on vertical restraints, as well as the issue of 'non-compete obligation'.*
    - *Arrangement (e): Discuss refusal to supply and* Commercial Solvents *v* Commission. *You should consider the issue of objective justification: Epsilon's failure to keep up the monthly payments; and the doctrine of proportionality: PM's demand for the overdue payments before halting supplies.*
    - *Arrangement (f): Discuss the extent of the discount: is the reduction below cost? In case it is, you should discuss the issue of predatory pricing. If not, consider selective price-cutting and the ECJ in* Compagnie Maritime Belge *v* Commission.
- *Acquisition of Portables: could this be regarded as strengthening a dominant position and so an abuse (see* Continental Can *v* Commission*)? Alternatively, could it be regarded as an indicator of market power?*
- *Discuss the issue of effect on trade between Member States and refer to* Commercial Solvents *v* Commission *and the Notice on effect on trade between Member States (2004).*
- *Finally, note the Commission's Guidance on Article 102 and the account given in the Guidance in relation to the relevant practices.*