Modernisation of Article 102 of the Treaty on the Functioning of the European Union
(Modernizace článku 102 Smlouvy o fungování Evropské unie)

Diplomová práce

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Katedra: Katedra evropského práva
Datum vypracování práce (uzavření rukopisu): 30.04.2010
Čestné prohlášení

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V Praze dne 30. dubna 2010

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Poděkování

Na tomto místě bych ráda poděkovala Doc. Mag. phil. Dr. iur. Haraldu Christianu Scheuovi, PhD. za cenné připomínky a odborné rady, kterými přispěl k vypracování této diplomové práce.
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I. Introduction

This paper is concerned with one of the main parts of European competition law -- the market dominance and its abuse. Concretely, it deals with the ongoing reform of article 102 of the Treaty on Functioning of the EU (TFEU)\(^1\) and its compatibility with the previous judicature of the EU Commission and the Community Courts. To achieve that, the introductory Chapter II will provide the reader with a short insight into EU competition law and the role it plays in the functioning of the common market and the EU as such. It will also explain the recent changes brought about by the Lisbon Treaty.\(^2\) Further it will clarify the relationship of the EU competition law and national laws and the division of competences between the Community institutions and member states. The conclusion of the introductory chapter will explain the importance of a balanced and well drafted abuse of dominance control.

The paper will proceed in Chapter III with an overview of existing law on the dominant position on the market and its abuse. It will not only review article 102 TFEU but primarily bring an overview of existing judicature to article 102 and the prohibited practices. The judicature is the main issue in the reform of article 102. As will be shown, the enforcement practice of the Commission and in particular of the Community Courts does not have much in common with the sparing wording of article 102. The main question of this paper will therefore be to what extent is the Commission's effort to reform article 102 compatible with the existing judicature of the Community Courts and what impact is it likely to have in case of any discrepancies.

The paper will then in Chapter IV identify the main reasons for a reform of Article 102. It will explain the principles on which Article 102 rested at the time of its drafting and their validity today. It will examine their impact on the case law and the development of the application practice and its main problem areas. Chapter V will deal with the Economic Advisory Group for Competition Policy report, a paper ordered by the EC Commission and published in July 2005. It proposed a radical shift towards the

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effects-based approach, which would entirely change the European application practice. It will describe its strengths and pitfalls and analyse the probable reasons of its failure. The second section of this chapter will deal with the Commission's Discussion Paper on Exclusionary Abuses. It will analyse its approach, showing that the proposed economic analyses is less revolutionary and much more in line with the Commission's wish to merely develop and explain itself.

Chapter VI. comes to the new Guidance on exclusionary abuses. Its first section will first handle the general aspects of the Guidance, focusing on the definition of dominance and market power, the central concept of anticompetitive foreclosure and the new concept of objective justification and defences. The second section of this chapter deals with the specific forms of abuses. Exclusive dealing, tying and bundling, predation and refusal to supply together with margin squeeze are the forms of abuse, which the Commission mentioned in its Guidance. This subsection will deal with those types on a one-by-one basis.

The VII. chapter first analysis the strong and weak points of the Guidance based on consensus among leading academics. Further, it discusses the likely enforcement practice after the publication of the Guidance. It highlights the institutional limitation that the Commission faces. Further it looks into the likely impact on the decisional practice of the Community Courts, national courts, and the national competition authorities (NCAs). It explores whether the Commission achieved its goal of legal certainty and predictability and what is the likely behaviour of the market players. It evaluates whether the Guidances paper broadens the horizons of the case law and if so, what are the likely consequences.

Chapter VIII. concludes and summarises the findings.
II. EU Competition Law

This chapter will explain the basics of the EU competition law, the problem areas it covers and the institutions entrusted with its enforcement. It will also focus on the relationship between the EU and member states competition law and enforcement, as it is an increasingly important topic especially after the Modernisation Regulation of 2003 entered into force.\(^3\)

A. Competition Law Definition and Practices of Concern

Competition policy as such can be defined as the set of laws and regulations governing market behaviour, particularly agreements and practices that restrict competition and the acquisition and use of market power. It ensures that competition in a marketplace is not restricted in such a way as to reduce economic welfare.\(^4\) Following overview lists the practices, with which competition law is generally the most concerned:\(^5\)

1. Anticompetitive agreements, also known as cartels or explicit collusion, that have as their object or effect the restriction of competition are unlawful. This applies to agreements of competitors or their associations or any other relevant persons. It also applies to explicit (overt) collusion, i.e. parallel behaviour, which is conditioned by an information exchange but without reaching the stage of an agreement. Mere parallel behaviour without information sharing, i.e. tacit collusion, is not unlawful in the EU. It is, however, not wished for and the EU tries to avoid tacit collusion e.g. by reducing the transparency on the supplier side of the market. The agreements can be vertical or horizontal, whereas vertical agreements are usually judged more leniently, as they are less likely to harm competition. However, even horizontal agreements may not be unlawful under certain conditions, supposing they fulfil the conditions of article 101(3) TFEU. As restricting competition are perceived e.g. agreements to fix prices, to

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\(^3\) Regulation 1/2003 (Modernisation Regulation) OJ [2003] L 1/1.
share market or to restrict output. In some of the member states of the European Union such behaviour is criminalised and might lead to imprisonment of the involved cartel members. In the EU as such, cartels and overt collusion are an administrative offence, which is punished by a fine addressed to the relevant company. The core legislation on anticompetitive agreements is article 101 TFEU.

2. **Abusive behaviour** by a monopolist or a company in a dominant position is deemed to be illegal. A company is in a dominant position, when it enjoys the market power to behave independently of its competitors, customers and consumers. However, not all practices of a monopolist are clear-cut abusive or beneficial. The focus in the last two decades shifts rather to the economic effect of the behaviour than to deeming a form of behaviour bad per se. The reform of legislation governing abusive behaviour is also the actual topic of this paper. Core rules on abusive behaviour are comprised in article 102 TFEU.

3. **Mergers** are called concentrations in the EU law. Concentrations can be harmful to competition because through reducing the number of market player, they increase their respective market power. Consumers are therefore deprived of choice and have to pay higher prices. However, mergers can also lead to considerable efficiencies and benefits to consumers. An analysis of a merger is a complicated issue involving counter-factual scenarios and predictions of the future. Depending on jurisdiction, merger control can be executed either ex ante or ex post. All member states in the EU, with the exception of Luxembourg, have a system of merger control in place. The EU merger control is enacted in the European Community Merger Regulation 139/2004.

4. **Public restrictions** of competition are unlawful. The state has an immense potential to distort competition through legislative measures, licensing, state aid or regulations. Such behaviour is not compatible with the single market imperative in the EU. Article 107 TFEU provides rules on incompatible state aids.

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B. Structure and Development of the EU Competition Law

The EU competition law is comprised already in the primary law constituting the Union. It is also a subject matter of the secondary legislation and numerous soft law documents. Originally, the chapter on competition law was incorporated in the Rome Treaty of 1957 in articles 85 to 93. The core antitrust articles are article 85, shortly described as cartel and collusion ban, and article 86, prohibiting the abuse of dominance. The original Treaty of Rome was renumbered by the Treaty of Amsterdam, and since then the EC competition law was contained in chapter 1 of part III of the EC Treaty, in articles 81 to 89, the core articles being 81 and 82. On December 1st 2009, the Lisbon Treaty (the ,,Reform Treaty“) entered into force. It brought about significant changes for the functioning of the EU. Competition law is now comprised in title VI, chapter 1, which is divided into two sections: articles 101 to 106 handle the rules for undertakings, whereas articles 107 to 109 describe the rules for aids granted by the member states. Nevertheless, the changes in competition law remained formal: articles 81 and 82 were shifted backwards and became articles 101 and 102, however remained unchanged in wording and context.

This work consequently tries to use the new numbering.

As for a special nature of competition law in the European context, it is necessary to bear in mind that EU competition law serves „higher“ aims than just the competition itself. It is a mean to fulfil the single market imperative and create Europe without barriers and borders. The integration is likely to remain a key feature of European competition policy. The common currency Euro is an important feature contributing to a transparent competitive environment, too. Informed consumers are able to compare prices and goods without much effort and make qualified choices.\(^8\) The single market imperative and the economic and monetary union are important aspects of the EU competition policy, which form its special character with comparison to other jurisdictions e.g. the United States.\(^9\) Third important feature of the EU competition law is that, in comparison to the US antitrust law, it is a young discipline and as such is in constant development.\(^10\)

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\(^10\) The first country to implement an effective competition policy in Europe was Germany as a part of the denazification programme. Before WWII cartels were generally encouraged as an element stabilising
The second half of the 20th century was in a sign of legal formalism for EC competition law. Some practices have been prohibited per se, being described as a certain form of behaviour. This has been severely mocked by the US where the focus shifted much earlier towards the economic effect of a practice, rather than to its outer form and outright prohibition. During the 1990's it became apparent that the formalistic competition law is in an urgent need of change. In the last two decades EU recognised the need for change of its competition policy and employed the position of the Chief Economist, who shall lead to the more effects-based approach in the EU Commission's policy.

However, not everything can be changed by the shift in focus and therefore, a number of reforms were set into pace as late as 1999. The adoption of regulation 2790/99 modernised the application of the cartel ban on vertical agreements. The modernisation of approach to welfare enhancing horizontal cooperation agreements was finished in 2000 in a set of guidelines and block exemption regulations and so took into account the beneficial economic effect of the horizontal cooperation. The legislation and policy regarding mergers and acquisitions (in the EU called "concentrations") has been considerably changed by the Regulation 139/2004. However, probably the most significant development was the entering into force of the Modernisation regulation. This changed the way of application of articles 101 and 102 in the way that it removed Commission's monopoly for application of these statutory provisions to the individual agreements and conduct. It also removed the system of individual exemptions from the horizontal agreement ban under article 101, which the Commission could grant based on article 101(3) upon prior notification of the agreement.

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14 Regulation 2659/00 (Block Exemption for R&D Agreements), OJ [2000] L 304/7.


C. Institutions Applying EU Competition Law and Policy

There are several institutions entrusted with the enforcement of the EU competition law. The ones mentioned below are merely the most important ones applying competition law on a whole-European level. However, the EU Competition law is also applied by National Competition Agencies and member states' courts. This issue is closely connected to the issue of competence relationship between the EU competition law and national competition laws, which will be dealt with in the next section.

1. **Council of the European Union**\(^\text{17}\) is the supreme legislative body. It does not act as a regular enforcer of the EU competition policy, but it acts as a delegator of powers on the Commission. It also enacted some major pieces of legislation, such as the Modernisation Regulation and the ECMR.

2. **European Commission**\(^\text{18}\) is the most important institution in the EU competition policy enforcement. It is responsible for fact-finding and punishing, adopting block exemptions, considering mergers and state aids and developing policy and legislation in general, e.g. by issuing soft-law documents. One of the Commissioners is entrusted with the competition policy agenda. He can take some of the decisions by himself, others have to be taken by the college of commissioners. Directorate General for Competition (DG COMP) can be described as a “ministry” charged with competition policy matters. It is presided by a Director General. It also employs Chief Competition Economist. All formal decisions of DG COMP must be vetted by the Legal Service of the Commission, which represents the Commission in legal proceedings before the Community Courts.

3. **General Court**, formerly known as the Court of First Instance, deals with ordinary competition cases against the Commission in the first instance. Since the Nice Treaty, all actions for annulment of a Commission’s decision, including those brought by the member states are taken to the GC. Note that under the Lisbon Treaty both the General Court and the European Court of Justice are

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\(^{17}\) Website available online at http://www.consilium.europa.eu

\(^{18}\) Website available online at http://ec.europa.eu
branches of the Court of Justice of the European Union. Thereby the Community Courts are united into one.

4. **European Court of Justice** hears appeals from the General Court on the points of law only. It also hears the issues of preliminary ruling under article 267 TFEU. So called Advocate General plays an important role in the case proceedings – he impartially reports on the case and supplies the Court with a proposed decision.

**D. Relationship between EU Competition Law and National Laws**

All the member states have their own competition law system, mostly based on Articles 101 and 102 TFEU. Even though there is a great similarity between the EC an MS law system, there is nevertheless the risk that the outcome of a case might be more lenient or stricter depending on the used law. These matters are now solved by article 3 of the Modernisation Regulation. Modernisation Regulation gives the national competition authorities (NCAs) and the member states' courts (MSCs) the right to apply articles 101 and 102 TFEU. They are naturally allowed to apply national laws as well. Articles 101 and 102 TFEU do not have to be applied to every case with a competition law aspect. According to article 3(1) of the Modernisation Regulation it is the concept of “affecting trade between Member States”, which triggers the obligation to apply TFEU.

There is another question, which arises in respect of the existence of two parallel legal systems: what will happen in case of a conflict? It depends on the fact, whether the conflict arises within the subject matter covered by article 101 TFEU or article 102 TFEU. In case of article 101 TFEU a “level playing field should be created for all agreements within Union”. According to article 3(2) of the Modernisation Regulation, it is therefore not possible for a national body to apply a stricter national rule in case that the EU legislation is more lenient. This should serve the purpose that no barriers to commerce and internal market are created under the pretension of protecting competition.

The position with respect to article 102 TFEU is different. The Modernisation

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Regulation does not require convergence with EU rules in case of a dominant position. Several member states\textsuperscript{20} have a stricter system of dominance control in place, which e.g. protects customers in a position of economic dependence.

According to article 3(3), the member state shall also not be precluded from applying its national laws when it is in its "legitimate interest" other than the protection of competition in the market. This rule is applicable provided that the main objective of the measure is other than competition, it is in the legitimate interest of the member state and it is compatible with the general principles and other provisions of Union law.

E. The Importance of a Balanced Abuse of Dominance Control

This paper is concerned with the ongoing reform of Article 102 TFEU. This topic is a very interesting subject of scrutiny for several following reasons. Article 102 TFEU deals with abuses committed by an undertaking in a dominant position. Dominance is a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers.\textsuperscript{21} Becoming an undertaking in dominant position, or ultimately a monopolist, is theoretically the aim of every competitor – it is the reason for innovation and effectiveness and other positive aspects connected with the competition on the merits. Therefore, it would be counterproductive to prohibit the undertakings to achieve the dominance as such. It would deprive them of an important incentive to compete, as the profit margin of the company is supposed to grow with its market power to the extend that the "last man standing" will reap the monopoly profits in the relevant market. Nonetheless, with the growing market power of the undertaking the opportunities to abuse it grow as well. There is a very thin line, which is not easy to strike: Dominant position as such cannot be prohibited, as it would compromise the competitive process; yet, it is necessary to ensure that a dominant undertaking is not going to abuse its power against its competitors and consumers.


Therefore, the launch reform of the article 102 TFEU attracts such a public attention. The European Union was in the past heavily criticised for not getting the balance right, focusing too heavily on the form of the behaviour of the dominant undertaking and not on the effects of this behaviour. This is said to be changed. Many Commission's officials present the reform in public as shifting from a "form-based approach" to an "effects-based approach." They call for more economic evidence in the proceedings. Yet, they like to present the reform not as a revolution but as an evolution. Commissioner Kroes emphasized many times that "there shall not be a radical shift in the enforcement policy. The Commission merely wanted to develop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behaviour to make it easier to understand Commission's policy as stated in the policy papers and individual decisions based on Article 82 EC."²² This approach brings many questions: what theory of harm shall be the prevailing one? The theory of economic interest and protection of competitive structure or the theory of consumer harm? How can an effects based approach be applied to types of abuse, i.e. to certain forms of behaviour? How can the new approach and the old case law be reconciled?

There were many questions in the beginning of the reform process. Four years later, after publishing a soft law Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings²³, only some of them have been partially answered. This paper's aim is among others to identify the problematic areas of the reform.

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III. Law on Article 102 TFEU and the Judicature to Date

This section will explain the law on Article 102 TFEU. Apart from the explanation of the concept of dominance and its abuse, it will shortly present the different types of abuse, which are normally recognised by the theory to be involved. It is necessary to note that the law on article 102 TFEU is created mainly by the judicature. The succinct wording of article 102 is not very informative and it is possible to read it from many different points of view. The European point of view was formed partly by the decisions of the Commission but mainly by the judicature of the Community courts. Therefore, this chapter will deal with the most important judicature on article 102 TFEU to date, which enlightens the concept of the different forms of abuse, as it is understood by the Commission and the Community Courts. However, due to the focus of this paper on the reform of Article 102 TFEU, which to date deals only with exclusionary abuses and leaves the exploitative abuses for a later date, the presented judicature will only apply to exclusionary abuses. As much as the judicature concerned with the other forms of abuse is informative and important to understand the concept of the EU abuse of dominance law as opposed to the US concept, it is not possible to handle it in the scope of this paper.

A. Article 102 TFEU

Wording of Article 102 TFEU:25

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

*Such abuse may, in particular, consist in:*

* (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

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

(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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

As is clear from the wording above, building up a case based on article 102 TFEU requires to fulfil two criteria: existence of a dominant position on the relevant market and its abuse (the aspect of the effect on trade between member states being presumed).

B. The Definition of Dominance

The definition of dominance is a legal one. In one of the first article 102 cases, *Hoffmann-La Roche*, the European Court of Justice gave the definition of market dominance we still use nowadays:

"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."26

It is difficult to translate the precise meaning of the expression "the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers" into economic terms.27 It means that the firm must enjoy a significant market power but in the judicature even companies having a relevant market share of 40% and far from holding a monopoly position have been deemed to be dominant. However, the 40% rule of thumb comes from one of the early cases of abuse of dominance28, and although it is still considered as a relevant threshold for the purpose of determination of dominance, it is neither a necessary, nor a sufficient condition to prove dominance. Other important factors are ease and likelihood of entry of further

competitors to the market and buyer's power, including the elasticity of the demand. Therefore, in practice, the assessment of dominance coincides with the economic analysis of the market power. 29

The market power, or dominance, has to be assessed on a so called 'relevant market', which is the set of products and geographic areas, to which the product of the firm belongs and that might create a competitive constraint to the firm under analysis. 30 The relevant market is defined by the substitutes to the firm's products.

It is possible to conclude that a dominant firm is a firm enjoying significant market power on a relevant market. However, as mentioned above, dominance in itself is not illegal neither undesired. If a company builds market power through innovation, investment or being effective, it is legal. It represents the award for being superior to its competitors. It is necessary to prove the abuse of dominance as a second step to establish an offence.

C. The Abuse of Dominance

The concept of abuse is also defined in the case Hoffman-La Roche:

"a behaviour which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." 31

The academics are not united in the classification of abuses. Some 32 recognise two (exclusionary and exploitative). Others 33 identify up to four possible types of abuses

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(exclusionary, exploitative, discriminatory and retaliatory). Any combination of the above mentioned types of abuses is conceivable and can be found in the literature. Although the Commission never formally acknowledged any division of the abuse types, its Guidance on exclusionary abuses and the remarks of awaited paper on the exploitative abuses indicate that the Commission distinguishes at least these two types of an abuse.

Exploitative abuse means that the dominant undertaking is charging too high prices to the buyers or extorting too low prices from the suppliers. Exploitative abuses are an area, where the EU law is inherently different to the US law. In the US it is not illegal to charge high prices – it is perceived as one of the well-earned benefits a dominant undertaking enjoys for being superior to its competitors in a fair manner.

Exclusionary abuse is a conduct by an undertaking in a dominant position which has the object or effect of excluding a competitor or a potential competitor from the market. It can take a form of predatory pricing, margin squeeze, tying and bundling of products, loyalty inducing rebates or refusal to deal or to supply. The list of the abusive practices is not exhaustive. One of the main arguments for the reform is actually the fact, that it is not the type of abuse, which is decisive, but the fact, that the behaviour is harming or preventing competition. It is necessary to pay attention especially to the fact that the law protects competition as such and not the competitors. This concept will be mentioned further throughout this paper. It is an important issue, meaning that the law does not intend to protect undertakings, which are less effective than the dominant rival. This point is clear in theory, but as might be seen from the following judicature overview, it has not been followed consequently in practice.

D. Judicature on Exclusionary Abuses

The judicature concentrated on clearing the most substantial questions of dominance and abuse in the first years of EC competition law existence. Such cases as United Brands or Hoffman-La Roche are much more concerned with defining relevant

36 Ibid. Ch. 5.
market and market power, than with the respective abuse themselves. However, till nowadays, their definitions are valid pieces of law. In Hoffmann-La Roche, the ECJ dealt with the concept of dominance and abuse, harm to consumers, exclusive dealing, and loyalty inducing schemes. Hoffmann-La Roche was found to have dominant position on markets for certain vitamins and to have abused that position by entering into exclusive agreements or agreements containing exclusionary fidelity rebates with purchasers of vitamins. Apart from the paragraphs defining the dominant position and its abuse, the case is also important for establishing that no direct harm to consumers is needed to find an infringement of EC competition law. An indirect harm in the form of impairing the effective competitive structure is enough.

"Chiquita Banana" case is also one of the first article 102 TFEU decisions where ECJ dealt with the very basics of dominance and relevant market definition and on the top of that with several types of abuse, among others with price discrimination, parallel imports, refusal to deal and restrictive conditions. United Brands was an importer of South-American Chiquita Bananas. It supplied green bananas to distributors in different EC countries who would let them ripe and then sell them to retailers, who would then pass them on to the final consumers. It was accused by the Commission of charging exploitative prices, discriminating in price between the customers, refusing to deal and imposing restrictive conditions.

The Commission's decision was upheld by the ECJ in all points but the exploitative pricing. The restrictive conditions were seen in imposing the ban on the distributors to sell the bananas while they are still green. As ripe bananas have a very short life it was considered to be in fact a measure avoiding parallel imports to other EC countries. The measure was held to be disproportionate to ensure quality for consumers. The refusal to deal abuse was seen in interrupting supply to a long standing distributor in Denmark on the ground that it was distributing bananas of a competing company Dole. The refusal to sell would limit the market to the prejudice of the consumers and a complete cessation of supply is disproportionate, even if it is a

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18. ibid. para 125.
20. ibid. para 157-161
good right of a dominant firm to protect its commercial interests.\textsuperscript{41} The third abuse lied in the fact that United Brands charged different prices for its goods in different EC states. Applying dissimilar conditions to the distributors without costs justification was held to be abusive no matter the commercial reasons provided.\textsuperscript{42} The decision was also important for the market dominance assessment.\textsuperscript{43} The most significant part of the decision for the assessment of dominance is the fact that the Court decided that the definition of the market is essentially a matter of interchangeability.\textsuperscript{44}

Also \textit{AKZO Chemie BV v Commission},\textsuperscript{45} one of the more recent cases decided in 1990's, is concerned with the definition of dominance. It represents a certain milestone because it sets out a presumption that a market share over 50% is a strong indication of dominance.\textsuperscript{46} Otherwise, it puts an emphasis on the fact that dominance must be assessed based on a combination of factors, not merely on the market shares.\textsuperscript{47}

Shifting from the basics of dominance assessment to the concrete types of abuse, the \textit{AKZO} case also defines predatory pricing. It states that pricing below average variable costs (i.e. the costs which can be avoided even in the short run) constitutes an abuse. Evidence of actual or impending elimination — e.g. evidence that the prices are too low to enable competitors to sustain their businesses — is not necessary to establish abuse.\textsuperscript{48} This is also called the first \textit{AKZO} test.\textsuperscript{49} Further the court held that prices higher than average variable costs, but lower than average total costs (i.e. lower than expenses of production avoidable both in the short-run and the long-run) are abusive if they are part of a plan to eliminate a competitor, however the focus on dominant undertaking's intentions is inherently difficult.\textsuperscript{50} This pricing strategy is capable to eliminate a competitor, which is as efficient as the incumbent, but due to lower financial resources is not able to withstand the pressure.\textsuperscript{51} This is also called the second \textit{AKZO}

\begin{itemize}
\item \textsuperscript{41} ibid. para 182-191.
\item \textsuperscript{42} ibid. para 228-234.
\item \textsuperscript{43} ibid. para 65-123.
\item \textsuperscript{45} ECJ. Case 62/86 \textit{AKZO Chemie BV v Commission.} [1991] ECR 1-3359.
\item \textsuperscript{47} ECJ. Case 62/86 \textit{AKZO Chemie BV v Commission.} [1991] ECR 1-3359, para 60-62.
\item \textsuperscript{48} ibid. para 69-74.
\item \textsuperscript{50} ibid. p. 731.
\item \textsuperscript{51} ECJ. Case 62/86 \textit{AKZO Chemie BV v Commission.} [1991] ECR 1-3359, para 72.
\end{itemize}
test. These principles have been later restated by the Judgement Tetra Pak II,52 where
the ECJ made clear that the principle that "prices below average variable costs must
always be considered abusive" is limited to cases where "there is no conceivable
economic purpose for such pricing other than the elimination of a competitor" and
where there is a risk that it might eliminate some competitors.53 It also made clear that
there does not have to be a prospect of recoupment of the losses through an increase in
prices after the elimination of competition (prospect of recoupment is compulsory in the
US for a finding of predatory pricing).54 This cases offers a certain foretaste of profit
sacrifice, which appeared later in the reform Guidance. The Commission asked, whether
Tetra Pak could forego its profits for some outer cause or merely for elimination of the
competitors.55

As one can see, the test for the predatory pricing is understandable and clear. The
position was different for other two types of abuses, namely rebates and refusals to deal
and to licence. These have a long and troublesome history and although most of the
cases presented below are recent, it is clear that there are many inconsistencies within
the judicature and that no clear-cut tests have been established.56 Michelin II v
Commission57 is one of the most complicated cases on rebates decided by the
Commission and fully upheld by the CFI two years later. As a recent case fully
committed to the formalistic approach and ignoring any economic reasoning behind the
practice of concern, it was one of the cases who paradoxically contributed the most to
the current reform of article 102 TFEU.58

The subject-matter of the case was an alleged abuse in the market for new
replacement tyres and retreaded tyres, whereas new tyres are considered to be superior
and more reliable than the retreaded tyres, therefore constituting a separate relevant
market. Production of tyres is a highly concentrated oligopoly market and Michelin was

53 ibid. para 41.
54 ibid. para 44.
56 SHER, B. The Last of the Steam-powered Trains: Modernising Article 82. European
58 MOTA, M. Michelin II: The treatment of rebates. In Cases in European Competition Policy.
at the time of the decision holding a dominant position (55-60%) on the relevant geographic market (France). The alleged objectionable behaviour was divided into three areas and consisted of general price conditions including invoicing scale and rebates, of binding the customers to "Michelin Friends Club" and so-called PRO Agreements. The PRO Agreements include an aspect of tying, because they provide rebate to a dealer for every tyre given to Michelin for retreading, but only to the amount of purchased new replacement tyres. Moreover the rebate is given in a form of a voucher for new replacement tyres.

The Michelin Friends Club was seen as a measure inducing loyalty and dependence on the brand. Michelin would provide training and quality service to the customers in return for a certain volume of trade. The most complicated part of the decision is the assessment of rebates and invoicing system. In summary Michelin's rebates can be divided in three types: quantity discounts, service bonus and progress bonus. None of the rebates was based purely on purchased volume. The quantity discounts were assigned to certain thresholds, where the sale in percent points was getting higher with every threshold reached. Effectively, a small amount purchased on the top of a planned order could get the customer in a new "class" and bring a higher rebate on all purchased units, which has a high motivation effect to purchase more from the very same producer, rather than diversifying one's purchases between more brands.\(^{59}\)

The service bonus is meant to contribute to the equipment and after-sale service of the dealer. To qualify, a minimum yearly turnover with Michelin was necessary. The higher the turnover, the higher the rebate provided. Progress bonus was assigned to dealers who committed themselves in writing at the beginning of the year to reach a certain target of purchase and to exceed it. All types of rebates were provided subsequently at once in the following year.\(^{60}\) According to the Commission the rebates had a loyalty-inducing effects leading to a market foreclosure.\(^{61}\) They were not connected to transaction-specific savings and did not correspond to economies of scale. The system was also perceived as unfair, putting the buyers in a weak psychological position, because the system of the rebates was complicated and disabled prediction of

\(^{59}\) ibid. para 59.
\(^{60}\) ibid. para 85.
\(^{61}\) ibid. para 241.
the final purchase price. Because the rebates were available only to purchases from Michelin France, they would prevent parallel imports, which was seen as a particularly serious violation of EC law. The Commission and the CFI were targeting a very aggressive competition strategy from a dominant undertaking and they might have well been right in the fact that the behaviour was abusive. What attracted the public critique was an absolute lack of economic analysis of the dominance and abusive behaviour findings in the decision. The authorities decided based on criteria such as fairness, which are not measurable. Most of the critics also mentioned the fact that Michelin was punished for assuring lower prices for the final consumer, whereas consumer welfare shall be one of the aims of the EC competition law.

British Airways v Commission revisited rebates just a little later and generally confirmed the direction of Michelin II. BA had a bonus system in place, which was rewarding UK travel agents for the sale of BA tickets. The system was based on reaching sales thresholds, qualifying the agent for an increasing commission fee. The Commission held this system for discriminatory, because it was open only to the UK agents and not agents from the other member countries. Secondly, the bonus system was held to be loyalty-inducing and imposing foreclosing barriers upon the competitors. Discounts based on purchased bulk or other quantity discounts justified by economic considerations are lawful. This is clearing the EU position to rebates slightly. However, from both of the above mentioned cases is clear that the Commission relied on assumptions rather than on sound economics.

The so far final decision on rebates is Intel, which is of a great importance, as it is the only article 102 TFEU case decided after the Commission issued the Guidance on Enforcement Priorities. The case is currently being appealed to the General Court and it will be very interesting to see, how the Court will deal with the new principles set

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62 ibid. para 223.  
63 ibid. para 239.  
66 ibid. para. 86.  
by the Commission. Intel is the world's largest producer of computer processing units in a very concentrated market, where AMD is its only larger competitor. In this situation, Intel was giving rebates to computer producers in case that they were willing to deal exclusively with Intel. Similarly, it was engaging in agreements with large retailers, rewarding them for stocking exclusively Intel fitted computers.

The Commission used the new tests mentioned in the Guidance: as-efficient-competitor test (testing the hypothesis, whether a company with the efficiency of the incumbent would be able to withstand the market climate), the contestable share concept (which is the part of the demand that is not yet tied-in to the incumbent and therefore the incumbent and the competitor effectively compete exactly for this part of the market) and the relevant range concept (which is the one part of the contestable share that consists the units purchased over the threshold needed to reach the rabat).

The new approach of the Commission says that the rebate provided by the incumbent has to be applied to the relevant range only: if the customer purchases from the competitor, he loses his entire rebate, even the one attached to the non-contestable share. Therefore, the entire rebate has to be considered only with regard to the relevant range of the contestable share. The competitors have to be able to compensate the customer for the loss of the entire bonus. If the price of the relevant range after applying the rebate falls below the average avoidable cost, the competitors are not effectively able to compete for the contestable share and the rebate is illegal. The contestable share concept is somewhat complicated and will be explained in detail the chapter on the Guidance on Enforcement Priorities. Nevertheless, the outcome of the case is not different to an outcome, which would be rendered under the old system, which is slightly disappointing.70

The other of never-ending stories in European control of dominance doctrine is the development of the judicature on refusal to deal and to licence. The holder of a dominant position controls an input (good, know-how, infrastructure etc.) which is essential for the competitor to supply a downstream market. However, it uses its dominant position to reserve that other market to itself and prevent the supply by others

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of a new product for which there is customer demand. Essential facility cases are inherently difficult, because they force the dominant undertaking to share its ownership with others, depriving him his competitive advantage and thereby of the incentive for investment and innovation. The EC judicature in essential facilities cases oscillates between a strict approach as shown in Bronner and IMS and a pro-competitor approach as shown below in Magill and Microsoft.

One of the early cases showing a benevolent approach, Commercial Solvents,71 is a case from pharmaceutical industry where an upstream raw material supplier refused to deal with its long-term downstream trading partner, a producer of TB medicine, because it was standing in a direct competition to a supplier's newly established daughter company. The decision in Commercial Solvents required elimination of all competition on the part of the refused customer for granting the access.72 Therefore, it is perceived as one of the criticised decisions, which are protecting competitors and not competition.73

The next big essential facilities decision in Magill74 is revolutionary, because the ECJ confirmed Commission's decision that several TV stations had to licence the copyright to their programme listings to a third party. At that point, each TV station in the UK and Ireland was producing its own magazine, listing only the programme of its own station. A comprehensive overview listing all programmes was missing on the market and there was a considerable consumer demand for such a product.75 The refusal to deal led to elimination of all competition on the downstream market. The Court stated three conditions, which must be fulfilled for granting a compulsory licence: (a) the IPR holder prevents the appearance of a new product which he does not offer and for which there is a potential consumer demand; (b) the unjustified refusal to grant a licence; (c) the IPR holder reserves a secondary market to himself by excluding all competition on that market.76 It is nevertheless not clear from the judgement, whether the conditions are alternative or cumulative. The decision in Magill is a perceived as a high water-mark of

72 ibid. para 25.
75 ibid. para 54.
76 ibid. para 56.
benevolence in granting access to essential facilities and generally it is concluded that
the judgement's outcome was rather due to the very special circumstances of the case
and they should not create a rule.\footnote{KORAH, V. Access to Essential Facilities under the Commerce Act in the Light of Experience in Australia, the European Union and the United States. \textit{Victoria University of Wellington Law Review}, 2000, 19, p 3.}

The case \textit{Oscar Bronner}\footnote{ECJ, Case 7/97 \textit{Oscar Bronner v Mediaprint} [1998] ECR I-7791.} is in a true sense the very opposite of the \textit{Magill} approach. The access to essential facilities is treated very carefully here. The conditions
already stated in \textit{Magill} are seen as a cumulative test.\footnote{Ibid. para 38.} Note that the Advocate General Jacobs' opinion provides a comprehensive review of law on essential facilities and it is
worth of reading. It emphasizes the right of a dominant undertaking to choose its
contractual partners. It highlights the considerations of long-term and short-term
competition. While competition might be increased in the short run, the lack of
incentive to innovate and invest will harm the consumers in the long run.\footnote{Ibid. para 56-65.} The ECJ in
this case decided the matter, whether refusal to grant access to a newspaper distribution
network constituted abuse of a dominant position, in a preliminary ruling under article
267 TFEU (former 234 EC) presented to the ECJ by an Austrian court. ECJ ruled in
favour of Mediaprint in a sense that a newspaper distribution network was not an
essential facility. It was possible for Bronner to either offer his newspaper on the market
through other distribution network than the home delivery of Mediaprint or to duplicate
the facility. The argument that duplicating the facility is connected with significant costs
was not relevant for the ECJ - the impossibility of duplicating the essential facility if
considered to be in a sense of physical impossibility (ports, railways etc.). Therefore,
not all competition on Bronner's part was eliminated.

This strict approach was followed by the ECJ in the case \textit{IMS Health}.\footnote{ECJ, Case 418/01 \textit{IMS Health} [2004] ECR I-5039.} It ruled
in a preliminary ruling under article 267 TFEU (former 234 EC) referred by a German
court. The question was, whether it is necessary to award a copyright to a special
programme interface. The petitioner wanted to present its own sales data in the same
interface as the incumbents sales data, because the customers were used to this interface
and preferred it. The Court restated the three conditions established in *Magill* and *Brommer* and made clear that they are cumulative. This has put an end to a long lasting controversy. The Commission namely handled this very case before in its own initiative. It decided that the conditions stated in *Magill* are alternative and that IMS has to license its copyright. IMS appealed to the CFI that quashed Commission's decision in 2001. However, as the decision in *Magill* comes from the ECJ, it is very suitable that the situation has been cleared by the highest court.

In the wake of the previous decisions, *Microsoft v Commission* is a swing in the opposite direction. Strangely following the Commission's decision in IMS and ignoring its own decision in that matter, the CFI upheld Commission's decision for abuse of a dominant position in relation to the refusal to supply the interoperability information for operating PC Windows with other systems and the tied sale of Windows Media Player. A € 497 million fine was imposed on Microsoft, which together with the subsequent fines for non-compliance amounts to over a billion Euro. The most significant part of the decision is that the court provides a compulsory licencing for a mere follow-on innovation and the requirement of the new product is lessened.

The case alleged two main exclusionary abuses. Firstly, tying which was seen in the fact that Microsoft was bundling its operating system together with its Windows Media Player and in this manner leveraged its market power in the MP3 player market. Microsoft was back-then “over-overwhelmingly” dominant on the market for operating system but not on the market for music players. Through tying the two products together it was effectively foreclosing its competitors such as Quick Player. Secondly, Microsoft was abusing its dominant position by not disclosing the interoperability information to its competitors on the server operating systems market. Microsoft was not dominant on the server operating systems market at the start. In this industry a so called “networking effect” comes into play - consumer wish for computer products to work together flawlessly and they tend to mistrust products with a

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82 ibid. para 21.
83 ibid. para 32.
86 Summary of the arguments: ibid. para 43-45.
87 Summary of the arguments: ibid. para 36-42.
compatibility problem. It was not possible for Microsoft competitors to produce server operating systems, which would be compatible with Microsoft's own computers operating systems without having the interoperability know-how. In this manner, Microsoft could leverage its position on the server market, because only its own server would work with its operating system. Although Microsoft was objecting infringement of the copyright and lack of proportionality, this practice was perceived as a wrongful refusal to deal and a monitoring trustee was appointed to oversee the compliance with the decision to disclose the know-how.

From the overview of the judicature above it is clear that the approach to abuses under article 102 SFEU is far from unambiguous and its development has not always been straight. The next chapter will deal with the reasons for the reform more closely.
IV. Reasons for Reform of Article 102 TFEU

A. Ordoliberal Principles of Preserving the Market Structure

In perceiving the article 102 TFEU one has to be aware of the history of the EU competition law and the principles on which the abuse of dominance doctrine rested when it was brought into life. As already mentioned above, the German competition law was the most developed antitrust system after the WWII in Europe. It exercised a serious influence on th European competition law practically until the end of the millennium, when the above mentioned reform of competition law started the journey towards higher convergence with the US system. To explain the depth of the problem, a short excursion into the history of economic thinking is necessary. German economic thinking was heavily influenced by the ordoliberal school after the war. Ordoliberals emphasize the necessity of certain regulating principles, which shall neutralise the powers excluding competition in the healthy market environment. The regulation is necessary in order to prevent this freedom from destroying its own prerequisites.88

Translated into more understandable economic terms, ordoliberals are afraid of the natural outcome of vigorous competition: the last man standing. The market power of the monopolist, even though acquired through legitimate means, is an undesired outcome. Therefore, ordoliberals are more concerned with preserving the structure of the market, than with the ultimate protection of the consumers.89 The most marked case, where influencing the structure of the market was considered to be an abuse was Continental Can (although this case would nowadays be decided under the Merger Regulation, therefore it is not mentioned under the abuse cases in the previous chapter).90 The US and recently the EU approach put the consumer in the centre of the attention. If consumer welfare is maximised (i.e. when the consumer gets the best choice of good quality products well under his reservation price), the competition is being legitimate. Naturally, it is necessary to stress out that the welfare of the consumer

has to be maximised in the long run – it is not beneficial for consumers when a predator lowers prices for a short period of time only to reap monopoly profits later on.

The effects approach concentrates on lifting the barriers to entry because a truly free market, where only one company is reaping monopoly profits, will soon attract new entrants and the competition will be restored. Such an effects analysis with regard to consumers is demanding and involves uncertain predictions of the future. Against that, the ordoliberal approach offers some merits for both companies and competition agencies. It increases legal certainty and reduces enforcement costs, because everyone is aware of what conduct is being prohibited. The aim of protecting the structure of the market is by no means dead in today’s competition policy enforcement. For example German Bundeskartellamt and also Advocate General Kokott are till nowadays vigorous advocates of the ordoliberal approach.

However, the form-based approach has some flaws, which cannot be underestimated and they are the subject of the ongoing critique towards article 102 TFEU. The strongest argument is that in using form-based approach the enforcers risk prohibiting conduct, which is in itself not anticompetitive. This renders type I. errors (i.e. over-enforcement) and sends wrong signals to the market players deterring them from adopting efficient and pro-consumers strategies. With regard to the fact that article 102 TFEU cases make up for about a quarter of Commission’s ongoing antitrust cases, over-enforcement presents wasting of scarce resources in a significant scope.

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93 The ordoliberals prefer the name “the economic freedom approach” because they, too, are refusing “per se” rules. However, the “forms-based approach” is a term used by a wide academic community.

B. Problem Areas of Enforcement in Practice

The problem areas of EU abuse of dominance enforcement have been summarised very nicely by John Temple Lang\textsuperscript{95} and Brian Sher.\textsuperscript{96} This section owes most of its arguments to these two papers.

The main problem is seen in on-going external and internal inconsistencies. Internal inconsistencies are visible in the individual categories of abuses, which developed each in its own way, some with economic tests (predatory pricing), some with mere assumptions (rebates), about others is not even clear whether they exist on its own (take e.g. discrimination). Externally the discrepancy is very clear with regard to the effects-based approach applied to mergers and article 101 TFEU cases. This is partly caused by the lack of big article 102 cases. Until 2004 the Commission was almost entirely occupied by allowing the individual exemptions for agreements and concerted practices in antitrust matters. It clearly did not make article 102 one of its enforcement priorities. Further, the problem is aggravated by the inability of the Commission to influence established case law ex post. The Commission has no power to create or to change the law with respect to the established judicature of the Community Courts. Moreover, it is law that the Commission itself contributed to. Further, it is caused by the true lack of consensus within the Commission and the member states with respect to the "right" competition policy. Many observe reported conflicts in this policy area between DG COMP and the Commission's Legal Service.\textsuperscript{97} This lack of coherent policy basis leads to the following particular arguments for the reform of article 102 TFEU:

1. Article 102 is the only area of EU competition law uninfluenced by a vigorous economic analysis, although risks of discouraging legitimate competition are known. Also, it was recognised that some practices previously understood as harmful are in fact encouraging price competition and bringing efficiencies.


\textsuperscript{97} PETIT, N. From Formalism to Effects? - The Commission's Communication on Enforcement Priorities in Applying Article 82 EC. World Competition: Law and Economics Review, 2009, Forthcoming, p. 3.
2. Decentralisation under the Modernisation Regulation imposed the duty to apply article 102 TFEU on national authorities. The unified approach to enforcement is needed to guide different approaches in the 27 member states. At the same time, national authorities published guidelines or notices on applications of national equivalents to article 102, thereby preceding the Commission and showing that, although giving guidance on this subject might be inherently difficult, it is also possible.\(^9\)

3. Even legitimately operating companies were increasingly dissatisfied, because creating a constructive company policy has become increasingly difficult. Laws which are not understood and accepted by the recipients are less likely to earn abidance than good laws. For lawyers it is complicated to give not overly cautious and clear advice on pricing and selective rebates.

4. Refusal to deal has in the meanwhile three rules: for existing customers, for new customers and for differential treatment of several customers. It is not clear whether the test with respect to the exclusion of competition "on the part of a certain competitor" applies to ordinary refusal to deal cases and the test requiring exclusion of competition "altogether" to copyright cases, or whether it is just an inaccuracy in the wording. The Microsoft case moreover woke up a heated debate and comparisons of US and EU antitrust laws.

5. The area concerning discrimination is completely opaque: is it a separate category of abuse or does it belong under exclusionary abuses? First, the Commission used article 102 TFEU to fight against national discrimination, then against state monopolies, and more recently as an exploitative category in exclusionary abuses cases. The true position of discrimination remains unclear.

6. Rebates are an area without any firm policy background. Michelin II and British Airways appear to say that selective rebates are illegal unless justified by reduced costs, fully ignoring the increased consumer welfare. The true emphasis here should be on the foreclosure effect on the competitors, not on the form of the rebate scheme.

7. Finally the concept of dominance itself is due for reconsideration. There are no safe havens under which the company cannot be found to be dominant. In British Airways a company was found dominant with a falling market share of 39.7 percent. It is not possible to treat equally companies, which built up a market share of 50% in a highly competitive market to operators of privatised natural monopoly structures.

All these arguments put together build a picture of a statutory provision, which is seriously due not only for a minor lift-up but for a complete make-over. As will be shown in the following chapter, the reform proceeded very EU-like: first with an ambitious economic report, carrying on with a restricted version in a discussion paper and ending up in compromising soft-law guidance. The rest of this paper will try to describe the changes to the policy and ask, whether the problem areas have been addressed consequentially and what are the likely effects of the reform.
V. Development of the Reform Efforts in the EU

This part of the paper will introduce the reform efforts, which ultimately led to the adoption of the Guidance paper. They do not have a legal significance as such but they are a very useful tool in explaining the thinking behind the abuse of dominance legislation. They are also an indicator of what can be realistically expected and what tendencies are likely to meet resistance within the EU structures.

The Commission launched the modernisation process already in 2003 when Mario Monti, the competition commissioner at that time announced that the European Commission had started an internal review of Article 102 TFEU. It awoke a massive wave of expectations on the part of the academics and professionals. As mentioned in the previous chapter, Article 102 TFEU was for good reasons a source of heated debates and criticism. However, this approach culminated in the new millennium, when Article 81, state aid rules and the merger regulations have been modernised and Article 82 became the “last steam-powered train among TGVs and Pendolinos.”

In 2005 two major papers were published by the Commission on the reform: the very innovative so called EAGCP Report and the Commission’s Discussion Paper.

A. “The Economic Approach to Article 82” (the EAGCP Report)

The first was a revolutionary paper by the Economic Advisory Group for Competition Policy (EAGCP), a panel of economic experts appointed by the Commission for consultation reasons. It was called ‘The Economic Approach to Article 82’ (the EAGCP Report). It elaborated on the arguments why there was a need for economic approach as such. This paper was truly revolutionary in the sense that it questioned the very base of assessment of dominance and abuse as such. An

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103 AKMAN, P. Article 82 Reformed? The EC Discussion Paper on Exclusory Abuses. Journal of
economic approach shall bring two major positives into the competition policy. Firstly, it makes sure that a clever anti-competitive behaviour, which does not fit any abuse category, does not escape the punishment. Secondly, on the contrary, it makes sure that the pro-competitive efficient behaviour is not banned.\textsuperscript{104}

The paper argues for leaving the ordoliberal concept of protecting the competition.\textsuperscript{105} It also argued for abolishing the categories of abuse as they might lead to labelling the behaviour as 	extit{per se} abusive, without regard to its merits.\textsuperscript{106} The economic panel focused completely on the effects of the conduct, i.e. on whether competitive harm was done or not. As the main competition policy objective is increasing consumer welfare it evaluated the effects of the practice on consumers.\textsuperscript{107} As might be concluded, the report argued for a case-by-case analysis proving actual harm to consumer in every separate case. This is a serious departure from the Commission policy to date, which only requires proving likely harm and does not require for actual harm to occur. This issue is not further addressed in the paper, which is somewhat disappointing.\textsuperscript{108} Even if the harm to consumer is proven, the undertaking might still prove that its conduct can be justified as legitimate competitive behaviour.\textsuperscript{109} Recognizing the weak spots of this approach, it is a fact that it requires a vigorous economic analysis on the part of the competition agency and provides very little legal certainty and guidance for the undertakings as to setting the standards of their conduct.\textsuperscript{110}

Maybe the most fascinating aspect of the report is that it departed from the assessment dominance altogether – saying that if an undertaking is able to cause significant and consistent competitive harm, it has to have a significant market power. According to the economic theory an undertaking in a perfect competition has no influence on the final price of the product; it is a mere price-taker. Therefore causing

\textit{Business Law, 2006, DEC, 816–829, p. 817}

EAGCP, \textit{An Economic Approach to Article 82 (Report for the EC Commission)} [online].

Brussels, 2005 [cit. 01/03/2010] available at


\textsuperscript{104} ibid. p. 2.

\textsuperscript{105} ibid. p 3.

\textsuperscript{106} ibid. p 7-9.

\textsuperscript{107} ibid. p 3.

\textsuperscript{108} ibid. p 13.

\textsuperscript{109} TORBOL, P. Modernising Article 82: Combining Legal Certainty and an Effect-based Approach. [online] \textit{Competition Law Insight, 2005, 4.} p 3. [cit. 05/02/2010] available at

\url{http://www.competitionlawinsight.com/article.php?article_id=87}
competitive harm requires market power. The report argues that this approach is not conforming to the case law but not contrary to the article 102 TFEU itself.\textsuperscript{111} However, considering the power of the precedent in the EU, this might not be a valid point.

However, in the opinion of the academics, it was clear that this innovative approach was rather meant to trigger public debate than to present serious alternatives for reform, as it did not seem to follow any line of reasoning the Commission and the Community Courts have been pursuing so far.\textsuperscript{112}

B. The EC Discussion Paper on Exclusionary Abuses\textsuperscript{113}

The Commission’s Discussion paper was published only a few moths after the EAGCP report in December 2005. It was more conservative than the report and woke up fears that the Commission will not lead the reform to the end.\textsuperscript{114} The restrictive approach was clear foremost in two aspects. Firstly, it was reduced only to exclusionary abuses and left the most controversial part of the EU abuse of dominance policy, the exploitative abuses, for a later date. Secondly, it relies on the assessment of dominance as it is know from the previous case law. The competition commissioner emphasized that the “Commission’s intention was not to propose a radical shift in enforcement policy but rather to develop and explain theories of harm on the basis of a sound economic assessment.”\textsuperscript{115} This dialectic mind exercise is not easily done, which is obvious when taking a closer look on the Discussion Paper.

With regard to dominance it preserves the well-know Hoffman-La Roche definition of “an undertaking behaving to an appreciable extent independently from its competitors, customers an, ultimately, consumers.”\textsuperscript{116} The structural indicators, such as

\textsuperscript{111} ibid. p 14.


\textsuperscript{116} DG COMPETITION. Discussion paper on the application of Article 82 of the Treaty to
market shares, also remain in place. No safe harbours are provided.\textsuperscript{117} The paper discusses barriers to entry and expansions, but stays in line with the current case law with regard to the required timing and scope of the entry.\textsuperscript{118} The test of “sufficient scope and magnitude” of the entry is somewhat opaque, as it is not spelled out what constitutes such an entry in economic terms.

With respect to the exclusionary abuses the true peak of dialectics is the quoted aim of “protecting competition on the market as a mean of enhancing consumer welfare and of ensuring an efficient allocation of resources.”\textsuperscript{119} This combines the ordoliberal focus on the structure of the market with the effects-based consumer welfare approach. It defines exclusionary abuse as “behaviours by dominant firms, which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers.”\textsuperscript{120} The paper operates with likely harm again: it does not require actual harm to occur. The paper concentrates rightly on the foreclosure capability of the conduct, but states that this can generally be established by investigating the form and nature of the conduct.\textsuperscript{121} This sounds concernedly like a form-based approach the Commission has been pursuing to date.

The Discussion paper presents the as-efficient competitor test, discussed in the \textit{Intel} case above. It means that only a conduct, which would exclude a hypothetical competitor which is as efficient as the incumbent is abusive.\textsuperscript{122} The question is, whether the dominant undertaking itself would be able to withstand the conduct had it been the target if it.\textsuperscript{123} The main problem is the concept of the not-yet-as-efficient competitor, which is according to the paper sometimes also worth protecting.\textsuperscript{124} This is a very arbitrary test leading to the danger of protecting competitors and not the competition, which is precisely what the Commission wants to avoid. The paper is not really concerned with what constitutes consumer harm and brings no test to prove it. It seems

\begin{footnotes}
\footnote{ibid. para 31.}
\footnote{ibid. para 35.}
\footnote{ibid. para 54.}
\footnote{ibid. para 1.}
\footnote{ibid. para 58.}
\footnote{ibid. para 63.}
\footnote{ibid. para 66.}
\footnote{ibid. para 67.}
\end{footnotes}
to take the ordoliberal stance that the harm to the structure of competition presents ultimately also the harm to the consumer. This is very unfortunate.

One of the good points of the paper is elaborating the possible defences to the allegation of abusive behaviour. This creates a parallel to article 101(3) TFEU and was much called for by the practice. If an undertaking can prove objective justification or it can demonstrate that its conduct produces efficiencies which outweigh the negative effects on competition, it might escape the prohibition in article 102 TFEU. Nevertheless, the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains. Also, it is unlikely that a conduct by a near-monopolist could be saved by efficiency gains.

Regarding the respective types of exclusionary abuse, the paper also brings some novelties. With respect to predation, the paper introduces a new benchmark of “average avoidable costs.” This might be higher than the average variable costs and therefore the finding of predation might be made easier. Concerning tying and bundling, a new category of “technical tying” has been introduced, meaning that the products are physically integrated. This is a very technical aspect and it is hard to perceive why the Commission pursued this approach, when the effect and not the form should matter. It raises concerns because of distinctive product and demand definition. For refusal to deal, the Paper generally takes the stance of ECJ in IMS Health mentioned above: the undertaking is not allowed to limit itself to duplicating the product, but intends to produce new goods for which there is a potential consumer demand. It is nevertheless legitimate to require licence for follow-on innovation, which is not completely distinctive to the offered product. This extends the test in IMS Health with regard to the outcome of the Microsoft case but ignoring that the IMS health judgement presents a lex posterior in this case. This approach would make it easier for licence-seekers to prove their legitimate interest.

125 ibid. para 77.
126 ibid. para 91.
127 ibid. para 91.
128 ibid. para 106.
129 ibid. para 65.
130 ibid. para 182.
131 ibid. para 239.
132 ibid. para 240.
Generally, the paper lacks the vigorous approach of the EAGCP report. It seems that the paper is rather systematising the current application than truly modernising it. The next chapter will present the stance of the Guidance to these issues and inquire to what extent it solved the above mentioned problems or whether it petrified them.

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VI. The Guidance on Enforcement Priorities

This chapter introduces the so far final stop in the Commission’s effort to reform article 102. It was issued after a long expectation in December 2008. This chapter will introduce its purpose and scope of application, the general principles of the guidance with respect to the assessment of dominance and finding of abuse and finally introduce the respective types of abuse and their concepts brought by the Guidance. The issues whether the Guidance achieved the purpose of introducing the effects-based approach to article 102 and whether it will be able to assert it will be dealt with in the next chapter.

A. The Purpose of the Guidance

The guidance is not a statement of law. It is nonetheless an attempt to place existing case law in a coherent analytical framework. Its stated purpose is as follows: “To set out the enforcement priorities that will guide the Commission’s action in applying article 102 to exclusionary conduct by dominant undertakings. Alongside the Commission’s specific enforcement decisions, it is intended to provide greater clarity and predictability on the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether a certain behaviour is likely to result in intervention by the Commission under Article 102.”

Shortly, the Guidance sets out the factors the Commission takes into account when deciding whether to open an investigation. But this goal is deceivingly narrow: it will de facto be considered by national courts and competition authorities as a document containing guidelines on how to apply article 102 to exclusionary abuses in

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the years to come. Thus its impact shall not be underestimated. There is also another issue with the objective of the paper: the Guidance’s soft law character is emphasized by an extremely infinite wording. The Guidance makes use of terms such as “generally” (eighteen times) or “in principle” (five times), which creates considerable uncertainty as to the Commission’s real likely enforcement priorities.

B. General Principles of the Guidance

The central expression of the Guidance is a so called “anti-competitive foreclosure.” That means that the undertaking is “impairing effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in form of higher prices...or in some other form, such as limiting quality or reducing consumer choice...The term “anti-competitive foreclosure is used to describe a situation where effective access to the market is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.”

Anti-competitive foreclosure is foreclosure that results in consumer harm, and is the overarching test to be used in assessing whether the Commission should intervene against exclusionary conduct by dominant undertakings.

It is really positive that the Commission resorted to only one overarching test, implying that there is actually just one type of abuse. However, the fact that the factors for the assessment of the anti-competitive foreclosure (mentioned below) are mostly focused on the structure of the competition, not on consumer harm, implies a strong ordoliberal influence and indicates that the Commission will not take the test very

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C. Content of the General Part of the Guidance

1. Market Power

This part deals with the assessment of dominance. It took the Discussion Paper approach and ignored the EAGCP report in the sense that it is necessary to assess market power at all. Generally speaking this section does not bring much news: it rather confirms Commission’s practice of assessing dominance. No safe harbours are provided, apart from the fact that an undertaking is unlikely to be found dominant if it holds a market share below 40%. However, in the same paragraph, the Commission states that there might be exceptions below that threshold, where competitors are not a position to constrain effectively the conduct of the dominant undertaking and such cases might also deserve attention of the Commission. Nevertheless, there is no mention of the Akzo assumption that market shares over 50% are a strong indication of dominance.

Otherwise, the Commission keeps the approach that market shares alone are not conclusive. Market position of the dominant undertaking and its competitors are analysed, as are the conditions of expansion and entry and countervailing buyer power. These factors are well known from the judicature and the Guidance does not bring any new angles to the assessment. It is much more an issue for sound economic applications of these provisions, which can bring them to life and give them a true meaning.

2. Anti-competitive Foreclosure

This test asks whether the conduct is likely to restrict competition and thereby harm consumers. The Commission promises to assess the current situation to a counterfactual, similarly as it does in mergers. To be able to do that, Commission has set out


145 ibid. para 16, 17.

146 ibid. para 18.

147 ibid. para 21.
the factors it will be taking into account by constructing a realistic alternative
scenario.¹⁴⁸

These factors as set out in paragraph 20 of the Guidance are as follows:
a) The position of the dominant undertaking: the stronger it is, the more likely it is that
its behaviour will lead to an anti-competitive foreclosure.
b) The conditions on the relevant market such as economies of scale and scope and
network effects and entry barriers in the upstream or downstream market, which makes
overcoming the foreclosure through vertical integration difficult.
c) The position of the competitors: this includes their importance for maintaining
effective competition, such as particularly innovative firms or firms having the
reputation of systematically cutting prices.
d) The position of customers or input suppliers: the undertaking might apply its
strategies only to customers, which are of particular importance for entry or expansion,
which might lead to anti-competitive foreclosure.
e) The extent of the allegedly abusive conduct: the higher volume of sales affected by
the conduct, its long duration and regularity enhances the chances of anti-competitive
foreclosure.
f) Possible evidence of actual foreclosure: if the conduct has been in place for some
time, there might be direct evidence of anti-competitive foreclosure. The market share
of a dominant undertaking might have risen or its decline might have been slowed.
Actual competitors might have been marginalised and potential competitors might have
tried to enter and failed.
g) Direct evidence of any exclusionary strategy: this includes internal documents such
as a detailed plan to engage into a certain conduct in order to exclude a competitor or to
prevent entry. This might be helpful in interpreting the dominant undertaking’s conduct.

These are general factors which serve for the analytical framework together with
the specific factors mentioned in respect of the particular types of abuse. The
Commission mentions that there might be circumstances, where it is not necessary to
engage into a detailed assessment, before concluding that the conduct is likely to lead to
consumer harm. When it appears that the conduct can only raise obstacles and creates

¹⁴⁸ ibid. para 20.
no efficiencies, its anti-competitive effect might be inferred.\footnote{ibid. para 22.}

In case of a pricing conduct (rebates and predatory pricing) there is additional investigation with regards to costs to assess whether the pricing conduct is able to foreclose hypothetical competitors that are as efficient as the dominant undertaking (the above mentioned as-efficient-competitor test).\footnote{ibid. para 23.} However, sometimes the protection of a less efficient competitor might be seen as necessary.\footnote{ibid. para 24.} This will probably occur where there is a reason to prevent complete monopolisation.

The Commission uses two benchmarks with respect to costs: Average Avoidable Costs (AAC - for the purpose of simplification in usual economic terms equals to Average Variable Costs, i.e. the cost which can be avoided in the short-run) and Long-Run Average Incremental Costs (LRAIC, where a good proxy can be Average Total Costs, i.e. the sum of the fixed costs and the variable costs, although the situation gets more complicated in case of multi-product markets with economies of scope. However, this differentiation is too technical and beyond the scope of this paper). The benchmarks present a refinement of the first and second \textit{Akzo} test. Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the market without incurring a loss. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all its fixed costs and that a foreclosure can occur.\footnote{ibid. para 26.} If the competitor is able to compete effectively, the Commission will infer that the conduct is not likely to have an adverse effect. Otherwise the Commission will integrate the risk of foreclosure in the analysis of factors mentioned in paragraph 20 and evaluate the conduct from a general perspective.\footnote{ibid. para 27.}

3. **Objective Necessity and Efficiencies**

The undertaking can claim that its conduct is justified either by being objectively necessary or by bringing substantial efficiencies which outweigh any anti-competitive effects on consumers. In both cases the conduct has to be indispensable and
proportionate. The objective necessity will occur in a rather limited amount of cases and can only arise from the factors external to the dominant undertaking, such as health and safety.

With regard to efficiencies the scope is broader. The dominant undertaking must demonstrate with a sufficient degree of probability and on the basis of verifiable evidence that four cumulative conditions are fulfilled. The criteria, which needs to be fulfilled are parallel to those that can save a concerted practice under article 101(3) TFEU:

a) The efficiencies have been or are likely to be realised as a result of the conduct (e.g. reduction in distribution costs)
b) The conduct is indispensable for realisation of those efficiencies and there is no less anti-competitive alternative.
c) The likely efficiencies brought about outweigh any likely negative effects on competition and consumer welfare in the affected markets.
d) The conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition. Rivalry is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack the incentive to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

The burden to prove objective necessity and efficiencies stays with the dominant undertaking.

D. Specific Forms of Abuse

The Guidance applies the above-described analytical framework to the most common forms of abuse. The Guidance lists exclusive dealing, tying and bundling,
predation, refusal to supply, and margin squeeze. This part of the guidance describes additional factors and efficiencies that will, together with the assessment under the general part of the Guidance, estimate whether the conduct is lawful or not.

1. Exclusive Dealing (Exclusive Purchasing and Conditional Rebates)

This type of abuse is about hindering competitors from selling to customers either through binding the customers to purchase exclusively or providing them with a loyalty-inducing rebate.

a) Exclusive Purchasing

This conduct covers not only obligations to purchase exclusively or to a large amount exclusively from the seller, but also practices which fall short of this conduct, such as stocking requirements etc. An individual customer might benefit from the exclusive obligation, but the aggregate demand will be worse off because of hampered entry and restricted competition to the detriment of consumers overall. The factors that play a special role in this type of conduct are whether the market is free to compete for the whole demand or whether a part of the customers is already bound to the dominant undertaking. This might occur for example as a result of the dominant undertaking’s good being a “must-stock item.” Moreover, the harmfulness of the conduct depends on the length of the exclusive obligation. However, if the dominant undertaking is an unavoidable trading partner of the most of the customers, even an exclusive obligation of short duration can lead to an anti-competitive foreclosure.

b) Conditional Rebates

The rebate is a reward to a customer for a particular form of purchasing behaviour. The guidance recognises two types of rebates. Firstly, a retroactive rebate is given when purchases over a defined period exceed a certain threshold. The rebate is then retroactively given on all purchases. Secondly, incremental rebates is granted only on all units exceeding a certain threshold, but not ex post to the units under the threshold. Rebates can benefit consumers because they lower the price. However, they

157 ibid. para 33.
158 ibid. para 34.
159 ibid. para 36.
might also have a foreclosure effect.\textsuperscript{160} This occurs especially (similarly to exclusive purchasing), where the competitor compete only for a part of the demand (contestable share) because a part of the demand (non-contestable share) is already fixed to the dominant undertaking.\textsuperscript{161} Therefore, the Commission considers additional factors when assessing the legality of the rebate schemes.

The main concern lies with the retroactive rebates (the incremental rebates do not raise as much concern but the below described test applies to them as well). They might have a foreclosing effect, because the customer would hesitate to switch small amount of demand to the competitor, as it might deprive him of the entire retroactive rebate for all purchased units. The amount of demand, which would be switched, is called “relevant range” in the Guidance.\textsuperscript{162} The test for legality of the retroactive rebate is as follows:

First, the whole retroactive rebate, which would get lost in case of purchasing from a competitor, is applied to the relevant range, i.e. the price of the relevant range is heavily discounted. The second step is to use the as-efficient competitor test: is the price of the discounted relevant range under AAC, the rebate is illegal, because no competitor would be able to compete effectively with such dumped prices. Is the price above LRAIC, the rebate is lawful, because a competitor, which is at least as efficient as the incumbent can match the price.\textsuperscript{163}

Is the price between AAC and LRAIC the Commission will look into whether the competitors have some effective counter-strategies, e.g. whether they can leverage the price of the relevant range by using the non-contestable part of the demand, which is attached to them. Where they do not have such effective counter-strategies, the Commission will consider that the scheme is capable of foreclosing equally efficient competitors.\textsuperscript{164} Moreover, it is important, whether the rebates are tailored to the customers or standardised. Standardised rebates generally have a lower foreclosing effect because they are ill suited for the tails of the demand.\textsuperscript{165}

Concerning efficiencies the dominant undertaking must prove cost or other

\textsuperscript{160} ibid. para 37.
\textsuperscript{161} ibid. para 39.
\textsuperscript{162} ibid. para 41.
\textsuperscript{163} ibid. para 43.
\textsuperscript{164} ibid. para 44.
\textsuperscript{165} ibid. para 45.
advantages passed on to consumers. Trans-related cost reductions are more likely to occur with standardised volume targets and in case of incremental rebates. Concerning exclusive dealing the practice might be saved by relationship-specific investments.166

2. Tying and bundling

Tying refers to a situation where a customer, who purchases one product (the tying product) is required to purchase also another product from the dominant undertaking (the tied product). Tying can be done on a contractual or technical basis. Bundling refers to the way the products are offered and priced. In case of fixed bundling, the products are only sold together. In case of mixed bundling (multi-product rebate) the products are available either separately or in a bundle, but the price of a bundle is lower than the sum of the respective prices of the products.167 Tying and bundling can be sound practices offering innovation and price-reduction to consumers, but they can be also means to leverage the dominant position from one market (tying market) into another (tied market), where the undertaking is not yet dominant and forecloses its competitor in this manner.168 Tying and bundling involve more distinctive products, i.e. products for which there is consumer demand if they are sold separately.169

The risk factors the Commission will consider in the assessment are as follows.

Firstly, the bundled or tied products are connected technically, which might lead to a foreclosing effect, because it is not easy for a consumer to reverse the bundle and resell.170 Secondly, if the dominant undertaking is dominant for more products in a bundle than just one, it increases the risk of an anti-competitive foreclosure.171 The elimination of competition in the tied market will lead to higher prices for consumers.172 If the tied and the tying market are substitutes the dominant undertaking might want to avoid the risk of decreasing the demand for tying product in case of a price elevation, because the substitution option is eliminated.173 If the prices in the tying market are regulated the incumbent might want to compensate for the loss by increasing prices in

166 ibid. para 46.
167 ibid. par 48.
168 ibid. para 49.
169 ibid. para 51.
170 ibid. para 53.
171 ibid. para 54.
172 ibid. para 55.
173 ibid. para 56.
the tied market. If the tied and tying products are complements, tying the two products together might raise the entry barriers into the tied market.\textsuperscript{174}

In case of multi-product rebates an additional test is used. The question is, whether the reduction in price for a bundle is such that the competitors can profitably compete with the dominant undertaking, if they sell only some components of the bundle.\textsuperscript{175} Here, a modification of as-efficient competitor test is applied. If the incremental prices, which the consumers pay for each of the dominant undertaking's products in the bundle remains above LRAIC of including the product in the bundle for the incumbent, the Commission will usually consider that an equally efficient competitor would be able to sell the unbundled product profitably.\textsuperscript{176} In case of bundle competing against a bundle the Commission will only consider whether the whole price of the bundle is predatory.\textsuperscript{177}

Efficiencies will be considered where the bundling and tying might lead to savings in production and benefit consumers. It will also be considered where it decreases transaction costs and brings savings in packaging and distribution. Quantity savings passed on to consumers will be taken into account, as will be the possible innovation brought about by the tying or bundling.\textsuperscript{178}

3. Predation

Predation occurs where an undertaking deliberately incurs losses or foregoes profits in the short term in order to exclude competitors and thereby strengthens or maintains its market power to the detriment of the consumers.\textsuperscript{179} The as-efficient competitor test is used. The central concept of predation in the Guidance is the issue of sacrifice. Pricing below AAC always includes a sacrifice.\textsuperscript{180} But this is not all: The Commission will investigate whether the conduct in a short term led to net revenues lower than could have been expected from a reasonable alternative conduct.\textsuperscript{181} Rational and practicable alternatives will be considered together with possible direct evidence in

\textsuperscript{174} ibid. para 58.
\textsuperscript{175} ibid. para 59.
\textsuperscript{176} ibid. para 60.
\textsuperscript{177} ibid. para 61.
\textsuperscript{178} ibid. para 62.
\textsuperscript{179} ibid. para 63.
\textsuperscript{180} ibid. para 64.
\textsuperscript{181} ibid. para 65.
form of documents from the dominant undertaking which clearly show a predatory strategy.\textsuperscript{182} For pricing between AAC and LRAIC additional factors will be considered. For instance, if the incumbent is better informed about cost or other market conditions, if he can distort market signals or if he has a reputation for predatory conduct or undermine the ability of its competitors to obtain external financing.\textsuperscript{183}

The consumers are likely to be harmed if the market power of the incumbent is greater in the end than it would have been in the counter-factual scenario if it would not have engaged in predatory conduct.\textsuperscript{184} This means that it is enough if the dominant undertaking was likely to be able to slow a decline in its market share and thus lead to a foreclosure.

The Commission states that it is less likely that an undertaking is engaging in predation if its conducts concerns low prices applied over a generally long period of time.\textsuperscript{185} The predatory conduct is unlikely to create any efficiencies apart from the argument that the dominant undertaking was achieving economies of scale or efficiencies related to expanding the market.\textsuperscript{186}

4. \textbf{Refusal to Supply and Margin Squeeze}

Even a dominant undertaking should have the right to choose its trading partners. Intervention into supply contracts on competition law grounds requires careful consideration, because imposing an obligation to supply, even for fair remuneration, may undermine incumbent's incentives to invest and innovate and thereby harm consumers.\textsuperscript{187}

The concept of refusal to deal covers a broad range of practices such as refusal to supply a new or existing customer, refusal to license intellectual property rights or refusal to grant access to essential facility or network.\textsuperscript{188} The product does not have to be already traded - it is enough when there is a potential demand and a potential market can be identified. The refusal can be unlawful both when denying to supply an existing

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{182} ibid. para 66.
\item ibid. para 68.
\item ibid. para 70.
\item ibid. para 73.
\item ibid. para 74.
\item ibid. para 75.
\item ibid. para 78.
\end{enumerate}
\end{footnotesize}
customer or refusing to take on a new obligation. However, disruption of an existing supply relationship is more likely to be found abusive. The fact that the owner of the essential input in the past has found it in his interest to supply is an indication that supplying the input does not involve any risk that the owner receives inadequate compensation for the original investment. Therefore the burden of proof shifts and the dominant undertaking has to show why circumstances have actually changed in a way that the continuation of an existing supply obligation would put its adequate compensation in danger.\textsuperscript{189}

The refusal does not have to be actual. Certain behaviour can amount to a constructive refusal to deal, where the dominant undertaking e.g. delays the supply unduly.\textsuperscript{190} Margin squeeze is a practice, where instead of refusing to supply outright, the dominant undertaking charges a price for the product in the upstream market which, compared to the prices on the downstream market does not allow an equally efficient competitor to trade profitably in the downstream market. The benchmarks in these cases are the LRAIC of the downstream division of the integrated dominant undertaking. If the price is above them, an equally efficient competitor will not be foreclosed.\textsuperscript{191}

For an intervention by the Commission in a refusal to supply case, the following cumulative conditions have to be fulfilled:\textsuperscript{192}

a) The input is objectively necessary to be able to compete on the downstream market. It does not mean that no competitor could enter or survive in the downstream market, but rather that the input is indispensable because there is no actual or potential substitute. The question is whether the competitor could effectively duplicate the facility in a foreseeable future.\textsuperscript{193}

b) The refusal is likely to lead to the elimination of effective competition on the downstream market. The likelihood of elimination is generally greater the higher the market share of the dominant undertaking in the downstream market.\textsuperscript{194}

c) The refusal is likely to lead to consumer harm. The Commission will examine whether the likely negative effects of the refusal to supply outweigh the negative

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{189} ibid. para 84
\item \textsuperscript{190} ibid. para 79.
\item \textsuperscript{191} ibid. para 80.
\item \textsuperscript{192} ibid. para 81.
\item \textsuperscript{193} ibid. para 83.
\item \textsuperscript{194} ibid. para 85.
\end{itemize}
\end{footnotesize}
consequences of imposing an obligation to supply. If so, than it will pursue the case.\textsuperscript{195} The consumer harm arises where innovative goods are prevented from entering the market or follow-on innovation is stifled. The undertaking requesting supply cannot limit itself to duplicate the goods already offered -- he has to produce new or improved goods for which there is a potential consumer demand or which are likely to contribute to technical development.\textsuperscript{196}

Concerning efficiencies, the claims will be considered that the incumbent needs to realise an adequate return on the investment and thus have incentives to continue to invest in the future. The Commission will also take claims into account, which allege that the incumbent's own innovation would be negatively affected by the disclosure but the dominant undertaking needs to prove this.

\textsuperscript{195} ibid. para 86.
\textsuperscript{196} ibid. para 87.
VII. Evaluation of the Likely Policy Impacts

There has been a wide range of reactions to the Commission's paper. Mostly, they praise that the Commission published a document addressing article 102 TFEU but in its majority they find many points in which it should have been done better or more persuasively. They criticise that the Commission did not move consequently enough from the formalistic approach, that the Guidance is eclectic and inconsistent. Some fear that the predictability and legal certainty will suffer and that the companies will never be able to perform self-assessment under the new conditions. Some say that the Guidance moved too far away from the established judicature and that being a soft law instrument, it cannot develop a sufficient pressure on the Community Courts to force them to apply the economic effects based approach.

This chapter will try to present and evaluate some of the main arguments of the critics of the Guidance.

A. Inconsistencies in the Guidance paper

The most common criticism of the Guidance is that the formalism of the past coexist with a more economics based analysis. To a certain extent the critiques mirror opinions and thought schools of the critics, but there are certain common points of concern, which appear in almost every evaluation. This section will try to address them and show where the Guidance has its pitfalls:

a) There is no safe harbour market share below which dominance could not be found.

This is detrimental to the legal certainty of the market players.

b) The Commission relies too much on intentions of the dominant undertaking. The abuse shall be an objective concept. The Commission attributes importance to mere


aggressive commercial statements instead of considering the effects of the behaviour. Only a plausible theory of consumer harm shall be able to establish an abuse. Even a dominant undertaking is allowed to be willing to supersede its competitors.

c) The Commission does not establish an elaborated theory of consumer harm.200 On several places of the Guidance, the Commission states that harming the structure of the competition on the market will ultimately harm consumers. Especially saying, that elimination of all competition in the market excluded the possibility of efficiency defence plainly ignores the existence of natural monopolies or competition in the market with tipping effects.201 However, those are aspects, where having no competition in the market does not harm consumers, because the minimum efficient scale of production only allows for one company in the market. These should be issues left for regulation and not for competition law.

d) The Commission is making too many assumptions.202 The effects based approach requires a vigorous case by case analysis. Such an approach is opposite to making presumptions. For example, the Commission says that the higher the market share, the higher the likelihood that the conduct might lead to an anti-competitive foreclosure. The Commission is more likely to be proactive in cases of super-dominance.

e) The Commission says that there are cases where the abuse is so apparent that it does not need to perform a detailed analysis.203 The Commission might stay away from the effects based approach when it wishes to do so. Such truncated assessments shall be narrowly justified, strictly exceptional and interpreted accordingly.204

f) The as-efficient competitor test requires the dominant undertaking to have


201 TEMPLE LANG, J. Article 82 EC - The Problems and the Solution [online]. Brussels:

202 Institutions and Markets Series, 2009 [cit. 28/10/2009] available at


204 KILLICK, J.; KOMNINOS, A. Shizophrenia in the Commission’s Article 82 Guidance Paper:

Formalism Alongside Increased Recourse to Economic Analysis. Global Competition Policy, 2009, FEB-

2010(1), 1-10. p. 3.


http://www.ceps.be/book/treatment-exclusionary-abuses-under-article-82-ec-treaty-

comments-european-commissions-guidance; p 3.
information, which it is not allowed to have.\textsuperscript{205} To be able to assess whether its competitor is as efficient as the incumbent, the incumbent would have to have information about the cost structure of the competitor. However, it is not permitted to share this information with other companies because it would promote collusion. This test might be damaging to legal certainty.

g) The efficiencies are not elaborated in a sufficient and correct manner.\textsuperscript{206} Nevertheless, introducing efficiency defence at all is a great step.\textsuperscript{207} The paper does not talk about the fact whether positive externalities on e.g. health or environment are a defence. Instead it copies the structure of article 101(3) TFEU which is ill suited for unilateral behaviour, because it is too strict.\textsuperscript{208}

With regard to the specific forms of abuse the most criticism is being addressed to the issues of pricing abuses and refusal to deal.

a) Concerning pricing, the “relevant range” and “contestable share” tools are criticised for being too complicated to estimate in practice and too strict.\textsuperscript{209} The profit sacrifice concept is being torn to the ground — it should not be a test in itself.\textsuperscript{210} The sacrifice concept punishes companies for wrong commercial decisions, as they might not know in advance which practice will turn out to be more profitable than the other. Such an approach detrains legal certainty and leads to the fact that the undertaking will be rather pricing higher to not expose itself to the allegation of predation. Moreover, the efficiencies for predation are not elaborated sufficiently including meeting the competition clauses. loss-leading, promotion expenditures or excess capacity during


\textsuperscript{210} ibid. p 7.
recession.\textsuperscript{211} 

j) The approach to refusal to deal is perceived as opening the gap between the EU and the US enforcement.\textsuperscript{212} The worst issue appears to be the negative presumption the Commission sets in case of disruption of a previous supply relationship. The undertaking's right to choose his trading partners freely is thereby seriously limited. It is probable that such an approach will make the incumbent more cautious to enter any supply obligation at all because it will be afraid of not being able to terminate this obligation. The Commission shall at least clarify under what conditions the dominant undertaking will be able to avoid continuation of previous supply.\textsuperscript{213} Better explanation of special conditions under which a mere follow-on innovation will be granted access is missing in the Guidance.

B. Future Enforcement and the Judicature of the Community Courts

It is necessary to stress out again that the Guidance is not a statement of law. It only sets Commission's enforcement priorities with all its implications. It is arguable in how far the Commission is entitled to set its own priorities. At best the paper provides an indication as to the focus of the Commission's enforcement.\textsuperscript{214} There are concerns that the Commission will not follow the path it set in the Guidelines and will recur to the form-based approach in practice again, because the case-by-case analysis might be burdensome and resources intensive. This option seems to be probable with respect of the back-door of "truncated analysis" which was open in the Guidance.\textsuperscript{215} However, the Community Courts made clear that even soft law documents create legitimate expectations and therefore is the Commission not entirely free to apply article 102 to its

\textsuperscript{211} ibid. p 7.


\textsuperscript{214} For a very interesting and well grounded discussion on the freedom of the Commission to choose its cases see EZRACHI, A. The European Commission Guidance on Article 82 EC - The Way in which Institutional Realities Limit the Potential for Reform. Legal Research Paper Series, 2009, 27. 1–31. p p 5-10.

will. The application in the next years will tell us more.

1. The Guidance and the Community Courts

With regard to the judicature of the Community Courts, there are optimistic voices that the Commission will not have a problem to assert its new approach, because the Guidance mostly either follows the precedent or it is even stricter. In case where the Guidance is more lenient, the Commission should not have a problem to incorporate additional factors to its decision so that it can withstand the court scrutiny. But even the optimists share the concerns as to judicature which arises from preliminary rulings brought about from the national courts under article 267 TFEU. However, there are also sceptical voices, which emphasize that the Courts have always had a certain aversion to the economic analysis and effects based approach, which is probably caused by the fact that they are manned by lawyers and do not have a position similar to the one of Chief Economist acting for the DG COMP.

The Guidance itself stresses out that it is without prejudice to the judicature of the Community Courts on article 102 TFEU. This was recently emphasized by AG Kokott who said that “even if the Commission's administrative practice was to change, it would still have to act within the framework prescribed for it by article 102 as interpreted by the Court of Justice.” AG Kokott is German and represents the ordoliberal school of thinking. Her approach is only one of the examples to show that the EU lacks consensus in the question of the treatment of abuses under article 102 TFEU. Breach of the analytical boundaries set by the judicature might be challenged in court. The paper's title “Guidance” instead of the usual “Guidelines” reflects that

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218 ibid.
there is a tension between the new concepts and the case law. It is for sure too early to make judgements on the Community Courts stances towards the reform, particularly when the appeal from the only article 102 decision reached after the reform, the Intel case, is still pending. However, in the recent case law, such as *British Airways*, *Microsoft* or *GlaxoSmithKline*, only the formalistic standpoint was used in the analysis, even though the opinions of some of the Advocates General pleaded for the effects-based analysis. This indicates that the reconciliation of the form-based and the effects-based approach at the Courts level will be complicated.

2. The Guidance and the Member States

Although the national competition authorities (NCAs) were involved in the preparation of the new Guidance through the European Competition Network, the risk of divergence is great. This is due to the lack of common consensus on the fact that consumer welfare is the focal point of interest. Notably Germany and the countries influenced by its abuse of dominance legislation present a risk to the Guidance. The president of the German Bundeskartellamt is very sceptical of the new approach as he stated on a conference: "The risk of divergence is great...The Priority paper focuses very heavily, at times exclusively on a consumer welfare approach - which is not in line with European jurisprudence...If the proof of harm to consumers were to become a central criterion for instituting proceedings in the future -- this would lead to highly complex examinations. Consequently, abuse control would fail in view of this excessive demand of proof." It is logical that the member states with a more strict competition regime, such as Germany, will base their infringement decision on national laws rather than on article 102.

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223 ibid. p. 18.
224 For example in ECI. Joined Cases C-168/06 to C-478/06 *Sot. Lélos Kai Sia v GlaxoSmithKline* [2008] ECR 1-739. Opinion of AG Darmas Ruiz-Jarabo Colomer, para 68-123.
Concerning member states' courts it is very uncertain how the Guidance will influence them. The Commission has no power over the courts and no possibility to influence them through soft instruments as it does with the NCAs through the European Competition Network. Some fear that the courts will apply the Guidance uncritically. Others are concerned that the courts might rather follow the application practice of the Community Courts. Also the ability of economic assessment is not equal in all member states' courts in Europe, which might render significantly different outcomes in similar cases.

At any case, the uncertainty at the national level will be amplified. There is a great risk of inconsistencies throughout Europe. This might involve forum shopping and an increased rate of settlements, because the undertakings will be willing to avoid uncertain outcomes.

3. The Guidance and the Dominant Undertakings

It is definitely an advantage that the law on article 102 TFEU is now concentrated in a single document. The previous state of affairs with scattered rules and tests has presented a serious threat to a dominant undertaking willing to create its commercial strategy. The Guidance definitely improves legal certainty and predictability. The paper provides the companies for the first time in history with an explicit option of an efficiency defence.

The issue is that, as is shown above, the job could have been done better. Despite these improvement, the companies will need to perform a complex self-assessment and will have to rely on information about efficiency of its competitors, which they can only
guess.\textsuperscript{235}

The companies will probably need to satisfy the rules of the national laws, which might follow the formalistic approach and at the same time the requirements of the Commission' Guidance. The divergence between the US and the EU also increased after the publication of the Guidance. It will be thus very complicated for big supranational corporations to adopt a worldwide compliance strategy, which effectively serves their commercial interests and respects antitrust rules in different jurisdictions.\textsuperscript{236}

\textsuperscript{235} ibid.
\textsuperscript{236} ibid. p 14.
VIII. Conclusion

The Commission's Guidance is a much welcomed and needed contribution to the reform of Article 102 TFEU. The Commission fulfilled what it promised and it would be unreasonable to expect more. The Competition Commissioner explained that the Commission wants to go the path of evolution rather than revolution. It wants to explain its approach and show that it is based on a sound analysis. It is true that the Guidance is eclectic and does not leave form-based approach entirely. It rather tries to marry the effects-based and the form-based approach. It is necessary to stress-out that in the majority of cases, these two approaches will render the same outcome. The borderline cases which will come up in the future will show, whether the Commission will start the thorn path of the case-by-case analysis or remain in the well-experienced formalistic approach.

The stance of the Community Courts to the new approach will play a crucial role. If they will decide to endorse the economic analysis it will eventually become binding law. That would open the way to a deeper development of the effects-based doctrine. Nevertheless, at the moment this would not be feasible. The strictly economic attitude might be appealing, but the Commission realistically estimated that there is not the necessary consensus to bring this approach into life. Therefore, the critics are right: the Guidance rather summarises than modernises the law on article 102. But realistically this is as much as can be done now. And it is already a significant development.

At the moment, the Commission and generally the EU are busy dealing with the worst economic recession in the history of the EU. In the past, economic crises were known to lead to relaxing of antitrust rules. The Commission does not appear to fall in this trap as it proved by the decision in the Intel case.

It is impossible to precisely evaluate the impact of the Guidance at the moment. This paper tried to explain its text in the light of the previous case law. It tried to foreshadow some implications the paper might have on the enforcement practice. At the moment it is necessary to abide and see how the application practice of the paper will deal with the subject matter.
České shrnutí: Modernizace článku 102 Smlouvy o fungování Evropské Unie

I. Úvod

Předložená diplomová práce pojednává o reformě právní úpravy zneužití dominantního postavení soutěžitele na trhu podle článku 102 SFEU, tedy jednoho z ústředních témat soutěžního práva. Práce je zaměřena na vývoj reformy a její současný stav, s cílem posoudit její soulad s judikaturou soudů společenství a její vyhlídky na úspěch v rámci současného institucionálního rámce.


Ve třetí kapitole se tato práce zabývá judikaturou evropských soudů, která tvoří závaznou část systému evropského práva. Teprve judikatura naplňuje demonstrativní výčet uvedený ve čl. 102 SFEU životem. Tato kapitola proto představuje dobří přehled toho, kam se v této oblasti ubírala právní praxe. Čtenář si také může udělat představu o systému, který judikatura vytvořila.

Čtvrtá kapitola uvádí důvody pro reformu současné právní úpravy. Popisuje principy, na kterých byl čl. 102 při vzniku Společenství vybudován a osvětluje jejich silné a slabé stránky. Druhá část kapitoly se zaměřuje konkrétně na slabiny současné úpravy, tak jak byla dotvořena padesátiletým vývojem. Problémem je zjevná, že judikatura nevytvořila ve výkladu čl. 102 SFEU žádný ucelený systém. Srozumitelné testy, které umožňují posoudit, zda bylo určitým chováním dominantní postavení zneužito, byly vytvořeny jen pro některé formy zneužití. Podniky ani národní soutěžní úřady a soudy, které jsou podle nařízení č. 1/2003 spolupověřeny vymáháním

evropského soutěžního práva, ncmají pro aplikaci čl. 102 SFEU zádné vodítko.\textsuperscript{238} To odporuje principu právní jistoty.

Pátá kapitola se zabývá vývojem reformy nejprve zprávou panelu ekonomických expertů EAGCP a poté vlastním „Discussion Paper“ Evropské Komise (tedy návrhem předestřeným k veřejné konzultaci). Ten byl vydán tři roky před „Pokyny k prioritám Komise v oblasti prosazování práva při používání článku 82 Smlouvy o ES na zneužívající chování dominantních podniků vylučující ostatní soutěžitele,“ které byly publikovány v prosinci 2008 a představují zatím konečný stav reformy.\textsuperscript{239} Jejich obsah je předmětem šesté kapitoly, která nejprve pojednává o obecných principech Pokynů a o tom, jak upravují zjišťování tržní síly a definují koncept zneužití, vylučujícího ostatní soutěžitele. Další část kapitoly popisuje, jak se Pokyny vyrovňávají s jednotlivými formami zneužití dominantního postavení.

Sedmá kapitola pak pojednává o tom, kde jsou přednosti a nedostatky Pokynů. Soustředí se na to, jakou má tento dokument šanci uspět v současnému institucionálním rámci a to především s ohledem na rozhodovací praxe soudů společenství a ve vztahu k národním soutěžním úřadům, soudům a podnikům. Poslední osmá kapitola shrnuje poznatky a uzavírá téma.

Toto shrnutí sleduje strukturu kapitol původní práce a podává jejich výtah.

\section{Evropské soutěžní právo}

Soutěžní právo je oblast práva zabývající se úpravou chování subjektů na trhu, zejména dohod a praktik, které omezují soutěž, a nabýváním a užíváním tržní síly. Soustředí se na to, aby volná hospodářská soutěž na trhu nebyla omezena způsobem, který škodí hospodářské prosperitě.\textsuperscript{240}

Soutěžní právo se obyčejně zabývá následujícími problémy:

a) Protisoutěžními dohodami a chováním ve shodě s výměnou informací s cílem nebo efektem poškodit hospodářskou soutěž.

b) Zneužitím dominantního postavení.

\textsuperscript{238} Nařízení Rady (ES) č. 1/2003 o provádění pravidel hospodářské soutěže stanovených v článkcích 81 a 82 Smlouvy. OJ [2003] L 1/1.

\textsuperscript{239} Pokyny k prioritám Komise v oblasti prosazování práva při používání článku 82 Smlouvy o ES na zneužívající chování dominantních podniků vylučující ostatní soutěžitele. OJ C [2009] 457/7.

c) Spojenými souťažiteli jako jsou fúze nebo akvizice.

d) Omezením hospodářské soutěže ze strany členských států, ať už ve formě státních subvencí nebo jinak.

Normy evropského soutěžního práva se nacházdí v pramenech různé právní síly, od práva primárního, přes právo sekundární až po právně nezávazné normy s pouhou silou přesvědčivosti. Po vstupu Lisabonské smlouvy v platnost ke dni 1. prosince 2009, byla původní čísla článků Smlouvy o Evropském Společenství přejmenována. Nově je tak evropské soutěžní právo v primárních pramenech obsaženo ve článcích 101-107 SFEU. Obsahově se ovšem články upravující evropské soutěžní právo nezměnily, jedná se tedy o pouhé přečíslování.

Aby bylo možno pochopit zvláštní povahu evropského soutěžního práva v kontrastu například s právem Spojených států, je třeba si uvědomit, že soutěžní právo v Evropské Unii slouží a od počátku sloužilo i „vyššímu“ cíli než je pouhé zachování soutěže na trhu. Je prostředkem sjednocení Evropy, vytvoření jednotného vnitřního trhu a odstranění bariér. Dalšími aspekty, které přispívají ke zvláštní povaze evropského soutěžního práva je společná měna Euro a také to, že se soutěžní právo v Evropě vyvinulo teprve po 2. světové válce a právý rozkvět začál v posledních dvaceti letech. Jedná se tedy o poměrně mladou disciplínu, která se stále vyvíjí. S tímto vývojem souvisí, že evropské soutěžní právo bylo ve druhé polovině dvacátého století poznáno silným formalismem a na ekonomický efekt praxí, kterými se zabývá, se vážněji začalo soustředit až v novém milénii. Od té doby byly ovšem reformovány v podstatě všechny oblasti evropského soutěžního práva. Oblast úpravy dominantního postavení souťažitele na trhu je tak poslední „parní lokomotivou mezi TGV a Pendoliny."

V Evropské Unii jsou tvorbou a vymáháním soutěžního práva pověřeny hlavně tyto instituce:

a) Rada Evropské Unie se zabývá hlavně tvorbou hlavních legislativních celků, jako je například Nařízení 1/2003. Dále také deleguje pravomoci na Evropskou Komisi.

b) Evropská Komise je hlavní institucí pověřenou jak tvorbou tak vymáháním

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soutěžních norem. Vydává nejenom závazné právní instrumenty, ale vypracovává i doporučení a pokyny, které působí silou přesvědčivosti. Zároveň je v soutěžních věcech vyšetřovatelem i soudcem zároveň, ukládá a vymáhá opatření k nápravě nedostatků.

c) Tribunál je nově jmenov Soudu prvního stupně, který se po účinnosti Lisabonské smlouvy stal instancí Soudního dvora Evropské Unie. Je odvolací instanci proti rozhodnutí Evropské Komise.

d) Soudní dvůr projednává odvolání proti rozhodnutí Tribunálu, a to výlučně v otázkách právních. Také slouží jako soud rozhodující řízení o předběžné otázce podle článku 267 SFEU. Velkou roli v soudním procesu hrají Generální advokáti, instance, která slouží obdobně jako soudce zpravodaj v českém systému, je nestraná, prezentuje soud rozbory dané otázky a nemá rozhodovací pravomoci.


Na závěr této kapitoly je třeba vyzdvihnout význam, který má efektivní a vyvážená kontrola dominantního postavení. Podle evropské definice je dominantní podnik vybaven takovou hospodářskou silou, která mu umožňuje bránit zachování účinné hospodářské soutěže na relevantním trhu tím, že mu poskytuje možnost jednat do značné míry nezávisle na svých konkurentech, svých zákaznících a nakonec i spotřebitelích.


\[^{244}\] ECJ Case 27/76 United Brands Company and United Brands Continental v Commission. [1978]
monopolistou. Vidina monopolních zisků je motivační, která nutí podniky investovat a inovovat, což je ku prospěchu spotřebitele. Samotné dominantní postavení na trhu není trestné, trestné je jen jeho zneužití. Proto je nezbytné, aby panovala naprostá právní jistota o tom, co takové zneužití představuje. Zneužití nesmí být formulováno příliš široce, aby nebrzdilo proces dynamické soutěže, ale ani příliš úzce, aby nedocházelo k tomu, že podnik v dominantním postavení bude své síly beztrestně využívat k neprospěchu spotřebitelů.

V pohledu na evropskou úpravu dominantního postavení už dlouho panuje názor, že rovnováha mezi těmito dvěma nebezpečími je výrazně vychýlena směrem k příliš širokému vymezení zneužití. Bohužel se názory na správnou střední cestu výrazně liší, a to hlavně mezi německým a britským pojetím, a není snadně dosažnou konsensus. Jak bude ukázáno v následujících kapitolách, přínásí reforma zneužití dominantního postavení mnoho otázek a jen na málo z nich uspokojivě odpovídá.

III. Článek 102 SFEU a judikatura evropských soudů

Tato kapitola krátce představí koncept dominantního postavení a jeho zneužití a uvede typy zneužití, tak jak jsou uznávány teorií a praxí. Znění článku 102 TFEU je poměrně kusé a poskytuje jen demonstrativní výčet možných forem zneužívajícího chování, proto tvoří hlavní část této kapitoly judikatura, která teprve naplňuje a dotváří znění článku 102 SFEU. Protože se reforma jako taková a Pokyny ke článku 102 omezují jen na chování vyřadující ostatní soutěžitele, bude představena judikatura jen s touto tématikou. Předpokládá se, že chování, které je na úkor spotřebitelů, bude upraveno reformou později.

Znění článku 102 SFEU je následující:

S vnitřním trhem je nestručetelné, a proto zakázání, pokud to může ovlivnit obchod mezi členskými státy, aby jeden nebo více podniků zneužívaly dominantního postavení na vnitřním trhu nebo jeho podstatné části.

Takové zneužívání může zejména spočívat:

a) v přímém nebo nepřímém vynucování nepřiměřených nákupních nebo prodejních cen anebo jiných nerovných obchodních podmínek.

h) v omezování výroby, odbytu nebo technického vývoje na úkor spotřebitelů;

c) v uplatňování rozdílných podmínek vůči obchodním partnerům při plnění stejně
povahy, čímž jsou někteří partneré znevýhodňováni v hospodářské soutěži;

d) v podmínkách uzavření smluv tím, že druhá strana přijme další plnění, která ani
věcné, ani podle obchodních zvyklostí s předem těchto smluv nesouvisí.

Z tohoto znění je tedy zřejmé, že pro trestnost chování jsou nezbytné dva prvky:
dominantní postavení, tedy významná tržní síla a její zneužití. (Třetím prvkem je vliv na
obchod mezi členskými státy, ten je ale vcelku nesporný). Následující odstavce krátce
představí oba koncepty, tak jak je pojímá současná praxe.

Dominantní postavení je taková pozice, která dává podniku možnost chovat se
nezávisle na svých konkurencích, zákaznících a konečně i spotřebitelích. Tento právní
pojem přeložen do ekonomických termínů praxe znamená, že je možné o dominantním
postavení uvažovat, pokud má společnost podíl na trhu vyšší než 40%. Tržní podíl je
ovšem jenom indikátor tržní síly. K jejímu prokázání je třeba provést analýzu dalších
faktorů, konkrétně postavení podniku a jeho nejblížích konkurentů, možností střetu
nebo expanze dalších soutěžitelů na trh a vyrovnaná kupní sílu. Analýzu tržní síly
nelze provést na celém ekonomickém trhu, protože by neměla žádnou výpovědní
hodnotu. Analysuje se tržní síla na trhu produktů, které jsou k posuzovanému výrobku
substituty v materiálním a geografickém měřítku, tedy na tzv. „relevantním trhu“.245

Prokázat chování, které dominantní postavení zneužívá, je druhým krokem
posouzení případu podle článku 102 SFEU. Podnik v dominantním postavení má
„zvláštní odpovědnost“ při svém chování na trhu.246 Praktiky, které by tak u jiného
soutěžitele byly legitimně obchodním jednáním jsou pro dominantního soutěžitele
zakázáno. Zneužití je objektivní koncept, který nevyžaduje zavinění. Za zneužití je
považováno takové chování, které poměřováno znaky nenarušené soutěže, vykazuje
abnormality a škodí struktuře trhu tím, že nenarušuje i zbytkovou soutěž, která byla na
trhu zachována. Jak bude uvedeno níže, vylučující zneužití může spočívat v mnoha
rozdílných konkrétních praktikách. Nicméně, jelikož čl. 102 podává jen jejich
demonstrativní výčet, není rozhodující forma chování, ale to, že předchází soutěži na
trhu nebo ji poškozuje.

245 Motta, M. Competition Policy: Theory and Practice. Cambridge: Cambridge University
Press, 2004. Ch. 3
Teorie není jednotná v tom, jaké typy zneužití rozeznává. Někdy se uvádí zneužití vylučující, vykořistující, odvětné a diskriminující. Někteří autoři uvádějí jen zneužití vylučující, zaměřená na ostatní soutěžitele a zneužití vykořistující, která spočívá v zneužívání výhod, které podniku přináší dominantní postavení a jsou naměřena primárně proti zákazníkům a spotřebitelům. Komise ani soudy společenství nikdy formálně jakékoliv rozdělení neuvážily, ale Pokyny dávají tušit, že evropské instituce rozlišují rovněž vykořisťující a vylučující typy chování.

Následující odstavec přináší přehled judikatury uvedené v diplomové práci jako relevantní k vylučujícím zneužitím. První roky evropské rozhodovací praxe se potýkaly hlavně s vymezením základních témat, jako je dominance a její zneužití. V případu Hoffman-La Roche v Commission bylo rozhodnuto, že pro rozhodnutí, že se podnik dopustil zneužití, není třeba, aby spotřebitelům vznikla škoda. Nepřímá škoda v podobě poškozování struktury trhu plně postačí. V dalším ranném rozhodnutí United Brands v Commission se ESD zabýval hlavně základními kameny toho, jak soutěžní právo přispívá k integraci společného trhu. Toto rozhodnutí je stěžejní zejména kvůli výroku o tom, že relevantní trh je tvořen výrobky, které jsou vzájemně zaměnitelné. V pořádí vývoje další, tentokrát novější rozhodnutí AKZO Chemie BV v Commission se opět zabývalo dominantním postavením jako takovým a stanovilo vyvratlenou domněnku dominance při tržním podílu nad 50%.

Z jednotlivých typů zneužití dominantního postavení se tento případ dále soustředil na definici pretorního chování a stanovil test pro jeho posouzení na základě struktury nákladů. Toto rozhodnutí později doplnil případ Tetra Pak II v Commission, který zdůraznil, že dominant nemusí mít realistickou šanci ztráty z predace později nahradit. Z dalších typů zneužití, které se výrazně projevily v judikatuře je možno uvést rabaty a odmítnutí dodávek nebo licence. Konkrétně rabaty projednával SPS v případu

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Ještě problematičejší oblastí, než jsou rabaty, je ale odmítnutí dodávek a povinné poskytnutí licence. Tato problematika je ošetřená zejména proto, že povinné poskytnutí přístupu zbavuje dominantní podnik motivace inovovat a investovat, protože nebude moci plody svých investic užívat sám. Evropská praxe se již dlouho snaží najít správnou rovnováhu a osciluje mezi benevolentním a striktním přístupem. Benevolentnější přístup reprezentují případy Commercial Solvents v Commission, 258 kdy ESD potvrdil, že je zneužitím přestat zásobovat existujícího zákazníka, aby dominant získal výhodu pro vlastní dceřinou společnost a Magill, 259 což je skutečně hranici rozhodnutí v oblasti povinného poskytování licence. ECJ zde judikoval, že licence musí být poskytnuta, pokud existuje nový produkt, po kterém je potencionální poptávka a který dominant ani nikdo jiný neposkytuje. Nebylo už ovšem řešeno, jestli tyto podmínky musí být splněny kumulativně nebo alternativně. Striktnější přístup reprezentuje hlavně Oscar Bronner, 260 případ, který poměrně volně hranice stanovené v případu Magill zase usměrnil. Bylo rozhodnuto, že vstup, který konkurent požaduje,

IV. Důvody pro reformu článku 102 SFEU

Je třeba si uvědomit, že evropská úprava dominantního postavení vznikala po druhé světové válce hlavně na základě německé zkušenosti, kde bylo soutěžní právo zavedeno v procesu denacifikace. Evropské soutěžní právo se tak vyvíjelo hlavně pod názorovým vedením ordoliberalní norimberské školy. Ta mezi jiným vyznávala názor, že svobodná hospodářská soutěž má sebevědomostní tendence. Jinými slovy, to, co je v ekonomické teorii považováno za motivační nástroj, tedy konečné monopolní postavení nejefektivnějšího soutěžitele na trhu („vítěz bere vše“), je ordoliberalní školou považováno za potenciálně nebezpečné, a to ekonomicky, politicky i sociálně.

Hlavním cílem je tedy zachování struktury trhu a blahobyt spotřebitele považován spíše za podružný cíl. Tento přístup je dodnes živý hlavně ve SRN a jeho horklivou zastánci je například generální advokátka J. Kokot. \[263\] Většina ekonomické teorie ovšem považuje tento přístup za překonaný a soustředuje se spíše na to, odstranit bariéry vstupu na trh, protože potenciálně monopolní zisky vždy přílákají konkurenci, pokud může na trh volně vstoupit. Samozřejmě analýza, která je se zaměřuje spíše

formálním směrem, má i své výhody: poskytuje právní jistotu, protože je jasné, které chování je nepřípustné, a také přináší nizké náklady vyvrocování práva, protože komplexní ekonomická analýza je nákladná. Nicméně nevýhody formalistického přístupu jeho výhody předčí. Hlavně škoda na celkovém hospodářském blahobytu je zřejmá, protože je odstraňováno chování, které může být prospěšné a efektivní.

Prakticky jsou problémy s článkem 102 SFEU spatřovány hlavně ve vnitřní i vnější nejednotnosti. Vnitřně je považováno za problematické, že článek 102 SFEU nemá žádnou strukturu, že nejsou zpracovány rozumnitelné ekonomické testy pro všechny druhy zneužití a že se Komise často řídí pouze svojí intuití a ne skutečnou ekonomickou analýzou. Vnější inkonsistence spočívá hlavně v tom, že všechny ostatní velké oblasti soutěžního práva už byly reformovány směrem k ekonomickému přístupu, který se soustředí na efekt chování a ne na jeho formu. Je tak paradoxní, že např. dohody podle článku 101 SFEU, které jsou teoreticky horší pro provinění, než zneužití dominantního postavení, by měly být posuzovány podle mírnějších měřítek.

V. Vývoj reformního úsilí v EU


Zpráva poradní skupiny pro soutěžní politiku (EAGCP) byla v pravdě revoluční a přinesla mnoho debaty. Tento dokument se orientuje téměř cele pouze na ekonomickou stránku věci a probírá zneužití dominantního postavení ze zcela nového

uhlů. Vychází z toho, že dominantní postavení není třeba dokazovat, protože podnik, který se na trhu dokáže chovat zneužívajícím způsobem a není signály trhu ovládán, má zákonně tržní sílu. Proto jediné kritérium, které je důležité, je, zda byla spotřebitelům způsobena prokazatelná škoda. Dalším konceptem bylo zrušení jednotlivých typů zneužití a jejich nahrazení prostou jednou kategorií, kde kritériem je právě škoda způsobená spotřebiteli. Velikou nevýhodou tohoto dokumentu je to, že prakticky neposkytuje právní jistotu tržním subjektům, protože posouzení vlastního chování v tomto ohledu je pro ně takřka nemožné.268 Dalším negativem je to, že dokument absolutně nereflektuje politickou realitu, která v Komisi panuje. Hledání konsensu pro dokument, který se tak radikálně rozchází s dosavadní politikou Komise by byl nadlidský úkol.


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soutěžitel se stejnou efektivitou a nákladovou strukturou) byl schopen obstát tváří v tvář určité cenové praktice. Dále dokument přichází s novou definicí nákladů a to s tzv. průměrnými eliminovatelnými náklady, která jsou podobné, ale přesněji než průměrné variabilní náklady a dále s tzv. dlouhodobými průměrnými přírůstkovými náklady, které jsou obdobou dlouhodobých celkových nákladů, ale umožňují připisovat náklady firmy jednotlivým produktům. Také tento koncept byl převzat do Pokynů. Mezi pozitiva tohoto dokumentu patří také to, že rozpracovává koncept ospravedlnění chování na základě efektivity, kterou přináší. Obecně je možno říci, že Discussion Paper navrhoval spíše systematizaci než modernizaci úpravy dominančního postavení. Tento přístup byl do značné míry přejat Pokyny ke článku 102 SFEU.

VI. Pokyny k prioritám Komise při prosazování článku 102 SFEU

Tato kapitola představuje zatím poslední krok v reformě čl. 102 SFEU. Probírá Pokyny, které byly vydány po dlouhém očekávání v prosinci 2008. Zabývá se principy, na kterých jsou Pokyny vystaveny, dále obecnou částí, která pojednává o posouzení tržní síly a koncepci vylučujícího zneužití, a konečné uvádí konkrétní typy zneužití, kterými se Pokyny zabývají a jejich hlavních znaků. Tato kapitola má charakter ryze popisný, posouzení Pokynů je přenecháno další kapitole.

Cílem Pokynů není být právním dokumentem, jak výslovně stanoví. Představuje jednostranné tvrzení Komise o tom, které případy bude v budoucnu považovat za prioritní, tudíž kterými se bude zabývat. V tomto smyslu je můžeme chápat jako jakési programové prohlášení Komise o tom, jaké je její smýšlení o článku 102 SFEU. Nicméně vzhledem k tomu, že tento dokument bude kvůli silné své přesvědčivosti používán národními souťažními úřady a soudy, nelze podceňovat jeho význam. Mezi ústřední principy, na kterých jsou pokyny vystaveny, patří koncept tzv. „uzavření trhu narušujícího hospodářskou soutěž“, což je v Pokynech vysvětleno jako „narušení účinné hospodářské soutěže uzavřením trhu konkurenčním protisoutěžním způsobem mající za následek nepříznivý dopad na prospěch spotřebitelů, ať již ve formě

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273 ibid. para 3.
vyšší cenové úrovně, než jaká by se prosadila za jiných okolností, či ve formě jiné, například omezování kvality či výběru pro spotřebitele.\textsuperscript{275} Zda toto protisoutěžní uzavření trhu nastává, je zaštitujícím testem při všech typech zneužití a rozhoduje o tom, zda Komise zasáhne, či ne.

Obecná část Pokyny se v oblasti analyzy tržní sily v podstatě drží tradičního přístupu. Nejsou poskytnuty žádné pevné hranice tržních podílů, pod kterými by podnik nemohl být shledán dominantním. Určitou hranici představuje prohlášení, že není pravděpodobné usoudit, že podnik je dominantní, pokud jeho tržní podíl leží pod hranici 40%. Výslovně jsou ovšem připuštěny výjimky z tohoto pravidla.\textsuperscript{276} Jako pozitivní aspekt je třeba hodnotit, že Pokyny opustily presumpci dominance při tržním podílu nad 50%, tak jak ji stanovuje AKZO. Podíl na trhu zůstává pouhým indikátorem dominance a dále jsou posuzovány tradiční aspekty jako je tržní pozice nejbližších konkurentů, možnosti vstupu a expanze na trh a vyvažující kupní síla.

Dalším aspektem při posuzování zda došlo ke zneužití je právě protisoutěžní uzavření trhu. Při tomto testu Komise vytváří jakýsi hypotetický scénář, který představuje situaci na trhu, kdyby k údajně zneužívajícímu chování nedošlo. Tuto metodu hypotetického scénáře uplatňuje Komise velmi úspěšně například při spojování soutěžitelů. K vytváření této hypotetické situace Komise využije různé aspekty, které uvádí ve 20. odstavci Pokynů.\textsuperscript{277} V případě zneužití založeného na cenových strategiích se uplatní výše zmíněný test stejně výkonného soutěžitele, který dává při porovnání s různými druhy nákladů odpověď na otázku, zda-li je chování protisoutěžní.\textsuperscript{278} Která cena je již považována za zneužívající, je uvedeno u jednotlivých typů chování. Poněkud alarmující je, že Komise připouští možnost ochrany konkurenta, který je méně výkonný než dominant, a to protože na dominantní podnik vyvíjí zvláštní tlak.\textsuperscript{279} Tento přístup ale přináší nebezpečí, že Komise bude hájit spíše soutěžitele, než soutěž samotnou.

Velmi důležitým prvkem je fakt, že Pokyny přináší možnost zneužívající

\textsuperscript{275} Pokyny k prioritám Komise v oblasti posazování práva při používání článku 82 Smlouvy o ES na zneužívající chování dominantních podniků vyžadující ostatní soutěžitele. OJ C [2009] 457, para 19.
\textsuperscript{276} ibid. para 14.
\textsuperscript{277} ibid. para 21.
\textsuperscript{278} ibid. para 23 a n.
\textsuperscript{279} ibid. para 24.
chování ospravedlnit, a to buď na základě objektivní nutnosti nebo efektivnosti. 280
Samozřejmě je třeba, aby chování bylo v obou případech nezbytné a přiměřené.
Zatímco objektivní nutnost, která je vymezena poměrně úzce, patrně nebude mít častého
využití, je ospravedlnění z hlediska efektivnosti vystavěno na podmínkách čl. 101(3) a
mohlo by tak nabýt širšího uplatnění. Zklamáním je ovšem v tomto ohledu požadavek,
že chování nesmí vylučovat všechny nebo většinu zdrojů efektivní soutěže na trhu. 281
To bude bohužel v případě dominantního postavení už z podstaty věci často problémem.
Na or doliberální přístup k ochraně trhu také ukazuje výslovné prohlášení, že chování
monopolisty nebude pravděpodobně vyváženo efektivitou. 282 Je na dominantním
podniku, aby objektivní nutnost nebo efektivnost přesvědčivě prokázal.

Mezi jednotlivé typy vylučujícího zneužívajícího jednání, tak jak je popisuje
Pokyny patří výhradní dohody (výhradní odběr a podminěné rabaty), vázaný a spojený
prodej, predátořské jednání a odmítnutí dodávek a zmenšování rozpětí. Vzhledem k
tomu, že Pokyny jsou ve své podstatě ekonomický dokument a koncepty některých
zneužití jsou značně technické, bude v tom shrnutí jejich obsah zjednodušen a popsán
jen zkráčeně.

Při výhradních dohodách se dominant snaží zákazník odradit od kupování od
konkurentů, ať už tím, že ho přímo zaváže dohodou, nebo ho motivuje poskytnutými
slevami. 283 Při výhradním odběru je hlavním aspektem, který bude Komise posuzovat,
to, zda konkurenti soutěží o celý trh, nebo zda je už určitá část poptávky vázána k
dominantovi. 284 Významným faktorem je také trvání těchto výhradních závazků.
Situace při podminěných rabatech je značně složitější: rozhoduje, zda-li jde o slevu
zpětnou, poskytnutou na všechno zboží po dosažení určitého objemu prodeje, nebo o
slevu přírůstkovou, která je poskytována jen na jednotky, které jsou zakoupeny nad
příslušný prahový objem. 285 Přírůstkové slevy jsou obecně považovány za méně
nebezpečné pro soutěž než zpětné slevy. Kritériem pro posouzení, zda je rabat
zneužívající, je otázka, zda-li sleva, která je poskytnuta při nákupu nad určitý stanovený
objem, přesahuje průměrné eliminovatelné náklady na výrobu jednotek, při jejichž
nákupu je sleva poskytnuta.\textsuperscript{286} To je v případě zpětných slev spíše nepravděpodobné. Při ceně, která nepokryvá dlouhodobé průměrné přírůstkové náklady jsou posuzovány další faktory, jako např. jestli mohou ostatní soutěžiteli vyvinout efektivní obranné strategie.\textsuperscript{287} Další roli hraje při posouzení to, o jakou část nabídky se reálně na trhu soutěží.\textsuperscript{288}

Vázaný prodej popisuje situaci, kdy zákazník musí k produktu dominantní firmy zakoupit i jiný její produkt nabízený na trhu, kde není firma dominantní.\textsuperscript{289} Dominant tak posiluje svoji pozici na vázaném trhu, ať už smluvně, nebo tím, že k sobě výrobky váže technicky. Spojený prodej popisuje, jak jsou produkty nabízeny na trhu a situaci, kdy se jejich spojený prodej zpravidla pozitivně odrazí na konečně ceně pro spotřebitele, ale někdy za cenu toho, že jsou vyloučeni soutěžitelé, kteří nabízejí jen jednu část svazku a nemohou tak konkurrovat s výhodnou cenou spojených výrobků.\textsuperscript{290} Vázaný a spojený prodej mohou vést ke značným úsporám pro spotřebitele, proto je třeba je pečlivě uvážit.\textsuperscript{291} Hlavní faktory, které bude Komise posuzovat je to, zda vázaný a spojený prodej vytváří překážky vstupu a expanze na trh a zda při spojeném prodeji přírůstková cena každého dalšího výrobku ve svazku pokrývá dlouhodobé průměrné přírůstkové náklady spojené s jeho zahrnutím do spojeného prodeje.\textsuperscript{292}

Posouzení predatorního chování využívá nákladových testů: pokud je cena výrobků pod průměrnými eliminovatelnými náklady, jedná se jednoznačně o protisoutěžní predatorní chování.\textsuperscript{293} Pokud je cena mezi průměrnými eliminovatelnými náklady a dlouhodobými průměrnými přírůstkovými náklady, bude Komise pátrat po dalších faktorech, jako je například přímý důkaz predacní strategie v podobě

\textsuperscript{286} Pro ilustraci jednoduchý příklad. Pokud je cena jednotky 120 a průměrné eliminovatelné náklady na její výrobu jsou 50, dlouhodobé průměrné přírůstkové náklady jsou 90. Rabat je poskytnut při dosažení objemu 100 jednotek ve vyšší cena jednotky. Přírůstkový rabat by v tomto případě byl legální, protože výsledná cena jednotek zakoupených nad objem by byla 119. Zpětný rabat by byl začínající, protože cena jednotky zakoupené nad pražský objem by byla 20, jelikož by se v ní odrazila sleva za bezmálo předchozí zakoupené jednotky. Pokud by sleva na jednotku byla stanovena např. ve vyšší 0,4, záleželo by na posouzení dalších faktorů, jelikož výsledná cena by byla 80, tedy mezi průměrnými eliminovatelnými náklady a dlouhodobými průměrnými přírůstkovými náklady.

\textsuperscript{287} ibid. para 43.
\textsuperscript{288} ibid. para 41.
\textsuperscript{289} ibid. para 49.
\textsuperscript{290} ibid. para 48.
\textsuperscript{291} ibid. para 49.
\textsuperscript{292} ibid. para 60.
\textsuperscript{293} ibid. para 54.
Pokyny užívají pro predatorní chování pojem obětování zisku, který je jedním z nejspornějších v celých Pokynech. Cena pod průměrnými eliminovatelnými náklady samořejmě bude v naprosté většině případů zahrnovat obětování zisku, ale pro cenu v „šedém pásmu“ mezi oběma nákladovými hladinami je nesnadné posuzovat obchodní strategie podniku zpětně jako úmyslně nerentabilní.

Zmenšování rozptřel popisuje situaci, kdy podnik dominantní na vertikálně předcházejícím trhu učtuje cenu, která v porovnání s cenou účtovanou na navazujícím trhu neumožňuje ani stejně výkonnému soutěžiteli trvale obchodovat se ziskem na navazujícím trhu. Komise bude porovnávat dlouhodobé průměrné přírůstkové náklady dominanta na navazujícím trhu s rozdílem mezi cenou produktu na navazujícím trhu a konečnou cenou produktu.

Odmítnutí dodávek je téma s bohatou judikaturou a stále sporné. Pokyny se kloni spíše k benevolentnějšímu udělování přístupu, i když uznávají nutnost zachovat motivaci pro inovace a investice. Pojetí pokynů je velmi sporné v tom ohledu, že vyžadují zvláštní okolnosti pro možnost přerušení dodávek existujícímu odběrateli. Obecně jsou podmínky udělení přístupu následující: přístup musí být nezbytný, na následném trhu musí být eliminována veškerá efektivní soutěž, chování může způsobit škodu spotřebitelům, například protože předchází vstupu nových, inovovaných nebo vylepšených produktů na trh. Je třeba vyzvednout, že se Pokyny pro udělení přístupu spokojí s pouhou inovací produktu a nevyžadují produkt kompletně nový.

VII. Zhodnocení dopadů Pokynů ke článku 102 SFEU
Tato kapitola zhodnotí silné a slabé stránky pokynů a posoudí jejich dopad na praxi Soudního dvora Evropské Unie, národních soutěžních řídicích soudů a soudu a v neposlední řadě jejich efekt pro podniky samotná.

Reakce na vydání pokynů byly smíšené. Většinově je úsilí Komise chváleno a zakončení reformy přijato s povděkem, ale jsou kritizována slabá místa, která Pokyny mají. Kritika se různí, ale některé připomínky se objevují soustavně a je třeba jim věnovat pozornost. Nejčastější kritikou je nedůslednost, s jakou Pokyny spojují

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294 ibid. para 68.
295 ibid. para 80.
formalistický přístup se zaměřující na ekonomický efekt. Mezi další kritizované body patří neexistence hranic, pod kterými nemůže být podnik shledán dominantním, dále velký význam, který Komise přisuzuje subjektivním záměrům podniků, neexistence rozpracované teorie škody způsobené spotřebitelům, stanovení příliš mnoha předpokladů, které se v praxi nemusí ukázat jako pravdivé a připuštění toho, že někdy není třeba provádět ekonomickou analýzu vůbec. Dalším trnem v oku je nedostatečně rozpracovaný koncept ospravedlnění díky zvýšené efektivitě, který bezmyšlenkovitě kopíruje strukturu čl. 101(3). Mnoho kritiky se také soudí o na test stejně výkonné soutěžitele, protože od dominanta vyžaduje znalost o nákladových strukturách, kterou podle čl. 101 SFEU mít nesmí. Z jednotlivých typů zneužití jsou kritizovány hlavně rabaty jako neuměreně technicky složité a příliš přísné a dále predace, která se v šedé zóně příliš opírá o subjektivní záměry dominanta. Úprava odmítá jednat je kritizována jednoznačně jako příliš benevolentní a ohrožující inovace a investice a odradzující dominantní podniky od uzavírání dodávkových smluv vůbec. Hlavním bodem kritiky je, že dále otevírá propast mezi právní úpravou tohoto tématu ve Spojených státech a v Evropě.

Co se týče vlivu směrnic na rozhodovací praxi soudů, je především třeba vyčkat. Soudy se v minulosti neukázaly nakloněny ekonomické analýze a tak až rozhodnutí v případu Intel přineslo odpověď na to, zda vzaly Pokyny na vědomí. Neštěba dodává, že v ohledu na soudy Pokyny mohou působit skutečně jen silou argumentu, protože


postrádají jakoukoliv právní závaznost. Vliv na národní soutěžní úřady a soudy bude pravděpodobně smíšený.\textsuperscript{290} Země jako Německo, s vysokou rezistence vůči ekonomickému přístupu, budou přijetí principů stanovených v Pokynech odolávat.\textsuperscript{300}

Jiné země Pokyny přijmou, ale je známo, že schopnosti a úroveň ekonomické analýzy se v jednotlivých státech velmi liší, proto bude úkolem Komise hlídat jednotu v aplikaci čl. 102 SFEU napříč Evropou.\textsuperscript{361} Tuto pravomoc ovšem Komise postrádá u národních soudů a proto hrozí nebezpečí tzv. forum shopping, tedy toho, že si soudce budou vybírat režim, který je pro ně nejvýhodnější. Ve vztahu k podnikům je jistě pozitivní, že jsou nyní pravidla ke článku 102 SFEU soustředěna do jednoho dokumentu a systematizována. To zvyšuje právní jistotu a předvidatelnost.\textsuperscript{302} Nicméně Pokyny kladou velké nároky na sebeposouzení podniků. Dále je taky problematické vyhoštění národního režimu, který může být formalistický, evropskému režimu, který je kompromisem a režimu v ostatních jurisdikcích, který může být zaměřen výhradně na efekt chování.\textsuperscript{303}

\textbf{VIII. Závěr}

Je možno uzavřít, že Pokyny ke článku 102 SFEU jsou všímáním dokumentem, protože přinašejí více systému a předvidatelnosti do právní úpravy dominantního postavení na trhu. Přestože Pokyny mohou zklamávat polovičatým přístupem, je třeba vzít na vědomí institucionální realitu a nedostatek konsenzu na více převratném řešení. Pokyny jsou celkově sličným krokom správným směrem a je třeba vyčkat toho, jak nová praxe prosazování článku 102 SFEU naplní tento dokument životem.

\textsuperscript{301} EHRACHI, A. The European Commission Guidance on Article 82 EC - The Way in which Institutional Realities Limit the Potential for Reform. Legal Research Paper Series, 2009, 27, 1–31, s. 27.
\textsuperscript{303} ibid., s. 14.
List of Abbreviations / seznam zkratek

English Abbreviations:
AG - Advocate General
Art. - Article
CFI - Court of First Instance
EAGCP - Economic Advisory Group for Competition Policy
EC - European Community
ECMR - European Community Merger Regulation
ECJ - European Court of Justice
ECN - European Competition Network
ECR - European Court Reports
EU - European Union
ibid. - ibidem (quote from the same source as the previous one)
MSC - Member State Court
NCA - National Competition Authority
OJ - Official Journal
p. - page
para. - paragraph
Reg. - Regulation
TFEU - Treaty on the Functioning of the European Union

České zkratky:
čl. - článek
ES - Evropská společenství
ESD - Evropský soudní dvůr
EU - Evropská Unie
ibid. - ibidem (citace ze stejného pramene jako citace předchozí)
nař. - nařízení
para. - odstavec
s. - strana
SFEU - Smlouva o fungování Evropské Unie
SPS - Soud prvního stupně
Table of Legislation / Seznam použité legislativy

In English:


Regulation 2659/00 (Block Exemption for R&D Agreements). OJ [2000] L 304/7.

V češtině:


Table of Cases / Seznam použitých rozhodnutí

Decisions of the European Commission:

Decisions of the Court of First Instance:

Decisions of the European Court of Justice:
ECJ. Joined Cases C-168/06 to C-478/06 Sot. Lēlos Kai Sia v GlaxoSmithKline [2008] ECR I-7139.
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LOVDAHL GORMSEN, J. Article 82 EC: Where are we coming from and where are we going to? Competition Law Review. 2005, 2 (2).


Keywords / Klíčová slova

Keywords: European Union, abuse of dominance, reform.

Klíčová slova: Evropská Unie, zneužití dominantního postavení, reforma.