THE TREATMENT OF DOMINANT UNDERTAKINGS UNDER EU COMPETITION LAW: TIME FOR A NEW APPROACH?

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ABSTRACT

Article 102 of the Treaty on the Functioning of the European Union ("TFEU") prohibits abuse of a dominant position by undertakings. It is clear therefore that Article 102 TFEU restricts the conduct of dominant undertakings. Although less evident, Article 101 TFEU, which prohibits anti-competitive agreements, also restricts the conduct of dominant undertakings. In fact, dominant undertakings famously have a 'special responsibility' not to distort competition on the market.

It is the argument of this thesis that the way in which the competition rules, in particular Article 102 TFEU, are now applied takes this special responsibility too far. The form-based approach evident in most Article 102 TFEU cases effectively means that dominant undertakings cannot contemplate entering into exclusive dealing arrangements, granting loyalty rebates or refusing supplies to existing customers. Although more rigorous testing is required by the existing case law, refusing supplies to new customers and squeezing competitors' margins is also generally prohibited.

There is already some literature on how this impacts markets and dominant undertakings generally. However, there is next to no literature on how this impacts small jurisdictions and dominant undertakings in small jurisdictions. This thesis therefore builds upon the existing literature on the impact of the current application of the competition rules on markets and dominant undertakings but specifically considers the case of small jurisdictions. One of the smallest Member States of the European Union, Malta, is used as a case study to analyse how the application of EU competition law affects small jurisdictions.

This thesis considers both the definition of dominance and its assessment (Part I) as well as the application of the law to four 'types' of conduct common in small jurisdictions (Part II), in order to determine whether it is now time for a new approach to the treatment of dominant undertakings under EU competition law, particularly in small jurisdictions. The thesis concludes that a new approach is indeed necessary and proposes how it might be achieved, primarily through an effects-based approach to EU competition law.

DEDICATION

To my parents and husband.

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LIST OF ABBREVIATIONS

CJ	Court of Justice
GC	General Court
CJEU	Court of Justice of the European Union (includes CJ and GC)
Commission	European Commission
Office for Competition	OC
Office for Fair Competition	OFC
CFT	Commission for Fair Trading
Appeals Tribunal	Competition and Consumer Appeals Tribunal

CHAPTER 1: INTRODUCTION

SCOPE AND OBJECTIVE

> I am in favour of strong competition – I will not constrain large companies from competing on the merits. But I will not hesitate to challenge the behaviour of major players unduly squeezing out smaller competitors.[1]

Margrethe Vestager, the European Commissioner responsible for competition, made her policy intentions clear in her first opening statement to the European Parliament back in 2014 – dominant undertakings are free to compete on the merits, but will be prohibited from eliminating smaller competitors. Ironically this statement belies one of the major criticisms of EU competition law and policy – that it tends to protect competitors ('unduly squeezing' them out) rather than competition.

The aim of this thesis is to analyse whether the treatment of dominant undertakings under European Union ("EU") competition law needs to be re-examined particularly in its application to small jurisdictions. In other words, is the interpretation and application of the competition rules preventing actions by dominant undertakings, especially in small jurisdictions, which in reality are pro-competitive or neutral, thereby endangering the very objective of competition law of protecting competition? Is a new approach to the treatment of dominant undertakings under EU competition law required, specifically in small jurisdictions?[2] The focus of this research will be Article 102 of the Treaty on the Functioning

[1] Margrethe Vestager, 'Hearing By The European Parliament: Introductory Statement Of Commissioner-Designate Margrethe Vestager Competition' (Brussels, 2 October 2014), available at < http://ec.europa.eu/commission/file/381/download_en> accessed 11 December 2014

[2] It should be noted at the outset that the aim of this thesis is not to posit the elimination of the prohibition on abusive conduct, but to examine whether, how and in which cases (if at all) the interpretation and application of the competition rules vis-à-vis dominant undertakings should be fine-tuned, in particular in order to take

of the European Union ("TFEU"), which deals exclusively with dominant undertakings, and which therefore restricts their conduct. However, the effect of Article 101 TFEU will also be considered, since this may come into play when agreements are entered into by dominant undertakings, particularly when they enter into vertical agreements in the ordinary course of business.

This thesis will necessarily assess whether the EU competition rules need to be re-interpreted in general, but it will focus on the effect that its current application and proposed changes have on small jurisdictions and consider whether the application of EU competition law should be different in such markets. Therefore, this thesis first examines the problems raised by the application of EU competition law to all markets and jurisdictions – irrespective of size – before honing in on the particular problems created for small jurisdictions.

In order to determine how the competition rules contained in the TFEU apply to small jurisdictions particular attention is given to the application of the EU competition rules in Malta. Malta is used as a case study because it exemplifies a small jurisdiction;[3] it embodies the characteristics which are particular to small jurisdictions,[4] and is therefore a small jurisdiction 'writ small', if you will.

This introductory chapter does two things. First, it sets the scene: it explains how the EU competition rules apply to dominant undertakings and considers the matter of 'small

account of the particular characteristics of small jurisdictions. On the conclusion that antitrust law 'should abandon its attack on (…) unilateral practices altogether, or at least sharply circumscribe their use' see Richard A Epstein 'Monopoly Dominance or Level Playing Field? The New Antitrust Paradox' (2005) 72(1) The University of Chicago Law Review 49, 49. On the conclusion that small jurisdictions need competition law, see among others Michal S Gal *Competition policy for small market economies* (Harvard 2009) and Ping Lin and Edward KY Chen 'Fair competition under laissez-faireism: policy options for Hong Kong' (Lingnan Univeristy of Hong Kong, 2008) < http://www.ln.edu.hk/econ/staff/plin/Fair%20Competition%20under%20Laissex%20Faireism.pdf> accessed 16 April 2016

[3] See p 30 *et seq*

[4] See p 7

jurisdictions', analysing the circumstances in which the EU competition rules apply to such jurisdictions *qua* markets and the general issues which arise in relation to the application of competition rules to small jurisdictions. Secondly, this chapter explains the content of this thesis. It justifies the use of Malta as a case study in order to examine the application of EU competition rules to small jurisdictions, and then gives an overview of the structure of this thesis and explains the methodology used. In doing so, it also explains why this research is necessary and what distinguishes it from the (scant) literature in the field.

WHAT IS A 'SMALL JURISDICTION'?

In this thesis the term 'small jurisdiction' is used to refer to 'small' EU Member States. Determining which States are members of the EU is a simple enough task. Determining which of these is to be considered 'small' is more of a challenge.

In order to do so, reference has to be made to the literature in the field of international relations, which has grappled with the difficulties of determining which States are to be considered 'small'. Indeed there is no single definition of what constitutes a 'small state'.[5] Nugent notes that there are generally two approaches in the relevant literature to defining a

[5] Tom Crowards 'Defining the category of "small" states' (2002) 14 Journal of International Development 143, 143; Neill Nugent 'Small States and European Integration: the case of Cyprus' (Seventh Biennial International Conference of the European Community Studies Association, Madison June 2001), p. 3; Diana Panke 'The influence of small states in the EU: structural disadvantages and counterstrategies' (2008) UCD Dublin European Institute Working Paper <http://www.ucd.ie/t4cms/wp_08-3_diana_panke.pdf> accessed 7 March 2015, p. 3; Roderick Pace 'Small States and the Internal Balance of the European Union: the perspective of small states' in Jackie Gower and John Redmond (eds) *Enlarging the European Union: The Way Forward* (Ashgate, Aldershot 2000), 107; Baldur Thorhallsson and Anders Wivel 'Small State in the European Union: What do we know and what would we like to know?' (2006) 19(4) Cambridge Review of International Affairs 651, 652-653; Bimal Jalan 'Introduction' in Bimal Jalan (ed), *Problems and policies in small economies* (Commonwealth Secretariat, 1982) 6; PJ Lloyd and RM Sundrum 'Characteristics of Small Economies' in Bimal Jalan (ed), *Problems and policies in small economies* (Commonwealth Secretariat, 1982),18-20

state as 'small'. One approach is objective, referencing population, GDP and geographical size,[6] or a combination of the three.[7]

The other approach is qualitative, defining a small state in relation to its position towards its environment in which the state has a certain deficiency in influence and in autonomy in relation to large powers.[8] In other words, can a case be made out that that State has 'exerted influence and power on the international stage that is significantly greater than its size'?[9]

Panke's methodology is a conflation and variation of these approaches, tailored specifically to the EU. She notes that within the EU 'smallness' is determined either 'based on economic and financial power (GDP), political power (votes in the Council, number of MEPs), population or territory'.[10] However size is relative, as even if the line between 'small' and 'big' is based on the EU-28 average, the groupings may vary depending on the measures used.[11]

An alternative definition is that expounded by Gal in her pivotal work on 'small economies' which she defines as being 'an independent sovereign economy that can support only a small number of competitors in most of its industries'.[12] This definition is sometimes considered problematic since it implies that an economy is small 'only if a majority of its markets are concentrated and have high entry barriers',[13] and assessing whether this is the case is nigh on impossible. However, Gal's definition relies on the characteristics of small states, and in this sense indicates one of the defining features of small states/economies, namely highly

[6] Nugent (n 5)
[7] Crowards (n 5)
[8] Nugent (n 5) 3-4
[9] Crowards (n 5), 165
[10] Panke (n 5), 4
[11] *Ibid*
[12] Gal (2009) (n 2) 2
[13] OECD Global Forum on Competition 'Small Economies and Competition Policy: A background paper' (February 2003) CCNM/GF/COMP(2003)4, para 15.

concentrated markets and high entry barriers. This definition has also been criticised as not addressing the concerns of economies which are small due to population and GDP or level of development.[14] However this critique ignores the fact that Gal believes that small population size is indicative of the small size of the economy, since this reduces demand.[15] Other implications of this definition will be considered in due course.

Given these various definitions, which EU Member States would be considered to be small and therefore are 'small jurisdictions'? Malta, the EU's smallest Member State, certainly falls squarely within each definition, given its limited population, land mass and GDP,[16] and the fact that it has never exerted influence on the international stage which goes beyond its size. Indeed, all literature on small states or small economies classify Malta as being small.[17] Likewise, the other island state – Cyprus – is easily classified as 'small'. Both Malta and Cyprus are classified as 'small states' by the World Bank.[18]

What about other Member States? By cross-referring the list compiled by Crowards[19] and Panke[20] a list of small Member States *qua* small jurisdictions emerges. Crowards and Panke are taken as reference points since the former uses a combination of GDP, population and geographic size to determine smallness whilst the latter considers the influence the Member States have on EU policy. Therefore cross-referring both lists means that the term 'small

[14] *Ibid*, para 15
[15] Gal (2009) (n2), 1-2
[16] Crowards (n 5)
[17] See for instance the Intergovernmental Panel on Climate Change; Crowards (n 5); Panke (n 5); Gal (2009) n 2; Leonard A Nurse and Graham Sem 'Small Island States' in James J McCarthy, Osvaldo F Canziani, Neil A Leary, David J Dokeen and Kasey S White (Eds) *Climate Change 2001: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2001) and Nobou Mimura and Leonard A Nurse 'Small Islands' in M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson (eds) *Climate Change 2007: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2007)
[18] https://data.worldbank.org/country/S1 accessed 31 March 2021
[19] n 5
[20] n 5

jurisdiction' is used solely to refer to those Member States that satisfy all the criteria that have been used to determine smallness. Using this cross-referencing method, apart from Malta and Cyprus the following would be considered small jurisdictions: Estonia, Latvia, Slovenia, Lithuania, Slovakia, Bulgaria, the Czech Republic, and Hungary. Therefore in this thesis, the term "small jurisdiction" is to be taken to refer to these small Member States.

Arguably the same policy discussions – and the conclusions reached in this thesis – would not just apply to small Member States, but also to small 'discrete' parts of larger Member States, such as the Mediterranean islands of Sardinia, Sicily, Rhodes and the Balearics – or even regions within Member States. However, this thesis will focus on Member States, as self-sufficient jurisdictions, with independent legal and judicial systems as well as economies, notwithstanding their membership in the internal market and, in some cases, in the eurozone. Further studies would need to be undertaken to determine whether the same, or some of the, conclusions reached vis-à-vis small jurisdiction would apply to parts of larger Member States.

This also distinguishes this thesis from Gal's work, which purposefully focuses on 'small economies' rather than 'small jurisdictions' in order to eliminate from her study and conclusions those jurisdictions or states whose economy is fully dependent on a neighbouring state's.[21] Although Gal does consider two of these jurisdictions in some of her work[22] – Malta and Cyprus – this work pre-dates 2004, and therefore accession of these small jurisdictions to the EU. Gal therefore never considers the application of EU competition law to these two

[21] Gal (n 2) 2

[22] n 2; Michal S Gal 'Market Conditions under the magnifying glass: general prescriptions for optimal competition policy for small market economies' (New York University Centre for Law and Business, Working Paper CLB-01-004(< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267070> accessed 16 April 2016

States. Indeed her goal was to establish an ideal competition policy for small economies rather than assessing how a particular competition regime applies and can be tailored to a small economy.

CHARACTERISTICS OF SMALL JURISDICTIONS

The Member States that have been identified as small jurisdictions may be considered a disparate group. However small states generally display some or all of the following characteristics, and the said Member States *qua* small jurisdictions are no different, even though they are part of the internal market:[23] a small domestic market; market failures, often due to relatively large external social and environmental effects; limited natural resources, which together with low inter-industry linkages, result in a relatively high level of imports in relation to GDP;[24] high reliance on export markets, which necessarily result in a dependence on economic conditions in the world in general; and reliance on state aid.

Small states suffer from insularity and high transport costs, with transport costs associated with international trade tending to be higher per unit of export than in other countries. Where transport is not frequent or regular, traders in small states need to keep large stocks to meet sudden changes in demand, which involves additional costs of production such as tied-up capital, rent for warehouses and additional wages.[25]

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[23] See Bimal Jalan, 'Introduction' and PJ Lloyd and RM Sundrum 'Characteristics of Small Economies' both in Bimal Jalan (ed), *Problems and policies in small economies* (Commonwealth Secretariat 1982); Lino Briguglio and Eugene Buttiġieġ 'Competition Constraints in Small Jurisdictions' (2004) 30 Bank of Valletta Review 1, 3-6; Lynette Chua Xin Hui, 'Merger control in small jurisdiction economies' (2015) 27 Singapore Academy of Law Journal 369, 374

[24] Lino Briguglio 'Small Island Developing States and their Economic Vulnerabilities' (1995) 23(9) World Development 1615, 1616

[25] Briguglio (1995) (n 27), 1617. See also Lewis Evans and Patrick Hughes 'Competition Policy in small distant open economies: some lessons from the economic literature' (2003) New Zealand Treasury Working Paper 03/31 < http://www.treasury.govt.nz/publications/research-policy/wp/2003/03-31/twp03-31.pdf> accessed 10 April 2016, 3

Moreover, small states also suffer from a small population pool and administrative constraints, which result in the number of personnel and cost of administration, per capita of population, being larger. Although smaller jurisdictions will require less administrative personnel, there is no proportionality in the number of people required, due to the problems caused by indivisibilities.[26] An added problem in relation to competition law is that competition authorities may not be well-staffed because of lack of financial resources and of well-educated lawyers and economists.[27] In fact, competition enforcement tends to be more costly in small markets.[28] This is due to a comparative lack of resources[29] as well as a likely higher administrative cost per capita.[30]

Small states are also characterised by exposure to international prices, since undertakings in small jurisdictions are price-takers, and high infrastructural costs due once again to the problem of indivisibility.[31] Moreover, there is a high degree of economic openness, export concentration and dependence on strategic imports, for instance of fuel and food. These characteristics are associated with economic vulnerability. Small states also tend to have a limited ability to exploit economies of scale,[32] which is in turn linked to the indivisibilities

[26] See also Chua (n 26) 377 and 379; 'A commodity is indivisible if it has a minimum size below which it is unavailable, at least without significant qualitative change' (William J Baumol 'Indivisibilities' in Steven N. Durlauf and Lawrence E. Blume (eds) *The New Palgrave Dictionary of Economics* (2nd edn, Palgrave 2008) < http://www.dictionaryofeconomics.com/article?id=pde2008_I000069 > accessed 30 March 2015

[27] On this later point see OECD 'Small economies and competition policy: a background paper' (February 2003) CCNM/GF/COMP(2003)4, para 33 and International Competition Network 'Special Project for the 8th Annual Conference: Competition law in Small Economies' < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 17 October 2015, 28

[28] Chua (n 26) 381

[29] Chua (n 26) 379

[30] Chua (n 26) 379

[31] Eugene Buttiġieġ ' Challenges facing Malta as a micro-state in an enlarged EU' (2004) 29 Bank of Valletta Review 1,2-3

[32] Lino Briguglio 'Resilience building in vulnerable small states' in Rupert Jones-Parry and Andrew Robertson (eds) *Commonwealth Yearbook 2014* (Nexus 2014) < https://www.um.edu.mt/__data/assets/pdf_file/0012/205104/Briguglio_Resilience_Article_for_Comsec_Yearbook_13Jan13.pdf > accessed 7 March 2015

associated with small-scale operations[33] and a limited scope for specialisation.[34] Perhaps more crucially, small states are unable to exploit economies of scale to the same extent as larger states.[35] One of the problems associated with this inability to exploit economies of scale, which is exacerbated in markets where there are high entry barriers, is that markets in small jurisdictions normally cannot self-correct, or do so only to a limited extent.[36]

In essence, undertakings in the small jurisdictions are limited by the size of the local markets.[37] Small jurisdictions are characterised by vulnerability in political, economic and strategic terms.[38] It is these characteristics which pose particular challenges to the application of the EU competition rules in relation to dominant undertakings in small jurisdictions, notwithstanding the advantages of the internal market.

THE INTERNAL MARKET AND SMALL JURISDICTIONS

Some may argue that as Member States of the EU, the economy in small jurisdictions is not effectively any different from the other Member States, and therefore EU competition law would not affect small jurisdictions any differently than larger Member States. Membership of the internal market might suggest that there are no high barriers to enter markets in these jurisdictions and that the economies of small jurisdictions are integrated not just together but also with those of the other Member States, effectively creating a "large" jurisdiction, economy and/or market. Moreover, being part of the internal market means that small

[33] Briguglio (2014) (n 35), 1
[34] Briguglio and Buttiġieġ (n 26), 5
[35] PJ Lloyd and RM Sundrum 'Characteristics of Small Economies' in Bimal Jalan (ed), *Problems and policies in small economies* (Commonwealth Secretariat 1982), 26
[36] ICN Special Project (n 30) 27-28. See also Gal (2001) (n 25) 50
[37] Evans and Hughes (n 28) 3. For a comprehensive review of the issues faced by small jurisdictions, see Bimal Jalan (ed), *Problems and policies in small economies* (Commonwealth Secretariat 1982)
[38] Roderick Pace 'Small States and the Internal Balance of the European Union: the perspective of small states' in Jackie Gower and John Redmond (eds) *Enlarging the European Union: The Way Forward* (Ashgate 2000), 109-110

jurisdictions are open to trade and consequently the markets within small jurisdictions subject to fierce competition from imports. Whilst it is true that EU membership offers some advantages in this respect, it does not follow that small jurisdictions do not have the same characteristics as other small states which are not part of a free trade area.

Indeed, one of the very characteristics of small states is openness to trade. Economic openness indicates economic vulnerability, because of the over-dependence on both exports, required to boost economic activity, and imports, which may be required for strategic products, such as fuel and food. Being part of the internal market simply means that the small jurisdictions may find it easier to export and import products – but does not mean they do not (over) rely on them.

Moreover, the internal market does not do away with costs associated with transportation and storage. This is especially the case in the small jurisdictions which are island states, such as Malta and Cyprus, but is also true of the other small jurisdictions, which are all geographically based to the east of the EU, and have traditionally tended to trade within the Eastern European bloc. In other words, whilst these small jurisdictions are not 'isolated' in terms of being part of a larger, largely successful, trading bloc, they are 'isolated' geographically. This is why the small jurisdictions are the EU Member States which are most open to trade.[39]

Neither does the internal market do away with the problems relating to lack of human resources – on the contrary, the free movement of people tends to create a 'brain drain' in small jurisdictions, with specialised personnel moving away from the small jurisdiction to

[39] <https://ourworldindata.org/grapher/trade-openness?region=Europe> accessed 2 April 2021

other larger Member States to study or work, where there are naturally more opportunities for both due to the size of the jurisdiction.

Therefore, although the internal market does remove a lot of costs relating to importation and exportation, and to the provision of services across borders, as well as potentially opening and creating competition, it cannot do away with the characteristics inherent in smallness. As a result, the application of EU competition law in small jurisdictions, particularly the treatment of dominant undertakings, merits further examination, especially since small jurisdictions, given their characteristics, raise particular competition concerns which are not raised in larger jurisdictions.

COMPETITION ISSUES PARTICULAR TO SMALL JURISDICTIONS

Small jurisdictions are expected to have a larger number of domestic markets which are concentrated, coupled with high entry barriers into its industries and inefficient levels of production, although some industries may be highly competitive.[40] Since most markets tend to be highly concentrated, it is common to find a supra-dominant undertaking, a monopoly or an oligopoly in small jurisdictions. It also follows that undertakings in small jurisdictions may enjoy greater market power than those in larger jurisdictions,[41] although this is not necessarily the case.

[40] Evans and Hughes (n 28) 28. See also International Competition Network 'Special Project for the 8th Annual Conference: Competition law in Small Economies' < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 17 October 2015, 27; Chua (n 26) 374; Michal S Gal 'The effects of smallness and remoteness on competition law – the case of New Zealand' (2006) Law & Economics Research Paper Series Working Paper No 06-48 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942073> accessed 10 April 2016, 4-6; Lin and Chen (n 2); Gal (2001) (n 25), 13-32; Gal (2009) (n 2), 13-45; Evans and Hughes (n 28), 5-14; Chua (n 26) 374

[41] Lin and Chen (n 2) 11

The reason for the high propensity to market concentration is that in many economic sectors within small jurisdictions, having several competitors (whether homegrown national suppliers or through imports) is unsustainable. Economies of scale reduce the number of undertakings operating in an industry because the number of undertakings necessary to supply any given demand is lower and therefore economies of scale may 'reduce or altogether eliminate competition in the affected market'.[42]

Because of the size of the market, certain sectors within the market may be a natural monopoly, namely markets where the entire demand within the relevant market can be satisfied at lowest cost by one firm.[43] In other words:

> [d]omestic competition tends to be curtailed in small economies because small size does not support a large number of firms producing a similar product. This generates a tendency toward oligopolistic and monopolistic organization.[44]

This phenomenon was recognised by the Maltese Commission for Fair Trading ("CFT")[45] in *Federated Mills*[46]. Federated Mills plc ("FM") was dominant on the market for the grinding of flour used for baking Maltese bread, in which it had a market share of around 95%. There was only one other small competitor on the relevant market. The CFT considered FM to be a 'natural monopolist'; it noted that Malta's small size, as regards its population, geographic mass and gross domestic product does not permit effective competition among grinding mills.

[42] Gal (2006) (n 46) 8
[43] Richard A Posner 'Natural monopoly and its regulation' (1969) 21(3) Stanford Law Review 548, p 548. See Gal (2009) (n 2)
[44] Briguglio (1995) (n 27), 1617
[45] Replaced by the Competition and Consumer Appeals Tribunal by virtue of Act VI of 2011, and now by the Civil Court (Commercial Section) by virtue of Act XVI of 2019
[46] Case number 5/2007: ex officio *investigation by the Office for Fair Competition with regard to Federated Mills plc in terms of article 13A of the Competition Act* 28 April 2008

In fact FM itself was composed of a number of different mills which had previously acted in competition with each other; however in order to survive, these competitors had to unite. Although there was no intention to create a monopoly, the particular size of Malta led to the creation of this monopoly. This was viewed as a natural development usual in small states.[47]

Moreover, the ease with which a small jurisdiction can be monopolised or dominated by a few firms has been seen as a particular trait of small states, which in turn means that such markets are characterised by limitations on the effectiveness of domestic competition policy.[48] Furthermore, small states may also be prone to state monopolies, particularly in the utilities sector, in order to counteract the risk of market failure.[49] This is less likely to occur within small jurisdictions, which are members of the EU, where privatisation and liberalisation are the order of the day. However, the influence of previous state monopolies within the small jurisdictions may become relevant when assessing dominance, although it need not necessarily indicate dominance.

That said, not all markets within small jurisdictions will necessarily be highly concentrated, and on the contrary some may be highly competitive. These would tend to be markets where economies of scale are less important.[50] Therefore it is important to keep in mind that whilst small jurisdictions are characterised by monopolies, in particular natural monopolies, and oligopolies, this *does not mean that all the markets in small jurisdictions are monopolies or oligopolies*, although markets in small jurisdictions are likely to be concentrated to some

[47] See Annalies Azzopardi 'A critical analysis of the leading decisions of the Commission for Fair Trading' (LL.D thesis. University of Malta 2010), 120-1
[48] Briguglio (2014) (n 35)
[49] International Competition Network 'Special Project for the 8th Annual Conference: Competition law in Small Economies' < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 17 October 2015, 27
[50] Chua (n 26) 372

extent or other. This in itself is a peculiarity of small jurisdictions. Therefore whilst in larger jurisdictions the majority of the markets are likely to be competitive, with only a few oligopolistic markets and no or a very little monopolistic markets, smaller jurisdictions will have a proportionality higher number of oligopolistic and monopolistic markets, notwithstanding that this is not true of all industry sectors within the small jurisdiction. Indeed, the majority of the markets in small jurisdictions will be monopolies, duopolies or oligopolies. This is what led Gal to define 'small economies' by referring to the small number of competitors in most industries.[51] This particular feature should be taken into account when making the competitive assessment.

However, notwithstanding the peculiarities of small jurisdictions, the Commission has been quoted as saying that there is

> no reason to modify competition law or their application according to the size of the relevant geographic market, and consider[s] as counter-productive and dangerous arguments that competition laws should be diluted or [misapplied] in order to allow <national champions> to develop, regardless of the size of the jurisdiction or market.[52]

Such a stance from the Commission is perhaps to be expected, given that it is the 'watchdog' for EU competition law and its role (so far) has been to apply the competition rules equally. The then-Commissioner Monti addressed concerns that the uniform application of EU competition law was disadvantageous to small jurisdictions by arguing that consumers need

[51] Gal (n 2) 1

[52] International Competition Network 'Special Project for the 8th Annual Conference: Competition law in Small Economies' < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 17 October 2015, 5

protection from dominant suppliers irrespective of the size of the market.[53] His arguments focused on criticism of EU merger policy in particular, however, they are indicative of the EU's stance on competition policy more generally. In his opinion the creation of a company with significant domestic market power would not bring any benefit to the economy of that state;[54] this would imply that in Monti's view a dominant undertaking cannot benefit a small jurisdiction (or indeed any market).

Such a straight line application of EU competition law however may not necessarily be realistic. The few jurists and academics who have actually studied the applicability of competition rules to small states or economies have in fact concluded that competition law must be adapted to them. Gal concludes that whilst competition policy is essential to small economies, it must be specifically tailored to them;[55] she advocates a more efficiency centred approach to merger policy countered with a stricter approach to unilateral conduct and an interventionist approach to natural monopolies.[56] Rutz advocates a refinement of the competition rules of large economies to the particular circumstances of an economy, with smallness being one such criterion.[57] Evans and Hughes back the application of efficiencies criteria to conduct in concentrated markets in small economies, particularly at the expense of rote application of competition rules of thumb.[58]

[53] Mario Monti 'Market definition as a cornerstone of EU competition policy' (Workshop on Market Definition; Helsinki 2011) < http://europa.eu/rapid/press-release_SPEECH-01-439_en.htm?locale=en > accessed 16 April 2016, 12
[54] *Ibid*
[55] Gal (2009) (n 2)
[56] *Ibid*, Gal (2006) (n 46)
[57] Samuel Rutz 'Applying the theory of small economies and competition policy: the case of Switzerland' (2013) 13 J Ind Compet Trade 255, 271
[58] Evans and Hughes (n 28) 28. See also Michael Schefer 'Guidelines for legislation on monopolies and restrictive practices in small economies' (1970) 15 Antitrust Bulletin 781.

There is an argument for saying that the applicability of the competition rules to such limited markets serves precisely one of the main aims of competition law, since competition law will ensure that dominant undertakings do not unlawfully keep the market to themselves, and that it will therefore ensure the market is opened to other competitors. However, this ignores the specific needs of small jurisdictions. As noted, in most sectors in small jurisdictions, monopolies or oligopolies are inevitable. In such markets, competition may not be a feasible method for regulation.[59] There is also evidence that oligopolies are not necessarily conducive to tacit collusion.[60]

More generally, certain aspects of the competition rules may be difficult or undesirable to implement in small jurisdictions.[61] For instance in small jurisdictions, cooperation can be particularly efficient because it enables undertakings to achieve economies of scale and therefore increase export performance. [62] On the other hand, certain conduct, such as refusal to supply, may need to be more readily checked in small jurisdictions, due to constraints in replicating infrastructural facilities.[63] Indeed there is an argument that markets in small jurisdictions which tend to monopolisation or oligopolisation require a tougher approach than that in larger markets, in order to remedy the failure of market forces to rectify the market

[59] Richard A Posner 'Natural monopoly and its regulation' (1969) 21(3) Stanford Law Review 548

[60] Horstmann N, Krämer J and Scnurr D, 'How many competitors are enough to ensure competition? – A note on number effects in oligopolies' [2015] SSRN < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535862 > accessed 8 March 2015

[61] Briguglio and Buttiġieġ (n 26), 1. See also Buttiġieġ (n 34), 12-14

[62] Evans and Hughes (n 28) 28

[63] Briguglio and Buttiġieġ (n 26) 8. See also Gianmaria Martini 'La Politica della Concorrenza: Fatti stilizzati, teoria, evidenza empirica Italiana' (1998) 106(2) Rivista Internazionale di Scienze Sociali 327, where at p. 349 Martini notes that:

'*Dall'analisi dei vari casi emerge la sensazione di un'economia dove la pressione concorrenziale è spesso ridotta (si pensi che l'intesta sulla vigilanza era relative ad un mercato limitato come quello della provincia di Cagliari) dove frequentemente il sistema degli appalti è oggetto di pratiche collusive, dove l'accesso ai mercati è ostacolato grazie al comportamento strategico degli* incumbent *piuttosto che per ragione economiche, dove il monopolio di una rete pubblica di servizi viene utilizzato a scopi discriminatori per limitare la concorrenze dei concorrenti effettivi e l'entrata da parte dei concorrenti potenziali.'*

scenario.[64] *This indicates that competition law in small jurisdictions needs to allow for a varied approach in its application.*

Furthermore, the small size of such markets will also affect the type of cases that will be dealt with under Article 102 TFEU, as well as Article 101 TFEU.[65] In other words, enforcing and applying EU competition law in small jurisdictions poses particular challenges which are as yet not being taken into account, particularly when considering the treatment of dominant undertakings.

OVERVIEW OF EU COMPETITION LAW: HOW DOES EU COMPETITION LAW APPLY TO DOMINANT UNDERTAKINGS?

Given the objective of this thesis, the next matter which has to be determined is how the EU competition rules apply to dominant undertakings. The TFEU contains few provisions relating to antitrust law,[66] even fewer that can be held to constitute 'substantive' competition rules,[67] and only one provision that specifically regulates dominant undertakings.[68] Article 102 TFEU prohibits abuse of a dominant position within the internal market or a substantial part of it in so far as it may affect trade between Member States.

The Court of Justice ("CJ") has made it clear that '[a] finding that an undertaking has a dominant position is not in itself a recrimination'.[69] However, an undertaking in a dominant position 'has a special responsibility not to allow its conduct to impair genuine undistorted

[64] See for instance Gal (2009) (n 2) Chapters 3 and 4
[65] See Silvio Meli 'Fair Competition Law in Malta: Chronicle of a Small State in Champions League Competition' (AECLJ Conference, Malta 13 June 2008)
[66] Namely Articles 101 to 109 TFEU
[67] Namely Articles 101 and 102 TFEU, coupled with Article 106 TFEU
[68] Article 102 TFEU
[69] Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v Commission* [EU:C:1983:313, para 57

competition in the internal market'.[70] Throughout the years, under the remit of Article 102 TFEU, the CJ, the General Court ("GC") and the European Commission ("the Commission") have prohibited a variety of conduct by dominant undertakings which they have considered to be abusive, such as predatory pricing,[71] refusal to supply,[72] exclusive purchasing,[73] margin squeeze,[74] and tying and bundling.[75]

Accompanying Article 102 TFEU is Article 101 TFEU, which prohibits anti-competitive agreements. Although Article 101 TFEU does not specifically regulate the conduct of dominant undertakings, its application has been such as to limit the type of agreements that dominant undertakings can enter into. Article 101 TFEU is split in three parts: the prohibition, the consequence and the legal exception. The prohibition in Article 101 TFEU requires that an agreement or concerted practice between undertakings, or a decision of an association have the object *or* effect of preventing, restricting or distorting competition.

Agreements may be either horizontal or vertical. Horizontal agreements are agreements entered into between actual or potential competitors,[76] whilst vertical agreements are agreements between undertakings which operate at different levels of the production or

[70] Case C-52/09 *Konkurrenscerket v TeliaSonera Sverige AB* EU:C:2011:83, para 24. See also for instance *Michelin I* (n 8), para 57 and Case C-202/07P *France Telecom v Commission* EU:C:2009:214, para 105.
[71] Case C-62/86 *AKZO Chemie BV v Commission* EU:C:1991:286; Case C-202/07 P *France Télécom v Commission* EU:C:2009:214
[72] Cases 6 and 7/73 *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp v Commission* EU:C:1974:18; Case 27/76 *United Brands v Commission* EU:C:1978:22
[73] Case 85/76 *Hoffman La-Roche v Commission* EU:C:1979:36; Case T-65/98 *Van den Bergh Foods Ltd v Commission* EU:T:2003:281
[74] Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603; Case T-336/07 *Telefonica SA v Commission* EU:T:2012:172; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83
[75] Case T-201/04 *Microsoft v Commission* EU:T:2007:289; Case C-333/94 P *Tetra Pak International SA v Commission* EU:C:1996:436
[76] European Commission 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2011] OJ C 11/1, para 1

distribution chain.[77] The prohibition in Article 101(1) TFEU applies to both horizontal and vertical agreements,[78] although the Commission has recognised that 'vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.'[79] This however is unlikely to be the case where one of the parties entering into a vertical agreement is a dominant undertaking.

In fact, the Commission indicates that restraints in vertical agreements when one of the parties is a dominant undertaking are likely to have an anti-competitive effect on the market in terms of Article 101 TFEU.[80] Moreover, the Verticals Block Exemption Regulation[81] does not apply to undertakings whose market share exceeds 30% of the relevant market,[82] meaning that dominant undertakings, which generally have a market share of over 40%, cannot make use of it. The applicability of the horizontal block exemptions is also excluded with respect to dominant undertakings.[83] Furthermore, co-operation agreements are more likely to be considered anti-competitive if a party to them is dominant.[84]

[77] Commission Regulation No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ [2010] L102/1, Article 1(a)
[78] Cases 56 and 58/64 *Etablissements Consten SA & Grundig-Verkaufs-BmnH v Commission* EU:C:1966:41
[79]European Commission 'Guidelines on Vertical Restraints' [2010] OJ C 130/1, para 6
[80] *Ibid,* para 132-134, 153, 194 and 219
[81] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2002] OJ L102/1
[82] *Ibid*, Article 3
[83] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L335/43, Article 3; Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, Article 4
[84] European Commission 'Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2011] OJ C11/1, para 34

As a result, Article 101 TFEU also restrains dominant undertakings.[85] In practice, the applicability of Article 101 TFEU to vertical agreements is likely to restrain dominant undertakings when entering into agreements in the normal course of business, namely agreements with distributors, retailers, customers or suppliers. It is for this reason that this thesis will also consider the application of Article 101 TFEU to vertical agreements entered into by dominant undertakings, where relevant.

Neither the text of these provisions nor their interpretation takes into account the differences in the markets within which dominant undertakings operate, nor the difficulties that dominant undertakings in particular markets may face in order to comply with European Union ("EU") competition law when attempting to conduct business. Indeed Article 102 TFEU in particular has been heavily criticised for the excessive emphasis placed on the legal form of conduct undertaken by dominant undertakings, the insufficiency of economic analysis and lack of attention paid to the economic impact or the effects of the conduct on the market.[86] Moreover, the interpretation of these provisions means that they do not apply to the same conduct in the same manner; in Ibáñez Colomo's words 'some of the presumptions found in the context of Article 102 TFEU are at odds with the way in which the same practices are treated in other areas of EU competition law.'[87]

Furthermore, the impact of Articles 101 and 102 TFEU on undertakings varies according to the size of the relevant market. First of all, where the relevant market is a small jurisdiction (or a part of a small jurisdiction), undertakings in small jurisdictions are more likely to be

[85] See also Monti (n 59) 2

[86] Liza Lovdahl Gormsen 'Article 82 EC: Where are we coming from and where are we going to?' (2006) 2(2) CompLRev 5, 6 .

[87] Pablo Ibáñez Colomo 'Beyond the "More Economics-based approach" a legal perspective on Article 102 TFEU case law' (2016) 53 Common Market Law Review 709, 713

considered 'dominant', because the smaller the relevant market, the larger an undertaking's market share is likely to be.[88] This means that the restrictions contained in Articles 101 and 102 TFEU apply to a greater proportion of undertakings in small jurisdictions than in larger ones. Consequently, there is proportionately a greater number of undertakings which must bear the burden of the 'special responsibility' placed upon them as dominant undertakings. This burden is felt in particular when such dominant undertakings are devising their business strategies. Secondly, 'certain aspects of competition law may not be desirable to implement or may be more difficult to put in operation in small states and other small jurisdictions'.[89] However so far the CJ, the GC and the Commission have not taken this into account when interpreting Articles 101 and 102 TFEU, notwithstanding their professed effects-based approach to competition law.

THE APPLICATION OF EU COMPETITION RULES TO UNDERTAKINGS DOMINANT IN SMALL JURISDICTIONS

As just noted, the treatment of dominant undertakings in EU competition law takes on particular importance when it comes to small jurisdictions, since, in view of the way dominance is assessed, the likelihood of an undertaking being considered dominant in such jurisdictions is greater, particularly since small jurisdictions may not be able to sustain several competitors. Therefore the application of EU competition law to small jurisdictions will effect small jurisdictions differently than larger ones; in certain instances it may stifle competition whilst it may be insufficient in other respects. It is precisely this phenomenon which is examined in this thesis.

[88] See Chapter 2
[89] Briguglio and Buttiġieġ (n 26) 1. See also Buttiġieġ (n 34) 12-14.

The very first step in any competition assessment is the definition of the market. The necessity for market definition has long been noted by the CJEU.[90] Market definition is required to identify competitive constraints on the relevant undertaking/s' behaviour[91] Market definition is essential in order to determine whether an undertaking is dominant, or whether undertakings are collectively dominant, on a particular market. Once a market is defined, the position of the undertaking being examined can be assessed; specifically one can assess the market share of that undertaking, whether there are any barriers to entry and exit in that market, determine who the competitors of that undertaking are, and evaluate whether there is countervailing buyer power.[92] Market definition is also necessary, *inter alia*,[93] to determine whether an agreement has the effect of restricting competition.

The exercise of market definition is considered in detail in Chapter 3; it suffices here to note that it has three aspects – the product market, the geographic market and the temporal market. The discussion in this thesis focuses on when the relevant geographic market is a small jurisdiction or a part thereof., meaning therefore that EU competition law is applied to the small jurisdiction (or a part of it) because it is the relevant market.

The 'geographic market' is defined by the Commission in its 'Notice on the definition of relevant market for the purposes of Community competition law'[94] as comprising:

[90] See Case 27/76 *United Brands v Commission* EU:C:1978:22, para 10, Case 85/76 *Hoffman La-Roche v Commission* EU:C:1979:36, para 21; Case 6/72 *Europemballage Corp & Continental Can v Commission* EU:C:1973:22, para 37

[91] European Commission 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C372/5, para 2 ('Notice on the relevant market')

[92] Discussed in detail in 'Indicators of dominance'

[93] See Richard Whish and David Bailey *Competition Law* (9th edn, OUP 2018) 25 for a more comprehensive list of when market definition is required.

[94] [1997] OJ C372/5

> the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.[95]

In order to make this assessment, the Commission has regard to demand substitutability, supply substitutability and potential competition. The final definition of the geographic market in a particular case could range, in the Commission's words, 'from a local dimension to a global one.'[96] Therefore, whilst it is not a given that the relevant geographical market is limited to the boundaries of a Member State, there may be several instances where this is the case, if in relation not the product being considered, the conditions of competition in that Member State are homogeneous and differentiated from that in other Member States. This means that small jurisdictions are easily capable of constituting the relevant geographic market in competition cases.[97] The relevant geographic market may similarly be part of a small jurisdiction where the conditions of competition in that part are differentiated from the rest of the small jurisdiction and other parts of the internal market. We now turn to examine how conduct by a dominant undertaking in a small jurisdiction would fall to be examined under Articles 101 and 102 TFEU.

'SUBSTANTIAL PART OF THE INTERNAL MARKET'

Article 102 TFEU is applicable only when the abuse occurs within the internal market or a substantial part of it. This element of Article 102 TFEU is a jurisdictional test, establishing the

[95] *Ibid,* para 8
[96] *Ibid,* para 51. Monti (n 24), 10 notes that in 14% of the merger decisions adopted between 1997-2001 markets were defined nationally.
[97] On the definition of the relevant market, see Chapter 2. See also European Commission 'Competition Policy Brief: Market definition in a globalised world' Issue 2015-12 (March 2015)

delimitation between conduct which falls to be regulated by EU competition law, and that which falls within the remit of the Member States. It also explains how small jurisdictions fall to be regulated by Article 102 TFEU.

The notions of relevant market and substantial part of the internal market are separate elements of Article 102 TFEU, and should not be confused. Whilst the former serves to determine whether an undertaking is dominant on a particular market, the latter determines whether that market is large enough for Article 102 to bite. It may well be that an undertaking is considered dominant on a relevant market, but that dominance is not held within the internal market or a substantial part of it, and therefore EU competition law does not apply.

This jurisdictional test is made up of two independent, non-cumulative, and potentially competing, tests.[98] The first is a 'territorial' test whereby any Member State, no matter how small,[99] constitutes a 'substantial part' of the internal market. This means that conduct which covers the territory of a Member State will be caught by Article 102 TFEU. This test was first adopted by the CJ in *BRT v SABAM,*[100] in which Belgium was found to be a substantial part of the internal market.

The second test is the 'economic relativity' test devised by the CJ in *Suiker Unie*[101] where:

[98] Leigh M Davison and Debra Jonson 'EC Competition Policy: Is the role of the substantial part of the common market in determining jurisdictional subsidiarity redundant?' (2010) 31 Liverpool Law Rev 273; Leigh M Davison 'EU Competition Policy: Article 82 EC and the notion of substantial part of the common market' [2009] Intereconomics 238; Edmund Fitzpatrick and Leigh Davison 'Competition policy and the competing interpretations of the notion of substantial part of the common market' (1997) 97(4) European Business Review 179

[99] Alison Jones, Brenda Sufrin and Niamh Dunne *Jones and Sufrin's EU Competition Law: Text, cases and materials* (7th edn OUP 2019) 288; Richard Whish and David Bailey *Competition Law* (9th end, OUP 2018), 196; Davison (n 51), 243

[100] Case 127/73 *Belgische Radio en Televisie v Societe Belge des Auteurs, Compositeurs et Editeurs (SABAM) and NV Fournier* EU:C:1974:25

[101] Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Cooperatieve Vereniging 'Suiker Unie' UA v Commission* EU:C:1975:174

> the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.[102]

This test, as adopted in *Suiker Unie*, has two components: a numerical component in which the production and consumption of the product in the market in question is compared to the production and consumption in the internal market as a whole; and an assessment of the habits and economic opportunities of vendors and purchasers of the product in question.[103]

Although technically either test may be used, once a Member State constitutes a substantial part of the internal market, the economic relativity test is irrelevant in cases where the conduct examined extends throughout the territory of a Member State. This includes small jurisdictions; it would be politically insensitive for the European authorities to conclude that a Member States is not a substantial part of the internal market because of its small size.

Therefore it is clear that geographic size is irrelevant for the applicability of Article 102 TFEU. Small jurisdictions[104] may also constitute a substantial part of the internal market and dominant undertakings within such small jurisdictions would therefore be subject to Article 102 TFEU.

[102] *Ibid*, para 371
[103] Davison and Jonson (n 122), 275. Although in Case C-179/90 *Merci Convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* EU:C:1991:464 the CJ only used the first component of this test and considered the Porto di Genova's importance vis-a-vis the Member State it served (see Davison and Jonson (n 122), 277).
[104] See Davison (n 122), p 243

'MAY AFFECT TRADE BETWEEN MEMBER STATES'

Articles 101(1) and 102 TFEU are only applicable when the agreements, decisions or concerted practices or the abuse 'may affect trade between Member States'.[105] This concept, like that of 'substantial part of the internal market', is also a jurisdictional criterion, however unlike the latter, it is found in both substantive antitrust provisions contained in the TFEU.[106] It is independent of the definition of the relevant geographic market,[107] and within the context of Article 102 TFEU, of the 'substantial part' criterion.

The elements and principles of interpretation of the 'effect on trade' criterion are contained in the Commission's 'Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty' ("the Guidelines").[108] Although the CJ, GC and the Commission have, since the date of the Guidelines, handed down decisions dealing with this concept [109] none of these recent decisions overturn any of the principles contained in the Guidelines, and the Guidelines therefore remain a sound statement of the law on the effect on trade criterion,[110] particularly since they reflect the case law of the CJ and the GC.[111]

[105] See Case 23/67 *SA Brasserie de Haecht v Cosorts Wilkin-Janssen* EU:C:1967:54: '[i]t is only to the extent to which agreements, decisions or practices are capable of affecting trade between Member States that the alteration of competition comes under [Union] prohibitions.'

[106] For an argument that the 'substantial part' criterion is redundant in view of the 'affect trade' criterion in Article 102 TFEU, see Davison and Jonson (n 122).

[107] European Commission ''Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty' [2004] OJ C 101/81, para 22

[108] [2004] OJ C 101/81

[109] Such as Case T-259/02 *Raiffeisen Zentalbank Osterreich AG v Commission* EU:T:2006:396; Case T-199/08 *Ziegler SA v Commission* EU:T:2011:285; Case C-393/08 *Emanuela Sbarigia v Azienda USL RM/A* EU:C:2010:388; COMP/38/700 *Greek Lignite and Electricity Markets* [2009] 4 CMLR 495

[110] Although they remain non-binding on the courts and authorities of the Member States, and naturally the CJ and GC.

[111] See Whish and Bailey (n 116), 151

The concept of effect on trade has three elements.[112] The first is the notion of 'trade between Member States', which is intended to cover all cross-border economic activity.[113] Any agreement or practice that affects the competitive structure of the market, by eliminating or threatening to eliminate a competitor within the EU would satisfy this element.[114] In the case of abuse of dominance, it is likely that this element be automatically satisfied.[115]

The second notion is that of 'may affect'. This involves a test that 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential on the pattern of trade between Member States'.[116] Finally, there is the notion of appreciability, which implies that agreements or conduct having a minor effect on trade do not fall within the remit of EU competition law. Appreciability can be measured in two ways – either by considering turnover or by considering market share.[117]

The Commission indicates that trade is not normally capable of being appreciably affected by an agreement when it is concluded between small and medium sized undertakings ("SMEs").[118] This might raise the question whether Article 101 TFEU would apply to small jurisdictions at all since small jurisdictions are characterised by SMEs within the definition of the current Commission Recommendation.[119] However, the preponderance of SMEs is not

[112] Guidelines, para 18
[113] *Ibid,* para 19
[114] *Ibid*, para 19-20
[115] See Jones, Sufrin and Dunne (n 123) 197, 284 and Whish and Bailey (n 116), 186.
[116] *Ibid*, para 23
[117] Guidelines, para 47
[118] The Guidelines refer to Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises [1996] OJ L107/4; this was replaced by Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36
[119] See in particular Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36 Annex, Article 2, which requires an employee head count of 250 and an annual turnover not exceeding €50,000,000, and/or an annual balance sheet total not exceeding €43,000,000.

limited to small jurisdictions – all the EU Member States have a large shares of SMEs;[120] as a result it is arguable that Article 101 TFEU is applicable to small jurisdictions in the same incidence it would be applicable to larger markets. Moreover, it is unlikely for the Commission to conclude that there is no effect on trade between Member States, even if the agreement is concluded between SMEs, if that agreement covers the whole small Member State, or contributes to the cumulative effect of similar agreements on the market.

On the other hand, the Guidelines do not indicate when abuse would not appreciably affect trade. This implies that abuse will in all or most cases appreciably affect inter-Member State trade. [121] The Guidelines do however specify when abuses covering a whole Member State effect inter-State trade. The Commission notes that when an undertaking which holds a dominant position that covers the whole of a Member State (irrespective of size) engages in exclusionary abuses, trade between Member States is normally capable of being affected, as it would be difficult for competitors from other Member States to penetrate the market.[122]

In the Commission's view, where dominance covers the whole of a Member State, it is normally immaterial whether the abuse covers only part of the territory or affects certain buyers within the national territory.[123] The exception is when only an insignificant share of the sales of that undertaking within that State is involved or the abuse is 'purely local in nature'.[124] An example of the latter arose in *Hugin*[125] where the firm's activities were

[120] See Eurostat' Key figures on European business - with a special feature on SMEs' (2011) < http://ec.europa.eu/eurostat/web/products-pocketbooks/-/KS-ET-11-001 > accessed 16 April 2016 and European Commission 'Annual Report on SMEs 2014/2015' (November 2015) < http://ec.europa.eu/growth/smes/business-friendly-environment/performance-review/> accessed 16 April 2016

[121] Guidelines, para 96

[122] *Ibid*, para 93

[123] *Ibid*, para 96

[124] *Ibid*

[125] Case 22/78 *Hugin Kassaregster AB and Hugin Cash Registers Ltd v Commission* EU:C:1979:138

confined in the London area, and there was no trade between Member States in cash register spare parts. This implies that for inter-Member State trade to be affected, there must be some repercussion of the conduct beyond the borders of a single Member State.[126]

Similarly, vertical agreements covering a Member State may be capable of affecting trade:

> when they make it more difficult for undertakings from other Member States to penetrate the national market in question, either by means of exports or by means of establishment.[127]

The CJ has affirmed that:

> [a]n agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production.[128]

In the light of the above, it is clear that abuse of a dominant position which covers the whole of a Member State is likely to be considered to affect trade between Member States, except in very specific circumstances. This means that generally conduct by a dominant undertaking in small jurisdictions will affect trade between Member States and therefore fall to be sanctioned under Article 102 TFEU, even if conduct affects only part of the territory or certain buyers.[129] Moreover agreements are more likely to cover a single Member States in small jurisdictions, especially in circumstances where a dominant player establishes a nationwide

[126] Jones, Sufrin and Dunne (n 123), 291
[127] Guidelines, para 86
[128] Case 8/72 *Vereeniging van Cementhandelaren v Commission* EU:C:1972:84, para 29
[129] *Ibid,* para 96

distribution or supply system. Again therefore, within the limits set out in the Guidelines, agreements covering small jurisdictions may also be considered to affect trade between Member States and therefore fall to be regulated by EU competition law.

MALTA AS A CASE-STUDY

As noted, small jurisdictions have particular characteristics which may result in the application of EU competition law having unwanted outcomes.[130] In order to examine the particular effects of the application of competition law in small jurisdictions, the application of the EU competition rules in relation to dominant undertakings in Malta will be studied.

Malta is the archetypical small jurisdiction. With a geographical size of 316 km^2 and a population of 493,559,[131] Malta is the smallest Member States within the EU. Its gross domestic product ('GDP') was € 12,320 million in 2017, [132] nearly double what it was in 2012.[133] However this is still a low figure when compared not just to that of the larger Member States such as the United Kingdom and Germany, but also other geographically small Member States such as Luxembourg and, fellow small jurisdiction, Cyprus. [134] In fact Gal describes Malta as being a 'very small' jurisdiction, and therefore a small economy, at the outset due to its small population.[135] Malta's small population consequently 'limits demand

[130] See p 11 *et seq*
[131] Figure as at 2018 – figure published by the National Statistics Office < https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C5/Population_and_Migration_Statistics/Documents/2019/News2019_108.pdf > accessed 30 December 2019
[132] Published by the National Statistics Office < https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_A1/National_Accounts/Documents/2019/News2019_038.pdf > accessed 30 December 2019
[133] €6.88 billion in 2012 – figure published on 'Malta in the EU http://europa.eu/about-eu/countries/member-countries/malta/index_en.htm> accessed 28 December 2014. Page no longer available.
[134] See figures published by the World Bank at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?name_desc=false accessed 30 December 2019
[135] Gal (2009) (n 2), 2; Gal (2001) (n 25), 6.

and reduces the number of firms that can efficiently serve the market'.[136] Gal views population as an indicator of market size, and therefore a small population such as that of Malta, indicates a small market size.[137]

It has already been noted that Malta falls squarely within each proposed definition of a small state,[138] and indeed is always defined as such in the relevant literature. In fact Malta is considered to be small if one examines GDP, population or territory, particularly if one considers a Member State to be 'small' if it falls below the EU average. The same conclusion is reached if one considers the number of members of the European Parliament ('MEPs') and the votes in the Council of the European Union. Malta in fact only has 6 MEPs, and under the qualified majority rule which existed prior to 1 November 2014, only had 3 votes in the Council.[139] Moreover, since the new qualified majority rule relies on population, Malta's power is still limited.

Therefore, there can be no question that Malta is considered a small state and small jurisdiction. In fact, is considered as such by all academics who have studied small states and it exhibits all the characteristics typical of small states. As a result it is the ideal case study to examine the application of the EU competition rules in a small jurisdiction. Once the application of EU competition law to this jurisdiction is studied, the findings should in theory be applicable to all other small jurisdictions exhibiting the same market characteristics.

[136] Gal (2009) (n 2), 2
[137] Gal (2006) (n 24), 5-6
[138] See "What is a 'small jurisdiction?'"
[139] European Council 'Qualified Majority' http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/ accessed 7 March 2015

Irrespective of its 'smallness', as a member of the EU since 1 May 2004 the competition rules contained in the TFEU apply in full to the Maltese territory as from that date. As was seen,[140] it is probable that conduct or agreements which cover the whole of Malta will fall to be assessed in terms of EU competition law. However no study as to how those rules affect the Maltese market has ever been carried out.

Although the 2004 enlargement saw an influx of small states entering the EU,[141] and indeed all the states considered as small jurisdictions in this thesis, save Bulgaria, which joined later, acceded to the EU in 2004, the Commission did not carry out any sort of 'impact assessment' as to how EU competition law would affect such small jurisdictions. The various Composite Papers [142] and Strategy Papers [143] of the Commission, prepared prior to accession, demonstrate that the Commission was mostly concerned about bringing the Central and Eastern European countries into the 'safe' fold of the EU.[144] Another area of concern was 'the Cyprus problem'.[145]

[140] See p 12-19.
[141] See Pace (n 5), 107 and Nugent (n 5), 3.
[142] European Commission 'Composite Paper: Report on progress towards accession by each of the candidate countries' (4 November 1998) < http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/composite_en.pdf > accessed 9 March 2015;European Commission 'Composite Paper: Report on progress towards accession by each of the candidate countries' (13 October 1999) < http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/composite_en.pdf > accessed 9 March 2015;
[143] European Commission 'Enlargement Strategy Paper: report on progress towards accession by each of the candidate countries' (2000) < http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/strat_en.pdf> accessed 9 March 2015; European Commission 'Making a success of enlargement: Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries' (2001) < http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/strategy_en.pdf> accessed 9 March 2015; European Commission 'Towards the enlarged Union - Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries' COM/2002/0700 final
[144] See in particular the Composite Paper 1999 (n 172) Strategy Paper 2000 and Strategy Paper 2002 (n 173).
[145] Strategy Paper 2002 (n 173). See also Nugent (n 5).

By contrast, Malta did not pose much of a problem. The Regular Reports on Malta indicated that there were areas in which Malta needed to align its policies with those of the EU,[146] however from the EU's perspective no major political issues threatened Malta's accession. Malta had lodged its accession application on 16 July 1990, but still needed to streamline its economic and legislative systems to those of the EU by the time the 1995 enlargement took place[147] and so failed to join the EU in the mid-90s. Malta's application was 'frozen' between 1996 and 1998, due to a change in Government, and therefore a change in Malta's external relations policy, but 're-activated' in 1998. However, Malta also had an Association Agreement in place since 1970.[148] Therefore, Malta-EU relations pre-dated accession negotiations.

Within Malta on the other hand, EU membership was a hotly contested and somewhat divisive issue. The main bone of contention was neutrality,[149] in particular whether joining the EU would go against the Constitution of the Republic of Malta which states in categorical terms that 'Malta is a neutral state'.[150] No consideration was given as to how the Maltese market would be affected by the application of EU competition law; partly perhaps because the Competition Act,[151] enacted in 1994, already largely mirrored the substantive provisions

[146] European Commission 'Regular report from the Commission on Malta's progress towards accession' (1999) < http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/malta_en.pdf> accessed 9 March 2015; European Commission 'Regular report from the Commission on Malta's progress towards accession' (2000) < http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/mt_en.pdf > accessed 9 March 2015; European Commission 'Regular report from the Commission on Malta's progress towards accession' SEC (2001) 1751; European Commission 'Regular report from the Commission on Malta's progress towards accession' SEC (2002) 1407

[147] Christopher Pollacco *European Integration: The Maltese Experience* (Agenda, Luqa 2004), 103

[148] Agreement establishing an association between the EEC and Malta, 5 December 1970 [1971] OJ L61/1

[149] See parliamentary debates on the European Union Bill < http://www.parlament.mt/billdetails?bid=123&legcat=5 > accessed 7 March 2015

[150] Constitution of the Republic of Malta, Article 1(3)

[151] Cap. 379 of the laws of Malta

of EU competition law, and largely because there was no real cognisance of how EU competition law works.

In the light of other more pressing concerns therefore the effect of EU competition law on Malta and other small jurisdictions seems not to have been taken into account. With respect to competition, the various Regular Reports on Malta[152] show the Commission was concerned about state aid control, state monopolies, the lack of merger control and the lack of a provision similar to Article 106 TFEU. The Commission was concerned about aligning national competition law with EU competition law rather than considering how the latter may affect the new Member States.[153] This notwithstanding the fact that the Commission was cognisant of the particular difficulties which smallness poses to competition law. In its 2001 Report on Malta, the Commission noted that:

> [w]ork is underway to establish a specific merger control system taking account *of the specific situation of the Maltese economy (in particular, its small size).*[154]

This approach may be explained in part by the fact that prior to the 2004 enlargement the EU already had 'small' members, such as Luxembourg, Ireland and Austria, and the potential application of EU competition law to conduct covering such Member States had never been considered particularly problematic. Moreover, EU competition law had already been applied to small parts of Member States. However, the 2004 enlargement not only introduced a large number of small states into the EU, but also incorporated some of the smallest states in Europe into the EU, such as Malta and Cyprus. This exponentially increased the possibility of

[152] n 176
[153] See the various Composite Papers (n 172) and Strategy Papers (n 173).
[154] European Commission 'Regular report from the Commission on Malta's progress towards accession' SEC (2001) 1751, 40 (emphasis added)

EU competition law being applied to conduct or agreements which cover only one small Member State.

Moreover, prior to the 2004 enlargement, the smaller Member States from a geographic point of view were also some of the more relatively economically powerful. Luxembourg for instance has today the highest rate of GDP per capita within the EU. Other 'small' states such as Ireland and Austria also have a GDP per capita which is above the EU average. Therefore, these geographically small states did satisfy other elements of smallness, and did not present the characteristics of 'smallness'. Malta and Cyprus however fall below the EU average, as do most of the states which joined the EU in 2004;[155] moreover, as was seen, they not only satisfy all the criteria of smallness but also present the expected characteristics. The geographically small Member States which where EU members prior to the 2004 enlargement were successful economically notwithstanding their smallness in other areas.[156] However, the small Member States which acceded to the EU in 2004 are not as successful economically, and therefore the application of EU competition law is likely to affect these small jurisdictions differently.

As a result, the examination of the application of the EU competition rules to small jurisdictions is now long overdue, in order to determine whether EU competition law affects small jurisdictions negatively or not. This thesis hopes to start that discussion by focusing on dominant undertakings within small jurisdictions.

[155] Eurostat 'GDP per capita, consumption per capita and price level indices' < http://ec.europa.eu/eurostat/statistics-explained/index.php/GDP_per_capita,_consumption_per_capita_and_price_level_indices > accessed 7 March 2015

[156] Briguglio (2014) (n 35)

In view of the fact that reference will be made to Maltese competition decisions, it would be pertinent to give a brief overview of the competition law provisions applicable within Malta. Since it is an EU Member State, two competition law regimes apply in Malta – the EU competition regime, and a local competition law regime.

Like Article 101 TFEU, Article 5 of the Competition Act[157] prohibits agreements and concerted practices between undertakings which have the object or effect of restricting competition. However, whilst the former requires the restriction to occur within the internal market and to affect trade between EU Member States, the latter requires the restriction of competition to occur within Malta or any part of Malta.

Similarly Article 9 of the Act mirrors Article 102 TFEU by prohibiting abuses of a dominant position. Again, whilst Article 102 TFEU applies when it occurs within the internal market and inter-Member State trade is affected, Article 9 of the Act applies when abuse of dominance occurs within Malta or any part of Malta.

The Competition Act makes it is possible for both or either of the Competition Act or TFEU provisions to apply. The national competition authority – namely the Office for Competition ("OC"), or its predecessor the Office for Fair Competition ("OFC") – and the Maltese courts are empowered to apply both the local rules and the EU rules,[158] and this is confirmed by the Competition Act itself.[159]

[157] Cap. 379 of the laws of Malta
[158] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1
[159] Competition Act, arts. 5(5) and 9(4)

Most of the decisions of the OC, OFC, the Competition and Consumer Appeals Tribunal ("the Appeals Tribunal") or its predecessor the Commission for Fair Trading ("CFT") do not apply the TFEU provisions *per se*. However, the application of the local competition provisions are still relevant in order to determine how Articles 101 and 102 TFEU would be applied in Malta.

First of all, the Maltese competition rules are modelled on the TFEU provisions on competition. Secondly, the Competition Act specifies that the OC is obliged to interpret local competition law taking into account the guidelines and decisions issued by the Commission and judgments of the Court of Justice of the European Union ("CJEU").[160] A similar obligation has existed since the enactment of the Competition Act in 1995. Up to 2019, the administrative tribunal which heard appeals from decisions of the OC – the Appeals Tribunal – was also so obliged.[161] This specific obligation was removed by Act XVI of 2019, following which appeals are heard by the Civil Court (Commercial jurisdiction), which, being a court of civil jurisdiction, is governed by the laws governing such courts. It is however expected that the Civil Court will still refer to Commission and CJEU decisions and guidelines in deciding cases brought before it. The result of the obligation at law to interpret local competition rules in line with EU competition law is that the OC and the Appeals Tribunal were applying the local competition rules as if they had been applying the EU competition rules. In fact, they often referred to EU decisions and guidelines when issuing a decision based on Articles 5 and/or 9 of the Competition Act. This will be evident in the cases being considered in this thesis.

[160] Competition Act, Article 12A(7).

[161] Malta Competition and Consumer Affairs Act, Second Schedule, Rule 9. A similar obligation was imposed on the CFT, which heard "review" applications from decisions of the OFC up to amendment of the Competition Act by Act VI of 2011.

As a result, Malta is particularly well-placed to act as a case study for small jurisdictions, not just because it exhibits the economic characteristics relative to smallness, but also because of the added benefit of an additional 10 years of decisions (from 1994 – 2004) which can be considered in the analysis of the application of the EU competition rules to dominant undertakings in small jurisdictions. Moreover, from a practical perspective, it has the added benefit that its competition laws are published in both English and Maltese, and that judgments of the CFT are available in English, thereby reducing any problems with language interpretation. Furthermore, the author, being Maltese, is conversant with both languages, meaning the judgments of the CFT and Appeals Tribunal are fully accessible, which cannot be said for the other small jurisdictions.

STRUCTURE AND AREAS OF STUDY

Part I of this thesis considers how a dominant undertaking is defined and identified. Chapter 2 deals with the idea of 'dominant position' from a theoretical point of view. The notion of dominance is studied, and it is considered whether the legal definition is in line with the economic idea of substantial market power. The idea of 'collective dominance' is also considered. Chapter 3 then deals with the assessment of dominance in practice, and considers the matter of market definition and which factors are and should be used to indicate dominance. The impact of the current practice and the changes proposed to take account of small jurisdictions are considered throughout.

Part II then considers four types of abuses. A choice of conduct had to be made due to the limitations of time and space. The four types of abuses considered are the four most common types that tend to be found in small jurisdictions. For instance, if one considers the judgments handed down by the CFT and the Appeals Tribunal in Malta between 1996 and 2019, there

are 3 judgments in these areas out of a total of 10 judgments where there was a finding of abuse of a dominant position. Therefore these practices are particularly relevant when considering the application of EU competition rules to small jurisdictions, and the treatment of dominant undertakings in small jurisdictions.

Chapters 4 and 5 deal with exclusive dealing and loyalty rebates respectively. Exclusive dealing and loyalty and/or loyalty-inducing rebates are some of the most common practices undertaken by undertakings, whether dominant or not, when conducting business. They are particularly common in small jurisdictions. Discounts are expected by retailers, distributors and other downstream operators as a sort of 'reward' for dealing with a particular undertaking, particularly when there is a long-standing relationship. Businesses often find that discounts are more effective when they contain some 'loyalty' element or when they are the result of individual negotiation between the supplier and the customer. These factors are intensified in small jurisdictions where there is necessarily a 'social' element to doing business, because 'everyone knows each other'. The prohibition on exclusive dealing and loyalty/loyalty-inducing rebates has given rise to a lively debate as to whether these practices are pro- or anti-competitive, and an analysis of this literature seemed appropriate. Exclusive dealing and rebates may occur not only through unilateral conduct, but also through the conclusion of agreements, and therefore both Article 102 TFEU and Article 101 TFEU are relevant.

Chapter 6 considers refusal to supply in particular in relation to physical property and infrastructure. Generally undertakings are free to contract with whomsoever they wish. Refusing to contract with particular undertakings may be problematic for dominant undertakings, since Article 102 TFEU proscribes refusal to supply in specific scenarios. One of

these scenarios is when dominant undertakings own or control 'an essential facility';[162] another is when a dominant undertaking stops supplying an existing customer.[163] This type of abuse is likely to arise in small jurisdictions due to the limited facilities and infrastructure available for competitors, and to the limited physical space available meaning that facilities and infrastructure cannot be easily replicated. When considering refusal to supply, this thesis focuses strictly on refusal to supply existing and new customers, and not refusal to license intellectual property rights.[164]

The last practice to be considered is margin squeeze (chapter 7) which is a practice which has only arisen to the CJEU and the Commission's consciousness in the past decades. Undertakings normally attempt to compete through prices, and low pricing is one way to attract customers. However, where an undertaking is dominant on the upstream market and is vertically integrated, it is required to ensure that its price for the input is set at a level which allows its competitors on the downstream market to compete with it for the supply of products or services to customers.[165] This may pose a problem for undertakings either trying to legitimately compete with other undertakings on the downstream market or attempting to get rid of old stock.

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[162] IV/34.174 *Sealink/B&I – Holyhead: Interim Measures* 11 June 1992; Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* EU:C:1998:569

[163] Cases 6 and 7/73 *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp v Commission* EU:C:1974:18

[164] Refusal to license intellectual property rights is outside the scope of this thesis and there is ample literature in this regard, see for instance: Josef Drexl (ed) *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar, 2008), Wolfgang Kerber and Claudia Schmidt 'Microsoft, Refusal to License Intellectual Property Rights, and the Incentives Balance Test of the EU Commission' SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297939 accessed 1 March 2015, Kelvin H Kwok 'A New Approach to Resolving Refusal to License Intellectual Property Rights Disputes' (2011) 34 World Competition: Law & Economics Review 261; Jones, Sufrin and Dunne (n 123) p. 503-518, Rita Coco 'Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and an International Setting' (2008) 12(1) Marquette Intellectual Property Law Review 3

[165] Jones, Sufrin and Dunne (n 123), p 416

Like refusal to supply, margin squeeze is a type of abuse that could easily occur in small jurisdictions, particularly in those markets which were previously statutory monopolies. However, it is only recently that focus has shifted to this type of abuse. As a result, an examination of this type of abuse seemed pertinent, particularly since in Malta, the Appeals Tribunal has on 29 January 2014 handed down its first judgment on margin squeeze, in which it found GO plc, a telecommunications company, to have abused of its dominance through margin squeeze.[166]

Chapters 4 to 7 have similar content, although the structure of each chapter varies slightly. The economics and the economic rationale behind the particular practice are examined; so is the approach taken by the various EU institutions vis-à-vis the specific practice. The 'tests' used by the CJ, the GC and the Commission in each of the instances highlighted to determine the existence of abuse are considered. The approaches taken are then analysed and criticised, and the impact this approach has on Malta and other small jurisdictions is considered.

Unlike other work dealing with the treatment of dominant undertakings in EU competition law, this thesis does not solely focus on the theoretical foundations, ideology and objectives behind Article 102 TFEU.[167] Nor does it attempt to extrapolate the tests used by the EU institutions in order to find abuse[168] or purely examine the economics behind Article 102.[169] This thesis, basing itself on these theoretical, ideological and economic studies, examines

[166] Application no. 8/2010 *Datastream Limited vs Camline Internet Services Limited* 29 January 2014
[167] Renato Nazzini *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2012), Pinar Akman *The Concept of Abuse in EU competition Law: Law and economic approaches* (Hart 2012), Liza Lovdahl Gormsen *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press 2010)
[168] Nazzini (n 197), Akman (n 197)
[169] Robert O'Donoghue and A Jorge Padilla The Law and Economics of Article 102 TFEU (2nd edn, Hart 2013), Simon Bishop and Mike Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010)

how, if at all, the interpretation and application of Article 102 TFEU may restrict competition, particularly in small jurisdictions, which have to date been largely ignored in the relevant literature, and what should be done so that competition policy best serves competition.

The focus of this thesis is the effect that the application of the EU competition rules has on small jurisdictions. There is hardly any literature on this matter. There is some literature on the form which competition policy should take for small jurisdictions,[170] Gal's seminal work being of note in this regard.[171] However, this body of work concentrates on proscribing the way competition rules should be, and focuses on competition policy in general. Very little is written specifically about the antitrust rules.

Moreover, the extant literature does not examine how EU competition law applies to small jurisdictions, and how, if at all, EU competition law should be adapted to small jurisdictions. Rather it focuses on the ideal competition policy in small economies or small states.

Furthermore there is no literature on the applicability of EU competition law to Malta. This thesis intends to fill the gaps in this regard.

The Merger Regulation[172] is outside the scope of this thesis. It will be noted that scholars who have examined how competition policy should be devised in small jurisdictions have noted that vetting of mergers in small jurisdictions should take into account efficiencies to a greater

[170] Schefer (n 51) 781; Samuel Rutz 'Applying the theory of small economies and competition policy: the case of Switzerland' (2013) 13 J Ind Compet Trade 255; Lewis Evans and Patrick Hughes 'Competition Policy in small distant open economies: some lessons from the economic literature' (2003) New Zealand Treasury Working Paper 03/31 < http://www.treasury.govt.nz/publications/research-policy/wp/2003/03-31/twp03-31.pdf> accessed 10 April 2016. There is a little more literature on merger policy for small jurisdictions.

[171] Gal (2009) (n 2), Gal (2006) (n 46); Gal (2001) (n 25)

[172] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1

extent than is done in larger markets.[173] Gal even concludes that a more lenient approach to mergers should be taken in small jurisdiction which would then warrant a stricter approach to unilateral conduct.[174] This thesis however will not consider such matters; its focus is the application of the EU antitrust rules in small jurisdictions and their effects. The link between the approach to mergers and unilateral conduct is tenuous at best. Dominance may be achieved without concentrations. In any case it is respectfully noted that it is illogical to allow concentrations for efficiencies of scale and scope and therefore take a lenient approach to proposed concentrations in small jurisdictions, and then severely restrict the conduct of the resulting dominant undertakings, or even worse natural monopolies which more likely than not are created because of efficiencies.

The research constituting this thesis is correct as at 31 December 2019.

METHODOLOGY

This research has been carried out primarily through an examination of the decisions of the CJ, the GC and the Commission. The guidelines and notices issued by the Commission, as well as academic articles and books in the field were also analysed. As noted above,[175] Malta has been used as a case-study in order to analyse the application of the EU competition rules in small jurisdictions. As a result, decided cases of the Appeals Tribunal/CFT[176] and legislation from Malta were considered, as well as its economic reality.

[173] Michal S Gal 'The effects of smallness and remoteness on competition law – the case of New Zealand' (2006) Law & Economics Research Paper Series Working Paper No 06-48 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942073> accessed 10 April 2016, 12-19; Rutz (n 200) 255-257

[174] *Ibid* 22

[175] See p 30 *et seq*

[176] Decisions of the OFC/OFT are not yet published, although unofficial reports of some decisions are available.

This thesis starts off from the idea that in order to study the effects of EU competition law in small jurisdictions, the difficulties raised by the application of EU competition law generally first have to be identified. As a result, this thesis first critically analyses the application of EU competition rules on dominant undertakings in general, without considering the specific case of small jurisdictions. This is used as a spring board for the analysis relating to small jurisdictions. Once the problems with the application of the current approaches are identified, the specific problems that these issues raise in small jurisdictions – and how these can be resolved – is investigated. This approach is intended to enable an assessment as to whether a new approach to dominant undertakings in general would mean that there is no need for a difference in treatment to dominant undertakings in small jurisdictions.

PART I: INTRODUCTION

Before considering whether the treatment of dominant undertakings in EU competition law requires a new approach, one must first consider what constitutes a dominant undertaking. This Part suggests that a more nuanced approach to the treatment of dominant undertakings should start with the understanding of what dominance is and the manner in which undertakings are considered to be dominant.

It is appropriate to start by noting that the notion of 'dominant position' is relevant to both substantive provisions of the TFEU relating to competition. It is naturally more relevant to Article 102 TFEU since a pre-condition of finding a breach of Article 102 TFEU is that the undertaking in question be in a dominant position. However, the notion of 'dominant position' may also affect the application of Article 101 TFEU since the interpretation of the concept of an agreement having an anti-competitive effect has taken into account whether a party to the agreement is dominant. In fact, the Guidelines on Vertical Restraints[177] frequently refer to the likely effect of restraints undertaken by undertakings in a dominant position. Therefore in certain circumstances the Commission's determination whether vertical agreements breach Article 101 TFEU also depends on the interpretation and assessment of 'dominance'.

It will be shown in this Part that (a) the definition of 'dominant position' is anything but clear and (b) the way in which dominance is assessed in practice needs to be reconsidered.

Such conclusions beg a number of questions: How can there be legal certainty as to the position of an undertaking on the market if the rules themselves are not clear-cut? How can

[177] European Commission 'Guidelines on Vertical Restraints' [2010] OJ C130/1

competition authorities enforce Article 102 TFEU with any consistency? And moreover, how can undertakings themselves assess whether they are in a dominant position so as to align their conduct with the competition rules, and not breach competition law in the first place? These issues will impact any jurisdiction, but will impact smaller jurisdictions to a greater extent, given the greater likelihood that an undertaking be deemed to be dominant in such a market. The GC has stipulated that undertakings which are in a dominant position must modify their conduct accordingly so as not to impair effective competition on the market;[178] indeed they have a 'special responsibility' not to allow their conduct to impair competition on the market.[179] It is unclear how undertakings are expected to modify their conduct so as not to impair competition in view of the doubt as to what 'dominance' really is, or indeed be able to measure with any certainty whether they are dominant or not.[180]

This Part is made up of two chapters. Chapter 2 will first consider the notion of 'dominant position' and critically examine the concept theoretically, by looking at the relevant economic theory and the legal definition. This chapter will conclude with an appraisal as to whether change is required with regards to the very notion of 'dominant position'. It will also consider the idea of 'collective dominance'.

Chapter 3 will then turn to the assessment of dominance, examining the elements that are taken into consideration when assessing whether an undertaking is dominant or not.

In other words, this Part first considers dominance notionally, in order to attempt to understand what dominance is in theory, and then examines its assessment, in order to

[178] See Cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises Inc v Commission of the European Communities* EU:T:2000:84, para 80
[179] Case 322/81 *Nederlandasche banden-Industrie Michelin v Commission* EU:C:1983:313, para 10
[180] See also Pinar Akman 'The European Commission's Guidance on Article 102TFEU: From *Inferno* to *Paradiso*?' (2010) 73(4) Modern Law Review 605, 612

attempt to clarify how an undertaking is considered dominant in practice. It will be shown how these policy decisions affect competition in small jurisdictions in practice.

CHAPTER 2: 'DOMINANT POSITION': A TERM IN SEACH OF MEANING[1]

Although competition law is inextricably linked with economics, the notion of 'dominance' or 'dominant position' is unknown in economics. Economists speak in terms of 'substantial market power' rather than 'dominance', and, as will be seen, at present these terms do not correspond with each other. Within the Treaty, the term 'dominant position' is used solely in Article 102 TFEU and Article 104 TFEU, and consequently in domestic laws which follow the text of the TFEU. The TFEU however does not define the term 'dominant position', much less does it detail how it is to be assessed. It has fallen on the CJ to define the term 'dominant position'. The CJ's definition however poses some problems of interpretation, leading to doubts as to what 'dominance' really is. This is considered in further detail below.

Neither 'dominant position' nor 'substantial market power' can exist in a vacuum. Whether one is considering whether an undertaking has a dominant position, as required by Article 102 TFEU, or substantial market power, as advocated in economic theory, the relevant market must first be defined. The definition of the relevant market is considered in Chapter 3, since it constitutes a crucial step in the assessment of dominance in practice.

'SUBSTANTIAL MARKET POWER'

Market power is defined in economic literature as the ability to price above short-run marginal cost.[2] In practical terms however, market power refers to the ability of an

[1] This first part of Chapter 2 is derived from Annalies Azzopardi '"Dominance position": a term in search of meaning' published in the Global Antitrust Review (2015) http://www.icc.qmul.ac.uk/docs/2015/170752.pdf accessed 19 May 2020

[2] Simon Bishop and Mike Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010), 52. Marginal cost is the cost incurred by an undertaking when producing an additional unit of output; it determines the level of output a firm will produce under conditions of perfect competition and is therefore not used in practice (Richard Whish and David Bailey *Competition Law* (9th edn, OUP 2018), 733). Short-run marginal cost is then the change in short run total cost for a small change in output (Economic Regulation Authority 'Short run marginal cost: discussion paper' 11 January 2008 <

undertaking to raise price, through the restriction of output, above the level that would prevail under competitive conditions and thereby enjoy increased profits.[3] There are in essence two forms of substantial market power: power over price and the power to exclude.[4] Bishop and Walker indicate that the definition of market power contains three elements, namely that 'the exercise of market power leads to lower output'; that 'the increase in price must lead to an increase in profitability'; and that 'market power is exercised relative to the benchmark of the outcome under conditions of effective competition.'[5]

THE LEGAL DEFINITION OF 'DOMINANT POSITION'

Notwithstanding this economic understanding of market power, in *United Brands*[6] the CJ defined dominant position for the first time as being a:

> position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[7]

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https://www.erawa.com.au/cproot/6316/2/20080111%20Short%20Run%20Marginal%20Cost%20-%20Discussion%20Paper.pdf> accessed 15 September 2015); total costs represent the total costs of production, constituted of fixed costs (costs which do not change with output) and variable costs (costs which do change with output).

[3] *Ibid.* Others have described market power as 'the ability to charge prices significantly above competitive levels or restrict output significantly below competitive levels for a sustained period of time' (Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013), 142).

[4] Damien Gerardin, Paul Hofer, Frederic Louis, Nicolas Petit and Mike Walker 'The Concept of Dominance in EC Competition Law' (2005) Global Competition Law Centre Research Paper on the Modernisation of Article 82 EC < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144 > accessed 1 November 2015, 4-5. Gunnar Niels Helen Jenkins and James Kavanagh *Economics for Competition Lawyers* (OUP 2011), 118, describe market power as 'the ability to raise prices above the competitive level or the ability to exclude or significantly harm competitors'. On the power to exclude, see Bishop and Walker (n 2), 91-92

[5] Bishop and Walker (n 2), 53

[6] Case 27/76 *United Brands Continentaal BV v Commission of the European Communities* EU:C:1978:22. It appears that the CJ was inspired by the Commission's definition of dominance in IV/26 811 *Continental Can* 9 December 1971 [1972] OJ L7/25, para II.B.3 and IV/26699 *Chiquita* 17 December 1975 OJ L95/1, para II.A.2.

[7] Para 65

The CJ built upon this definition in *Hoffmann-La Roche*,[8] which has now become the standard definition of dominance in EU competition law.[9] After repeating the *United Brands* definition, the CJ went on to state that:

> Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.[10]

The definition in *United Brands* has been adopted practically wholesale in the Maltese Competition Act.[11]

In the Discussion Paper the Commission indicated that the keystone to the definition and understanding of 'dominant position' is the notion of 'independence', which the Commission understands as meaning that the undertaking in question is not facing effective competitive constraints.[12]

[8] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* EU:C:1979:36

[9] See for instance Case T-340/03 *France Telecom SA v Commission of the European Communities* EU:T:2007:22, para 99. In Case 322/81 *NV Nederlandesche Banden-Industrie Michelin v Commission of the European Communitities* EU:C:1983:313 the CJ used slightly different wording, stating that Article 102 TFEU 'prohibits any abuse of a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competition and customers and ultimately of consumers' (para 30).

[10] *Ibid*, para 38-39

[11] Competition Act (Cap. 379 of the laws of Malta), article 2: 'dominant position' means a position of economic strength held by one or more undertakings which enables it or them to prevent effective competition being maintained on the relevant market by affording it or them the power to behave, to an appreciable extent, independently of its or their competitors, suppliers or customers

[12] Discussion Paper, para 23

THE PROBLEM WITH THE LEGAL DEFINITION

This notwithstanding, the definition of 'dominant position' poses two problems. First, the definition is unclear,[13] and, secondly much like the term 'dominant position' itself, the definition has no meaning in economics.

UNCLEAR DEFINITION

The legal definition is unclear to the extent that different analysts and authors interpret it in a different manner. Nazzini divides the various interpretations of 'dominant position' according to two 'models'. One is a structuralist model that regards dominance as coextensive with substantial and durable market power. This is the preferred approach of the EU institutions,[14] where the focus is on the economic strength of the undertaking in question rather than on its ability to exclude rivals.[15] The other is a behavioural or dynamic model that regards dominance as the ability to harm competition, which is Nazzini's preferred interpretation,[16] where rather than focusing on economic strength, the focus is on the ability to foreclose competition.[17]

This lack of clarity is contrary to the general principle of legal certainty, which requires rules of law to be 'clear, equal, and foreseeable' in order to 'enable those who are subject to them to order their behaviour in such a manner as to avoid legal conflict or to make clear

[13] Monti is also of this opinion: "the meaning of dominance in the decisions of the European Commission (…) and the Court's case law on Article 82 is far from clear" (Giorgio Monti 'The Concept of Dominance in Article 82' (2006) 2 European Competition Journal 31, 31). Renato Nazzini *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2012) describes the definition as being 'not self-explanatory' (p 328).
[14] Nazzini (n 13) 328
[15] *Ibid* 329-330, 333-342
[16] *Ibid* 328
[17] *Ibid* 330-331

predictions of their chances in litigation'.[18] The CJ and the GC have established 'legal certainty' as a general principle of EU law, and have held that the 'principle of legal certainly requires that *Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them* (…).'[19] The CJ has even gone so far as to say that 'legal certainty must be observed all the *more strictly* in the case of *rules liable to have financial consequences'*.[20] This should be the case with the competition rules, since should the undertaking in question be considered to have infringed Articles 101 or 102 TFEU, the Commission is in a position to fine undertakings up to 10% of their turnover in the preceding business year.[21] However rather than the interpretation of the competition rules being clearer, the opposite is the case.

Moreover, for the sake of consistency, the assessment of dominance in practice needs to consider the theoretical definition of 'dominant position'. The elements which should be assessed when determining whether an undertaking is dominant vary according to the interpretation given to 'dominant position'. For instance, a 'dynamic' approach would require that the conduct of the undertaking be considered, whereas a more empirical approach is required if the interpretation of 'dominant position' is considered as 'structural'. As a result, the correct approach to the assessment of dominance cannot be taken if the definition is open to interpretation. Therefore, if the theoretical notion of 'dominance' is uncertain, the assessment of dominance in practice will also be unsound.

[18] Paul Heinrich Neuhaus 'Legal certainty versus equity in the conflict of laws' (1963) 28 Law and Contemporary Problems 795, 795

[19] Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* EU:C:2007:370, para 25 (emphasis added)

[20] *Ibid,* para 26 (emphasis added)

[21] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 23

LACK OF ECONOMIC MEANING

Dominance is considered a 'legal' concept,[22] and has no meaning in economics. This is obviously problematic for an area of law so tied with economics, particularly considering that the assessment of dominance requires an economic assessment.[23]

Walker and Pearce Azevedo argue that the legal definition can never make sense in economic terms.[24] They give two reasons for this. First, no successful firm can truly act independently of its customers and consumers to an appreciable extent, due to the discipline of the demand curve, whereby, if a firm raises its prices, it will sell fewer units, whether it is dominant or not. Second the dominant firm can only raise prices above the competitive level to the point at which the constraints imposed on it by its competitors on the demand curve are binding, and therefore it cannot act truly act independently of its competitors to an appreciable extent.[25]

Walker and Pearce Azevedo's theory is criticised by la Cour and Møllgaard who argue that the definition in *Hoffmann-La Roche*[26] *can* be given an economically sensible interpretation. They propose that the CJ's definition of a dominant position is that the rivals' price elasticity, the rivals' quantity elasticity and the own-price elasticity be close to zero, so that the dominant

[22] Geradin et al (n 4); Neils, Jenkins and Kavanagh (n 4), 121. See also Massimiliano Vatiero 'Dominant market position and ordoliberalism' (2015) 62(4) International Review of Economics 291, 292

[23] See Chapter 3. Gerardin *et al* (n 4) in fact state that 'the assessment of dominance is ultimately very heavily influenced by economic considerations' (p 10).

[24] Mike Walker and Joao Pearce Azevedo 'Dominance: meaning and measurement' (2002) 23(7) ECLR 363. For an analysis of this theory, see Annalies Azzopardi '"Dominant position": a term in search of meaning' [2015] Global Antitrust Review 6, 13-15 < http://www.icc.qmul.ac.uk/docs/2015/170752.pdf > accessed 2 January 2018

[25] Walker and Pearce Azevedo (n 24) 364. This is embraced by Gerardin *et al* (n 4) p 3. Niels, Jenkins and Kavanagh are largely of the same opinion – see (n 4) p 121. See also Emanuela Arezzo 'Is there a role for market definition and dominance in an effects-based approach?' in M-O Machenrodt, B Conde Gallego and S Enchelmaier (eds) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Berlin, 2008), 25.

[26] n 8

undertaking may change its price without a price response from its competitors or a quantity response from its customers and consumers.[27]

It appears that the biggest problem from an economic point of view is the notion of 'independence', even though the legal definition refers to independence *to an appreciable extent*.[28] From the foregoing discussion of independence perhaps a tentative distinction can be drawn between 'practical' independence and 'theoretical' independence. It would appear highly unlikely that an undertaking can be considered to be 'independent' if one were to consider solely economic theory since, in view of well-established economic assumptions about markets, and about the demand and supply curves, no undertaking can act truly independently, whether one considers absolute independence or independence to an appreciable extent.

In fact, the evidence from Malta would tend to show that it is Walker and Pearce Azevedo's theory which is true of small jurisdictions. In *Datastream vs Camline*[29] the OFC found that Datastream was dominant on the market even though it found that it could not act independently of its competitors; this conclusion was re-affirmed by the Appeals Tribunal, notwithstanding Datastream's submissions on the matter. No real reason was given by the Appeals Tribunal as to why Datastream's submission was to be rejected. This implies that at least in small jurisdictions an undertaking may be dominant even if it cannot act independently of its competitors. It would appear therefore that the text of the definition

[27] Lisbeth F la Cour and H Peter Møllgaard 'Meaningful and Measureable Market Domination' [2002/05] LEFIC Working Paper < http://openarchive.cbs.dk/bitstream/handle/10398/6792/wplefic052002.pdf?sequence=1> accessed 27 June 2015

[28] Arezzo (n 25), comments that "economists often seem incapable of grasping the flexibility inherent in the wording 'to an appreciable extent'" (p 25)

[29] Application no. 8/2012 *GO plc previously Datastream Limited vs Camline Internet Services Limited* 29 January 2014; MT:TAKK:2014:85708 (Competition and Consumer Appeals Tribunal)

itself is redundant, since although undertakings are deemed to be unable to act independently of competitors, they can still be considered to be dominant. This situation would disprove la Cour and Møllgaard's conception of dominance. It may of course be argued that this is only one case, and therefore cannot be relied on with any certainty; however *Datastream vs Camline* appears to be the only judgment where this issue was discussed in Malta. In fact, as will be shown in Chapter 3, most abuse cases in Malta, including *Datastream vs Camline*, focus on the market shares of the undertaking in question, rather than analysing the very notion of dominance, irrespective of the definition of 'dominant position' in the Competition Act.

On the other hand, it may be arguable that although in theory it is highly unlikely that an undertaking can act independently of its competitors, customers and consumers to an appreciable extent, this may be possible in practice. For instance, the idea dismissed by Walker and Pearce Azevedo of an undertaking that can raise prices to an extent above the competitive level could be said to indicate dominance in practice. In a way, la Cour and Møllgaard's theory envisages situations of 'practical' independence, since in their view the definition in *Hoffmann-La Roche* refers to situations where competitors cannot easily respond to price changes by the dominant undertaking, whether through price or output.

However, the reality is that if la Cour and Møllgaard's interpretation were the correct interpretation of the definition of dominant position, the number of undertakings which were considered dominant would have been much lower. Very few undertakings can raise their price without a price response – for instance in *United Brands* it was clear that the relevant

market was highly competitive. From the decisional practice of the EU institutions,[30] it does not appear that this interpretation is what the CJ had in mind when devising the legal definition.

RATIONALISING THE DEFINITION

It should be evident by now that the legal definition has raised more questions than it answers. There have been various attempts at making sense of the legal definition of 'dominance',[31] however the most accurate explanation of the legal definition has been put forward by Monti.[32]

Monti rationalises the legal definition by interpreting it as 'commercial power'.[33] The idea that a dominant position is 'commercial power' is inspired by the judgments in *Hoffmann-La Roche,*[34] *United Brands*[35] and the *GE/Honeywell*[36] merger decision. In *United Brands* for instance, the Court considered vertical integration as evidence of dominance because UBC had certain advantages which none of its competitors enjoyed, such as a number of

[30] For instance in *United Brands* (n 6), the CJ noted that it was the cumulative effect of the advantages enjoyed by UBC, namely the market share of UBC (which was larger than its competitors'), advertising, the method of production, packaging, transportation, selling and displaying of the product, which ensured it had a dominant position. None of these elements in and of themselves or in conjunction with others would indicate that UBC's competitors could not respond to price changes by UBC. Similarly in *Hoffmann-La Roche* (n 8), the emphasis was on 'the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition' (para 48); no consideration was given to the ability of Hoffmann-La Roche's competitors to respond to changes in price by the undertaking in question.

[31] See Monti (n 13); Economic Advisory Group for Competition Policy, *An economic approach to Article 82* (July 2005); John Vickers 'Market power in competition cases' (2006) 2 European Competition Journal 1 p 11; Nazzini (n 14) 357-8; Vatiero (n 22). On the different views taken see Annalies Azzopardi 'Dominant position: a term in search of meaning' (2015) 8 Global Antitrust Review 6, 17-19

[32] Monti (n 13)

[33] Monti (n 13) , 38-43

[34] n 8

[35] n 6

[36] Case COMP/M.220 3 July 2001

plantations and a fleet of ships.[37] It also carried out research and development, and was able to hold competitors off although there was fierce competition on the market. The CJ considered relevant the fact that UBC sold more bananas than anyone else, notwithstanding it was making losses.[38] Monti notes that this is evidence of efficiency not economic harm to consumers; the CJ therefore was focusing on UBC's commercial power and not on whether UBC was free to set prices and reduce output,[39] which is required by the notion of 'substantial market power'. The conception of 'dominance' as 'commercial power' is also espoused by Dethmers and Dodoo[40] (although they do not use the term 'commercial power'), and sustained by the study carried out by Fishwick, who found that the judgments of the CJEU stressed the importance of freedom from the constraint of competition, and the existence of a trading partner or competitor without whose consent other firms cannot remain in business.[41] The idea of 'dominance' as 'commercial power' is also implied in Martini's description of a dominant position as a position of dominant leadership on the relevant market.[42]

Monti notes that the case law on dominance differs from the idea of substantial market power since it considers commercial power and the ability to use it when confronted by competition.[43] Indeed the legal definition includes within it firms which have acquired a

[37] Monti (n 13), 39
[38] *Ibid,* 39-40
[39] *Ibid.* 40
[40] Frances Dethmers and Ninette Dodoo 'The abuse of Hoffmann-La Roche: the meaning of dominance under EC competition law' (2006) 27(10) ECLR 537, 537
[41] Francis Fishwick 'The Definition of the Relevant Market in the Competition Policy of the European Economic Community' (1993) 63 (1) Revue d'economie industrielle 174, 175
[42] Gianmaria Martini 'La politica della concorrenza: fatti stilizzati, teoria, evidenza empirica italiana' (1998 106(2) Rivista Internazionale di Scienze Sociali 327. Vatiero (n 22) describes a dominant firm somewhat similarly although less comprehensively: "there is more than one competitor (hence, it is not a monopoly), but no firm (or a group of firms, but not all) has a relevant (thus, is not a perfect atomistic competition context)."
[43] Monti (n 13) 38

strong market position through any manner, even if 'stemming from superior performance or quality, or due to structural absence of competition.'[44] This potentially has a greater impact on small jurisdictions than on larger markets.

As explained in Chapter 1, small jurisdictions are characterised by monopolies and oligopolies due to the nature of the market. Although a finding of dominance is not itself a criticism,[45] assessing dominance without considering whether that dominance stems from the structural absence of competition means that natural monopolies or oligopolies may possibly be penalised for conduct which is seen as foreclosing competition when no potential competition exists and actual competition is limited by the structure of the market itself.

Indeed natural monopolies are characterised by the fact that a single undertaking can provide a specific product at a lower cost than multiple undertakings.[46] There is therefore unlikely to be any potential competition in such markets. The consequence is that natural monopolies would be restricted in their conduct by the competition rules notwithstanding the fact that their conduct cannot in reality harm the relevant market, because it is of its nature less competitive than other markets.

One might indeed argue that natural monopolies should never be considered as dominant undertakings in EU competition law. A more moderate approach would be to consider the particular characteristics of natural monopolies when assessing whether they are dominant,

[44] Dethmers and Dodoo (n 40),537

[45] Case 322/81 *Nederlandasche banden-Industrie Michelin v Commission* EU:C:1983:313

[46] Michal S Gal *Competition Policy for small market economies* (Harvard University Press, 2009) 112. Gal also advocates that natural monopolies should be regulated somewhat from other monopolies; she sees nothing wrong in direct government intervention through price regulation, in particular because natural monopolies are in a better position to price closer to the profit-maximising level (see Chapter 4 of the same book). However, in practice natural monopolists have the same effect as undertakings in a dominant position on the market and therefore, it is submitted that the same principles which govern dominant undertakings should apply to natural monopolies. Government intervention is more likely to cause harm. The main reason for this is that it is unlikely to be as timely as required by market forces.

and then again when assessing whether they are considered to have abused that dominance. This is the approach which the CFT took in in Malta in *Federated Mills.*[47] In *Federated Mills* although the OFC found an abuse of a dominant position, the CFT concluded that there was no breach of the competition rules and that both the undertaking's monopoly in the market and its conduct were the result of the structure of the market.

Conversely, a superior, more efficient undertaking which is subjected to intense competition by less-efficient competitors would still be considered dominant. This was the case in *United Brands*, where the undertaking, which was clearly highly efficient through vertical integration,[48] was considered dominant, although the CJ itself admitted that it was subject to intense competition by smaller undertakings.[49] Once again, the potential for this to happen in Malta and other small jurisdictions is greater due to the particular limitation of resources in small jurisdictions. Therefore, the current application of the definition would potentially apply to a greater number of undertakings in small jurisdictions, possibly unnecessarily.

The problem is that commercial strength does not necessarily equate to market power. The fact that an undertaking is successful does not mean that an undertaking is dominant. This problem is particularly exacerbated in small jurisdictions. In Malta, as in other small jurisdictions, it is very common for undertakings to be regarded as forerunners in a particular market, particularly if they were the first company to carry on a particular business. This conception of dominance may classify undertakings as being in a dominant position simply because they have earned notoriety in their field. This would restrict the conduct of particular

[47] Case no 5/2007: *Ex Officio investigation in relation to Federated Mills plc* 28 April 2008 (Commission for Fair Trading). This case is considered in detail later, see p 89-90.
[48] n 6, para 70 *et seq.*
[49] *Ibid,* para 116

undertakings which are considered 'leaders' in a particular market, again potentially unnecessarily. In any case, the very fact that the notion of 'dominance' equates to 'commercial power' indicates just how nebulous the notion really is, since the term 'commercial power' itself is particularly subjective.

IS 'DOMINANCE' REALLY 'SUBSTANTIAL MARKET POWER' IN DISGUISE?

Since there is no agreement as to what 'dominance' means in economic terms, 'dominance' is often equated with 'market power', more specifically with 'substantial market power',[50] which does have meaning from an economic point of view.[51] However dominance cannot currently be said to be substantial market power in its economic meaning.[52] The definition of 'dominance' does not encompass the elements which make up substantial market power. The ability to act independently does not necessarily entail the ability to lower output and increase price in order to enjoy increased profitability.

It may be argued that the ability to act independently implies these requirements, since an undertaking in a dominant position may raise prices above the competitive level and

[50] Bishop and Walker (n 2), 227-229. See also Nicolas Petit and Norman Neyrinck 'Behavioural Economics and Abuse of Dominance: A proposed alternative reading of the Article 102 case-law', GCLC Working Paper 02/10, p 6.

[51] See for instance Whish and Bailey (n 2), 187 and O'Donoghue and Padilla (n 3) 141; however this view is challenged: see Niels, Jenkins and Kavanagh (n 4) p 121 and Nazzini (n 13) p 335-336.

[52] The fact that dominance was originally not intended to equate to substantial market power is evidenced by the fact that in the Guidance Paper the Commission has attempted to marry the definition of dominance as found in the CJ's case law and its own decisions with the notion of substantial market power (European Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, para 10 and 11). An inkling of this view was already given in the Discussion Paper, where the Commission concluded that:
'For dominance to exist the undertaking(s) concerned must not be subject to effective competitive constraints. In other words, it thus must have substantial market power.' (para 23). See Pinar Akman 'The European Commission's Guidance on Article 102TFEU: From *Inferno* to *Paradiso*?' (2010) 73(4) Modern Law Review 605, 612, 612 on the matter of 'significant period of time'.
The position in the Guidance Paper is problematic conceptually. The Commission is bound to use the CJ's definition of dominance, since this constitutes law. Therefore, the Commission uses the legal definition as a starting point of an attempt towards a more economic and effects-based approach towards dominance. However forging an economic approach within the legal definition is not straightforward.

therefore act independently of its competitors, and reduce output and thus act independently of its customers and consumers. However, the jurisprudence on dominance indicates that this was not the intention of the CJ and the Commission when this definition was devised. In *United Brands* itself the CJ dismissed the idea that profitability is indicative of dominance.[53]

There have been some attempts at integrating the notion of 'substantial market power' into the definition of dominance.[54] However there is presently only minimal acceptance of the use of the notion of substantial market power in EU competition law, notwithstanding generally widespread support for the use of this criterion. This caution is perhaps warranted, since the notion of substantial market power is not without its problems. The criticism of substantial market power centres around two issues.

First of all, identifying the 'competitive price level' is near impossible.[55] In view of the fact that the direct identification of the competitive price level is generally impossible, market power has to be inferred indirectly from the characteristics of the industry and the nature of competition within the market.[56] This means that adopting substantial market power as the

[53] Paragraph 126. This idea was reiterated in Case 322/81 *Nederlandasche banden-Industrie Michelin v Commission* EU:C:1983:313, para 59: "it must be observed that temporary unprofitability or even losses are not inconsistent with the existence of a dominant position".
It should be noted that 'economic' profitability is not the same as 'accounting' profitability (See Bishop and Walker (n 4), 98-99; Neils, Jenkins and Kavanagh (n 4), 152, 155-157), and it is the former which is preferred for competition analysis. Economic profits consider the difference between the revenue received from the outputs and the opportunity costs of the inputs (Investopedia 'Economic profit (or loss)' < http://www.investopedia.com/terms/e/economicprofit.asp> accessed 21 January 2016). It is possible that UBC and Michelin both argued on the basis of their accounting losses. However the CJ categorically said that '*An undertaking' s economic strength is not measured by its profitability*' and did not distinguish between the types of profits. No attempt was made at considering whether the undertakings in question were in fact making economic profits or losses. The CJEU have however used profits as a factor indicating dominance.
[54] Apart from the Commission's statements in the Guidance Paper (see n 52), there have been some attempts by the Commission to introduce the idea of 'substantial market power' in its decisions. For instance see COMP/C-3 /37.990 *Intel* 13 May 2009, para 837, 839 and COMP/39.525 *Telekomunikacja Polska* 22 July 2011, para 641. However, this idea has not yet trickled upwards to the GC and the CJ (See Case T-286/09 *Intel Corp. v European Commission* EU:T:2014:547). Moreover, in other recent cases the Commission has simply relied on the traditional notion of dominance (Case AT.39985 -*Motorola - Enforcement of GPRS standard essential patent*).
[55] Walker and Azevedo (n 24); Akman (n 52) 612; Bishop and Walker (n 2) 59-60
[56] Bishop and Walker (n 2), 61

definition of dominance would re-create part of the problem with the legal definition, in that the assessment of an element of the interpretation of substantial market power is still unclear. However, unlike with the legal definition, the concept of competitive price level (as opposed to its assessment in practice) is well-established. Therefore, at least conceptually, the idea of substantial market power is still clearer than the legal definition of dominance.

Secondly, it is not necessarily the case that there is a link between price-cost margins and the intensity of competition on a particular market; an undertaking may earn large profits simply because of its superior efficiency when compared to its rivals, rather than because of its market power.[57] This would, like the legal definition, identify an undertaking as dominant irrespective of how it achieves that dominance.

This notwithstanding, utilising substantial market power as a definition would be preferable to using the current legal definition in view of the fact that there is consensus on the elements which make up substantial market power. Although some of the elements which make up the definition of 'substantial market power' are difficult to quantify, they are clearly identified and comprehended. The same cannot be said for the legal definition.

In view of the *Datastream vs Camline* judgment, defining dominance as substantial market power would be in line with what could be a new trend in decisional practice in Malta. By holding that an undertaking is dominant although it could not act independently of its competitors, the Appeals Tribunal has, perhaps unconsciously, adopted the idea of 'substantial market power' instead of the legal definition of dominance.

[57] Akman (n 52), 612

Utilising 'substantial market power' instead of the current legal definition would likely mean that, because of the strict economic tests required, fewer undertakings will be found to be dominant. This would be the case largely because most of the indicators which are currently used to determine whether an undertaking is dominant,[58] which in reality indicate that an undertaking is efficient rather than dominant, would have no place in the test utilised to determine substantial market power. At the very least, if substantial market power is adopted as the relevant definition, competition authorities would be required to adduce further evidence before concluding an undertaking is dominant. Monti for instance opines that the undertakings in *United Brands* and *GE/Honeywell* would probably not have been found to be dominant if dominance were considered to be substantial market power.[59]

This being the case, the application of 'substantial market power' as 'dominance' would mean that the number of undertakings considered dominant in relevant markets within Malta could potentially be lower. This would in turn signify that Article 102 TFEU could potentially apply to fewer undertakings, and thus fewer undertakings would be restricted in their conduct by Article 102 TFEU, whilst at the same time, undertakings which are truly dominant because they are, through rigorous economic testing, proven to have substantial market power, would be constrained by the provisions of Article 102 TFEU. Therefore, the application of the 'substantial market power' test would proscribe anti-competitive conduct by truly dominant undertakings, whilst not checking the conduct of undertakings who may be considered 'dominant' but not have 'substantial market power'. This could potentially be pro-competitive, since the latter undertakings, which are currently restricted in what they can do,

[58] See p 91 *et seq*. See also Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, cases and materials* (7th edn, OUP 2019) 340-343, 344-354
[59] Monti (n 13) 42.

would be able to compete more fiercely on the market, therefore increasing the level of competition on the market, and consequently benefitting the market. Moreover, the application of the 'substantial market power' test could arguably benefit Malta and other small jurisdictions which have a preponderance of oligopolies and monopolies in a number of relevant markets, since the possibility of the competition rules prohibiting conduct which in reality could be pro-competitive would be decreased.[60]

COLLECTIVE DOMINANCE

The discussion on dominance has so far focused on what is sometimes referred to as 'single firm' dominance, that is a dominant position held by one undertaking. However, Article 102 TFEU refers to abuse committed by 'one *or more* undertakings of a dominant position' (emphasis added), and not just to abuse committed by one undertaking. The GC confirmed in *Italian Flat Glass*[61] that Article 102 TFEU could be applied to 'two or more independent economic entities'.[62] This introduced the notion of 'collective dominance' within the interpretation of Article 102 TFEU. Once again however, the economic and legal understanding of the term differ.

ECONOMIC COLLECTIVE DOMINANCE

Economists tend to view the competition law notion of 'collective dominance' as an incarnation of the idea of 'tacit collusion' in economics.[63] It will be shown that the CJ's conception of 'collective dominance' is wider than the idea of 'tacit collusion'.

[60] See Part II where the pro-competitive effects of conduct deemed to be abuse is considered.
[61] Cases T-68/89 et *Societa' Italiana Vetro SpA v Commission* EU:T:1992:38
[62] *Ibid* para 358
[63] See for instance, O'Donoghue and Padilla (n 4) Chapter 4, Section 4.3; Bishop and Walker (n 3) ; Niels, Jenkins and Kavanagh (n 4) 145

'Tacit collusion' in economics is not to be confused with the idea of collusion in terms of Article 101 TFEU. In economics, the notion of 'tacit collusion' encompasses situations where the relevant market is an oligopoly,[64] and where the characteristics of the market lead the oligopolists, because of repeated interactions on the market, to reach 'an implicit understanding about behaviour that is in their common interest'.[65]

This concept is based on game theory, exemplified in modern economics by the so-called 'Prisoner's Dilemma'. Game theory posits that acting in a non-co-operative manner, each undertaking would adopt a low price strategy in order to attempt to undercut its competitors and therefore obtain higher profits than those competitors. However, because undertakings on a market will interact more than once, they will come to the conclusion that by pricing a particular level, they would all benefit since they would earn profits, irrespective of the fact that their profits may be lower than in situations where they price lower than a competitor. This could have one of two outcomes: either an undertaking gives in to the temptation to price low and therefore a competitive market emerges, or else the undertakings will tacitly collude, pricing at a high level and enjoying profits without the risk of losing out to a competitor.

The Prisoner's Dilemma therefore shows that tacit collusion is not a given in an oligopoly.[66] Indeed, an oligopolist may have a greater incentive to undercut its competitors rather than tacitly collude. Whether oligopolists will tacitly collude depends on the characteristics of the market in question. Tacit collusion is likely to arise where two cumulative elements coexist.[67]

[64] An oligopoly is a market in which only few firms compete, or in which a few firms hold the bulk of the market power albeit with number of smaller competitors at the periphery (Sandra Marco Colino *Competition law of the EU and UK* (7th edn, OUP 2011), 144)
[65] Niels, Jenkins and Kavanagh (n 4) 147
[66] See Bishop and Walker (n 2) 88; Niels, Jenkins and Kavanagh (n 5) 146
[67] O'Donoghue and Padilla (n 4) 178

The first is an *incentive* for the undertakings to avoid competing, which generally occurs when the undertakings in question have common interests.[68] The second is that the undertakings have the *ability* to avoid competing, which normally arises when the costs of coordination are low, because the market is highly concentrated and stable; the customers of the oligopolist have no option but to purchase the goods at the agreed price; and there is the ability to police deviating undertakings.[69]

The idea of 'tacit collusion' is based on the same principles which govern explicit collusion, save that in tacit collusion the coordination is tacit and self-policing.[70] The economic notion of 'tacit collusion' is sanctioned both in terms of Article 101 TFEU when this is considered to lead to a concerted practice[71] and Article 102 TFEU, which is being considered below.

LEGAL COLLECTIVE DOMINANCE

The notion of collective dominance as understood by the EU institutions however is somewhat different to that of 'tacit collusion' outlined above. In *Italian Flat Glass*[72] where the GC first applied the notion of collective dominance to Article 102 TFEU, the GC gave a definitive description of collective dominance:

[68] *Ibid*
[69] *Ibid* 180-181. See also at p 184.
[70] Neils, Jenkins and Kavanagh (n 4) 145
[71] See Cases C-89, 104/114, 116-7 and 125-85 *Re Wood Pulp cartel: Ahlstrom Oy v Commission* EU:C:1993:120: 'parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct (…) it is necessary (…) to ascertain whether the parallel conduct (…) cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation' (para 71 and 72).
[72] Cases T-68, 77, 78/89 *Società Italiana Vetro SpA and others v Commission* EU:T:1992:38

> (…) two or more independent economic entities (…) being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market.[73]

This indicated that for a finding of collective dominance 'economic links' are required. The examples given by the GC of 'economic links' however muddied the waters; the GC mentioned 'agreements or licenses', which seemed to imply that the 'economic links' need to be more tangible than the structure of the market, such as the links created in an oligopoly. In *Italian Flat Glass* itself the finding of collective dominance was annulled, as the Commission was found to have 'recycled' the facts used for finding a breach of Article 101 TFEU.[74]

This matter was somewhat clarified in *Compagnie Maritime Belge*[75] where the CJ stated that:

> The existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.[76]

This indicated that there can be a finding of collective dominance even in the absence of agreements or similar links,[77] and that connecting factors which are not as tangible, such as 'the way in which undertakings interact on the market'[78] could still lead to a finding of collective dominance.

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[73] *Ibid*, para 358
[74] *ibid,* para 366
[75] Cases C-395/96P and C-396/96P *Compagnie Maritime Belge Transports v Commission* EU:C:2000:132
[76] *Ibid,* para 45 (emphasis added)
[77] See Ariel Ezrachi *EU Competition law : an analytical guide to the leading cases* (5th edn, Hart 2016), 239
[78] Ezrachi (n 77) 240

This means that in terms of EU competition law, there may be collective dominance in non-oligopolistic markets (collective dominance through agreements and similar links) as well as oligopolistic markets (collective dominance because of connecting factors in view of the structure of the market).[79] In this sense 'collective dominance' is a wider notion than that of 'tacit collusion'. Another reason why 'collective dominance' is wider than the notion of 'tacit collusion' in economics is that collective dominance can also be found between undertakings which are in a vertical relationship, and not just a horizontal relationship. This was affirmed in *Irish Sugar plc v Commission.*[80] Therefore, the guidelines established by economists for 'tacit collusion' are only relevant to oligopolistic collective dominance. What is crucial for collective dominance is that the relevant undertakings are 'sufficiently linked between themselves to adopt the same line of action on the market'.[81]

There is very little guidance as to what could actually constitute collective dominance in practice. To date, there have been very few cases contemplating collective dominance within the context of Article 102 TFEU.[82] Compounding this problem is that in nearly all the reported cases there was some sort of agreement in place between the parties.[83]

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[79] See also Nazzini (n 13) Chapter 11, Jones, Sufrin and Dunne (n 58), 285, Barry E Hawk and Giorgio A Motta 'Oligopolies and Collective Dominance: a solution in search of a problem' (Fordham Law Legal Studies Research Paper No. 1301693, 2008), 96-97

[80] Case T-228/97 EU:T:1999:246. O'Donoghue and Padilla seem to dismiss the judgment in Irish Sugar ((n 4) 202-204, particularly p. 203). It is respectfully submitted that their comments are based on the wrongful assumption that collective dominance is tacit collusion. However none of the EU institutions have so far restricted the notion of collective dominance to apply simply to horizontal relationships, or simply to oligopolies.

[81] Joined cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission of the European Communities* EU:T:2003:245 (*TACA*), para 594-595. See Ali Nikpay and Fred Houwen 'Tour de force or a little local turbulence? A heretical view on the Airtours judgment' (2003) 24(5) ECLR 193, p 197

[82] Namely: *Flat Glass* (n 72), *TACA* (n 81), *French-West African Shipowner's Committees* [1992] OJ L134/1, *Compagnie Martime Belge* (n 75), Case T-193/02 *Laurent Piau v Commission* EU:T:2005:22, *Irish Sugar* (n 80)

[83] In *Compagnie Maritime Belge* (n 75)*, French-West Africa Shipowner's Committees* (n 82) and *TACA* (n 80; see in particular para 602), the undertakings found to have a collective dominant position on the market were parties to a liner conference. A liner conference system or a shipping conference is an agreement between two or more shipping companies to provide scheduled cargo and/or passenger service on a particular trade route under uniform rates and common terms. (Business Dictionary, "liner conference" http://www.businessdictionary.com/definition/liner-conference.html). In *Irish Sugar*, the parties were in a

The fact that most of the reported cases concerned an agreement between the parties (or at least tangible links between them) means there is ambiguity regarding which 'connecting factors' could potentially amount to 'collective dominance'. Furthermore, few of the reported cases actually found an abuse of a collective dominant position[84] and none have found abuse through tacit collusion, that is abuse of an oligopolistic collective dominance.[85] As yet therefore the concept of 'collective dominance' exists mostly in theory rather than in practice.

In *Laurent Piau*[86] the GC highlighted three cumulative elements that must subsist for there to be collective dominance:

> first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; secondly, the situation of tacit co-ordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of

vertical relationship (supplier-trader), and Irish Sugar had shareholding in SDL (*Irish Sugar v Commission* (n 80). The undertakings were so linked between them that they just fell short of comprising a single economic entity; para 28: 'Having accepted the applicant's argument that it did not control the management of SDL, despite holding 51% of SDH's capital, the Commission decided that even if it was not possible to regard the applicant and SDL as a single economic entity, they had, together at least, held a dominant position on the market in question.'). Finally, in *Laurent Piau* (n 82) the GC found FIFA to have a collective dominant position on the market, basing its findings on the fact the national football associations and the clubs forming them adhered to FIFA's regulations (Para 114-116). FIFA itself was held to hold the collective dominant position irrespective of the fact that it did not itself operate on the relevant market, since it was considered the 'emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members' (para 116). Therefore even in *Irish Sugar* and *Laurent Piau* there was what could be held to constitute an agreement between the parties.

[84] *Compagnie Maritime Belge* (n 75), *TACA* (n 81), *French-West African Shipowner's Committees* (n 82) and *Irish Sugar* (n 80)

[85] See Felix E Mezzannotte 'Tacit collusion as economic links in article 82 EC revisited' (2009) 30(3) ECLR 137 and Felix E Mezzanotte 'Using abuse of collective dominance in Article 102 TFEU to fight tacit collusion: the problem of proof and inferential error' (2010) 33(1) World Competition 77

[86] n 82

> current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.[87]

The phrase 'each member of the dominant oligopoly' indicates that these conditions are applicable only to situations where there is a collective dominance through an oligopoly, rather than through some other connecting factors, although rather confusingly in *Laurent Piau* the collective dominance was found because of links through an international association not because of an oligopolistic market. As Ezrachi points out

> the application of these conditions to the facts of the case was rather simplistic and did not amount to a serious attempt to establish that tacit collusion may materialise on that market.[88]

Since the GC did not find any abuse in *Laurent Piau* and these conditions were referred to rather superficially, it is difficult to definitively conclude that these conditions are to apply to situations of collective dominance which do not arise from an oligopolistic market.[89] Therefore although this attempt to tune the concept of 'collective dominance' under Article 102 TFEU may be welcomed, there is still little practical guidance on the application of these conditions to Article 102 TFEU cases.

In spite of all this, Nazzini has streamlined the legal tests for collective dominance. He rightly considers that the tests for oligopolistic collective dominance and non-oligopolistic collective dominance are different because there is a distinction between situations where undertakings operate in a concentrated market and have the ability and incentive to restrict

[87] *Ibid,* para 111
[88] Ezrachi (n 77) 240
[89] Nazzini (n 13) applies them only to situations of oligopolistic collective dominance.

prices and output, and those where members of an association or a consortium have the ability to harm competition by adopting a common policy on the market.[90]

As a result, Nazzini concludes that when considering whether there is non-oligopolistic collective dominance, which can be either horizontal or vertical, the test comprises two steps: first, an analysis of the links or contracts that justify a finding that the undertakings are a collective entity; and secondly an application of the test of dominance based on the same analytical structure that applies to single-firm dominance.[91] This is in line with the judgments in *TACA*[92] and *Compagnie Maritime Belge.*[93]

Adopting 'substantial market power' as a definition for dominance would not impact negatively non-oligopolistic collective dominance. It would simply mean that after examining 'the economic links or factors which give rise to a connection between the undertakings concerned'[94] and whether the undertakings are 'sufficiently linked between themselves to adopt the same line of action on the market', [95] the assessment would continue by determining whether the undertakings which are so linked have substantial market power, rather than whether they have the ability to act independently of competitors, customers and consumers.

In the case of oligopolistic collective dominance, the test means ensuring that the undertakings have the ability and incentive to coordinate and have no incentive to deviate.[96] Structural or commercial links, or direct or indirect contact cannot be sufficient for a finding

[90] Nazzini (n 13) 360
[91] *Ibid*, p. 387; see also pp.364-370
[92] n 81, para 594-595
[93] n 75
[94] *Ibid*, para 41
[95] *TACA* (n 81), para 594-5
[96] Nazzini (n 13) 387; see also pp.370-384

of oligopolistic collective dominance.[97] The test suggested by Nazzini for oligopolistic collective dominance is in fact the same test used by economists for 'tacit collusion' and the test promulgated by the CJ in *Laurent Piau*.[98]

Nazzini's tests are sound, rational methods for assessing collective dominance, which are in line with the concept of collective dominance as found in EU competition practice, whilst still having economic grounding. Either of these tests, as applicable, should be applied during an analysis of collective dominance in practice.

In the light of our previous discussion, what can be definitely concluded? Certainly, the legal understanding of collective dominance is not limited to oligopolies and to abuse committed by the oligopoly as a whole; indeed it has so far never been applied to a situation of tacit collusion proper.[99] In fact, it has a wider application and can be utilised whenever it can be shown that undertakings are somehow linked.

Whilst the GC has held that the abuse of the collectively dominant undertakings 'does not necessarily have to be the action of all the undertakings in question',[100] it should be good practice that in both oligopolistic and non-oligopolistic cases of collective dominance, conduct by one of the undertakings should only be considered abusive if it is intended to strengthen or safeguard the collective dominant position on the market.[101] However, the legal notion of

[97] *Ibid*
[98] n 82
[99] See Felix E Mezzannotte 'Tacit collusion as economic links in article 82 EC revisited' (2009) 30(3) ECLR 137 and Felix E Mezzanotte 'Using abuse of collective dominance in Article 102 TFEU to fight tacit collusion: the problem of proof and inferential error' (2010) 33(1) World Competition 77
[100] *Irish Sugar* (n 80) para 66
[101] See Jones, Sufrin and Dunne (n 58) 697-698. For applicability of this notion, see Monti (n 13), 141-144 and Geradin et al (n 4) 25.

collective dominance can only be clarified with further judgments in the field which apply Article 102 TFEU and which examine collective dominance with a critical eye.[102]

COLLECTIVE DOMINANCE IN MALTA

To date, there has been no case in Malta in which a breach of a collective dominant position was found. There have however been indications of collective dominance in the decided cases.

For instance in *WJ Parnis England*[103] two competitors reacted to a new entrant by setting up a campaign of issuing threatening letters and making telephone calls to customers stating their intention to increase tariffs if the customers switched to certain services offered by the new entrant. Moreover, tariffs were 'jointly increased by the defendant undertakings giving unequivocal expression and proof, to their illegitimate behaviour'.[104] This is somewhat reminiscent of the facts in *TACA*[105] and *Compagnie Maritime Belge*.[106] In this case, the CFT found that the undertakings against whom a complaint had been lodged had in fact abused their dominant position; however from the report of the decision it does not appear that the CFT indicated whether they were dominant individually or collectively. Presumably, it considered them collectively dominant since they acted together in driving out their new

[102] See Craig Callery 'Considering the oligopoly problem' (2011) 32(3) ECLR 142, 151-152

[103] Complaint Number 3/2003: *W J Parnis England Ltd v Sea Malta Company Ltd and Gollcher Company Ltd as agents to Grimaldi (Genoa) Line* 10 October 2005 as reported in Andrew Muscat, Simon Cachia and Simon Schembri 'Current Developments in Member States' (2006) 2 European Competition Journal 236 and Silvio Meli and Eugène Buttiġieġ 'Malta' in Ioannis Kokkoris (ed) *Competition Cases from the European Union* (Sweet & Maxwell, London 2007), 920. Judgment was not published; the account of this judgment is based on the summaries prepared by Meli (the presiding magistrate) and Buttiġieġ and Muscat, Cachia and Schembri, cited in this note.

[104] Silvio Meli and Eugène Buttiġieġ 'Malta' in Ioannis Kokkoris (ed), *Competition Cases from the European Union* (Sweet & Maxwell, London 2007) p. 921

[105] n 81

[106] n 75

competitor. These undertakings were also found to be in breach of Article 5 of the Competition Act, which mirrors Article 101 TFEU.[107]

In another case – *Roads Group*[108] – the relevant undertaking was a limited liability company set up by various contractors to enable them to make a unitary bid for public tenders. Once the contract was awarded, the contract would then be 'sub-contracted' to one of the members. This was a blatant bid-rigging case. Although the CFT found a breach of Article 5 of the Competition Act, its reasoning appears to be based on jurisprudence under Article 102 TFEU.[109] It may be argued that the company set up by competitors created sufficient 'links' between various undertakings (the contractors) for there to be collective dominance between them; although one must be wary not to 'regurgitate' the same facts to find a breach of both Article 5 of the Act/Article 101 TFEU and Article 9 of the Act/Article 102 TFEU, as the Commission was reprimanded for doing in the *Italian Flat Glass* case.[110] The CFT however did comment that the various contractors were a 'unified collective entity'.[111]

Despite the scarcity of Maltese decisions on collective dominance, the notion of collective dominance could potentially have a wide application in Malta, as well as in other small jurisdictions. It was already shown in Chapter 1 that small jurisdictions typically have a relatively large number of oligopolies in various markets. The preponderance of oligopolies means that there is a greater likelihood that in some markets the oligopolists be deemed to

[107] Annalies Azzopardi ' A critical analysis of the leading decisions of the Commission for Fair Trading' (LL.D thesis, University of Malta 2010), 44-45 and 50

[108] Complaint Number 3/2000: *Complaint submitted by The Director, Ministry of Public Works and Construction re Roads Group Limited following the call for tenders for the hot asphalt surfacing of roads* 11 June 2001 in Silvio Meli *Judgements of the Malta Commission for Fair Trading* (Gutenberg Press 2006) 124

[109] Azzopardi (n 107) 70-71

[110] n 72, para 360, 366

[111] See Azzopardi (n 107) 132 for an exercise as to how the 'collective entity' could have abused of its dominant position on the market.

be in a collective dominant position. In other words, the probability of tacit collusion is higher in Malta and other small jurisdictions. Moreover, due to the relatively small number of businesses, and the fact that, from a practical point of view in a small geographic space, everyone 'knows one another',[112] the chance of a non-oligopolistic collective dominant position is also likely to be proportionately higher in small jurisdictions than in larger markets.

It may come as a surprise therefore that the number of decided cases concerning collective dominance in Malta is so low. One reason for this could be the same problem that would afflict any competition authority: collective dominance is not easy to detect and prove. This is particularly the case with oligopolistic collective dominance, since the links between the oligopolists on the market is not tangible. Another possible source of caution for competition authorities is that the number of cases on collective dominance at EU level is also very low; meaning that there is not much guidance for authorities when it comes to investigating possible instances of collective dominance. Indeed cases on Article 102 TFEU regarding collective dominance are very few, and cases on oligopolistic collective dominance are even fewer. Therefore there is very little practical experience of collective dominance.

In fact it appears that enforcement of collective dominance is low in most states: a special project of the International Competition Network found that hardly any respondents had any experience with situations of collective dominance.[113] Pending further decisions and

[112] The population in Malta for 2013 was 425,384; the population density (persons per km2) 1,346 (National Statistics Office 'Malta in Figures 2014' (Valletta, Malta 2014). At the end of 2018, Malta's population stood at 493,559 (National Statistics Office 'World Population Day: 2019' (Valletta, Malta 2019)). On this phenomenon see also Lynette Chua Xin Hui, 'Merger control in small market economies' (2015) 27 Singapore Academy of Law Journal 369, 375

[113] International Competition Network 'Competition Law in Small Economies' (Special Project of the 8th Annual Conference, 3-5 June 2009), 30

judgments from the EU institutions, it is suggested that national competition authorities and national courts consider Nazzini's tests in attempting to curb abuses of collective dominance.

The application of the notion of collective dominance in Malta and other small jurisdictions is unlikely to have an impact in and of itself. With respect to oligopolistic collective dominance, the oligopolists' behaviour would be similar to that of cartelists; in essence the oligopoly would provide an environment where a cartel can succeed without leaving discernible and discoverable evidence required under Article 101 TFEU.[114] As a result, in the long term oligopolistic collective dominance is harmful for the same reasons, such as: overcharge to parties downstream in the supply chain; deadweight welfare loss (the effect of a reduction in volume of product); lower levels of innovation; slower rate at which improvements in efficiency are achieved, or at which inefficient firms exit markets; and distortions in downstream markets, which rely on the product produced by the oligopolists.[115]

As a result, the detection and prohibition of abuses of an oligopolistic collective dominant position in Malta should not be controversial of itself. Similarly, non-oligopolistic collective dominance, where undertakings are somehow linked through agreements or other structural or economic links, and therefore act like a single dominant undertaking without constituting a single economic entity proper, cause the same harm caused by a single dominant firm. For instance, in relation to exclusionary conduct, abuse of a non-oligopolistic collective dominant position may cause: dampening of competitive dynamics; reduction in efficiency and innovation; and harm to specific parties, such as preventing existing competitors from competing effectively in the market, or forcing them to exit, and/or preventing potential

[114] Hawk and Motta (n 79), 63
[115] Niels, Jenkins and Kavanagh (n 4), 500-503

competitors from entering the market or restricting them to small-scale entry and/or buyers may be faced with higher prices, reduction in choice or reduction in quality.[116]

In the light of the above, it is unlikely that the notion of collective dominance itself will impact Malta or any other small jurisdiction any differently to a larger market, except for potentially having a wider application. Indeed, the International Competition Network concluded that whilst respondents 'described different approaches towards the situation of joint dominance, no contributors explicitly associate any specific approach with an economy's small size'.[117]

However, enforcement against collectively dominant undertakings who abuse their position in small jurisdictions would likely be highly beneficial, as it would potentially open more markets to competition, and should be encouraged, as long as enforcement considers the effect of that allegedly abusive conduct on the market in question in line with the considerations made in the following chapters.

CONCLUSIONS

It is now clear that dominance as defined by the CJ, the GC and the Commission is considered as a position of commercial power. From the decisional practice of the CJ, the GC and the Commission, and taking into account the legal definition propounded by the EU institutions as well as the factors which are considered in order to assess dominance, one may suggest that currently the term 'dominant position' should be understood to mean a position held by an undertaking on the market in which it operates which enables it to harm or damage that

[116] Niels, Jenkins and Kavanagh (n 4), 508
[117] International Competition Network (n 113), 30

market in any manner whatsoever, irrespective of how or why it has obtained that position, and of whether it has the power to, in some manner, raise prices above competitive levels**.**

Perhaps this approach to dominance is unsurprising in view of the fact that EU competition law is the product of the post-war era, when the EU Member States were focused on re-building their economies. A vague yet wide definition of dominance enabled the EU authorities to review any conduct by undertakings who are powerful enough to somehow harm the market, which at the time needed strengthening. Perhaps this need to constrain dominant undertakings was also a direct result of Member States promoting local businesses as 'national champions' in the post-war era. Certainly market players in Malta need to re-adjust their mentality as Malta moved from a protectionist market in the 1970s to a competitive and liberalised market in the 1990s and 2000s. However, the fact remains that today this definition is no longer satisfactory.

It is proposed that the idea of dominance be truly aligned with the concept of 'substantial market power' since this concept has an economic rationale and has been properly analysed and defined and therefore would lead to certainty for undertakings and enforcers alike. This idea is not particularly novel, and has already been proposed by other authors, for a variety of reasons.[118] The positive impact of this on small jurisdictions, such as Malta, has been noted.[119] The shortcomings inherent in the notion of substantial market power are considerably less than those associated with the legal definition of dominant position, and therefore adopting substantial market power as the definition of dominant position would

[118] See for instance Gerardin et al (n 4) 4. Note also that others already view dominance as equating substantial market power, see n 52.
[119] See p 60-61.

constitute a step forward in the understanding of the concept of 'dominant position', and particularly in the application of Article 102 TFEU.

On another note, competition authorities particularly those in small jurisdictions should take collective dominant positions more seriously. This would have a particularly positive effect on small jurisdictions where the likelihood of a collective dominance position is higher than in larger markets, and which would therefore be safeguarded from harmful conduct which does not fall within the remit of Article 102 TFEU otherwise, and possibly falls short of collusion in terms of Article 101 TFEU.

CHAPTER 3: THE ASSESSMENT OF DOMINANCE

So far, this Part has considered the notion of 'dominance' from a theoretical perspective. However, the epithet of 'dominant position' must be applied to undertakings in the real world. In terms of EU competition practice, to assess whether an undertaking is dominant one must first define the relevant market, and then consider a number of factors in relation to that market, the most relevant of which is the market share of the relevant undertaking on that market.

This chapter will first look into why and how markets are defined. The problems, both theoretical and practical, involved in market definition will then be highlighted. The chapter will then turn to the examination of which factors have been used by the CJ, the GC and the Commission in order to conclude that an undertaking is dominant. The impact of market definition and the factors used to indicate dominance in EU competition practice on small jurisdictions will be considered as part of the analysis of these concepts.

DEFINITION OF THE RELEVANT MARKET

The 'relevant market' is 'the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market'.[1] The relevant market can be said to be made up of the relevant product market, the relevant geographic market and, if applicable, the relevant temporal market. The definition of the relevant market 'often has a decisive influence on the

[1] L Sullivan *Handbook of the Law of Antitrust* (1977) as quoted in Donald I Baker 'Market definition and international competition' (1982) 15 International Law and Politics 377, 379

assessment of a competition case'; [2] the extent to which this should be the case however shapes any discussion on market definition, and the present is no exception.

HOW IS THE RELEVANT MARKET DEFINED?

In *United Brands*[3] and *Hoffmann La Roche*[4] the CJ held that the relevant market must be defined with reference to the product and geographic markets. This is the approach taken by the Commission, outlined in its Notice on the definition of relevant market for the purposes of Community competition law ("Notice on the relevant market").[5]

The definition of the relevant geographic market has already been briefly considered in Chapter 1. Essentially, the geographic market is 'the territory in which all traders operate in the same or sufficiently homogeneous conditions of competition in so far as concerns specifically the relevant products or services, without it being necessary for those conditions to be perfectly homogeneous.' [6] On the other hand, the relevant product market comprises 'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.[7] The Notice on the relevant market lists various indicators considered by the Commission in its assessment of the relevant markets.[8]

In order to define both the relevant product and the relevant geographic markets, one must consider the relative competitive constraints, namely the demand and supply substitutability

[2] European Commission 'Notice on the definition of relevant market for the purposes of Community competition law' [1997] OJ C372/5, para 4 ('Notice on the relevant market')
[3] n 3, para 10
[4] n 3, para 21
[5] [1997] OJ C372/5
[6] Case T-219/99 *British Airways v Commission* EU:T:2003:343, para 108
[7] Notice on the relevant market, para 7
[8] *Ibid* paras 37-43, 45-50

for each market. Demand substitution, that is whether customers consider the product or service as substitutable and interchangeable with another, is the most relevant element since it is likely to have the most immediate effect on competition.[9] Demand substitution involves assessing the range of products or services and geographic areas which are viewed as substitutes by the consumer. [10] Supply-side substitution is normally taken into account to define markets where its effects are as effective and immediate as with demand substitution.[11] Potential competition, which is also a competitive constraint, is not considered when defining the market, but is normally considered subsequently, once the position of the undertakings involved in the relevant market has been ascertained.[12]

In certain circumstances, the temporal market may also be of relevance although it is not considered in the Notice on the relevant market. The temporal market is the market defined with reference to time. The notion of the temporal market was raised in just two cases. The first was *Chiquita*,[13] where UBC tried to argue that it had no market power over the summer months when fruit was more plentiful. The Commission however concluded there was only one temporal market and the issue was not dealt with on appeal. The second was *ABG*[14] where the Commission did take into account the temporal market, and defined the market for oil by limiting it to the period of crisis following the OPEC decision to increase prices.

MARKET DEFINITION IN MALTA

In line with EU competition practice, the Competition Act defines the 'relevant market' as:

[9] *Ibid*, para 13
[10] *Ibid,* para 15
[11] *Ibid*, para 20
[12] *Ibid*, para 24
[13] IV/26699, 17 December 1975 [1975] OJ L95/1
[14] IV/28.841, 19 April 1977 OJ [1977] L117/1

> the market for the product whether within Malta or limited to any particular area or locality within Malta, or outside Malta, and whether or not restricted to a particular period of time or season of the year.[15]

The national competition authority, the OC, has not issued guidelines on how markets are to be defined, however since the law obliges the national competition authority to consider EU guidance notes,[16] the OC is expected to apply the principles in the Notice on the relevant market.

Normally the Appeals Tribunal adopts the market definition proposed by the OC. Because of this, coupled with the fact that in the past the decisions of the OC were generally not published, the judgments of the Appeals Tribunal rarely provide any insight as to how the relevant market is defined.

For instance, in *Malta Dairy Products*,[17] the relevant market was said to be the market for the purchase of milk produced by milk producers and the processing of milk and other products derived from it, presumably, within Malta.[18] In *Cassar Fuels – Enemalta*,[19] the relevant product market was the market for the supply of fuel for industrial use; again although not specifically stated, the geographic market was the entire territory of Malta. These cases do not indicate that any in-depth analysis was carried out when defining the market. It is likely that the CFT relied on the business undertaken by the undertakings in question: Malta Dairy

[15] Competition Act, Article 2
[16] Competition Act, Article 12A(7)
[17] Case 1 of 1999 *Salvu Fenech of Fenech Farm, Zejtun re alleged abuse of dominance by Malta Dairy Products Ltd* 2 October 2000 (CFT) reported in English in Silvio Meli *Judgements of the Malta Commission for Fair Trading* (Gutenberg Press 2006) 99
[18] *Ibid,* p 109
[19] Complaint no. 5 of 2006 *Cassar Fuels Ltd vs Enemalta Corporation* 30 April 20017 (Commission for Fair Trading)

Products Limited is a dairy in Malta, and Enemalta Corporation was at the time the statutory monopoly in relation to energy.

More recent cases display more care with market definition. A particularly interesting case is *Austria Tabak (Malta) Limited vs Central Cigarette Company Limited*[20] where the CFT followed the OFC in defining two relevant markets, one being the market for cigarettes sold through vending machines in Malta as a whole and the other being the market for cigarettes sold through vending machines in St Julian's and Paceville, which is the entertainment hub within Malta, having a large concentration of bars and clubs, as well as restaurants, a cinema and a bowling alley. The case focused in particular on the second (narrower) relevant market. Similarly in *Datastream vs Camline*, the OFC appears to have carried out a thorough analysis of the relevant market and related markets. The Appeals Tribunal[21] adopted its assessment of the market, noting that the internet market in Malta has various strata, with the three major strata being the market for International IP Bandwidth (which delivers internet to the Maltese islands, through underwater cables), the market for wholesale internet, where an undertaking with access to International IP Bandwidth sells international broadband to internet service providers (who then sell on the retail level), and the retail market. Since this case concerned an allegation of margin squeeze,[22] the focus was on the markets for wholesale and retail internet.

[20] Complaint number 4/2006; 19 October 2009 (unreported)
[21] Application no. 8/2012 *GO plc previously Datastream Limited vs Camline Internet Services Limited* 29 January 2014 MT:TAKK:2014:85708. The Appeals Tribunal took over the case from the Commission for Fair Trading in terms of Article 70 of the MCCAA Act
[22] See p 305 *et seq.*

It is apparent that market definition in Malta is carried out along the lines of that carried out at EU level. As a result, it suffers from the same problems and limitations. These are considered in brief here.

PROBLEMS AND LIMITATIONS WITH MARKET DEFINITION IN EU COMPETITION PRACTICE

The first problem relates to the measurement of demand substitutability. Demand substitution can be measured directly through 'revealed preference', that is by examining consumers' past behaviour. When this evidence is not readily available, indirect evidence is required, such as analysing the price elasticity of demand or else inspecting the product characteristics and intended use. [23]

The Notice on the relevant market indicates one way of making the assessment on demand substitutability, which focuses on price elasticity: the SSNIP test (small but significant, non-transitory increase in price), which is also sometimes called the hypothetical monopolist test (HMT).[24] This test considers whether a hypothetical small, lasting change in the price of the product or service in question, or in a particular geographic area, would lead customers to switch to another product or service or another geographic area. The SSNIP test therefore attempts to measure sensitivity to price. The SSNIP test however is completely arbitrary. The choice of how small a price increase, how significant it has to be and what exactly 'non-transitory' entails is a choice which must be made by the relevant enforcing authority, in this

[23] Robert O'Donoghue and A Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013), 101
[24] The SSNIP test/HMT has widespread application: see Safinaz Mohd Hussein, Nazura Abdul Manap and Mahmud Zuhdi Mohd Nor 'Market definition and market power as tools for the assessment of competition' (2012) 13(2) International Journal of Business and Society 163, 170-1

case the Commission.[25] The test has also been criticised because of what is referred to as 'the cellophane fallacy'[26] and the implied relationship between elasticity of demand and gross margins.[27]

The second is the fact that although the analysis of demand substitutability is evident in all CJ and GC judgments,[28] the EU institutions, particularly the GC and the CJ, tend to define product markets by basing themselves on the physical characteristics and use of the product.

However, according to economic theory, market definition should be about substitution and price pressure between products and not about the physical characteristics of products. Market definition based on product characteristics tends to overlook the fact that price pressure between products does not require all customers to consider them substitutes.[29] Moreover, what is required by demand-side substitution is that consumers view products as substitutes. Whether the products have similar characteristics is generally irrelevant, as consumers might view products with distinct characteristics as close substitutes and vice versa.[30] However, the EU case law indicates that product characteristics are considered, and are often definitive, when defining markets.[31] The classic case is *United Brands,*[32] although a

[25] See Gunnar Niels, Helen Jenkins, James Kavanagh *Economics for Competition Lawyers* (OUP 2011), 37-38, 45 and Simon Bishop and Mike Walker *The Economics of EC Competition Law: Concepts, application and measurement* (3rd edn, Sweet & Maxwell 2010), 136.

[26] O'Donoghue and Padilla (n 27), 112. The cellophane fallacy refers to the situation which arises where an undertakings' products are already at a supra-competitive price level, and therefore the elasticity of demand for its products may be very large simply because those products which consumers would not generally consider as interchangeable become credible substitutes.

[27] O'Donoghue and Padilla (n 27), 113

[28] This is often more clearly seen when the relevant *product* market is being defined, rather than geographic market.

[29] Neils, Jenkins and Kavanagh (n 29) 2730

[30] O'Donoghue and Padilla (n 27), 101

[31] See *ibid*, 119

[32] n 3, para 31. See also Notice on the relevant market, para 7

similar approach was taken for instance in *France Télécom*[33] and *Continental Can*.[34] A more cautious approach to the emphasis on product characteristics however was taken in other cases.[35] This seems to indicate that whilst the EU authorities do over-rely on product characteristics in their assessment, they are at times wary of the inaccurate results that this reliance may bring about.

Thirdly, when it comes to defining the relevant geographic market, in most cases the geographic market was found to be EU-wide, without much analysis on the part of the Commission and/or the CJEU.[36] In most of the other cases, the relevant geographic market was a single Member State,[37] again without really many reasons being given for this conclusion. As already noted, following this trend in Malta the market is often automatically considered by the domestic authorities to be the whole territory of the Maltese islands, without much thought.

[33] Case T-340/03 *France Telecom SA v Commission* EU:T:2007:22 para 78-91

[34] n 3

[35] Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* EU:C:1983:313, para 37, 39-40, 49; Case T-219/99 *British Airways v Commission* EU:T:2009:519

[36] For instance in *Hoffmann-La Roche* (76/642/EEC: Commission Decision of 9 June 1976 relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020 - Vitamins) [1976] OJ L 223/27, para 20) and para 22 of the CJ judgment (n 3)

[37] For instance in *France Telecom* (n 37), Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* (n 39), para 26 (in practice dealers established in the Netherlands obtained their suppliers only from suppliers operating in the Netherlands and Michelin's main competitors also acted through subsidiaries located in the Netherlands) and Case T-219/99 *British Airways v Commission* (n 10), para 109-111 (generally travellers reserve airline tickets in their country of residence; IATA's rules prevented tickets sold outside the United Kingdom from being used for flights departing from the United Kingdom; once the distribution of airline tickets took place nationally, airline normally purchased the service for distributing those tickets on a national basis.). One exception is *United Brands* (n 3) where the CJ agreed with the Commission that the relevant geographic market was the market for Germany, the Netherlands, Belgium, Luxembourg, Ireland and Denmark since in those Member States the markets were free, in that there were no national preferences; therefore although the applicable tariff provisions and transport costs were different, they were not discriminatory. Another relevant factor was that UBC was using one subsidiary to deliver its products in these markets.

Fourthly, in practice, supply-side substitution is seldom considered in detail in EU competition cases. [38] The earlier judgments rarely contain any consideration of supply-side substitutability.[39] Although the situation has since improved a 2013 study found that when defining relevant markets, supply-side substitutes are considered infrequently and when they are, it is done only superficially.[40] This means that markets may have been defined too narrowly,[41] as this competitive constraint was not considered when analysing the relevant market. Again, this trend has carried over to the Maltese decisions.

Indeed the decisional practice proves that the EU institutions tend to take a narrow view of markets. One need only refer to *Michelin*[42] (the market in new replacement tyres for heavy vehicles in the Netherlands); *Hoffmann-La Roche*[43] (the market for each type of vitamin in the common market); and *British Airways*[44] (the market for air travel agency services provided by agents in the United Kingdom)[45] in order to ascertain the truth of this. This therefore means that it is very likely that a competition investigation will involve a small jurisdiction. Moreover, as evidenced by the Maltese cases, the example set at EU level will be followed by competition authorities throughout the EU including in small Member States, thereby defining even smaller markets.

[38] Two exceptions are Case 6/71 *Europemballage Cop & Continental Can Co Inc v Commission* (n 3), para 33; *Michelin* (n 39), para 41

[39] Francis Fishwick 'The definition of the relevant market in the competition policy of the European Economic Community' (1993) 63 Revue d'economie industrielle 174, 183. See Lawrence Wu and Simon Baker 'Applying the market definition guidelines of the European Union' (1998) 19(5) ECLR 273,273

[40] Javier Elizade 'Market definition with differentiated products: a spatial competition application' (2013) 36 Eur J Law Econ 471, p 503

[41] *Ibid*

[42] n 39

[43] n 3

[44] n 10

[45] Para 115

This problem is aggravated by the fact that market definition in EU competition practice suffers from lack of review. The GC and the CJ rarely review, let alone overturn, the Commission's assessment of the market in particular cases.[46] As a result, undertakings are in reality only given one shot at attempting to shape the definition of the market in a case that could find their conduct to be abusive, or their agreements to be anti-competitive. This also means that the Commission has great power in the application of the EU competition rules, since its relatively unchecked assessment will likely determine whether undertakings are dominant, and therefore whether those specific undertakings are controlled in their actions by the limitations imposed by EU competition law. This problem also exists at micro level. So far in Malta the definition of the market adopted by the competition authority has always been adopted or confirmed upon review or appeal. A more pro-active approach by undertakings during the market definition process undertaken by competition authorities is therefore advisable.

Generally, the premise in EU competition practice is that market definition is a tool for the competitive assessment of the EU competition rules and that: '[i]t serves to establish the framework within which competition policy is applied by the Commission.'[47] This is uncontroversial. The more relevant question to ask is whether market definition is actually being used simply as a tool in EU competition practice or whether it has become the defining feature of competition analysis.

[46] See Miguel Sousa Ferro 'Judicial review: do European courts care about market definition?' (2015) 6(6) Journal of European Competition Law & Practice 400. Sousa Ferro found that out of 608 annulment proceedings since *Continental Can* (n 3), market definition was raised in 134 cases, in which only 5 cases did the applicants manage to annul the Commission's decision on the basis of an incorrect or insufficiently justified market definition. (403-404)

[47] Notice on the relevant market, para 3

IS MARKET DEFINITION USED SIMPLY AS A TOOL?

The idea that market definition is a tool is stated in clear terms in the Notice on the relevant market. [48] Indeed, the general consensus is that '[m]arket definition (…) is merely an aid for determining whether power exists.'[49] The same approach should be taken were the notion of substantial market power to be adopted instead of dominance as proposed in Chapter 2.

If market definition were being used simply as a tool, the problems and limitations inherent in market definition would be corrected or at least compensated for by other considerations which the Commission and/or the CJEU make when assessing whether an undertaking is dominant, or when they are carrying out any other competitive assessment. This means that overly narrow market definitions, and even overly wide market definitions, would be corrected at a later stage when dominance *per se* is being assessed.

Unfortunately it is evident that the Commission, the GC and the CJ all tend to use market definition as the definitive element in the competitive assessment, rather than simply as a tool. This occurs because the EU institutions tend to focus on market shares as a preliminary and main assessment of dominance on the market.[50] Therefore, the problems encountered with market definition, and the inexactness of the science, is carried over when it comes to assessing whether an undertaking is dominant or whether an agreement is anti-competitive.

[48] Notice on the relevant market, para 3. See also Mario Monti 'Market definition as a cornerstone of EU competition policy' Workshop on Market Definition, Helsinki Fair Centre, 5 October 2001

[49] L Sullivan in Baker (1982, n 1) 379

[50] See also Martin S Gaynor, Samuel A Kleiner and William B Vogt 'A structural approach to market definition with an application to the hospital industry' (2013) LXI(2) The Journal of Industrial Economics 243, 244: 'Market definition often determines the results of antitrust cases'.

As yet, no generally accepted solution has been found in order to make market definition more accurate.[51] Currently similar methods for assessing the market are being utilized on both sides of the Atlantic.[52] Notwithstanding its limitations, as Baker notes 'market definition remains the best analytical tool available for assessing market power'.[53] The only possible 'solution' at present therefore is to actually use market definition as simply a method for obtaining a rough framework within which a competitive analysis can be undertaken, whilst considering market forces which may go beyond the market as defined.

THE IMPACT OF MARKET DEFINITION IN EU COMPETITION PRACTICE ON SMALL JURISDICTIONS

Generally market definition does not impact small jurisdictions in itself. Market definition is the method through which a market can be defined as small or otherwise. The impact of market definition on small jurisdictions tends to be felt because, as just discussed, market definition is not, contrary to what is stated, considered only as a tool. Since dominance will be considered in the light of the relevant market, the likelihood of finding an undertaking to be in a dominant position is increased in markets defined as small, particularly where the relevant geographic market is a small jurisdiction or part of a small jurisdiction. The same is bound to happen if substantial market power is the relevant benchmark. As a result, the fact that in EU competition practice market definition tends to result in narrow markets means that dominance or market power is overstated. This in turn means that undertakings will be

[51] Although see Willem H Boshoff 'Market definition as a problem of statistical interference' (2014) 10(4) Journal of Competition Law & Economics 861 and Robert G Harris and Thomas M Jorde 'Antitrust market definition: an integrated approach' (1984) 72(1) California Law Review 3 for suggestions.
[52] On the difference between market definition in the EU and in the US, see Javier Elizade 'A theoretical approach to marked definition analysis'(2002) 34 European Journal of Law and Economics 449
[53] Baker (1982, n 1), 381

considered to be in a dominant position when they might not in fact exert such power on the market.[54]

Utilising market definition as a tool rather than the definitive factor could have a radical effect on the outcome of competition cases in small jurisdictions where they are the relevant market. An example can be found in a Maltese case – *Federated Mills*.[55]

In this case the OFC investigated a (proposed) increase in the price of flour by Federated Mills plc ("FM"). The relevant market was defined as being the market for milling the mix of flour used in order to make Maltese bread. It is understood that the relevant geographic market was Malta as a whole. It will be noted that the relevant market was very narrowly defined. It is true that Maltese bread is a very specific type of bread, which is considered a staple in Maltese households. Maltese people generally differentiate between Maltese bread and other types of bread; it can be argued that Maltese bread is a distinct product. However it is arguable that other types of bread may to some extent or other be interchangeable with Maltese bread. Moreover, and more pertinently, the relevant market referred to the milling of flour not to bread *per se*. Although FM is the only flour mill on the island, flour can be imported, and indeed today FM faces competition from a number of flour importers.[56] Therefore the relevant product market may have been defined overly narrowly in this case.

Since the market was defined as the market for milling the mix of flour used in order to make Maltese bread, the OFC concluded that FM, being the only operator, was dominant on the relevant market. In their opinion, the undertaking had also abused its position. In view of the

[54] See Frances Dethmers and Ninette Dodoo 'The abuse of Hoffmann-La Roche: the meaning of dominance under EC competition law' (2006) 27(10) ECLR 537, 549

[55] Case no 5/2007: *Ex Officio investigation in relation to Federated Mills plc* 28 April 2008 (Commission for Fair Trading)

[56] COMP-MCCAA/28/2015 *Acquisition of Nomar Distributors by Federated Mills plc* 27 January 2016

law as it stood at the time, the OFC submitted a report asking the CFT to take a decision on the matter. In this case, the CFT found no abuse of dominance. It does not appear from the judgment that the definition of the market was challenged by the undertaking in question. Moreover, it is not clear whether the CFT found the undertaking not to be dominant, or not to have abused of its position. However, in reaching its conclusion that there was no breach of the competition rules, the CFT made a number of observations on the market, particularly the fact that Malta is a small state, specifically in relation to population, geographic mass and domestic product, which did not permit effective competition between mills and that Maltese operators were in a 'passive' position in relation to the sale of grains by the United States and the European Community.[57]

In *Federated Mills* therefore, because market definition was only used as an aid to the competitive assessment, and was not conclusive of the case in question, the relevant undertaking was found not to have breached the competition rules.

This should be done in every competition case, thereby leading to a more realistic and nuanced competitive assessment. Moreover, the likelihood is that more undertakings would be unrestricted in their conduct, particularly by Article 102 TFEU, which would in turn encourage more competition in particular markets to the benefit of the economies of small jurisdictions, particularly small states.

INDICATORS OF DOMINANCE

Once the relevant market is defined, the assessment of dominance requires a determination as to whether the undertaking under examination is in a dominant position on that market.

[57] See also p 98-99.

This latter stage of the assessment process necessarily involves the consideration of certain elements which indicate dominance, bearing in mind the fact that the market defined need not necessarily have been definitive. In the oft-quoted *United Brands* judgment,[58] the CJ noted that:

> In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.[59]

The assessment of dominance has to consider various factors because, from an economic point of view, direct measures of market power are difficult to find.[60] The factors actually used to indicate dominance will depend on the approach taken to dominance;[61] the approach taken by the EU authorities so far has been a 'structuralist' approach, which should entail the use of economic criteria.[62] In this section, it is being examined which factors have been utilised by the EU authorities to indicate dominance, and the extent to which these factors have any basis in economics. Adopting 'substantial market power' as a definition of 'dominance', as proposed in Chapter 2, would not require alteration of this structuralist approach. Therefore, the analysis of the factors used to indicate dominance equally applies in the event that one considers 'dominance' to be 'substantial market power'.[63]

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[58] n 3

[59] para 66

[60] Bishop and Walker (n 29), 62 and International Competition Network 'Unilateral conduct workbook: Chapter 3: Assessment of Dominance' (2011) < http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf >accessed 28 May 2016 ("ICN Workbook), para 16 and 17

[61] On this point, see also ICN Workbook (2011, n 64), para 11

[62] See Chapter 2

[63] Because in economic terms market power is the ability to price above cost, it has been suggested that dominance or substantial market power be measured through the Lerner Index which is computed as price minus marginal cost, divided by price (see Neils, Jenkins and Kavanagh (n 29), p 131). However, various economists caution against using the Lerner Index to assess market power, mainly because the marginal cost of a product is not necessarily indicative of the competitive price on the market. See for instance John Vickers 'Market power in competition cases' (2006) 2 European Competition Journal 3. Bishop and Walker (n 29), 89-90 indicate 4 problems with the Lerner Index, namely that the short-run marginal cost of a firm will only rarely

The decided cases clearly show that the Commission and the CJEU tend to focus on market shares, and then consider 'other factors'. It will be shown however that although market shares are useful, and their consideration generally seen as necessary,[64] they are not decisive. In fact, in order to assess dominance, one cannot simply consider a single factor or a checklist of factors;[65] the assessment of dominance "requires a 'comprehensive survey' of the competitive conditions on the relevant market before making any determination as to dominance."[66] Various factors indicate market power because they are likely to be the result of an undertaking pricing above cost and having the power to exclude its competitors. The extent to which such factors can be relied upon in assessing dominance is considered below.

MARKET SHARES

In EU competition practice, market shares are considered 'the most direct indicator'[67] of dominance. Each and every Article 102 TFEU case considers the market share of the undertaking being examined.[68] The emphasis on market shares derives from the 'traditional' case law on Article 102 TFEU such as *Hoffmann-La Roche,* where although the CJ was willing

provide a good approximation of a competitive price; even if precise estimates can be obtained, gross margins will not necessarily provide a good indicator of the level of competition a firm faces where firms also incur sunk costs; the simple Lerner equation only holds of a single product firm and most firms produce multiple products; and the Index assumes the firm is choosing prices to maximise short-run profits. Neils, Jenkins and Kavanagh (n 29), 131 note that the Lerner Index 'focuses on marginal cost as the benchmark, but there are many reasons why companies price above marginal costs even in markets that are effectively competitive'.
As a result, it is prudent to continue assessing dominance through the examination of various factors which may indicate market power, even if substantial market power is adopted as a definition of dominance as proposed herein.

[64] Duncan Cameron, Mark Glick and David Mangum 'Good riddance to market definition?' (2012) 57(4) The Antitrust Bulletin 719, 720-1

[65] O'Donoghue and Padilla (n 27), 143

[66] *Ibid*. The Commission attempts this comprehensive approach in the Guidance Paper, see para 12, but as will be seen, fails in practice.

[67] IV/D-2/34.780 *Virgin/British Airways* 14 July 1999 [2000] OJ L30/1, para 87. See also Vickers (n 67), 11. For criticism on this approach, see Frances Dethmers and Jonathan Blondeel 'EU enforcement policy on abuse of dominance: some statistics and facts' (2017) 38(4) European Competition Law Review 147, 149 and 154

[68] Apart from the cases examined below, see for instance also the Commission decisions in IV/26811 *Continental Can* 9 December 1971 [1972] OJ L7/5 and IV/30.787 and 31.488 *Euorfix-Bauco v Hilti* 22 December 1987 [1988] OJ L65/19, and the CJ judgment in *Michelin* (n 39)

to acknowledge that the relevance of market shares may vary from market to market, it firmly established market shares as the most relevant element to indicate dominance, and even went so far as to create a presumption that 'very large shares' are evidence of a dominant position in and of themselves, without any further evidence being required.[69]

At that stage, the CJ did not clarify what 'very large' market shares meant. It did not take long for this dictum to be transposed into a more tangible presumption against the undertaking being investigated. In *AKZO*,[70] holding 50% of the market was considered sufficient.[71] This position still constitutes valid law and was recently reaffirmed in *France Télécom*.[72]

Therefore, should the undertaking be found to have at least 50% of the relevant market, it is presumed to be dominant ("the *AKZO* presumption"). This presumption is rebuttable. However, the burden of proof is placed on the undertaking being investigated. Although the *AKZO* presumption provides legal certainty, it goes against the economics-based approach to competition analysis which is being advocated by the EU.[73] Moreover, this presumption means that undertakings are considered dominant when they are far from being monopolists or quasi-monopolists.[74] As a result, the present position in EU competition practice means that market shares, together with market definition, are often conclusive of dominance.

This position has been thoroughly criticised. First of all, market shares are simply a proxy for measuring market power, and cannot be conclusive in and of themselves.[75] Market shares of

[69] n 3, para 39-40
[70] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* EU:C:1991:286
[71] Para 60
[72] Case C-202/07 P *France Télécom SA v Commission of the European Communities* EU:C:2009:214, para 100
[73] Dethmers and Dodoo (n 58), 541
[74] See Whish and Bailey (n 6), 190. See also O'Donoghue and Padilla (n 27), 173
[75] O'Donoghue and Padilla (n 27), 146; Damien Gerardin, Paul Hofer, Frederic Louis, Nicolas Petit and Mike Walker 'The Concept of Dominance in EC Competition Law' (2005) Global Competition Law Centre Research Paper on the Modernisation of Article 82 EC < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144 > accessed 1 November 2015, 10

their nature are not indicative of the realities of a market, the influence of potential competitors on the market power of current operators or about the strength of buyers.[76] It has been argued that the inference that market shares equals market power is not supported in modern economic theory or evidence;[77] in particular market shares may not equate to market power either where entry into a market is easy, or where the undertaking has large market shares because it has low costs or sells superior products,[78] or where there are relatively few transactions in the market.[79]

Market shares therefore do not, and cannot, tell the whole story. They should normally be seen in the light of other circumstances and in particular of barriers to entry and exit. The *AKZO* presumption however militates against this analysis. In fact, the assessment of barriers to entry and expansion has been lacking in most of the EU's decisional practice, notwithstanding the fact that the decisions of the Commission and of the CJ and the GC all stress the need for 'other factors indicating dominance'. Some commentators believe that

[76] Whish and Bailey (n 6), 42. Oluseye Arowolo 'Application of the concept of barriers to entry under Article 82 of the EC Treaty: is there a case for review?' (2005) 26(5) ECLR 247, 252.
Moreover, the importance of market shares as an indicator of dominance varies according to the market being considered. For instance, market shares are important in mature or declining markets (O'Donoghue and Padilla (n 27) 146). On the contrary, in dynamic markets, such as new economy markets, market shares are not a reliable indication of market power. Markets in the new economy are often characterised by monopolies or oligopolies (Joyce Verhaert 'The challenges involved with the application of article 102 TFEU to the new economy: a case study of Google' (2014) 35(6) ECLR 265, 266-7), as competition is frequently through innovation rather than price, and is therefore often for a market rather than in it. However, these monopolies or oligopolies are under the permanent threat of entry and are only able to keep their leading position if they continue to innovate (Verhaert 268-9). As a result focusing on market shares without acknowledging the dynamics of the market is problematic, and is likely to give a distorted picture of the relevant market (Verhaert 268-9). In such markets, the 'full competitive environment' must be considered (Verhaert 268-9).
[77] Vassilis Droucopoulos and Panagiotis Chronis 'Assessing market dominance: a comment and an extension' (Bank of Greece Working Paper, January 2010), 11-12
[78] Jonathan B Baker and Timothy F Bresnahan 'Empirical methods of identifying and measuring market power' (1992) 61(1) Antitrust Law Journal 3, 4
[79] Douglas A Herman, Shawn W Ulrick and Seth B Sacher 'Dominance thresholds: a cautionary note' (2014) 59(4) Antiturst Bulletin 855

the EU authorities do in fact consider these 'other factors'.[80] It is however submitted that these 'other factors' often play a secondary role. In particular, when the undertaking has a market share of 50%, the *AKZO* presumption implies that no analysis need be carried out by the Commission or the national competition authority. It is up to the undertaking in question to bring evidence of these 'other factors' and to attempt to rebut the presumption of dominance.

The approach taken by the EU authorities has consistently been that:

> the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest (...) enables the competitive strength of the undertaking in question to be assessed.[81]

The fact that there is lively competition on the market does not detract from the relevance of this criterion.[82] Certainly comparing the allegedly dominant undertaking's market shares with those of its competitors is a useful exercise which should be carried out in all cases. However, the emphasis should be on whether competitors can 'quickly expand production to meet demand'[83] not on their market shares *per se*. In certain markets, particularly when there is excess capacity, competitors with small market shares may be able to constrain larger undertakings from raising prices or reducing output.[84]

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[80] O'Donoghue and Padilla (n 27), 146 and Emanuela Arezzo 'Is there a role for market definition and dominance in an effects-based approach?' in M-O Machenrodt, B Conde Gallego and S Enchelmaier (eds) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Berlin, 2008), 26

[81] *Hoffmann-La Roche* (n 3), para 48. See also *Michelin* (n 39)*, British Airways* (n 10) as well as *AKZO* (n 74) and Case C-55/92 P *Hilti AG v EC Commission* EU:C:1994:77.

[82] See *United Brands* (n 3), para 111 and *France Télécom* (n 76) para 101 and 109.

[83] O' Donoghue and Padilla (n 27), 151

[84] *Ibid*

The above should not be read as a manifesto in favour of the abolition of market shares as an indicator of dominance. Market shares are essential because they give an indication of the strength of the undertaking in the market. After all, the more the number of undertakings in a market, the more the demand curve becomes elastic, as consumers have more alternative suppliers to switch to should an undertaking raise its prices.[85] However, market shares cannot be conclusive evidence; where there is price competition even two competitors are enough for there to be effective competition.[86] If entry and exit in the market are costless and easy, a monopolist would be threatened by entry or expansion.[87] It is mainly for this reason that the EU approach of focusing on market shares has been criticised: because it ignores the realities of the market.

This is also why a presumption of dominance based on market shares is problematic. It has been suggested that rather than assuming dominance based on high market shares, competition authorities 'should focus more on industry dynamics, including the behaviour of rival firms.'[88] Such an approach should be welcomed, particularly for the potentially positive effect it would have on small jurisdictions,[89] although it is not yet apparent in the decisional practice. Moreover, the threshold for the applicability of the presumption – a mere 50% – is particularly low, and places the onus of proving that there is no dominant position on the undertaking itself at a market share level which is far from indicating dominance outright. As will be explained later, [90] the threshold at which the presumption applies should be raised.

[85] Bishop and Walker (n 29), 63
[86] *Ibid*, 64
[87] *Ibid*, 65
[88] Dethmers and Dodoo (n 58), 549
[89] See next section.
[90] See p 112-115

What remains to be examined is the effect that this reliance on market shares has on small jurisdictions. The trend in Malta appears to have been to concentrate on market shares, generally to the exclusion of other factors. Very rarely does it appear from Appeals Tribunal/CFT decisions that other factors indicating dominance have been taken into account, although since the Appeals Tribunal/CFT often adopt the conclusions reached by the OC/OFC without much comment, it is difficult to know the extent of the analysis which would have been carried out by the competition authority.

Part of the reason for this heavy emphasis on market shares may be because before 2011 the Competition Act contained a presumption of dominance if the undertaking was found to have 40% of the relevant market. [91] Moreover, the Appeals Tribunal and the OC rely on the EU decisions and judgments such as *AKZO*[92] and *Hoffmann-La Roche*,[93] which focus on market shares as the main and most often the only indicator of dominance. In *Melita Cable I,*[94] a decision as to whether an interim measure should be issued against a telecommunications provider, the CFT, basing itself on *Hoffmann-La Roche* went so far as to say that an undertaking which alone or with others has a market share of at least 40% of the relevant market must be considered as being in an *unequivocal* dominant position.

[91] Article 9(3) of the Competition Act provided:
For the purpose of determining whether one or more undertakings are in a dominant position, an undertaking which alone or in conjunction with others has a share of at least forty per cent of the relevant market shall, in the absence of proof to the contrary, be deemed to be in a dominant position:
Provided that one or more undertakings which alone or in conjunction with others have a share below forty per cent of the relevant market may, notwithstanding the above, be determined to be in a dominant position.
[92] n 74
[93] n 3
[94] Measure no: 4/2006 *Melita Cable plc* 19 May 2006

Another reason for the apparent over-reliance on market shares could be the fact that in most cases, the relevant undertakings had very large market shares. Thus for instance in *Austria Tabak (Malta) Limited vs Central Cigarette Company Limited*,[95] Central Cigarette Company Limited was found to have a market share of 96.4% on the market for cigarettes sold through vending machines in Malta and 82% on the market for cigarettes sold through vending machines in St Julian's and Paceville (the relevant geographic market). In *Melita Cable I*,[96] the relevant undertaking was found to have 95% of the local cable television market, and 75% of the market in relation to the transmission and retransmission of sporting events. In *Datastream Limited vs Camline Internet Services Limited*,[97] the OFC found that for the years 2004-2006, there were only two operators on the International IP Bandwidth market, and Datastream Limited, the undertaking complained against, had between 70-90% of the market. In *Cassar Fuels – Enemalta Corporation*,[98] Enemalta Corporation was a statutory monopoly in relation to the market for the supply of fuel for industrial use.

However, large market shares should not be seen in isolation particularly in small jurisdictions, where there may be other factors which militate against a finding of dominance. For instance in *Federated Mills*,[99] although the relevant undertaking had 100% of the relevant market, it was found to be at the mercy of its suppliers. The CFT specifically noted that Federated Mills plc was a price taker. This led the CFT to conclude that there was no breach of the competition rules, irrespective of the fact that there appeared to be natural barriers to entry in the market.

[95] n 24
[96] n 98
[97] n 25
[98] n 23
[99] n 59

In particular, potential competition may exercise a stronger competitive constraint in small jurisdictions. For instance in *Salvu Fenech – Malta Dairy Products*[100] Malta Dairy Products Limited ("MDP") was found to have 100% of the market for the buying of milk produced by milk producers and the processing of milk and other products derived from it. However, although it was at the time the only dairy on the island, its products, save for fresh milk, faced competition from imports. Competition from imports for dairy products has today increased. Moreover, today MDP also faces competition from other smaller dairies. It is possible that a more nuanced approach to the factors which indicate dominance might have found that MDP did not have 100% of the relevant market. In *Datastream vs Camline*,[101] Datastream Limited tried to argue that it faced competition from other sources, including from potential competitors who had already invested in the necessary infrastructure and indeed entered the market soon after; the OFC and the Appeals Tribunal however simply looked at the market as defined, and made their conclusions on the basis of market shares.

As a result, simply looking at market shares when identifying dominant undertakings in small jurisdictions gives a highly distorted picture of reality. Undertakings with large market shares in a market defined for locally produced products often face competition from other sources, particularly from imports.[102] Undertakings operating in small jurisdictions are often constrained by foreign suppliers, on whom they rely for raw material due to the lack of resources in small jurisdictions. On the other hand, in small jurisdictions it might be possible to find that the market in question is already saturated, meaning that new entry is unlikely as

[100] n 21
[101] n 101
[102] Michal S Gal *Competition Policy for small market economies* (Harvard University Press, 2009) 60 advocates the inclusion of imports in market definition since these are 'real and significant substitutes for domestic products'

it cannot be sustained. These are just some of the considerations that should be made when assessing dominance in a small jurisdiction. It is for this reason that, as with other markets, the assessment of dominance in small jurisdictions should take into account far more than simply market shares.

COUNTERVAILING BUYER POWER

The Guidance Paper recognises that an undertaking with large market shares may be unable to act to a large extent independently of its customers; this will depend on the customer's size and its commercial significance to the allegedly dominant undertaking, as well as the customer's ability to switch to other suppliers, to promote new entry or to integrate vertically.[103]

In the event that an undertaking is constrained by its customers, it cannot be said to be in a dominant position. This is evident from the wording of the legal definition of dominance, which requires that the undertaking 'behave independently of customers'. However, it also has sound grounding in economic reasoning.

Buyer power is a measure of whether buyers are able to influence the terms and conditions on which they acquire products.[104] In the event that buyers do not have alternative suppliers, and are constrained to continue acquiring products from a particular supplier when the latter increases his prices, there is no buyer power.[105] There may also be buyer power where the customer is a key customer for the supplier.[106]

[103] Para 18
[104] O'Donoghue and Padilla (n 27), 166. See OECD *Buying power of multiproduct retailers* DAFFE/CCP(99) (1999)
[105] Bishop and Walker (n 29), 83
[106] Geradin et al (n 78), 21

The assessment of buyer power involves four steps. Firstly, the relevant procurement market must be defined; this is made up of 'those demand sources to which suppliers may realistically sell their products'.[107] Secondly, the concentration of customers in that market must be examined.[108] Thirdly, the retailer's prices must be taken into account. The retailer's share of supplier's turnover, whether retailers have an 'own brand' label, and switching costs for supplier must also be considered at this stage.[109] Finally the switching costs for the supplier if it had to switch retailers are compared with the costs for the retailer if it had to switch suppliers. This step is considered crucial from an economic point of view.[110]

This analysis however has rarely been seen in EU competitive practice.[111] Properly considering buyer power in a competitive assessment would have a drastic effect on the application of EU competition law to small jurisdictions, such as Malta. Just as many relevant markets in Malta and other small jurisdictions are characterised by monopolies, quasi-monopolies and oligopolies, so are many buying/customer markets. This means that it is likely that in a number of cases, the undertaking being investigated does not have market power, because it is constrained by equally strong customers. This is less likely where the undertaking operates on the retail level and its buyers are end-consumers, but is possible where the undertaking in question operates at wholesale level, and therefore where its buyers are operators in industry.

[107] O' Donoghue and Padilla (n 27), 167
[108] *Ibid*
[109] *Ibid*
[110] *Ibid*
[111] See Alison Jones, Brenda Sufrin and Niamh Dunne *Jones & Sufrin's EU Competition Law: text, cases and materials* (7th edn, OUP 2019) 351 for instances where it could be argued this analysis was present.

Moreover, constraints imposed by suppliers should be considered. For instance in *Federated Mills*,[112] the relevant undertaking was found to have no control on the price at which it purchased its raw material (grain). This factor was considered by the CFT in finding no breach of the competition rules. This case however was a one-off, even though in view of the heavy reliance of Maltese industries on importation of raw material, such findings should be more common.

BARRIERS TO EXPANSION OR ENTRY

Barriers to entry are factors which 'prevent or hinder companies from entering a specific market'.[113] Barriers to expansion on the other hand are factors that that prevent an undertaking already operating on the relevant market from being able to increase its output quickly and cheaply.[114] The same factors that constitute barriers to entry may also constitute barriers to expansion and vice-versa, although this is not always the case.

The consideration of barriers to entry and expansion is particularly important to small jurisdictions. When considering barriers in small jurisdictions, one has to keep in mind that the limited number of players which can operate in a small jurisdiction will constrain competition possibilities and that the entry and exit of a large undertaking may destabilise a small jurisdiction, which would likely have negative effects on consumer welfare.[115] There may be instances for example where the competitive assessment indicates the existence of a natural monopoly, meaning that barriers to entry and expansion are high, because the market

[112] n 59
[113] European Commission 'Glossary of terms used in EU competition policy' (Brussels, 2002) (archived); Although archived, this definition is used by O'Donoghue and Padilla (n 27), 151 and Julia Heit 'The justifiability of the ECJ's wide approach to the concept of "barriers to entry"' (2006) 27(3) ECLR 117, 117
[114] Bishop and Walker (n 29), p 81
[115] Lino Briguglio and Eugene Buttigieg 'Competition constraints in small jurisdictions' (2004) 30 Bank of Valletta Review 1, 8

is already operating at its optimal level and there are no potential competitors. This would tend to indicate that there is dominance or substantial market power. On the other hand, if the natural monopolist is in reality a price taker on the international market, being at the mercy of its suppliers, as was in case in *Federated Mills*,[116] and also constrained by large customers, the natural monopolist might still not be in a position to exert substantial market power.

Certain markets in small jurisdiction may already be saturated with undertakings and new entry would not feasible. In such markets it is likely that the market players are in a position of economic strength.

On the contrary, other markets which are still in their gestation stage, such as new economy markets, may easily admit new entrants or expansion of existing competitors. It is possible that new entrants (an innovator) in small jurisdictions suddenly find themselves controlling a large share of the market,[117] but this might not necessarily indicate dominance if there are no barriers to entry.

Furthermore, the isolation and smallness of an economy, which are characteristics of Malta and other small jurisdictions, may of themselves be a barrier as this may make the market less attractive for entry.[118] The more open to trade that a small jurisdiction is, the lower the entry barriers are likely to be in this regard. [119] However, irrespective of the level of openness to trade, the isolation (distance) and size of the jurisdiction might still constitute a barrier particularly to non-local undertakings, which would view entry into a small jurisdiction as not

[116] n 59
[117] Briguglio and Buttigieg (n 119) 8
[118] ICN Workbook (2011, n 64), para 80
[119] *Ibid*

feasible or attractive, due to the small population size and therefore relatively small demand, notwithstanding there being potential demand.

There has been copious economic literature on what a barrier to entry is, and therefore on which elements constitute barriers to entry, yet no definitive answer has been reached. For instance Bain exemplified the Harvard School approach[120] in defining barriers to entry as:

> the extent to which, in the long run, established firms can elevate their selling prices above the minimal average cost of production and distribution (…) without inducing potential entrants to enter the industry.[121]

Therefore, this definition allows for economies of scale and scope, capital requirements and product differentiation to constitute barriers to entry. This definition also includes first mover advantages as barriers.[122] On the other hand, Stigler, who typified the Chicago School approach,[123] took the view that barriers to entry are 'costs of production which must be borne by a firm that seeks to enter an industry but is not borne by firms already in the industry'.[124] Utilising this definition, economies of scale are not barriers because the incumbent faces or faced the same requirement.[125]

In the Guidance Paper, the Commission explains that it views factors as a veritable constraint on the undertaking being examined if entry or expansion is 'likely, timely and sufficient'.[126] From the list of examples of barriers given in the Guidance Paper,[127] it is evident that the

[120] Arowolo (n 80), 248
[121] Bishop and Walker (n 29), 75; O'Donoghue and Padilla (n 27), 151
[122] Arowolo (n 80), 248; Niels, Jenkins and Kavanagh (n 27), 133
[123] Arowolo (n 80), 248
[124] Bishop and Walker (n 29), 75; O'Donoghue and Padilla (n 27), 151
[125] Neils, Jenkins and Kavanagh (n 29), 133. For other positions on barriers to entry, see O'Donoghue and Padilla (n 27), 151 and Bishop and Walker (n 29), 75
[126] Guidance Paper, para 16
[127] Para 17

Commission considers to be barriers a much wider range of factors than would be allowed by most of the various definitions proposed by economists of barriers to entry and expansion.[128]

Unlike the Commission, the CJEU generally does not refer to 'barriers to entry' or 'barriers to expansion' as such. These factors tend to fall within the term 'other factors' indicating dominance.[129] However, like the Commission, the CJEU too takes a very wide approach to barriers to entry and barriers to expansion. Assuming that the 'other factors' considered by the CJ and the GC in their judgments are what they consider to be barriers to entry or expansion,[130] the courts have considered factors such as the portfolio of the undertaking concerned,[131] vertical integration and/or relationship within a group,[132] the distribution system and sales network of the undertaking,[133] technical expertise,[134] commercial

[128] See Niels, Jenkins and Kavanagh (n 29), 133

[129] See in this regard: Julia Heit 'The justifiability of the ECJ's wide approach to the concept of "barriers to entry"' (2006) 27(3) ECLR 117, p 119: 'EC authorities have so far refrained from providing a general definition of entry barriers, referring instead to "factors indicating dominance"'

[130] This appears to be the approach taken by O'Donoghue and Padilla (n 27), and to a lesser extent Whish and Bailey (n 6), p 184-5. However, it cannot simply be concluded that all the 'other factors' considered by the GC and CJ constitute barriers to entry or expansion. In *United Brands* (n 3), the CJ, after considering various factors such as market shares, vertical integration and UBC's developed sales network considered five elements – a large capital expenditure, increased sources of supply, logistics (which were necessary as bananas are a perishable product), economies of scale, and actual cost of entry – specifically as 'barriers'. This would counter the argument that all the 'other factors indicating dominance' are considered by the EU authorities as 'barriers to entry'. In other words, it is not clear whether what the CG and CJ consider as 'other factors' indicating dominance are all to be considered as barriers to entry or expansion, or whether some of these elements are additional elements. The latter view of course would go against the 'economics-based' approach which is being advocated at EU level. Although the Commission in the Guidance Paper has attempted to streamline the 'other factors' in the decided cases and to classify them as barriers, it appears that the CJ and the GC, at least originally, view barriers to entry and expansion simply as one type of 'other factors'.

[131] *AKZO* (n 74) (para 58), *Michelin* (n 39) and the Commission's decision *Continental Can* (n 72, para II.B.3). However, see *Hoffmann-La Roche* (n 3), where it concluded that the portfolio of the undertaking was 'immaterial' (para 45) as in that case each group of vitamins constituted a specific market. Therefore the fact that the undertaking produced various groups of vitamins could not be used as an indicator of dominance in a particular market.

[132] *United Brands* (n 3)*, Michelin* (n 39)*, France Télécom* (n 76) and the Commission's decision in *Continental Can* (n 72)

[133] *Hilti* (n 85)*; United Brands* (n 3)*; Michelin* (n 40)*; France Télécom* (n 37)

[134] Commission's decisions in *Continental Can* (n 72) and *Hilti* (n 72) and the CJ decisions in *Hoffmann-La Roche* (n 3)*, AKZO* (n 74), para 61, *France Télécom* (n 37) and *Michelin* (n 39)

advantages,[135] the number of employees,[136] intellectual property rights,[137] advertising,[138] the undertaking's conduct,[139] the maintenance of a profit margin,[140] and the fact that the undertaking is an obligatory business partner[141] or produces a must-stock brand[142] as indicators of dominance, and therefore arguably as barriers to entry or expansion. The tendency therefore is to consider all and any factors that might somehow limit entry or expansion which may result in a loss of consumer welfare.[143] The wide approach taken to 'other factors' indicates that the approach to assess dominance undertaken in EU competition practice is closest to Bain's view of barriers to entry and expansion.[144]

However, when barriers to entry are given a wide interpretation:

> dominance will more readily be established, increasing the risk for efficient undertakings to be caught by [Article 102 TFEU] even if their advantage triggering the indication of dominance is solely due to their efficient business strategy (…). This can have the effect of stifling incentives to invest in research and development and of making trading with or within the [EU] unpopular.[145]

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[135] *Virgin/British Airways* (n 71 – British Airways had more routes, held more slots, and benefitted from a 'grandfathering system'); *Hoffmann-La Roche* (n 3 - Hoffmann – La Roche had enough manufacturing capacity to meet world demand without this surplus manufacturing capacity placing it in a difficult economic or financial situation (para 48)); *France Télécom* (n 37) (WIN enjoyed advantages because of its relationship to the France Télécom group); *Continental Can* (Commission – n 72) (the group had factories worldwide)

[136] Commission decision in *Continental Can* (n 72)*; Michelin* (n 39)

[137] *Continental Can* (n 72); *Hilti* (n 85)

[138] *United Brands* (n 3)

[139] *United Brands* (n 3), and *Michelin* (n 39), as well as in the Commission's decision in *British Airways* (n 71) and *Eurofix-Bauco v Hilti* (n 72), para 71

[140] Case T-321/05 *AstraZeneca v Commission* EU:T:2010:266. See Jones, Sufrin and Dunne (n 115), 341

[141] Commission decision in *British Airways* (n 71)

[142] *Michelin* (n 39)

[143] O'Donoghue and Padilla (n 27), 154

[144] Julia Heit 'The justifiability of the ECJ's wide approach to the concept of "barriers to entry"' (2006) 27(3) ECLR 117, 119

[145] *Ibid* 122

In view of this, it is suggested that the EU institutions streamline their approach to barriers in line with prevalent economic theory. It is therefore pertinent to ask which factors have acquired consensus as truly being barriers to entry and expansion, and to limit the consideration of factors as being indicative of dominance only to such barriers. It is recommended that factors be considered to be indicative of dominance only if they can be characterised as one of the following barriers to entry or expansion.

UNCONTESTED BARRIERS TO ENTRY AND EXPANSION

It is generally uncontested that *legal barriers,* including intellectual property rights, licensing requirements and statutory monopolies may be considered as barriers.[146] Whether they can indicate dominance depends on both their strength and duration.[147] Such barriers are particularly relevant to small jurisdictions, where governments are more likely to set limits on authorisations or licenses in order to avoid over-saturation of the market and avoid potential market failure. For instance in Malta there can only be two ground handlers who can provide 'airside services' at local airports[148] (of which there is only one) and there are limitations on licenses for pharmacies.[149]

[146] IPRs should not always be considered a barrier – third parties may be able to 'find alternative sources of supply in the market place, and will be able to purchase, rent, own and even borrow' (Miguel Rato and Nicolas Petit 'Abuse of dominance in technology-enabled markets: established standards reconsidered?' (2013) 9(1) European Competition Journal 1,15) or perhaps replicate (See Geradin et al (n 79), 18) the IPRs. Where the relevant product market is wider than the market protected by IPRs, it is unlikely that the owner of the IPR has a dominant position. (ICN Workbook (2011, n 64), para 91) Therefore a proper analysis must be undertaken before concluding that IPRs constitute a barrier to entry which is indicative of dominance.

[147] *Ibid*

[148] Airport (Groundhandling Services) Regulation, Legal Notice 66 of 2003 as subsequently amended. Ironically this restriction emanates from an EU directive on ground handling services, whose aim is liberalisation. See more generally Kent Karlsson and James J Callaghan 'Air transport liberalisation comes down to the ground recent EC developments in the groundhandling sector' (1999) 20(2) ECLR 86

[149] Pharmacy Licensing Regulations, Legal Notice 279 of 2007 as subsequently amended

Also uncontroversial are *economies of scale and scope*. Economies of scale are obtained by an undertaking when average costs fall as output increases; economics of scope, where it is cheaper to produce several products rather than each of them separately.[150] They constitute a barrier when a new entrant can only operate below the minimum efficient scale, that is below the lowest scale necessary for it to achieve the economies of scale,[151] or when a potential entrant is deterred by the knowledge that its entry could lead to excess capacity and therefore price decrease, making entry unprofitable.[152] Economies of scale are of particular relevance to small jurisdictions, since they reduce the number of competitors which may be required to satisfy demand in the affected market.[153] Therefore economies of scale may likely reduce the number of competitors in a given market.[154] Linked to this is the fact that in small jurisdictions the minimum efficient scale of production is likely to be large,[155] and therefore the likelihood of new entrants having to operate below it is increased in small jurisdictions. These dynamics tend to indicate that the undertaking under consideration is dominant.

Similarly *sunk costs* are considered to be barriers. Sunk costs are costs incurred upon entering a market which are not recoverable upon exit.[156] Bishop and Walker[157] distinguish between exogenous sunk costs, which are those which any undertaking must incur if it is to enter the market, and endogenous sunk costs which are determined by the undertakings themselves,[158]

[150] O'Donoghue and Padilla (n 27), 157-8
[151] Economics Online 'Minimum Efficient Scale' < http://www.economicsonline.co.uk/Business_economics/Minimum_efficient_scale.html> accessed 28 May 2016
[152] Neils, Jenkins and Kavanagh (n 29), 136-7
[153] Michal S Gal 'The effects of smallness and remoteness on competition law – the case of New Zealand' (2006) Law & Economics Research Paper Series Working Paper No 06-48 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942073> accessed 10 April 2016, 8
[154] *Ibid*
[155] *Ibid*, 4
[156] O'Donoghue and Padilla (n 27), 157. See also Neils, Jenkins and Kavanagh (n 29), 137
[157] See also Neils, Jenkins and Kavanagh (n 29), 137
[158] Bishop and Walker (n 29), 73

meaning that the undertaking can choose how much costs to 'sink' and as a result affect the costs of new competitors entering the market.[159] When sunk costs are of the latter type, there is a possibility that competition between undertakings will lead to a competitive escalation in expenditure, implying that some industries can become more concentrated.[160] However caution must be exercised: the fact that there are large sunk costs in a particular industry does not automatically preclude entry or aggressive competition on the market, particularly when there are no barriers for existing players to expand, such as because it has spare capacity or can increase capacity.[161]

Another barrier is *network effects*; this refers to situations where the benefit of a good or service increases with the addition of other users.[162] Network effects may create an entry barrier when a particular undertaking reaches critical mass.[163] When this happens, a new entrant would be unable to acquire that undertaking's customers and build up over time; the new entrant would need to acquire is own critical mass quickly to become a viable competitor.[164] Network effects however are not necessarily barriers to entry.[165] First of all, network effects do not mean there is necessarily one supplier. Secondly, snowballing and tipping (which lead to an undertaking acquiring a critical mass) occur under "restrictive assumptions which require some sort of 'bottleneck' in the industry", and not in every situation where network effects are evident.[166]

[159] Neils Jenkins and Kavanagh (n 29), 137
[160] *Ibid*
[161] Geradin et al (n 79), 16
[162] O'Donoghue and Padilla (n 27), 158
[163] Niels, Jenkins and Kavanagh (n 29), 140-1
[164] *Ibid*
[165] See Cento Vejljanovski 'EC antitrust in the new European economy: is the European Commission's view of the network economy right?' (2001)22(4) ECLR 115, 116
[166] *Ibid*

Finally, there are *switching costs for consumers.* Dethmers and Dodoo note that a customer's ability to switch should particularly be considered when analysing barriers to expansion.[167] However, switching costs can encourage entry 'when they are neither too high nor too low and firms cannot price discriminate between locked-in and uncommitted consumers.'[168]

The EU authorities have in the past implicitly considered such barriers in their discussions without using the economic terms for them. This is the case of the financial strength of the undertaking, [169] its technical expertise, [170] commercial advantages, its product portfolio, the fact that it is an obligatory trading partner and branding and advertising. [171] The problem with the approach taken by the EU authorities is that they consider these factors as *per se* indicative of dominance, whereas these factors do not in themselves amount to barriers in each and every case. An analysis of whether these factors amount to barriers should be undertaken every time.

Adopting this nuanced approach to these factors which have in the past been considered to indicate dominance would have a positive effect on small jurisdictions. The current indiscriminate approach to these factors may deter undertakings sensitive to competition law from growth or from investing in new technology to avoid a finding of dominance. Alternatively, it might lead such undertakings in whose regard these factors might be said to exist to detract from conduct which could be seen to be abusive if they are considered dominant. Although this is not a desired outcome in any jurisdiction or market, including large

[167] Dethmers and Dodoo (n 58), 543
[168] O'Donoghue and Padilla (n 27), 160
[169] Case T-321/05 *AstraZeneca* (n 144), para 284-286 and Commission decision in *Continental Can* (n 72), Para B.4. See O'Donoghue and Padilla (n 27) 163-4 for a consideration as to when access to capital is relevant in the assessment of dominance.
[170] Commission's decisions in *Continental Can* (n 72) and *Hilti* (n 72) and the CJ decisions in *Hoffmann-La Roche* (n 3)*, AKZO* (n 74), para 61, *France Télécom* (n 37) and *Michelin* (n 39)
[171] See further p 105-106.

ones, it is particularly harmful to small jurisdictions, where growth, innovation and pro-competitive conduct should be encouraged in an attempt to grow a limited market.

BARRIERS IN MALTESE DECISIONAL PRACTICE

Unfortunately in Malta, the judgments of the CFT/Appeals Tribunal hardly ever include an assessment of 'other factors' or 'barriers to entry or expansion'. As noted, the Appeals Tribunal generally adopts the OC's position as regards dominance. Parties have rarely been in a position to attack the OC's assessment, mostly because of the heavy emphasis on market shares (noted above), particularly since in many cases regarding dominance, the undertaking in question had a statutory monopoly or otherwise (close to) 100% of the relevant market. In *Datastream vs Camline*[172] there is however an indication that the OFT had carried out a competitive assessment including an analysis of the relevant barriers, and that the Appeals Tribunal (sitting as the CFT) was adopting this analysis as its own.

CONCLUSIONS

It is clear that the assessment of dominance as a whole requires a more nuanced approach in EU competition practice. Although there is nothing wrong with the market definition exercise, it has to be remembered that it is only a tool, and should be used as such. It is the tendency to narrowly define markets coupled with an over-reliance on market shares in EU competition practice which has been criticised rather than the exercise of market definition and the use of market shares in itself.

[172] n 25

It follows that a finding of dominance under Article 102 TFEU (and Article 101 TFEU, where applicable) requires further analysis than that which has been evident till today.[173] In particular, the Commission, the GC and the CJ should seriously consider and analyse other factors when assessing dominance and consider only elements which truly can be considered to suggest dominance. A more rigorous, economics-based approach is suggested for the assessment of dominance.[174]

The Commission and the CJEU have referred to various elements in assessing whether an undertaking is dominant. At face value, this should be lauded. The problem with the approach taken at EU level however is two-fold: first, the main indicator of dominance remains market shares, and second, elements which indicate efficiency rather than dominance have often been considered along with market shares, meaning that the assessment of dominance is hardly economic in nature, and may likely find dominance where an undertaking is simply efficient.

The focus on market shares has been heavily criticised. This should not be seen as a criticism against the use of market shares. Market shares are a suitable factor to indicate dominance. They should not however be seen in isolation. As noted, the resulting definition from the market definition exercise may likely be inexact. As a result, placing too much emphasis on the resulting market shares would lead to an undependable conclusion of dominance. This problem is exacerbated with the tendency in EU competition practice to define markets narrowly, as the likelihood of an undertaking being found to be dominant is increased

[173] O'Donoghue and Padilla (n 27), 173
[174] See also *ibid*, p 173-4

exponentially.[175] This practice will likely have the effect of precluding or deterring undertakings who do not have market power in reality from:

> engaging in conduct which is pro-competitive or at least neutral from a competition perspective (…) Competition law may then have the perverse effect of inhibiting the competitive process on the market.[176]

The problems associated with the over-reliance on market shares are aggravated by the *AKZO* presumption. It is true that this presumption aids the assessment of dominance, and provides for a swift conclusion and legal certainty. In particular, undertakings making a self-assessment can easily conclude whether they are dominant. However, this presumption unnecessarily places the burden of proof on the undertaking being investigated and is symptomatic of the over-dependence on market shares, and all its consequent problems.

The complete removal of this presumption at law might militate against legal certainty. A compromise solution would be to raise the threshold at which the presumption bites, if not in all cases, at least where small jurisdictions are concerned. This is sustained by an example from a non-EU country. In Singapore, the national competition authority indicates a 60% market share threshold for a presumption of dominance, which takes into account the fact that some degree of market concentration is inevitable in small jurisdictions.[177] It is proposed that in EU competition practice the threshold be similarly raised to a market share of at least 60%.

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[175] See Jones, Sufrin and Dunne (n 115), 332. See also International Competition Network 'Special Project for the 8th Annual Conference: Competition law in Small Economies' < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 17 October 2015, where the EU is cited as having stated that 'it is a priori reasonable to suppose that the smaller the geographic market, the easier it is to attain a dominant position' (p 27).

[176] Jones, Sufrin and Dunne (n 115) 332

[177] ICN Special Project (n 179) 27

There are mixed views as to the correlation between market shares and market power in small jurisdictions. [178] Gal believes that in small economies lower market shares indicate a higher degree of market power because of the higher degree of inelasticity of supply,[179] as well as the level of oligopolistic interdependence, assuming no or only a small degree of imports is possible.[180] In other words because generally there are high entry barriers in small jurisdictions, lower market shares are more relevant.[181] Supporting this argument would be the view that self-corrective mechanisms in small jurisdictions are less pronounced because of the existence of economies of scale and possibly other high entry barriers.[182] However Gal herself admits that the presumption that in small economies a given market share will signify more market power than in a larger one is only a general presumption.[183]

On the contrary it is submitted that a low presumptive threshold is more harmful in small jurisdictions. Based simply on market shares, it restricts an undertaking *a priori* from acting competitively for instance by giving discounts and therefore stops undertakings from acting competitively on an already limited market. It will be remembered this is only a presumption; *dominance can be found at lower market shares if additional analysis proves that is the case.*

Finally, it is suggested that the EU authorities should focus on countervailing buyer power, which has rarely been considered in the decisional practice, and 'true' barriers to entry or expansion, namely legal barriers, economies of scale and scope, sunk costs, network effects

[178] ICN Special Project (n 179) para 28
[179] Gal (2006) (n 157), 24; Gal (2009) (n 106) 63-65
[180] Michal S Gal 'Market Conditions under the magnifying glass: general prescriptions for optimal competition policy for small market economies' (New York University Centre for Law and Business, Working Paper CLB-01-004(< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267070> accessed 16 April 2016, 62; Gal (2009) (n 106) 63-65
[181] Gal (2009) (n 106) 64
[182] ICN Special Project (n 179) 27-28. See also Gal (2001) (n 184) 50
[183] Gal (2001) (n 184) 62; Gal (2009) (n 106) 64

and customer's switching costs. Other factors which have been considered to assess dominance in the past should only be considered if they actually constitute barriers to entry or expansion.

This should have a positive effect on all markets, in particular on small jurisdictions. Reliance on market shares in small jurisdictions means that market realities are ignored. Increasing the market share threshold for the presumption of dominance means that competition authorities will be forced to consider other factors to conclude there is dominance in many cases, not just market share. Particular market characteristics of small jurisdictions, such as natural monopolies, the constraints imposed by suppliers and customers, and the restraints effected by imports would instruct the assessment of dominance and therefore considering countervailing buyer power and barriers to entry will likely alter the conclusions on the competitive assessment in small jurisdictions. This change should be welcomed as it would result in a more authentic assessment of dominance.

Classifying undertakings as 'dominant' means that such undertakings are restricted in their conduct. This is the case even if they have a relatively low market share of say 40 or 50%, and are therefore not particularly powerful. Therefore, they cannot compete to the full extent of their ability. The current assessment of dominance therefore results in the market not being as competitive as it could, and should, be. This, in turn, is detrimental to the economy: it does not encourage innovation, better service, or better prices as competitors might not have the incentive to distinguish themselves from each other. The current scenario might also result in smaller, less efficient competitors being unfairly protected from larger, more efficient, competitors who may not necessarily have (substantial) market power, and are therefore not truly dominant. These effects are harmful to all markets, but more especially to small

jurisdictions which, as seen in Chapter 1, are already disadvantaged in certain respects. Adopting a more nuanced approach to the assessment of dominance in EU competition practice would therefore undoubtedly have a positive effect on small jurisdictions.

In view of the analysis carried out in Part I, it is clear that a new approach to 'dominance' is long overdue.

First, the definition of 'dominant position' should be conclusively aligned with the idea of 'substantial market power'. This would instruct competition enforcers to take into account only economic factors when considering whether an undertaking is dominant, and as a result, undertakings which have commercial power but do not have substantial market power would not be constrained by the provisions of Articles 101 and 102 TFEU. Adopting the idea of substantial market power as a definition would not affect the structuralist approach taken by the EU institutions to the idea of dominance so far. It would however require competition enforcers when assessing whether an undertaking is dominant to show, through indirect methods of measurement, that the undertaking has the ability to raise prices above competitive level and the ability to reduce output.

Second, in this respect, even if the legal definition is not completely aligned with the definition of 'substantial market power', competition enforcers should not focus solely on market shares as an indication of dominance but also countervailing buyer power and barriers to entry and expansion. When considering barriers to entry and expansion, they should only take into account those elements which truly amount to barriers.

Thirdly, market definition should be truly considered as an aid to the competitive assessment rather than the be-all and end-all. Although this is the stated objective of market definition in EU competition doctrine, this has not been the practice. The problem is not with how the

market is defined in EU competition practice, but rather the over-reliance on market shares and consequently over-reliance on the necessarily imprecise market definition.

All these suggestions should affect small jurisdictions positively, as they ensure that only conduct by truly dominant undertakings is caught by the restrictions in Articles 101 and 102 TFEU, whilst conduct by undertakings which do not have market power is allowed. Naturally, this would also positively impact larger jurisdictions. However, this effect in small jurisdictions would in turn would encourage more competitive conduct on a market which would likely have limited competition. In other words, this would avoid chilling competition on small jurisdictions, which is particularly beneficial considering that small jurisdictions tend to have a preponderance of monopolies and oligopolies. Consequently, it is hoped that markets which are monopolies or oligopolies would open up to further market players.

Another two suggestions need to be considered vis-à-vis small jurisdictions. The first is that the market shares threshold set in the *AKZO* presumption should be raised. Setting the rebuttable presumption of dominance at least at 60% would be a better indicator of market power. Moreover, it would save undertakings with a market share of between 50% and 60% from having to expand resources on rebutting the presumption – resources which can be used in research, development and innovation. Secondly, competition authorities should be more aware of collectively dominant undertakings, of which there is likely a high incidence in small jurisdictions due to the high number of oligopolistic markets. Cases of alleged abuse of collective dominance should be prioritised in small jurisdictions, due to the negative effects of such conduct on a small jurisdiction.

Re-assessing how 'dominance' is considered will lead to a re-assessment of who the competition rules apply to. Adopting the proposals set forth in Part I should ensure that it is

only undertakings which real market power which are constrained by Articles 101 and 102 TFEU.

PART II: INTRODUCTION

The main focus of this research is the effect of EU competition law on the treatment of dominant undertakings in small jurisdictions. To examine this effect four types of conduct, which can be considered 'abusive' in terms of Article 102 TFEU, are being analysed, and an assessment of the effect that the prohibition of these four types of 'abuses' has on Malta is subsequently carried out.

Naturally, in order to assess the effect of EU competition law in Malta and other small jurisdictions, the tenets of EU competition law must be assessed, and the economic rationales as to why certain conduct is considered anti-competitive has to be considered. Therefore, each chapter in this Part II will necessarily consider both the economics behind prohibiting certain types of conduct (including the pro and anti-competitive effects of the said conduct), and EU case law on the subject.

Chapter 4 has a slightly different structure to Chapters 5, 6 and 7, since unlike rebates, refusal to supply and margin squeeze, exclusive dealing is dealt with similarly under US antitrust law and EU competition law. Therefore, more emphasis will be placed on the economic context of exclusive dealing. Moreover, exclusive dealing and loyalty rebates may constitute not just a breach of Article 102 TFEU, but also a breach of Article 101 TFEU. Therefore, Chapters 4 and 5 contain an interwoven discussion on the approach taken in terms of Article 101 TFEU which is not found in Chapters 6 and 7.

CHAPTER 4: EXCLUSIVE DEALING OBLIGATIONS

WHAT IS EXCLUSIVE DEALING?

A is in a dominant position on the market for the supply of widgets. B buys widgets wholesale and sells them at retail level to end-users.[1] B is a good customer, since it makes a number of orders throughout the year and always pays on time, whilst A is a reliable supplier, and over the years A and B have built a good relationship. If B were to buy exclusively from A, both parties would benefit. A would ensure a certain, steady stream of revenue, but this arrangement would also enable it to stop its competitors free-riding on its investments. Meanwhile, B would be able to secure its supplies.

The exclusivity arrangement may be entered into in various ways. B may be contractually bound not to sell widgets produced by A's competitors or to only buy widgets from A. We can call such arrangements 'contractual exclusivity', that is exclusivity arrangements which arise by virtue of a contract.

Another alternative could be that B is bound to obtain a minimum amount of widgets from A. This specific number could amount to either B's total amount of requirements of widgets or a substantial amount thereof, say 80% of B's requirements of widgets. This is often referred to as 'quantity forcing'. A could also offer some sort of payment should B only purchase widgets from A. In other words, a payment would be given in return for exclusivity.

Finally, A could, without imposing any type of exclusivity obligation, offer B, a retailer, storage units for widgets, for free or on preferential loan terms, and require that B only store A's

[1] Similar scenarios to those discussed in this introduction could exist where B is producer of blodgets and uses widgets as an input for the production of the said blodgets.

widgets in its storage unit. Due to limited space in its shop, B will only have A's storage units in stock, and therefore effectively only sell A's widgets. This is commonly referred to as *de facto* exclusivity.

These arrangements are all considered to be exclusive dealing obligations. At first glance, the anti-competitive effects of such obligations may not be evident. Indeed, this type of exclusivity may be requested by B itself, precisely because it may be beneficial to B to enter into such arrangements.

A particular problem that arises in the application of EU competition law to exclusive dealing obligations undertaken by dominant undertakings is that such conduct falls to be considered under both Article 101 TFEU and Article 102 TFEU, and that somewhat different approaches have been evident in the application of these provisions to exclusive dealing obligations. Indeed, as will be considered shortly, the Guidelines on Vertical Restraints,[2] as well as certain case law,[3] require that an effects-based approach is taken in applying Article 101 TFEU to exclusive dealing obligations, with the arrangement being considered against the legal and economic background within which it operates. On the other hand the case-law on Article 102 TFEU[4] is still rather more form-based,[5] whereby once a dominant undertaking's conduct is categorised as 'exclusive dealing' it is considered to be abuse. However, it will be shown that the apparent divergence in interpretation converges upon the application of Article 101

[2] [2010] OJ C130/1

[3] Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities* EU:T:2003:281*;* Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* EU:C:1991:91*,* Case 23/67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen* EU:C:1967:54

[4] See for instance Case 85/75 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* EU:C:1979:36 and Case C-549/10 P *Tomra Systems ASA and Others v European Commission* EU:C:2012:221

[5] Although other authors have a different opinion. See p 134-135 for a discussion on this point.

TFEU to dominant undertakings. Moreover, following the CJ's judgment in *Intel*[6] the goalposts may have moved even closer.

Likely because of the efficiencies that may be created, exclusive dealing obligations are very common in small jurisdictions. In Malta, there has been one case decided by the CFT which dealt with exclusive dealing.[7] The likelihood is that there are many exclusive dealing arrangements leading to foreclosure in Malta, however they rarely come to light because since they tend to be beneficial to both parties, neither party would complain to the competition authority, or even less start an action for damages.

Indeed, although the Maltese competition authority has the power to act *ex officio,* most cases start with a complaint by an aggrieved party. Although there is no official data, if one were to consider the cases decided by the Tribunal between 2011 and 2018, 9 out of 10 cases (including cases where there was no finding of a breach of the competition rules) arose out of a complaint.[8] This reliance on complaints is likely because, with an under-resourced competition authority,[9] the resources of the national competition authority are normally tied

[6] Case C-413/14P *Intel Corporation Inc v European Commission* EU:C:2017:632

[7] Between 1995 and 2005, the CFT decided 16 cases, including a request for an interim measure, which included a preliminary and final judgment, a case regarding a price order (procedure today abolished), and 5 cases regarding individual exemptions (which procedure is today abrogated). There were 8 cases based on substantive antitrust complaints, one of which dealt with rebates.
The case on exclusive dealing proper arose in 2005 and was decided in 2009. From information which is available, between 2005 and 2010 the CFT decided another 15 cases, two of which again dealt with another interim measure.
Since 2011, the Appeals Tribunal decided 14 competition cases, of which 8 were final judgments on substantive matters. During this period, there were no cases regarding exclusive dealing.

[8] The nine cases include one Ministerial reference, and one case where the OFC asserted that it had commenced the investigation *ex officio* but the case had actually been spurred by a complaint of an undertaking that had previously been investigated for another infringement. The tenth case originally arose in the civil courts when the defendant pleaded that the agreement which the plaintiff sought to enforce in its regard was anti-competitive.

[9] See Chapter 1. In 2018, the Maltese national competition authority consisted of the Director General, one Director (a lawyer), another lawyer and an economic officer. In 2019, these were joined by another economist in the post of Director.

up investigating those complaints and dealing with merger notifications.[10] Clearly therefore, in Malta complaints are highly important for anti-competitive conduct to come to light. As a result, when parties benefit from the arrangement in question – in this case, exclusive dealing – the likelihood of a complaint being made is lessened, and consequently it comes as no surprise that there is only one decided case dealing with exclusive dealing.

In fact, in the one decided case in Malta, the case arose because a third party upstream competitor, which was being harmed by the arrangement, found out about the arrangement and complained to the competition authorities. In many market sectors however, the third party upstream competitor would likely have similar beneficial arrangements in place and would therefore not complain to competition authorities, so as not to bring attention to its own dealings.

This Chapter will first consider whether, in economic terms, exclusive dealing is pro- or anti-competitive. It will then attempt to determine when, in terms of EU competition law, exclusive dealing undertaken by dominant undertakings is anti-competitive. This naturally involves an in-depth analysis of the decided cases. The cases which are considered in this chapter have been characterised as one of four types: exclusivity contracts, quantity forcing, *de facto* exclusivity and payments in return for exclusivity. These various types of arrangements all have the same effect – exclusivity on the part of the downstream operator. The approaches taken by the Commission and the CJEU in each of these scenarios will be considered in detail, as well as the impact that this approach has on small jurisdictions.

[10] Concentrations have time periods for decisions to be issued.

EXCLUSIVE DEALING IN CONTEXT

Exclusive dealing (or exclusive purchasing, as it is sometimes called) has always been of concern to EU competition authorities. The first case which dealt with this type of conduct dates back to 1976 – *Hoffmann-La Roche*.[11] Hoffmann-La Roche had various agreements with customers, some of which bound customers by an exclusive commitment in favour of the company as a result of an express obligation of exclusivity.[12] The Commission's concern was that this arrangement 'by its very nature removes all freedom of choice from purchasers in their selection of sources of supply, and ties them to one supplier'.[13]

The Commission therefore took issue with exclusive dealing because of anti-competitive foreclosure at the upstream level, although it did not say so in so many words. This is in line with economic theory, since the theory of harm related to exclusive dealing is that access to customers or distribution channels is foreclosed.[14] The extent of the foreclosure will depend on the degree of dominance, on the form and design of the practice and on the proportion of the distributors or customers which are effectively foreclosed.[15]

Today the Commission has adopted this language in the Guidance Paper.[16] The Commission clarifies that where exclusive dealing has the effect of preventing the entry or expansion of competing undertakings, particularly because of the number of customers of a dominant undertaking and the exclusive dealing obligation taken together, the consumer will not

[11] IV/29.020 *Vitamins* 9 June 1976 [1976] OJ L223/37
[12] Other types of agreements gave loyalty rebates to customers – these will be dealt with in the following chapter.
[13] n 11, para 24
[14] Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for Competition Lawyers* (OUP 2011), 224
[15] *Ibid.*
[16] Para 36

benefit.[17] The emphasis today therefore is consumer welfare, in line with one of the objectives of EU competition law.

Similarly, in the Guidelines on Vertical Restraints, the Commission highlights that exclusive dealing may result in foreclosure of the market to actual and potential competing suppliers, as well as the softening of competition, resulting in facilitation of collusion between suppliers,[18] and a loss of inter-brand competition within each individual customer's business.[19] These conclusions are sustained by economic theory.[20]

Foreclosure, softening of competition and collusion in turn lead to an increase in wholesale prices, less choice of products, the lowering of products' quality and/or a reduction in innovation, again to the detriment of consumers.[21]

[17] Para 34. See also Chia-Wen Chen and Shiou Shieh 'Does exclusive dealing matter? Evidence from distribution contract changes in the US beer industry' (2016) 64 The Journal of Industrial Economics 411, 434

[18] On this point, see Stanley I Ornstein 'Exclusive dealing and antitrust' (1989) 34 Antitrust Bulletin 65, 79 notes that: 'For collusion to occur at least three conditions should exist: the industry should be highly concentrated and have the other economic characteristics that facilitate collusion, such as homogenous products, inelastic demand, high fixed and uniform costs, etc.; exclusive dealing must be used by all leading firms; and dealers and potential dealers must be in short supply.' He later notes that (p 89)' a relatively inelastic supply of retailers, rarely obtains unless the number of dealers is limited by law.' Exclusive dealing can also be used to facilitate collusion at the downstream level, with a supplier acting as the cartel ringmaster – J Mark Ramseyer and Eric B Rasmusen 'Exclusive dealing: Before, Bork and Beyond' (2014) 57 The Journal of Law and Economics 145

[19] Para 130; see also para 100 (a) and (b). See also Discussion Paper, para 139

[20] Simon Bishop and Mike Walker *The economics of EC competition law: concepts, application and measurement* (3rd edn, Thomson Reuters 2010) 198 and Neils, Jenkins and Kavanagh (n 14) 322 to 327; R Scott Hiller 'Exclusive dealing and its effects: the impact of large music festivals on local music venues' (2014) 45 Rev Ind Organ 153, 173

[21] Guidelines on Vertical Restraints, para 101. Jonathan M Jacobson and Scott A Sher '"No economic sense" makes no sense for exclusive dealing' (2006) 73(3) Antitrust Law Journal 779, 786; Wanda Jane Rogers 'Beyond economic theory: a model for analysing the antitrust implications of exclusive dealing arrangements' (1996) 45(5) Duke Law Journal 1009, 1022; Linda Gratz and Markus Reisinger 'On the competition enhancing effects of exclusive dealing contracts' (2013) 31(5) International Journal of Industrial Organisation 429; Jonathan M Jacobson 'Exclusive dealing, "foreclosure", and consumer harm' (2002) 70(2) Antitrust Law Journal 311, 354; Patrick DeGraba 'Naked exclusion by a dominant input supplier: Exclusive contracting and loyalty discounts' (013) 31(5) International Journal of Industrial Economics 516; Ornstein (n 18) 79;

Exclusive dealing may also create barriers to entry: new entrants may not find distributors or retailers for their products.[22] This is more likely to arise when the upstream party to the exclusive arrangement is in a dominant position,[23] or else where there are a number of similar arrangements in the market. Although not an Article 102 TFEU case, the latter was one of the considerations in *Delimitis*.[24] In *Delimitis* the CJ noted that in order to consider whether exclusive purchasing agreements had the effect of restricting competition in terms of Article 101 TFEU, one had to determine whether networks of similar agreements affected access to the market.[25] In circumstances where the upstream party is dominant or there are networks of similar arrangements, a new entrant would *at best* have to enter the market at two levels (upstream and downstream).[26] At worst, a new entrant would be completely unable to enter.

However, exclusive dealing has a number of benefits and may be pro-competitive. Indeed whilst it may reduce intra-brand competition, it can create inter-brand competition, that is competition between brands.[27] One way it does this is by avoiding free-riding.[28] A study by

[22] John S Chard 'The economics of exclusive distributorship arrangements with special reference to EEC competition policy' (1980) 25 Antitrust Bulletin 405, 419; Gratz and Reisinger (n 21) 429; Hiller (n 20) 173; Jacobson (n 21) 355; Ornstein (n 18) 79 and 86; Rogers (n 21) 1021-2. Ornstein (n 18), 86-7 notes that:

> Two kinds of higher costs for entrants and rivals are imputed to exclusive dealing: absolute cost disadvantages owing to the use of less efficient dealers, and capital cost differentials. Higher costs due to the use of inefficient dealers assumes the supply of dealers and prime locations is relatively inelastic. The skills requisite to being an efficient dealer are said to be in short supply, limiting the pool of competition dealers. In like manner, [p. 87] the number of prime dealer locations is said to be limited, such as in rural areas lacking sufficiently sized markets. Entrants will be forced to use less efficient dealers and poorer dealer site locations, resulting in a higher cost dealer network than for existing firms. In short, an absolute cost advantage accrues to suppliers if existing dealers cannot switch to new suppliers.

[23] Chard (n 22) 419

[24] *Delimitis* (n 3)

[25] *Ibid,* para 19

[26] Chard (n 22) 419

[27] Niels, Jenkins and Kavanagh (n 14) 237. See also Richard M Steuer 'Exclusive dealing in distribution' (1983-4) 69 Cornell Law Review 101, 115

[28] See Jacobson and Sher (n 21) 789;Rogers (n 21) 1019; Jan B Heide, Shantanu Dutta and Mark Bergen 'Exclusive dealing and business efficiency: evidence from industry practice' (1998) 41(2) The Journal of Law & Economics 387, 389-390; Steuer (n 27) 115; Ramseyer and Rasmusen (n 18); Hans Zenger 'When does exclusive dealing intensify competition for distribution? Comment on Klein and Murphy' (2010) 77(1) Antitrust Law Journal 205; Niels, Jenkins and Kavanagh (n 14), 237; 315-318

Heide, Dutta and Bergen found that firms tend to use exclusive dealing when there is a likelihood that competing manufacturers can free ride on the services they provide.[29] This benefit is recognised in the Guidelines on Vertical Restraints.[30]

Free-riding can occur at both upstream and downstream levels. It occurs upstream when a supplier A makes an investment for its product, for instance training the distributor's employees, only for a competitor B's products to benefit because both A and B have the same distributor.[31] Free-riding occurs downstream when a distributor C who sells supplier A's products 'piggy backs' on the promotional efforts made by another distributor D for A's products.[32] Exclusive dealing would avoid such problems because, in the first instance, A's efforts would only benefit A, as the distributor would have an incentive to sell A's products, since they would be the only products it carries, whilst in the second instance D's efforts would only benefit D, and therefore D has an incentive to invest resources in A's products (thereby also benefitting A). Within this context, exclusive dealing can increase inter-brand competition and encourage optimal distribution of products to consumers.[33] By encouraging brand loyalty on the part of the distributor, the distributor has a greater incentive to ensure that the brand is successful,[34] and the supplier has an incentive to aid the distributor, knowing that the distributor will not be passing off inferior products as the supplier's own.[35]

[29] Heide, Dutta and Bergen (n 28) 403
[30] Para 106 et seq
[31] For further details on this see Chard (n 22) 418; Jacobson and Sher (n 21) 789; Benjamin Klein and Kevin M Murphy 'Exclusive dealing intensifies competition for distribution' (008) 75(2) Antitrust Law Journal 433, 435; Jacobson (n 21); Ornstein (n 18) 71; Niels, Jenkins and Kavanagh (n 14), 315; Steuer (n 27) 115; 124 and 126
[32] See further Benjamin Klein and Andres V Lerner 'The expanded economics of free-riding: how exclusive dealing prevents free-riding and creates undivided loyalty' (2007) 74(2) Antitrust Law Journal 473, 477 and 519; Ornstein (n 18) 71; Niels, Jenkins and Kavanagh (n 14) 316; Steuer (n 27) 115
[33] Chard (n 22) 419. See also Steuer (n 27)115
[34] Jacobson and Sher (n 21) 789; Jacobson (n 21) 357; Ornstein (n 18)
Jacobson and Sher (n 21) 789; Jacobson (n 21) 357; Klein and Lerner (n 32)183

Economic evidence shows that products which are distributed by exclusive distributors receive more promotional efforts through non-pricing methods.[36] However, today the use of exclusive dealing to solve free-riding is only relevant to certain sectors of the economy.[37] In some markets, the idea of free-riding is outdated, largely thanks to the fact that consumers can access information online.[38] As a result there is an argument for saying that free-riding must be proven to be a real problem before it is weighted against the possible anti-competitive effect of the restraint.[39] The Commission certainly takes this stance in the Guidelines on Vertical Restraints.[40]

Another common problem which is solved by exclusive dealing is the hold-up problem. This occurs when the supplier has to make a client-specific investment,[41] such as special equipment or specialist training,[42] which cannot be used for other customers, whether for the duration of the contract or more pertinently after its termination. Hermalin and Katz explain that the hold-up problem:

> arises when one party makes a sunk, relationship-specific investment and then engages in bargaining with an economic trading partner.[43]

The hold-up problem may also arise at some stage during the period of the contract. The buyer would be able to 'threaten' the seller *qua* investor with choosing alternative suppliers or possibly terminating the contract in case of disagreement. This would leave the seller stuck

[36] Chen and Shieh (n 17) 433
[37] Niels, Jenkins and Kavanagh (n 14) 316
[38] *Ibid*
[39] *Ibid*
[40] Para 107(1)
[41] Guidelines on Vertical Restraints, para 107(4)
[42] Guidelines on Vertical Restraints, para 107(4); For other examples, see Benjamin E. Hermalin and Michael L. Katz 'Information and the Hold-Up Problem' < http://faculty.haas.berkeley.edu/hermalin/Hermalin_Katz_7706_RR.pdf > accessed 28 October 2017 1
[43] Hermalin and Katz (n 42) 1

with the relationship specific investment, and possibly a 100% capital loss.[44] An exclusive dealing contract would prevent this.

It is clear that the possibility of a hold-up cannot be used to justify exclusive dealing in all cases. In order for the avoidance of the hold-up problem to be considered as a benefit of exclusive dealing, the Commission notes, within the context of Article 101 TFEU, that the investment has to be (i) relationship-specific, that is it cannot be used to supply other customers, (ii) long-term, which is not recouped in the short run, and (iii) asymmetric, that is the supplier invests more than the customer.[45]

Exclusive dealing may also create economies of scale in distribution. Large scale economies can be exploited and therefore the supplier can, because it has lower production costs, indirectly ensure a lower retail price for its product,[46] thus being more competitive. Moreover, such arrangements create security for suppliers who can ensure they will have sufficient sales volumes to justify possible costly investments.[47] They also ensure that the distributor has a dependable source of supply, thereby reducing the risk of out-of-stock products.[48] In this regard, exclusive dealing would serve as an alternative to vertical integration,[49] a particularly important aspect for small jurisdictions. This latter point is considered in detail in the next Section.

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[44] See Benjamin Klein 'The Economic Lessons of Fisher Body-General Motors' 14(1) International Journal of the Economics of Business 7-8

[45] Guidelines on Vertical Restraints, para 107(4). These are sustained by economics theory – Niels, Jenkins and Kavanagh (n 14) 318-9

[46] Guidelines on Vertical Restraints, para 107(7); see Jacobson (n 21) 359

[47] Jacobson and Sher (N 21) 789; see Jacobson (n 21)359

[48] Steuer (n 27) 242; see Jacobson (n 21) 359; Jacobson and Sher (n 21) 789

[49] See Jacobson (n 21) 360. In this respect, exclusive dealing may in some cases lead to lower prices, and therefore an increase in consumer welfare – Bishop and Walker (n 20) 191; see also Daniel O'Brien and Greg Schaffer 'On the dampening-of-competition effect of exclusive dealing' (1993) XLI(2) The Journal of Industrial Economics 215, 220

In small jurisdictions, each of these effects is likely to be magnified. Dominant undertakings in many sectors in small jurisdictions are more likely to have significant market power, especially in terms of market share, and are also more likely to stock must-have products. This means that anti-competitive foreclosure due to exclusive dealing is more probable in small jurisdictions.

Similarly, undertakings operating in an oligopolistic market, with two or three operators, would tend to follow suit if one undertaking decides to enter into exclusive dealing arrangements with its customers, and this appears beneficial to that first oligopolist. As a result, should they decide to appoint a number of exclusive distributors or retailers, the possibility of anticompetitive foreclosure is again higher than in larger markets because of an increase in the cumulative effects of exclusive dealing arrangements.

Indeed the possibility of cumulative exclusive dealing arrangements, and therefore cumulative anti-competitive foreclosure, is relatively high in small jurisdictions precisely because of size. As a result, the chances that exclusive dealing in small jurisdictions results in an increase in wholesale prices and less choice of products is potentially higher. In small jurisdictions there might also be a limited number of distributors, who if tied by an exclusive dealing obligation, would effectively be unavailable to actual or potential competitors of the supplier again leading to anti-competitive foreclosure. This problem is compounded if the distributor itself is in a dominant position. This is likely in markets for distribution of products with particular characteristics which require expertise.

However, the positive effects of exclusive dealing are also more likely to be felt. In view of the lack of resources in small jurisdictions a supplier and customer may find they have to

agree upon a relationship specific investment that the supplier has to make in order for the customer to provide a particular (innovative) product. It is also more likely to have a buyer who would require the seller's facility to market its products or who must invest in complementary assets to be used in conjunction with the seller's product for the same reason. Due to the limited size of small jurisdictions, and the consequent limited resources, transacting parties in small jurisdictions are dependent on one another to a greater extent than in larger markets. The way to incentivise the supplier to make such an investment would be entering into an exclusive dealing arrangement. Exclusive dealing would therefore avoid or minimise the hold-up problem, which tends to be an issue in small jurisdictions.

It has been noted that free riding would discourage suppliers from investing in their distributors, and distributors from making an effort when selling the suppliers' products. In small jurisdictions this is more likely to have a negative effect since the market will already be somewhat limited, and lack of investment and promotion would limit it further. Exclusive dealing can combat such an outcome.

Moreover when considering small jurisdictions, the fact that exclusive dealing leads to economies of scale in distribution and is an alternative to vertical integration is highly important. Gal[50] and Schefer[51] have argued that mergers should be allowed in small jurisdictions to allow the creation of economies of scale. Exclusive dealing is a preferable alternative since it allows the markets and consumers – and the undertakings themselves – to reap the benefits of a merger, in particular economies of scale, and the avoidance of the

[50] Michal S Gal 'The effects of smallness and remoteness on competition law – the case of New Zealand' (2006) Law & Economics Research Paper Series Working Paper No 06-48 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=942073 > accessed 28 December 2019

[51] Michael Schefer 'Guidelines for legislation on monopolies and restrictive practices in small economies' (1970) 15 Antitrust Bulletin 781

risk of free riding and hold up issues, without actually having two (or more) undertakings merging, thereby allowing the two undertakings to exist separately and to continue to supply and/or service other market operators outside the exclusive dealing obligation, to the benefit of competition on the market.

THE ANALYSIS THAT SHOULD BE UNDERTAKEN AND THE APPROACH IN EU COMPETITION LAW

Exclusive dealing can have both pro and anti competitive effects on the market, even in small jurisdictions. As a result, a full analysis of the market and the restraint in context needs to be undertaken before an exclusive dealing restraint can be said to be in breach of the competition rules.

This approach is evident in the application of Article 101 TFEU and the Guidelines on Vertical Restraints. A detailed analysis of the market however is not so evident so far in the context of Article 102 TFEU. A number of authors are of the opinion that the Commission and CJEU's approach to exclusivity arrangements within the context of Article 102 is equally effects-based as that taken under Article 101.[52] However this is clearly not the case. This is confirmed by the CJ's judgment in *Intel*, where the CJ annulled the decision of the GC on the basis that the Commission (and subsequently the GC) did not consider whether the conduct being examined was capable of restricting competition and producing the alleged foreclosure effects.[53] In other words the CJ confirmed that up to that point an effects based analysis was

[52] See for instance Frances Dethmers and Jonathan Blondeel 'EU enforcement policy on abuse of dominance: some statistics and facts' (2017) 38(4) European Competition Law Review 147, 153; Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013), 423-4, 433

[53] n 6, para 138. The facts of this case are reported on p 159.

not being carried out, notwithstanding that it should have been. [54] We have to await the GC's fresh judgment on the case to assess to what extent an effects-based approach will now be taken.

This state of affairs is better evidenced by the relevant Commission documents themselves. The Guidelines on Vertical Restraints indicate that an analysis should be carried out when determining whether exclusive dealing has negative effects on the market, and details how this is to be done.[55] The Guidance Paper on the other hand does not contain any such detail. The approach taken in the Guidance Paper is to highlight when and why exclusive dealing is anti-competitive.[56] Indeed the Commission concludes that 'if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure'.[57] Since most dominant companies are likely to be unavoidable trading partners, this seems to imply that exclusive dealing entered into by dominant undertakings is in all cases abusive. [58]

The Guidelines on Vertical Restraints do state that exclusive dealing is 'more likely to result in anticompetitive foreclosure when entered into by dominant companies'.[59] This is borne out by economic theory, yet like economic theory it does allow some leeway for exclusive dealing by dominant undertakings to be found not to be anti-competitive. The Guidelines on Vertical

[54] Admittedly, the appeal focuses on loyalty rebates (which lead to exclusive dealing in effect), however it is strongly arguable that this principle applies equally to exclusive dealing obligations which the company had also engaged in.
[55] Para 34 and 36 . See Paul Lugard 'Eternal sunshine on a spotless policy? Exclusive dealing under Article 82EC' (2006) 2 European Competition Journal 163, 172
[56] Para 34 to 36
[57] Para 36
[58] But see O'Donoghue and Padilla (n 52) 432, who see a "rule of research" approach in the Guidance Paper.
[59] Para 133

Restraints also note that Article 101(3) is unlikely to be applicable to conduct which also constitutes an abuse of a dominant position.[60]

Those who believe that a more effects-based approach is evident in the application of Article 102 to exclusive dealing generally point to *Van den Bergh* in support of their argument.[61] However, the more effects based approach evident in the GC's and CJ's judgments in relation to Article 102 TFEU was due to the fact that the undertaking in question was being investigated both in terms of Article 102 and Article 101. In other words, the analysis undertaken with respect to Article 101 informed and instructed the assessment of the practice in terms of Article 102. In the recent *Tomra*[62] CJ decision for instance, no such approach was evident.

There is therefore a dichotomy in how exclusive dealing has been dealt with so far under Article 101 and Article 102, in that it can be said that an effects-based approach is taken in terms of Article 101 whilst a more form-based approach is evident for Article 102. A more effects-based approach – or an attempt at an effects-based approach – will probably be evident now following *Intel*.

In *Intel* the CJ held that where the undertaking concerned submits that its conduct was not capable of restricting competition and of producing the alleged foreclosure effects the

[60] Para 127

[61] This case will be considered in further detail below, however on this point see for instance O'Donoghue and Padilla (n 52) 423-4, and 431-432 (and 445 although in this section they discuss cases which do not deal with exclusive dealing) although they too note that 'the Commission's translation of its policy [in the Guidance Paper] into the decisional practice remains somewhat schizophrenic, which in turn may have limited the EU Courts' willingness to embrace a similar position' (p. 424); and Renato Nazzini *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP, 2011), 245: 'Since Hoffmann-La Roche, however, and despite an apparent deference to this case as a precedent, the case law has been moving away from a strict *per se* prohibition. (…)Thus the Court [in Van den Bergh] relied on three factors in order to presume a foreclosure effect: dominance, exclusivity, and the size of the foreclosed share of demand.'

[62] See pages 141-152; 146-147.

Commission is required to analyse (i) the extent of the undertaking's dominant position on the relevant market; (ii) the share of the market covered by the challenged practice; (iii) the conditions and arrangements for granting the rebates in question, their duration and amount; and (iv) the possible existence of a strategy aiming to exclude as-efficient competitors.[63] In other words, the CJ is saying that an effects-based analysis must be carried out where the undertaking being investigated raises the defence that its conduct does not produce foreclosure of the market. Therefore today it pays for the undertaking being investigated to raise this defence in each and every case. This would in turn mean that in nearly every case regarding exclusive dealing, an effects based analysis will have to be undertaken.

The CJ judgment speaks of 'rebates'. However, it is submitted that the CJ's decision applies equally to contractual exclusive dealing. First of all, *Intel* was found both to have made payments in return for exclusivity,[64] as well as granted rebates.[65] Moreover, both types of conduct have always been considered to amount to exclusive purchasing and a similar analysis has, to date, been carried out in EU competition practice. It would therefore make no sense for the EU competition authorities to consider taking a different approach to contractual exclusive dealing.

In reality, dominant undertakings are at a disadvantage when arguing that there is no anti-competitive foreclosure. Economics shows that dominant undertakings are more likely to foreclose a market with exclusive dealing than non-dominant undertakings, and as noted, this principle is also contained in the Guidelines on Vertical Restraints, [66] which are based on an

[63] Paragraph 139
[64] See p 156 *et seq*.
[65] See Chapter 5.
[66] Guidelines on Vertical Restraints, para 133; Niels, Jenkins and Kavanagh (n 14), 238

effects-type analysis. Therefore, dominant undertakings will still have an uphill battle to convince a competition authority that an exclusive dealing agreement is not anti-competitive.

The strict approach taken to exclusive dealing undertaken by dominant undertakings in EU competition law can be seen as the result of the principle that such undertakings have a 'special responsibility' not to impair competition on the market.[67] Admittedly, exclusive dealing will in all cases restrain competition which would otherwise occur between competing products.[68] Therefore exclusive dealing cannot automatically be allowed in terms of the competition rules.

Neither however, can it be *per se* prohibited.[69] Exclusive dealing helps to facilitate distribution, resulting in benefits for both businesses and consumers.[70] In view of the fact that exclusive dealing, like other vertical agreements, may contribute to greater efficiency and consumer welfare,[71] the agreement's countervailing benefits must be considered[72] in each and every case. That includes not just assessments undertaken in terms of Article 101 but also those in the light of Article 102.

This approach is taken in US antitrust law. The much longer experience of the US courts in dealing with exclusive dealing arrangements has shown that the approach taken today by the

[67] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* EU:C:1983:313, para 55
[68] Alan J Meese 'Exclusive dealing, the theory of the firm, and raising rivals' costs: Toward a new synthesis' (2005) 50(3) Antitrust Bulletin 371, 391
[69] See William S Comanor and HE French III 'The competitive effects of vertical agreements?' (1985) 75(3) The American Economic Review 539, 545 and Hans Zenger 'When does exclusive dealing intensify competition for distribution? Comment on Klein and Murphy' (2010) 77(1) Antitrust Law Journal 205, 211
[70] Rogers (n 21) 1018
[71] Niels, Jenkins and Kavanagh (n 14), 311
[72] Niels, Jenkins and Kavanagh (n 14), 238

Commission and by the CJEU post-*Intel* is the best approach to take, both in terms of economic theory, as well as in practice.

Indeed the US and EU systems are comparable with regards to exclusive dealing. Under US law, much like under EU law, both Section 1 and 2 of the Sherman Act can be used in relation to exclusive dealing undertaken by dominant undertakings.[73]

From an approach which saw exclusive dealing as having 'inherent potential to foreclose competitors',[74] US antitrust law today applies a genuine rule of reason approach. Today therefore, whilst exclusive dealing is considered as 'often motivated by output-enhancing efficiencies', it is also recognised that it is 'rational for dominant firms to enter into these arrangements to increase their market power' and therefore result in anti-competitive conduct.[75] This approach is similar to that taken in the Commission's Guidelines on Vertical Restraints, and is possibly the new approach to be taken by the CJEU following *Intel*.

Under the current US approach, the relevant competition authorities or courts will examine (i) whether the undertaking in question has market power; and (ii) 'other factors to determine whether the arrangement has a substantial likelihood of lessening competition',[76] such as the duration of the exclusivity, the notice period for termination of the agreement, the proportion of commerce foreclosed, the presence of alternative distribution methods, whether competitors enjoy similar exclusive dealing arrangements and the ease of entry into the market.[77] The factors which are considered by the US courts are highly reminiscent of the

[73] Lugard (n 55) 173
[74] *Ibid,* 164
[75] *Ibid*
[76] *Ibid,* 174
[77] *Ibid*, 174

factors laid out in the Guidelines on Vertical Restraints and which should hopefully start being applied to Article 102 TFEU cases. At this point, one can only wait and see.

EXCLUSIVE DEALING IN EU COMPETITION PRACTICE

BASIC EXCLUSIVITY: EXCLUSIVITY CONTRACTS

Exclusivity contracts are the most straightforward type of exclusive dealing. The term is used here to refer to contracts which specifically indicate that a customer is to buy all or most of its requirements (the latter often called 'requirements contracts') for a particular product from the dominant supplier. The Vertical Block Exemption Regulation,[78] applicable within the context of Article 103(3) TFEU, considers an obligation to obtain 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market to be a non-compete obligation.[79] It is therefore likely that for the purposes of Article 102 TFEU, an obligation to obtain at least 80% of the customer's requirements from the dominant supplier will be considered exclusive dealing.

The classic case on exclusivity contracts is *Hoffmann-La Roche*.[80] Most of the agreements examined in *Hoffmann-La Roche* contained an exclusivity clause together with a preferential price *and* a rebate, save for one which only contained the former. Both the Commission and the CJ therefore considered these issues as one and the same thing.

The CJ held that exclusivity obligations (whether for rebates or not):

[78] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (2010) OJ L 102/1
[79] Article 1(1)(d)
[80] n 4

> are incompatible with the objective of undistorted competition within the common market because (…) they are not based on an economic transaction which justified this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.[81]

Such conduct would 'tend to consolidate' a dominant position on the market.[82]

This line of thinking, cemented in the 1970s has informed all the decisions on exclusive dealing to today. This means that historically, EU competition law has essentially held that exclusivity contracts are prohibited when the supplier is a dominant undertaking. This however, ignores the benefits which can accrue to the market thanks to exclusivity contracts.[83] Rather than taking such a categorical approach, an analysis of the market should be carried out, including a consideration of the cumulative effect of similar agreements and the duration of the contract.

This is particularly important in small jurisdictions. If one accepts that in small jurisdictions, resources are limited, exclusivity contracts will be required in most sectors so that dominant suppliers – of which there is more likely to be a preponderance as discussed in Chapter 1 – may enter into supply contracts without fear of free-riding or a hold-up problem. The decision in *Hoffmann-La Roche* however precludes this. Thus on the basis of *Hoffmann-La Roche*

[81] Para 90

[82] Para 90. *Hoffmann-La Roche* (n 4) was cited in Case C-393/92 *Municipality of Almelo and others v NV Energieedrijf Ijsselmij* EU:C:1994:171 a case where rather than a straight out exclusivity clause, there was a clause prohibiting local distributors from obtaining electricity supplies from other suppliers, which naturally had the same effect. From an EU law point of view, this conduct was compounded by the fact that it compartmentalised the single market since effectively local distributors were prohibited from obtaining supplies of electricity from distributors or producers in other Member States.

[83] See p 127-130.

dominant suppliers in small jurisdictions are restricted in their dealings with customers in some instances to the detriment to the market.

In *Hoffmann-La Roche* the only exception mentioned by the CJ were 'exceptional circumstances' where an agreement could be justified under Article 101(3) TFEU.[84] It is however unclear what this means. Did the CJ mean that an agreement would not be in breach of Article 102 if the agreement satisfied the elements of Article 101(3)? Alternatively, this statement could be sanctioning the application of an 'Article 102(3) approach', where the elements used to justify an agreement which is anti-competitive under Article 101(1) would be used to justify conduct which is abusive. This is the line taken by the Commission in the Guidance Paper.

This statement also raises another question. Arguing *a contrario senso* does this mean that an exclusivity agreement with a dominant undertaking automatically breaches Article 101 TFEU, without the need of the effects analysis in terms of *Delimitis* being carried out? The Guidelines on Vertical Restraints do point towards this. However, this interpretation would be unfortunate as it would mean that there is no space at all for considering the economic effects of an exclusive dealing agreement, not even within the context of Article 101 TFEU.

The *per se* abuse approach taken in *Hoffmann-La Roche* is also evident in *Tomra*.[85] In *Tomra* the Commission found that agreements whereby customers undertook to retain Tomra as the 'preferred', 'main' or 'primary' supplier in fact amounted to exclusivity agreements. These agreements in certain instances also contained quantity forcing clauses (considered below) or progressive rebates (considered in the next chapter) thereby strengthening their exclusive

[84] n 4, para 90

[85] Case COMP/E-1/38.113 *Prokent-Tomra* 29 March 2006 [2008] OJ C219/11, Case T-155/06 *Tomra Systems ASA and Others v European Commission* EU:T:2010:370, Case C-549/10 P *Tomra* (n 4)

nature. The Commission's analysis combined these types of agreements with the quantity commitments and retroactive rebates that Tomra was also found to be engaged in – perhaps because Tomra had engaged in a combination of these practices. Upon appeal both the GC[86] and the CJ[87] confirmed that the agreements in question amounted to exclusivity agreements.

However such an approach[88] is in stark contrast to the approach taken with respect to Article 101 TFEU, where, starting from *Brasserie de Haecht v Wilkin* [89] and *Delimitis,* [90] the determination of whether exclusivity is lawful has always involved an extensive analysis. In *Brasserie de Haecht v Wilkin,* the CJ highlighted the importance of examining agreements which have the effect of restricting competition within the 'economic and legal context of such agreements (…) and where they might combine with others to have a cumulative effect on competition.' Although it is true that Article 102 TFEU does not refer to the 'object or effect' of restricting competition, it is illogical to carry out a legal and economic analysis of a type of conduct under Article 101 TFEU and fail to do so under Article 102 TFEU.

[86] n 85, see in particular para 57. This emphasises the fact that, rightly, competition authorities will look beyond the form of an agreement towards its substance.
[87] n 4, para 88-100
[88] It is pertinent to point out that there are also three commitments decisions which deal with exclusivity contracts within the context of Article 102 TFEU: COMP/B-137.966 *Distrigaz* 11 October 2007, COMP-39.386 *Long-term contracts France* 17 March 2010 and COMP/A.39.116/B2 *Coca-Cola* 22 June 2005. Unfortunately the commitments decisions themselves do not contain much detail in order to enable any solid conclusions as to the approach taken by the Commission to exclusivity contracts in these cases. What can be noted is that the Commission appears to have taken a more 'effects-based' approach to the commitments, rather than to the infringement in the first place, as the Commission did not prohibit these undertakings from entering into exclusive arrangements outright. On the contrary it accepted that these undertakings enter into exclusivity contracts under specific conditions, with limitations as to duration and ensuring that a proportion of the supply was open to contest within the relative supply market every year. It appears therefore that the exclusivity contracts where deemed problematic in and of themselves (although in *Distrigaz* the Commission did note the cumulative effect of similar agreements on the market), however, once the undertakings concerned showed willing to co-operate, the Commission was more open to consider the effects that such commitments would have on the market.
[89] *Brasserie de Haecht* (n 3)
[90] *Delimitis* (n 3)

Delimitis builds upon *Brasserie de Haecht*[91] and notwithstanding that the case was a preliminary reference, the CJ gave detailed guidance on what should be considered when assessing exclusivity contracts. The CJ pointed out that the first step in the analysis had to be the definition of the relevant market.[92] Following that, it highlighted that to assess whether the existence of several supply agreements impedes access to the relevant market, the nature and extent of the agreements in their totality have to be considered.[93] The CJ noted that the market position of the parties has to be considered to determine whether the market can be cumulatively sealed off.[94] This does not just relate to the market share but also the number of outlets which are tied in relation to the total number of outlets.[95]

These principles are evident today in the Guidelines on Vertical Restraints. However at the same time that the CJ was establishing the groundwork for assessing exclusivity contracts in terms of Article 101 TFEU, in *Hoffmann-La Roche*[96] (and later), it categorically refused to consider such an assessment within the context of Article 102 TFEU. This notwithstanding that in *Delimitis* the CJ noted that the market position of the parties is only one consideration that must be considered, and it not simply dependent on market shares (and therefore possibly dominance) but also depends on the actual number of downstream operators which are tied. It remains to be seen whether the EU courts will now adopt a similar approach to Article 102 TFEU following *Intel*. [97]

[91] See para 14
[92] Para 16-18
[93] see para 15, 19-26
[94] Para 26
[95] Para 26
[96] n 4
[97] n 6

It is augured that this is the case. By taking a genuinely more effects based approach to exclusive dealing in terms of Article 102 TFEU, all markets, but especially small jurisdictions would benefit. The assessment which is carried out in terms of Article 101 TFEU would allow for the peculiarities of small jurisdictions to be taken into consideration. The limitations of small jurisdictions (discussed in Chapter 1) such as limited resources – whether of product, finance and human – and the insularity of the market would be considered allowing for a fairer conclusion on whether the exclusive dealing arrangement entered into by a dominant undertaking truly is anti-competitive.

NUMBERS GAME: QUANTITY FORCING

The Commission describes 'quantity-forcing' as being 'a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate his purchases to a large extent with one supplier.'[98] One type of quantity-forcing is having minimum purchase requirements.[99] Another type of quantity forcing is non-linear pricing, referred to in EU competition practice as 'fidelity rebates'. These are dealt with in the next Chapter. The reason for this is that whilst having minimum purchase requirements is not a pricing practice, non-linear pricing, as the name suggests, is.

It appears that the only Article 102 TFEU cases which dealt with minimum purchase requirements are *Distrigaz*[100] and, to a lesser extent, *Tomra*.[101] Most of the contracts examined in *Distrigaz*[102] contained a fixed annual contractual quantity and an annual

[98] Guidelines on Vertical Restraints, para 129
[99] Para 129. See also Van Bael & Bellis (Ivo Van Bael) *Competition Law of the European Community* (Kluwer Law International, 2005) 324
[100] *Distrigaz* (n 88)
[101] Case COMP/E-1/38.113 *Prokent-Tomra* (n 85), Case T-155/06 *Tomra* (n 85), Case C-549/10 P *Tomra* (n 4)
[102] *Distrigaz* (n 88)

minimum quantity. In other words, customers were obliged to buy minimum quantities from Distrigas.[103] Generally, because of their consumption volumes, customers only had one gas supplier.[104] The Commission was concerned that the supply contracts entered into by Distrigas with its customers were likely to foreclose the market, particularly because a large proportion of the market was already tied to Distrigas.[105] The case never went further as the Commission accepted Distrigas's commitments. The commitments included an obligation on Distrigas to ensure that for each calendar year at least 65%, and on average 75%, of the gas volumes supplied to industrial users and electricity producers would return to the market, and that new contracts with such customers would not be longer than five years. Contracts with re-sellers would not be for longer than two years. Moreover, the company was not to include any use, resale or destination clauses, or any tacit renewal clauses in new agreements, and remove them from existing agreements.

The Commission did appear to conduct a market appraisal in this case.[106] However, there is minimal detail on the actual appraisal carried out. In fact, Ridyard comments that after having made 'the significant policy shift towards an effect-based framework, the Commission has then adopted an ultra-conservative standard in applying that standard.'[107] However, when one considers the commitments accepted by the Commission, it may be possible to argue that, although still influenced by the form-based approach, the Commission was more willing to take an effects based approach to commitments, once undertakings were shown to be willing to co-operate. For instance, the Commission saw nothing wrong with an undertaking

[103] Para 19
[104] Para 20
[105] Para 23 and 24
[106] Derek Ridyard 'Exclusive contracts and Article 82 enforcement: an effects-based perspective' (2008) 4(2) European Competition Journal 579, 592
[107] *Ibid*, 593

entering into exclusive dealing arrangements for two or five years (depending on the counter-party), particularly since Distrigas was willing to allow customers freedom in how to use its product, and to allow customers the option to switch suppliers. This indicates that the Commission had carried out an analysis of the proposed commitments and deemed them not to restrict competition. On the contrary, no such approach is evident from the decision when the Commission found Distrigas to be in breach in the first place. A more consistent effects-based approach would be preferable.

Being less restrictive forms of exclusive dealing, quantity forcing should be looked upon more favourably in small jurisdictions, particularly in order to obtain any benefits of vertical integration that can be obtained through exclusive dealing, previously discussed. Quantity forcing results in less of a chance of foreclosure since the buyer can, for the remainder of its requirements, seek supplies from a competing seller – in other words a part of the market is always contestable. Quantity forcing provides the best of two worlds for small jurisdictions – the benefits of exclusive dealing with less risk of foreclosure. Naturally this does not mean that quantity forcing should be permitted in all cases when the market in question is small. What is required is a thorough examination of the market to determine if the quantity forcing obligation is in reality precluding all competition. If it does not then there is an argument that it is not as restrictive of competition as EU case law would have us think.

The issue of contestability of the market arose in *Tomra,*[108] although technically in relation to the rebates that Tomra was granting its customers. However the analysis carried out appears to conflate three types of conduct: exclusivity agreements, retroactive rebates, and setting minimum targets for some customers. With regards to quantity commitments, the

[108] Case T-155/06 *Tomra* (n 88)

Commission simply notes that such conduct is prohibited.[109] There is therefore not much analysis and the matter was not considered further by the GC and the CJ. It appears that this type of conduct is *per se* abusive.

With respect to contestability, the GC held that the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by the fact that the contestable part of the market is still sufficient to accommodate a limited number of competitors, as competitors should be able to compete on the merits for the entire market and not just part of it.[110] It is not objectionable that a dominant undertaking is still found to have abused of its dominant position notwithstanding that a part of the market is contestable. What is problematic is that this categorical approach means that the contestability of the market seems to be irrelevant. Whether part of the market and the extent of such a part, is contestable or not is relevant when assessing whether there is or could potentially be anticompetitive foreclosure, and therefore whether there really is abuse of a dominant position. In particular in small jurisdictions, limited demand (due to limited population and size) means that the contestability of at least part of the market would in nearly all cases be relevant in order to assess whether there is foreclosure. EU competition law is in this regard too draconian, and this stance is likely to harm small jurisdictions to a much greater extent than larger jurisdictions.

NO SPACE FOR COMPETITORS : *DE FACTO* EXCLUSIVITY

The cases considered so far have dealt with situations where the contract specifically provides for exclusivity or near exclusivity, or a minimum purchase threshold. Such situations are often

[109] n 88, para 280
[110] n 88, para 241

referred to as *de jure* exclusive dealing. However, exclusive dealing can also arise *de facto*, that is when through some other inducements, which at times can appear to be unrelated to the main transaction (that is, the sale and purchase of goods), the customer is induced or obliged to buy all its requirements for a particular product from the dominant supplier.

The textbook case is *Van den Bergh*.[111] The case concerned the distribution arrangements for impulse ice-cream in Ireland, which required refrigerated transport from the factory to the sales outlet/catering establishment. HB Foods made freezer cabinets available to retailers either with no direct charge or leased for a nominal annual rent which was not collected.[112]

The Commission, in a decision confirmed by the GC and CJ, found a breach of both Article 101 and Article 102. The Commission found a breach of Article 102 because it was proven that there were difficulties in persuading retailers to replace the cabinets provided by HB or to install additional cabinets in such outlet. Thus HB's inducement to retailers to enter into freezer-cabinet agreements had 'the effect of rendering those outlets de facto exclusive sellers of HB impulse ice-cream products'; the Commission continues that:

> Any inducement by a dominant supplier of a customer to grant it exclusivity, so as to prevent competing suppliers over significant periods from dealing with the customer, is prohibited by Article [102](…)[113]

[111] IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited* 11 March 1998 [1998] OJ L246/1; Case T-65/98 *Van den Bergh Foods Ltd* (n 3)
[112] *Ibid*, para 58. Maintenance and repair was carried out by the company. Ownership of the freezer remained with HB Foods (paragraph 59). The freezers were to be used exclusively for storing HB products (paragraph 59). The standard agreement entered into between HB and the retailer was terminable with two months' notice (paragraph 59).
[113] *Ibid*, para 264

Exclusive supply was found to constitute an unacceptable obstacle to entry into the market and impair the effective competitive structure.[114] Contrary therefore to the many claims that *Van den Bergh* heralded a more effects based approach, the Commission's stance clearly tended towards considering exclusive dealing arrangements entered into by dominant undertakings to be abusive in themselves. The Commission uses the conduct undertaken by HB as proof of the foreclosure which occurs when dominant undertakings enter into exclusive dealing arrangements.

Similarly, in the GC judgment there is no indication of an effects-based approach to exclusivity with respect to Article 102 TFEU. The GC notes that whilst in competitive markets exclusivity might be in the interests of both parties and 'cannot be prohibited as a matter of principle', in markets where there is an undertaking with a dominant position this consideration 'cannot be accepted without reservation'.[115] In fact, the GC goes on to say that:

> The fact that an undertaking in a dominant position on a market ties de facto – even at their own request – 40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position within the meaning of Article [102] of the Treaty.[116]

This statement is reminiscent of the statement in *Hoffmann-La Roche.*[117] The GC was concerned, again as in *Hoffmann-La Roche*, that exclusivity had the effect of preventing retailers from selling other brands of ice cream notwithstanding demand for such brands, and of preventing competing manufacturers from accessing the relevant market.[118] Therefore,

[114] *Ibid*, para 265
[115] n 3, para 159
[116] *Ibid*, para 160
[117] n 4
[118] n 4, para 160

those who read this judgment as indicating an effects-based approach to exclusive dealing within the context of Article 102 TFEU are at best unduly optimistic.

On the contrary, an effects-based approach is evident in the Commission's and GC's assessment under Article 101 TFEU. The Commission's analysis of the freezer exclusivity within Article 101 TFEU was extensive. The Commission assessed the restrictive effects of the arrangement against the background of the effect of similar networks of freezer-cabinet agreements operated by Van den Bergh's competitors, and other relevant market conditions.[119] Although naturally the GC did not go into as much detail when affirming the Commission's decision, it did re-affirm the analysis made by the Commission in finding a breach of Article 101. Therefore, there is ample evidence of an effects-based approach in relation to Article 101 when it comes to exclusive dealing.

HB attempted to argue that the application of Article 101 infringed its property rights, since the freezers remained its property.[120] The Commission and GC however justified the application of Article 101 by stating that the exercise of property rights may be restricted in the public or general interest to the extent necessary.[121] This argument is legitimate – within any legal system, the use of one's property cannot harm another. Harm caused to other

[119] n 111, para 145. In its assessment, the Commission considered for instance that this network of agreements entered into by HB with its retailers meant that retailers were restricted in stocking competitors' ice cream, where the HB freezer was unlikely to be replaced by a retailer-owned or a competitor's freezer, or where it was not 'economically viable' to install an additional freezer (para 143). The Commission undertook an extensive outlet profile noting that only a small proportion of retailers in Ireland had non-exclusive cabinets, and that the remaining retailers contained one or more supplier-exclusive cabinets. The majority of the retailers were found to have only one exclusive freezer supplier by one supplier the majority of which were supplied by HB. A competing supplier wishing to enter the market either had to find a non-exclusive retailer (which were limited) or persuade retailers to replace HB's freezer with a retailer's own freezer or that of the competitor or to add the competitor's freezer. The Commission found that there was little likelihood of the latter three options occurring (para 158-183). The inevitable conclusion was that in those retailers where the only freezer where HB freezers, HB was exposed to no interbrand competition at the consumer level at all (para 200).

[120] Para 59

[121] Commission decision (n 111), para 212; GC (n 3) para 170 - 172

persons would generally give rise to actions of tort (civil action), and in particular circumstances raise claims of a breach of human rights. With competition infringements, harm is also caused to the market. Competition law is a law in the public interest, and therefore restrictions on ownership are more easily defensible.

HB also attempted to argue that it would be disadvantaged vis-à-vis its competitors who would make the freezer available for free.[122] The GC dismissed this argument on the basis that HB's conduct foreclosed the market.[123] Again therefore competition trumped the dominant undertaking's rights – possibly unfairly. Arguably HB was forced to do nothing and allow its competitors to eat into its market share.

This is a problem often encountered in small jurisdictions. Often, particularly if the market is oligopolistic or has oligopolistic tendencies, exclusive dealing – whether *de facto* or not is entered into by all or nearly all the undertakings operating on the market. However, an undertaking which happens to have a larger market share and therefore considered dominant falls foul of the competition rules simply by virtue of being dominant, notwithstanding that its competitors are operating in a similar manner.

Should a dominant undertaking opt to not enter into such agreements, its customers would complain because that undertaking's competitors would in fact be offering them exclusivity which the buyers often see as beneficial particularly if exclusivity includes (as is often the case) some other benefit.

The applicability of the principles laid down in *Van den Bergh* to small jurisdictions, including the issue of the right to property, can be directly assessed thanks to *Austria Tabak (Malta)*

[122] n 3, para 172
[123] *Ibid*

Limited vs Central Cigarette Company Limited[124] which was decided by the CFT. The case is strikingly similar, although strangely, the CFT does not refer to the *Van den Bergh* decision.

Rather than ice-cream, this case dealt with cigarettes packets sold through vending machines. Austria Tabak (Malta) Limited ("AT") complained about various practices undertaken by Central Cigarette Company Limited ("CCCL"). From the CFT's judgment it appears that the OFC decision (which was not published) considered only some of these allegations. CCCL was found to have 82% of the market for the sale of cigarettes through vending machines in the St Julian's/Paceville area, which is the main entertainment hub within Malta. The OFC found that CCCL had bound certain outlets in the relevant market to exclusively stock and sell its cigarettes in breach of Article 5(1) CA of the Competition Act. It also found CCCL to have offered an advance payment to outlets, calculated on sales from the vending machines, or a commission for cigarettes sold through the vending machines in breach of article 9(1) of the Competition Act. The OFC ordered that 15% of the machines be made freely accessible to brands of cigarettes not sold by CCCL, notwithstanding that the vending machine belonged to CCCL.

It is interesting that the OFC found different conduct to breach each of the substantive provisions of the Competition Act. Technically, it could have found both types of conduct to breach both provisions. Perhaps the OFC was wary of doing so, for fear of falling foul of the principles laid down in the *Italian Flat Glass* case.[125] The CFT confirmed the decision, although

[124] Complaint number 4/2005: *Austria Tabak (Malta) Limited vs Central Cigarette Company Limited* 19 October 2009 (Commission for Fair Trading)

[125] Cases T-68/89 et *Societa' Italiana Vetro SpA v Commission* EU:T:1992:38. In *Italian Flat Glass* the decision on Article 102 TFEU was annulled by the GC as it found that the Commission had 'recycled' the facts used for finding a breach of Article 101 TFEU (para 366)

it seems to take a more holistic approach to the conduct undertaken by the undertaking in question when finding it to have breached both substantive provisions of the Act.

The agreements concluded between CCCL and its customers (that is, the retailers) included one or more of these conditions: (i) a commission for packets of cigarettes sold from automatic vending machines; (ii) a considerable lump sum so that the vending machine be installed on an exclusive basis (that is, no competing vending machines were allowed); (iii) exclusive and continuous supply by CCCL; and (iv) other benefits such as travel and refurbishment of bars. This reinforced the *de facto* exclusivity – the CFT noted that this meant that only CCCL's vending machines were installed and that only cigarettes sold by CCCL were placed in the machines. There were various penalties in the event that the retailer breached these conditions.

The CFT held that it should be abundantly clear that such practices where objectively intended to impede, restrict or prevent fair competition in the area in question, as they made it nearly impossible for competing undertakings to penetrate the market for the sale of cigarettes from automatic vending machines, because they negated the possibility for them to have equipment to be able to do so. The contractual mechanisms entered into by CCCL also had the ancillary effect to control the sale of cigarettes from vending machines. The CFT noted that CCCL's conduct caused clear and demonstrable damage both to the consumer, who could only find CCCL products on the market, and to direct competitors, who were not allowed to penetrate the relevant market and therefore could not sell their products.

This case highlights the negative side to exclusive dealing: consumers in the relevant market could in practice only find products supplied by the dominant undertaking. Unfortunately the CFT appears to have relied on the OFC decision in finding a breach, meaning that there is no

detail as to the reasoning behind the decision. However since in this case exclusive dealing clearly resulted in anti-competitive effects, the result of this case is hardly controversial. At the time, CCCL carried the most popular type and brand of cigarettes, which it leveraged together with its high market share in order to eliminate its competitor from the market.

What is perhaps more controversial is the remedy imposed by the OFT and confirmed by the CFT. The OFT imposed a compliance order on CCCL which forced the company to inform the vendors who had installed the automatic vending machines that whilst 85% of the machines were reserved for the cigarettes belonging to CCCL, 15% where to be freely accessible to any other brand of cigarettes. The OFT and the CFT therefore went beyond telling the dominant undertaking what not to do; they told it specifically what to do.

In terms of Article 13(1) of the Competition Act, as it then stood, the Director General for Competition could issue a compliance order which set behavioural or structural remedies addressed to the undertaking in question for the purpose of bringing the infringement to an immediate and effective end. The remedy in this case would technically fall within the definition of a 'compliance order'. What is perhaps less clear is whether a competition authority can – or should – specifically mandate what an undertaking does with its property. It is one thing to issue a compliance order stopping an undertaking from offering incentives to customers. It is quite another to force it to make its property available to third parties.[126] However, since competition law is generally considered a law enacted in the public interest,[127]

[126] This is what competition authorities effectively do when forcing access to essential facilities or forcing an undertaking to deal (see Chapter 6 on Refusals to Supply). The difference however is that whilst the obligation on a dominant undertaking to supply is circumscribed (specific criteria have to be met for access to be mandated – see Chapter 6), in the case of *de facto* exclusive dealing it is relatively easy for a competition authority to find a breach of competition law (there are to date no criteria for the finding of a breach of Article 102 TFEU through exclusive dealing), and consequently require that undertaking to give access to its property.

[127] See above p 150-151 on the GC's view regarding property rights and the public interest nature of the competition law rules contained in the Treaty.

such encroachments onto private property are arguably allowed, even by human rights law. For instance, Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms permits the deprivation of possession in the public interest as long as they are subject to the conditions provided for by law.

There is some precedent of similar remedies at EU level. In *Coca-Cola*[128] the company provided rent-free beverage coolers and fountain dispensers, which were to be used exclusively for the company's products. These were both considered to amount to *de facto* outlet exclusivity.[129] The company committed to allowing customers to use at least 20% of coolers, which were given free of charge, for any other products in cases where there was no capacity. In the case that customers rented the cooler, they could also use at least 20% of the coolers for any products. If the cooler is purchased, the customer was free to choose how to use it. This commitment appears to legitimize the conclusion reached by the CFT in *Austria Tabak*, whereby 15% of the vending machine was to be made available to competitors. The difference however is that whilst Coca-Cola, as the owner of the coolers, can legitimately decide to limit the use of its own property to the benefit of competitors, in *Austria Tabak* it was the competition authority which was dictating how the dominant undertaking was to use its property.

[128] *Coca-Cola* (n 88). In COMP/B-2/38.381 *De Beers* 22 February 2006, the Commission took exception to an agreement between De Beers and ALROSA which in its view would lead to de facto distribution exclusivity. De Beers undertook to purchase substantial amounts of rough diamonds from ALROSA (para 8 and 29). This meant that ALROSA would essentially only be selling to De Beers. This arrangement also prohibited customers from buying directly from ALROSA. De Beers committed to buy fewer amounts of rough diamonds from ALROSA over a period of five years.
Once again, it would appear that when considering commitments, the Commission takes a more effects based approach to exclusive dealing. Such an approach can only be beneficial to markets, no matter the size.

[129] Para 30 and 31

Unfortunately for our purposes, the *Austria Tabak/CCCL* decision had absolutely no effect on the Maltese market. The reason for this is that CCCL never respected the compliance order, and instead filed an application to judicially review the decision of the CFT. The issue regarding the use of its property was raised by CCCL during the judicial review proceedings. Judgment in the judicial review case is pending. Unfortunately therefore, the undertaking being investigated managed to delay closure, and possibly justice, through the use of legitimate legal procedures.

SHOW ME THE MONEY: PAYMENTS IN RETURN FOR EXCLUSIVITY OR NEAR-EXCLUSIVITY

Finally, exclusive dealing may arise when by virtue of an arrangement between the seller and the buyer the seller straight out pays for exclusivity on the part of the buyer. Most types of payments would be considered as a rebate, since they would effectively lower the price paid by the buyer. However there are four particular cases which do not quite fit the bill. These are *BPB Industries,*[130] *Intel*, [131] *Qualcomm*[132] and *Google Android*[133] where the payments effected in return for exclusivity cannot be said to have had a similar effect to a rebate, as will be seen shortly.

In *BPB Industries*[134] BPB Industries plc and its subsidiary British Gypsum Limited[135] were making regular payments to larger, loyal customers. Some of these payments were in the

[130] IV/31.900 5 December 1988, [1989] OJ L10/50. On appeal Case T-65/89 *BPB Industries plc and British Gypsum Limited v Commission of the European Communities* EU:T:1993:31 and Case C-310/93 P *BPB Industries plc and British Gypsum Limited v Commission of the European Communities* EU:C:1995:101

[131] COMP/C-3/37.990 13 May 2009 confirmed on appeal in Case T-286/09 *Intel Corp. v European Commission* EU:T:2014:547 which was quashed by Case C-413/14P *Intel Corporation Inc v European Commission* EU:C:2017:632

[132] AT.40220 *Qualcomm* 24 January 2018 – decision not yet published. Summary decision: [2018] OJ C269/25

[133] Case AT. 40099 *Google Android* 18 July 2018

[134] IV/31.900 (n 130)

[135] The companies were found to be dominant on the market for plasterboard within Great Britain and Ireland

form of contributions for advertising and promotional expenses.[136] These promotional payments were made to individually selected merchants and not within the framework of a scheme based on objective criteria.[137]

The Commission did accept that the payments were made for sales promotion, however it concluded that British Gypsum also had another objective. Internal documents proved that exclusivity or loyalty was one of the aims of the promotional payment, the purpose of which was to prevent merchants from purchasing and selling imported plasterboard.[138] The Commission also found that there was a causal link between the promotional payments and loyalty since a number of merchants which were stocking imported plasterboard actually ceased doing so upon accepting the promotional payments.[139]

In a succinct decision, the Commission highlighted the main problem with payments in return for exclusivity. Aside from exclusivity being problematic in itself, in this case because it effectively blocked imports of plasterboard, exclusivity was also potentially problematic because it retained high prices on the market.

DeGraba explains the problem of exclusivity payments such as the one in *BPB Industries*. He notes that these payments allow:

> … the dominant supplier to charge supracompetitive per unit prices for its input, leading to high end user prices, which extract significant rents from end users.

[136] See (n 130) para 58 of the decision
[137] n 130, para 124
[138] *Ibid,* para 127
[139] *Ibid,* para 128

> The small rival can offer its input at a much lower price. However, each downstream firm realizes that if it accepts the rival's low price, then the dominant supplier will lower its price to competitive downstream firms who remain exclusive. This will result in downstream competition, which will compete away most of the profits from using the rival's input, leaving the deviating firm with only a small profit from using the rival's input. The deviating firm would also give up the dominant supplier's exclusivity payment.[140]

Upon appeal, the GC[141] (and subsequently, the CJ[142]), confirmed the Commission's decision. The GC makes a number of interesting comments as to how payments in return for exclusivity are to be considered. The GC accepted that promotional payments are a normal business practice and that in competitive markets they benefit both supplier and buyer *qua* distributor; one secures sales whilst the other secures supply.[143] It also noted that in return for such payments an exclusivity commitment is often given by the buyer.[144] The GC then seems to say that an effects-based approach is to be taken to cases where promotional payments are given in return for exclusivity, since it continues that 'exclusivity purchasing commitments cannot as a matter of principle be prohibited', and that since the effects of these commitments depends on the characteristics of the market, the effects of these commitments on the market in their specific context must be examined.[145] This statement

[140] DeGraba (n 21)
[141] Case T-65/89 *BPB Industries* (n 130)
[142] Case C-310/93 P *BPB Industries* (n 130)
[143] n 130, para 65
[144] *Ibid*, para 66
[145] *Ibid*, para 66

seems to have been inspired by the jurisprudence on exclusive dealing which has arisen in the context on Article 101 TFEU, since the GC quotes *Delimitis.*[146]

However the GC then takes a step back and states that this is applicable in a competitive market and not in a market where because of the existence of a dominant undertaking competition is restricted.[147] Indeed it goes further by citing *Hoffmann La-Roche* and it concludes that where 'an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market'.[148] Therefore, although the GC appears at first to take an effects-based approach to exclusivity payments, in actual fact it takes a form-based approach to them, essentially holding that when a dominant undertaking undertakes exclusivity payments it is abusing of its dominant position, and no market analysis is required. This position was essentially affirmed by the CJ.

In *Intel*,[149] Intel Corporation Inc ('Intel') was found to have engaged *inter alia* in what the Commission called 'naked restrictions'. In essence Intel threatened Hewlett Packard ('HP') and Acer that they would lose preferential rebates and Lenovo that Intel would not increase funding to Lenovo, should these three original equipment manufacturers (OEMs)[150] not delay cancel or in some other way restrict the marketing of products (namely computer central processing units "CPUs") of its competitor Advanced Micro Devices Inc ('AMD'). Seen in another light Intel was making payments should its customers delay, cancel or otherwise

[146] *Delimitis* (n 3)
[147] n 130, para 67
[148] *Ibid,* para 68
[149] COMP/C-3/37.990 confirmed on appeal in Case T-286/09 (n 131)
[150] The Commission aptly describes OEMs as follows in its decision (paragraph 133): "OEMs assemble computers which incorporate a variety of other hardware and software components, and these computers are then sold either to retailers or directly to end customers."

restrict the commercialisation of customer's products using its competitor's product. The GC characterised such restrictions as being capable of making the marketing of the competitors' products more difficult.[151]

The fact that the Commission called this conduct a 'naked restriction' makes it already evident that it viewed such conduct to be abusive in itself. The Commission was influenced by the fact that these three OEMs actually did cancel, delay or place restrictions on the commercialisation of AMD-based products, which had already been planned and for which there was consumer demand.[152] The Commission noted therefore that customers were deprived of choice they would otherwise have had.[153] As a result Intel's conduct had a detrimental effect on competition on the merits.[154] The Commission also noted there could be no objective justification for such conduct.[155] The Commission therefore has taken a stand that such payments are abusive of their very nature, and can never be objectively justified.

This position was effectively sustained by the GC upon appeal. The GC comments that for the purposes of applying Article 102 TFEU showing an anti-competitive object and an anti-competitive effect may in some cases be one and the same thing.[156] In other words if the object pursued by a dominant undertaking is to restrict competition such conduct will have the same effect.[157] In such cases it is not necessary to show the probability or possibility of foreclosure.[158] Essentially the GC's judgment in Intel is saying that if you carry out certain

[151] n 131, para 202
[152] n 131, para 1670, 1678
[153] *Ibid* para 1670, 1672, 1679
[154] *Ibid* para 1670, 1672 and 1681. See also GC judgment (n 131) para 207
[155] *Ibid* para 1676
[156] *Ibid* para 203
[157] *Ibid* para 203
[158] *Ibid* para 110

conduct with the object of restricting competition, the effect of such conduct need not be examined.

In the case at hand there was not much scope in examining the effect of Intel's conduct, since Intel's customers did in fact refrain from marketing AMD's products. Such wide, all-encompassing statements can however be problematic as they lay down a principle of *per se* abuse which is not necessarily applicable in all cases. The GC even rejects the idea that the as-efficient competitor test needs to be undertaken in such cases,[159] which again may not be the case in all circumstances.

The approach taken by the Commission and the GC in *Intel* contrasts with the approach advocated by the Commission in its Guidance Paper where the focus is on anti-competitive foreclosure.[160] Again whilst this may be somewhat justifiable in the case at hand, it should not become a general principle. As already noted, the CJ in *Intel* quashed the GC's decision and referred the case back to the GC. This will possibly result in an effects based approach being taken in the future to exclusive dealing, as it is unlikely that any well instructed undertaking will not raise this defence during the administrative proceedings. The CJ's statement is however unfortunate, because it places the onus on the dominant undertaking to show that there is no foreclosure of competition. A true effects based approach should require the competition authority to do so as part of its investigation.

Moreover, objective justifications of the conduct – also referred to by the CJ[161] – would have no place if a true effects based approach were to be adopted. The elements which would

[159] n 131, para 214
[160] See in this respect Pablo Ibañez Colomo 'Intel and Article 102 TFEU case law: making sense of a perpetual controversy' LSE Law, Society and Economy Working Papers 29/2014, 3
[161] n 4, para 140

normally be considered under the umbrella of 'objective justification' would already have been considered under the effects analysis. Therefore, if a true effects based approach is adopted, there would be no need for objective justification. These points are considered in more detail in Chapter 5. That said, the judgment of the CJ in *Intel* is still a major step in the right direction, because it appears to allow at the very least a limited effects based approach to Article 102 TFEU as regards exclusive dealing.

Since the CJ's judgment in *Intel*, the Commission has taken another two decisions concerning payments in return for exclusivity. The first, *Qualcomm*,[162] related to Long-Tern Evolution (LTE) baseband chips used in mobile phones for voice and data transmission. Qualcomm Inc ("Qualcomm") was found to be the dominant LTE baseband chipset manufacturer worldwide (excluding China). Qualcomm entered into an agreement with Apple Inc to effect payments on condition that Apple Inc would exclusively use Qualcomm chipsets in its products. This agreement was entered into in 2011, and renewed in 2013 up to 2016. The agreement made it clear that a large part of the payments made would have to be returned if Apple Inc switched suppliers. In 2016, when the agreement was about to expire, Apple Inc started to source part of its chipset requirements from Intel Corp, so there was some indication that Qualcomm's conduct foreclosed at least one competitor from the market. The Commission found Qualcomm to have abused of its dominant position. Unfortunately the decision is not yet public, so it is not yet clear whether Qualcomm argued that its conduct did not foreclose competition and the Commission's response to this claim.

[162] n 132

However, if the decision in *Google Android*,[163] which followed, is anything to go by, very little has changed in the Commission's practice. Amongst other conduct, Google effected payments to original equipment manufacturers (OEMs) and mobile network operators (MNOs) for the latter not to pre-install competitor's search services on their products. The Commission concluded, *inter alia*, that by granting revenue share payments to OEMs and MNOs on condition that these do not pre-install competing general search services on devices within an agreed portfolio, Google had abused its dominant position.

The Commission did go to some trouble to show how Google's conduct led to foreclosure. However, if one looks that the principles which formed the Commission's train of thought, the Commission starts off by stating that '[e]xclusivity payments are therefore *presumed* to constitute an abuse of dominant position within the meaning of Article 102 of the Treaty (…).'[164] It then continues to cite the CJ's judgment in *Intel*. However, the said judgment never speaks of a *presumption* of abuse. It is therefore clear that the Commission, notwithstanding the *Intel* judgment, still considers exclusive dealing to be *per se* abusive. This means that a dominant undertaking would be obliged to *rebut a presumption* of unlawfulness,[165] which in legal and practical terms goes beyond raising a defence of non-foreclosure and adducing evidence thereto. If the presumption of unlawfulness is accepted by the CJEU, this would mean that EU competition law has in fact not yet adopted the limited effects based approach which appeared to have been laid down by the CJ in *Intel*. Google has since appealed, so this point remains open until definitive judgment of the CJEU.

[163] n 133
[164] n 133, para 1188
[165] The Commission's *forma mentis* is confirmed by para 1189.

Notwithstanding the above, truth be told, it is very difficult to find a pro-competitive effect for payments which are expressly being made in return for loyalty on the part of the buyer, as was the case in *BPB Industries, Intel, Qualcomm* and *Google Android.* The very fact that an undertaking felt the need to pay for loyalty indicates that the dominant undertaking felt threatened by its competitors and was ready to dig into its pockets in order to maintain its position on the market. Such conduct is inimical to competition and highly detrimental to small jurisdictions.

A constant theme when considering small jurisdictions is that there are often limited players in certain product markets. If any of these limited market players felt the need to pay for exclusivity it would be because the market is becoming more competitive. Therefore it is likely that such conduct undertaken in small jurisdictions would have an anti-competitive effect and further foreclose an already limited market.

CONCLUSIONS

Until a few years ago, it was safer for dominant undertakings who wanted to avoid the risk of being found in breach of the competition rules to simply avoid having exclusive dealing obligations in place. EU competition policy was such that exclusive dealing undertaken by a dominant undertaking was prohibited, notwithstanding that a dominant undertaking has 'many of the same pro-competitive rationales for implementing vertical restraints as non-dominant firms'.[166] Indeed, the decided cases show that dominant undertakings still continued to enter into exclusivity arrangements.

[166] Bishop and Walker (n 20) 208

Recently, EU competition policy showed signs of change. There were however mixed signals from the CJEU in recent times. For instance in *Tomra,* the GC held that in order to determine whether exclusivity agreements are compatible with Article 102 TFEU, one has to assess all circumstances of the case including their context and whether they restrict competition.[167] This might be interpreted as a more effects-based approach to exclusive dealing, but in practice, the GC appears to have adopted a *per se* approach to exclusive dealing (the exclusive contracts and quantity commitments) by confirming the Commission's decision. In any case, on appeal, when considering this approach to loyalty rebates, the CJ[168] took a more traditional approach to this type of abuse, citing once again *Hoffmann-La Roche*.[169] In *Intel* then the GC was criticised by the CJ for not taking a more effects based approach, irrespective of the fact that effectively the GC took the same approach the CJ took in *Tomra*. Indeed part of the problem with EU competition law in this area is the mixed signals that are sent by the EU institutions, including the CJ.[170]

There is today sound economic literature that exclusive dealing does not give rise to foreclosure of the market in all circumstances. Indeed, there is an argument that 'anti-competitive customer foreclosure' will not occur in 'ideal circumstances'.[171] This means that the more correct approach to take in competition cases is to assess the relevant arrangement within the legal and economic context in which it operates. In more economic terms, it makes sense to 'seek to identify the externality that may being anti-competitive dealing about.'[172] In other words, the approach taken to Article 101 TFEU should be adopted to Article 102 TFEU.

[167] n 88, para 215
[168] n 4
[169] n 4, para 70
[170] See also Ibanez Colomo (n 160) 3
[171] Lugard (n 55) 170
[172] *Ibid*, 170

Ibáñez Colomo has already argued that '[m]uch could be gained (…) if the two lines of case law (*Delimitis* and *Hoffmann-La Roche*) converged into the approach (standard-based) that is now known to be more appropriate'.[173]

So how would an effects-based approach work? Much of the elements which would need to be considered are already evident from *Delimitis* and the Guidelines on Vertical Restraints. Ridyard indicates three principles for an effects-based approach: (i) the identification of a plausible story of foreclosure; (ii) testing the theory against facts; and (iii) encouraging and allowing exclusive contracts where there are no foreclosure concerns.[174] Some questions to be considered when assessing exclusive dealing include whether the undertaking benefits from stocking a 'must stock' item; whether efficient firm entry is prevented; whether the contestable share is too small to allow competitors to establish a minimum viable scale; and whether consumers are harmed.[175]

This method should be applied more painstakingly in small jurisdictions. When it comes to small jurisdictions, exclusive dealing is not necessarily harmful, but given particular environments it may be even more harmful by foreclosing an already limited market. Therefore it is even more important to carry out an assessment similar to that in relation to the application of Article 101 TFEU when considering applying Article 102 TFEU in small jurisdictions. This would prohibit conduct which, because of the peculiarities of the size of the market, would tend to restrict the market even further, ruled by a large number of dominant firms or oligopolies with similar contracts having a cumulative effect. At the same

[173] Ibañez Colomo (n 160) 31
[174] Ridyard (n 106) 594
[175] Ridyard (n 106) 594

time, it would allow the creation of economies of scale and other efficiencies which would otherwise be created through vertical integration, without consolidating the market further through mergers. The type of exclusive dealing entered into would also be indicative – whilst payments in return for exclusivity in small jurisdictions are rarely justifiable, quantity forcing would tend to be more a less restrictive method for obtaining the benefits of exclusive dealing minimising the disadvantages. It is clear that the effects analysis in small jurisdictions is a more delicate balancing act but is especially crucial.

CHAPTER 5: LOYALTY REBATES AND LOYALTY INDUCING REBATES

WHAT ARE LOYALTY REBATES AND LOYALTY INDUCING REBATES?

Undertakings, whether dominant or not, often engage in discounting and rebating in order to attract customers. Whilst discounts are reductions on price given on the invoice, rebates are generally refunds or benefits granted after purchase. However, the terms 'discount' and 'rebate' are often used interchangeably largely because the end result is the same – the purchaser is benefitting from a reduction in price. In this Chapter too, unless required otherwise by the context, discounts and rebates will be referred to simply as 'rebates'.

Rebates are therefore a form of sales of promotion, and are a very common business practice.[1] Yet in EU competition law there is a large body of jurisprudence which prohibits several types of rebates granted by dominant undertakings. Rebates can in fact be structured in various ways.

One way to structure a rebate would be for undertaking A, who manufacturers and sells widgets, to set a discount policy whereby customers who purchase 100 widgets would be eligible for a 10% discount; whereas customers who purchase 175 widgets would be eligible for a 20% discount. This discount is commonly referred to as a 'quantity discount'. EU competition law has not taken exception to quantity discounts, even when granted by dominant undertakings, except when these discriminate along national lines.

An alternative scenario could be the following. Undertaking 'A' manufactures and sells widgets to wholesale customers. Undertaking 'B' is one such wholesale customer – it buys

[1] Iliana Nunez Osorio '"A test to ban rebates": which test is applicable to rebates under TFEU art. 102?' (2012) 33(2) ECLR 91, 91

widgets from A regularly. B considers A to be the leading supplier of widgets, and A has proven to be reliable with supplies. B however, keen not to put all its eggs in one basket, also buys widgets from undertaking 'C', a smaller supplier, just as reliable as A. Knowing this, A suggests to B that if it starts buying exclusively from A, A will grant B a hefty discount. The discount would make it unprofitable for B to buy widgets from C, as no discount offered by C would match the reduction in price offered by A. B therefore switches all its orders to A. The discount offered by A in this case constitutes a loyalty rebate or a fidelity rebate.

A may also consider structuring its rebates in an alternative manner. At the end of the year, A will review the sales effected to customers X, Y and Z. A will set a purchase target for the following year for each of X, Y and Z based on the sales effected to them. It then approaches each of them separately, and indicates that if by the end of the following year they meet their purchase target, they will get a discount on all purchases effected from A throughout that calendar year. X, Y and Z are therefore incentivised to meet the target, which effectively ensures that they meet or increase their purchase of widgets from A, and would not consider purchasing any widgets from C, particularly if, at the end of the calendar year they are close to reaching the target. The discount offered by A in this case constitutes a target rebate. Target rebates, and some other types of rebates, have been called 'loyalty-inducing rebates' by the CJEU and the Commission.[2] The term loyalty inducing rebates is not a term of art, but has been adopted by the CJEU and the Commission to refer to rebates which, whilst not strictly loyalty rebates, have the same effect.[3] Loyalty rebates and loyalty inducing rebates will hereinafter be referred to simply as "loyalty rebates", unless the context requires a

[2] Alison Jones, Brenda Sufrin and Niamh Dunne *Jones & Sufrin's EU Competition Law: Text, cases and materials* (OUP 7th edn 2019) 449
[3] *Ibid*

distinction to be made, where the term "fidelity rebate" will be used to refer to loyalty rebates proper.

The latter are just two examples of rebates that have been prohibited by EU competition law, not just under Article 102 TFEU but also under Article 101 TFEU. From the scenarios outlined above it is clear why, given a particular environment, loyalty rebates raise competition concerns. For instance in the first scenario, if A is a dominant undertaking, and A's offer is made to not just B, but to all its customers, or all those customers who are also customers of C, C would be effectively foreclosed from the market for the supply of widgets, even if it is as efficient as A. The same result is achieved in the second scenario if A, a dominant undertaking, adopts a target rebate scheme for all its customers (or its customers who are also customers of C). On the assumption that C is as efficient as A, this would necessarily have a detrimental effect on competition.

However, as is often the case in competition law, loyalty rebates do not result in anti-competitive foreclosure in each and every case. This notwithstanding, the CJEU and the Commission have traditionally taken a formalistic approach whereby once an undertaking is dominant, and has engaged in loyalty rebates, then that undertaking has acted in breach of Article 102 TFEU. A similarly formalistic approach is taken to quantity rebates, but these are nearly always considered lawful.

On the other hand, when rebates are considered within the context of Article 101 TFEU, an effects-based analysis is undertaken,[4] because rebates are considered not to have the object of restricting of competition, but may have this effect. This divergence in approaches taken

[4] See Guidelines on Vertical Restraints [2010] OJ C 130/1, para 129 *et seq.*

to the same conduct is undesirable, as it leads to a haphazard application of EU competition law, where the economic background of the case is considered within the context of Article 101 TFEU and ignored within the context of Article 102 TFEU. Indeed the approach traditionally taken to loyalty rebates within the context of Article 102 TFEU is untenable, as it pre-empts the legal and economic analysis that should take place in each case. Although a form-based approach has the benefit of being easy to administer and of creating legal certainty, it also hinders growth and the creation of efficiencies, which is detrimental to all markets, and more so to small jurisdictions.

In fact, the discussion on loyalty rebates is particularly pertinent to small jurisdictions. Like exclusive dealing, loyalty rebates are a common business practice in most markets, [5] and small jurisdictions are no exception. The resultant negative effects of over enforcement of competition law with respect to loyalty rebates are magnified in a small jurisdiction, because, given its size, such effects cannot be easily absorbed or rectified by the market. EU competition practice to date, which did not allow much scope for analysing the effects of loyalty rebates on as-efficient competitors, is therefore potentially harmful to small jurisdictions. Perversely, lack of enforcement in small jurisdictions would similarly have devastating effects. This is because the number of operators on any given market is necessarily limited, and likewise resources are limited, and therefore, harmful effects on competition and foreclosure of a market may not necessarily be easily corrected, particularly if new entrants are deterred from entering that market by the dominant player. Therefore, it is acknowledged that adopting an effects-based analysis will place a heavy burden on

[5] Jones, Sufrin and Dunne (n 2) 448; OECD Policy Roundtables: 'Fidelity and Bundled Discounts and Rebates' (2008) - DAF/COMP(2008)29, 7; Patrick Greenlee and David Reitman 'Distinguishing competitive and exclusionary uses of loyalty discounts' (2005) 50(3) The Antitrust Bulletin 441, 462, although the latter comment that 'while loyalty rebates in their various guises are fairly common, they are hardly omnipresent.'

competition authorities in small jurisdictions, which are often under-resourced,[6] as they would have to carry out a thorough analysis of the case at hand.

Out of twenty seven cases decided by the competition tribunal in Malta on substantive matters between 1995 to date,[7] one dealt with rebates. It will be seen in this Chapter how this case had its own factual peculiarities, much like each case on loyalty rebates decided by the EU institutions. Before considering this case and its effects however, EU competition practice on loyalty rebates will be considered in detail, including the origin of the case law and its evolution in later years, comprising recent developments. In so doing, the pre-requisites for finding that loyalty rebates are abusive will be considered, as well as the test used, and an alternative test will be proposed.

This Chapter will not consider 'bundled rebates'. Both US and EU courts have considered bundled rebates separately from other loyalty rebates, as a type of 'tying'. Therefore, bundled rebates have been considered to form another type of abuse. Due to space constraints, tying is not considered in this thesis.[8] Bundled rebates are outside the scope of this Chapter, which is concerned solely with the assessment of loyalty rebates and loyalty-inducing rebates, generally assessed either as exclusive dealing (in the EU) or predatory pricing (in the US), as detailed below.[9] An examination of the distinction between loyalty and bundled rebates also falls outside the scope of this thesis. This would require an analysis of the current assessment of bundled rebates as a type of tying.

[6] See Chapter 1

[7] This includes cases on Article 5 of the Competition Act, which mirrors Article 101 TFEU.

[8] The choice of topics has been discussed in detail in Chapter 1.

[9] The differentiation of loyalty rebates and bundled rebates is not without criticism – see for instance Sean P Gates 'Antitrust By Analogy: Developing Rules For Loyalty Rebates And Bundled Discounts' (2013) 79 Antitrust Law Journal 99

This Chapter will refer to predatory pricing and the test for the assessment of predatory pricing. Due to space constraints, this Chapter will assume that the test adopted for predatory pricing in EU competition law is correct and that is an adequate test for abusive conduct. Superficially one can argue that this statement is true. The test for predatory pricing was laid out in *AKZO*,[10] where the CJ held that prices below average variable cost are presumed to be predatory and thus abusive. This arm of the test reflects the so-called 'Areeda-Turner' test,[11] and thus has economic underpinning. The test in EU competition law is wider, as prices above average variable cost but below average total costs, where the intention to exclude competitors is also proven, are also predatory. Whilst this arm of the test is not evident in the Areeda-Turner test, it is clear that this protectionist approach is largely in line with EU competition policy, ensuring that pricing which is predatory in intent is still prohibited.

LOYALTY REBATES IN EU COMPETITION PRACTICE

In EU competition practice, loyalty rebates are generally considered and assessed as if they were exclusive dealing obligations through other means – possibly a type of *de facto* exclusive dealing. However, the application of the assessment of exclusive dealing to loyalty rebates is a policy choice made by the EU institutions. Loyalty rebates may alternatively be assessed as a type of predatory pricing or as a type of 'tax' on the competitor's products or prices.[12] Moreover, before the idea that loyalty rebates are another type of exclusive dealing took hold, loyalty rebates were often prohibited in EU competition law as a type of discrimination

[10] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* EU:C:1991:286

[11] P Areeda and D Turner 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act' (1975) 85 Harvard Law Review 697

[12] OECD 'Fidelity Rebates' (11 March 2016 – DAF/COMP(2016)5). See also OECD Policy Roundtables 'Fidelity and Bundled Discounts and Rebates' (n 5)

between customers in breach of Article 102 TFEU, particularly when the case concerned loyalty-inducing rebates.

Although in *Michelin I*,[13] and subsequent cases like *Post Danmark II,*[14] the CJ advocated a full market inquiry in cases where the rebate is not specifically a fidelity rebate, in practice, a *per se* approach has been adopted by the EU institutions, including the CJ itself, whereby all loyalty rebates – including loyalty inducing rebates – are treated like exclusive dealing obligations, and therefore all loyalty rebates are immediately prohibited. This is evidenced by Table 5.1, which indicates that out of 15 cases involving loyalty rebates,[15] only 3 cases brought before the Commission did not result in a prohibition decision.

What is particularly interesting is that the Commission in its Guidance Paper adopted an adapted predatory pricing test in order to assess whether loyalty rebates are abusive. This involves a price-cost test, which considers the effect on as-efficient competitors. In the Guidance Paper the Commission notes that when the effective price[16] is consistently above the long run average incremental cost of the dominant undertaking, an as efficient competitor would be able to continue competing, and thus there is no abuse.[17] Where the effective price is below average avoidable cost, the contrary is true.[18] Where the effective price is between

[13] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* EU:C:1983:313, para 73
[14] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* EU:C:2015:651, para 29
[15] Includes *Coca-Cola* (XIXth Report on Competition Policy (1989) 65) which was terminated by undertakings; Case T-286/09 *Intel Corp. v European Commission* EU:T:2014:547 which found an abuse but was overturned on appeal (n 4); and proceedings concerning Soda-Ash, which were overturned on procedural grounds on appeal (see Table 5.1).
[16] The price of the product once rebate is deducted
[17] Guidance Paper, para 43
[18] Guidance Paper, para 44

average avoidable cost and long run average incremental cost, a more thorough investigation into whether the entry or expansion of equally efficient competitors may be effected.[19]

This test has been equally criticised and applauded.[20] It however contrasts sharply with the actual decisional practice of the Commission itself, including decisions taken after the introduction of the Guidance Paper. This has been admitted by the Commission which has defended itself, with the excuse that the Guidance Paper only applies to proceedings initiated after its publication.[21] This is clearly a nonsensical reason – if the approach advocated in the Guidance Paper evidences what the Commission believes to be sound economic principles, it should have been in evidence in practice since well before the publication of the Guidance Paper. To date therefore, the approach advocated by the Commission in the Guidance Paper has not been adopted in practice.

When considering the EU competition case law on loyalty rebates it is interesting to see a shift in the assessment of loyalty rebates in EU competition practice from an assessment that comprised exclusive dealing and discrimination to one that focused almost entirely on the exclusive dealing nature of loyalty rebates. In the interim, the analysis adopted by the EU institutions has been somewhat schizophrenic – with some cases nearly finding that abusive loyalty rebates are a separate type of (*per se*) exclusionary abuse, and others making internal market considerations or considering the vague concept of 'unfairness' in their assessment.

[19] Guidance Paper, para 44

[20] Lars Kjolbye 'Rebates under article 82 EC: navigating uncertain waters' (2010) 31(2) ECLR 66, particularly at 73; John Temple Lang 'How can the problems of exclusionary abuses under Article 102 TFEU be resolved?' (2012) 37(2) European Law Review 136, 138; Bill Batchelor and Kayvan Hazemi Jebelli 'Rebates in a state of Velux: filling in the gaps in the article 102 TFEU enforcement guidelines' (2011) 32(11) ECLR 545, 547; Bill Batchelor and Fientje Moerman 'A practical approach to rebates' (2016) 37(12) ECLR 482; See Renato Nazzini *The Foundations of European Union Competition Law: The objective and principles of Article 102* (OUP 2011) 239

[21] Commission decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel) 13 May 2009, para 916

THE ORIGINS OF LOYALTY REBATES AS AN ABUSE: DISCRIMINATION

Ironically, the Commission and the CJ first considered loyalty rebates as an abuse in breach of Article 102 TFEU in a cartel case. In *Suiker Unie*[22] the CJ confirmed that SZV, a company through which some sugar producers were coordinating their conduct in breach of Article 101 TFEU, had also abused its dominant position because it had granted a rebate to customers who bought their annual requirements of sugar exclusively from members of SZV. The CJ correctly identified this practice as a fidelity rebate, but chose to prohibit this on the basis of Article 102(c) which specifically indicates as an abuse conduct whereby the dominant undertaking applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. In a brief analysis, the CJ agreed with the Commission that the rebate system resulted in different net prices to economic operators who bought the same amount of sugar from SVZ members simply because some might choose to purchase sugar from other producers.[23]

This same principle underpinned the conclusion in *Vitamins,*[24] where the Commission found that rebates granted on condition of exclusivity (fidelity rebates) discriminate against customers who do not benefit from them or those who do not benefit to the same extent, notwithstanding that they have purchased the same quantities.[25] Although the CJ[26]

[22] Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v EC Commission* EU:C:1975:174
[23] Para 522. The CJ was also concerned because: (i) the rebate gave other producers, especially those located in Member States other than Germany, no chance or restricted their opportunities of competing with sugar sold by SZV members; and (ii) the rebate in question could further consolidate SVZ's dominant position. (para 526-7)
[24] IV/29.020 *Vitamins* 9 June 1976 (1976) OJ L233/27
[25] Para 26. Again, there were some internal market considerations as the English clause (price match clause) only applied for offers made by reputable manufacturers in the customer's territory – therefore excluding offers from manufacturers based in other Member States (para 25).
[26] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* EU:C:1979:36

reiterated this principle upon appeal, it also introduced the idea that loyalty rebates are additionally problematic because of the effects of exclusivity on the market. [27]

Subsequently, in *Irish Sugar*,[28] the Commission took a differentiated approach to each type of rebate it examined.[29] It quickly, and rather simplistically, found that fidelity rebates are abusive because they tie customers to the dominant undertaking.[30] In other words it used the exclusive dealing type of assessment. Whilst this approach may be objectionable because of the method of assessment, and indeed the Commission decision is effectively devoid of any assessment in relation to the fidelity rebate, it is in line with the test adopted for exclusive dealing.[31]

When it came to the selective rebates and target rebates, it adopted an assessment based on the idea of abusive discrimination. As regards the selective rebates it noted that not all customers benefitted to the same extent.[32] However, from the reasoning adopted by the Commission, it is clear that its concern was also regarding the effect that these rebates, which concerned national borders and exportation to other Member States, might have on the internal market. Indeed, this was made clear in the GC decision.[33] Given the importance of the internal market to the EU integration project, it is therefore hardly surprising that these

[27] See para 90
[28] IV/34.621, 35.059/F-3 *Irish Sugar plc* 14 May 1997 [1997] OJ L258/1
[29] To some extent, a similar approach was also taken in the *Soda-Ash/Solvay* Commission decisions, both in 1990 and 2000, which were subsequently annulled on procedural grounds (IV/33.133-C *Soda-ash – Solvay* 19 December1990 [1991] OJ L 152/21; COMP/33.133-C: *Soda ash — Solvay* 13 December 2000 [2003] OJ L10/10)
[30] n 28, para 127
[31] This point is discussed further below
[32] See for example para 136-138 on the export rebates and para 145 on the additional rebates
[33] Case T-228/97 *Irish Sugar plc v Commission of the European Communities* EU:T:1999:246

types of rebates, which discriminated according to nationality were prohibited. A similar approach is evident in the *Portuguese Airports* cases.[34]

As regards the target rebates, the Commission appears to have objected to them because they were not quantity discounts.[35] However, it also found that the target rebate involved price discrimination between customers, as the rebate depended on percentage increases in purchases rather than absolute purchase volumes.[36] The GC however preferred to view target rebates as a type of exclusive dealing.[37] Analysing a target rebate from the point of view of discrimination is preferable than simply concluding that it is objectionable because it is similar to exclusive dealing/not a quantity discount, because this conclusion should require some analysis of the mechanics of the rebate in question. Assuming it is *de facto* exclusive dealing clearly did not require the GC to really analyse the effects of the rebate on the market, although at least the judgment does contain some consideration of the resultant effects.[38] That said, neither is it correct to analyse target rebates only for their discriminatory effects. It may well be that a target rebate is not discriminatory, but is otherwise abusive for instance because the resultant price is predatory or because it leads to other exclusionary effects on the market.

The approach taken by the Commission in *British Airways*[39] was altogether less nuanced. Although the Commission felt that the rebates in question also resulted in discrimination, it primarily considered loyalty rebates to encourage loyalty, and stated that there is a general

[34] IV/35.703 Portuguese airports 10 February 1999 [1999] OJ L 69/31, para 25- 32; Case C-163/99 *Portuguese Republic v Commission of the European Communities* EU:C:2001:189, para 50-60
[35] n 28, para 153
[36] *Ibid*, para 154
[37] n 33, para 213
[38] *Ibid*
[39] IV/D-2/34.780 *Virgin/British Airways* 14 July 1999 [2000] OJ L30/1

principle that a dominant undertaking 'cannot give discounts or incentives to encourage loyalty, that is for avoiding purchases from a competitor of the dominant supplier'.[40] With this statement, the Commission therefore adopted a clear *per se* abusive type of approach to loyalty inducing rebates – in this case, target rebates based on the previous year's sales. The Commission however did emphasise that part of the problem with the rebate in question was that it discriminated between travel agents – two travel agents selling the same number of tickets would not get the same rebate if they had sold different numbers of tickets in the previous year.[41] Given the mechanics of the rebates in question, this is a fair conclusion, and it is unlikely that British Airways could ever hope to justify the discrimination effected.

As it happened, this was one of the last cases in which discrimination was considered. Upon appeal, the GC in *British Airways* simply noted that loyalty inducing rebates granted by dominant undertakings are prohibited 'irrespective of whether the rebate system is discriminatory'. [42] This echoed the GC's judgment just a few months earlier in *Michelin II*.[43] Discrimination was then considered in *Post Danmark II*,[44] but the CJ found that since the rebate was standardised, there was no discrimination contrary to Article 102 TFEU,[45] even though the rebate in question was abusive on other grounds.[46]

It is true that a loyalty inducing rebate – or indeed a loyalty rebate – need not be discriminatory in order for it to breach Article 102 TFEU. However, it is not correct to say that '*any* loyalty-inducing rebate system applied by an undertaking in a dominant position has

[40] *Ibid,* para 101
[41] *Ibid*, para 102 and 109
[42] Case T-219/99 *British Airways plc v Commission of the European Communities* EU:T:2003:343, para 248
[43] Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* EU:T:2003:250, para 65
[44] *Post Danmark II* (n 14)
[45] *Ibid,* para 37
[46] *Ibid,* para 42

foreclosure effects prohibited by Article [102]'.[47] Not all such loyalty or loyalty inducing rebates will result in foreclosure of the market, and this is borne out by the economic literature.[48] However, these statements heralded the subsequent approach whereby loyalty rebates were considered *per se* abusive.

It is not clear why, simply on the basis of these statements in two GC judgments, from then onwards discrimination was no longer considered when assessing loyalty rebates in EU competition practice. The mundane conclusion is that probably the EU institutions quickly realised that by applying the form based test which was developed to assess exclusive dealing,[49] which effectively only required the finding of dominance and the existence of an exclusive dealing obligation,[50] enforcement of Article 102 TFEU would be easier and quicker.

This is unfortunate, because undoubtedly in certain instances loyalty rebates would result in discrimination on the downstream market. This might be the case where the dominant undertaking grants a fidelity rebate, but might also result where a rebate somehow favours certain operators over others, notwithstanding that the operators are otherwise equivalent.

The difficulty with adopting the test for discrimination is that this test is not fully developed in EU competition practice, and the few cases that have arisen have simply relied on the text of Article 102(c) TFEU. Indeed, this is what happened in the aforementioned cases (save perhaps for *Irish Sugar*) [51] – discrimination was found on the basis of a superfluous

[47] *Michelin II* (n 43), para 65 (emphasis added)
[48] See for instance Giulio Federico 'The antitrust treatment of loyalty discounts in Europe: towards a more economic approach' (2011) 2(3) Journal of European Competition Law & Practice 277, 278; Simon Bishop and Mike Walker The Economics of EC Competition Law: concepts, application and measurement (3rd edn, Sweet & Maxwell 2010), 266; Hans Zenger 'Loyalty rebates and the competitive process' (2012) 8(4) Journal of Competition Law & Economics 1, 45
[49] Considered in detail in Chapter 4
[50] Whether contractual, *de facto*, quantity forcing or in return for payment, as discussed in Chapter 4
[51] n 28 and n 34

examination of their being two 'equivalent' parties (with no analysis as to this was indeed the case) and because different conditions applied to them, namely that no rebate was given to those players which did not meet the condition(s) attached to the rebate.

However the recent preliminary reference judgment in *MEO v Autoridade da Concorrencia*[52] provides some guidance on the proper 'discrimination test'. The CJ held that in order for the conditions under Article 102(c) to be fulfilled, the conduct must not only be discriminatory, but must also tend:

> 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.[53]

The mere presence of a disadvantage is not enough;[54] therefore most of the loyalty rebate cases here examined, which relied on the presence of a disadvantage did not carry out the proper assessment as now required by *MEO v Autoridade da Concorrencia*. Moreover, to create a competitive disadvantage, the discrimination 'must affect the interests of the operator which was charged higher tariffs compared with its competitors.'[55] In other words a full market analysis needs to be carried out.[56] This is consistent with the preferred approach for assessing loyalty rebates.[57]

In the light of the above, the effect of the discrimination on the market should be considered when assessing loyalty rebates as discriminatory conduct, even if perhaps in many cases where the loyalty rebate results in discrimination there might be some level of foreclosure.

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[52] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* EU:C:2018:270
[53] *Ibid,* para 25
[54] *Ibid,* para 26
[55] *Ibid,* para 30
[56] See also para 28-29
[57] See p 188 *et seq*.

Where the loyalty rebate, notwithstanding that it entails discrimination, does not lead to anti-competitive foreclosure, there is little point in sanctioning it.

This approach of adopting a full analysis when the rebate being examined appears to be discriminatory may require the use of resources which authorities in small jurisdictions can ill afford. However, in *MEO v Autoridade da Concorrencia*, the CJ did also say that where a distortion of competition can be shown, additional proof of 'an actual, quantifiable deterioration in the competitive position of the business partners taken individually'[58] need not be shown. This therefore, would mitigate the burden on authorities in small jurisdictions.

Moreover, this approach of adopting the discrimination test has the benefit of further protecting small jurisdictions. As discussed in Chapter 1, individual sectoral markets would also tend to be small in small jurisdictions, with a limited number of market players. This is true not just on the market on which there is a dominant undertaking, but is also true of the market it supplies. Therefore, if the loyalty rebate adopted by the dominant undertaking is discriminating between customers, given that the number of customers is limited, the effect of the discriminatory rebate is more likely to have negative repercussions. It is also easier to discriminate, and easier for a dominant undertaking to police its customers to ensure compliance with the conditions of the rebate. Therefore, the discriminatory nature of loyalty rebates is particularly pertinent to small jurisdictions, and consideration of any discriminatory effects of loyalty rebates would aid competition authorities to catch anti-competitive conduct which might not necessarily lead to exclusive dealing.

[58] n 52, para 27

EVOLUTION: LOYALTY REBATES AS EXCLUSIVE DEALING

Notwithstanding this eclectic start, in most cases the CJEU and the Commission have assessed loyalty rebates as a type of exclusive dealing. EU competition policy has therefore taken a policy decision to assess loyalty rebates as *de facto* exclusivity. Perhaps this lasting link with exclusive dealing happened by chance, simply because in the first cases dealing with loyalty rebates – such as *Suiker Unie*[59] and *Hoffmann La-Roche*[60] – the dominant undertaking had also entered into exclusive dealing arrangements, and thereafter the granting of loyalty rebates was indelibly linked to exclusive dealing.

Whatever the reason, traditionally, there are two strands of case law under the 'exclusive dealing' type of cases. The first is where a 'pure' exclusive dealing test was adopted. Generally, although not always, this test is adopted because the rebate was conditional upon exclusivity. This was the case in *Hoffmann-La Roche* (CJ)[61] and *Compagnie Maritime Belge* (GC[62] and CJ[63]). The GC in *Intel*[64] encapsulated this test when it commented that fidelity rebates can be categorised as abusive without carrying out an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect.[65] The GC continued that such rebates are abusive if there is no objective justification for them and there is no requirement of proof of a capacity to restrict competition depending on the circumstances of the case.[66]

[59] n 22
[60] n 26
[61] n 26
[62] Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* EU:T:1996:139
[63] Joined cases C-395/96 P and C-396/96 P. *Compagnie Maritime Belge transports SA (C-395/96 P), Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* EU:C:2000:132
[64] n 15
[65] n 15, para 80
[66] *Ibid*, para 81

In other words, according to this strand of case law, fidelity rebates, like exclusive dealing arrangements, are *per se* abusive.

The second strand of case law is where an 'all circumstances' test was adopted, normally because the rebate being considered was neither a fidelity rebate nor a quantity rebate. By 'all circumstances' test what is meant is that in order to determine whether the rebate is abusive, all the circumstances have to be considered. In particular the criteria and rules governing the grant of the rebate, and an investigation into whether, in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition must be undertaken.[67] This test was adopted in *Michelin I,*[68] *Michelin II,*[69] *British Airways* (GC[70] and CJ)[71] and *Post Danmark II* (CJ).[72] The wording used by the CJEU (and subsequently by the Commission), seems to imply that these rebates require an effects-based foreclosure analysis. Nothing however could be further from the truth.

This was made clear by the Commission decision in *Intel* where the Commission opined that even the all circumstances test 'does not require evidence of actual foreclosure'.[73] In fact, the 'all circumstances' test only considers the characteristics of the rebate under inspection. The case law has effectively created a check-list of characteristics which consider whether the

[67] Case C-23/14 *Post Danmark* (n 14), para 29. See also *British Airways* (GC) (n 42) para 270
[68] n 13
[69] n 43
[70] n 42
[71] Case C-95/04P *British Airways plc v Commission of the European Communities* EU:C:2007:166
[72] n 14
[73] n 21, para 923

rebate relates to a target; is individualised or standardised; is retroactive, progressive, incremental and, or top slice; as well as the relevant reference period, that is the period considered when granting the rebate. Once the rebate presents a number of these characteristics, it is immediately considered to be abusive.

In other words, in all rebate cases where the 'all circumstances' test was adopted, once the Commission or the CJEU considered that a rebate had characteristics which identified it as 'loyalty inducing', then the rebate was assumed to amount to *de facto* exclusive dealing and therefore *per se* prohibited. This is why the 'all circumstances' test is here being considered as a strand of the assessment of loyalty rebates as exclusive dealing. The 'all circumstances' test simply involves a tick box exercise, where characteristics which differentiate the rebate in question from a pure quantity rebate are considered. As a result of this test, target rebates have automatically been considered to result in abusive exclusivity.

To illustrate this, two key decisions on 'loyalty inducing' rebates can be considered. In *Post Danmark II*,[74] the rebate was standardised, which is not normally considered problematic, but was also conditional on reaching a target and retroactive. As a result, it was deemed abusive. In *Michelin II*[75] quantity rebates based on targets achieved during an annual reference period were also deemed abusive.

Based on these strands of cases, Nazzini concludes that the EU's decisional practice adopts different approaches to different forms of loyalty rebates.[76] His view is that when rebates are conditional on the customer obtaining all or most of its requirements from the dominant

[74] n 14
[75] n 43
[76] Nazzini (n 20) 232-233

undertaking, the rebate in question is prohibited,[77] whilst when the rebate is not so conditioned, a full market inquiry test is adopted.[78] He then however qualifies this by saying that the EU institutions have adopted this test in a formalistic manner,[79] so that whilst quantity rebates which are not conditioned on exclusivity are deemed to reflect efficiencies,[80] other types of rebates, like retroactive rebates, are treated more restrictively.[81]

Although theoretically correct, this view is too sanitised and much too clean when compared to how these 'tests' have been adopted in practice. Firstly, Nazzini fails to recognise that once a rebate, after considering all the circumstances surrounding it, is found to be loyalty-inducing, it too is *per se* abusive. He justifies this practice by stating that non-quantity rebates are treated 'restrictively', implying that they are not deemed to reflect efficiencies.

Secondly, this test, even if reiterated in a number of cases,[82] was not strictly adhered to by the EU competition authorities. For instance, in *Tomra,* where the dominant undertaking had, apart from exclusivity agreements, engaged in individualised target rebates, retroactive rebates or bonuses and progressive bonus rebates, the EU authorities viewed the rebates in question to be abusive simply on the strength of their being non-quantity rebates adopted by a dominant undertaking.[83] Similarly the Commission in *Michelin II*[84] and *British Airways*[85] did not mention the 'all circumstances' test, even though these cases followed the CJ decision in

[77] *Ibid 233*
[78] *Ibid* 233
[79] *Ibid* 233
[80] *Ibid* 233
[81] *Ibid* 234
[82] *Michelin I* (n 13), *Michelin* II (n 43), *Post Danmark II* (n 14), para 29. See also *British Airways* (GC) (n 42 para 270
[83] Case COMP/E-1/38.113 *Prokent-Tomra* 29 March 2006 [2008] OJ C219/11*;* Case T-155/06 *Tomra Systems ASA and Others v European Commission* :EU:T:2010:370; Case C-549/10 P *Tomra Systems ASA and Others v European Commission* EU:C:2012:221
[84] IV.29.491 *Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin* 7 October 1982 [1981] OJ L353/33
[85] n 39

Michelin I.[86] On the other hand, in *Intel*, the Commission[87] and the GC,[88] although faced with fidelity rebates, still allegedly considered all the circumstances of the case, even if simply to strengthen its conclusions.

In any event, Nazzini's interpretation of the EU's decisional practice in effect impliedly admits that in reality, when faced with a loyalty rebate case, the approach taken is similar to that for exclusive dealing, namely a formalistic approach[89] is adopted whereby all loyalty rebates are *per se* prohibited. This has been the prevalent approach to date, until the CJ in *Intel* agreed with the appellant that where the dominant undertaking submits that its conduct is not capable of restricting competition, and in particular, of producing foreclosure effects,[90] then the competition authorities are:

> required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[91]

In support of this brief yet, given its previous draconian approach, earth shattering statement, the CJ cited *Post Danmark I*, a predatory pricing case.[92] This reference is rather puzzling, given not only that it relates to a different type of abuse, but also that the text cited does not delve into the foreclosure effects of abuse on the market (an analogy that might have made sense). Either way, the case is now back in front of the GC for a decision, and it remains to be seen how the case law will evolve following this clear statement that the effects of the loyalty rebate must be considered.

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[86] *Michelin I* (n 13). A full list of which test was adopted in each case can be found in Table 5.1
[87] n 21
[88] n 15
[89] See Chapter 4
[90] Case C-413/14 *P Intel Corp. v European Commission* EU:C:2017:63, para 138
[91] *Ibid*, para 139
[92] *Post Danmark* (n 14) para 29

TYPES OF REBATES

Therefore, as far as EU competition law is concerned, at least before the CJ decision in *Intel*,[93] it is relatively easy to find that a loyalty rebate is abusive. Aside from having a dominant position, the undertaking must have granted a rebate which is of a given type.

Generally, although not exclusively, the rebate has to fall within one of the following categories: (i) a fidelity rebate proper;[94] (ii) a target rebate[95] – often retroactive, but also incremental, progressive or top-slice, and generally individualised, particularly if with a long reference period;[96] (iii) rebates which discriminate according to Member State.[97]

It is easy to see why the latter is prohibited in EU competition law. Dividing Member States along national lines, or favouring own national undertakings would be counter-productive to the internal market, the over-arching goal of the EU. This type of harm is more likely to be of

[93] n 90

[94] These were prohibited in the Commission decisions in *Vitamins* (n 24), *Irish Sugar*(n 28) and IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwal*) and 86 (IV/32.448 and IV/32.450: *Cewal*) 23 December 1992 [1993] OJ L34/2*;* in the GC decisions in Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities* EU:T:1993:31*, Irish Sugar* (n 30) and *Compagnie Maritime Belge* (n 62)*;* and the CJ decisions in *Suiker Unie* (n 22)*, Hoffmann-La Roche* (n 26) and *Compagnie Maritime Belge* (n 63).

[95] These types of rebate were prohibited in the Commission decisions in *Irish Sugar* (n 28)*,* IV.29.491 - *Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin* 7 October 1981 [1981] OJ L353/33*, British Airways* (n 39)*,* COMP/E-2/36.041/PO *Michelin* 20 June 2001 [2002] OJ L 143/1, IV/33.133-D *Soda-ash – ICI* 19 December 1990 [1991] OJ L152/40, COMP/33.133-D: *Soda-ash — ICI* 13 December 2000 [2003] OJ L10/33, IV/33.133-C: *Soda-ash – Solvay* 19 December 1990 [1991] OJ L 152/21, COMP/33.133-C: *Soda ash — Solvay* 13 December 2000 [2003] OJ L10/10, *Tomra* (n 83) and *Intel* (n 21)*;* the GC decisions in *Michelin II* (n 43)*, British Airways* (n 42)*, Irish Sugar* (n 30)*,* Case T-57/01 *Solvay SA v European Commission* EU:T:2009:519 (*Solvay)*, Case T-66/01 *Imperial Chemical Industries Ltd v European Commission* EU:T:2010:255 (*ICI*)*, Tomra* and *Intel* (n 15)*;* and the CJ decisions in *Michelin I* (n 13), *British Airways* (n 71) and *Tomra* (n 83) and considered by the CJ in *Post Danmark II* (n 14)*.*

[96] According to *Michelin II* (n 95), this was be the case if the reference period if more than three months; Commission decision, para 216

[97] This type of rebate was prohibited in the Commission decisions in IV/31.900 *BPB Industries plc* 5 December 1988 [1989] OJ L10/50)*, Portuguese Airports* (n 34) and (marginally) *Irish Sugar* (n 28) *,* the GC decision in *Irish Sugar* (n 30), and the CJ decision in *Portuguese Airports* (n 34).

concern to the Commission, rather than national competition authorities, which may perhaps not prioritise such cases.

Moreover, undoubtedly, both rebates given in return for exclusivity (fidelity rebates) and target rebates may raise competition concerns. There is nothing controversial in the application of Article 102 TFEU to these types of rebates. What is controversial is the assessment carried out in these cases in order to determine that a breach of Article 102 TFEU occurred, and the test used.

ASSESSMENT OF LOYALTY REBATES

THE CURRENT ASSESSMENT OF LOYALTY REBATES: EU AND US APPROACH

The foregoing discussion should already have indicated that determining how loyalty rebates are viewed is crucial because the test for the assessment of loyalty rebates, and the theory of harm, changes according to how loyalty rebates are viewed.[98] Therefore, in so far as EU competition policy views loyalty rebates as a type of exclusive dealing, EU competition law is correct in adopting the test adopted for exclusive dealing, even if this test in itself is incorrect for being too formalistic, rather than an effects based, case by case approach.

When loyalty rebates are viewed as a type of exclusive dealing, the resultant harm which competition law should prevent is the dampening of trade.[99] The idea is that adopting loyalty rebates would result in an increase in rivals' costs, an increase in rival's prices, and the reduction of competitive pressure on the dominant undertaking's prices[100]. This would allow the dominant undertaking to increase its prices whilst maintaining a difference in pricing for

[98] OECD 'Fidelity Rebates' (n 12)
[99] OECD 'Fidelity Rebates' (n 12), 8
[100] *Ibid,* 10

loyal and disloyal customers.[101] Where competition authorities intend to protect consumer welfare, they can focus on the effects of loyalty rebates on welfare itself, rather than on proxies thereof,[102] and this might help to maximise total welfare.[103] However, since EU competition policy, inspired by ordo-liberal principles, pursues consumer welfare indirectly, by ensuring the competitive process is protected or by preserving a process where operators are free to compete without distortions on the market, the assessment required has to focus on the effect of the loyalty rebate on the freedom of firms to compete, and not specifically on consumer welfare.[104] Within the context of EU competition practice therefore, the adoption and application of an as-efficient competitor[105] standard to loyalty rebate cases makes sense. The problem is that so far, the EU institutions have only paid lip service to this test, and have failed to carry out a proper assessment of the effect that the loyalty rebate being considered has on as-efficient firms. In *Post Danmark II,* the CJ went so far as to state that the as-efficient competitor test is not a necessary pre-condition to the finding of abusive loyalty rebates.[106] The result has been that a form based approach is taken in practice to test whether loyalty rebates are abusive.

The OECD notes that the form based approach is an advantage to businesses as it results in legal certainty and faster case resolution.[107] This is true, and the advantage is of particular benefit to small jurisdictions. Businesses in small jurisdictions, which face the disadvantage of added costs and less resources[108] can, thanks to a form based approach, easily organise their

[101] *Ibid*, 10
[102] *Ibid*, 12
[103] *Ibid*, 12
[104] *Ibid*, 12
[105] Nazzini (n 20) at 235 *et seq* discusses loyalty rebates within the context of the as efficient competitor test.
[106] n 14, para 62
[107] See OECD Policy Roundtables 'Fidelity and Bundled Discounts and Rebates' (n 5), 21
[108] See Chapter 1

business activities to ensure compliance with EU competition law, without much expense. Moreover, faster case resolution in the cases that do breach the competition rules will again result in less expense to businesses, which although dominant on the relevant (small) market, are, on a European-wide or world-wide market actually quite small. Certainly however, the form based approach is more of an advantage to competition authorities – faster case resolution means resources can be utilised on other matters (not necessarily other cases), and frankly, they get to burnish their reputations because they are deciding cases quickly and efficiently, and punishing wayward 'large business' (the dominant undertaking in question) to boot. This is never truer than in small jurisdictions, where authorities often face criticism for lack of enforcement.[109]

However, as already noted with respect to exclusive dealing and other types of abuses, the form based approach to abuse – including loyalty rebates – will potentially result in both false positives and false negatives.[110] This is without a doubt more harmful to a small jurisdiction, and the harm is not outweighed by the advantages of legal certainty and faster case resolution. Once a small jurisdiction is permanently harmed it is difficult to restore the market, given the lack of resources and limited number of operators, whether actual or potential, on the market. The OECD in fact notes that in countries where an effects, case-by-case, approach is taken, the risk of chilling pro-competitive behaviour is reduced, and the incentives for firms to strive to become market leaders are less likely to be dulled.[111]

[109] Keith Micallef 'Competition watchdog remains toothless, seven months after court judgment' (The Times of Malta 3 December 2017) https://www.timesofmalta.com/articles/view/20161230/local/competition-watchdog-remains-toothless-seven-months-after-court.635172 accessed 5 May 2020; Keith Micallef 'A year on, competition watchdog still has to grow teeth' (The Times of Malta 3 August 2017) https://www.timesofmalta.com/articles/view/20170803/local/a-year-on-competition-watchdog-still-has-to-grow-teeth.654756 accessed 5 May 2020

[110] See also OECD Policy Roundtables 'Fidelity and Bundled Discounts and Rebates' (n 5), 21

[111] See also OECD Policy Roundtables 'Fidelity and Bundled Discounts and Rebates' (n 5) , 21

Furthermore, by discouraging pro-competitive practices, the form-based approach fails to protect consumer interests.[112] The benefits of an effects based approach to small jurisdictions is clear – in jurisdictions where the number of competitors on any given market is necessarily limited, competitors will continue to compete in an attempt to gain an advantage. This will mean that (i) any dominant undertaking(s) on that market are checked in their behaviour by their very competitors; (ii) no dominant undertaking can rest assured that its market position is set in stone. An effects-based approach would therefore lead to a more competitive market, which is the desirable result in all jurisdictions, but more especially in small jurisdictions.

Moreover, one cannot simply conclude that the rebate leads to exclusivity.[113] The approach in US antitrust law contrasts completely with that taken by the EU, and not just because generally US courts and authorities tend to adopt a strict consumer welfare approach, rather than a protection-of-competition approach. US antitrust law posits that for loyalty rebates to be anti-competitive and therefore prohibited, they have to result in predatory pricing. US courts have refused to find antitrust liability for inducing loyalty through rebates, and have instead required that the dominant undertaking be shown to have "priced below an 'appropriate' measure of cost",[114] as established in *Brooke Group*, a predatory pricing case.[115] According to Alhborn and Bailey, this test is supported by mainstream economic analysis as well as helping to ensure legal certainty.[116]

[112] Simon Bishop and Philip Marsden 'The Article 82 EC Discussion Paper: a missed opportunity' (2006) 2(1) European Competition Journal 1, 1
[113] Zenger (n 48) 21
[114] Christian Ahlborn and David Bailey 'Discounts, rebates and selective pricing by dominant firms: a trans-atlantic comparison' (2006) 2Spec Ed European Competition Journal 101, 123
[115] *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209 (1993). See *ibid*, 123 and 126.
[116] *Ibid*, 126

This approach tends to result in false negatives, where anti-competitive conduct is permitted due to the fact that it does not satisfy the price-cost test. However US antitrust policy would rather have false negatives than potential false positives, given the difficulty in distinguishing between legitimate and illegitimate price competition and the US concern about unnecessary regulatory intervention.[117] It will be recalled that US antitrust law was influenced by the Chicago school of economics, which notwithstanding variations in thought, has consistently believed that markets are self-correcting and therefore minimal intervention is required. Therefore false negatives are, perhaps sub-consciously, preferred to false positives in US antitrust policies. The US approach has meant that in practice there is a strong presumption of legality of discounts and rebates, contrary to the situation in the EU.[118] Given the adoption of the consumer welfare approach in the US, the presumption of legality can only be rebutted if tangible exclusionary effects to the detriment of consumers is shown.[119] Indeed generally the consumer welfare standard would 'seek to understand the likely net effect of alleged anticompetitive conduct on consumers'.[120] This entails a balancing of anticompetitive effects identified with any countervailing efficiencies found to benefit consumers, and, where both effects exist the relative scale of these effects are considered.[121]

[117] *Ibid*. See also Damien Geradin 'Separating pro-competitive from anti-competitive loyalty rebates: A conceptual framework' (Paper prepared for the Asia International Competition Conference, Seoul, 4 September 2008) (largely reflected in the TILEC working paper – 'A proposed test for separating pro-competitive loyalty rebates from anti-competitive ones' TILEC Discussion paper, DP 2008/041, November 2008), 4; DAF/COMP/M(2016)1/ANN4/FINAL Executive Summary of the Roundtable on Fidelity Rebates held at the 125th meeting of the Competition Committee of the OECD 15-17 June 2016 Paris, France, 3

[118] Gianluca Faella 'The antitrust assessment of loyalty discounts and rebates' https://ssrn.com/abstract=1079504 accessed 5 October 2019, 7; Zenger (n 48); Geradin (n 117), 4

[119] Faella (n 118) 7

[120] OECD 'Fidelity Rebates' (n 12), 13

[121] *Ibid*, 13

When loyalty rebates are viewed as predatory pricing, the main harm which is sought to be prevented is the discouragement of trade,[122] just like where loyalty rebates are considered like exclusive dealing. However, the discouragement of trade occurs differently. The theory of predation is that the dominant undertaking temporarily sacrifices profit to discourage customers from buying from its competitors, and therefore deters entrants or forces actual competitors from the market, whereupon the undertaking in question can increase both prices and profit.[123] It pays a dominant undertaking that has non-contestable sales to adopt loyalty rebates as a predatory strategy, as its profit sacrifice is reduced since the rebate is only applied to some proportion of sales, rather than all (as in the case of 'pure' predatory pricing).[124]

One might wonder why treating loyalty rebates like predatory pricing was never seriously considered in the EU, notwithstanding the Commission's price cost test in the Guidance Paper. British Airways had tried to argue that the only discounts which were prohibited by Article 102 TFEU were either those specifically granted in return for exclusivity, or where they resulted in predatory pricing.[125] However, the CJ had given short shrift to this argument, noting only that the judgment in *Michelin* proved otherwise.[126] Unfortunately therefore the CJ was in no humour to consider whether loyalty rebates have any affinity with predatory pricing. [127] In *Post Danmark II,* it merely noted that:

> (…)the Court has held that the invoicing of 'negative prices', that is to say, prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebate

[122] *Ibid*, 8
[123] *Ibid*
[124] *Ibid*
[125] Case C-95/04P *British Airways* (n 71) para 44
[126] *Ibid*, para 64-65
[127] A similar approach is evident in the CJ decision in *Tomra* (n 83), para 73

> scheme operated by a dominant undertaking is abusive (…). In that same case, the Court specified that the absence of a comparison of prices charged with costs did not constitute an error of law (…).[128]

There are therefore very few cases where this particular point was raised with any seriousness in front of the courts.[129] Certainly, from a defendant's point of view, once the received wisdom, and stated law, provided clearly that loyalty rebates are to be assessed like exclusive dealing, there is little point in trying to argue that the analysis used for predatory pricing should apply.

However, assessing loyalty rebates like predatory pricing only is not entirely satisfactory either, given the resultant false negatives, where conduct is adjudged to be lawful notwithstanding that it causes foreclosure and eliminates competitors.[130] This is because loyalty rebates which do not result in predatory pricing, because they are priced above average total costs or above average variable costs (with no predatory intent), may still lead to foreclosure of competition. However, it would be preferable if, in cases where the rebate results in predatory pricing, it is assessed as such, as this would result in consistency in testing for abuse.

In the light of the above, it is clear that the EU and the US have adopted different approaches because the policy starting point and their beliefs about what competition law is meant to

[128] n 14, para 56

[129] Case COMP/35.141 — *Deutsche Post AG* 20 March 2001 [2001] OJ L125/27, there was an allegation of predatory pricing, but this was a separate ground of abuse from the abuse of granting loyalty rebates.

[130] Danilo Samà 'The Antitrust Treatment of Loyalty Discounts and Rebates in the EU Competition Law: in Search of an Economic Approach and a Theory of Consumer Harm' < https://ssrn.com/abstract=2425100> accessed 10 May 2020; Nicholas Economides 'Loyalty/Requirement Rebates and the Antitrust Modernization Commission: What is the Appropriate Liability Standard?' (2009) 54(2) Antitrust Bulletin 259 https://ssrn.com/abstract=2425100 accessed 28 September 2019, 14. See also Ahlborn and Bailey (n 114) 126

achieve are different. Therefore they view loyalty rebates differently – as exclusive dealing and predatory pricing respectively. Their different ideas as to the goal of competition law, influenced by ordo-liberal theories in the EU, and by the Chicago school of economics in the US, has also resulted in different welfare standards being adopted, which in turn affects the tests being used in each jurisdiction.

The reality is that both analytical approaches have limitations. Crane notes that both approaches to loyalty rebates retain 'a schizophrenic relationship with both formalism and functionalism', although they do so 'with different values and assumptions'.[131] Whilst the EU approach to loyalty rebates adopts 'legal formalism', the US approach adopts 'economic formalism'.[132] As already discussed, whilst the EU approach may lead to both false positive and false negative results, the US approach tends to lead to false negative results. Therefore, both types of 'formalism' lead to undesirable results. These undesirable results can harm small jurisdictions – it is imperative in small jurisdictions that anti-competitive behaviour be prohibited, whilst behaviour which is not anti-competitive is allowed in order to stimulate the already limited competition on the market.

PROPOSED TEST

Both EU and US approaches to loyalty rebates have merits and demerits. The reason for this is that in certain circumstances loyalty rebates have the effect of excluding as efficient competitors through *de facto* exclusive dealing, whilst in others, the exclusionary effect is more akin to that in predatory pricing, and therefore a cost based test is preferable. This was perhaps impliedly admitted by the Commission in its Guidance Paper, where a cost based test

[131] Daniel Crane 'Formalism And Functionalism In The Antitrust Treatment Of Loyalty Rebates: A Comparative Perspective' (2016) Chicago Antirust Law Journal 81(1) 209
[132] *Ibid*

was proposed for assessing loyalty rebates. It has also been suggested by the US courts who have indicated that the selection of the applicable theory of harm should depend on the predominant method of exclusion, even if in practice they have depended on predation.[133]

The ideal scenario therefore, would be for competition authorities and courts to truly consider the workings and the effect of the rebate under investigation, and then determine which method of exclusion is being adopted in the particular case. This would have the merits of allowing the authority or court in question to consider whether other types of exclusionary behaviour, such as discrimination, are in play and therefore allow them to prohibit conduct which, although not necessarily having an effect similar to exclusive dealing, nonetheless harms the market.

In the light of this, the nuanced approach adopted by the EU institutions in the *Irish Sugar* litigation[134] is really the type of approach that should be taken by competition authorities and courts when considering loyalty rebates. Not all rebates can be assessed in the same manner – the proper test to apply varies according to the type of rebate being considered and its mechanics.

In other words, competition authorities should, when commencing an analysis of the rebate in question, first consider whether the rebate has characteristics of (i) exclusive dealing; (ii) predatory pricing; or (iii) discrimination. Next competition authorities would have to apply the relevant test.

In the event that the rebate in question appears to have the characteristics of exclusive dealing, the competition authorities have to determine that the rebate actually does result in

[133] OECD 'Fidelity Rebates' (n 12), 16
[134] n 28 and n 30

exclusive dealing. This part of the analysis would require an examination of the strength of the loyalty-enhancing effect of the rebate and whether there are strong incentives for the customer to increase its loyalty.[135]

Once this is determined, competition authorities would then have to carry out an effects analysis to determine whether the 'exclusive dealing rebate' has the effect of foreclosing competition on the market, rather than simply conclude that it automatically leads to foreclosure as is currently the case. Part of this examination would require the competition authorities to consider whether the *de facto* exclusivity raises competitors' costs; what impact increased costs have on competition and market outcomes; and why competitors were not able to match such a scheme.[136] This latter element would involve a consideration of whether an 'as efficient' competitor would be able to compete with the dominant undertaking.[137] In other words, the effects analysis would require the application of the as efficient competitor test, rather than it simply being an aid to assessment, as in *Post Danmark II*.[138] This analysis would lead to the establishment of a coherent theory as to why the rebate in question results in consumer harm and, or leads to foreclosure on the market.[139]

The benefit of a proper effects based approach can be shown through a simple example which frequently arises in small jurisdictions, due to the limited number of players. In a scenario where the dominant undertaking, notwithstanding that it is dominant, say with a market share of 40%, has a few competitors, say two competitors each with 20% of the market, and all the operators grant loyalty rebates, it is unlikely that there will be anti-competitive

[135] See Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for competition lawyers* (2011 OUP), 227
[136] OECD 'Fidelity Rebates' (n 12), 18; Federico (n 48) 278
[137] See OECD 'Fidelity Rebates' (n 12), 19; Niels, Jenkins and Kavanagh (n 135), 227; Bishop and Marsden (n 112) 4
[138] n 14
[139] See Federico (n 48) 278

foreclosure of the type to be sanctioned in terms of Article 102 TFEU simply because the dominant undertaking grants the rebate. The anti-competitive foreclosure on the market would, if anything, result because of the cumulative effect of the rebates on the market, with the consequence that a new entrant might find it difficult to enter the market. This would be a breach of Article 101 TFEU, with *each operator's* arrangements coming under scrutiny for single branding, rather than simply sanctioning the dominant undertaking under Article 102. This type of proper analysis would therefore aid competition authorities in determining which provision of the competition rules it would be best to apply, to the benefit of markets everywhere, including in particular small jurisdictions. In the example here provided, if the competition authority were to simply sanction the dominant undertaking without undertaking a proper analysis of the market, it would be allowing another two operators to carry on with conduct which is still harmful to the market.

Similarly, if the rebate being examined has characteristics of discrimination, in line with *MEO v Autoridade da Concorrencia,* competition authorities must first consider whether through the grant of the rebate the undertaking in question is discriminating between (equivalent) customers, and must then carry out an effects based analysis to determine whether the rebate is resulting in a distortion of competition between those customers. The effects-based analysis in this case is also likely to involve some consideration of as-efficient competitors, as discrimination would involve the distortion of the downstream market, where a competitor as efficient as the customer benefitting from the rebate would be unfairly prejudiced. The application of the discrimination test is particularly beneficial to small jurisdictions – in small jurisdictions, the purchasing market is likely to be equally small, and therefore conduct, such

as discrimination, by an upstream operator which is likely to harm the downstream operators should be prohibited to protect the already limited competition on the market.

Finally, in the case where the rebate has the characteristics of predatory pricing, because the resultant price is particularly low, the test adopted in *AZKO* would need to be applied, where if the effective price is below average variable cost, abuse is presumed, whilst if the effective price is above average variable cost but below average total cost and a predatory intent is proven, the rebate must similarly be condemned. This cost-price test is inherently both an 'intent-based' test and an 'as efficient competitor' test.[140] It is an intent based test because the intent to foreclose is either presumed (where price is below average variable cost) or required to be proven (where price is above average variable cost but below average total costs). It is an as efficient competitor test because its aim is to preclude conduct which would not allow a competitor as efficient as the dominant undertaking to compete – or indeed survive – on the market. Given the nature of the price-cost test however, there is no need to carry out an actual economic analysis, as these tests are built into the price-cost test itself.

The proposed approach would mean that no rebate is automatically lawful or unlawful – not even quantity rebates. Indeed there is no economic evidence that quantity rebates are never anti-competitive.[141] Hence Ibáñez Colomo suggests that *inter alia* the predatory pricing test would be an appropriate test for quantity rebates.[142] This means that quantity rebates would still be abusive when the resultant price is below the appropriate cost measure.

[140] See Nazzini (n 20) 201 et seq and 222 et seq

[141] Derek Ridyard 'Exclusionary pricing and price discrimination abused under Article 82 – an economic analysis' (2002)23(6) ECLR 286, 289

[142] Pablo Ibáñez Colomo '*Post Danmark II,* or the quest for administrability and coherence in Article 102 TFEU' (LSE: Law, Society and Economy Working Papers 15/2015)

This proposed approach would benefit small jurisdictions, as anti-competitive conduct which is perhaps at present not being caught by the prohibition in EU competition law (a false negative) would be so caught. The result would naturally be that the (small) market is protected from conduct which could prove fatal to its proper operation. On the other hand, through the adoption of the proper test to the conduct in question, pro-competitive or neutral conduct which is presently caught under the prohibition in EU competition law (false positives) would be allowed to continue. As noted elsewhere, markets in small jurisdictions cannot easily self-correct the harm caused by false negatives and false positives, so whilst even larger jurisdictions would benefit from the prohibition of real anti-competitive conduct – and only such conduct, not pro-competitive or neutral conduct – this is crucial in small jurisdictions. When assessing loyalty rebates it has to be remembered that even if the loyalty rebate in question would eliminate less efficient competitors, and thereby reduce the number of competitors on an already limited market, the rebate would benefit customers through lower pricing, which it is hoped would then be passed on to consumers. This should help counter-balance the high prices that normally result in small jurisdictions due to over-reliance on imports, which entail higher expenses, and to limited resources. Given that EU competition policy has often highlighted that its aim is the protection of competition not competitors, this stance would be in line with the stated objectives of EU competition law and its ordo-liberal principles. It would prohibit rebates that are predatory through the application of the predatory pricing test, whilst also prohibiting above cost rebates that are still exclusionary through the application of the exclusive dealing/discrimination tests. In addition, it would avoid the difficulties currently faced by policy makers having to choose one approach over

the other; at present there are commentators on both sides of the Atlantic who prefer the policy approach taken by the other.[143]

The proposed approach would also be in line with economic studies that all show that rebates have pro-competitive as well as anti-competitive results, depending on the rebate and the market.[144] Loyalty rebates are generally not granted for exclusionary purposes:[145] often the main purpose is to increase profits through price differentiation, which allows undertakings to increase output whilst extracting larger rents on the initial quantities of product sold.[146] Rebates have been shown to lead to more price competition,[147] and therefore the EU's form based approach would tend to imply that price competition will be less intense that it should be.[148] Whilst it is true that individualised, retroactive rebates are potentially more harmful to competition, they would also be potentially more pro-competitive than other rebates, by creating more aggressive price competition in the relevant market.[149]

Apart from lower prices to customers,[150] rebates may result in the following benefits: (i) incentivising customers to provide complementary or supplementary services to end-users; [151] (ii) inducing customers to lower prices to end-users (removal of double

[143] See for instance Joshua D Wright 'Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts' (Bates White 10th Annual Antitrust Conference, Washington, DC; June 3, 2013) 20; ; Economides (n 130); Geradin (n 117) 4, 16

[144] See A Jorge Padilla and Donald Slater 'Rebates as an abuse of dominance under Article 82 EC' (GCLC Research papers on Article 82 EC – July 2005), 102, and Ahlborn and Bailey (n 114), 108-114 on this point.

[145] Geradin (n 117), 4

[146] Zenger (n 48) 18

[147] Padilla and Slater (n 144), 88; Zenger (n 48) 21

[148] Zenger (n 48) 21

[149] *Ibid* 45

[150] Padilla and Slater (n 144) 88; Geradin (n 117) 21; Faella (n 118) 5; Ridyard (n 141), 294

[151] Bishop and Walker (n 48), 263; Nunez Osorio (n 1) 91; Geradin (n 117) 21; Padilla and Slater (n 144), 88; Assaf Eilat, David Gilo, and Guy Sagi 'Loyalty discounts, exclusive dealing and bundling: rule of reason, quasi-per-se, price-cost test, or something in between?' (2016) 4 Journal of Antitrust Enforcement 345, 350; Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013), 466

marginalisation);[152] (iii) reduction of product costs;[153] (iv) encouraging efficient product design; [154] (v) allowing specific supplier investments for particular customers, whilst preventing hold up; [155] (vi) economies of scale and faster and more efficient fixed costs recovery;[156] (vii) economies of scope and reduction of transaction costs;[157] (viii) promoting downstream competition;[158] and (ix) preventing free riding.[159]

It is also unquestionable that rebates may result in anti-competitive effects. [160] The foreclosure of competitors from the market, and raising competitors' costs is just one such effect, which is crucial to the finding of abusive loyalty rebates.[161] It might also facilitate collusion downstream.[162] Anti-competitive effects are more likely to arise where (i) the dominant undertaking has an assured base of sales; (ii) the dominant undertaking can rely on that base to offer better prices for any incremental sales; (iii) there is no possibility for equally efficient competitors to counter the effects of the dominant undertaking's scheme; and (iv) demand is more or less finite.[163]

These matters should all be considered when undertaking an assessment of a rebate, specifically when the assessment is being undertaken under the exclusive dealing or discrimination tests. In the wake of the *Intel* CJ decision,[164] it is now a remarkably interesting

[152] Bishop and Walker (n 48) 263; Geradin (n 117), 21; Faella (n 118) 5; O'Donoghue and Padilla (n 151) 467
[153] Nunez Osorio (n 1) 91;
[154] *Ibid*
[155]*Ibid*; Geradin (n 117) 21; O'Donoghue and Padilla (n 151) 467
[156] Faella (n 118) 5; Geradin (n 117), 21; Padilla and Slater (n 144), 88; O'Donoghue and Padilla (n 151) 465; Bishop and Walker (n 48) 263
[157] Geradin (n 117), 21; Executive Summary of the Roundtable on Fidelity Rebates (n 117) 1
[158] Padilla and Slater (n 144), 88; Executive Summary of the Roundtable on Fidelity Rebates (n 117) 1
[159] Eilat, Gilo, and Sagi (n 151) 350; Executive Summary of the Roundtable on Fidelity Rebates (n 117) 1.
[160] See OECD 'Loyalty and fidelity discounts and rebates' (2003) OECD Journal: Competition Law and Policy vol5/2, 146, 168
[161] Padilla and Slater (n 144) 101; Eilat, Gilo, and Sagi (n 151) 348
[162] Eilat, Gilo, and Sagi (n 151) 349
[163] O'Donoghue and Padilla (n 151), 469-470
[164] n 90

time for loyalty rebates, and the application of EU competition law with regards to loyalty rebates in small jurisdictions, as we wait for the approach that the GC will take. A true effects-based, case-by-case approach would largely nullify the criticism which has been directed towards the application of Article 102 TFEU in this area, and would ensure that competition in small jurisdictions is protected. At the same time the application of the predatory pricing test when the resultant prices following a rebate are predatory similarly warrants that competition is protected whilst ensuring a cohesive application of the competition rules and tests to like abuses.

OBJECTIVE JUSTIFICATION

In theory, loyalty rebates which appear to be abusive may still be objectively justified. The opportunity to objectively justify the rebate would permit the undertaking being investigated to force an effects based analysis to be carried out, a 'back door' effects analysis if you will. Even though this would put the onus on the undertaking being investigated, rather than the competition authority (or plaintiff in a civil action for damages), and although a proper effects based analysis would be preferable, since all the circumstances surrounding the rebate would be properly considered as a whole, the opportunity to objectively justify conduct is preferable to not having any effects analysis at all. However, in practice, this defence has only been successful in two cases, and partially in another.[165] As will be shown, the form based

[165] In *Euronext* (Sean Greeway 'Competition between stock exchanges: findings from DG Competition's investigation into trading in Dutch equities' (Autumn 2005) 3 Competition Policy newsletter 69), Euronext responded to a new entrant on the market for trading Dutch equities by various price reductions on operations in relation to Dutch securities. The Commission concluded that the rebates complained of were not abusive, *inter alia* because it believed that the digressive fee schedule in this case was welfare enhancing, as it stimulated margin trading thus making markets more liquid. However, this consideration is also coloured by the fact that this system of pricing existed prior to the London Stock Exchange's entry and is used by other exchanges. Moreover, there was no evidence that the rebates were individualised or retroactive. Therefore, it would appear that in reality the rebates in question where not deemed abusive because the rebate did not tick the "boxes" of individualisation and retroactivity, and possibly because prohibiting this pricing system would have upset most European exchange markets.

approach adopted by the EU institutions has meant that any objective justification is summarily dismissed.

In *Suiker Unie*,[166] the Commission described the fidelity rebate in question as an 'unjustifiable discrimination'. This was confirmed on appeal by the CJ.[167] At the outset therefore, EU competition law deemed fidelity rebates as incapable of any justification.

This stance was softened slightly in *Hoffmann-La Roche*, where the CJ allowed that there may be 'exceptional circumstances', similar to those found in Article 101(3) TFEU, where a fidelity rebate would be permitted. Otherwise, and, the text seems to imply, in most cases, fidelity rebates:

> are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.[168]

This position supports the form-based approach evident in loyalty rebate cases – if loyalty rebates are *per se* abusive, then whether they are objectively justified would be largely irrelevant. This position was subsequently entrenched in EU competition law, and continued

In *Velux* (AT.40026, 14 June 2016), the Commission found that the rebates were not abusive and did not partition national markets because all rebate schemes shared the same basic structure, even if not all discounts were granted in all Member States. The discounts were found to apply equally to all distributors and reflected a cost saving or a commercial effort from the distributors. Neither were they conditional on exclusivity or any condition which could induce loyalty on their part. In other words, in this case the rebate was lawful because it did not display any characteristics which were traditionally present in prohibited loyalty rebates. As a result, the Commission adopted a form based approach to assess the rebate in question, rather than assessing its effect or whether it was objectively justified.
Similarly some of the discounts in *BPB Industries* (Commission decision, n 97), which did not display the characteristics of loyalty rebates, were not deemed unlawful.

[166] IV/26 918 - *European sugar industry* 2 January 1973 [1973] OJ L140/17

[167] n 22, para 502

[168] n 26, para 90

largely unaltered to the present day – although later cases did allow that abusive loyalty rebates could be economically justified.[169]

Thus for instance, in *Irish Sugar* the GC was unimpressed that the company had to meet competition, and specifically stated that 'the defensive nature of the practice complained of in this case cannot alter the fact that it constitutes an abuse'.[170] In *ICI*[171] the desire to maintain plant capacity to avoid plant closures was not considered to be an objective justification either. In *Portuguese Airports*,[172] given that the rebates were benefitting the national airlines, the meeting competition defence, the economies of scale argument and the promotion of Portugal as a tourist destination were not deemed to be objectively justifiable reasons to render the rebate lawful.[173] Regarding the latter two arguments in particular, the Commission simply held that that goal could be achieved through non-discriminatory means.

In *Michelin II*,[174] the GC appears to have considered the nature of the objective justification. It clarified that to be economically justified, the rebate must be based on a countervailing advantage.[175] In reality however the GC appears to consider that it is only a quantity rebate justified by the volume of business or economies of scale they allow the supplier that are permitted,[176] although, in the GC's defence this emphasis on quantity rebates may have been a result of the fact that it was considering the dominant undertaking's quantity rebate system at the time. However, Michelin's argument that the quantity rebate was in return of

[169] See Ariel Ezrachi *EU Competition law : an analytical guide to the leading cases* (5th edn, Hart 2016), 189
[170] n 32, para 187, see also para 188
[171] Case T 66/01 (n 95), para 306
[172] n 34
[173] See Commission decision para 27-31
[174] n 43
[175] *Ibid,* para 98-99
[176] *Ibid*, para 100

economies of scale was dismissed, because allegedly its line of argument was 'too general' and 'insufficient'.[177]

This approach however is problematic. In both *Portuguese Airports*[178] and *Michelin II*,[179] the economies of scale justification was summarily dismissed, even though in the latter case the GC admitted that economies of scale could justify the granting of rebates. Economies of scale are recognised as being a pro-competitive result for the grant of rebates.[180] If these claims are not taken seriously, EU competition law is not ensuring that it is only conduct which truly forecloses competition which is prohibited.

Secondly, any market operator, including dominant undertakings, should be allowed to compete on the market – even aggressively – and to structure its business in the most profitable and efficient manner. Indeed, such defences may be particularly important in small jurisdictions. Active competition on the market would ensure that only efficient firms compete, with the hoped for result being that prices, which as noted, may be relatively high in small jurisdictions, would decrease. Allowing less efficient competitors to flourish in the market would not be beneficial to small jurisdictions, even if it would result in an additional competitor. Moreover, given the capacity and resource constraints in small jurisdictions, defences relating to over and under capacity may be crucial.

Once again therefore, not allowing dominant undertakings to justify rebates by reference to meeting competition or to ensure there is no under capacity is unduly draconian vis-à-vis

[177] *Ibid,* para 108
[178] n 34
[179] n 43
[180] Ahlborn and Bailey (n 114), 108; OECD policy Roundtables: 'Fidelity and Bundled Discounts and Rebates' (n 5), p7 and 22; Geradin (n 117), 4 and 21; Leonardo Borlini (2009) Methodological Issues of the "More Economic Approach" to Unilateral Exclusionary Conduct. Proposal of Analysis Starting from the Treatment of Retroactive Rebates, European Competition Journal, 5:2, 409-449

dominant undertakings, and may result in over-regulation, especially in small jurisdictions. This is not to say that such defences should be accepted in all cases, however they should be considered in significantly more detail than have been considered to date.

In truth, if the test here proposed is adopted, there is very little need for objective justification as a defence, particularly when the rebate is assessed in a similar manner to exclusive dealing and discrimination, as these matters would be considered in the effects-based analysis itself.[181] The CJ does not seem to have recognised this yet. In *Intel*, the CJ first notes that the analysis of the capacity to foreclose is relevant in assessing whether a rebate is objectively justified,[182] which appears to conflate the two principles, but then concludes that:

> [t]hat balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.[183]

It is respectfully considered that this would be completely superfluous. It will be noted that where the rebate is assessed under the test of exclusive dealing, an effects based analysis, including therefore any economic or objective justifications, would need to be carried out. Where the rebate is assessed as a type of discrimination, similarly the effects of the conduct in question would have been considered. Finally, where the rebate is assessed as predatory pricing, the price cost test adopted would in any case not allow for any objective justification – as the test implies that pricing below average variable cost can have no purpose other than to eliminate a competitor; whilst pricing below average total cost would require in any case

[181] See also Bishop and Marsden (n 112) 6
[182] n 90, para 140
[183] n 90, para 140

evidence of intent to eliminate a competitor. There is therefore little or no necessity for 'objective justification' if the proposed approach is adopted.

LOYALTY REBATE CASES IN MALTA AND THEIR EFFECT

There has to date only been one loyalty rebate case decided by the CFT. The case, *Portanier Brothers/General Soft Drinks,*[184] concerned schemes adopted by General Soft Drinks Limited ("GSD"), the local franchisee of the Coca Cola Company, in the 'take-home' market, that is in the market for groceries and supermarkets. GSD also produced mineral water. Portanier Brothers Limited ("Portanier") at the time was a local franchisee for PepsiCo International and produced and, or bottled '7-UP', 'Diet 7-UP', 'Like Cola' and 'Miranda', as well as its own mineral water. Although it seems the scheme also covered water, the relevant market was defined as the market for one (1) litre bottles of carbonated soft drinks in the take home market.

In 1998, Portanier filed a complaint with the OFC against GSD arguing that an incentive scheme adopted by the latter was in breach of the substantive competition rules in the Competition Act. From the judgment it appears that initially, the complaint had been filed not just to challenge the incentive schemes, but also to challenge a proposed merger between GSD and another drinks manufacturer. At the time there were no merger regulations in Malta, as these were only introduced in 2002, so it is assumed that the complaint was similar

[184] Complaint number 2 of 2000: Complaint submitted by Portanier Brothers Limited re Discount Schemes adopted by the General Soft Drinks Company Limited on the sale of soft-drinks and mineral water, 11 June 2001, published in Silvio Meli *Judgements of the Malta Commissions for Fair Trading* (Gutenberg Press, Malta 2006), 114

to the case in *Continental Can*.[185] However during the course of the investigation the proposed merger fell through and the case focused solely on the incentive schemes.

There is not much detail on the incentive scheme in the judgment. It is succinctly described as involving 'the granting of a number of free bottles or in the granting of monetary incentives once the previously established sales levels as determined by the undertaking complained of are reached'.[186] These incentives were rightly characterised as 'target sales schemes'. Although free bottles and 'monetary incentives' may not immediately bring rebates or discounts to mind, their effect is in fact to grant the customer a rebate or discount. Moreover, the target schemes were individualised, as they were calculated in a way that reflected the sales capacity of each retail outlet.[187] The OFC found that, as a consequence of the target scheme, the retail outlets in question were allocating more space to GSD's products, thereby reducing the shelf-space of competing products, with the result that products manufactured by competitors like Portanier were not sold.[188] The OFC therefore concluded that the target schemes adopted by GSD were in breach of Article 9 of the Competition Act.

GSD appealed this decision, arguing mainly that the market was incorrectly defined. Much of the judgment of the CFT in fact deals with this matter, only for it to confirm the OFC's definition of the market. On the merits, GSD argued that the contracts it had in place with retailers regarding the incentive schemes were never enforced, and that Portanier's lack of sales was caused by other factors, including the change in the taste of its principal product (presumably '7-UP'). The emphasis upon appeal on the definition of the market, and the

[185] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* EU:C:1973:22
[186] n 184, C.3, p 116
[187] C.5, p 117
[188] C. 4 and C.6, p 117

rather weak grounds for appeal on the merits suggest that GSD did not really have a defence on the merits, and therefore attempted to have the decision overturned on a technical point – a wider definition of the market – which would have resulted in GSD not being found to be in a dominant position. Indeed, these grounds of appeal, which did not cover the actual nature of the incentive schemes in question, effectively admitted that the analysis of the OFC, which concluded that these were individualised target schemes (rebates), was correct. In today's terms, GSD was simply arguing that these individualised target schemes did not have a foreclosure effect.

On the merits, the CFT concluded that there were indeed 'binding elements' between GSD and the retailers,[189] and found that the contracts in question were legally binding irrespective of whether they were enforced or not.[190] It found that the result of the conditions of the contract were tantamount to 'conditions that prevent, restrict and distort competition as these re-sellers are not merely coaxed but actually bound to exclusively sell these particular products.'[191] The CFT therefore appears to have adopted an 'exclusive dealing' test to the target schemes in question. It found that the scheme 'created suffocating artificial aims that could only be reached if the re-sellers sold bigger quantities of the products manufactured' by GSD.[192] Perhaps surprisingly, given that EU competition law at that stage had taken a formal approach to target rebates, the CFT considered the effect of these schemes, noting that:

[189] E.12.g, p 122
[190] E.12, p 121
[191] E.12.c, p 121
[192] E.12.g, p 122

> as a result of this specific arrangement the net effect was that the inert consumer was being subtly misguided as at a given glance he would not find any product manufactured by the complainant undertaking displayed within immediate reach.[193]

This was a result of retailers dedicating shelf space to GSD products in order to benefit from the rebate *qua* incentives offered.

Finally, the CFT, although not in so many words, also considered that there was no objective justification for the conduct in this case. It noted that the benefits of this scheme 'were not intended to favour the consumer' and did not contribute 'to some efficiency in the manufacturing process' but was intended solely 'to strengthen to hegemony' of GSD and 'to stimulate the retailers involved to work towards the attainment of this end'.[194] Therefore the CFT, even before the Guidance Paper, adopted an 'Article 102(3)' approach, whereby the elements which need to be fulfilled in order for an anti-competitive agreement to be deemed lawful in terms of Article 101 (3) TFEU were considered in order to determine whether the allegedly abusive conduct could be objectively justified. In this case, the CFT found that the consumer was not benefitting – presumably because the reduction in price was not being passed on to the consumer – and that the company could not claim any efficiency gains. As a result, the CFT confirmed the decision of the OFC finding a breach of Article 9 of the Competition Act.

The CFT therefore, appears to have been somewhat ahead of its time, by applying an effects-based approach to target rebates, even if its effects based approach is somewhat rudimentary. In this case it appears that the effects of the market were rather visible, with

[193] E.12.i, p 122
[194] E.12.h, p 122

Portanier's products not being visible or even present at retail outlets thereby excluding them from the market.

The CFT did not consider the other elements referred to by GSD, which may have contributed to Portanier's waning popularity. Certainly, on the facts of this case, these were largely irrelevant. GSD never denied that retailers were effectively granting shelf space only to it. This clearly has a tangible anti-competitive effect. It is however interesting to consider what weight should be given to other factors when considering the anti-competitive effect of conduct on the market. What weight should be given to a complainant's business decision, which affects its sales? The CFT appears to have accepted that Portanier had contributed to the downward trends in its sales because 'it had been forced to change the taste of the product which change was not positively welcomed by the consumer.'[195]

This point brings out an important issue when considering the effects of allegedly anti-competitive conduct on the market. When considering effects, competition authorities and courts cannot simply look at the effect on sales of the complainant or other competitors. There can naturally be other causes for a downward trend in sales. Without considering all the facts – for instance in this case, a change in the product recipe – one cannot get a clear picture, and therefore one cannot simply conclude that a downward trend in sales is due to anti-competitive conduct by a dominant undertaking. Dips in sales may be due to other business decisions taken by competitors during the relevant period, and therefore further investigation is required before it is concluded that downward dips are due to the anti-competitive conduct in question.

[195] E.12.e, p 121

In this case, although there were other factors, like the change in recipe at play, the fact remained that the arrangements in question resulted in shelf space being dedicated exclusively or almost exclusively to GSD. This had a clear anti-competitive effect on the market. By considering the effects of the conduct on the market in question, the CFT could therefore safely conclude that the conduct in question had to be sanctioned, thereby protecting competition on the relevant market, not just to the benefit of Portanier and other competitors, but also to the benefit of Maltese consumers, who, as a result of this judgment could expect a better choice of products.

Did the consumer actually benefit from this decision? What effect did this judgment have on competition in Malta? As it turned out, this judgment did not necessarily lead to the outcome expected, even if Portanier was vindicated. Portanier in fact closed down in 2002.

During the same period, GSD and Portanier were also involved in court litigation, this time instituted by GSD, regarding Portanier's use of marketing graphics which mimicked those of GSD. The case started in 1995, a mere 3 years before Portanier's complaint, and was finally concluded in GSD's favour by the Court of Appeal in 2003, just a couple of years following the CFT's decision. It would appear therefore that during the relevant period these two companies were at loggerheads over a number of issues, and Portanier was not necessarily being 'victimised' by GSD in all cases.

It is also worth noting that Portanier never instituted a follow-on action in order to claim damages for GSD's proven anti-competitive conduct.

It is therefore quite difficult to draw conclusions on the effect of this judgment on the market. Certainly, GSD's anti-competitive conduct had some effect on Portanier. However, Portanier

may simply have exited the market because ultimately it was a less efficient competitor. Clearly, the decision to change the product recipe was not popular with the consumer, and this too may have led it to leave the market. It will be noted that Portanier was a relatively small family-run business, where other (familial) considerations may have been at play, besides purely commercial purposes.

There is in fact an interesting postscript to this case. The Portanier family still owned the factory premises. Through a different company – Portanier Developments Limited[196] – the family sought to develop the land into a number of apartments, garages and commercial spaces.[197] Planning permission was granted in 2012,[198] following a highly publicised process, which involved scaling down the original project. Therefore, the soft-drink manufacturing business may have been closed down because the family involved may have simply considered that the premises could be put to more profitable use.

This notwithstanding, the CFT's judgment, although rather short, and although it does not delve into too much detail, had effectively considered the effect of the target schemes on the market, as well as considering whether there was any objective justification for them. This resulted in a satisfying judgment which did not just engage in a 'tick-box' exercise but

[196] The Malta Independent "164 New residential units at former 7-UP factory site turned down" 30 July 2010 https://www.independent.com.mt/articles/2010-07-30/local-news/164-New-residential-units-at-former--7-UP-factory-site-turned-down-278033 accessed 17 November 2019. Involvements in the two companies are publicly available at the Malta Business Registry online: https://registry.mbr.mt/ROC/index.jsp#companySearch.do?action=companyDetails

[197] The Malta Independent "164 New residential units at former 7-UP factory site turned down" 30 July 2010 https://www.independent.com.mt/articles/2010-07-30/local-news/164-New-residential-units-at-former--7-UP-factory-site-turned-down-278033 accessed 17 November 2019; Claudia Calleja "Thumbs down for 'crowded' flats at site of 7Up plant" The Times of Malta 30 July 2010, https://timesofmalta.com/articles/view/thumbs-down-for-crowded-flats-at-site-of-7up-plant.320166 accessed 17 November 2019

[198] The Malta Independent "Scaled Down '7-Up' development gets Mepa approval" 23 March 2012 https://www.independent.com.mt/articles/2012-03-23/news/scaled-down-7-up-development-gets-mepa-approval-307542/ accessed on 17 November 2019; The Times of Malta "Ex 7-Up factory to become flats" 23 March 2012 https://timesofmalta.com/articles/view/Ex-7-Up-factory-to-become-flats.412378 accessed 17 November 2019

summarily analysed whether the conduct in question was actually abusive. One can only hope that the local competition authorities and courts follow this example today.

CONCLUSIONS

It has been shown that the test currently adopted for the assessment of loyalty rebates is unsatisfactory, and may cause more harm than good to competition, particularly in small jurisdictions. It has been proposed that the test for rebates should depend on the characteristics presented by the rebate in question, rather than its form.

Therefore rebates that present characteristics of *de facto* exclusive dealing should be assessed as such, with a full effects based analysis being undertaken, including the application of the as-efficient competitor test.

Where rebates present characteristics of discrimination on the downstream market, the test for discrimination should be applied, which again involves the application of a full effects based analysis.

Where rebates result in below cost pricing, the predatory pricing test should be applied, such that prices below average variable costs are presumed abusive while those below average total costs but above average variable costs are only abusive if exclusionary intent is proven.

If this approach is adopted, the importance of having an 'objective justification' diminishes, as any considerations which could qualify as a justification would be considered within the applicable test itself.

This approach would benefit all markets, in particular small jurisdictions, by reducing the amounts of both false positives and false negatives. It would also reduce the risk of a chill on

competition and innovation. Moreover, this approach is in line with the philosophical underpinning of EU competition law, which tends to take a protectionist approach to the market as well as considering the removal of barriers to trade.

Although difficult to extrapolate any conclusions about the effects of the *Portanier Brothers* judgment on the market, the judgment itself, even if short, shows how an effects based approach might work in practice. Unfortunately, it is difficult to use the results in the judgment to draw any generic principles on the effect that an effects-based approach would have on small jurisdictions. There is however no reason to believe that sanctioning of conduct which forecloses competition, whilst allowing conduct which does not, would not be beneficial to small jurisdictions. Indeed, given the benefits of the approach outlined above, it can be safely argued that this approach would profit small jurisdictions.

WHAT IS REFUSAL TO SUPPLY?

Generally, an undertaking can lawfully refuse to enter into contractual relations with another. It is a general principle of EU and Member State law that undertakings have a right to choose with whom they contract.[1] The freedom to contract includes the freedom not to contract, and this is diametrically opposed to any obligation to supply, which implies no such freedom. The matter however complicates itself when the undertaking issuing the refusal is in a dominant position. Let us consider a few scenarios.

An undertaking 'A' produces and sells blodgets. Blodgets are used as an input in the production of widgets. A is the largest supplier of blodgets on the relevant market. A has been selling blodgets to undertaking 'B' for the last five years. A has recently entered the market for the production and sale of widgets through a wholly-owned subsidiary, undertaking 'C'. Since doing so, A has stopped supplies to B, because most or all of its supplies of blodgets are being used by C. Does B have a right to claim that A is abusing its dominant position on the market?

An alternative scenario is where A has no use for blodgets itself, because it is not in the market for widgets whether directly or through a subsidiary. Although B has been buying blodgets from A for the last five years, B is looking at alternative sources for blodgets, even though A

[1] Opinion of Mr Advocate General Jacobs delivered on 28 May 1998 in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*:EU:C:1998:264; Romano Subiotto and Robert O'Donoghue 'Defining the scope of the duty of dominant firms to deal with existing customers under Article 82EC' (2003) 24(12) ECLR 683, 683; Richard Whish and David Bailey *Competition Law* (9th edn, OUP 2018) 713; Alison Jones, Brenda Sufrin and Niamh Dunne *Jones & Sufrin's EU Competition Law: Text, cases and materials* (7th edn OUP 2019) 484

is the leading supplier. B realises that there is a gap for blodgets on the market, and therefore it enters into a joint venture agreement with another undertaking 'D' to start producing blodgets. Although B now has another source for blodgets, it still requires blodgets from A in order to meet the demand for widgets. However, A is unwilling to continue to supply it with blodgets once B is competing with it, through the joint venture, for the production and supply of blodgets. Can A legitimately stop supplies to B in this case?

What about when B is a bad debtor – or when B drags its feet when paying invoices? Or what if A is admittedly an unavoidable trading partner, however B, who still requires its products, denigrates A's blodgets in the market? Or what about the case where A suspects that B is aiding another undertaking in producing counterfeit blodgets, made to resemble A's blodgets, but A has no proof?

Yet another scenario is where undertaking 'X' is the owner of the only facility for the production of blodgets. X used to be a state monopoly, however it was privatised in the liberalisation drive occurring throughout the EU in the 1990s. Undertaking 'Y' also wants to produce blodgets, but to do so, it requires access to X's facility. Can X legitimately refuse to give Y access to its facility? What about in cases where X is not a previous state monopoly, but an undertaking which started its business from scratch?

These are some of the many questions that arise when dealing with refusal by a dominant undertaking to supply or to give access to an infrastructure. The body of case law of the CJEU on abuse of a dominant position in this area is one of the more finely balanced, possibly precisely because of the legal principle of the freedom to contract.

In the light of this it is likely that the CJEU always felt it had to tread carefully before circumscribing this right and concluding that there is abuse for refusing to contract with a third party. The case law on refusal to supply is in fact among the most pragmatic and effects based when compared to the other types of abuses. Unlike the 'form-based' abuses, there are clear limits as to when conduct which constitutes refusal can be considered to be abusive, although this trend is more visible when considering access to an infrastructure or a facility, than when considering the cessation of supplies to an existing customer.[2] However, the Commission has recently started to expand its power to sanction dominant undertakings for refusal to supply under more questionable principles, as will be discussed in this Chapter.

The case law on refusal to supply is germane to small jurisdictions. A recurring leitmotif in this thesis is that in small jurisdictions there is a higher incidence of dominant undertakings. Therefore the case law regulating when dominant undertaking can refuse to supply their customers is important to operators in small jurisdictions; both those considered dominant (in order to know what they can and cannot do) and those which are not (in order to determine when a dominant supplier is abusing its position). Due to size constraints, in small jurisdictions there are more likely be dominant undertakings which control a particular infrastructure which cannot be replicated, often simply because there is not enough space. Moreover, the likelihood of natural monopolies is higher, and where an upstream market is a natural monopoly, the input is more likely to be indispensable or even an essential facility. Therefore, the case law on refusal to supply, in particular in the case of refusal to give access to an essential facility, is pertinent when considering abuse of a dominant position in small

[2] In this thesis, the terms 'refusal to supply' and 'cessation of supplies' within the context of supplies to existing customers will be used interchangeably.

jurisdictions. Because of its greater likelihood of applicability, the effect of this case law on small jurisdictions has to be carefully assessed.

This chapter is structured as follows. The abuse of refusal to supply in EU competition practice will first be considered: both in its origins, as refusal to supply an existing consumer, and its evolution, as refusal to supply a new customer, and give access to an infrastructure or an 'essential facility'. The current state of the case law will therefore be assessed. It will then be shown how these two types of refusal are essentially the same species of abuse. The pre-requisites for finding an abusive refusal are assessed. The assessment of refusal to supply will be considered, and the notion of objective justification in this context analysed. Before concluding, the effect of the only decision in Malta on refusal is considered.

Refusal to give access to intellectual property rights (IPRs) will not be considered, for various reasons. First of all, this type of abuse is clearly identifiable, and distinct from other types of refusal. There is a distinct line of case-law which governs this type of abuse, which, although developed on the basis of the principles contained in the types of refusal considered herein, has now taken on its own trajectory. Consequently, there is also an ever growing body of literature on this type of abuse,[3] which means there is little scope to expand thereon. This

[3] David Howarth and Kathryn McMachon '"Windows has performed an illegal operation": the Court of First Instance's judgment in Microsoft v Commission' [2008] ECLR 117; Steven Anderman 'The epithet that dares not speak its name: the essential facilities concept in Article 82 EC and IPRs after the Microsoft case' in Ariel Ezrachi (ed) *Article 82 EC: Reflections on its recent evolution'* (Hart Publishing 2009); Cyril Ritter 'Refusal to deal and essential facilities: does intellectual property require special deference compared to tangible property?' (2005) 3 *World Competition* 281; Christian Ahlborn and David S Evans 'The Microsoft judgment and its implications for competition policy towards dominant firms in Europe'' (2008-1009) 75 Antitrust Law Journal 887; D Beard '*Microsoft:* what sort of landmark' (2008) 4 Competition Policy International 39; James Venit 'The IP/Antitrust interface after *IMS Health* ' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) *European Competition Law Annual* 2005; F Fine 'NDC/IMS: A logical application of the essential facilities doctrine' [2002] ECLR 457; Pierre Larouche 'The European Microsoft case at the crossroads of competition policy and innovation comment on Ahlborn and Evans' (2008-2009) 75 Antitrust Law Journal 933; Fabio Domenico and Michela Angeli 'An analysis of the IBM commitment decision concerning the aftermarket for IPB mainframe companies' (2012) 1 Competition Policy Newsletter; Joost Houdijk 'The IMS Health ruling: some thoughts on its significance for legal practice and its consequences for future cases such as Microsoft' (2005) 6(3) European Business Organization

issue is related to a second reason why refusal to supply IPRs is not being considered, namely that the issues that arise with refusal to give access to IPRs are not any different whether the relevant market is small or otherwise. A small jurisdiction is not impacted any differently than a large market with this type of refusal, because this type of refusal is linked to intangible property and IPRs not to physical size, and any dominance and/or foreclosure arising therefrom, may exist in both small and large markets. There is no greater likelihood of a preponderance of IPRs depending on the size of the market, as is the case with the other types of abuse. Therefore, its contribution to this thesis would be very limited.

REFUSAL TO SUPPLY IN EU COMPETITION PRACTICE

In EU competition practice, there is no doubt that refusal to supply may in certain circumstances constitute an abuse of a dominant position. Case law has somewhat clarified in which circumstances this is the case, although there remains some doubt as to which assessment should be carried out in which case.

On the contrary, in US antitrust law, there is some doubt as to whether a person has a 'duty to deal' or, more pertinently, whether there is this obligation in a unilateral context. The case law has given conflicting answers. The doctrine on 'duty to deal' in US antitrust law originally developed within the context of Section I of the Sherman Act, that is under the rule which prohibits anti-competitive agreements. Conversely, the obligation to supply in EU competition law was established under the auspices of Article 102 TFEU, whilst case law under Article 101 TFEU which can be considered as involving refusal is normally, although not

Law Review 467; Mattias Ganslandt 'Intellectual property rights and competition policy' (2008) 2 Frontiers of Economics and Globalization 233; Bo Vesterdorf 'IP rights and competition law enforcement questions' (2013) 4(2) Journal of European Competition Law & Practice 109

exclusively, considered within a different context, and thus requires a different assessment– it is generally either considered as exclusive dealing[4] or selective distribution.[5]

Within the context of Section I, an 'essential facilities doctrine' saw the light of day in US antitrust law, which according to the seminal article by Areeda effectively means that:

> (1) whenever competitors jointly created a *useful facility*, (2) that is essential to the *competitive vitality of rivals*, (3) and (perhaps) essential to the *competitive vitality of the market*, (4) and admission of rivals is *consistent* with the *legitimate* purposes of the venture, then (5) the collaborators must admit rivals on *relatively equal* terms.[6]

However, Areeda himself pointed out that these principles cannot automatically be said to govern unilateral conduct.[7] One of the few cases which imposed an obligation to supply on a company was *Aspen Skiing*,[8] where the court was impressed by the fact that the firm in question had ceased cooperation; its previous cooperation had implied that cooperation was efficient and practical.[9]

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[4] Dealt with in Chapter 4. See also Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for competition lawyers* (OUP 2011), 261 and Derek Ridyard 'Essential facilities and the obligation to supply competitors under the UK and EC competition law' (1996) 17(8) ECLR 438, 444-445

[5] Hans Henrik Lidgard 'Unilateral refusal to supply: an agreement in disguise?' (1997)18(6) ECLR 352; MB Cox 'Apple's exclusive distribution agreements: a refusal to supply?' (2012) 33(1) ECLR 11. See also Christopher Stothers 'Refusal to supply as abuse of a dominant position: essential facilities in the European Union' (2001) 22(7) ECLR 256, 256, where the author does not deal with refusal to supply under Article 101 TFEU because he believes they raise different issues. Indeed, the cases on selective distribution and exclusive dealing raise different issues, both from an analytical and a practical point of view. They will not be dealt with in this chapter for that reason. Conceptually, it might be possible to have a refusal to supply in terms of Article 101 TFEU which arises where a few undertakings agree not to supply another undertaking. It is likely however that this would be viewed as a cartel which limits output rather than as refusal to supply *per se*. Again, this would require a different analytical framework than that adopted under Article 102 TFEU.

[6] Phillip Areeda 'Essential facilities: an epithet in need of limiting principles' (1990) 58 Antitrust Law Journal 841, 844

[7] *Ibid*

[8] *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585, 601 (1985)

[9] Areeda (n 6) 849. See also *Verizon Communications Inc., Petitioner v Law Offices Of Curtis V. Trinko, LLP 540* U.S. 398 (2004), Part III; Ulf Muller and Anselm Rodenhausen 'The rise and fall of the essential facility doctrine' (2008)29(5) ECLR 310, 313

The principles in *Aspen Skiing*[10] were guardedly referred to in *Trinko*,[11] where the Supreme Court recognised that under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate Section 2.[12] However, the Supreme Court expressed concern about the virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.

Moreover, with specific reference to the essential facilities doctrine, the Supreme Court in *Trinko* held that: '[w]e have never recognized such a doctrine (....), and we find no need either to recognize it or to repudiate it here'.[13] So whilst stating that it has not recognised the doctrine, it left the door open to do so in the future, leaving the question unanswered. So far, this doctrine has only been accepted and applied by the lower courts.

This discussion is absent in EU competition law,[14] and it is fair to say, even if it is a simplified generalisation, that at the same time that EU competition law expanded on refusal to supply, US antitrust law has been characterised by a retreat.[15]

The doubt that remains in EU competition law is whether the elements that have to be satisfied for there to be an unlawful refusal to grant access, as laid out in *Bronner*,[16] should be applied to all refusal cases, including where there is refusal to supply an existing customer. Linked to this is the question raised in academic circles as to whether, within the scope of

[10] n 8
[11] n 9
[12] Part III
[13] (n 11) Part III
[14] On this aspect, see also Barry Doherty 'Just what are essential facilities?' (2001) Common Market Law Review 397, 404
[15] See Whish and Bailey (n 1) 722-723
[16] Case C-9/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* EU:C:1998:569
The elements are considered in further detail below.

'refusal' as an abuse, there is currently one line of case law, two or three. Some view the body of case law which developed under the rubric 'refusal to supply' as a coherent whole, with the cases naturally developing in response to a better understanding of market forces and to the development of new markets.[17] Others consider the refusal to supply existing customers as being completely separate from cases where the abuse concerns the refusal to give access to an essential facility and the refusal to license IPRs.[18]

The more common approach, and the approach taken by the Commission in the Discussion Paper,[19] is to consider three distinct 'streams': refusal to supply existing customers, refusal to supply new customers and refusal to license IPRs.[20] On the strength of the wording used by the Commission in the Discussion Paper, as well as that used by the CJ in *United Brands,*[21] *Commercial Solvents*[22] and more recently *Sot Lelos*[23] it is submitted that this is the correct approach and will be adopted here. In reality any nomenclature currently used to analyse the

[17] Ekaterina Rousseva *Rethinking exclusionary abuses in EU competition law* (Hart 2010), Chapter 3; Sebastien J Evrard 'Essential facilities in the European Union: *Bronner* and beyond' (2004) 10 Colum J Eur L 491; Ritter (n 3); Doherty (n 14) 435; Antonio Capobianco 'The essential facility doctrine: similarities and differences between the American and the European approach' (2001) 26(6) European Law Review 548 in particular at 553. On the idea that the nomenclature is unhelpful, even nomenclature that distinguishes between abuses, see Pablo Ibáñez Colomo 'Indispensability and abuse of dominance: from *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*' [2019] 10(9) Journal of European Competition law & Practice 532.

[18] See Ritter (n 3), although he himself views the case law as one whole; Renato Nazzini *The Foundations of European Union Competition Law: The objective and principles of Article 102* (OUP 2011), 272; Subiotto and O'Donoghue (n 1). Muller and Rodenhausen (n 9), clearly view IPR cases as part of the refusal to grant access cases. On the idea that there is a difference between the application of the 'refusal to supply' idea to one market versus two market situations see Csongor Istvan Nagy 'Refusal to deal and the doctrine of essential facilities in US and EC competition law: a comparative perspective and a proposal for a workable analytical framework' (2007) 32 European Law Review 664, 674 and 680; Nazzini (n 18) 261 and 270 sees a dichotomy between refusal to supply IPRs and other refusals.

[19] 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' (December 2005), Section 9

[20] See Jones, Sufrin and Dunne (n 1) 485 et seq and Angelo Castaldo and Antonio Nicita 'Essential facility access in US and EU: drawing a test for antitrust policy' < https://ssrn.com/abstract=877135 > accessed 9 May 2020, 5.

[21] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* EU:C:1978:22 , where reference is made to "a long-standing customer" (para 182)

[22] Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* EU:C:1972:70, where reference to made to the downstream operator being a "customer" (para 25)

[23] Case C-468 – 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* EU:C:2008:504, where the CJ speaks of an "existing customer" (para 34)

decided cases is somewhat irrelevant, given that the first two streams are really two twigs from the same branch; in that whilst distinct, they are informed by the same principles and their treatment in practice should be similar. First however, they will be considered individually, and an attempt at rationalising the decided cases will be made. It has already been noted that refusal to supply IPRs will not be considered here, and in this Chapter reference to refusal to supply is taken to refer only to refusal to supply existing customers and refusal to supply new customers.

THE ORIGINS OF REFUSAL TO SUPPLY AS AN ABUSE: REFUSING TO SUPPLY AN EXISTING CUSTOMER

Most of the early cases where refusal was considered an abuse of a dominant position concerned cases where a dominant undertaking refused to supply an existing customer. In *Sot Lelos,* the CJ held that:

> the refusal by an undertaking occupying a dominant position on the market of a given product to meet the orders of an existing customer constitutes abuse of that dominant position under Article [102 TFEU] where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor.[24]

This definition effectively captures the two broad classes which make up this (artificial) category of refusal cases, namely when refusal is the result of the dominant undertaking entering the downstream market, and when it is a 'punishment'. In fact, in these cases, the dominant undertaking either stopped supplies because it wanted to start producing the

[24] n 23, para 34.

derivative product itself, in competition with its customers[25] or as punishment because the customer showed interest in a competitor's products, or had started competing with the dominant undertaking itself.[26] Table 6.1 lists these cases in chronological order and indicates why the refusal was effected.

The principle which derives from the decided cases is, put simply '(…)that once a dominant company has begun dealing with a third party, Article [102] will prevent it from refusing to continue to deal with it if such refusal is based on some anti-competitive purpose.'[27]

This principle is perhaps more the result of the cases the EU institutions had to deal with than anything else. Although abuse is an objective concept, it is evident that the underlying reason for refusal in each of the decided cases where there was a finding of abuse indicated foreclosure. Be that as it may, the result is that as EU competition law currently stands, a dominant undertaking who has already supplied a customer is obliged to continue to supply that customer the same quantities unless it has an objective justification for stopping. Effectively, this type of refusal appears to be a form based or *per se* type of abuse. In the Discussion Paper, the Commission indicated what in its view, is the *raison d'être* for this. It noted that the fact that the dominant company in the past:

[25] *Commercial Solvents* (n 22); IV/29.132 *Hugin/Liptons* 8 December 1977 [1978] OJ L22/23, although revoked on appeal in Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities* EU:C:1979:138. This was defined in *Commercial Solvents* (para 25): "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 is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer(…)".

[26] *United Brands Company* (n 21); 87/500/ECC Commission decision of 29 July 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/32.279) *BBI/Boosey & Hawkes: Interim measures)* (1987) OJ L286/36. This conduct was defined in *United Brands* (para 182): "an undertaking in a dominant position for the purpose of marketing a product – which cashes in on the reputation of a brand name known to and valued by the consumers – cannot stop supplying a long standing customer who abides by regulated commercial practice, if the orders placed by that customer are in no way out of the ordinary."

[27] Romano F Subiotto 'The right to deal with whom one pleases under EEC competition law: a small contribution to a necessary debate' (1992) 13(6) ECLR 234, 234

> has found it in its interest to supply an input to one or more customers shows that the dominant company at a certain point in time considered it efficient to engage in such supply relationships. This and the fact that its customers are likely to have made investments connected to these supply relationships create a rebuttable presumption that continuing these relationships is pro-competitive.[28]

It appears therefore that in the Commission's mindset, once there is an existing relationship, there is a 'rebuttable presumption' that the dominant undertaking has an obligation to continue supplies. The reasoning adopted by the Commission in the Discussion Paper is similar to the Supreme Court's reasoning in *Aspen Skiing*:[29] an existing relationship means that for the dominant undertaking to supply its customer is efficient and therefore non-supply has to be anti-competitive. It is not clear from its statement whether this rebuttable presumption exists only when customers have made investments in relation to these supply relationships, or whether this is simply an additional element that would indicate foreclosure. The latter is likely the case. Given that this reasoning is missing from the Guidance Paper, it is not clear whether the Commission is still of this opinion.

This reasoning is an oversimplification of what actually happens on the market, where company policies on supply do change with time, but it is likely that the Commission was influenced by the cases which had been decided by it and the CJEU, where it was quite clear that supplies were being ceased for the purpose of foreclosure, and indeed had that effect or were likely to have that effect. Technically, cases where the dominant undertaking has to stop supplies for a good reason, for instance because of a shortage, should either not be

[28] Para 217. Sustained by Subiotto and O'Donoghue (n 1), 688
[29] n 8

considered as abusive in the first place, or, at least, objectively justified. However, cases where company policy changes because a dominant undertaking has decided to enter a downstream market would be more difficult to justify, since these tend to indicate leverage of a dominant position on one market in order to enter another. Therefore although the dominant undertaking would need the input for itself, it is likely that a competition authority or court would, rightly or wrongly, take the view that it is foreclosing the downstream market. On the other hand, in cases where the dominant undertaking is not mainly involved in the supply of the input, but acquires the input to use itself, and as a 'side-line' also provides the input to third parties, the supplier should be allowed to refuse supplies where these are required internally. However the case law does not make any distinction between these cases, and the burden remains on the dominant undertaking who ceases supplies to prove that there is no likely foreclosure of the market; a potentially difficult task.

To be fair, claims based on the cessation of supplies is one of the few areas where the CJ and the Commission have been open to taking a more pragmatic approach to foreclosure. For instance in *BP,* [30] the CJEU overturned the Commission decision because, since the complainant was an occasional customer, BP could not be considered to have applied less favourable treatment to the complainant during the crisis than that it reserved to its traditional customers.[31] This pragmatic approach is likely the result of the influence of general principle of freedom to contract.

[30] Case 77/77 *Benzine en Petroleum Handerlsmaatschappij BV and others v Commission of the European Communites* EU:C:1978:141
[31] *Ibid,* para 32

However, cases such as *BP*[32] are rare and there are very few cases where a dominant undertaking who ceased supplies was not considered to have abused its position on the market. Therefore, a dominant undertaking should likely err on the side of caution and either not supply at all, or else take the view that once it supplies a customer, it should continue doing so, even if it does so with some difficulty, unless it is willing to risk a competition claim. Indeed, it is interesting to note that most of the cases which can be categorised within this field were decided before the early 90s, which seems to imply that dominant undertaking are today wary of acting in breach of this prohibition.

This approach, which is essentially a blanket prohibition of refusals to supply existing customers, raises problems. Firstly, dominant undertakings may simply not supply in the first place, to avoid the aggravation of having to deal with a claim that they have abusively stopped supplies in the future,[33] when their plans might have changed. Secondly, the distinction made in the decided cases between refusing to supply an existing customer and refusing to supply a new customer is unjustified, as in both cases, the dominant undertaking is disposing of its property and therefore in both cases interfering with its freedom to do so risks reducing investment incentives.[34] It is true that previous supplies raise the expectation in the customer that supplies will continue for the foreseeable future. However, no trading party can have the expectation of supplies beyond the contractual period agreed upon. Termination of supplies during a pre-defined contractual period, *without just cause*, is if anything more indicative of abuse then non-supply following expiration of a contract.

[32] *Ibid*
[33] See Areeda (n 6) 849; Nazzini (n 18) 272; Ridyard (n 4) 449; Ian S Forrester 'Article 82: Remedies in Search of Theories?' (2004) 28(4) Fordham International Law Journal 919, 928
[34] Nazzini (n 18), 272

The effect of this blanket prohibition on small jurisdictions can be devastating. In a market which is already limited, fostering an environment where dominant suppliers do not supply inputs for derivative products, or reducing investments is out of the question, as it is only through such methods that the market can grow (to the extent that it can do so). A possible counter-argument to this is that in reality, a dominant undertaking on a small jurisdiction is perhaps less likely to stop supplies: an undertaking in a small jurisdiction, even if dominant, is itself limited in how to make profits, precisely because of the limited size of the market. Therefore, it may be argued that a dominant undertaking in a small jurisdiction would not be deterred from supplying because of fear of future claims should it stop supplies, possibly unless it is already considering entering the derivative market itself. Moreover, it might be argued that having a near automatic finding of abuse when supplies to existing customers cease may be advantageous to small jurisdictions since it means that the flow of supplies is encouraged to continue unless there is a genuine reason for it not to.

However, there is a major issue with this line of thinking in small jurisdictions. In such markets, the capacity of dominant undertakings is also limited, and their own supplies might be restricted or subject to costs which would not be present in a larger market such as importation costs and expenses; a higher price due to lower volumes requested; higher rents or costs for storage where space is an issue. Therefore there are additional market factors which should be considered before obliging a dominant undertaking to continue supplying an existing customer. Given the current state of the case law, dominant undertakings in small jurisdictions, in particular those whose main line of business is not the supply of the input, need to consider carefully their capacity, their own requirements and their costs when

accepting to supply their very first customer, or they might find that they are unprofitably locked in to continued supplies.

This prohibition on refusing supplies to existing customers appears to be limited in one significant way. Additional quantities requested by the customer, or orders which are out of the ordinary, may be refused. This limitation should ensure that the dominant undertaking is able to safeguard its profitability.[35] Judging by the decided cases, in these circumstances, the competition authority or court would likely thoroughly assess any claim that the refusal is abusive. This is what happened in *BP*[36] and *Sot Lelos*[37] respectively. Unfortunately, these cases are not quite clear.

In *Sot Lelos*, the CJ seems to have intermingled the question of objective justification and that of finding an abuse in the first place.[38] Although the Advocate General had argued in favour of a move away from a formalistic approach, his analysis was not adopted by the CJ.[39] Indeed, it is difficult to effectively determine what the judgment is saying: it has rightly if bluntly been described as a 'work of art because it largely avoids taking a firm view.'[40] If one were to try to make sense of it however, it would appear that the Court is effectively saying that the refusal to supply extra quantities is abusive, particularly if it restricts parallel trade,[41] but may be justified where the order is out of the ordinary. This is rather a circular argument, and

[35] Subiotto and O'Donoghue (n 1), 689
[36] n 30
[37] n 23
[38] This issue is considered further when the question of 'objective justification' is analysed below.
[39] See Ariel Ezrachi *EU Competition Law: An Analytical Guide to the Leading Cases* (5th edn, Hart 2016), 222
[40] Robert O'Donoghue and Louise Macnab 'Dominant firms' duties to deal with pharmaceutical parallel traders following *Glaxo Greece*' (2009) 5(1) Competition Policy International 153, 154
[41] Nazzini (n 18) 193; O'Donoghue and Macnab (n 41)160

does not provide any guidance whatsoever to dominant undertakings wishing not to supply extra quantities.

Neither can much guidance be found in *BP.*[42] In that case, the CJ did not decide the case on the principles of refusal to supply, but rather on principles of discrimination, namely that the dominant undertaking was treating an occasional customer differently from traditional customers, and that it was entitled to do so, given also the crisis in the market at the relevant time. This case therefore seems to be very much the result of its facts.

As a result, currently EU competition law mandates that once a customer is being supplied, a dominant undertaking cannot stop supplies unless it has an objective justification for doing so, which is difficult to prove. In the event that the customer requests additional supplies, it appears that the dominant undertaking can refuse such additional supplies, although it is not clear in which circumstances it may do so.

EVOLUTION: REFUSING TO SUPPLY NEW CUSTOMERS, AND THE QUESTION OF ACCESS TO ESSENTIAL FACILITIES

Interestingly, around the same time that cases on refusal to supply an existing customer started to die off, cases on refusal to supply new customers flourished, although hints of these cases can be found in earlier case law. A few cases decided on the basis of Article 101 TFEU (see Table 6.2), can also be considered to have involved a refusal to supply new customers. It is within the context of such cases that the term 'essential facilities'[43] began to be bandied

[42] n 30

[43] The term 'essential facilities' has to date never been uttered by the CJEU. It has only been used by the Commission. In IV/34.174 *Sealink/B&I – Holyhead: Interim Measures* 11 June 1992, the Commission defined an essential facility as being "a facility or infrastructure without access to which competitors cannot provide services to their customers" (para 41).

about in EU competition law, generally because of the implied notion that a dominant undertaking can only be obliged to supply a new customer if it owns an essential facility.

In cases involving a refusal to supply a new customer and/or refusal to grant access to an essential facility, the received wisdom is that in terms of EU competition law the competition authority or court has to consider three elements,[44] often referred to as 'the *Bronner* criteria', since they were first laid out in *Bronner*[45]. In *Bronner* the CJ noted that what was required for abusive refusal was that (i) the conduct in question was likely to eliminate all competition on the part of the undertaking requesting access;[46] (ii) that the refusal is incapable of being objectively justified;[47] and that (iii) the service or input be indispensable to carrying on the downstream business, inasmuch as there is no actual or potential substitute for it.[48] It is only if the conclusion is positive with respect to all these elements that it can be said that a dominant undertaking is abusing its dominance.

The truth is however, that these elements were only really considered in two cases: *Bronner* and *Clearstream.*[49] The current approach to this type of refusal is much more fluid. In *Telekomunikacja Polska*,[50] the Commission paid lip service to the *Bronner* criteria, but there is very little attempt on its part to actually apply them, and indeed it notes that they need not be considered in all cases, hinting that they did not need to be considered in that case.[51]

[44] Whish and Bailey (n 1), 716; Guidance Paper para 81; Jones , Sufrin and Dunne (n 1) 493
[45] n 16
[46] *Ibid,* para 38 and 41
[47] Para 41
[48] Para 41
[49] Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* EU:T:2009:317
[50] COMP/39.525 22 June 2011
[51] *Ibid,* para 704

Even worse, in *Slovak Telekom*,[52] the Commission purposely discarded them. It relied on *TeliaSonera*,[53] and stated that the *Bronner* criteria are not applicable to all refusal to supply cases, such as constructive refusal cases.[54] This statement is erroneous and illogical. *TeliaSonera* is a margin squeeze case, not a refusal to supply case, and even within that context it is considered controversial for its conclusion that indispensability of the input is not a necessary element to finding abuse.[55] Within the context of refusal to supply, such a statement is unacceptable. Staggeringly this line of reasoning has been accepted by the GC on appeal.[56] The GC distinguished between *Bronner* and similar cases, where there was no regulatory obligation to supply, from cases, such as *Slovak Telekom* where there is such a duty.[57] This regulatory duty, according to the GC, meant that access to the local loop was automatically indispensable.[58]

Whilst it is true that Slovak Telekom had a regulatory obligation to supply access to the local loop, by virtue of the sectoral regulator's decision (taken pursuant to *national* law implementing an EU regulation) this does not necessary mean that the access was indispensable. Downstream operators may well be able to acquire access from other sources, meaning that should be no EU competition law obligation to supply.

The Commission seems to have been influenced by the fact that in this case the infrastructure was paid for by public funds and by the fact that the undertaking was already obliged by regulation to provide access.[59] This however is irrelevant. In the first place, whether an asset

[52] Case AT/39523; 15 October 2014
[53] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83
[54] *Ibid,* para 365, 370
[55] See p 297-301
[56] Case T-851/14 *Slovak Telekom as v European Commission* EU:T:2018:929
[57] *Ibid,* para 118 and 119
[58] *Ibid,* para 121
[59] *Ibid,* para 370

has been developed by the private sector, or by the government is neither here nor there. Upon privatisation, the undertaking acquiring the asset from the government is paying for that asset. If one accepts that the privatisation process was carried out correctly, then the acquiring undertaking effectively invested in that asset, and is as much an owner of that asset as a private company that develops it itself. Therefore, there should be an obligation to supply in the same circumstances, irrespective of who carried out the actual development or originally invested.[60] The only thing that an infrastructure built by public funds may be able to prove is that it is not economically viable to replicate, and is therefore indispensable – however this is not an automatic finding, since the economic situation may have changed dramatically from the date that the infrastructure was built to the date that the alleged abuse has occurred, meaning that duplication could in any case be possible at the relevant time.[61]

Secondly, whether access was mandated by sectoral regulation or not is irrelevant for the purposes of determining whether there is an antitrust obligation to supply. If access is mandated by (sectoral) legislation, and the dominant undertaking disregards it, it is up to the sectoral regulator to assess the situation and take steps to remedy it, not the competition authorities. The GC's attempt to link the regulatory duty to supply with the indispensability requirement is a clear attempt to sanitise the Commission's decision – but unfortunately is nonsensical! Sectoral regulators are driven by different policy considerations than antitrust authorities, and the existence of an obligation to supply in one respect should not affect the other.

[60] Even in cases where the dominant undertaking is a government entity, there can be no coherent argument for applying different criteria when mandating access, unless the government is making use of its legislative powers in order to retain the market to itself. That would likely be an issue which would have to be considered in terms of Article 106 TFEU, perhaps together with Article 102 TFEU, and is outside the scope of this thesis.
[61] See Evrard (n 17) 32

Indeed it is a pity that the *Bronner* criteria are not being consistently applied, given they make economic sense. Requiring a complainant, or an undertaking requiring access, or the competition authority to prove that "it is either physically impossible or economically too expensive to duplicate the alleged 'essential facility'",[62] counteracts the risks involved with a lenient approach, namely 'the potential negative effects on dynamic efficiency and consumer welfare'.[63] In other words, more lenient criteria where the indispensability of the input is not required, will actually work against the very objectives of competition law. And yet this is what the Commission and the GC are advocating in *Slovak Telekom*.

It seems that the Commission is more interested in retaining the power to scrutinise conduct it does not approve of, even if it is not anti-competitive or foreclosing competition. Therefore, the rules change, and they become more lenient when convenient. This is a problem both conceptually – since there is no legal certainty – but also in practice – since dominant undertakings are unclear about the rules, and, even worse, the Commission may take steps which are actually not aiding competition. At best, the Commission is taking a 'static view' of the market,[64] and looking only at the short-term benefits of mandating access, rather than considering the long-term effects on the market of doing so.

The approach taken in *Slovak Telekom*[65] is dangerous in small jurisdictions. If the *Bronner* criteria are not applied religiously in small jurisdictions, in particular the requirement that the input be indispensable, claims for access will multiply where no such access is necessary – this leads not only to deterrence of investment by the dominant undertaking but also free-riding

[62] Roger J Van den Bergh and Peter D Camesasca *European Competition Law and Economics: A comparative perspective* (2nd edn, Sweet & Maxwell 2006), 280
[63] *Ibid*
[64] See Valentine Korah 'Access to essential facility under the Commerce Act in the light of experience in Australia, the European Union and the United States' (2000) 31 Victoria U Wellington L Rev 231, 232
[65] n 52 and n 56

by non-dominant competitors and 'laziness' in innovation on the part of such competitors. Indeed, the position in *Bronner*[66] makes sense from an economic point of view because it ensures that intervention by competition authorities is 'not be[ing] used as a low-cost alternative to the more arduous and time consuming process of competing to make better products than one's rival.'[67] This is essential in any market, but more so in a small jurisdiction where resources are limited, and the creation of any new product is an asset to the economy.

TWO TWIGS FROM THE SAME BRANCH

In truth, the risks in mandating supply are the same whether the obligation is to continue supplies to existing customers or to supply new customers, or indeed whether the obligation relates to access to an essential facility: namely dampening the incentive to invest in the product that the dominant undertaking is being forced to supply and/or encouraging free-riding on the dominant undertaking's investment by competitors.

In the short term of course, mandating supplies or access might be seen as beneficial to consumers:[68] consumers may potentially be able to obtain the product in question from more than one supplier and/or access/supply might result in price competition.[69] The trade-off however is that a dominant undertaking which is forced to deal might be less willing to spend time and resources to innovate in the first place.[70] Moreover, if the obligation to supply or

[66] n 16
[67] Capobianco (n 17) 560
[68] Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for competition lawyers* (OUP 2011), 261
[69] See Ridyard (n 4) 440; Damien Geradin 'Limiting the scope of Article 82 of the EC Treaty: What can the EU learn from the US Supreme Court's Judgment in *Trinko* in the wake of *Microsoft, IMS* and *Deutsche Telekom*?' < https://ssrn.com/abstract=617263 > accessed 9 May 2020,18
[70] Niels, Jenkins and Kavanagh (n 68), 261; Bill Bishop and Alan Overd 'Editorial – Essential facilities: the rising tide'(1998) 19(4) ECLR 183; Ridyard (n 4) 440; Nazzini (n 18) 260; Geradin (n 69) 18; Rossella Incardona 'Modernisation of Article 82 EC and refusal to supply: any real change in sight? (2006) 2(2) European Competition Journal 337, 353; OECD Policy Roundtables 'The Essential Facilities Concept' (February 1996), 12; See also Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013) 516

grant access results in reduced profitability for the dominant undertaking, it might also influence its competitors who would resist investing for fear that they might have to share their innovation with third parties.[71] In more economic terms, this means that an obligation to supply or to grant access may be beneficial to a static economy, but harm a dynamic economy.[72] Consequently in the long term, mandating access or supplies may be harmful to competition and consequently to consumers.[73] Indeed, some economists argue that in the majority of cases, there is a stronger argument against mandating access or supplies and it is only in exceptional cases that the benefit of mandating supply or access outweighs the disadvantages.[74] Although this may be true in larger markets, it is likely that in smaller markets there will be a higher incidence of circumstances in which access is mandated because the pro-competitive effects outweigh the risks of doing so.

On the other hand, there are those that believe that mandating access will only ensure that a dominant undertaking will not exert monopoly rents, and that, as long as access is mandated at market rates, then the incentive to innovate should not be affected in any way.[75] This, it is claimed, should have beneficial dynamic effects on the market.[76] What this alternative view does not consider is how market rates could be established for something which is so unique and indispensable that access has to be mandated; in effect there can be no such thing.

[71] Incardona (n 70) 368; Bishop and Overd (n 70) 183; Ridyard (n 4) 440; Nazzini (n 18) 260; O'Donoghue and Padilla (n 70) 516
[72] Stothers (n 5); Incardona (n 70) 368; Korah (n 64) 232
[73] See Bishop and Walker 322, Guidance Paper, para 75
[74] Bishop and Overd (n 70)
[75] Stothers (n 5)
[76] Stothers (n 5)

Having an obligation to supply also means that rivals may attempt to free-ride on the investment[77] made by the dominant undertaking, and indeed this may be an added disincentive to invest in the first place.[78] Free-riding in itself also reduces competition in the long term.[79] If access or supplies were mandated too easily, there would be no incentive for competitors to develop their own facilities or product.[80] Moreover, free-riding will also negatively affect the incentive to invest in facilities essential to other activities.[81] For this reason, it is essential that access to that infrastructure or product is indispensable for carrying on the activity in question.[82]

These difficulties in mandating access or supply, and the various considerations which should be carried out by a competition authority or court, were considered in detail by Advocate General Jacobs in his opinion on *Bronner*.[83] He noted that the primary purpose of Article 102 TFEU is to prevent distortion of competition, and safeguard consumers, not to protect competitors.[84] Indeed, his premise is that:

> [i]n 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[85]

[77] The investment made by the dominant undertaking may not necessarily be reflected in the price, particularly since dominant undertakings are precluded from exploitative/excessive pricing. The price may also be mandated by law or regulation.
[78] Guidance Paper, para 75; Whish and Bailey (n 1), 713; Nazzini (n 18) 260; Incardona (n 70) 353
[79] Capobianco (n 17) 559; Nazzini (n 18)260
[80] Capobianco (n 17) 559; Nazzini (n 18) 260
[81] Korah (n 64) 232
[82] See Capobianco (n 17) 560
[83] n 1, para 57 to 62
[84] Para 58
[85] Para 57

precisely because otherwise, there would be no incentive for competitors to develop competing facilities, thereby reducing competition in the long term, and the incentive for dominant undertakings to invest in efficient facilities would be reduced.[86] He appears to believe that the indispensability of the product or access is essential for a finding of abuse.[87]

From the above, it is sufficiently clear that the negative effects of mandating access or supply do not change whether this is within the context of supplies to new customers or the cessation of supplies to existing customers. The same can be said for the reasons for which supply or access should be mandated. There can be no doubt that any type of refusal will bring about some foreclosure in a market. Naturally, this lessens competition, as it impedes entry.[88] This is true, irrespective of whether one is stopping supplies to an existing customer, or refusing supplies to new ones.

If dominant undertakings behave as rational operators, they would in fact supply customers.[89] If a dominant undertaking refuses supplies, then either (i) it has a legitimate reason for doing so[90] – indeed, often there are reasonable explanations for refusals,[91] or (ii) the dominant undertaking is attempting to increase its market power and exploit the market.[92] This is true irrespective of whether the refusal is to supply a new or an existing customer. EU competition law should be less concerned with who the dominant undertaking is supplying, and more

[86] Para 57

[87] Para 61, where Advocate General Jacobs notes "access [being] a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability"

[88] Simon Bishop and Mike Walker *The economics of EC competition law: concepts, application and measurement* (3rd edn, Sweet & Maxwell 2010) 323

[89] Nagy (n 18) 680; John Temple Lang 'Defining Legitimate Competition: Companies' duties to Supply Competitors and Access to Essential Facilities' (1994) 18(2) Fordham International Law Journal 437, 475; Antonio Bavasso 'Essential facilities in EC law: the rise of an 'epithet' and the consolidation of a doctrine in the communications sector' (2001) 21(1) Yearbook of European Law 63, 103

[90] Temple Lang (1994) (n 89) 475

[91] Whish and Bailey (n 1) 714; Temple Lang (1994) (n 89), 475

[92] Nagy (n 18) 680; Temple Lang (1994) (n 89) 475;

concerned with distinguishing lawful refusals from unlawful – and abusive – ones, particularly in smaller markets, where the negative effects of over enforcement are likely to be magnified due to size.

Therefore, it makes absolutely no difference whether the refusal is directed towards a new customer or an existing one. In all cases, the dominant undertaking has rights over the good or facility in question, in most cases of ownership. Similarly, if a dominant undertaking provides a service, that service, although intangible, is effectively within its control, and it is up to the undertaking in question to determine whether it wishes to enter into a contract or not. The same principles and the same test for abuse should therefore be applied in all cases of refusal. In this regard, there is no need for a complete overhaul of the current case law. All that is required is a consistent application of the *Bronner* criteria to all cases involving refusal. For the remainder of this section, it will be shown how this can be done within the context of the current legal framework.

PRE-REQUISITES TO FINDING AN ABUSIVE REFUSAL

An abusive refusal to supply can only occur within a specific environment. From the decided cases it is clear that the following circumstances are germane to this type of abuse, even though these are not specified as such.

I. ONE MARKET OR TWO?

In most refusal to supply cases, there are two markets, one which is identified as the 'upstream' market, and one identified as the 'downstream' market. Indeed, the way that refusal to supply is conceptualised is that one undertaking through its conduct on one market (the upstream market), affects competition on another (the downstream market). Unlike

with margin squeeze,[93] there is no need for the undertaking in question to be vertically integrated, that is, to be present in both markets, in order for the abuse to occur. For instance in the cases where refusal to supply was intended as a punishment, the dominant undertaking was only present on the upstream market, yet its refusal was affecting a market in which as such it had no (direct) interest. Cases where foreclosure is made on the grounds of nationality (*GVL v Commission*)[94], or to prohibit parallel trading (*Sot Lelos,*[95] possibly *Polaroid/SSI Europe*[96]), would also be impacting a second market. Even in most of the cases which involved aspects of Article 101 TFEU, the conduct (the refusal) tends to affect another market. [97]

There are a few cases however where the refusal was affecting the same market where the refusal was being made (horizontally). These have tended to be cases where an operator requires acceptance into a grouping (such as an association or a joint venture) in order to carry out a particular business activity.[98]

[93] See p 274

[94] Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* EU:C:1983:52

[95] n 23

[96] The facts of this case are not clear as it was reported in the Competition Policy Report. However, it appears that Polaroid was refusing additional supplies until SSI Europe informed Polaroid of the destination of these additional volumes. Polaroid's aim therefore appears to have been either to prevent parallel trading or similar.

[97] For instance, in IV/33.544 *British Midland/Aer Lingus* 26 February 1992 [1992] OJ L96/34, British Midland refused to continue to interline its tickets with Aer Lingus. The refusal was made on the 'market' (so to speak) for interlining, or rather for the sale of airline tickets (defined as the market for the sale of London (Heathrow) - Dublin air transport in both Ireland and in the UK), however British Midland's conduct affected Aer Lingus's flights, and therefore affected the market for the provision of London (Heathrow) - Dublin air transport in Ireland and the UK. This was recognised by the Commission, which noted that "the refusal or withdrawal of interline facilities (…) is objectively likely to have a significant impact on the other airline's ability to start a new service or sustain an existing service". This does not mean that there has to actually be a market – a 'hypothetical' or 'potential' market is sufficient. (see para 16, 26)

[98] Such as *Disma* where the initial agreements notified to the Commission "contained clauses preventing non-Disma companies from having access on non-discriminatory terms to the joint venture's services" (Twenty-third report on Commission Policy, para 224); IV/36.120 *La Poste-SWIFT* [1997] OJ C335/3; Amadeus/*Sabre* (Press release: IP/000/835)

II. DOMINANCE

Naturally, for Article 102 TFEU to apply, the undertaking in question must be dominant. The question is on which market does that undertaking have to be dominant? Certainly, in those rare cases where there is only one market being considered, since the refusal and the foreclosure occur on the same market, the undertaking would have to be dominant in that market.

In the more common cases where there are two markets, generally the undertaking has been found to be dominant on the upstream market. This would be in line with economic theory.[99] Reading between the lines, it is clear that the CJEU expects that the undertaking should hold a dominant position on the market for the product for which access or supply is requested for activities on another market.[100] In fact, it is difficult to conceive of a situation where this is not the case. Refusal cases are different from cases where the undertaking is interested in leveraging its strength on one market by abusive conduct in another, as in tying and bundling, and where therefore the abuse does not tend to occur on the market where the undertaking is dominant.[101]

That said, whilst in refusal cases the dominant undertaking should be dominant on the upstream market, this does not mean that it is actually operating on that market – for instance, the undertaking in question may not actually be in the business of supplying that input.[102] The view taken by the Commission[103] is that a potential demand is sufficient.[104]

[99] See Abbott B Lipsky and J Gregory Sidak 'Essential facilities' (1999) (51) Stanford Law Review 1187, 1214
[100] Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* EU:C:1985:394, para 26
[101] Case C-333/94 P *Tetra Pak International SA v Commission* EU:C:1996:436
[102] Whish and Bailey (n 1) 717
[103] Guidance Paper
[104] *Ibid,* para 79

THE ASSESSMENT OF REFUSAL TO SUPPLY

As should by now be evident, there are currently two tests for refusal to supply in EU competition law. These will be considered in turn. A test which should be applied to all refusal cases is then proposed.

TEST FOR ABUSIVE REFUSAL TO SUPPLY EXISTING CUSTOMERS

In the Discussion Paper, the Commission indicated four conditions which would normally have to be fulfilled in order to consider the cessation of supplies to an existing customer as abusive:

> (i) the behaviour can be properly characterised as termination; (ii) the refusing undertaking is dominant; (iii) the refusal is likely to have a negative effect on competition; (iv) the refusal is not justified objectively or by efficiencies.[105]

These conditions would seem to indicate that there is, in fact, no rebuttable presumption of abuse as the Commission stated in the paragraph immediately preceding this statement (discussed above).[106] A closer look at these four conditions however shows that these conditions are closer to the near automatic finding of abuse which has characterised Commission decisions and the CJEU case law to date than they first appear. If one were to ignore the element relating to dominance – which is in any case a pre-requisite for the application of Article 102 TFEU – the conditions indicated in the Discussion Paper are simply stating that there has to be cessation of supplies, that there is likely to be foreclosure of competition due to said cessation and that there is no objective justification. Indeed, these

[105] Para 218
[106] See p 227

conditions can be extracted from the definition of refusal to supply existing customers found in *Sot Lelos*.[107]

The test for this category therefore is quite straightforward. All that has to be shown is that there was an existing supply relationship which was terminated; that the termination results in some foreclosure of the downstream market (elimination of the customer is sufficient); and that there is no objective justification.

In practice, the latter condition (no objective justification) is easily satisfied. The Commission and the CJEU have taken a very strict interpretation of the objective justification defence and it has rarely succeeded. This criterion is considered in further detail below. The first condition is relatively easy to satisfy, as all that has to be shown is that the dominant undertaking used to supply the downstream operator and no longer does so. Cases where the dominant undertaking adopts delaying tactics or imposes certain unfair conditions[108] are more complicated but it would still not be too difficult to bring forward the required evidence.

The second condition, ensuring that there is actual or potential foreclosure of the market before concluding there is abuse, is really the key condition. Unfortunately, very little thought is dedicated to this element in any of the decided cases, and often, there is a finding of foreclosure with very little analysis. Indeed, it is in relation to this element that the near-automatic finding of abuse is relevant – the Commission and the CJEU appear to presume that there is foreclosure in cases where the first condition (termination of an existing supply relationship) is satisfied.

[107] n 23, para 34 of the judgment. See p 225
[108] See Discussion Paper, para 219

A more moderate approach to take, even in small jurisdictions, notwithstanding any possible benefits to a near-automatic finding of abuse, would have been for competition authorities and courts to truly consider these elements, in particular by assessing whether there is actual or potential foreclosure of the market. This would have avoided genuine cases of cessation of supplies, where no anti-competitive effect is felt, or where there is an objective justification, from being caught in the prohibition. This would be beneficial to all jurisdictions and markets, but especially to small ones in view of the peculiarities which plague them. In particular, any risk of deterrence of investment would be further minimised, meaning that small jurisdictions would be able to benefit from the best of both worlds: the creation of an environment where investment is encouraged (without fear of being obliged to continue supplies) whilst ensuring that no abuse occurs, and that therefore no foreclosure of competition occurs. Ironically, this test was applied properly in *Slovak Telekom* – which however is not a case of refusal to supply an existing customer, but a case of refusal to grant access to a new customer to essential facilities.

TEST FOR ABUSIVE REFUSAL TO SUPPLY A NEW CUSTOMER

In cases where the request for supply is by a new customer, a stricter test has traditionally been applied, namely the test elaborated in *Bronner*, discussed above.[109] These same conditions were applied in *Clearstream,* [110] and are referred to in *Telkomunikacja Polska*[111] and *Slovak Telekom*.[112]

[109] See p 233
[110] n 49, para 149
[111] n 54, para 702. In *Telekomunikacja Polska*, the Commission referred to *Clearstream* (n 49).
[112] n 52, para 361 to 363 deal with the *Bronner* criteria, which the Commission then chose not to consider.

The condition requiring that the refusal be incapable of objective justification is a familiar one, and this concept within the context of refusal to supply will be treated in more detail below. The other two conditions however are particular to this particular type of abusive refusal and have been the subject of lively discussions.

Much has been written about the criterion of indispensability, with some opining that it limits findings of abusive refusal to cases where there is a natural monopoly or an essential facility.[113] However, this is not the case. It is not what the CJ intended, and the clues are in *Bronner* [114] itself. The CJ simply concluded that the fact that other inputs are less advantageous does not mean that the input owned by the dominant undertaking is indispensable.[115] In order for an input to be indispensable there must be technical, legal or economic obstacles making it impossible or unreasonably difficult to create or establish an alternative input.[116] The test considers whether it is viable for an as efficient competitor as the dominant undertaking to replicate the input.[117] The *Bronner* criteria are actually an optimal test for abusive refusal which obliges dominant undertakings to supply only those undertakings that are more efficient than the dominant undertaking's competitive arm.[118]

It is therefore true that the criterion of indispensability effectively limits the applicability of Article 102 TFEU in refusal cases.[119] This is probably why the Commission[120] and subsequently

[113] Mats A Bergman 'The Bronner case – a turning point for the essential facilities doctrine?' (2000) 21(2) ECLR 59; Nagy (n 18) 679. It also appears to be the view of Niels, Jenkins and Kavanagh (n 68) 264. Doherty (n 14) at 424 comments on this interpretation; see also Bavasso (n 89) 68; Nazzini (n 18) 262 notes that "there is no reason to define a special category of indispensability as 'essential facilities'."
[114] n 16
[115] *Ibid,* para 43
[116] *Ibid*, para 44
[117] *Ibid* para 45 - 46; see Nazzini (n 18) 264; Incardona (n 70) 352; Whish and Bailey (n 1) 719
[118] On the fact that the optimal rule is one which mandates access to more efficient competitors, see Michal S Gal *Competition Policy for Small Market Economies* (2003 Harvard University Press), 133
[119] Whish and Bailey (n 1) 717
[120] n 52

the GC[121] in *Slovak Telekom* decided to consciously disregard it; otherwise, it would likely have found that the undertaking in question had not in fact acted in breach of EU competition law, at least as far as refusal is concerned. This recalls the argument made earlier that the Commission tends to bend the rules in order to sanction conduct it disapproves of, whether it is technically unlawful or not. This contrasts with the Commission's stated position in the Guidance Paper, where it considered refusal as an enforcement priority only if the input was objectively necessary to compete on the downstream market.[122] Why investigate Slovak Telekom in the first place if its conduct was not an enforcement priority?

However, the element of indispensability does not limit Article 102 TFEU to the extent feared. On the contrary, it is an essential requirement in order to ensure that it is only conduct which truly restricts competition which is sanctioned. This helps to maintain the delicate balance between safeguarding competition and ensuring that the innovation is not stifled. Indeed, by requiring that the input cannot be replicated, this test ensures that where possible, alternatives are created, rather than having downstream competitors free-ride on the dominant undertaking's investments. This condition creates a win-win situation for the market, and is particularly important in small jurisdictions, where resources are limited. Indeed the limitation is positive, as it ensures that EU competition law is not protecting inefficient competitors and reducing the ownership rights of the dominant undertaking.[123] Since the test does not rely on the needs of the undertaking requesting access, but on more objective criteria, it also ensures legal certainty as the dominant undertaking need only consider whether its refusal would make it impossible for an as efficient competitor to enter

[121] n 54
[122] Guidance Paper, para 81, and see para 83
[123] Gal (n 118), 139

the market, and not whether each and every undertaking claiming access requires it to enter the downstream market.[124]

Most of the misinterpretation of this criterion stems from the CJ's statement that duplication has to be impossible or unreasonably difficult. However, the question which has to be considered is whether there are technical, legal or economic reasons for an as efficient competitor not to be able to create an alternative or a substitute input. The fact that one can consider technical, legal and economic reasons which make replication not viable means that the limitation imposed on Article 102 TFEU by virtue of this requirement is in fact rather limited itself. [125]

Turning to the third element, the notion the conduct is likely to eliminate competition in the downstream market raises some doubts as to the extent to which competition has to be eliminated. This certainly is not intended to mean that *all* competition has to be eliminated, in the sense that there be no competitor,[126] otherwise Article 102 TFEU would be restricted to the extent that it would hardly ever be applied in this context.[127] On the other hand, it is probably not enough to show that the refusal makes competition more difficult.[128] The key seems to be 'effective' competition,[129] and indeed the Commission indicates that the higher the market share of the dominant undertaking, the more likely that the refusal will eliminate effective competition.[130] Effective competition has been described by the GC as being 'the degree of competition necessary to ensure the attainment of the objectives of the Treaty'.[131]

[124] See *ibid* 139
[125] See Evrard (n 17) 32 who is of the same opinion.
[126] Nazzini (n 18) 267
[127] See Whish and Bailey (n 1) 723
[128] Doherty (n 14) 425
[129] See also Nazzini (n 18) 267
[130] Guidance Paper, para 85
[131] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* EU:T:2006:265, para 109

For refusal to be abusive therefore, the dominant undertaking's conduct must jeopardise competition to the extent that the aims of the Treaty – in particular consumer welfare – would also be jeopardised. In truth, there is some difficulty in determining what effective competition is in the abstract, and it has to be determined in each case. This element therefore gives scope to competition authorities and courts to assess in detail whether the refusal is truly capable of restricting competition in the market in question. Again, this is beneficial to small jurisdictions in particular, given the difficulty for markets in small jurisdictions to self-correct, since it gives scope for a proper assessment of the case at hand, and would assist in avoiding over zealous enforcement of the prohibition of refusal to supply.

The test for abusive refusal to supply a new customer is therefore coherent and makes economic sense. Given the benefits of the application of this test, the pity is the haphazard application of this test by the EU institutions, in particular by the Commission.

PROPOSED TEST FOR ABUSIVE REFUSAL TO SUPPLY

From the above, it is clear that the test which in theory applies to abusive refusal to supply a new customer is economically sound, whilst the one which applies for abusive refusal to supply existing customers is much less defensible. The reality is that the fact that there are different tests is not defensible in itself.[132] The economic implications of a refusal are the same, irrespective of whether the downstream undertaking being refused is an existing customer or a new one.[133] As EU competition law stands, a pre-existing relationship means that the downstream operator has easier access.[134] However, in the end, the current position

[132] See in this regard, Incardona (n 70) 351; Nazzini (n 18) 265; Ridyard (n 4) 449

[133] See above p 237-241. See also Nazzini (n 18) 265

[134] Incardona (n 70) 351. Ibáñez Colomo (n 17) argues that the tests should vary depending in particular on whether the remedy imposed by the competition authority is reactive or proactive (at 542-544; 550). He also takes the view that indispensability is (implicitly) required in cases where the refusal is a cessation of supplies;

in EU competition law ignores the fact that even relationships with long standing customers end, for whatever reason. As long as the product being supplied or being given access to is not indispensable, what justification or reason could a customer have for insisting that it continue to be supplied by the dominant undertaking?

One might argue that a downstream operator who is already a customer of the dominant undertaking has a legitimate expectation that unless there is some objective impediment, the dominant undertaking will continue to supply it. However, this is not, and should not be, a concern for competition law. Such expectations are the concern of contract law. The same applies to the question whether a relationship has been unlawfully terminated. The concern for EU competition law should be consumer welfare and the protection of competition. If an existing customer has access to the input through some other means, or has access to a reasonable alternative, then the dominant undertaking should not be obliged to continue supplies.

An important factor to consider when constructing a test for abusive refusal is to keep a balance between *ex post* allocative efficiency gains, which can be realised by mandating access, with the *ex ante* dynamic efficiency gains, which can be protected by refusing access.[135] This not only makes sense in order to ensure that the market is encouraging innovation whilst remaining competitive, but would also be in line with the objectives of Article 102 TFEU.[136] Whilst these are important throughout the EU, the former reason is

based on the decisions in *Commercial Solvents* (n 22) and *Télémarketing* (n 99) (at 538, 542). This approach however is not evident in later cases of termination of an existing relationship.

[135] Damien Geradin 'Limiting the scope of Article 82 of the EC Treaty: What can the EU learn from the US Supreme Court's Judgment in *Trinko* in the wake of *Microsoft, IMS* and *Deutsche Telekom*?' < https://ssrn.com/abstract=617263 > accessed 9 May 2020, 18. See also Nazzini (n 18) 260 and Paolo Siciliani 'Luton Buses: Refusal to supply and the difficult path to economic tests in litigation' (2014) 4(9) Journal of European Competition Law & Practice 641

[136] Nazzini (n 18)260

particularly significant in small jurisdictions, as already discussed. The EU institutions have traditionally focused on *ex ante* efficiencies by mandating access,[137] without considering the detrimental effects of doing so. This is particularly evident in *Telkomunickacja Polska*[138] and *Slovak Telekom*.[139]

Adopting the *Bronner* criteria *in all cases* would ensure that *ex post* allocative efficiency gains and *ex ante* dynamic efficiency gains are adequately balanced. The *Bronner* criteria, as much as possible, effectively ensure that it is only in cases where the negative impact on allocative efficiency would outweigh the positive effects on dynamic efficiency that access is mandated. This test circumscribes findings of abuse to cases where there truly is foreclosure whilst allowing dominant undertakings to refuse supply in other cases. This would be beneficial to all markets, but to small jurisdictions in particular. The *Bronner* criteria effectively allow dominant undertakings in small jurisdictions to refuse supplies when this is not harmful to competition, thereby encouraging innovation and discouraging free riding, which boosts the economy and hopefully creates new resources in a restricted market, whilst ensuring that supply is mandated when really required for competition in a limited market to thrive.

OBJECTIVE JUSTIFICATION

Both tests currently adopted for refusal cases, including therefore the *Bronner* criteria, which it is being argued, should be applied to all claims of abusive refusal without any distinction, require that there be no objective justification for the conduct. The practical difficulty of proving this has been mentioned throughout this work.

[137] Geradin (n 135) 18
[138] n 48
[139] n 50

However, in relation to refusals to supply, objective justification should be easier to prove. There are various legitimate reasons why a dominant undertaking should chose to refuse to supply a downstream undertaking. In fact, it is in this area of EU competition law that objective justifications have been accepted by the CJEU, although it is still not altogether clear what this element of the refusal test comprises or how it is to be applied.

In principle the CJ has accepted that there is objective justification for refusal where the dominant undertaking is meeting competition. This is evident from *United Brands*[140] and *Sot Lelos.*[141] To what extent a dominant undertaking can rely on such a justification is less clear.[142]

In *United Brands*,[143] the CJ felt that although a dominant undertaking can protect is own commercial interests if they are attacked, and that it has the right to take reasonable steps to protect them, the dominant undertaking cannot through such steps strengthen its dominant position and abuse it.[144] It held that any 'counter-attack' must be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.[145] Effectively however, this would mean that a dominant undertaking can hardly ever protect itself from an insidious downstream competitor by refusing supplies. If one is starting off from the premise that the dominant undertaking is in a much stronger position, the counter-attack will never be proportionate.

[140] n 21
[141] n 23
[142] This was admitted by the European Commission in OECD Policy Roundatables 'The Essential Facilities Concept' (February 1996), 102
[143] n 21
[144] Para 189
[145] Para 190

In *Sot Lelos*,[146] the CJ softened its position although it based itself on *United Brands*. It held that:

> in order to appraise whether the refusal by a [dominant undertaking] to supply wholesalers involved in parallel exports constitutes a reasonable and proportionate measure in relation to the threat that those exports represent to its legitimate commercial interest, it must be ascertained whether the orders of the wholesalers are out of the ordinary.[147]

This is rather confusing as in *United Brands*, the issue of orders being 'out of the ordinary' was related to the finding of abuse not to its justification.[148] In *Sot Lelos*,[149] the CJ seems to have either confused or else purposely conflated the issue of objective justification with finding an abuse. Technically of course, these two issues are not distinct, since Article 102 TFEU simply prohibits abuse, and does not provide for a justification of an abuse itself, like Article 101 TFEU. In other words, the assessment of 'objective justification' should really be carried out in order to determine whether there is abuse, and indeed the refusal tests outlined above are based on that premise. Previous practice however indicated that the 'objective justification' was being considered much like Article 101(3) TFEU, in other words, as justification of abusive conduct, not as a method of determining whether there was abuse. Indeed, the CJ has made it clear that the burden of proving that conduct is objectively justified is on the dominant undertaking, and that this is to be done after the initial competitive assessment of the case.[150]

[146] n 23
[147] Para 70
[148] n 21, para 182
[149] n 23
[150] Case C-209/10 *Post Danmark A/S v Konkurrencaeradet* 27 March 2012, para 40

This also appears to be the Commission's position.[151] It is not clear whether in *Sot Lelos*[152] the CJ was moving to the former, technically correct type of analysis.

In any case however, *Sot Lelos*[153] indicates that when downstream operators are requesting larger volumes than previously required, a dominant undertaking may be able to legitimately refuse supplies if this undermines its business model. Similarly, in *BP*, the dominant undertaking could legitimately refuse additional supplies requested by an occasional customer in the context of a scarcity of supply of oil. However, in that case the CJ's findings did not set out any specific elements which should be considered when assessing whether a dominant undertaking is justified in refusing supplies. *BP*[154] was very much a case decided on its own particular merits.

What then, could constitute a justification for refusal to supply? Whish and Bailey give some examples: when the downstream undertaking is a bad debtor, when it poses a credit risk or when the downstream undertaking has failed to observe contractual obligations.[155] They also cite a case[156] from the United Kingdom where the communications regulator opined that the refusal was not unlawful since the downstream operator would have been acting unlawfully.[157] The Commission in the Guidance Paper indicates that refusal is justified when it allows adequate return on investments required to develop the input business.[158] In other words, the Commission is saying that refusal is lawful when it encourages the dominant

[151] Guidance Paper, para 28 to 31
[152] n 23
[153] *Ibid*
[154] n 30
[155] Whish and Bailey (n 1) 724. See also Bishop and Walker (n 88) 328
[156] *Disconnection of Floe Telecom Ltd's Services by Vodafone Ltd* (OFCOM 3 November 2003), which was subsequently quashed, remitted to OFCOM, confirmed on appeal but set aside on further appeal to the Court of Appeal. See Whish and Bailey (n 1) 726
[157] Whish and Bailey (n 1) 726
[158] Guidance Paper, para 89

undertaking to innovate – however, this is likely to be difficult to prove and rarely successful in practice.

Another objective justification – which is particular to the conduct under examination, and highly pertinent to small jurisdictions – is the claim by the dominant undertaking that it has no capacity to supply the input or grant access. Without spare capacity, a dominant undertaking physically cannot supply. Otherwise, if supply is mandated, the downstream operator would simply be replacing the dominant undertaking on the market, with no pro-competitive effect.[159] Therefore, a dominant undertaking cannot and should not be mandated to supply if there is no unlimited, unused or spare capacity.[160]

This justification for refusal is likely to come up often in small jurisdictions and has to be duly heeded. Due to limited resources, even a dominant undertaking is likely to have limited supplies. It is very possible that a dominant undertaking on a small jurisdiction either has no capacity to supply third parties, or has capacity to supply only a few third parties. The issue of spare capacity arose in the only case decided in Malta which dealt with refusal to supply, *Maltco*.[161] The OFC found, *inter alia*, that the national lottery operator did not have the capacity to supply a second sales terminal to all lotto booths and therefore its decision to award a second sales terminal only to those with the highest value ticket sales in the preceding six months was not deemed abusive.[162]

[159] Gal (n 118) 132; Bishop and Walker (n 88) 328
[160] See Temple Lang (1994) (n 89) 524
[161] Eugene Buttigieg 'Malta: abuse of dominant position – national lottery' (2007) 28(8) European Competition Law Review N121
[162] *Ibid*

Whilst the decided cases from the national competition authorities are encouraging, the cases from the EU institutions are less so. In *Frankfurt Airport*,[163] the Commission concluded that the argument that it was impossible to admit competitors for ramp handling services because of lack of space was not sustainable since there were 'solutions which would allow any lack of space to be overcome'.[164] However, the solutions to which the Commission refers are hardly minor adjustments. The Commission mentions[165] (i) adjustments to the existing infrastructure, which would have cost the dominant undertaking DM 35 million to DM 70 million; (ii) closing off some stands to obtain space for competitors, which would have led to the loss of slots; (iii) reducing parking space; and (iv) not allocating space to another customer. In truth however none of these options make sense for a commercial operator, and it smacks of the Commission mandating access at all costs, even if in effect it was simply a case of switching one operator for another operator, for the sake of the illusion of having a more competitive market. A similar line of reasoning was followed by the Commission in *Ferrovie dello Stato.*[166] Commenting on the latter case, Castaldo and Nicita note that the Commission's decision requires the incumbent's excess of capacity to perfectly match the requirements of the competitor.[167] However, when this is not the case, the obligation to supply would result in shortages for the dominant undertaking, which would need to purchase new assets in order to substitute what it supplies to the competitor.[168] This, they rightly maintain would be contrary to the principle that it is lawful to refuse to deal in case of shortages, as also sustained in *BP*.[169] Shortages may also extend to employees which would be an even more intrusive

[163] IV/34.801 FAG - *Flughafen Frankfurt/Main AG* 14 January 1988 [1998] OJ L72/30
[164] B.2.1.3, para 86
[165] B.2.1.3, para 87
[166] COMP/37.685 *GVG/FS* 27 August 2003 [2004] OJ L 11/17
[167] Castaldo and Nicita (n 20) 21-22
[168] *Ibid,* 22
[169] *Ibid,* 22

invasion of the dominant undertaking's business as it interferes with the dominant undertaking's organisational structure.[170] This outcome would be damaging to the economy of a small jurisdiction to an even greater degree given the limited resources that even dominant undertakings would have access to. The EU authorities should take the lead from the national competition authorities in small jurisdictions and take a more practical approach to capacity constraints.

Assuming that there is some spare capacity, what happens when that spare capacity is limited? Again, this is particularly relevant to small jurisdictions for the same reason. Two questions then arise: (i) which competitors should be given access?; and (ii) on what terms should access be given?[171] The answers to both are not easy to determine.

Gal notes that US antitrust law adopts a first-come-first served principle,[172] which is self-explanatory: downstream operators are granted supplies in order of requests until capacity is exhausted. This rule is fair to dominant undertakings, however unfair for new entrants, and might restrict competition in the future. EU courts tends to apply a proportionality rule, in other words, they require sharing (as in *Frankfurt Airport*,[173] although Gal cites *Sealink*[174] as evidence of this) which may mean that the dominant undertaking's customers may end up being worse off, as it would be unable to operate on an efficient scale.[175] Another issue, which Gal does not consider, is that applying a proportionality rule means that no operator is actually benefitting from access. No operator would actually be obtaining its required supplies, but a proportionate amount thereof. Therefore, no operator can actually operate

[170] *Ibid,* 22
[171] Alison Jones and Brenda Sufrin *EU Competition Law: text, cases and materials* (5th edn, OUP 2014) 516
[172] Gal (n 118), 146
[173] n 174
[174] *Sealink/B&I – Holyhead: Interim Measures* (n 43)
[175] Gal (n 118), 148

at an efficient scale, leading to a detrimental effect on the market. Moreover, on a more practical level, it might not always be easy or possible for the dominant undertaking to apply a proportionality principle; for instance existing contracts may have penalties for disruption of supplies.[176] Mandating supply in such cases is patently unjust.

Secondly, once supply is mandated, it must be provided under some terms and conditions. Ideally, supply would be given under 'normal commercial terms',[177] whatever those may be. However, this might be difficult to achieve if the input is not already being provided on the market. Moreover, under normal commercial conditions, undertakings would be left to themselves to negotiate terms, including prices. This was the option taken by the Commission in *Google Shopping* [178] (not strictly a refusal case), where the Commission left the remedy up to Google/Alphabet, the dominant undertaking. This however is hardly an optimal solution, as free negotiation in a context where one party is dominant and was already willing to restrict competition (otherwise supply should not be mandated by the competition authorities), cannot reach a satisfactory outcome.[179] The competition authority or courts might have to act as price regulator,[180] which is a task they often shy away from. Ridyard notes the benefit of this: competition authorities and courts might desist from over-zealous findings of abusive refusal.[181]

This is perhaps too much to hope for. However, it is clear from the discussion above that in refusal cases the objective justification criterion needs to be given more weight, and further

[176] Doherty (n 14) 431
[177] Bo Vesterdorf and Kyriakos Foutoukakos 'An appraisal of the remedy in the Commission's *Google Search (Shopping)* Decision and a guide to its interpretation in light of an analytical reading of the case law' (2018) 9(1) Journal of European Competition Law & Practice 3, 11
[178] Case AT. 39740 *Google Search (Shopping)* 27 June 2017
[179] Jones, Sufrin and Dunne (n 1) 490; Ridyard (n 4) 449
[180] Jones, Sufrin and Dunne (n 1) 490; Ridyard (n 4) 448
[181] Ridyard (n 4) 448

thought, than is normally adopted in Article 102 cases, even more so given that it is an inherent part of the abusive refusal test. In small jurisdictions, the consideration of the objective justification can have a dramatic impact on the outcome of the case, as is evident from the *Maltco*[182] case.

REFUSAL TO SUPPLY CASES IN MALTA AND THEIR EFFECT

Surprisingly, notwithstanding the possible applicability to the prohibition on refusal to supply in various industries in small jurisdictions, there appears to be only one refusal case which has been decided by the Maltese authorities.[183] The case – *Maltco*[184] – was determined by the OFC, and unfortunately the OFC's decision is not available publicly.[185] It has however been reported.[186] From the report it appears that the national lotteries operator – Maltco Lotteries Ltd – had awarded a second sales terminal to the lotto booths which had the highest value ticket sales in the preceding six months. A lotto receiver subsequently filed a complaint with the OFC.

[182] Buttigieg (n 161)

[183] There appears to be another case which might concern refusal to supply – a complaint by Shell Aviation Limited ("Shell"), represented in Malta by Attard Services Limited, chosen as the 'second operator for aircraft refuelling services' at Malta International Airport, regarding conduct by Enemalta Corporation (now Enemalta plc) which allegedly effectively deprived Shell for access to the necessary infrastructure regarding the storage and distribution of jet fuel for aeroplanes. The OFC decision is not public, and the Appeals Tribunal has not yet handed down judgment (judgment pending), so the exact facts and merits of the case are not clear. However, there was litigation between the parties in front of the Malta Resources Authority, the Board for Appeals from decisions of the Malta Resources Authority and the Court of Appeal (Civil, inferior jurisdiction) which sheds some light on the possible dispute between the parties. From the judgment of the Court of Appeal (Application no. 6/2007 *Attard Services Limited noe vs Awtorita' ta' Malta dwar ir-Riżorsi* 9 January 2008) it appears that after being appointed 'second operator', Shell attempted to gain access to the infrastructure owned by the incumbent Enemalta ('the centralised infrastructure') which Enemalta had a regulatory duty to grant access to. Shell alleged that the price demanded by Enemalta for the use of the centralised infrastructure was prohibitive. Shell's claims in front of the Authority were initially focused on excessive pricing and discrimination. Upon appeal to the Board, Shell also claimed margin squeeze, and referred to constructive refusal to supply. The Board decided on the basis of constructive refusal to supply (i.e. that the price amounted to a refusal as it was prohibitive).

[184] Buttigieg (n 161)

[185] There is no particular reason for this; unfortunately before 2011 there was no practice to publish official decisions of the OFC.

[186] Buttigieg (n 161)

The OFC started off from the principle that restriction on the exercise of property rights could only be made to the extent that they are necessary to protect competition. It then applied the *Bronner* criteria to the case, and concluded that the second sales terminal was not an essential facility. The use of this terminology is unfortunate, as it appears that what the OFC meant was that a second sales terminal was not indispensable to the carrying on of the downstream business. As already noted, the OFC also found that there were capacity constraints which had to be taken into account.

Therefore it appears that the OFC actually made an assessment using the *Bronner* criteria without going into the merits of whether the complainant was an existing customer (which it was), in this case requesting additional supplies, or a new customer. It has already been argued that this is the correct approach to take.

The fact that access was not mandated in this case does not seem to have had a negative effect on competition. Lotto receivers have not closed shop due to Maltco Lotteries's refusal to supply and the competition authority's failure to mandate supply. Maltco Lotteries's grant of the second sales terminal was made on objective criteria which encouraged those lotto receivers who were more efficient than their counterparts and thus made more sales, and might have had the effect of motivating the less efficient lotto receivers. The strict application of the test currently used at EU level in the case of refusal to supply an existing customer might have resulted in a finding of abuse, unless the principle in *Sot Lelos*[187] regarding additional supplies was deemed applicable. As a result, *Maltco* clearly shows how *not*

[187] n 23

mandating supply may be more pro-competitive than obliging the dominant undertaking to supply.

CONCLUSIONS

Bishop and Overd's warning in 1998 is still relevant today: with the majority of refusal to supply claims being 'little more than an attempt to use competition law to try to negate a legitimate advantage enjoyed by a competitor':

> [c]ompetition authorities should treat such claims with scepticism because the over-zealous application of the essential facilities doctrine has the potential seriously to undermine the incentive for firms to innovate.[188]

This is not to say that there should be no abuse of refusal to supply, or that there should be no such abuse in small jurisdictions. Indeed, in the cases which actually found a breach of Article 102 TFEU, there probably was a need for such a finding. However, the principles which can be extracted from these cases are too far-reaching. This is possibly the case because the Commission and the CJEU were influenced by the refusal in that particular case, which in most cases involved a blatant abuse. In the early cases, the Commission and the CJEU were not intending to establish a general principle, or a test for abuse as such. It is the Commission's approach in recent cases which raises more concerns; it is to be hoped that the CJEU will reign the Commission back in and establish a clear path for EU competition law in this area.

It has been shown that the optimal test for abusive refusal cases is the application of the *Bronner* criteria to all cases where abusive refusal is claimed. This has benefits for small

[188] Bishop and Overd (n 70)

jurisdictions, particularly if the objective justification criterion is seriously considered. It has been shown that the application of this test in Malta has actually led to a finding that there was no abuse, and that this had benefits for the market in question. We can therefore only hope for a dovetailing of the case law, and the strict application of the *Bronner* criteria in all cases in which refusals to supply are contested.

CHAPTER 7: MARGIN SQUEEZE

WHAT IS MARGIN SQUEEZE?

An undertaking 'A' produces and sells widgets and blodgets. Widgets are used for the production of blodgets, which are sold to end-consumers. A is therefore vertically integrated, being present on the upstream market (the product market for the production and supply of widgets) and the downstream market (the product market for the production and supply of blodgets). A has a dominant position on the market for the production and supply of widgets, however the market for the production and supply of blodgets is highly competitive. Undertaking 'B' is a producer of blodgets. B acquires widgets from A. B is as efficient as A in producing and supplying blodgets. A and B therefore have the same costs for the production and supply of blodgets.

In order to eliminate B from the downstream market, with the hope of attracting B's customers, A is considering a variety of pricing strategies. One is to increase the price of widgets. The increase in the price of widgets increases B's costs. If B were to retain the same prices for blodgets in order to maintain its customers, it would suffer from a reduction in its profits. Should B raise its price for blodgets, it is likely to lose customers, which would again decrease its profits. Alternatively, A could lower its price for blodgets. In this case, B's customers are likely to start purchasing blodgets from A. In order to retain its customers, B would therefore have to decrease the price for blodgets. The result would be that B would again suffer from a reduction in profits. Finally, A could both decrease its price for blodgets and increase its price for widgets. Through a combination of these prices, with B attempting to match A's price for blodgets, whilst dealing with an increase in its costs, B's profits would again decline.

These various pricing strategies are known as 'margin squeeze' or 'price squeeze'. The margin is the difference between B's costs, including the price of widgets, and the prices at which it is able to sell blodgets to end-customers. The effect of the action taken by A is to reduce – and therefore squeeze – that margin. As a result, by leveraging its position in the upstream market, A succeeds in foreclosing a competitor on the downstream market.

It will be immediately clear that margin squeeze can only occur where an undertaking in a dominant position is vertically integrated. Because A's downstream competitors cannot easily turn to alternative suppliers of widgets, A's pricing strategy means that competitors downstream find it difficult to compete with A for the supply of products or services to customers[1] on the downstream market. As is clear from the example given, margin squeeze can occur either when the price of the input provided by the dominant undertaking is too high, or when the price of the retail product is too low, or when there is a combination of both.[2] In view of the various permutations it may take, margin squeeze can be a canny yet pernicious manner for a dominant undertaking to foreclose competitors on the downstream market, or even to strengthen its position on the upstream market.

Often, margin squeeze is *not* a rational business strategy, as a vertically integrated undertaking that engages in margin squeeze is in essence eliminating its customers, who are also competitors on the downstream market. Margin squeeze can be considered a rational strategy when the profits on the downstream market obtained through strengthening its

[1] Alison Jones, Brenda Sufrin and Niamh Dunne *Jones & Sufrin's EU Competition Law: Text, cases and materials* (7th edn, OUP 2019) 416. See also Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for competition lawyers* (OUP 2011) 239

[2] *Ibid*. See also Damien Geradin and Robert O'Donoghue 'The concurrent application of competition law and regulation: the case of margin squeeze abuses in the telecommunications sector' (2005) 1(2) Journal of Competition Law and Economics 355, 356

position on that market are sufficient to off-set the losses made on the upstream market.[3] Ironically, margin squeeze may also be motivated by the objective to maintain market power upstream. This would occur as by eliminating competitors on the downstream market the vertically integrated undertaking would be removing the constraints imposed by its buyers.[4] As a result, recent economic thinking has considered margin squeeze as a rational strategy in order to (i) restore market power on the upstream markets; (ii) leverage defensively in order to deter entry in the upstream market; and (iii) monopolise or deter competition downstream.[5]

There has recently been an increase in margin squeeze cases both at EU level and at national level.[6] The increase in margin squeeze investigations is often linked to the liberalisation of network utilities in the EU.[7] Indeed, margin squeeze is common in newly liberalised markets, particularly in the telecommunications sector.[8] The reason for this is that these markets

[3] Niels, Jenkins and Kavanagh (n 1) 242-244; see also Christian Bergqvist and John Townsend 'Enforcing margin squeeze ex post across converging telecommunications markets' (2015) 2 Konkurrensverkets Working Paper Series in Law and Economics < http://www.konkurrensverket.se/globalassets/publikationer/workingpaper/working_paper_2015-2.pdf > accessed 14 August 2016, 7-8; John B Meisel 'The law and economics of margin squeezes in the US versus the EU' (2012) 8(2) European Competition journal 383, 393 and Niamh Christina Gleeson 'Has Margin Squeeze Abuse in EU competition law developed because of the liberalisation of the network industries in the EU?' (2013) 1 ENLR 15, 22 who comments that vertical leveraging 'may be a profitable strategy, particularly when the downstream market is not perfectly competitive.'

[4] Niels, Jenkins and Kavanagh (n 1) 242-244

[5] Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013), 369. See also A Jorge Padilla 'The economics of margin squeeze: a short history of nearly everything' (Margin Squeeze under EC Competition Law Conference(GCLC and BT), London, December 2004) < https://www.coleurope.eu/fr/website/recherches/global-competition-law-centre/conferences/conferences-and-workshops > accessed 9 May 2016

[6] Cento Veljanovski 'Margin squeeze: an overview of EU and national case law' [2012] e-Competitions: Competition Laws Bulletin, No. 46442 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079117 > accessed 9 May 2016, para 4, 5 : "According to the *e-Competitions* database there have been 41 cases - 38 national cases in 20 European countries, and three decisions by the European Commission - over the period 2003 to March 2012. … These are underestimates because in addition the national sectoral regulators in the telecommunications, energy and other network industries have carried out *ex ante* margin squeeze investigations, and many require that all prices and new tariffs are subject to pre-implementation screening to avoid a margin squeeze."

[7] Gleeson (n 3) 15

[8] Jones, Sufrin and Dunne (n 1) 416; Niels, Jenkins and Kavanagh (n 1) 239; O'Donoghue and Padilla (n 5) 365; Gleeson (n 3) 1 ENLR 15, 15; Veljanovski (n 6) para 4

generally have the characteristics necessary for margin squeeze to represent a rational business strategy. Newly liberalised markets commonly have a previous statutory monopolist which still controls an upstream market, often because it controls an essential facility, with the previous incumbent now having to compete on a fully liberalised downstream market with new entrants. These markets are therefore ripe for margin squeeze abuses to flourish.

This would be in line with the evidence from Malta. The only Maltese case dealing with margin squeeze so far, *Datastream vs Camline,*[9] dealt with the telecommunications industry. It concerned the product markets for International IP Bandwidth, wholesale internet and retail internet. It is extraordinary that, in a country where there has been a dearth of abuse of dominance cases, there has been a case concerning margin squeeze, which has only recently started being seriously analysed in EU competition practice, particularly since it is the only abuse of dominance case decided on the merits by the Appeals Tribunal since 2011, when the Competition Act was amended.

Legal responses to margin squeeze are therefore developing rapidly. For this reason, it is pertinent to examine the application of EU competition rules regarding margin squeeze in the context of small jurisdictions, in particular because it is less likely that incumbent operators will face serious competition in such markets. Put otherwise, margin squeeze is more likely to be possible in small jurisdictions where incumbents are less likely to face new entrants on the upstream market. It is in fact likely that margin squeeze will be possible in more sectors in small jurisdictions than in larger markets, given the natural tendency of small jurisdictions

[9] Application 8/2012 *Datastream Limited vs Camline Internet Services Limited* (29 January 2014; Competition and Consumer Appeals Tribunal)

to natural monopolies and oligopolies in various industries. Therefore any positive or detrimental effects as a result of the margin squeeze ban would be amplified in small jurisdictions.

This chapter will consider EU competition practice; first delving into the historical margin squeeze cases, then examining and analysing the relevant cases, whilst considering the criticism and problems which arise with it. The effect of EU competition practice on small jurisdictions will be considered throughout. The final section comprises a case study on the implications of EU competition practice regarding margin squeeze for small jurisdictions.

MARGIN SQUEEZE IN EU COMPETITION PRACTICE

THE ORIGINS OF MARGIN SQUEEZE IN EU COMPETITION PRACTICE

Margin squeeze has only recently started to attract the serious scrutiny of the Commission and the EU courts, where it has been sanctioned under Article 102 TFEU. However the first statement relating to margin squeeze was made by an EU institution in 1975. In *National Carbonizing*[10] the Commission, in a letter informing a complainant of the considerations made in dismissing its complaint, laid down the foundations for the definition of margin squeeze in EU competition law. It noted that an undertaking in a dominant position as regards the production of a raw material, which is able to control its price to independent manufacturers of derivatives, and which produces the same derivatives itself in competition with such manufacturers, can abuse its dominance if it acts in a way to eliminate competition from the manufacturers of derivatives. Therefore, the Commission concluded that:

[10] The letter of the Commission services dated 16 October 1975 is reported in [1976] OJ L35/6

> the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term.[11]

At this stage, it was unclear what the Commission considered to be a 'sufficient' margin. Neither was it clear whether the vertically integrated undertaking had to have an obligation to supply in terms of EU competition law, although the wording may seem to suggest it.[12]

This position was maintained in *Napier Brown/British Sugar*[13], where the Commission found that British Sugar had left 'insufficient margin for a packager and seller of retail sugar, as efficient as BS itself in its packaging and selling operations, to survive in the long term.'[14] The Commission also seemed to imply that the vertically integrated undertaking has to be dominant on both the wholesale and retail level in order for it to be found to have margin squeezed its competitors.[15] Although the Commission did find an abuse in this case, the finding of abuse was linked to various other forms of abusive conduct,[16] making it unclear if the Commission considered margin squeeze as a separate abuse.[17]

The case that followed did little to clarify this point. In *Industries de Poudres Spheriques v Commission,*[18] the GC in confirming the Commission's decision stated that in the absence of abusive, namely exploitative, pricing for the raw material or predatory pricing for the derived

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[11] *Ibid*

[12] See Liyang Hou 'Some aspects of price squeeze within the EU: a case law analysis' (2011)32(5) European Competition Law Review 250, 251 and John Kallaugher, The "Margin Squeeze" under Article 82: Searching for Limiting Principles, (Margin Squeeze under EC Competition Law (GCLC and BT), London, December 2004), 5

[13] [1988] OJ L284/41

[14] *Ibid*, para 65

[15] See *ibid* para 66; see also Bergqvist and Townsend (n 3) 11

[16] See Kallaugher (n 12) 7

[17] For instance whilst Kallaugher (n 12) 7 believes that there is a suggestion that margin squeeze could constitute a distinct category of abusive, Bergqvist and Townsend (n 3) 11 opine that neither *National Carbonizing* or *British Sugar* indicate that margin squeeze constituted a separate infringement of Article 102 TFEU.

[18] Case T-5/97 EU:C:2000:138

product, the fact that the downstream competitors cannot remain competitive does not mean that the dominant undertaking's pricing is abusive.[19] Indeed on the facts the GC confirmed that the complainant was not sufficiently efficient to compete on the market, since it had a product which was similar to that of its competitors but had higher processing costs, leading to a higher retail price.[20] This highlights one of the reasons when a 'margin squeeze' would not be abusive: namely, when the competitor on the downstream market is inefficient. However, the GC's statement regarding abusive and predatory pricing seems to imply that margin squeeze is not a stand-alone type of abuse, and that it can only constitute abuse when prices are either exploitative or predatory.[21] This idea has since been overturned in EU competition practice,[22] although it is the leading idea in US antitrust law.[23]

Based on these first cases, notwithstanding divergences in thought, one can still note certain common elements. First, all these cases dealt with mature markets with limited competition both upstream and downstream.[24] In all cases, the vertically integrated undertaking was dominant on the upstream market. It also had some power on the downstream market. Secondly, the input was the most important input for the downstream market;[25] in other words it was indispensable. However, as will be seen, the recent margin squeeze cases have moved away significantly from these tentative beginnings.[26]

[19] *Ibid* para 179
[20] *Ibid* para 185
[21] See also Kallaugher (n 12) 9-10
[22] See p 288
[23] See p 289
[24] Kallaugher (n 12) 2
[25] *Ibid*
[26] See also Bergqvist and Townsend (n 3) 11

Deutsche Telekom,[27] decided by the Commission in 2003, heralded a new era for margin squeeze. It served to reignite the discussion on this type of conduct, which so far had been largely ignored. Its impact was likely felt so strongly because *Deutsche Telekom* dealt with margin squeeze alone and did not consider any other type of abuse. Therefore it shone a spotlight directly on margin squeeze as an abuse. Its timing was also particularly relevant, because by the 2000s most markets were liberalised in light of the liberalisation drive in the 1990s, and, as noted, newly liberalised markets are the right environment within which margin squeeze can thrive. Remarkably, when one considers how long it took for margin squeeze to be seriously considered as an abuse, *Deutsche Telekom* was soon followed by other cases on margin squeeze.

Margin squeeze was also included in both the Discussion Paper and the Guidance Paper, although the GC and CJ moved radically away from the ideas laid down by the Commission in the Guidance Paper in particular. One of the most obvious deviations is how margin squeeze is perceived in the first place. This pricing strategy was originally seen as a variation of refusal to supply,[28] essentially as 'constructive' refusal to supply, since by forcing competitors to operate on the downstream market at reduced profits, or at a loss, the dominant undertaking would essentially be making it impossible for the downstream competitors to acquire its product. However, in terms of EU competition practice,[29] such conduct has since started being considered as a separate type of abuse.

[27] Case COMP/C-1/37.451, 37.578, 37.579 21 May 2003, [2003] OJ C263/9
[28] See Guidance Paper, para 80
[29] This will be considered in further detail below at p 288 *et seq*.

Based on the decisions in *Deutsche Telekom* and *Telefonica,* which include the Commission,[30] the GC[31] and the CJ[32] decisions, the CJ's decision in *TeliaSonera,*[33] the GC's decision in *Kingdom of Spain v European Communities*,[34] the commitments decision in *RWE gas foreclosure*,[35] and the Commission and GC decisions in *Slovak Telekom*,[36] as well as the Discussion Paper and the Guidance Paper, there is now consistent and clearly identifiable EU competition practice when it comes to margin squeeze. Each of the leading principles is considered in turn.

DEFINITION OF MARGIN SQUEEZE

First of all, a clear definition of margin squeeze has emerged from the EU's decisional practice. In EU competition law, margin squeeze has been defined as occurring when:

> the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.[37]

Because the retail price charged by a dominant undertaking to final customers less the wholesale price at which it sells to competitors downstream, is less than the costs of an efficient downstream undertaking, downstream undertakings as efficient as the vertically

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Deutsche Telekom (n 27); Case COMP/38.784 *Wanadoo España vs. Telefónica* 4 July 2007

[31] Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* EU:T:2008:101; Case T-336/07 *Telefónica SA v Telefónica Espana SA v Euroepan Commission* EU:T:2012:172

[32] Case C-280/08P *Deutsche Telekom v European Commission* EU:C:2010:603; Case C-295/12P *Telefónica SA v Telefónica Espana SA v Euroepan Commission* EU:C:2014:2062

[33] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83

[34] Case T-398/07 EU:T:2012:173

[35] Case COMP/39.402 *RWE Gas Foreclosure* 18 March 2009

[36] Case AT.39523 *Slovak Telekom* 15 October 2014; Case T-851/14 *Slovak Telekom as v Commission* EU:T:2018:929

[37] *Deutsche Telekom* (Commission) (n 27), affirmed in the GC and CJ judgments; *TeliaSonera* (n 33) para 32; *Slovak Telekom* (n 36) para 823

integrated undertaking cannot remain in the market without making losses,[38] or suffering reduced levels of profitability.[39] In other words, the margin squeeze definition indicates that margin squeeze eliminates as-efficient downstream competitors because they cannot continue to trade profitably.

The current definition of margin squeeze in a sense goes beyond the definition given by the EU courts in *National Carbonizing,*[40] *Napier Brown*[41] and *Industries des Poudres Spheriques*,[42] and the Commission in the Guidance Paper, as it explains in tangible terminology when the vertically integrated undertaking's conduct is deemed not to allow downstream competitors to remain in business, namely when the difference between the retail price and wholesale price is either (i) negative; or (ii) insufficient to cover the vertically integrated undertakings costs on the retail market.[43]

PRE-REQUISITES FOR MARGIN SQUEEZE

Secondly, the doctrine of the EU institutions has established some pre-conditions which must be satisfied in order for there to be abusive margin squeeze, albeit this was done indirectly, without specifically noting that these elements are pre-requisites to the finding of abusive margin squeeze.

[38] See *Deutsche Telekom* (Commission) (n 27), para 102 (GC) (n 31), para 237. See also Simon Bishop and Mike Walker *The economics of EC competition law: concepts, application and measurement* (3rd edn, Sweet & Maxwell 2010) 337.
[39] *TeliaSonera* (n 37), para 33
[40] n 10
[41] n 13
[42] n 18
[43] For an example of when costs may be insufficient, see *Deutsche Telekom* (Commission) (n 27), para 152 et seq. See also *Deutsche Telekom* (CJ) (n 32), para 197

(I) VERTICAL INTEGRATION

The first, in line with the economic view of margin squeeze, is that the undertaking exercising the squeeze be vertically integrated. Vertical integration is an inherent characteristic of this type of abuse. Since margin squeeze requires the ability to manipulate prices on two markets, it can only be carried out by a vertically integrated undertaking.[44] The necessity of this condition is evident from the definition of margin squeeze, which presupposes that the dominant undertaking is selling its product on the retail market (and therefore it charges a retail price) as well as on the wholesale market (and therefore charges a wholesale price).[45] In the Discussion Paper, the Commission had more clearly specified that margin squeeze may occur 'when the upstream input owner is integrated downstream'.[46]

(II) DOMINANCE ON THE UPSTREAM MARKET

Secondly, it can be said that EU competition practice requires that the vertically integrated undertaking is dominant on the upstream market.[47] This is true of all the decided cases. Requiring upstream dominance is in line with the economic pre-conditions for margin squeeze.[48] If there were no significant market power upstream the vertically integrated undertaking's downstream competitors would simply switch suppliers when faced with the vertically integrated undertaking's pricing strategy.

That said, the GC and CJ have strangely not been consistently clear on this essential requirement. It is only in *Telefónica* that the GC appears to say that dominance upstream

[44] Meisel (n 3) 385; Geradin and O'Donoghue (n 2) 358
[45] See *Deutsche Telekom* (Commission) (n 27); *TeliaSonera* (n 33), para 32
[46] Para 220
[47] *Telefonica* (GC) (n 31), para 146. See O'Donoghue and Padilla (n 5) 374
[48] O'Donoghue and Padilla (n 5) 366-367; Ieva Balasyte 'The economics analysis of the margin squeeze ban effects: an application to the market of differentiated products' < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971704 > accessed 28 August 2016, 6-7

needs to be determined (whilst dominance downstream does not).[49] The statement in *Teliasonera*[50] on which the GC in *Telefónica* relies is even less categorical, as the CJ in that instance was simply examining whether an undertaking which is dominant on a market could breach Article 102 TFEU with conduct on an associated market on which it is not dominant.[51] Therefore technically, in *Teliasonera* the CJ left the door open for margin squeeze to occur when an undertaking is dominant on the downstream market but not on the upstream market.[52]

It would however be nigh on impossible for a vertically integrated undertaking to effect a margin squeeze in such cases. If the vertically integrated undertaking is not dominant on the upstream market, its downstream competitors would approach alternative suppliers rather than allow themselves to be margin squeezed. Moreover, a vertically integrated undertaking which is not dominant on the upstream market, would likely conduct itself in another manner in order to foreclose the downstream (or indeed the upstream) market, for instance by pricing in a predatory manner.[53]

What is clear from *TeliaSonera,*[54] as well as *Telefónica,*[55] is that downstream dominance is not a requirement of EU competition law. In economics some degree of market power downstream is required for the vertically integrated undertaking to be able to influence the

[49] n 31, para 146
[50] n 34, para 89
[51] See paras 84-88
[52] Bergqvist and Townsend (n 3) 5 appear to be of the same view since they conclude that '[t]he dominance position could be either upstream or downstream and the contemplated foreclosure could be directed by the dominant undertaking in both directions' 5-6
[53] For there to be predatory pricing in EU competition practice, the price must either be below average variable costs or else below average total costs, however in this case it must be shown there is an intent to restrict competition – see Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* EU:C:1991:286; Case C-202/07 P *France Télécom SA v Commission of the European Communities* EU:C:2009:214
[54] n 33
[55] Commission (n 30), paras 243, 284; GC (n 31) para 146

margins between the wholesale and retail price, and to do so without its competitors profiting by capturing the lost sales of the downstream undertaking which are exiting the market.[56] In other words, if the vertically integrated undertaking did not have some market power on the downstream market, it would be the downstream competitors which benefit from a margin squeeze, rather than the vertically integrated undertaking, making carrying out a margin squeeze pointless.

RELEVANCE OF MARGIN SQUEEZE TO SMALL JURISDICTIONS

In view of the definition of margin squeeze and the above-mentioned pre-requisites, EU competition practice relating to margin squeeze is likely to have a bigger impact – positive or negative, as the case may be – in small jurisdictions. It is likely that margin squeeze will be applied to more business sectors in small jurisdictions, since there will likely be more sectors where: (i) because of efficiency gains and economies of scale, there are vertically integrated undertakings; (ii) such vertically integrated undertakings, because of the size of the market are likely to be dominant in a(n upstream) market; and (iii) there are more likely to be business sectors where an undertaking has control over an input, whether 'indispensable' or not, which could open that undertaking to margin squeeze claims.

Moreover, in the light of the above, it is evident that a particular environment is required for margin squeeze to be a successful, rational strategy. As a result certain sectors or industries are more prone to margin squeeze than others.

For instance Moselle and Black note that where the vertically integrated undertaking has access to what they term a 'bottleneck resource', that is an indispensable product, which is

[56] O'Donoghue and Padilla (n 5), 367. See also Geradin and O'Donoghue (n 2) 408 and Kallaugher (n 12) 28

price-regulated it has even more incentive to foreclose competitors from gaining access to that resource in order to gain monopoly profits in the competitive downstream market.[57] Gleeson notes that 'liberalised network industries contain all the economic conditions necessary'[58] for margin squeeze in order 'to deter their entry in newly-liberalised markets.'[59] The benefits from liberalisation and competition tend to be large,[60] although this will depend on the business sector in question.[61] This is likely to attract undertakings to monopolise such markets.

In view of the size of markets in small jurisdictions, and the necessarily limited number of competitors, ensuring that newly liberalised markets and markets with bottleneck resources in small jurisdictions are competitive – or at least as competitive as possible – is essential. Therefore, even if for the sake of argument small jurisdictions are not any more prone than larger markets to possible margin squeezing, margin squeeze should still be of particular concern to small jurisdictions.

ASSESSING MARGIN SQUEEZE

When it comes to assessing whether margin squeeze occurred, in theory the EU courts have accepted that it is necessary to consider 'all the circumstances'.[62] In reality however assessing whether abusive margin squeeze has occurred involves two steps. The first is carrying out the relevant imputation test; in other words making the necessary economic analysis and mathematical calculation in order to determine whether the margin between the retail price

[57] See Boaz Moselle and David Black 'Vertical separation as an appropriate remedy' (2011) 2(1) Journal of European Competition Law & Practice 84, 85
[58] Gleeson (n 3), 23
[59] *Ibid*
[60] See Moselle and Black (n 57) 90
[61] *Ibid* 88
[62] *TeliaSonera* (n 33), para 28. See also *Telefonica* (GC) (n 31), para 268; *Deutsche Telekom* (CJ) (n 32), para 175; *Kingdom of Spain v Commission* (n 34) para 77

and the wholesale price of the dominant, vertically integrated undertaking is negative or insufficient. The second is determining whether the margin squeeze results in an anti-competitive effect.

(I) THE RELEVANT IMPUTATION TEST

There are various tests which could be used to determine a margin squeeze.[63] However, two imputation tests are widely accepted as a measure for margin squeeze: (i) the as-efficient competitor test, which compares the difference between the retail price and wholesale price of the dominant undertaking to the costs of the dominant undertaking; and (ii) the hypothetically reasonably efficient downstream operator test (also referred to as the reasonably efficient operator test), which, as the name implies compares the difference in price to the costs of a hypothetically reasonably efficient operator on the downstream market.[64]

It is now well-established in EU competition practice that the relevant imputation test is the as efficient competitor test. This is evident from all the decided cases,[65] including the Commission decisions.[66] In fact, it is evident from the very definition of margin squeeze, which refers to the prices charged by the dominant undertaking wholesale *and* retail and to

[63] Frederic Marty 'Margin squeeze strategies in the Telecom sector: a comparative analysis of US and European competition case-law' (Innovation In Netowrk Industries: accounting, economic and regulatory implications, Paris March 2011) < http://www.docfoc.com/margin-squeeze-strategies-in-the-telecom-sector-a-comparative-analysis-of-us-and-european-competition-case-law-frederic-marty-cnrs-fellow-research-group > accessed 9 May 2016

[64] Neils, Jenkins and Kavanagh (n 1) 244

[65] Deutsche Telekom (GC (n 31) and CJ (n 32)); Telefonica (GC) (n 31)

[66] *RWE Gas Foreclosure* (n 35), para 30-31; *Deutsche Telekom* (Commission) (n 27) para 186. It was also made clear in *Napier Brown/British Sugar* (n 13) (para 65-66); see to this effect Hendrik Auf'mkolk 'The "feedback effect" of applying EU competition law to regulated industries: doctrinal contamination in the case of margin squeeze' (2012) 3(2) Journal of European Competition Law and Policy 149, 149

the product-specific costs of the dominant undertaking itself.[67] This means that generally in order to assess whether a margin squeeze occurred, the relevant court or competition authority must take into account relevant costs and prices of the undertaking itself.

The as-efficient competitor test has the benefit of complying with the principle of legal certainty, as undertakings are in a position of knowing their own costs and prices. It also has the benefit of only protecting competitors who are at least as efficient as the vertically integrated undertaking,[68] and not competitors who are less efficient. This occurs precisely because it only takes into account the vertically integrated undertaking's costs, and therefore only considers whether a competitor with the same costs would be squeezed.

However, in certain instances courts or competition authorities must consider prices and costs of competitors on the retail market;[69] in other words, certain circumstances merit the use of the reasonably efficient competitor test. The latter test is inimical to legal certainty, not just because the vertically integrated undertaking may not be aware of its competitors' costs, but also because such data may not be available. It also tends to protect small entrants and less efficient competitors, as it considers the costs of downstream competitors irrespective of their efficiency. As a result, its use in competition cases should be strictly circumscribed.

The margin squeeze test does not stop with the as-efficient competitor test. The Commission has specified that there are:

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[67] See also Guidance Paper, para 80: '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.' (emphasis added)
[68] See Geoff Edwards 'Margin squeezes and the inefficient "equally efficient" operator' (2011) 32(8) ECLR 402, 403; Meisel (n 3) 395; Jones and Sufrin (n 1) 429; O'Donoghue and Padilla (n 5) 381-382
[69] *TeliaSonera* (n 33), para 45-46; *Telefonica* (GC) (n 31), para 193

> four principles of the margin squeeze test, notably the equally efficient competitor test ..., the aggregated approach..., the appropriate test for assessing profitability over time ..., and the appropriate cost measure ... [70]

Therefore, aside from the as-efficient competitor test, another three assessments must be carried out.

Firstly, since the as efficient competitor test means assessing whether 'the vertically integrated company's own downstream operations could operate profitably on the basis of the upstream price charged to its competitors by its upstream operating arm',[71] the vertically integrated undertaking's profitability over time must be determined. Profitability is assessed either through the use of the 'period-by-period' approach, where the profitability of the retail operations are considered for a given period of time,[72] or through the use of a Net Present Value (NPV) analysis, which adopts the 'discounted cash flow approach', where the revenues and costs of the downstream operation over a period of time is considered.[73] In *Telefónica*, the Commission used both tests to determine whether there was a margin squeeze.[74] In view of the fact that these tests, as with any economic test, can never be completely accurate, the approach taken in *Telefónica* is sound and should be taken in each case. This would enable the Commission to make a more convincing case against the undertaking being investigated.

[70] *Slovak Telekom* (n 36), para 827 and *Telefónica* (Commission) (n 30), para 310
[71] *Telefónica* (Commission) (n 30) para 325
[72] *Ibid*
[73] Z Biro, G Houpis and M Hunt 'Applying margin squeeze in telecommunications: some economic insights' (2011) 2(6) Journal of European Competition Law & Practice 588, 592. See also Bergvist and Townsend (n 3) 14-15
[74] *Telefónica* (Commission) (n 30) para 349

On the contrary, where one of the tests adopted results in positive margins, the Commission has to investigate further.[75]

Secondly, the aggregated approach means that in order for the margin squeeze test to be carried out, the prices compared must be comparable. This means that the products whose prices are compared must be of the same type. Generally, the prices compared are either at the 'highest level of detail', where therefore each individual offer is considered, or else at the 'aggregate portfolio' level, in other words by considering a mixture of the retail services offered.[76] In *Deutsche Telekom* the Commission carried out a weighting exercise in order to be able to compare the cost of the upstream input, which was regulated, with the prices for the retail services offered.[77] In *Telefónica* the Commission conducted the test on an aggregated approach, that is on the basis of a mix of the services marketed by Telefónica on the downstream market.[78] The Commission has indicated that this was done on the principle that an equally efficient competitor must be able to at least profitably replicate the vertically integrated undertaking's product pattern.[79] The same approach was taken in *Slovak Telekom.*[80]

Finally, a competition authority or court might have to consider the appropriate cost measure. When the wholesale prices of the vertically integrated undertaking are *all* higher than its retail prices, and there is therefore a negative spread of prices, the dominant undertaking's costs need not be considered.[81] However, when there are positive margins, one has to determine

[75] See *Slovak Telekom* (GC) (n 36), para 250-268
[76] *Telefónica* (n 30); *Slovak Telekom* (n 36) para 831
[77] n 27, para 112 et seq; see also European Commission "Margin Squeeze" OECD Working Party No 2 on Competition and Regulation (DAF/COMP/WP2/WD(2009) 32) September 2009 (hereinafter referred to as "Commission OECD document"), para 22
[78] n 30, para 388
[79] Commission OECD document (n 77), para 22
[80] n 36, para 832
[81] *Deutsche Telekom* (n 27), para 138

whether the difference between the wholesale and retail prices for comparable services are insufficient to cover the product-specific costs of the vertically integrated undertaking when it provides its retail services. In this second scenario therefore the relative costs and cost structure have to be considered. Costs are calculated by using the 'long run average incremental costs' (LRAIC).[82] The LRAIC includes 'all the product specific variable and fixed costs of the relevant activity',[83] except for common or joint costs.[84]

Notwithstanding the fact that, as with any economic test, it contains certain elements of subjectivity, the imputation test used in EU competition practice is on the whole a legitimate starting point and a useful exercise for the assessment of margin squeeze. The problem with EU competition law, as is often the case, is that there tends to be over-reliance on the margin squeeze test, without much consideration of the anti-competitive effects of such conduct. This could have far-reaching effects on small jurisdictions in particular, as will be seen below. Indeed whilst the imputation test itself will not affect small jurisdictions any differently than large markets, evidence of anti-competitive effect is crucial.

(II) ANTI-COMPETITIVE EFFECT

In terms of EU doctrine finding that the downstream competitors' margin may be squeezed through the use of the relevant imputation test is not sufficient. It is now well-established that there must also be proof of anti-competitive effect,[85] before the existence of abuse can

[82] *Telefonica* (Commission) (n 30), para 318, *Telefonica* (GC) (n 31), para 268; *Slovak Telekom* (n 36), para 860; Guidance Paper, para 80; see also Commission OECD document (n 77) para 21
[83] O'Donoghue and Padilla (n 5) 382
[84] *ibid*
[85] *TeliaSonera* (n 33), para 61; *Deutsche Telekom* (CJ) (n 32), para 250-251; *Deutsche Telekom* (GC) (n 27) para 234-344; *Telefonica* (GC) (n 31), para 268. See also Padilla (n 5); Martin Rauber 'Case C-52/09 Konkurrentsverket v TeliaSongera Sverige AB [2011] ECR I-527 – confirming an inappropriate assessment framework for margin squeeze.' (2013) 34(9) ECLR 490 497; Elisabeth de Ghellinck and Christian Huveneers 'Who is right on margin squeeze: competition law or sector specific regulation?' (2014) 5(2) Journal of European Competition Law & Practice 95, 97-98

be confirmed. This is even more crucial where one of the imputation tests indicates positive margins.[86] This distinguishes margin squeeze from other types of abuses, commonly referred to as *per se* abuses, such as exclusive dealing,[87] whose very existence has traditionally been deemed to be abusive.

In theory, this principle should help to avoid cases where a margin squeeze is wrongly imputed.[88] The imputation test itself cannot be fully accurate, as it depends on a number of judgements made by the person carrying it out, particularly when it comes to the assessment of profitability, the choice of the level of aggregation and the calculation of the LRAIC. Aside from these possible 'calculation errors', this arm of the assessment of margin squeeze would help weed out cases where the squeeze in price is not anti-competitive. The classic case is when 'margin squeeze' is the result of an efficient pricing structure.[89] A price squeeze could be the result of cost savings which arise from the very fact that the dominant undertaking is vertically integrated, since a vertically integrated undertaking may be more efficient in providing the input to its own downstream arm than to a rival.[90] Requiring there to be an anti-competitive effect would help to mitigate the fact that in EU competition practice certain pre-requisites which are required in economic terms for there to be a margin squeeze – such as downstream market power and the indispensability of the product[91] – are not required,

[86] *Slovak Telekom* (GC) (n 36) para 260
[87] Pablo Ibáñez Colomo 'Beyond the "More Economics-based approach" a legal perspective on Article 102 TFEU case law' (2016) 53(3) Common Market Law Review 709
[88] O'Donoghue and Padilla (n 5) 390
[89] *Ibid* 247
[90] Gianluca Faella and Roberto Pardolesi 'Squeezing price squeeze under EC antitrust law' (2010)6(1) European Competition Journal 255, 257 and Meisel (n 3) 399. See also Faella and Pardolesi, page 259 where the authors note that: 'The fact that the difference between upstream and downstream prices is lower than the downstream costs of the dominant firm indicates that the latter must have engaged in (at least) one of the two practices: either the internal transfer charge is lower than the external price, or the downstream price does not cover the costs of the dominant firm's downstream operations'
[91] See below

and therefore would somewhat mitigate the wider approach taken in EU competition practice than would be advocated by economists.

In small jurisdictions the element of anti-competitive effects takes on particular significance and should be given prominence. The effects of particular conduct on a market in a small jurisdiction are different from those of that same conduct in a market in a larger jurisdiction. If this element is given the importance it should be, the peculiarities of small jurisdictions would be taken into account and both under-enforcement and over-enforcement in small jurisdictions would be avoided. In other words margin squeeze conduct would only be prohibited when there is a real potential that competition would be foreclosed.

The idea therefore that the anti-competitive margin squeeze should be considered before finding an abusive margin squeeze is admirable. However, in practice the analysis of anti-competitive effects in the decided cases is often spurious,[92] both at national and EU level. There is therefore little guidance from the cases as to how the analysis of anti-competitive effects is to be carried out. For instance, the analysis of this element is sadly completely absent in the Maltese case of *Datastream vs Camline*.[93] Had this element been considered the outcome of that case might have been significantly different. Alternatively, it would have strengthened the conclusion that there was an abuse of a dominant position.

So what can be divined from the decided cases? In *Deutsche Telekom* the GC held that the Commission had to demonstrate anti-competitive effects related to the possible barriers which the applicant's pricing practices could have created for the growth of competition in the market in question.[94] In the appeal decision, the CJ elaborated further and noted that

[92] O'Donoghue and Padilla (n 5) 393
[93] n 9. See below p 305
[94] n 31, para 235

what should be considered is the capability of that conduct to make market penetration more difficult and whether it could hinder growth because a competitor who is as efficient would not be able to carry on his business in the retail market without incurring losses.[95] The emphasis therefore appears to be on whether the market in question can grow in view of that pricing practice.

The EU authorities have emphasised that the anti-competitive effect on the market does not have to be concrete.[96] Indeed the anti-competitive effect need not actually materialise on the market,[97] even if enough time has passed between the margin squeeze and the investigation for any anti-competitive effects to have materialised.[98] On the contrary it is sufficient to demonstrate that the anti-competitive effect has the potential to exclude competitors who are at least as efficient as the dominant undertaking.[99] In other words, the potential for the pricing strategy of the dominant undertaking to hinder growth in the relevant market is sufficient. However, the potential effect has to be clearly identified, and cannot be merely 'theoretical'.[100] That said, there is little evidence of how clearly identified a potential effect should be. In *Telefónica*, Telefónica's argument that enough time had passed to determine there was no anti-competitive effect on the market[101] was ignored. Had it been given some consideration, it might have been clear that the *potential* anti-competitive effect which was considered was merely theoretical and unlikely to occur. The logical conclusion of this principle should be that the more that time has passed without any

[95] n 31, para 252-255
[96] *TeliaSonera* (n 33), para 64-65; *Telefonica* (GC) (n 30) para 268; *Telefonica* (CJ) (n 32), para 124; *Slovak Telekom* (n 36) para 825 and 1046
[97] *Deutsche Telekom* (CJ) (n 32), para 254; see de Ghellinck and Huveneers (n 82), 97-98
[98] *Telefonica* (GC) (n 31), para 272
[99] *Ibid*
[100] Jean-Yves Art 'Highway 102: A nice turn with still some miles to go' (2011) 2(3) Journal of European Competition Law & Practice 183, 183
[101] n 31

evidence of anti-competitive effects, the stronger the argument that no anti-competitive effects are likely to occur.

In *TeliaSonera*, the court held that the potential anti-competitive effect of the margin squeeze is probable when the wholesale product is indispensable[102] and when the margin between the wholesale and retail price is negative.[103] The extent of the market power of the vertically integrated undertaking is also relevant to assess potential anti-competitive effects.[104] This is as much practical guidance as can be gained from the decided cases as to what constitutes an anti-competitive effect.

When assessing whether the apparent margin squeeze has an anti-competitive effect it should be kept in mind that although margin squeeze is generally considered to be exclusionary in nature it may also be exploitative. It is exclusionary when the vertically integrated undertaking intends to foreclose competitors on the downstream market or where it forecloses the downstream market in the short term in order to prevent entry in the upstream market in the long term.[105] It is exploitative when the vertically integrated undertaking sets its prices at a level to allow it to capture the surplus introduced by a *more* efficient entrant which remains in the market.[106] In such cases, the dominant undertaking would engage in margin squeeze by setting a low retail price which the more efficient competitor would have to undercut, thereby increasing demand on the upstream market with the vertically integrated undertaking increasing profits on the upstream market.[107] Although

[102] n 33, para 70-71
[103] n 33, para 73. See also *Slovak Telekom* (n 36), para 826
[104] n 33, para 81
[105] Germain Gaudin and Despoine Mantzari 'Margin squeeze: an above-cost predatory pricing approach' Journal of Competition Law and Economics, 17
[106] *Ibid*, 18-19
[107] *Ibid,* 1-19

generally this harms downstream competitors rather than competition,[108] such conduct would in any case affect the upstream market, and affect competition upstream.

By focusing on the potential foreclosure of the price squeeze, competition authorities would indirectly provide clearer guidance as to what could indicate anti-competitive effects *in practice*, as well as ensuring a more just outcome and better substantiated decisions. Although this benefits markets in all jurisdictions, it would particularly benefit small jurisdictions, as it would ensure that truly abusive conduct, which harms competition on a limitedly competitive market, is prohibited whilst allowing pro-competitive or neutral conduct to continue, therefore heightening competition.

MARGIN SQUEEZE AS A STAND-ALONE ABUSE[109]

The EU decisional practice makes it clear that margin squeeze is to be considered as a stand-alone abuse. This was stated unambiguously in *Deutsche Telekom,*[110] *TeliaSonera*,[111] and *Telefonica.*[112] Margin squeeze was specifically said to be a separate type of abuse from refusal to supply (in this respect see *TeliaSonera*[113] and *Telefonica*[114]) and predatory pricing as well as excessive or exclusionary pricing (in this respect see *Deutsche Telekom,* [115] *TeliaSonera*[116] and *Telefonica*[117]). The idea is that margin squeeze is capable of constituting abuse in itself 'in view of the exclusionary effect which it may create for competitors who are

[108] *Ibid*
[109] This section is derived in part from an article published in European Competition Journal (2017) <copyright Taylor & Francis>, available online: http://www.tandfonline.com/10.1080/17441056.2017.1379730
[110] CJ (n 32), para 167 and 183
[111] n 33, paras 31, 34: "the unfairness of margin squeeze relates to the very existence of the margin squeeze and not to its precise spread"
[112] GC (n 32), para 187
[113] n 3, para 55
[114] GC (n 31) para 181
[115] CJ (n 32) para 183
[116] n 33, para 34
[117] GC (n 31), para 186-187

at least as efficient as the dominant undertaking, in the absence of any objective justification.'[118]

Therefore, there is no need to determine whether the wholesale price is excessive, whether the downstream price is predatory, or whether there is a duty on the vertically integrated undertaking to supply its product to its downstream competitors.[119] This position contrasts with the original stance taken by the Commission in the Discussion Paper and the Guidance Paper. In both documents, the Commission viewed margin squeeze as an abuse akin to refusal to supply.[120] In fact in the Guidance Paper the Commission goes as far as to say that both margin squeeze and refusal to supply are an enforcement priority if the same elements were satisfied, namely the objective necessity of the product to be able to effectively compete downstream, the likelihood of elimination of effective competition downstream in the case of refusal and the fact that refusal is likely to lead to consumer harm.[121]

The current position in EU competition law is also in stark contrast to that taken in the US. The definitive judgment on margin squeeze in US antitrust law is *Pacific Bell Telephone Company et al., v. Linkline Communications, Inc., et al*[122] where the Supreme Court held that:

> If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals' profit margins.[123]

[118] *TeliaSonera* (n 33), para 31
[119] *Telefónica* (Commission) (n 31), para 283; *TeliaSonera* (n 33), para 31, 34, 55, 58; *Telefónica* (GC) (n 31), para 187; *Kingdom of Spain v European Commission* (n 34), para 68; *Deutsche Telekom* (GC) (n 31) para 237; *Slovak Telekom* (n 36) para 822
[120] Discussion Paper, para 72; Guidance Paper, paras 80-81
[121] Guidance Paper, para 81
[122] 555 US 438 (2009) ("*Linkline*")
[123] III.B.3

In other words in terms of US antitrust law, squeezing the downstream competitors' margins is not prohibited unless there is a breach of an antitrust duty to deal on the upstream market or there is predatory pricing on the downstream market. No mention was made of exploitative pricing on the upstream market, because in terms of US antitrust law, exploitative pricing is not prohibited.[124] The Supreme Court was most concerned with the idea that a vertically integrated undertaking had to ensure a 'fair' or 'adequate' margin.[125] It felt that attempting to determine a fair margin is impossible, as no one can establish what it is with any certainty. In the Supreme Court's view, '[i]f both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price.'[126]

The difference in the approach taken by the EU and the US can be traced back to the philosophical and historical roots of EU and US competition law. The EU approach to margin squeeze reflects its ordo-liberal influences.[127] Although there are successive 'waves' of ordoliberalism, this ideology is based, *inter alia*, on the idea that whilst competition is the result of market players' freedom to choose, there must also be rules against restraints of competition in order to protect such economic freedom.[128]

On the other hand, US antitrust law is traditionally, although not exclusively, influenced by the Chicago school of economics.[129] Again, whilst there are differing views within the Chicago

[124] III.C.1
[125] III.C.1
[126] *Ibid.*
[127] See Marty (n 63)
[128] Peter Behrens 'The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658045> accessed 17 August 2017, 12 and Ignacio Herrera Anchustegui 'Competition law though an Ordoliberal Lens' (2015) 2 Oslo Law Review 139, 143 and 152
[129] See Marty (n 63)

school, a recurring theme is that operators are rational and profit-maximisers, and consequently markets are more self-correcting and self-disciplined than expected, with the result that the level of antitrust enforcement can be reduced.[130] The basic idea underlying this school of thought is that firms can only obtain or strengthen monopoly power through unilateral action if they are (irrationally) willing to trade profits for market position, as with an increase in price, demand will decrease.[131]

EU competition law therefore would tend to be more protective than its US counterpart, and tends to take a stricter approach to abuses by dominant undertakings. This is even more the case considering that EU competition law is also shaped by the overarching idea of market integration, which necessarily requires to a greater extent than other legal systems that the (internal) market is not distorted.[132] On the other hand, the objective of US antitrust law is more focused on consumer welfare and encouraging economically efficient outcomes.[133]

In view of the stark divergence in views on either side of the Atlantic, two questions naturally arise. First, is there any merit in considering margin squeeze as a stand-alone abuse? If that is the case, is there, in any case, merit in applying the principles of refusal to supply and/or exploitative pricing and/or predatory pricing to a margin squeeze assessment?

There are distinctly contrasting views in relation to whether margin squeeze *should* be considered an abuse in itself.[134] Considering margin squeeze as a stand-alone abuse is

[130] Jones, Sufrin and Dunne (n 1), 15-16; Richard A Posner 'The Chicago School of Antitrust Analysis' (1979) 127University of Pennsylvania Law Review 925, 928; Robert D. Atkinson and David B. Audretsch 'Economic Doctrines and Approaches to Antitrust' < http://www.itif.org/files/2011-antitrust.pdf > accessed 17 August 2017, 11

[131] Posner (n 130), 928

[132] See George A Hay and Kathryn McMahon 'The diverging approach to price squeezes in the United States and Europe' (2012) 8(2) Journal of Competition Law & Practice 259, 278-9

[133] *Ibid*

[134] See: (i) Daniel Petzold 'It is all predatory pricing: margin squeeze abuse and the concept of opportunity costs in the EU competition law' (2015) 6(5) Journal of European Competition Law & Practice 346, 346 and 350, who

protective of the market and of competition. It catches conduct which may appear not to harm competition if the upstream or downstream markets are viewed separately, but which entails consumer harm when the conduct on both markets is viewed together. The OECD has appreciated that the notion of margin squeeze could control anti-competitive behaviour which would not be sufficiently controlled under other types of anti-competitive abuse.[135] In view of the fact that Article 102 TFEU prohibits abuse of a dominant position, and the actual conduct need not fall within any specified category of abuse, and in the light of the generally market-protectionist approach of Article 102 TFEU, the approach taken in EU competition law is in line with the spirit of Article 102 TFEU. The approach taken in EU competition law is therefore justified.

This approach is also beneficial to small jurisdictions. It has already been shown how margin squeeze is of particular relevance to small jurisdictions. When one considers that small jurisdictions of their very nature already suffer from limited competition,[136] an approach which does not take any chances with the health of the market is to be preferred.

It therefore remains to be considered whether the assessment of margin squeeze should be informed by the assessments for refusal to supply, predatory pricing and exploitative pricing.

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believes that the idea of 'margin squeeze' in EU competition practice is 'redundant' because any harm that arises from margin squeeze cases can be remedied as predatory pricing. (ii) Rauber (n 85), 494 starts off by noting that the requirements for predatory and excessive pricing can be satisfied in margin squeeze cases, and in such cases there should be no need for a framework for assessing margin squeeze. He however then points out that this would not cover cases where vertically integrated undertakings still minimise the margins for their competitors without their wholesale price being excessive or the retail price predatory. At the same time, he believes that the CJEU has been 'correctly criticised for considerably broadening the liability of dominant undertakings'. (iii) Niamh Dunne 'Margin squeeze: theory, practice, policy: Part 1' (2012) 33(1) ECLR 29, 39 takes the view that once the prohibition of margin squeeze is utilised to protect the competitive process, there is merit in viewing margin squeeze as an independent form of abuse. She notes that margin squeeze can address cross-subsidies and vertical leveraging which would not otherwise be caught. (Also in Niamh Dunne 'Margin squeeze: theory, practice, policy – Part 2' (2012) 33(2) ECLR 61, 61)

[135] OECD 'Policy roundtables: Margin Squeeze' (2009) DAF/COMP(2009)36, 22. See also Jones, Sufrin and Dunne (n 1) 429

[136] See Chapter 1

Indeed the OECD suggests that where margin squeeze is considered as a stand-alone abuse, 'the principles and standards applied in prosecuting margin squeeze cases should be identical to the principles and standards applied if the case were prosecuted as the equivalent alternative form of abuse of dominance.'[137]

EXCESSIVE PRICING

First, let us consider exploitative or excessive pricing. Excessive pricing is said to occur when the price charged 'is excessive because it has no reasonable relation to the economic value of the product supplied'.[138] Therefore, in a margin squeeze context, the test used for exploitative pricing would be relevant when the vertically integrated undertaking increases the price of the input, possibly, although not necessarily, while decreasing the retail price.

The problem with adopting the methods of assessment for exploitative pricing and applying them to margin squeeze is that EU competition law is still imprecise as regards the tests for exploitative pricing. Some tests have been devised,[139] and today we do have some guidance on how they are to be applied, in particular when a comparison across Member States is applied.[140] However, these tests have rarely been applied in practice. Therefore, the tests for excessive pricing are in practical terms less satisfactory than the test used for margin

[137] OECD 'Policy roundtables: Margin Squeeze' (n 135), 21. See also p 24. See also Berqgvist and Townsend (n 3) 22-23 and Pablo Sanchez Iglesias 'The non-indispensable condition in 'margin squeeze' claims in Europe' (2013) 19 Columbia Journal of European Law Online 1, 3-4

[138] Case 27/79 *United Brands Company vs Commission of the European Communities* EU:C:1978:22, para 250

[139] See *United Brands* (n 138), para 252; Opinion of Advocate General Wahl delivered on 6 April 2017 in Case C-177/16 *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome* nyr 6 April 2017 EU:C:2017:286

[140] Case C-177/16 *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome* EU:C:2017:689

squeeze, whether the market is small or larger. There are also normative reasons why the tests for excessive pricing should not be applied to margin squeeze.[141]

PREDATORY PRICING

The next type of abuse to consider is predatory pricing, which occurs when the dominant undertaking prices its products so low that its competitors are unable to compete.[142] Within the margin squeeze context therefore the predatory pricing test might be useful when considering the retail price of the vertically integrated undertaking. The test for predatory pricing is well established in EU competition law, and roughly tallies with the suggested economic test. The so-called 'AKZO test' holds that prices below average variable costs are abusive; whilst prices above average variable costs but below average total costs are abusive if they form part of a plan for eliminating a competitor.[143]

Notionally margin squeeze is similar to predatory pricing, in the sense that when margin squeeze is engaged in in order to exclude downstream competitors from the market, the notion of 'sacrifice' is similar to that in predatory pricing. In the case of margin squeeze the vertically integrated undertaking would be willing to sacrifice profits in the short term in order to recoup them once it strengthens its position on the downstream market.[144] There is in fact an opportunity cost for each product not sold to the downstream competitor, which might be quite large.[145] In fact, in both predatory pricing and margin squeeze, the conduct has to be part of a rational (exclusionary) business strategy.[146]

[141] See Annalies Azzopardi 'No abuse is an island: the case of margin squeeze' (2017) 2-3 European Competition Journal 228, 238
[142] Jones, Sufrin and Dunne (n 1) 397
[143] Case C-62/86 *AKZO Chemie BV* (n 53), para 71 and 72
[144] See to this effect Gaudin and Mantzari (n 105) 17-18. See also O'Donoghue and Padilla (n 5) 398
[145] O'Donoghue and Padilla (n 5) 398; Padilla (n 5)
[146] See O'Donoghue and Padilla (n 5) 397

In view of these similarities, the failure by the EU institutions to utilise the predatory pricing standard, and the insistence on the margin squeeze test which goes beyond the idea of protecting markets from below-cost retail pricing which hinders new entry or excludes existing competitors, could be criticised for protecting competitors [147] rather than competition. The failure to consider the predatory pricing test has even been said to be putting the idea of consumer welfare at risk.[148]

The EU authorities should integrate part of the AKZO test in the margin squeeze test, particularly when the allegation is based on low retail prices. This would be done by considering whether the retail price charged by the dominant undertaking is below average total costs of the vertically integrated undertaking – which in a claim of abusive predatory pricing would require anti-competitive intent – before assessing whether there is sufficient margin for as-efficient competitors to compete with the vertically integrated undertaking. Retail prices above average total costs are not unduly low and it is therefore arguable that downstream competitors who could be foreclosed from the market with such retail prices are not as-efficient as the dominant undertaking. Indeed the Commission itself, within the context of predatory pricing, has recognised that a price above average total costs can usually only exclude less efficient competitors.[149] Therefore, assessing whether the retail price is below the average total costs would help weed out cases where as-efficient competitors would not be harmed by the dominant undertaking's conduct.

[147] Jones and Sufrin (n 1) 429
[148] *Ibid.* On considering whether the retail price is predatory, see Mairead Moore 'Deutsche Telekom and the margin squeeze fallacy' (2008) 29(12) European Competition Law Review 721, 724
[149] Discussion Paper, para 127

In most cases this step might be considered unnecessary, since in cases of margin squeeze the applicable test is the as-efficient competition test, which should be more than sufficient, as it considers the costs of the vertically integrated undertaking itself. Inherently therefore, one would be assessing whether an undertaking which is as-efficient as the dominant undertaking would be foreclosed from the market.

However, adopting the average total costs threshold would be beneficial when the competition authority has to carry out a margin squeeze test based on the reasonably efficient competitor. The use of the reasonably efficient competitor test in EU competition cases is circumscribed: it may only be used in those rare cases when carrying out the as-efficient competition test is not possible.[150]

The reasonably efficient competitor test tends to protect small entrants and less efficient competitors by considering the costs of downstream competitors irrespective of their efficiency. Applying a pure version of the reasonably efficient competitor test in competition cases would therefore result in the protection of inefficient competitors, rather than competition. Downstream competitors may also have higher costs, precisely because they are not vertically integrated, and therefore a margin squeeze is more easily found by using the reasonably efficient competitor test.[151] As a result, carrying out an assessment as to whether the retail price is above the average total costs in such cases would assist in ensuring that it is only genuine cases of margin squeeze, where as-efficient competitors are foreclosed from the market, that are caught by the prohibition in Article 102 TFEU.

[150] *TeliaSonera* (n 33), para 45 and 46

[151] Laurent Garzaniti 'Margin Squeeze: Some Observations from a Practitioner's Perspective' < https://www.coleurope.eu/fr/recherches/global-competition-law-centre/conferences/conferences-and-workshops> accessed 23 August 2017, 5-6

For the same reason, the partial AKZO test might also be beneficial in the rare situation where the squeeze resulting from the application of the as-efficient competitor test is the result of inefficiencies within the vertically integrated undertaking arising out of vertical integration, and where therefore its competitors would generally be more competitive, as it would prove that the vertically integrated undertaking's pricing is not unduly low, and that the market, and consumer welfare, is not being harmed by the vertically integrated undertaking's pricing strategy.

This proposed integration of the predatory pricing test into the margin squeeze tests is perhaps less obviously beneficial to small jurisdictions than to larger markets. On the one hand, due to the already limited products which are necessarily available to customers on the downstream market, disincentivising vertically integrated undertakings in small jurisdictions from selling at low retail prices which are in no way predatory, simply because there is not sufficient margin for its competitors to compete with it downstream is counter-productive. This is the case because in line with the theory of supply and demand, due to the limited supply of particular products, prices for products in small jurisdictions tend to be higher than in larger markets. Therefore low retail prices are beneficial to small jurisdictions where prices of inputs may already be higher than in the same product markets in larger jurisdictions.

On the other hand, requiring that margin squeeze which occurs through low retail pricing can only be sanctioned if the retail price is below the average total costs, may mean that downstream competitors could be foreclosed from the downstream market, leading to a lessening of competition on that market, which may already have limited players due to its size. However, as noted, a competitor who is foreclosed when the vertically integrated undertaking's retail price is above average total costs (assuming the wholesale price is not

unduly high) means that the downstream competitor is not very efficient. One might argue that in small jurisdictions, it is better to have less efficient competitors operating, since this would increase the number of players on the market. However this is not a sustainable model for competition law and policy, in *any* market. In particular, it would place a very heavy burden on the vertically integrated undertaking, which would in essence be made responsible for ensuring that downstream competitors who are not efficient, and could be considered dead-weight on the market, are able to somehow operate profitability. Such a state of affairs would both be unjust on the vertically integrated undertaking, special responsibility notwithstanding, and also highly detrimental to the market as a whole, which would become less and less viable. Indeed, if this were the goal of competition law, the applicable imputation test would be the reasonably efficient operator test, rather than the as-efficient operator test. Therefore, it is contended that this arm of the predatory pricing test should still be utilised in small jurisdictions, since this would ensure that retail prices which would not lead to the elimination of at least as-efficient competitors are lawful.

REFUSAL TO SUPPLY

Finally, and perhaps most importantly, is the abuse of 'refusal to supply'. This type of abuse has been considered in detail in Chapter 6. From an economic point of view there should be a duty to deal before an undertaking can be said to have squeezed the margins of its downstream competitors abusively,[152] however EU competition law has not deemed it

[152] Faella and Pardolesi (n 90) 268. See also See Geradin and O'Donoghue (n 2) 358, Gleeson (n 3), 23 and Niels, Jenkins and Kavanah (n 1) 239, who speak of indispensability of the input (which is an essential pre-requisite of refusal to supply).

necessary, notwithstanding that the economic effects of margin squeeze is the same as for refusal to supply.[153]

In other words in terms of EU competition practice, the vertically integrated undertaking may be subject to a margin squeeze investigation even if it is free to refuse supply. The reason behind the position in EU competition law is that the CJ believes that making margin squeeze subject to the same assessment as refusal to supply would 'unduly reduce the effectiveness'[154] of Article 102 TFEU. This explanation has been considered unsatisfactory,[155] particularly when one considers why margin squeeze should be analysed under the same conditions as refusal to supply.

Logically, it is unsound to argue that a dominant undertaking has a duty to deal on specific terms (namely allowing sufficient margins), when there is no duty to deal in the first place.[156] Auf'mkolk argues convincingly that margin squeeze is economically equivalent to refusal to supply because from the point of view of the downstream competitors it makes no difference whether the integrated firm charges a high price for the input, which would technically amount to a constructive refusal to supply, or straight out refuses to supply the input at any price.[157] The same argument applies to situations where the vertically

[153] Peter Oliver 'The concept of "abuse" of a dominant position under Article 82 EC: Recent developments in relation to pricing' (2005) 1(2) European Competition Journal 315, 325-326. See also O'Donoghue and Padilla (n 5) 366. Ibáñez Colomo (n 87), 16 is of the same opinion: he opines that the reason why the CJ requires evidence of an 'anticompetitive effect' in margin squeeze cases is precisely because 'Article 102 TFEU comes into play where the terms and conditions under which access is granted do not allow the latter to competitive effectively on the relevant downstream market'. The Commission also considered margin squeeze to be an extension of refusal to supply; see Guidance Paper, para 75-90

[154] *Telefonica* (n 32), para 58

[155] Auf'mkolk (n 66), 156 and Jones, Sufrin and Dunne (n 1) 428. See also Renato Nazzini 'Google and the (ever-stretching) boundaries of Article 102 TFEU' (2015) 6(3) Journal of European Competition Law & Practice 301, 309

[156] O'Donoghue and Padilla (n 5) 400; Rauber (n 85) 495-6; Jones, Sufrin and Dunne (n 1) 428; See also Gleeson (n 3) 25

[157] Auf'mkolk (n 66) 155

integrated undertaking squeezes the competitors' margins through other means. The over-zealous approach taken to margin squeeze is particularly problematic for small jurisdictions. When one considers that such markets tend towards oligopolies, the risk from over-deterrence is very likely to have a negative effect on markets in small jurisdictions.

The OECD has concluded that '[w]here there is no duty to deal, it is likely that margin squeeze cases are inappropriate'.[158] There tends to be a consensus that margin squeeze should be subject to the same conditions as refusal to supply; and that therefore there be a duty to deal on the vertically integrated undertaking before it be found to have engaged in abusive margin squeeze.[159] In particular the fact that there is no need for the input to be essential,[160] is not considered sustainable in economic terms, as it is only then that a margin squeeze has negative effects on the market.[161] The lack of having indispensability as a pre-requisite to finding a margin squeeze raises a notional problem: can there be said to be abusive margin squeeze at all if downstream competitors can acquire an alternative?

The main practical issue with the possibility of finding an abusive margin squeeze without there being an obligation to supply is that the vertically integrated firm might, rather than risk a margin squeeze investigation, simply not supply the product at all, or withdraw its product

[158] OECD 'Policy roundtables: Margin Squeeze' (n 136), 24

[159] O'Donoghue and Padilla (n 5) 403, Bergqvist and Townsend (n 3) 6; Rauber (n 85) 494; Art (n 100) 184; Renato Nazzini *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2012) 274-5. But see Pablo Ibáñez Colomo 'Indispensability and abuse of dominance: from *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*' [2019] 10(9) Journal of European Competition law & Practice 532 who makes an argument that rather than the "type" of abuse, what should be considered in determining whether indispensability of the input is required is whether the dominant firm is vertically integrated and the remedies that would be imposed (at 550).

[160] *TeliaSonera* (n 33) , para 72; On the difference between the current position and the position in the Guidance Paper see Ariel Ezrachi *EU competition law: an analytical guide to the leading cases* (5th edn, Hart 2016), 205

[161] Wolfgang Kopf 'Margin squeeze under competition law: a comparison of perspectives' (Florence School of regulation, June 2010) < http://www.energy-regulators.eu/portal/page/portal/FSR_HOME/COMMUNICATIONS_MEDIA/Policy_events/Annual_Conferences/2010/Wolfgang%20Kopf%20%28Deutsche%20Telekom%29 > accessed 9 May 2016

from the market.[162] This would be more detrimental to competition,[163] as it would result in the loss of an alternative product on the market. This is particularly problematic in small jurisdictions, where due to the size of the market the number of products on the market is already more limited than that on markets in larger jurisdictions, and where therefore the need for alternative products is stronger. Not supplying the product might not be an attractive option to many dominant undertakings, in any market, as like all businesses dominant undertakings try to create trading opportunities whenever possible. However, the risk of competition fines may outweigh the possibility of loss of revenue.

In terms of EU competition law, indispensability of the input may be relevant when determining whether the margin squeeze has an anti-competitive effect.[164] The CJ has held that where the input is indispensable for the sale of the retail product, the at least potentially anti-competitive effect of the margin squeeze is probable.[165] The issue of the indispensability of the input has therefore been integrated in the analysis as to whether a margin squeeze has an anti-competitive effect, rather than rendering it as a pre-requisite to finding a margin squeeze in the first place. Considering the indispensability of the input at such a late stage however means that indispensability is down-graded from an essential requirement to simply one consideration of many. This approach is unfortunate, as it means that undertakings may find themselves being investigated on margin squeeze grounds when they have simply made another non-essential product available on the downstream market, as was the case in

[162] See OECD 'Policy roundtables: Margin Squeeze' (n 135), 29 ; Faella and Pardolesi (n 90), 271; Pablo Sanchez Iglesias 'The non-indispensable condition in 'margin squeeze' claims in Europe' (2013) 19 Columbia Journal of European Law Online 1, 3-4; Auf'mkolk (n 66) 156-7
[163] Jones and Sufrin (n 1) 428
[164] *TeliaSonera* (n 33), paras 68-72; 82
[165] *TeliaSonera* (n 33) para 71

Telefónica. This is particularly detrimental to small jurisdictions, where availability of products may already be somewhat restricted due to their size.

In view of the benefits of having margin squeeze as a stand-alone abuse,[166] it will not be suggested here that the undertaking has to have a duty to deal before it can be found to have abusively squeezed its competitors' margins. However, EU competition practice should require the indispensability of the input before a margin squeeze claim can be contemplated. It is particularly unfair for a dominant undertaking, such as Telefónica, to be found to have abused its dominant position, by squeezing its competitors' margins, when its product was not necessarily required by its downstream competitors. Requiring that the input be indispensable before abusive margin squeeze can be found to subsist would temper the disadvantages of not requiring a duty to deal whilst maintaining the advantage of having margin squeeze as an independent abuse.

How would this impact small jurisdictions? Small jurisdictions generally have less access to a specific product than larger jurisdictions. They also suffer from lack of resources, particularly natural resources. Therefore customers and consumers in small jurisdictions tend to have less access to products than those in larger jurisdictions. This means that when vertically integrated undertakings are, due to competition enforcement, encouraged not to supply non-indispensable inputs, or not to innovate and invest, small jurisdictions are more at risk of being harmed than larger jurisdictions: first through shortages of the (non-indispensable) input, and subsequently through the resulting lessening of competition, or, 'at best' the lessening of quality products on the market. Since it is more difficult for small jurisdictions to self-correct, this harm will potentially last longer. Naturally, since there is a likelihood of there

[166] See p 290-291

being less availability or choice for particular products *qua* inputs, it is more likely that a particular product will be deemed indispensable in a small jurisdiction than in a larger jurisdiction, where the product concerned may not be indispensable.

As a result, requiring that an input be deemed to be indispensable before considering there to be abusive margin squeeze should benefit small jurisdictions in two ways. First because it would not unduly restrict vertically integrated undertakings who supply non-indispensable inputs, and secondly because it would ensure the availability of alternative products on a market which is likely to already have been restricted because of its size. This in turn ensures there is healthy competition upstream and subsequently allows downstream operators the possibility to obtain a particular input from a selection of upstream suppliers, with the consequence that the downstream market too would become or remain competitive. Second, it would ensure that vertically integrated undertakings who are truly in a position to foreclose the downstream market through margin squeeze, because their product is essential to downstream operators, are prohibited from doing so.

OBJECTIVE JUSTIFICATION

In *TeliaSonera* it was made clear that margin squeeze which has an anti-competitive effect, and would therefore fall to be considered to be abusive, may be objectively justified, or in the words of the CJ 'economically justified'.[167] In order for abusive margin squeeze to be justified, all the circumstances of the case must be considered.[168]

The CJ specified that it has to be determined whether the exclusionary effect of the margin squeeze is counterbalanced or outweighed by advantages in terms of efficiencies which

[167] *TeliaSonera* (n 33), para 75
[168] *Ibid*, para 76

benefit the consumer.[169] If it does not, or it goes beyond what is necessary to obtain the said advantages, the margin squeeze would still be considered to be abusive.[170] This lends support to the Commission's view in the Guidance Paper, where the Commission considered that conduct, including margin squeeze, can be considered to be justified on the ground of efficiencies.[171] The overarching idea with justifying conduct which would otherwise be considered to be abusive therefore is that the conduct, in reality, contributes towards consumer welfare in that 'no net harm to consumers' would arise.[172]

No case of margin squeeze has ever been justified,[173] and indeed it is difficult to imagine that any margin squeeze case can be justified in this manner, since the finding of abusive margin squeeze requires that there be anti-competitive effect. In other words, the finding of abusive margin squeeze pre-supposes that the conduct leads to consumer harm. As a result, it is contradictory to state that conduct which is inherently considered to result in consumer harm could ever be justified because consumers will ultimately benefit. Therefore, notwithstanding the EU courts' and Commission's statements in this regard, it is highly unlikely that a margin squeeze case can ever be objectively justified. Indeed, if the anti-competitive effect arm of the margin squeeze test is truly taken into account, there is no need for the 'objective justification' defence, as any possible 'defences' would be considered as an inherent part of the test.

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[169] *Ibid*

[170] *Ibid*

[171] Guidance Paper, para 28-31. The Commission noted four elements which must be satisfied for anti-competitive conduct to be justified: (i) the efficiencies are realised as a result of the conduct; (ii) the conduct is indispensable to the realisation of the efficiencies; (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected market; and (iv) the conduct does not eliminate effective competition.

[172] Guidance Paper, para 30

[173] See for instance *Telefónica* (Commission) (n 30) para 641-663 where the defence was rejected

The Commission also accepted in theory that an undertaking may objectively justify its conduct if it was necessary to meet competition.[174] The meeting competition defence can only be used if the response is suitable, indispensable and proportionate.[175] However, it said in no uncertain terms that:

> the meeting competition defence may not legitimise a margin squeeze that enables the vertically integrated company to impose losses on its competitors that it does not incur itself. The meeting competition defence may not legitimise a behaviour whose effect is to leverage and abuse an upstream dominance.[176]

As pointed out by O'Donoghue and Padilla, this argument is circular, as 'the whole point of objective justification is that it results in the conduct overall being classified as *not* infringing Article 102 TFEU'.[177] This is particularly the case with margin squeeze, since in terms of EU competition law a pre-requisite of finding a margin squeeze is that it has an anti-competitive effect. Again, a proper 'anti-competitive effect' assessment would obviate the need of the meeting competition defence anyway.

In any case, as the law currently stands it is highly unlikely that the objective justification defence will ever be successful in margin squeeze cases, whether based on efficiencies or on the meeting competition defence. However, it is submitted that in margin squeeze cases, particular attention should be given to certain defences raised by vertically integrated undertakings, as there could well be legitimate reasons for a margin squeeze which do not fit neatly in these pre-determined defences.

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[174] *Telefónica* (Commission) (n 30), para 637-640
[175] *Ibid* 639
[176] *Ibid* para 638
[177] O'Donoghue and Padilla (n 5) 394

These would include difficult market conditions, the introduction of a new product, a growing market, or a failed investment.[178] For instance, in the event of difficult market conditions upstream, the price of the wholesale product could increase. On the other hand, retail prices could decrease in the case of difficult market conditions downstream. Difficult market conditions are very likely in small jurisdictions due to their inherent limitations and therefore this may well be a legitimate reason for a margin squeeze.

Low retail prices are also evident in the case of the introduction of new products or when entering a market; undertakings often offer new products at cut-prices in order to encourage customers to buy the said product. Similarly, when downstream markets are growing, undertakings tend to cut their retail prices in order to (legitimately) compete for customers. Again, retail (downstream) prices are cut when undertakings have invested in a downstream product which has not been successful, in order to at least obtain some revenue for their failed investment. 'Failed' products may have failed precisely because they were or had become overpriced. Again, this is very possible in small jurisdictions where products are generally limited and where therefore undertakings may well price their products above their competitive price.

These price strategies are rational whether the undertaking is in a dominant position or not. It is therefore submitted that such claims should be considered as possible defences for dominant vertically integrated undertakings which are faced with claims of abusive margin squeeze. Alternatively, they should be considered as part of the analysis of whether there is

[178] Balasyte (n 48) 8; O'Donoghue and Padilla (n 5) 370

any anti-competitive effect in the first place, which would do away with the need of 'objective justification'.

MARGIN SQUEEZE CASES IN MALTA AND THEIR EFFECT

So far, there is only one decided case in Malta relating to margin squeeze – *Datastream vs Camline.* [179] The case concerned Datastream Limited ('Datastream'), a wholesaler of internet services operating on the market for International IP Bandwidth, which was a subsidiary of Maltacom plc, the state owned telecommunications incumbent. The Maltacom group of companies included an internet retail arm, an internet service provider called Maltanet Limited ('Maltanet'). The sector was privatised in 2006[180] and subsequently the companies forming part of the Maltacom group merged and were rebranded as GO plc ('GO'). Although the case dealt with conduct in the period 2004-2006, it arose when Camline Internet Services Limited ('Camline') was faced with a lawsuit for payment for wholesale broadband internet by GO in 2008. GO *qua* Datastream was said to have squeezed the margins of Camline because the wholesale prices were much higher than the prices offered by Maltanet on the retail market. In terms of the law as it stood at the time, the matter was referred to the CFT for a decision. The CFT requested the OFC to issue a report; due to legislative amendments, the case was finally decided by the Appeals Tribunal on the basis of the OFC report and submissions of the parties.

Although this case was based on Article 9 of the Maltese Competition Act, the Appeals Tribunal cited *Telefónica*, and indeed followed EU competition practice on margin squeeze without question.

[179] n 9

[180] < https://privatisation.gov.mt/en/past-projects/Pages/Maltacom.aspx > accessed 20 August 2016

The Appeals Tribunal first concluded that Datastream was dominant in the market for wholesale internet, in view of company's market share and the barriers to entry for other operators indicated in the OFC's report. It then considered margin squeeze conduct, and noted that downstream competitors who are forced to exit the market would have to be as efficient as the vertically integrated undertaking for there to be an abuse. The Appeals Tribunal noted that in *Telefónica*, the relevant test applied was the as-efficient competitor test; that the abuse consisted of the difference between the wholesale and retail prices; and that margin squeeze is still possible even if the wholesale prices were regulated by the relevant regulator. The Appeals Tribunal held that margin squeeze results in discouraging potential competitors from entering into the market, to the detriment of the consumer, who will pay a higher price than if there were no abuse.[181]

In its report, the OFC had concluded that since Camline could use the services of Datastream's competitors, and therefore the input was not indispensable, there could be no abuse. The Appeals Tribunal however did not agree, as it was of the view, in line with EU competition law, that one needed only to consider whether Datastream's prices did not allow its downstream competitors to compete on the market and whether Camline was as-efficient as Datastream/Maltanet. The Appeals Tribunal held that therefore one had to analyse whether Datastream would have made sufficient profit to operate on the retail market if its own service was based on the prices charged to third parties. This analysis was not carried out by

[181] On a related note, a case in Cyprus relating to the same period (Decision CPC: 22/2013 - Complaint of Areeba Ltd against CYTA concerning the national tariffs (margin squeeze) in mobile telephony) found that the Cyprus Telecommunications Authority (dominant in the markets for retail telephony and national roaming services) had not margin squeezed a new entrant (Areeba), as "retail prices provided by CYTA for these services were high enough to yield a markup for applicants (i.e Areeba) intended to access the use of CYTA's network and retail services". < http://www.competition.gov.cy/competition/competition.nsf/All/E6A7A49093412164C2257EC4003529AD?OpenDocument > accessed 30 December 2017. Since only a summary is available in English, analysis of this judgment and its conclusions it not possible.

the OFC. The Appeals Tribunal then simply concluded that from the evidence provided it resulted that the wholesale prices charged by Datastream were all much higher than the retail prices charged by Maltanet, and therefore it was clear that Datastream had exercised a margin squeeze in Camline's regard. As a result, the Appeals Tribunal concluded that Datastream had abused its dominant position through a margin squeeze.

There is some doubt whether Datastream was dominant on the market for international IP bandwidth and the market for wholesale internet services. It appears from the judgment that the OFC had concluded that Datastream did not have the ability to act independently of its competitors on both markets, yet had concluded it was dominant. So did the Appeals Tribunal. As noted in Chapter 2, this could perhaps indicate that the OFC and the Appeals Tribunal are adopting substantial market power as a definition of dominance. There is no explanation as to whether this is the case. It could also be the case, and this is more likely, that both the OFC and the Appeals Tribunal simply relied on the undertaking's market shares. In fact, the Appeals Tribunal did conclude that Datastream was dominant on the market for wholesale internet in view of its market share and barriers to entry on the relevant markets.

However, Datastream's dominance would not have been a given in any case. In fact the judgment indicates that there were, during the relevant period, only two operators on the market for wholesale internet. This meant that the market was a duopoly. Therefore the importance of Datastream's market share, whatever it was, is somewhat diminished. Indeed the Malta Communications Authority, in a communication to the Commission in 2006, concluded that:

> no single dominance can be found on the wholesale market, since both wholesale broadband access providers have stable and symmetric market shares (…) and enjoy

the same economies of scale and scope, as well as the same barriers to entry, absence of countervailing buyer power and vertical integration.[182]

It is difficult to see how GO could be considered to be dominant by the competition authorities yet not by the regulator.

Moreover, the judgment also indicates that GO's competitor, Melita plc ("Melita"), did not offer its services to third parties, preferring instead to supply its own downstream arm,[183] nothwitstanding that both GO and Melita had a regulatory duty to supply.[184] Since GO's competitor did not offer its services to third parties the situation at hand raises a number of questions.

First of all, it could have been the case that Datastream had no antitrust obligation to supply wholesale internet. This is likely since the OFC had concluded that its input was not indispensable. The reason for reaching this conclusion was that ISPs like Camline could potentially use Melita's product. Of course it appears that Melita was refusing to supply its product. Paradoxically therefore it could be said that Datastream's product was indispensable precisely because its competitor refused supplies. This is a preserve result where Melita's product was potentially considered not indispensable (otherwise it might have faced a refusal to supply action), which created an indispensable input of Datastream's product.

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[182] Case MT/2007/0563: Wholesale broadband access 29 January 2007, 3 < https://circabc.europa.eu/webdav/CircaBC/CONNECT/e-cctf/Library/01%20-%20Commission%20Decisions/Commission%20Decisions%202007/MT%202007%20563%20Serious%20doubts%20letter%20LS%20amended%202.pdf > accessed 2 January 2018 (link no longer available, but reference to this document can be found in Case MT/2007/0563: Wholesale broadband access; Opening of Phase II investigation pursuant to Article 7(4) of Directive 2002/21/EC (SG-Greffe (2007) D/200366))

[183] This is confirmed in *ibid* p 4

[184] *Ibid*

In any case, within the context of market definition, Datastream argued that alternative inputs could be provided through fixed line connections and satellite connections, as well as via igaming companies and other operators which although not licensed, were providing the same service. This argument was disregarded within the context of market definition, but could have been relevant when considering whether Datastream's input was indispensable or its conduct anti-competitive.

Moreover, its (upstream) competitor Melita was not obliged to supply; otherwise, assuming that Melita's market share as a duopolist was also substantial, it too would have faced an antitrust investigation. In such a case, Datastream, like Telefónica, was penalised for making another product available on the market, simply because its pricing structure did not benefit its competitors on the downstream market. However, this cannot be said to be beneficial to a small jurisdiction such as the retail internet market in Malta. Assuming there was no antitrust obligation to supply, since there were only two upstream operators, had Datastream decided not to supply it could well have resulted in the downstream market becoming less competitive, with only the downstream arms of the upstream operators operating on the market. The irony is of course that Datatstream was penalised for margin squeezing its competitors, whereas its own upstream competitor was not sanctioned for refusing to supply.

Indeed today, there are only two main retail broadband providers for the general public – GO and Melita.[185] Whether this is because the operator which did provide wholesale internet,

[185] See Malta Communications Authority 'Communications Market Review: January to June 2016 (2016) < http://www.mca.org.mt/sites/default/files/cmr_fh_2016_report_02%2012%202016.pdf > accessed 28 December 2016, 14; Malta Communications Authority 'Wholesale Broadband Market: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies' (2012) < https://www.mca.org.mt/sites/default/files/attachments/decisions/2013/response-to-consultation-and-notifcation-document-wholesale-broadband-markets-market-4-5-151012.pdf> accessed 28 December 2016, 18-19

namely Datastream (subsequently GO) was actually abusing its dominant position through margin squeeze, and therefore successfully managed to foreclose downstream competitors from the retail internet market, or because of reluctance by GO to offer wholesale internet to third parties following an antitrust investigation, or even whether this was the result of inefficiencies on the part of ISPs, would require an economic investigation into the relevant market during the relevant period which is beyond the scope of this thesis.

Whatever the reason today the retail internet market in Malta is not competitive, and is in fact less competitive than it was in the period 2004 to 2006.[186] This would indicate that either (i) competition enforcement is not adequate and is not timely – in fact although the conduct allegedly started in 2004, and the claim came to light in 2008, the case was only finally decided in 2014; or (ii) competition enforcement ironically led to a lessening of competition on the market.

The lack of effect of competition enforcement in this case might be the result of the natural tendency of markets within small jurisdictions to concentration. In fact, the telecoms market in Malta is a prime example of the level of concentration present in small jurisdictions. In 2017, Apax Partners Midmarket SAS ("APAX"), the main shareholder in Melita, attempted to acquire Vodafone Malta Limited ("Vodafone").[187] The idea behind this merger was clearly an attempt by Melita to strengthen its mobile telephony branch, although Vodafone also supplies retail internet. In December of the same year, it was announced that the merger notification had been withdrawn.[188] From the announcements made by the two companies,

[186] See data available for 2008 in Malta Communications Authority 'Communications Market Review: January to June 2008' (2008) < https://www.mca.org.mt/sites/default/files/reports/communications-market-review-july-december-2008.pdf> accessed 28 December 2016, 28

[187] http://www.mccaa.org.mt/en/mccaa-news accessed 30 December 2017 (webpage no longer available)

[188] Malta Competition and Consumer Authority, Press Release (9 December 2017) http://mccaa.org.mt/en/mccaa-press-releases accessed 30 December 2017

it appears that commitments had been offered to the OC, however they had not been deemed sufficient by the OC to allay its concerns.[189] In this case therefore, *ex ante* competition enforcement proved effective in retaining competition on a concentrated market. Arguably, if one compares the outcome of *Datastream vs Camline* to the abandoned Melita/Vodafone merger, in practice *ex ante* competition enforcement is more effective at protecting small jurisdictions than *ex post* enforcement.

The comment made by the Appeals Tribunal in the *Datastream vs Camline* judgment that margin squeeze would result in higher prices for consumers also merits some discussion. It may be true that, once foreclosure downstream is successful (or even foreclosure upstream), prices may rise. However, this is not necessarily the case. The vertically integrated undertaking may simply benefit by having more downstream (or upstream) customers. Moreover, in the short term it is unlikely that prices will rise; this would likely only be the case once the market is made less competitive, as otherwise customers would switch to the vertically integrated undertaking's competitors.

Finally, it is not clear from the judgment what evidence was provided for the Appeals Tribunal to conclude that there was a margin squeeze in this case. Certainly, the judgment does not contain the level of analysis which is usual in Commission decisions on margin squeeze. Neither does it contain any consideration of the anti-competitive effects of the conduct. GO has applied for judicial review of this decision, which in its main part is based on the fact that

[189] Vodafone 'Termination of the proposed merger between Vodafone Malta and Melita' (8 December 2017) < https://www.vodafone.com.mt/Vodafone-news-details/2002 accessed 30 December 2017 >; Melita 'Termination of the proposed merger between Melita and Vodafone Malta' (8 December 2017) < https://www.melita.com/termination-proposed-merger-melita-vodafonemalta/> accessed 30 December 2017

the Appeals Tribunal did not conduct the margin squeeze test in the manner it was obliged to do. The case is awaiting judgment.

Based on *Datastream vs Camline*, it is therefore difficult to determine whether competition enforcement with regard to margin squeeze is beneficial to small jurisdictions, particularly since it can be argued that in this case there was no timely enforcement of competition law. However, considering that today (i) there are less competitors on the downstream market, and (ii) there has been no change in the wholesale internet market, with GO and Melita still being the only two players;[190] it is arguable that competition enforcement either had no effect on the retail market (if it be argued that ISPs left the retail market due to inefficiencies) or had a negative effect (if it be argued that enforcement had a chilling effect on upstream operators).

CONCLUSIONS

It is by now evident that the, somewhat controversial, stance taken in EU competition practice to consider margin squeeze as a stand-alone abuse means that certain conduct which in other jurisdictions would not be considered to be harmful to the market, is considered abusive. This means that EU competition law captures conduct which would not fall to be determined as abusive otherwise. The stance taken in EU competition practice regarding margin squeeze should be seen in a positive light, as it attacks conduct which would otherwise fall through

[190] Malta Communications Authority 'Wholesale Broadband Market: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies' (2012) < https://www.mca.org.mt/sites/default/files/attachments/decisions/2013/response-to-consultation-and-notifcation-document-wholesale-broadband-markets-market-4-5-151012.pdf> accessed 28 December 2016, 77-78

the cracks (although it has been noted that this could still happen with the law as it stands today).[191]

Margin squeeze is likely to increase in importance as time goes by. As noted in the very beginning, the time is ripe for margin squeeze cases to crop up, in view of the fact that we are now living in a post-liberalisation world. Moreover, the growing number of small Member States of the EU mean that the incidence of margin squeeze cases where EU competition law is applicable is likely to increase. The increase in small states also means that the applicability of EU competition law on margin squeeze to small jurisdictions may need to be seriously considered, particularly in the light of all the concomitant problems which have been highlighted in this chapter. Although the Commission has been reported as saying that the analytical framework for the assessment of abuse of dominance did not need to alter because of the size of the economy,[192] the EU has to at least consider that the size of the economy is relevant in the application of competition law and policy to certain conduct or practices.[193] This is undoubtedly the case with margin squeeze.

The application of the imputation test used, particularly the use of the as-efficient competitor test, is generally uncontroversial. In deciding to apply the imputation test, the EU competition authorities have made the best choice they could, particularly keeping in mind that no legal-economic test can ever give perfect results. The EU position however can be criticised for ignoring the tests it has adopted for predatory pricing and refusal to supply. It has already been suggested that a pre-requisite for margin squeeze claims should be whether the product

[191] Bergvist and Townsend (n 3) 23
[192] International Competition Network 'Special Project for the 8th Annual Conference: Competition Law in Small Economies' 26 < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 30 December 2017
[193] *Ibid*

is indispensable. Moreover, in certain instances, the competition authorities should consider whether the retail price is below the average total costs. This chapter has shown how this would benefit both small and larger markets.

At present, the empirical test used in EU competition law is moderated by the requirement that there be an anti-competitive effect on the market. The fact that not enough attention is paid to this criterion is a major problem in EU competition practice. This is of particular concern in small jurisdictions, since the competitive reality in small jurisdictions is drastically different from other markets, and therefore an analysis of any potential anti-competitive effects could drastically alter the outcome of cases.

A ban on margin squeeze can have both pro- and anti-competitive effects. A vertically integrated undertaking wanting to comply with competition law could either lower its wholesale prices or raise its retail prices in order to avoid squeezing its competitors downstream.[194] The former is more likely to lead to aggressive pricing, as it reduces the costs of the downstream competitors,[195] and these downstream competitors can therefore compete with the vertically integrated undertaking by offering lower prices to their common customers on the downstream market. However, lowering wholesale prices also reduces the vertically integrated undertaking's incentives to invest,[196] as it would be unable to make the profits it expects from its wholesale product, no matter how innovative. The ban on margin squeeze may also increase the vertically integrated undertaking's incentive to foreclose the upstream market,[197] as it would potentially be the market on which that undertaking could

[194] See Bruno Jullien, Patrick Rey and Claudia Saavedra 'The Economics of Margin Squeeze' IDEI Report, October 2013, 31
[195] *Ibid*, 32
[196] Bishop and Walker (n 38) 340
[197] Jullien, Rey and Saavedra (n 194) 33, cited also in Bergqvist and Townsend (n 3), 7-8

exert monopoly profits. As a result the actual result of a margin squeeze ban on the market is difficult to gauge with any certainty.[198] Because of this 'the enforcement effects of prohibiting margin squeeze are ambivalent for consumers.'[199] This will be true of any market, whether small or otherwise. This is very evident from the judgment in *Datastream vs Camline*,[200] where one can have no clear conclusion whether the ban on margin squeeze actually lead to any positive results, or, as is more likely whether it had no effect or even had a negative effect on the market. Therefore, although margin squeeze should be considered as a stand-alone abuse, care should be taken with its enforcement, even more so in the case of small jurisdictions, which, due to the limits inherent in their nature,[201] are less likely to self-correct [202] following overzealous enforcement of competition law. In such cases the ban on margin squeeze might result in more harm than good.

[198] See Jullien, Rey and Saavedra (n 194) 32
[199] Bergqvist and Townsend (n 3) 7
[200] n 9
[201] See Chapter 1
[202] See Chapter 1

PART II: CONCLUSIONS

This Part has examined four types of conduct commonly, or potentially commonly, found in small jurisdictions. It has been shown how the application of EU competition law, particularly Article 102 TFEU, to such conduct may potentially harm small jurisdictions rather than safeguard them.

The results of the analysis clearly show that competition law is essential to small jurisdictions, as it has the potential to stop monopolists and oligopolists from taking advantage of the market to the detriment of competition and ultimately consumers. The problem is the current interpretation and application of Article 102 TFEU, which tends to take a very form based approach to conduct by dominant undertakings. This form based approach does not allow for the evaluation of the effects of the conduct in question on the market. Whilst this is problematic also in larger jurisdictions, since this form based approach was formulated by taking into account the economic realities of large jurisdictions, the resulting principles tend to be more problematic when applied to small jurisdictions.

Effectively, conduct which, due to the peculiarities of small jurisdictions, actually has pro or neutral competitive effects, may be prohibited simply because it is being carried out by an undertaking which is dominant on that market, notwithstanding the benefits that may accrue to the market, or the fact that the market cannot be harmed by that conduct.

To this end, this Part has proposed the tests that should be adopted for the conduct examined herein to be considered to be abusive:

(i) when it comes to exclusive dealing, competition authorities and courts should first identify the potential foreclosure and then test this theory against the facts of the case. To do so, one would have to ask whether the undertaking produces a must stock product or has a captive sales based, whether entry of as-efficient competitors is being prevented, whether contestable shares are too small for as-efficient competitors to establish a minimum viable scale and whether customers and consumers are harmed by the conduct. This is effectively the test proposed by Ridyard.[1]

(ii) when it comes to rebates, the characteristics of the rebate have to be considered to determine whether it more closely resembles exclusive dealing, discrimination or predatory pricing. Subsequently the test adopted for each of these types of abuses in EU competition law should be applied. The proposed test for exclusive dealing is highlighted in point (i) above. If the rebate potentially results in discrimination, competition authorities and courts should consider whether the grant of the rebate is discriminating between equivalent customers, and assess whether it is resulting in a distortion of competition between those competitors (competitive disadvantage). Finally, if the rebate resembles predatory pricing, the competition authority or court has to carry out the *AKZO*[2] cost based test.

(iii) when it comes to refusal to supply, the *Bronner*[3] criteria should be applied to all cases.

[1] Derek Ridyard 'Exclusive contracts and Article 82 enforcement: an effects-based perspective' (2008) 4(2) European Competition Journal 579

[2] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* EU:C:1991:286

[3] Case C-7/97 *Oscar Bronner BmbH & Co HG v Mediaprint* EU:C:1998:569

(iv) when it comes to margin squeeze, although the test is adequate, the test should be refined in two ways. Firstly, a dominant undertaking should only be assessed for abusive margin squeeze if the input in question is considered 'indispensable' to operate downstream. Secondly, where the reasonably efficient competitor test, rather than the as-efficient competitor test, has to be adopted, or where the vertically integrated undertaking is inefficient, a dominant undertaking should only be subject to a margin squeeze investigation if the resulting retail price is below average total costs.

If these reformed tests were to be adopted, there would be no place for the 'objective justification' defence. The elements that are normally considered as a defence to findings of abusive conduct would be considered as part of the tests highlighted above. This would reverse the current burden of proof – but only to an extent. Currently, the dominant undertaking has to prove that its conduct is harmless, except perhaps in the case of margin squeeze, where the competition authority or plaintiff has to show anti-competitive effect. Adopting these tests would mean that the competition authority or plaintiff would have to show anti-competitive effect in all cases – whether specifically or as an inherent part of the test adopted. This however is in line with the general principle of law that *ei incumbit probatio qui dicit, non qui negat*, and so should not be particularly controversial. Being dominant does not deprive an undertaking of the protection afforded by the law. The dominant undertaking should only be forced to bring proof to defend its position, and not to bring forward evidence which should truly be considered as part of the allegation of anti-competitive conduct.

CHAPTER 8: CONCLUSIONS

This thesis set out to examine whether the EU competition rules applicable to dominant undertakings are in need of an overhaul, particularly when they are applied in small jurisdictions. The research and analysis carried out have led to the conclusion that this is indeed the case.

This thesis has shown that the current application of EU competition law to undertakings in a dominant position in some instances tends to harm competition rather than safeguard it. EU competition policy on dominant undertakings favours a form-based approach, which, whilst having the merit of ensuring legal certainty, tends to dull incentives for undertakings to attempt to become market leaders and risks chilling pro-competitive behaviour, which ultimately fails to protect consumers.[1]

Naturally this effect may occur in all jurisdictions, irrespective of their size, and therefore the effects-based approach would likely benefit large jurisdictions as well as small jurisdictions.

However, this thesis has shown that this chill on competition occurs in small jurisdiction to *a larger degree* because:

(i) small jurisdictions have a higher proportion of dominant undertakings and therefore the form-based EU competition rules will apply to a larger proportion of undertakings in small jurisdictions;

[1] See OECD Policy Roundtables: 'Fidelity and Bundled Discounts and Rebates' (2008) DAF/COMP(2008)29, 21 and Simon Bishop and Philip Marsden 'The Article 82 EC Discussion Paper: a missed opportunity' (2006) 2(1) European Competition Journal 1, 1

(ii) small jurisdictions have a higher proportion of monopolies and oligopolies, and therefore again the form-based EU competition rules will be applied to a larger number of markets in small jurisdictions;

(iii) the uniform form-based approach was devised to be applied in large jurisdictions and to their economies, and not in small jurisdictions or to their economies, meaning that the principles underpinning this approach do not, in many cases, apply to small jurisdictions at all; and

(iv) therefore, the uniform form-based approach does not take into account the peculiarities or realities of markets in small jurisdictions.

Undoubtedly a chill on competition should be avoided in all jurisdictions. However, additional care must be taken to avoid this in small jurisdictions, because the self-corrective mechanism in small jurisdictions does not work as well as in larger jurisdictions.[2] This means that market forces in small jurisdictions cannot easily re-equilibrate the market following either over-zealous enforcement (false positives) or under enforcement (false negatives). The failure of markets in small jurisdictions to self-correct moreover, has two particular direct repercussions in small jurisdictions which should be considered when devising competition policy vis-à-vis the treatment of undertakings which are dominant in small jurisdictions, or parts of small jurisdictions.

The first repercussion is perhaps obvious – where the application of competition law harms a market in a small jurisdiction, whether because of over-zealous application, or because of incorrect application, or application which does not consider the effects of the conduct being

[2] International Competition Network 'Special Project for the 8th Annual Conference: Competition law in Small Economies' < http://www.internationalcompetitionnetwork.org/uploads/library/doc385.pdf > accessed 17 October 2015, 27-28. See also Gal (2001) (n 184) 50

examined on the market, that market is unlikely to re-calibrate itself with time. This would result in long-term, potentially permanent, damage to the market. On the contrary, in larger jurisdictions, over-zealous or incorrect application or form-based application of the rules, without reference to the effect of conduct on the market, is more likely to result in short or medium term damage to the market, if at all, as opposed to long-term or permanent damage.

The second repercussion may appear to be diametrically opposed to the first: given the market's inability to self-correct, the conduct of dominant undertakings must be scrutinised in order to ensure that harmful conduct is nipped in the bud before the market is harmed by that conduct. Otherwise, untimely enforcement of competition law, which would allow dominant undertakings in small jurisdictions to continue their abusive conduct for some time, would irreparably harm the market in question (again given the market's inability to correct itself with time).

However, these two repercussions are not in fact contradictory. Both stem from the reality of small jurisdictions, and upon closer inspection are actually two sides of the same coin. Effectively because of the particular characteristics of small jurisdictions, most especially because the market cannot easily self-correct, competition law in small jurisdictions needs to ensure that conduct by dominant undertakings that truly forecloses competition on a particular market is prohibited, in order to ensure that the market is safeguarded (and therefore forbid unlawful conduct by dominant undertakings in a timely manner, thereby avoiding the second repercussion), whilst conduct which has a neutral or pro-competitive effect, notwithstanding that it may appear to be anti-competitive, should be allowed to continue unchecked, in order to encourage whatever limited competition there is on the

market (and therefore avoid over-zealous enforcement or incorrect application of the law, and consequently avoiding the first repercussion).

Whilst naturally this is the optimal strategy for any competition policy, the current, mostly form-based approach adopted by EU competition law does not reach this goal in small jurisdictions, because, as just noted, the current rules were designed for larger jurisdictions. Therefore the form-based approach, to some extent or other, tends to meet this objective in larger jurisdictions, and where it does not do so, the market in a larger jurisdiction can more readily self-correct. This would be the case even where the market in question is a monopoly or oligopoly in a large jurisdiction. On the contrary, in small jurisdictions, this objective is not met, and the resultant harm is more likely to lead to long-term or permanent damage to the market. This objective however could be met by utilising the effect based approach in small jurisdictions.

The effects based approach applied to small jurisdictions should enable competition enforcers to take into account the realities of small jurisdictions. This approach would allow enforcers to take a more lenient or tougher approach to conduct on a case by case basis depending on the nature of the conduct and the characteristics of the product market being considered.

Some general principles can however still be extracted as a guideline. Of its very nature some conduct is more likely to result in foreclosure in small jurisdictions than others, and not all conduct currently viewed as abusive harms the market in small jurisdictions to the same extent. This is why this thesis proposes a more lenient approach to some types of conduct, whilst proposing adopting a stricter approach to other types of conduct.

This idea of a differentiated approach for small jurisdictions is not a radical suggestion; what is novel is the conclusion that this differentiated approach should also be applied to different types of conduct. Thus for instance, Gal advocated for a more lenient approach to merger control in small economies, coupled with a tougher approach to abuse.[3] This thesis however started off from the hypothesis, borne out by the results of the research and analysis carried out, that this approach would not go far enough, and indeed a tough approach to conduct by dominant undertakings based on a form-based method of analysis, such as that adopted in EU competition law, tends to do more harm than good in small jurisdictions. Whilst Briguglio and Buttiġieġ[4] already flirted with the idea of a differentiated approach to abuse in their 2004 paper, they do not take the idea any further, and never go into much detail on their thought process, nor do they test their hypothesis, and indeed the comment seems an *obiter* remark. This thesis has proven that that idea is indeed the correct approach to take.

Thus for instance a more "lenient" approach to exclusive dealing in small jurisdictions is preferable. Adopting a purely form based approach to exclusive dealing in small jurisdictions means that undertakings dominant on the upstream market can never enter into an exclusive dealing arrangement with a downstream operator without falling foul of Article 102 TFEU (and potentially also Article 101 TFEU). However this means that undertakings and end-consumers in small jurisdictions, where the relevant market is likely to be highly concentrated, would be unable to benefit from economies of scale and other efficiencies which would be created through the exclusive dealing arrangement. Exclusive dealing would

[3] Michal S Gal, 'Market Conditions under the magnifying glass: general prescriptions for optimal competition policy for small market economies' (New York University Centre for Law and Business, Working Paper CLB-01-004(< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267070> accessed 16 April 2016; Michal S Gal, *Competition Policy for small market economies* (Harvard University Press, 2009)

[4] Lino Briguglio and Eugene Buttigieg 'Competition constraints in small jurisdictions' (2004) 30 Bank of Valletta Review 1

allow the benefits of vertical integration to accrue to small jurisdictions, without consolidating the already small market any further through mergers, particularly where contracts are entered into for a limited duration. Therefore, exclusive dealing in small jurisdictions should, *in cases where no foreclosure is proven*, be allowed.

On the contrary, refusals to supply in small jurisdictions should be considered with a more critical eye. Given the limited resources in small jurisdictions, particularly if the market is highly concentrated – such as where the relevant market is a monopoly, duopoly or monopoly – wherever possible downstream operators should be allowed access on fair terms to critical inputs which are owned or controlled by dominant undertakings, especially where due to the (geographic) size of the jurisdiction, the input – say a critical infrastructure – cannot be replicated. That said, this should only be the case where the input really *is* indispensable. The recent approach taken in *Slovak Telekom*[5] to essential facilities is equally dangerous in small jurisdictions. If the *Bronner* criteria are not applied religiously in small jurisdictions, in particular the requirement that the input be indispensable, claims for access will multiply where no such access is necessary, for instance, where alternatives can be acquired from upstream competitors or alternative methods of production can be made use of. This not only deters investment by the dominant undertaking but also encourages free-riding by non-dominant competitors, which harms an already limited market where investment should be encouraged.

The current approach to margin squeeze is problematic for small jurisdictions for the same reason, given there is no requirement that the input be indispensable before it is found that

[5] Case AT/39523 15 October 2014; Case T-851/14 *Slovak Telekom as v European Commission* EU:T:2018:929

there is abusive margin squeeze. Again, cases of alleged margin squeeze should be prioritised in small jurisdictions, as margin squeeze may easily eliminate a downstream competitor in an already limited market. It will be remembered that in small jurisdictions markets may be limited even if they do not constitute a monopoly, duopoly or even an oligopoly proper, as there are limited resources and limited demand. However, where the input is not indispensable, the dominant, vertically integrated firm might, rather than risk an investigation or action for damages, simply not supply the product at all, or withdraw its product from the market, resulting in the loss of an alternative product. Given the limited number of products on small jurisdictions, where the need for alternative products is much stronger, the current approach is therefore particularly harmful to small jurisdictions.

Naturally, these are only general guidelines which would tend to apply where the market is concentrated (a monopoly, duopoly or oligopoly) and in markets within small jurisdictions which are less concentrated this may not apply. The benefits highlighted may therefore not extend to such markets, particularly if they are also highly competitive – on the contrary, conduct on such markets may be to be more rigorously checked to protect what competition there is. Underenforcement may be equally pernicious as over enforcement in small jurisdictions. This is precisely why an effects based approach, which requires a case by case approach to conduct by dominant undertakings in small jurisdictions is being proposed. Such an approach would have to consider the foreclosure effects – or otherwise – of the conduct in question. Although the effects based approach may create an additional burden on enforcers – both probatory and resource wise – as well as additional burdens on dominant undertaking carrying out a self-assessment as to whether their conduct is anti-competitive or

not, this is still preferred to the potential negative consequences on the market, highlighted at the start of this chapter.

Undoubtedly, certain aspects of the current application of EU competition law has some benefits to small jurisdictions. These benefits can for instance be clearly seen with respect to the approach taken to collective dominance and the market protective approach taken to some types of abuse.

The notion of collective dominance, as considered in EU competition law, is particularly wide and includes oligopolistic and non-oligopolistic collective dominance, with the latter including the possibility of undertakings in vertical relationships also being deemed to be collectively dominant. Given the preponderance of oligopolistic markets, as well as the fact that the business community is equally small in small jurisdictions and 'everyone knows each other', the application of this wide notion of collective dominance as found in EU competition law to small jurisdictions is particularly useful. This means that conduct whereby existing competitors attempt to exclude potential entrants or exploit the market, as occurred in Malta in *WJ Parnis England*,[6] is also prohibited under Article 102 TFEU, and not only under Article 101 TFEU. Given the requirement to prove a 'concurrence of wills'[7] or 'co-ordination'[8] under Article 101 TFEU, the use of Article 102 TFEU is useful as it might be easier to prove 'collective dominance' and therefore trigger the application of Article 102 TFEU, thereby prohibiting conduct which forecloses competition in small jurisdictions.

[6] Complaint Number 3/2003: *W J Parnis England Ltd v Sea Malta Company Ltd and Gollcher Company Ltd as agents to Grimaldi (Genoa) Line* 10 October 2005 as reported in Andrew Muscat, Simon Cachia and Simon Schembri 'Current Developments in Member States' (2006) 2 European Competition Journal 236 and Silvio Meli and Eugène Buttiġieġ 'Malta' in Ioannis Kokkoris (ed) *Competition Cases from the European Union* (Sweet & Maxwell, London 2007), p 920. Judgment was not published.

[7] Case T-41/96 *Bayer AG v Commission* EU:T:2000:242, para 69

[8] Cases 48, 49 and 51-57/69 *ICI v Commission* EU:C:1972:70, para 65

Morevoer, the generally protective approach that EU competition law takes to the market is also advantageous to small jurisdictions. This is evidenced by the approach taken to margin squeeze as a stand-alone type of abuse. The fact that margin squeeze is considered a stand-alone abuse in EU competition law, as opposed to the position in US antitrust law, means that conduct which may not appear harmful to competition but which in reality results in consumer harm when the upstream and downstream markets are viewed together is caught by the prohibition in Article 102 TFEU. Again, given the limited competition in small jurisdictions, this is beneficial as it ensures that the little competition there is, is in fact safeguarded.

The approach proposed in this thesis might well also be beneficial to large(r) jurisdictions, and indeed in some instances in this thesis, this has been indicated (see for instance in this respect pages 147, 250, 291, 320 and 324). However, the aim of this thesis was to examine and consider in particular the current application of EU competition law to small jurisdictions and then propose a solution to the problems identified in that regard. Further study is required in order to *conclusively* determine whether larger jurisdictions would also benefit from a similar approach.

CONCLUDING REMARKS – TIME FOR A NEW APPROACH?

This thesis certainly does not posit that markets in small jurisdictions can never be competitive, and that EU competition law should not be applied to small jurisdictions. On the contrary. There is undoubtedly competition in markets in small jurisdictions. Indeed even in markets which are duopolies or oligopolies there may be competition between the market players – sometimes even fierce competition. Even in markets which are monopolies, EU competition law may assist with the creation of competition where the monopoly is retaining

the market to itself through anti-competitive means. Gal indeed goes into some detail as to how competition law can be applied to natural monopolies.[9] Sector specific regulation may also assist monopolistic markets either by creating competition for a market or regulating conduct on that market. However the current application of EU competition law does not encourage competition to flourish in small jurisdictions because it does not take account of the realities of small jurisdictions.

Therefore, this study has shown that whilst EU competition law is just as necessary, if not more necessary, in a small jurisdiction, the current interpretation and application of EU competition law may in certain instances leave much to be desired.

No matter how non-concentrated or competitive a market in a small jurisdiction may be, competition in small jurisdictions is limited, and there are limited players and limited resources. EU competition law, which essentially sets out rules on best behaviour for dominant players on markets, including small jurisdictions, is therefore a vital regulatory tool for the protection of small jurisdictions, ensuring that the limited competition there is on small jurisdictions is safeguarded and prospers.

However, its current application may in certain instances cause more harm than good. This starts with the very definition and assessment of dominance, which includes within it undertakings which, rather than being dominant, are commercially successful or more efficient. To counteract this, this study has proposed adopting the definition of 'substantial market power' as understood in economics for the definition of 'dominant position' as well as (i) considering market definition as a tool rather than as an end; and (ii) considering other

[9] Michal S Gal *Competition policy for small market economies* (Harvard University Press, 2003), 111 - 122

factors, such as countervailing buyer power, when assessing dominance, not just market shares.

The assessment of abuse also, at times, falls short. The importance and benefits of an effects based approach was evident in the application of Article 102 TFEU to exclusive dealing and loyalty rebate cases. Moreover, it has been shown how the *Bronner* test should be applied to both refusals to supply existing customers and refusals to supply new customers/grant access to essential facilities, and that these should be adopted in all cases. Finally, with respect to margin squeeze, the indispensability of the input should be considered as a main part of the abuse test, and not simply as a secondary consideration. The application of an effects-based approach to abuse in general would need to take into account the fact that markets work differently in small jurisdictions.

The current interpretation and application of EU competition law may have worked well when there were only a few Member States, when even the smallest among them were larger than the smallest Member States today. Today, the EU landscape has changed, and there are more Member States, many undoubtedly small, and with a much smaller GDP and population and, perhaps more critically, less influence than the original Member States.

This study has focused on the impact of EU competition law on Malta. It was explained in Chapter 1 why Malta was taken as a case study for small jurisdictions, and how the inferences drawn for Malta extended by analogy to all small jurisdictions. In view of the fact that some negative impact of EU competition law on Malta has been established, further studies focusing on other small jurisdictions should be carried out as a matter of urgency, in order to establish whether or not what has been found to apply to Malta applies to the other small

jurisdictions *qua* Member States. If so, the need for reform of Article 102 would be compelling.

TABLE 5.1: CASES DEALING WITH LOYALTY REBATES

Date	Case	Court/Commission	Type of assessment	Comments
2 January 1973	*Suiker Unie*[1]	Commission	Discrimination	Cartel case; issue of rebate a relatively minor issue. Fidelity rebate
16 September 1975	*Suiker Unie*[2]	CJ	Discrimination	Cartel case; issue of rebate a relatively minor issue. Some internal market considerations Fidelity rebate
9 June 1976	*Vitamins*[3]	Commission	Discrimination	Some exclusivity and internal market considerations Fidelity rebate
13 February 1979	*Hoffmann-La Roche*[4]	CJ	Discrimination + exclusive dealing (emphasis on discrimination)	Fidelity rebate (although called 'progressive' and 'fixed' rebates)
7 October 1981	*Michelin I*[5]	Commission	Exclusive dealing + discrimination (exclusionary effects considered)	
9 November 1983	*Michelin I*[6]	CJ	Exclusive dealing – all circumstances test	Some emphasis on the exclusionary effect

[1] IV/26 918 *European sugar industry* 2 January 1973 [1973] OJ L140/17
[2] Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v EC Commission* EU:C:1975:174
[3] IV/29.020 *Vitamins* 9 June 1976 (1976) OJ L233/27
[4] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* EU:C:1979:36
[5] IV.29.491 *Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin* 7 Ocotber 1981 [1981] OJ L353/33
[6] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* EU:C:1983:313

5 December 1988	*BPB Industries plc*[7]	Commission	Internal market considerations - restriction of trade between Member States	Apart from discounts, payments in return for exclusivity were granted (see Chapter 4). Some discounts not considered abusive. Fidelity rebate
1989	*Coca-Cola*[8]	Commission	Exclusive dealing	Undertakings decision Fidelity rebate (individualised)
19 December 1990	*Soda-Ash/ICI*[9]	Commission	Exclusive dealing	Exclusionary effects discussed. Annulled by GC on procedural grounds.[10] Top-slice rebates
	Soda-Ash/Solvay[11]	Commission	Exclusive dealing + discrimination	Annulled by the GC on procedural grounds[12] Fidelity rebate (progressive rebate, top-slice rebates
23 December 1992	*CEWAL*[13]	Commission	Exclusive dealing	Fidelity rebate
1 April 1993	*British Gypsum*[14]	GC	Exclusive dealing	Fidelity rebate
8 October 1996	*Compagnie Maritime Belge*[15]	GC	Exclusive dealing	Discrimination marginally referred to Fidelity rebate
14 May 1997	*Irish Sugar*[16]	Commission	Discrimination (selective rebates, target rebates) +	Some internal market considerations

[7] IV/31.900, *BPB Industries plc* 5 december 1988 [1989] OJ L10/50
[8] XIXth Report on Competition Policy (1989) 65
[9] IV/33.133-D: *Soda-ash – ICI* 19 December 1990 [1991] OJ L152/40
[10] Case T-37/91 *Imperial Chemical Industries plc v Commission of the European Communities* EU:T:1995:119
[11] IV/33.133-C: *Soda-ash – Solvay* 19 December 1990 [1991] OJ L 152/21
[12] Case T-32/91 *Solvay SA v Commission of the European Communities* EU:T:1995:117
[13] IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwal*) and 86 (IV/32.448 and IV/32.450: *Cewal*) 23 December 1992 [1993] OJ L34/2
[14] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities* EU:T:1993:31
[15] Joined Cases T-24/93 to T-26/93 and T-28/93 C*ompagnie Maritime Belge Transports and Others v Commission* EU:T:1996:139
[16] IV/34.621, 35.059/F-3 *Irish Sugar plc* 14 May 1997 [1997] OJ L258/1

			exclusive dealing loyalty rebate)	Fidelity rebate, target rebate, various discriminatory/selective rebate including border rebate (amongst other conduct)
10 February 1999	*Portuguese Airports*[17]	Commission	Discrimination	Due to nature of the case, internal market considerations were also evident Quantity rebates – favoured local airlines
14 July 1999	*British Airways*[18]	Commission	Discrimination + exclusive dealing	Fidelity rebate
7 October 1999	*Irish Sugar*[19]	GC	Discrimination (selective rebates + exclusive dealing (target rebates, fidelity rebates)	Due to 'border rebate' internal market considerations were also made Fidelity rebate, target rebate, selective rebate
16 March 2000	*Compagnie Maritime Belge*[20]	CJ	Exclusive dealing	Fidelity rebate
13 December 2000	*Soda-Ash/Solvay*[21]	Commission	Exclusive dealing + discrimination	Exclusionary nature considered. Case confirmed in Case T-57/01 (see below) but annulled for procedural reasons by CJ.[22] Fidelity (progressive) rebates, top-slice rebates
15 December 2000	*Soda-Ash/ICI*[23]	Commission	Exclusive dealing	Top slice rebate

[17] IV/35.703 *Portuguese airports* 10 February 1999 [1999] OJ L 69/31

[18] IV/D-2/34.780 *Virgin/British Airways* 14 July 1999 [2000] OJ L 30/1

[19] Case T-228/97 *Irish Sugar plc v Commission of the European Communities* EU:T:1999:246

[20] Joined cases C-395/96 P and C-396/96 P. *Compagnie Maritime Belge Transports SA (C-395/96 P), Compagnie Maritime Belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* EU:C:2000:132

[21] COMP/33.133-C: *Soda ash — Solvay* 13 December 2000 [2003] OJ L10/10

[22] Case C-109/10P *Solvay SA v European Commission* EU:C:2011:686

[23] COMP/33.133-D *Soda-ash — ICI* 13 December 2000 [2003] OJ L10/33

20 March 2001	*Deutsche Post*[24]	Commission	Exclusive dealing	Fidelity rebates
29 March 2001	*Portuguese Airports*[25]	CJ	Discrimination	Due to nature of the case, internal market considerations were also evident Quantity rebates – favoured local airlines
20 June 2001	*Michelin II*[26]	Commission	Exclusive dealing + unfairness (focus on loyalty inducing effects)	Unfair and loyalty-inducing quantity rebates, service bonus, progress bonus, additional rebates, invoice rebates, progressive rebates, 'pro' arrangement, Michelin Friends Club
30 September 2003	*Michelin II*[27]	GC	Exclusive dealing – all circumstances test	Unfair and loyalty-inducing quantity rebates, service bonus, progress bonus, additional rebates, invoice rebates, progressive rebates, 'pro' arrangement, Michelin Friends Club
17 December 2003	*British Airways*[28]	GC	Exclusive dealing – all circumstances test	Highlights exclusionary nature of the conduct. States loyalty inducing rebates are abusive irrespective of whether they are discriminatory. Target rebate
September 2005	*Euronext*[29]	Commission		Text not available. No infringement.
29 March 2006	*Tomra*[30]	Commission	Exclusive dealing	Individualised purchase target, retroactive rebates or bonuses, progressive bonus rebates
15 March 2007	*British Airways*[31]	CJ	Exclusive dealing – all circumstances test	Target rebate

[24] 2Case COMP/35.141 *Deutsche Post AG* 20 March 2001 [2001] OJ L 125/27

[25] Case C-163/99 *Portuguese Republic v Commission of the European Communities* EU:C:2001:189

[26] COMP/E-2/36.041/PO *Michelin* 20 June 2001 [2002] OJ L 143/1

[27] Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* EU:T:2003:250

[28] Case T-219/99 *British Airways plc v Commission of the European Communities* EU:T:2003:343

[29] Sean Greenway 'Competition between stock exchanges: findings from DG Competition's investigation into trading in Dutch equities' (Autumn 2005) 3 Competition Policy Newsletter 69

[30] Case COMP/E-1/38.113 *Prokent-Tomra* 29 March 2006 [2008] OJ C219/11

[31] Case C-95/04 P *British Airways plc v Commission of the European Communities* EU:C:2007:166

24 February 2009	Guidance Paper	Commission		
13 May 2009	*Intel*[32]	Commission	Exclusive dealing – all circumstances test	Fidelity rebates
17 December 2009	*Solvay SA*[33]	GC	Exclusive dealing	Dealt marginally with discrimination. Annulled for procedural reasons by CJ.[34] Fidelity rebate
25 June 2010	*ICI*[35]	GC	Exclusive dealing – all circumstances	Exclusionary nature considered Top slice rebate
9 September 2010	*Tomra*[36]	GC	Exclusive dealing	Individualised purchase target, retroactive rebates or bonuses, progressive bonus rebates
19 April 2012	*Tomra*[37]	CJ	Exclusive dealing	Individualised purchase target, retroactive rebates or bonuses, progressive bonus rebates
12 June 2014	*Intel*[38]	GC	Exclusive dealing + exclusive dealing – all circumstances test	Test depends on type of rebate – fidelity rebate requires simply 'pure' exclusive dealing test, whilst 'third category rebates' require the all circumstances test Fidelity rebates
6 October 2015	*Post Danmark II*[39]	CJ	Exclusive dealing – all circumstances test + discrimination	Preliminary reference. Found that rebates adopted did not lead to

[32] COMP/C-3 /37.990 *Intel* 13 May 2009
[33] Case T-57/01 *Solvay SA v European Commission* EU:T:2009:519
[34] Case C-109/10P *Solvay SA v European Commission* EU:C:2011:686
[35] Case T-66/01 *Imperial Chemical Industries Ltd v European Commission* EU:T:2010:255
[36] Case T-155/06 *Tomra Systems ASA and Others v European Commission* EU:T:2010:370
[37] Case C-549/10 P *Tomra Systems ASA and Others v European Commission* EU:C:2012:221
[38] Case T-286/09 *Intel Corp. v European Commission* EU:T:2014:547
[39] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* EU:C:2015:651

				discrimination however noted that such rebates may still have exclusionary effect. Standardised, conditional, retroactive rebates
14 June 2016	*Velux*[40]	Commission	Exclusive dealing + internal market considerations	Decision rejecting complaint
6 September 2017	*Intel*[41]	CJ	Analysis must consider extent of dominant position; share of the market covered by the conduct; conditions and arrangements for granting the rebates, their duration and amount; existence of strategy to exclude as-efficient competitor; and of capacity to foreclose	Fidelity rebates

[40] Case AT. 40026 *Velux* 14 June 2016

[41] Case C-413/14 P *Intel Corp. v European Commission* EU:C:2017:632

TABLE 6.1: CASES RELATING TO A REFUSAL TO SUPPLY AN EXISTING CUSTOMER/STOPPING SUPPLIES TO AN EXISTING CUSTOMER

			Reason for refusal	
Date	**Case**	**Court/Commission**	**Dominant undertaking started production of the derivative product in competition with customer/wanted to prevent parallel trading**	**Punishment: Customer showed loyalty to a competitor of the dominant undertaking/started competing with the dominant undertaking/dominant undertaking only supplying loyal customers**
31 December 1972	*Commercial Solvents*	Commission	✓	
6 March 1974	*Commercial Solvents*	CJ	✓ (Customer had previously stopped supplies to try and obtain them elsewhere but CJEU found that 'it appears from the applicants' own statement that, when the supplies provided for in the contract had been completed, the sale of aminobutnol would have stopped in any case.'[1]	
17 December 1975	*Chiquita*	Commission		✓
19 April 1977	*ABG/Oil companies operating in the Netherlands*[2]	Commission		✓ (started supplying only long-standing customers due to oil crisis)
27 January 1978	*Hugin*	Commission	✓ (spare parts could only be acquired through subsidiary of	

[1] Para 25

[2] IV/28.841 – *ABG/Oil companies operating in the Netherlands* 19 April 1997 [1977] OJ L117/1

			dominant undertaking – annulled on appeal to CJ[3])	
14 February 1978	*United Brands*	CJ		✓ (customer taking part in competitor's advertising – which was normal practice)
28 June 1978	*BP*[4]	CJ		✓ (overturned *ABG*: found no abuse)
1983	*Polaroid/SSI Europe*[5]	Commission	✓ (denied larger orders, as wanted to know destination; undertakings were given by the dominant undertaking)	
29 July 1987	*Boosey & Hawkes*	Commission		✓ (customer started producing brass instruments itself)
26 April 1989	*Filtrona/Tabacalera*[6]	Commission	✓ (complaint unfounded)	
26 February 1992	*British Midland/Aer Lingus*[7]	Commission		✓ (customer started operating the same route)
16 September 2008	*Sot. Lelos*[8]	CJ	✓ (supplying only specific amounts to avoid parallel trading by customer)	
3 December 2019	*AB InBev*[9]	Commission	✓ (supplying only specific amounts to avoid parallel trading by customer – but decided on the basis	

[3] Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities* EU:C:1979:138

[4] Case 77/77 *Benzine en Petroleum Handerlsmaatschappij BV and others v Commission of the European Communites* EU:C:1978:141

[5] Thirteenth Report on Competition Policy, paras 155-157

[6] *Filtrona Espanola / Tabacalera* 16 April 1989 (Rejection of complaint by decision)

[7] (IV/33.544 *British Midland v Aer Lingus* 26 February 1992 [1992] OJ L96/34

[8] Case C-468 – 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* EU:C:2008:504

[9] Case AT.40134 *AB InBev* 3 December 2019

			that restrictions were abusive because conduct was contrary to the single market imperative rather than refusal *per se*)	

TABLE 6.2: CASES INVOLVING A REFUSAL TO SUPPLY A NEW CUSTOMER

Date	**Case**	**Court/Commission**	**Notes**
1981	*IGR Stereo Television*[10]	Commission	Article 101 TFEU case
2 March 1983	*GVL v Commission*[11]	CJ	GVL was a rights collecting society which precluded artists not resident in Germany from being members, therefore limiting their secondary rights
3 October 1985	*Télémarketing*[12]	CJ	Preliminary reference; more related to tying/bundling
4 November 1988	*London European/Sabena*[13]	Commission	**First case on refusal to supply existing customers proper**
16 January 1991	*IJsselcentrale*[14]	Commission	Article 101 TFEU case
11 June 1992	*Sealink/B&I*[15]	Commission	**First reference to 'essential facility'**[16]
1993	*Disma*[17]	Commission	Changes effected to a joint venture agreement following Commission's request
21 December 1993	*Sea Containers/Stena Sealink*[18]	Commission	
21 December 1993	*Port of Rødby*[19]	Commission	
21 September 1994	*ENS*[20]	Commission	Considered both Article 101 and 102 TFEU

[10] Eleventh Report on Competition Policy

[11] Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* EU:C:1983:52

[12] Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* EU:C:1985:394

[13] IV/32.318, *London European – Sabena* 4 November 1988 [1988] OJ L 317/47

[14] IV/32.732 - *IJsselcentrale and others* 16 January 1991 [1991] OJ L28/32

[15] IV/34.174 – *Sealink/B&I – Holyhead: Interim Measures* 11 June 1992

[16] The Commission decision in *United Brands* does mention the term 'essential facilities' however it is used out of context, and that cases clearly did not refer to any sort of essential facility

[17] 23rd Report on Competition Policy (COMP.REP. EC 1993)

[18] IV/34.689 - *Sea Containers v. Stena Sealink - Interim measures* 21 December 1992 [1994] OJ L15/8

[19] *Port of Rødby (Denmark)* 21 December 1993 [1994] OJ L55/52

[20] IV/34.600 - *Night Services* 21 September 1994 [1994] OJ 1994 L 259/20

16 May 1995	*CCI Morlaix*[21]	Commission	
6 November 1997	*La Poste/SWIFT*[22]	Commission	Undertakings were accepted by the Commission
14 January 1998	*Frankfurt Airport*[23]	Commission	
11 June 1998	*Aéroports de Paris*[24]		
15 September 1998	*ENS*[25]	GC	Considered both Article 101 and 102 TFEU
26 November 1998	*Bronner*[26]		**First application of economic criteria to establish abuse of refusal to supply access**
20 July 1999	*1998 Football World Cup*[27]	Commission	
25 July 2000	*Amadeus/SABRE*[28]	Commission	Investigation closed by the Commission after a 'code of good behaviour' was offered.
27 August 2003	*Ferrovie dello Stato*[29]	Commission	
2 June 2004	*Clearstream*[30]	Commission	Case of constructive refusal
9 September 2009	*Clearstream*[31]	GC	Case of constructive refusal – GC notes that the complainant competed with a group company of the dominant undertaking on the downstream market, however although it was suggested that the dominant undertaking wanted to keep the complainant out of the market, constructive refusal was not considered in this light, [32] and the elements highlighted in *Bronner* were considered.

[21] IV/35.388 (C(95) 787 final)
[22] IV/36.120 [1997] OJ C335/3
[23] IV/34.801 *FAG - Flughafen Frankfurt/Main AG* 14 January 1998 [1998] OJ L72
[24] IV/35.613 - *Alpha Flight Services/Aéroports de Paris* 11 June 1998 [1998]OJ L 230/10
[25] Cases &-374, 375, 384 and 288/94 *European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission of the European Communities* EU:T:1998:198
[26] Case C-9/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* EU:C:1998:569
[27] Case IV/36.888 - *1998 Football World Cup* 20 July 1999 [2000] OJ L 5/55
[28] Press release: IP/000/835
[29] COMP/37.685 *GVG/FS* 27 August 2003[2004] OJ L 11/17
[30] COMP/38.096 – *Clearstream (Clearing and Settlement*)) 2 June 2004
[31] Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* EU:T:2009:317
[32] Para 143

12 December 2000	*Aéroports de Paris*[33]	GC	
18 March 2009	*RWE Gas Foreclosure*[34]	Commission	Commitments decision
3 December 2009	*Gaz de France*[35]	Commission	Commitments decision
4 May 2010	*E.ON*[36]	Commission	Commitments decision
29 September 2010	*ENI*[37]	Commission	Commitments decision
15 December 2010	*CEAHR*[38]	GC	Originally a complaint to the Commission.[39] This decision annulled the Commission decision which had rejected the complaint, which was held to be vitiated by a manifest error of assessment.
22 June 2011	*Telekomunickacja Polska*[40]	Commission	Case was appealed on the quantum of the fine but not on the merits. Fine was confirmed.[41]
15 October 2014	*Slovak Telekom*[42]	Commission	*Bronner* criteria not applicable when there is a regulatory duty to supply
13 December 2018	*Slovak Telekom*[43]	GC	Confirmed Commission decision.
17 December 2018	*BEH Gas*[44]	Commission	Public version of decision is not yet available

[33] Case T-128/98 *Aéroports de Paris v Commission of the European Communities* EU:T:2000:290
[34] Case COMP/39.402 *RWE Gas Foreclosure* 18 March 2009
[35] Case COMP/39.316 *Gaz de France* 13 December 2009
[36] Case COMP/39.317 *E.ON Gas* 4 March 2010
[37] Case COMP/39.315 *ENI* 29 September 2010
[38] Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission* EU:T:2017:748
[39] Case AT.39097 *Watch Repair* 29 July 2014
[40] COMP/39.525 22 June 2011
[41] Case T-486/11 *Orange Polska SA v European Commission* EU:T:2015:1002 confirmed by Case C-123/16P *Orange Polska SA v European Commission* EU:C:2018:590
[42] Case AT/39523 15 October 2014
[43] Case T-851/14 *Slovak Telekom as v European Commission* EU:T:2018:929
[44] Case AT.39849 *BEH Gas* 17 December 2018

TABLE 7.1: CHRONOLOGICAL ORDER OF MARGIN SQUEEZE CASES IN EU COMPETITION PRACTICE, INCLUDING COMMISSION'S DISCUSSION PAPER AND GUIDANCE PAPER

1975	*National Carbonizing*[1]
1988	*Napier Brown/British Sugar*[2]
1996	*IPS-Pechiney*[3]
2000	*Industries de Poudres Sphériques v Commission*[4]
2003	*Deutsche Telekom* (Commission)[5]
2005	Discussion Paper
2007	*Telefonica* (Commission)[6]
2008	*Deutsche Telekom* (GC)[7]
2009 (February)	Guidance Paper
2009 (March)	*RWE gas foreclosure*[8]
2010	*Deutsche Telekom* (CJ)[9]
2011	*TeliaSonera*[10]

[1] [1976] OJ L35/6
[2] [1988] OJ L284/41
[3] IV/35.151./E-I
[4] Case T-5/97 EU:T:2000:278
[5] [2003] OJ C263/9 21 May 2003
[6] COMP/38.784 *Wanadoo España vs. Telefónica* 4 July 2007
[7] Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* EU:T:2008:101
[8] Case COMP/39.402 *RWE Gas Foreclosure* 18 March 2009
[9] Case C280/08P *Deutsche Telekom v European Commission* EU:C:2010:603
[10] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83

2012	*Spain v Commission*[11] */ Telefonica* (GC)[12]
2014 (July)	*Telefonica* (CJ)[13]
2014 (October)	*Slovak Telekom* (Commission)[14]
2018	*Slovak Telekom* (GC)[15]

[11] Case T-398/07 EU:T:2012:173
[12] Case T-336/07 *Telefónica SA v Telefónica Espana SA v European Commission* EU:T:2012:172
[13] Case C-295/12P *Telefónica SA v Telefónica Espana SA v Euroepan Commission* EU:C:2014:2062
[14] AT.39523 *Slovak Telekom* 15 October 2014
[15] Case T-851/14 *Slovak Telekom as v Commission* EU:T:2018:929

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