European Union

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Article 102 of the Treaty on the Functioning of the European Union (TFEU) is the statutory provision governing the abuse of dominance in the European Union. European Council Regulation No. 1/2003 sets forth the procedures for the application of articles 102 (and 101) TFEU. It is complemented by a series of implementing regulations, notices and guidance papers – the most important of which, for abuse of dominance purposes, is the European Commission's Guidance on its Enforcement Priorities in Applying article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings (the Guidance Paper).

Broadly, there are four conditions for article 102 TFEU to apply: (i) the entity at issue must qualify as an 'undertaking'; (ii) the undertaking must hold a dominant position on a relevant market; (iii) the undertaking's conduct must abusively restrict competition; and (iv) the conduct must affect trade between member states.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is not defined in article 102 TFEU. EU Court judgments, Commission decisions and the Guidance Paper, however, define dominance as a position of economic strength that confers on a company 'the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers' (Guidance Paper, paragraph 10; Case 27/76 *United Brands* ECLI:EU:C:1978:22 (*United Brands*), paragraph 65; Case 85/76 *Hoffmann-La Roche* ECLI:EU:C:1979:36 (*Hoffmann-La Roche*), paragraph 38). The courts also refer to a dominant company as 'an unavoidable trading partner' (*Hoffmann-La Roche*, paragraph 41; Case C-95/04 P *British Airways*, Opinion of Advocate General Kokott ECLI:EU:C:2006:133, paragraph 52).

A first step in assessing dominance is to define a relevant market (see question 9). An undertaking can then be considered dominant where it is able to raise (or maintain) prices on a market above the competitive level for a significant period of time (Guidance Paper, paragraph 11).

The Courts and the Commission have identified various factors that can indicate dominance. The Guidance Paper classifies these factors into three non-exhaustive categories (paragraph 12):

- constraints imposed by competitors (involving an assessment of market structure and market shares);
- the threat of expansion by existing competitors or entry by potential competitors; and
- the importance of countervailing buyer power.

Market shares can provide a useful first indication of a company's potential market power or dominance, but the broader market context must also be taken into account in this assessment. This includes fluctuations in shares over time, the existence of barriers to entry, customer buyer power, spare production capacity, rates of innovation, and the ease and rate of customer switching.

As just one example, the General Court in *Cisco* found that even shares of about 90 per cent do not indicate market power where products are offered for free, there is a high rate of innovation, and users can easily switch between alternatives (Case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The dominance standard is strictly economic. Sociopolitical or other non-economic factors are not considered.

Likewise, the goal of article 102 TFEU is the generation of consumer welfare through the competitive process. In particular, EU competition rules seek to put in place a system of undistorted competition as part of the internal market established by the EU (Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, paragraph 22). The aim is to protect the competitive process, not individual competitors (Case C 8/08 *T-Mobile Netherlands BV*, Opinion of Advocate General Kokott ECLI:EU:C:2009:110, paragraph 71). As Advocate General Wahl has recently advised, 'EU competition rules seek to capture behaviour that has anticompetitive effects' (Case C-413/14 *Intel*, Opinion of Advocate General Wahl ECLI:EU:C:2016:788, paragraph 43).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Article 102 TFEU applies equally to all sectors.

There may, however, be sector-specific rules implemented at member state level through national laws and national regulations. The Commission has also issued Directives in certain sectors, including communications, the postal sector, energy and rail transport. These may create specific, additional obligations on companies in these sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The prohibition on abuse of dominance applies to 'undertakings'. This is interpreted widely: 'The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.' (Case C-41/90 *Höfner* ECLI:EU:C:1991:161, paragraph 21).

If public bodies carry on economic activities, they are subject to abuse of dominance rules with regard to those activities. Public bodies, however, are not subject to the dominance rules with respect to their public tasks.

For example, in *Eurocontrol*, the exercise of powers relating to the control and supervision of air space were not of an economic nature (despite the fact that Eurocontrol collected route charges) and it did not therefore constitute an undertaking for those purposes (Case C-364/92 *Eurocontrol* ECLI:EU:C:1994:7).

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6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Article 102 TFEU applies only to dominant firms. It does not cover the conduct of non-dominant companies attempting to become dominant (such as 'attempted monopolisation' under section 2 of the US Sherman Act).

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes. Article 102 TFEU may apply to one or more undertakings (acting individually or collectively). The leading cases on collective dominance are *Airtours* (Case T-342/99 *Airtours* ECLI:EU:T:2002:146 (*Airtours*) (which concerned collective dominance under merger control) and *Laurent Piau* (Case T-193/02 *Laurent Piau* ECLI:EU:T:2005:22) (which concerned collective dominance under article 102 TFEU).

As a general matter, for there to be a finding of collective dominance, the collectively dominant firms must either enjoy some structural or contractual link or be active in a market that otherwise allows them to coordinate their behaviour.

So far, all article 102 TFEU decisions finding collective dominance have been based on agreements between firms leading them to behave as a collective entity; there are no cases to date where article 102 TFEU has applied to mere tacit collusion.

In the merger context, the Commission has found that collective dominance may occur as a result of tacit collusion among competitors where: (i) a monitoring mechanism permits firms to arrive at tacit collusion; (ii) a deterrence mechanism permits firms to sustain collusion; and (iii) current and future competitors, as well as consumers, cannot jeopardise the collusion (*Airtours*, paragraph 62).

If collective dominance is proved, each individual undertaking is in principle subject to the special responsibility of dominant firms under article 102 TFEU. One collectively dominant company can commit an abuse even if not acting jointly with the others, but the conduct must be 'one of the manifestations of such a joint dominant position being held' (Case T-228/97 *Irish Sugar* ECLI:EU:T:1999:246, paragraph 66).

Collective dominance is not mentioned in the Guidance Paper and would therefore not appear to be a Commission priority.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes. Article 102 TFEU applies to dominant purchasers (see, eg, the General Court's judgment in *British Airways* (Case T-219/99 *British Airways* ECLI:EU:T:2003:343, paragraph 86). In that context the assessment of dominance turns on the buyer's ability to impose purchasing terms on their suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The approach to market definition is the same in article 102 TFEU cases as in merger control or under article 101 TFEU. A relevant (product and geographic) market circumscribes the sources of competitive constraint faced by the company under investigation. It comprises all those products or services 'which are regarded as interchangeable or substitutable by the consumer, by virtue of the products' characteristics, their prices and their intended use' (Market Definition Notice, paragraph 36).

Substitutability should be assessed by the SSNIP or hypothetical monopolist test: this asks whether a hypothetical monopolist could profitably sustain a price that is a 'small but significant' amount (usually 5–10 per cent) above competitive price levels over a range of goods. If not, the market definition is widened to include the products that customers would switch to in response to a price increase.

As to market share thresholds, in the *Akzo* judgment, the Court of Justice established a (rebuttable) presumption that a company is dominant if it holds a market share of 50 per cent or more (Case C-62/86 *Akzo* ECLI:EU:C:1991:286 (*Akzo*), paragraph 60). The Guidance Paper states that dominance is not likely if the undertaking's market share is below 40 per cent (paragraph 14).

That said, even above the 50 per cent threshold, it is necessary to consider the nature and dynamics of a particular market. In markets subject to a high degree of innovation or where services are offered for free, shares (even above 90 per cent) may not be a good proxy for market power (Case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635 and Case COMP/M.7217 *Facebook/WhatsApp* 3 October 2014).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Holding or acquiring a dominant position is not unlawful under EU competition law. A dominant company only infringes article 102 TFEU if it abuses its dominance to restrict competition.

Article 102 TFEU does not define the concept of abuse. Instead, it lists four categories of abusive behaviour:

- article 102(a) prohibits directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- article 102(b) prohibits limiting production, markets or technical developments to the prejudice of consumers;
- article 102(c) prohibits applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- article 102(d) prohibits making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Broadly, the categories of abuse can be grouped into: (i) exclusionary abuses (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition); and (ii) exploitative abuses (where a dominant firm uses its market power to extract rents from consumers). Exclusionary abuses are by far the most common type of abuse.

The definition of abuse has largely grown out of the case law and been fleshed out in the Guidance Paper. The classic formulation of an abuse is behaviour that 'which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' (*Hoffmann-La Roche*, paragraph 91).

But not all conduct that affects rivals is anticompetitive. Competition on the merits, by definition, may lead to the 'departure from the market or the marginalisation of competitors that are less efficient' (Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172, paragraph 22). The challenge for agencies and undertakings alike in article 102 TFEU cases is therefore to distinguish between abusive conduct and vigorous competition on the merits.

Case law qualifies certain categories of conduct as 'by nature' abuses: 'by nature' abuses do not require a full analysis of anticompetitive effects. Exclusive dealing and discounts conditioned on exclusivity are examples of by nature abuses. By nature abuses, however, are not the same as per se infringements because the dominant company always retains the possibility of objectively justifying its conduct.

Outside the 'by nature' exceptions, the Commission has to perform a fully fledged effects analysis. This will apply, for example, to tying, product design, pricing abuses and refusals to supply. An effects analysis for exclusionary conduct requires proving at least the following four elements.

First, the dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets (Guidance Paper, paragraph 19). In other words, the abusive conduct must create barriers to independent competition (Case 262/81 *Coditel II* ECLI:EU:C:1982:334, paragraph 19).

Second, the abusive conduct must cause the anticompetitive effects (Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651, paragraph 47). Causation must be established by comparing prevailing competitive

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conditions with an appropriate counterfactual where the conduct does not occur (Guidance Paper, paragraph 21).

Third, the anticompetitive effects must be reasonably likely (Case T-201/04 *Microsoft* ECLI:EU:T:2007:289 (*Microsoft*), paragraph 1089). If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place (Case T-70/15 *Trajektna luka* ECLI:EU:T:2016:592, paragraph 24).

Fourth, the anticompetitive effects must be sufficiently significant to create or reinforce market power (Guidance Paper, paragraph 11, 19).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. As explained in response to question 10, article 102 TFEU covers both exclusionary abuses (such as tying, refusal to supply, or exclusive dealing) and exploitative abuses (such as excessive pricing or imposing unfair trading conditions).

The Commission's enforcement activity over the past decade has focused almost wholly on exclusionary abuses, and the Guidance Paper sets enforcement priorities only for exclusionary conduct. There are, however, indications that the Commission would like to increase its caseload on exploitative abuses (see Updates and trends).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

There is case law suggesting that it is unnecessary to show a causal connection between dominance and the abuse (Case 6/72 *EContinental Can* ECLI:EU:C:1973:22 paragraph 27). These cases are quite old, however, and it is generally expected today that the Commission must demonstrate a connection between the dominant position and the abusive conduct. Indeed, in *Tetra Pak II,* the Court held that article 102 TFEU 'presupposes a link between the dominant position and the alleged abusive conduct' (Case C-333/94 *Tetra Pak* ECLI:EU:C:1996:436 (*Tetra Pak II*), paragraph 27).

In exceptional circumstances, an abuse may occur on an adjacent market to the dominant market (*Tetra Pak II*). For this to apply, there must be 'close associative links' between the adjacent market where the conduct occurs and the dominant market.

Irrespective of the above, the Commission must still prove causation in fact. In particular, it must show that the abusive conduct actually causes the posited anticompetitive effects (as noted in response to question 10, this should be done by reference to an appropriate counterfactual). In *AstraZeneca*, the Court confirmed that 'a presumption of a causal link ... is incompatible with the principle that doubt must operate to the advantage of the addressee of the decision finding the infringement' (Case C-457/10 *AstraZeneca* ECLI:EU:C:2012:770, paragraph 199).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Even if conduct is found to constitute an abuse and to restrict competition, a company can always show that its conduct is objectively justified. This applies for all abuses, including 'by nature' abuses.

The dominant company bears the evidentiary burden to substantiate an objective justification. It is then for the Commission to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the 'justification put forward cannot be accepted' (*Microsoft*, paragraph 688).

Conduct may be justified if it is either objectively necessary or produces efficiencies that outweigh the restrictive effects on consumers (Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172, paragraph 41; Guidance Paper, paragraph 28). The Guidance Paper notes that 'the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking' (Guidance Paper, paragraph 28). The EU Courts have also held that a dominant company may justify its conduct based on legitimate 'commercial interests' (*United Brands*, paragraph paragraph 189-191). In *Motorola* and *Samsung*, for example, the Commission accepted that it is legitimate for a holder of standard essential patents to seek injunctions against patent users that are not 'willing licensees'. (Case AT.39985 *Motorola*, 29 April 2014; and Case AT.39939 *Samsung* 29 April 2014).

The Guidance Paper sets out four requirements for a company to justify abusive conduct that forecloses its rivals (paragraph 30): First, the conduct must cause efficiencies; these efficiencies are not confined to economic considerations in terms of price or cost, but may also consist of technical improvements in the quality of the goods (*Microsoft*, paragraph 1159; Guidance Paper, paragraph 30). Second, the conduct must be indispensable to realising those efficiencies. Third, the efficiencies must outweigh the negative effects on competition. And fourth, the conduct must not eliminate effective competition by removing all or most existing sources of actual or potential competition.

As to exclusionary intent, this is not a necessary element of an abuse because an abuse is 'an objective concept' (*Hoffmann-La Roche*, paragraph 91). That said, evidence as to the company's intent may be useful in interpreting its conduct (Guidance Paper, paragraph 20). As the Court of Justice held in *Tomra*, 'the existence of any anticompetitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused' (Case C-549/10 *P Tomra* ECLI:EU:C:2012:221, paragraph 20).

Specific forms of abuse

14 Rebate schemes

The grant of rebates to consumers is generally pro-consumer and thus pro-competitive. But certain forms of rebates may constitute an abuse if applied by a dominant company. The concern is that the dominant company exploits its larger base of sales to offer discounts in ways that preclude smaller (but equally efficient) rivals from competing for the contestable portion of a customer's demand.

The case law generally distinguishes between three categories of rebates: rebates based on volumes of purchases, rebates conditioned on exclusivity and loyalty-inducing rebates.

The first category – forward looking volume-based rebates – is presumptively lawful (*Hoffmann-La Roche,* paragraph 90; Case T-203/01 *Michelin v Commission* ECLI:EU:T:2003:250, paragraph 58). This reflects gains in efficiency and economies of scale.

The second category – rebates conditioned on exclusivity – has been condemned in a number of cases, including *Hoffmann-La Roche, Michelin, British Airways*, and Case T-286/09 *Intel* ECLI:EU:T:2014:547 (*Intel*) as presumptively unlawful. Exclusivity rebates have historically been treated as restrictive of competition 'by nature' and therefore do not require proof of anticompetitive effects.

The third category – loyalty-inducing rebates – require a full assessment of circumstances to analyse whether the rebate is likely to foreclose equally efficient competitors or make it more difficult for purchasers to choose their sources of supply (Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172, paragraphs 31–32).

The relevant circumstances include whether the rebates are individualised or standardised; the length of the reference period; the conditions of competition prevailing on the relevant market; the proportion of customers covered by the rebate; and whether the rebate is ultimately likely to foreclose an equally efficient competitor.

In addition, whether a rebate is retroactive or incremental is an important part of the assessment of all the circumstances. The Commission and EU Courts take a strict approach to retroactive rebates (which pay discounts retroactively on past purchases over a reference period if the customer meets pre-defined quantity targets (see, eg, Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651)). The concern is that the rebate creates a suction effect that makes it less attractive for customers to switch small portions of incremental demand to rivals (Guidance Paper, paragraph 40). Incremental rebates, on the other hand, do not create the same suction effect and are considered less of a concern (although they can still be problematic depending on the other factors set out above). In his recent *Intel* Opinion, Advocate General Wahl has advised that exclusivity rebates 'should not be regarded as a separate and unique category of rebates' (Case C-413/14 *Intel* Opinion of Advocate General Wahl ECLI:EU:C:2016:788, paragraph 106). Instead, exclusivity rebates are part of the third category, and require an assessment of

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'all the circumstances' before they can be classified as abusive. It is yet to be seen how the Court of Justice will determine the issue.

15 Tying and bundling

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product.' Five conditions must be established for a finding of abusive tying (*Microsoft*):

- the tying and tied good are two separate products;
- the undertaking concerned is dominant in the tying product market;
- customers have no choice but to obtain both products together;
- the tying forecloses competition; and
- there is no objective justification for the tie.

Typically, the core issue is establishing whether two components constitute separate products or an integrated whole. In *Microsoft*, the Court held that this assessment must be based on a number of factors, including 'the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also [...] commercial practice' (*Microsoft*, paragraph 925).

A company could achieve the same effect as tying by ostensibly offering a standalone version of the tying product alongside a tied version, but at a price that realistically means customers will not purchase the standalone version. This is referred to as mixed bundling.

The Guidance Paper states that such bundled discounts should be assessed not under the tying framework described above, but in the same way as other forms of pricing abuse, by allocating the discounts fully to the price of the non-dominant tied product (paragraph 60). According to the Guidance Paper, if that calculation results in a price below the dominant company's long-run average incremental costs of supplying the tied product, the discount is anticompetitive – unless equally efficient rivals can replicate the bundle.

16 Exclusive dealing

The Guidance Paper defines exclusive dealing as an action by a dominant undertaking 'to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates' (paragraph 32).

The concern is that the exclusivity condition enables the dominant company 'to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share' (*Intel*, paragraph 93). A threshold question is therefore whether the clause involves the company leveraging a non-contestable share of demand.

If leveraging of a non-contestable share is established, the next question is to determine whether the condition constitutes exclusivity. The test is whether the purchaser has 'to obtain all or most of their requirements exclusively' from the dominant undertaking' (*Intel*, paragraph 72)

As to what 'all or most of their requirements' actually means: 70–80 per cent of a purchaser's requirements will constitute 'most' and therefore be considered as exclusivity (*Intel*, paragraph 135; *Hoffmann-La Roche*, paragraph 83). Similarly, the Vertical Restraints Block Exemption refers to an exclusive agreement as one where a buyer must purchase more than 80 per cent of its requirements from the seller (article 1d).

In *Intel*, however, the General Court referred to exclusivity requirements 'in a certain segment' (*Intel*, paragraph 79). HP was required to purchase 95 per cent of its requirements for microprocessors in a specific sector. The General Court held that this constituted exclusivity even though it only amounted to 28 per cent of HP's total requirements for microprocessors (the judgment is under appeal).

Exclusivity arrangements have been treated as restricting competition by their very nature. They therefore do not require proof of actual restrictive effects (although see response to question 14 concerning the Advocate General's Opinion in *Intel*; if the Court of Justice follows the Advocate General, they would require an assessment of all the circumstances).

17 Predatory pricing

Predatory pricing arises when a dominant company prices its products below cost such that equally efficient competitors cannot viably remain on the market.

A two-stage test applies to classify predatory pricing as abusive: first, pricing below average variable cost (AVC) is presumptively abusive (*Akzo*, paragraph 71); second, pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor (*Akzo*, paragraph 72).

The Guidance Paper, however, indicates that the Commission will usually use alternative benchmarks – in particular, long-run average incremental cost (LRAIC) and average avoidable costs (AAC). In practice, however, this makes little difference because AVC and AAC will usually be the same, and ATC and LRAIC are good proxies for each other (Guidance Paper, fn. 18).

Recoupment (that is the ability of the dominant firm to raise prices once other competitors have been foreclosed and thus recoup its costs associated with predatory pricing) is not a formal precondition of predatory pricing under article 102 TFEU (*France Telecom v Commission Case C-202/07 France Telecom* ECLI:EU:C:2009:214). The Guidance Paper, however, suggests that the Commission will likely assess the impact of below-cost pricing on consumers as part of its analysis (paragraph paragraph 69-71).

18 Price or margin squeezes

A margin squeeze occurs when a vertically integrated company sells an input to its downstream rivals at a high price and, at the same time, prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market.

This is abusive in EU law when 'the difference between the retail price 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' (Guidance Paper, paragraph paragraph 64-66; *TeliaSonera*; and *Deutsche Telekom Case C-280/08 Deutsche Telekom* ECLI:EU:C:2010:603).

19 Refusals to deal and denied access to essential facilities

Generally, dominant companies are free to decide whether to deal (or not) with a counterparty. As Advocate General Jacobs confirmed in *Bronner*, 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' (Case C-7/97 *Bronner* ECLI:EU:C:1998:264, paragraph 57). Refusal to supply cases have generally concerned alleged exclusion of rivals (ie, refusals to deal that may provoke the elimination of a competitor) or other conduct clearly in pursuit of an anti-competitive aim. As a practical matter, absent a competitive relationship between the customer and the dominant company, a refusal to supply an actual or potential customer is very unlikely to infringe article 102.

Even when dealing with rivals, though, a refusal to supply products or access to facilities can only be found abusive in exceptional circumstances. The following three conditions need to be met for this to be the case (Case *C-7/97 Bronner* ECLI:EU:C:1998:569; Cases 6/73 to 7/73 *Commercial Solvents* ECLI:EU:C:1974:18; Cases T-374/94 et al, *European Night Services and Others* ECLI:EU:T:1998:198):

- the requested input must be indispensable (ie, it is an essential facility);
- the refusal to supply is likely to eliminate competition in the downstream market; and
- there is no objective justification for the refusal.

If the refusal involves intellectual property, the refusal to license must also prevent the emergence of a new product (*C-418/01 IMS Health GmbH & Co* ECLI:EU:C:2004:257; Cases C-241/91 to C-242/91 *Magill* ECLI:EU:C:1995:98; and *Microsoft*).

A refusal to supply can be express or constructive (ie, the dominant company insists on unreasonable conditions for granting access to the facility).

The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are 'technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult' to create alternatives, or to create them within a reasonable time frame (*Bronner, IMS Health, European Night Services*).

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If there are 'less advantageous' alternatives, that means the input is not indispensable. For example, in *Bronner*, access to Mediaprint's (a newspaper distributor's) delivery network was not indispensable because Bronner could have used kiosks, shops and post. Mediaprint's refusal to grant access was therefore not abusive.

For this reason, past essential facilities cases typically involve state-funded natural monopolies such as ports (Case IV/34.689 *Sea Containers v Stena Sealink*), airport facilities (Case IV/35.613 *Alpha Flight Services/ Aéroports de Paris*), or gas pipelines (Case IV/32.318 *London European – Sabena*, 4 November 1988), or essential inputs for downstream products like basic chemicals (Joined Cases 6/73 to 7/73 *Commercial Solvents* ECLI:EU:C:1974:18) or interoperability information (*Microsoft*).

20 Predatory product design or a failure to disclose new technology

Product design

Product design can only be found abusive in exceptional circumstances. Either the design must have no redeeming value and serve only to exclude competition or there must be additional factors that impede rivals' ability compete independently.

In the first scenario, the design must be introduced solely to render rivals' products incompatible or to exclude rivals from the market. There is only one such example in EU case law: the changes in transmission frequencies in *Decca Navigator* that deliberately caused rival devices to malfunction (Case IV/30.979 *Decca Navigator Systems*, 21 December 1988).

In the second scenario, the design change must create barriers that hinder rivals from reaching customers through their own means. In the *Microsoft* tying case, for example, Microsoft's tie foreclosed competing media players from access to third-party PC OEMs as a distribution channel. Microsoft therefore prevented rivals from reaching users independently of Microsoft via PC OEMs. The Court found that Microsoft's tie facilitated the 'erection of such barriers for Windows Media Player' (*Microsoft*, paragraph 1088).

Absent a barrier to independent competition, a product improvement should not infringe article 102 TFEU. As Bo Vesterdorf, former president of the General Court, explained in comments on the *Microsoft* judgment: 'a technical development or improvement of ... products is to the advantage of competition and thus to the advantage of consumers' (B Vesterdorf, article 82 EC: 'Where Do We Stand after the Microsoft Judgment?', *Global Antitrust Review*, 2008).

Failure to disclose IP

The Commission has found that an intentional and deceptive failure to disclose relevant IP during a standard-setting process may contribute towards an abuse (Case COMP/38.636 *Rambus* 9 December 2009). This is known as a 'patent ambush'.

In this scenario, the abuse actually constitutes the claiming of royalties for use of the IP after the IP is incorporated in the standard. This is because the company will not hold a dominant position at the time of its failure to disclose IP; it only achieves dominance once the IP is (deceptively) incorporated into the standard.

21 Price discrimination

Unlawful price discrimination under article 102(c) TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions.

Abusive price discrimination requires a number of elements:

- the dominant company must enter into equivalent transactions with other trading parties;
- the company must apply dissimilar conditions to these equivalent transactions (Case C-174/89 *Hoche* ECLI:EU:C:1990:270, paragraph 25);
- if there are legitimate commercial reasons for the discrimination, there is no abuse (Case C-322/81 *Michelin* ECLI:EU:C:1983:313, paragraph 90); and
- the discrimination must place customers at a competitive disadvantage relative to other customers to such a degree that the conduct risks foreclosing equally efficient competitors (Case C-95/04 *British Airways* ECLI:EU:C:2007:166, paragraph 144).

Price discrimination abuses are relatively rare under article 102 TFEU. Price discrimination will generally only be found to be abusive if it is part of a strategy to drive rivals out of the market.

22 Exploitative prices or terms of supply

Exploitative abuses, such as excessive pricing, fall under article 102(a) TFEU. This provides that an abuse may consist of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

Excessive pricing cases are rare; the leading case is *United Brands*. There, the Court held that a price is excessive if 'it has no reasonable relation to the economic value of the product supplied' (*United Brands*, paragraph 250).

This is assessed by a two-stage test: first, the difference between the dominant company's costs actually incurred and the price actually charged must be excessive; second, the imposed price must be either unfair in itself or when compared to the price of competing products (*United Brands*, paragraph paragraph 251-252; Case COMP/A.36.568/D3 *Port of Helsingborg* 23 July 2004, paragraph 147).

23 Abuse of administrative or government process

Misuse of administrative or government processes may constitute an abuse. In December 2012, the Court of Justice upheld the Commission's decision finding that AstraZeneca had committed an abuse by misusing patent and regulatory procedures to boost its patent protection and exclude new entrants (Case C-457/10 *AstraZeneca* ECLI:EU:C:2012:770).

AstraZeneca's abuse consisted of two elements: First, AstraZeneca submitted false and misleading statements to patent offices in various member states to extend its patent protection for the drug omeprazole. Second, AstraZeneca withdrew market authorisations of certain drugs so that new entrants could not rely on them. Even though this conduct was lawful under the relevant EU Directive, it still constituted an abuse of competition law because it was pursued with an anticompetitive strategy of excluding rivals from the market.

These cases, however, are rare. They would require a clear anticompetitive intent and proof of anticompetitive effects to found any enforcement action.

24 Mergers and acquisitions as exclusionary practices

'Concentrations' (including mergers and acquisitions) with an EU dimension are covered exclusively by the EU Merger Regulation. If applicable national thresholds are met at the member state level, concentrations that do not have an EU dimension are assessed by member state competition authorities.

But this is not to say that acquisitions falling outside the EU Merger Regulation cannot constitute an abuse. In Case AT.39612 *Perindopril (Servier)* 9 July 2014, for example, the Commission investigated a series of acquisitions by Servier of rival technologies – which Servier then did not use – to produce Perindopril. The Commission found that these strategic, blocking acquisitions constituted an abuse of a dominant position under article 102 TFEU.

Finally, if a transaction ultimately results in a dominant position (whether reviewed by the Commission or not), the Commission could later investigate if it suspected the company was abusing that dominance.

25 Other abuses

The categories of abuse under article 102 TFEU are not a closed or exhaustive set. Other abuses found in the past include removing competing products from retail outlets (Case T-228/97 *Irish Sugar* ECLI:EU:T:1999:246); bringing frivolous litigation (Case T-111/96 *ITT Promedia* ECLI:EU:T:1998:183); seeking and enforcing injunctions based on standard essential patents (Case AT.39985 *Motorola* 29 April 2014, Case AT.39939 *Samsung* 29 April 2014 and Case C-170/13 *Huawei* ECLI:EU:C:2015:477); and petitioning for the imposition of anti-dumping duties on rivals (Case T-2/95 *Industrie des poudres sphériques* ECLI:EU:T:1998:242).

New abuses, however, cannot be postulated without limitation. If a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish that abuse need to be satisfied.

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Also, exclusionary abuses must bring about anticompetitive foreclosure according to the criteria set out in response to question 10. This includes erecting barriers to independent competition; causation; a reasonably likely anticompetitive effect; and creating or reinforcing a dominant position.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

At the EU level, the European Commission is the body with the power to investigate and sanction abuses of dominance. In parallel, national competition authorities of individual member states are competent to apply article 102 TFEU as long as the Commission has not opened a formal investigation on the same matter.

The Commission's primary instrument for investigation is issuing requests for information (including through formal decisions that are subject to penalty payments if the company does not respond), as well as interviews with the company under investigation, complainants and third-party industry participants. The Commission may also conduct unannounced inspections ('dawn raids') at a company's premises, although these are relatively rare in article 102 TFEU cases.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The Commission can impose structural or behavioural remedies, interim measures, fines and periodic penalty payments. Alternatively, an undertaking can itself offer commitments to bring the infringement to an end, thereby avoiding a formal finding of an infringement and a fine.

Fines

For infringements of article 102 TFEU, the Commission can impose a fine of up to 10 per cent of a company's total turnover of the preceding business year. The methodology used to calculate the fine is set out in detail in the Commission's Fining Guidelines: the calculation takes it account the nature, length and scope of an infringement; the value of goods or services affected; and whether there are aggravating or mitigating circumstances. The record fine under article 102 TFEU was the €1.06 billion fine the Commission imposed on Intel (currently under appeal).

Remedies

The Commission may impose both structural and behavioural remedies. Structural remedies, however, are only a means of last resort in article 102 TFEU cases when no behavioural remedies are appropriate; they are therefore very rare.

There are two main elements of remedies imposed under article 102 TFEU.

First, the remedy must be appropriate, necessary and proportionate to bring the identified infringement to an end (article 7 of Regulation 1/2003; and Case T-395 *Atlantic Container Line* ECLI:EU:T:2002:49, paragraph 418).

Second, in cases where an infringement can be brought to end in different ways, the Commission cannot 'impose ... its own choice from among all the various potential courses of actions which are in conformity with the treaty' (Case T-24/90 *Automec* ECLI:EU:T:1992:97, paragraph 52; Case T-167/08 *Microsoft* ECLI:EU:T:2012:323, paragraph 95). This means that the Commission can only impose a specific behavioural remedy if it is 'the only way of bringing the infringement to an end'.

For example, in the *Microsoft* interoperability case, the Commission's decision stated that Microsoft had to disclose interoperability information at reasonable rates. But the decision did not prescribe the precise terms and conditions, and the Commission argued in Court that it did not have the power to make such an order.

Individual sanctions

Individuals may not be fined or sanctioned at the EU level.

Update and trends

The debate over the role of detailed economic analysis in Article 102 TFEU cases will likely continue to play out in the European Courts (see the contrasting opinions of Advocate General Kokott in *Post Danmark II* and Advocate General Wahl in *Intel*). The Court of Justice's ruling in Intel is therefore particularly eagerly anticipated.

Competition Commissioner Vestager has also spoken publicly of the need to address exploitative abuses (which has generally been area of low activity for the Commission). The Commissioner highlighted possible exploitative abuses in the gas industry, in pharmaceuticals and with standard essential patents.

Finally, there is concern among practitioners and agencies that increasing protectionism in national industrial policy may spill over into competition enforcement. In that regard, it is to be hoped that the UK's exit from the EU will not lead to a reversion of formalism in the application of the EU competition rules by member states, and a departure from a purely competition-based assessment in favour of analysis influenced by strategic national industrial concerns.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Commission can impose sanctions directly. If a company appeals a Commission infringement decision and fine, the fine is not suspended pending the appeal. The company may, however, post a bank guarantee and pay the full fine (plus annual interest) if its appeal is unsuccessful.

As to remedies imposed by the Commission, companies may apply for interim suspension of the decision to the General Court pending the outcome of the substantive appeal. The Court will grant interim suspension if the company discloses a prima facie case; demonstrates urgency (which requires serious and irreparable harm if the suspension is not granted); and the balance of interest favours suspension.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The Commission is an active enforcer of abuse of dominance rules in Europe. Since 2010, the Commission has opened roughly 30 abuse of dominance cases, and closed about 10. It has found four infringements in that time. It has roughly 20 cases ongoing.

The average length of proceedings in its closed cases is about three years, although the Commission has a number of open cases that have been ongoing for much longer. The sectors most commonly investigated are utilities, former regulated sectors and technology. The Commission has mainly investigated cases involving alleged exclusionary conduct (across the full spectrum of abuses), although there are some indications it would like to increase its caseload on exploitative abuses (see Update and trends).

The most high-profile ongoing abuse of dominance case is the Commission's investigation of Google's search service. The case is now entering its seventh year. In that time, the case has seen three unsuccessful commitments offers, two Competition Commissioners, over 40 complainants, a European Parliament non-binding resolution to break-up Google and two statements of objection. Over the same period, courts and authorities in the USA, Canada, Taiwan, the UK, Brazil and Germany have opened and completed reviews of Google's conduct (finding no infringement).

The Commission's case has now narrowed to how Google shows groups of ads for product offers compared to free results for comparison shopping services. The Commission is investigating whether the different way that Google ranks and displays product ads compared to free results amounts to unlawful favouring.

Google contests the Commission's preliminary concerns. Google explains that it ranks all its results based on consistent relevance standards. The product ads at issue are an enhanced ad format that help users find relevant products, and offer advertisers better conversion rates. Showing ads in clearly marked ad space separate from free results is how Google monetises the free search service it offers to users. And Google has no obligation to show ads from rival services because it is not an essential facility. Google also points to what it considers a thriving product search space, where Amazon (not Google) is the leading player.

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The Commission has two other ongoing cases against Google, concerning Google's Android mobile platform and its intermediated ad service, AdSense. The Commission served statements of objections on Google in those cases in 2016. Google responded in late 2016, disputing the allegations.

At the Court level, the Court has ruled on a number of high-profile cases since 2010, including Case C-549/10 *Tomra* ECLI:EU:C:2012:221, Case C-295/12 *Telefónica* ECLI:EU:C:2014:2062, *Intel, Microsoft, AstraZeneca* and *Deutsche Telekom*. The Court has yet to overrule the Commission on substance in an article 102 TFEU case (although note the Advocate General's Opinion in *Intel* advising that the Court of Justice should uphold three of Intel's grounds of appeal, quash the General Court's judgment and refer the case back to the General Court).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Although there is no express equivalent to article 101(2) TFEU for article 102 TFEU, a contractual provision that infringes article 102 TFEU will likely (by analogy with article 101(2)) be void. Provided the infringing provision can be severed from the rest of the contract, the rest of the contract will remain valid (Case 56-65 *Société Technique Minière* ECLI:EU:C:1966:38).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

At the EU level, all antitrust enforcement is public enforcement by the Commission. Nonetheless, the Commission aims to encourage and facilitate actions brought by private claimants before member state courts. See question 32.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Breaches of competition law are directly actionable in damages claims in member state courts.

In addition, companies can bring follow-on claims before member state courts, where a Commission decision finding an infringement acts as proof of breach. In such claims, the claimant only needs to prove causation and loss.

As to quantum, the Court of Justice established in *Courage v Crehan* (Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465) that a claimant has the right to compensatory damages for harm incurred as a result of the infringement. The Commission has published a Communication on quantifying harm in damages cases, which states that compensation should include the full value of any loss suffered, as well as loss of profit and interest from the time damage was incurred.

The recent Damages Directive, published on 5 December 2014, aims to ensure that victims of competition infringements can obtain full compensation for the harm they have suffered. Among other things, the Directive introduces rules on the disclosure of evidence in such cases, as well as on the standing of indirect customers, the length of limitation periods, joint and several liability of infringers, and the passing-on of damages as a possible defence.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Commission decisions can be appealed to the General Court on points of fact and law. The General Court must establish 'whether the evidence relied on is factually accurate, reliable and consistent ... and contains all the information [needed] to assess a complex situation ... [and] is capable of substantiating the conclusions drawn from it' (*Microsoft*, Case T-21/05 *Chalkor* ECLI:EU:T:2010:205, and Case E-15/10 *Posten Norge AS*).

After the General Court appeal, the appeal is to the Court of Justice on points of law only.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not at the EU level. See question 6.

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