INTERNATIONAL COMPETITION LAW SERIES

Exclusionary Abuse after the *Post Danmark I* Case

The Role of the Effects-Based Approach under Article 102 TFEU

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The law is stated as of 1 of February 2017. Any errors and omissions are mine alone, and the opinions I express are strictly personal; they do not represent the views of Bech-Bruun, Aarhus University or any other institution, entity, person, etc.

Anders Fløjstrup Jessen
February 2017

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CHAPTER 1
Introduction

1 INTRODUCTION TO THE TOPIC

A central objective of the Treaty on the Functioning of the European Union (the "TFEU") is to ensure a system of free competition within the Internal Market.[1] Accordingly, the TFEU features provisions which, among other things, regulate firms' conduct to ensure competition is not distorted; thereby, protecting consumers. One of these provisions is Article 102 of the TFEU ("Article 102 TFEU"). It follows from that provision that a firm holding a dominant position in the relevant market is not allowed to abuse this power through unilateral conduct. It must be stressed that, in both theory and practice, it is well established that merely holding a dominant position does not infringe Article 102 TFEU in itself.[2] A dominant firms' conduct is only contrary to Article 102 TFEU when it constitutes abuse of that dominant position. In other words, unilateral conduct only infringes Article 102 TFEU when it is deemed anti-competitive.[3]

1. *See* Protocol No. 27, annexed to the TEU and TFEU. Before the Lisbon Treaty came into force, the objective was found in Article 3(1)(g) EC. However, it was removed with the introduction of the Lisbon Treaty and substituted with Protocol 27. With the objective transferred to a Protocol uncertainty emerged in regards of whether the objective is still applicable. The conclusion is that it is still as important as before the introduction of the Lisbon Treaty. *See also* Chapter 3, section 3.1.
2. *See* Judgment of 9 November 1983 in Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission of the European Communities* ("*Michelin I*"), at 53. Instead, a firm that holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.
3. *See* for that effect Communication of the Commission of 24 February 2009 OJ 2009/C 45/02, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* ("*the Article 102 Guidance Paper*"), at 19–20; Bishop, Simon & Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2010.

The aim of Article 102 TFEU is, therefore, to safeguard and maintain effective competition within the Internal Market,[4] thereby kerbing the adverse effects of market power. It is well established in legal and economic literature that a firm[5] possessing a dominant position (i.e., market power) may be able to increase prices and restrict output, with the effect of harming consumer welfare.[6] Competition policy targeted at dominant firms is, therefore, appropriate compared to having only Article 101 of the TFEU ("Article 101 TFEU") which targets collusive behaviour between firms.

One difference between Article 101 TFEU and Article 102 TFEU is worth noticing. In legal literature, Article 102 TFEU is treated as the second of the twin pillars of the competition policy established under the EU Treaty.[7] While Article 102 TFEU primarily aims to control conduct of a single firm, Article 101 TFEU primarily concerns anti-competitive agreements between undertakings, decisions of the associations of undertakings and concerted practices. Therefore, for the types of conduct subject to an assessment under Article 101 TFEU, the market power is created through the establishment of a type of coordination by a number of firms, and through such coordination, anti-competitive effects are achieved. In other words, the "abused" market power exists only due to the type of coordination, and it is, thereby, the product of such coordination. As opposed to this, a [single] firm's conduct is subject to an assessment under Article 102 TFEU when market power already exists due to its dominant position. Accordingly, it is not the product of the specific type of conduct. As a result, the types of exclusionary conduct that may be abusive are relying on existing market power rather than created market power to achieve anti-competitive foreclosure.[8] Accordingly, [unilateral] conduct that relies on existing market power to harm competition is the focus of Article 102 TFEU, whereas united conduct that creates market power to harm competition is the focus of Article 101 TFEU. Anti-competitive foreclosure found under both provisions may then either strengthen or preserve the (dominant) firm's market power. Both provisions complement thereby each other.

In consequence, Article 102 TFEU is worded as:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;

4. *See* Judgment of 21 February 1973 in Case 6/72, *Europemballage and Continental Can v Commission of the European Communities* ("*Continental Can*"), at 25. *See also* Chapter 2.
5. Not only are the concern attached to a single firm, but also the event where a group of firms hold a dominant position (i.e., collective dominance).
6. *See* e.g., Carlton, Dennis & Perloff, Jeffrey, *Modern Industrial Organization*, 2004; Tirole, Jean, *The Theory of Industrial Organization*, 1988.
7. *See* Goyder, Joanna & Albors-Llorens, Albertina, *Goyders's EC Competition Law*, 2009.
8. Conduct may also directly exploit consumers by, for example, charging excessive prices. However, due to the topic of this book, such conduct will not be addressed.

(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.

1.1 The Background to the Topic

Concern for abuse of market power is nothing new. The concern is that abuse of a dominant position will lead to increased prices, lower output and/or reduced innovation/quality. This is shown in the classic industrial economic models. They illustrate how a monopoly can exercise its market power by setting prices above the competitive level while simultaneously reducing quantities.[9] In other words, prices are increased through a reduction of output, and vice versa. According to this monopoly theory, the issue relating to exercised market power is excessive pricing or other exploitive conduct.

Nonetheless, only few Article 102 TFEU cases involve exploitive conduct.[10] Instead, cases tend to concern exclusionary abuse. These types of abuse involve the exclusion or marginalisation of actual or potential competitors through, for example, pricing below the competitive level. The conspicuous concern is, therefore, not the excessive pricing [and lower outputs], but the harm to competition. By harming competition, the concern is that the dominant firm's market power will be strengthened or preserved, enabling it to raise its prices [and lower its output]. The concern is still exploitive conduct; however, at a later stage. While such exploitive conduct is seen in the short term with, for instance, excessive pricing, it is seen in the long run when dealing with an exclusionary abuse. In consequence, even if exclusionary conduct may appear as welfare increasing – for example, setting prices below rather than above the competitive level – it may still constitute abuse within the meaning of Article 102 TFEU.

Therefore, the issues relating to exploitive abuse and exclusionary abuse differ significantly. Concerning exploitive abuses, the effect is directly visible, while it is more inconspicuous in regards to exclusionary abuse. As a result, spotting an exploitive abuse may be easier than spotting an exclusionary abuse. That being the case, it is far from clear when dominant firms are abusing their position through exclusionary abuse, and consequently unclear how to assess such within Article 102 TFEU. This aspect is clearly seen in regards to conduct which benefits consumers in the short term, but at the same time may harm them in the long run; for example, pricing below the competitive level.[11] This is, among other things, because the line between legitimate

9. *See*, among others, Tirole (1988); Carlton & Perloff (2004).
10. For a general discussion of exploitative and exclusionary abuse *see* e.g., Geradin, Damien, et al., *EC Competition Law and Economics*, 2012, at Chapter 4.
11. The fear is that such conduct will exclude competitors from the market and/or deter their entrance to market with the result of excessive pricing, limiting production/innovation or the like. This is made possible since the dominant firm does not face any (significant) competitive pressure and is, therefore, able to profit optimize to the detrimental of consumers.

conduct and exclusionary conduct has not been fully delimited due to their similarities, and thus, a very fine line exists between infringing and complying with Article 102 TFEU.[12] The motivation for this book lies, among other things, in this uncertainty.

1.2 Developments and Legal Issues

Until recently, academic interest in Article 102 TFEU was limited.[13] Likewise, the Commission of the European Communities (the "Commission") has cared less for cases concerning abuse of dominance compared to, for example, the types of cases concerning coordination between firms (i.e., Article 101 TFEU) or mergers (i.e., the EU Merger Regulation[14]). That being the case, the Commission has only been engaged in a limited number of Article 102 TFEU cases over the years. This has provided the EU Courts[15] little opportunity to deliver rulings on exclusionary abuse, and thereby, to assist in the understanding and development of Article 102 TFEU in the same way as it has done in Article 101 TFEU and the EU Merger Regulation.[16] This causes uncertainties for dominant firms and its competitors.

However, there has been a growing interest from both academics and practitioners in the provision over the last decades, and the provision may even be held as the object of attention in recent years. This has caused the emergence of different controversies that had been hidden due to the previously limited interest.[17] The reasons for this new attention are various and many, but some important ones are worth mentioning. They include, first, the increased development in and involvement of economic theory in relation to competition law, second, an increased collaboration between competition authorities, and finally, the fact that Article 101 TFEU and the EU Merger Controls have been subject to a reform suggesting that Article 102 TFEU was likely to receive a similar treatment.[18]

This "rediscovery" of Article 102 TFEU gave rise to an attempt to modernize the provision.[19] The result was, among other things, that the Commission, in late 2008, published a communication[20] indicating how it intends to assess exclusionary conduct by dominant firms (the "*Article 102 Guidance Paper*"). In brief, the *Article 102 Guidance Paper* reveals that the Commission will shift its approach to the enforcement of Article 102 TFEU by, to some extent, increasing the application of economic analyses

12. *See* e.g., Padilla, Jorge & O'Donoghue, Robert, *Law and Economics of Article 102 TFEU*, 2013, at 217.
13. *See* e.g., Rousseva, Ekaterina, *Rethinking Exclusionary Abuses in EU Competition Law*, 2010, at 1.
14. *See* Council Regulation of 20 January 2004, *on the control of concentrations between undertaking* ("*the EU Merger Regulation*").
15. The European Court of Justice and the General Court.
16. Additionally, it was not before the early 1970s that the ECJ was given the opportunity to deliver its first ruling concerning Article 102 TFEU, see Case 6/72, *Continental Can*.
17. *See* e.g., Rousseva (2010), at 1.
18. *See id.*
19. The first serious consideration of a shift from a more form-based approach to a more economic approach was a rapport by the Economic Advisory Group on Competition Policy, see Gual, Jordi, et al., *An Economic Approach to Article 82*, 2005, EAGCP Report.
20. *See* footnote 3.

and applying the so-called effect-based approach. This communication was broadly welcomed by the literature – although criticism did exist.[21] This included, for example, that the concept of anti-competitive foreclosure effects is too over inclusive,[22] that the rigid and relatively precise language of EU case law was to be abandoned in favour of a more fluid set of principles in the *Article 102 Guidance Paper*,[23] and the practical guidance from the communication is limited.[24]

Similar discussions have also taken place in relation to the approach to Article 101 TFEU[25] and the EU Merger Regulation, in which the form-based approach (to a large extent) has been deserted in favour of a more effect-based analysis that has been implemented.[26] In contrast to these policy rules, it is unclear which role the effect-based (and the form-based) approach has within Article 102 TFEU (see below) as it has yet to be clarified by the EU Courts; thus, making it the last major component of competition law to be reformed.[27] In addition, case law, which will be addressed below, seems only to have contributed to this uncertainty instead of bringing clarity to the issue. For those reasons, uncertainty regarding the assessment of exclusionary abuse by dominant firms has emerged. This includes: (i) the approach that should be applied, and (ii) when exclusionary conduct is anti-competitive.

1.2.1 The Relevance of the Form-Based and Effect-Based Approach

One issue with the proposed reform arose around the uncertainty of whether the EU Courts would share the same vision for Article 102 TFEU; an issue which did not follow from the *Article 102 Guidance Paper*.[28] The *Article 102 Guidance Paper* explicitly stated that it merely sets out the enforcement priorities and "is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article [102 TFEU] by the [EU Courts]."[29] Case law has only further enhanced this uncertainty, as the *Article 102 Guidance Paper* has been rejected as a binding on national competition authorities and courts' assessment of exclusionary conduct,[30] while it has applied both

21. For an overview see Padilla & O'Donoghue (2013), at 80.
22. *See* Lang, John Temple, *Article 82 EC – The Problems and the Solution*, 2009, FEEM Working Paper No. 65, available at SSRN: http://ssrn.com/abstract = 1467747.
23. *See* Padilla & O'Donoghue (2013), at 80.
24. *See* Blanco, Luis Ortiz & Colomo, Pablo Ibáñez, *Evolving Priorities and Rising Standards: Spanish Law on Abuses of Market Power in the Light of the 2008 Guidance Paper on Article 82 EC, in* European Competition Law: The Impact of the Commission's Guidance on Article 102 (Lorenzo Federico Pace ed., 2011.
25. It worth mentioning that the "by object" test within Article 101 TFEU may still be regarded as a form-based approach since the assessment is based on the characteristics of the agreement. *See* further Chapter 4.
26. *See* Gual, et al. (2005), at 5; Padilla & O'Donoghue (2013).
27. *See* Akman, Pinar, *The Reform of the Application of Article 102 TFEU: Mission Accomplished?*, Forthcomming Antitrust Law Journal (2016), at 1.
28. *See* Monti, Giorgio, *Article 82 EC: What Future for the Effects-Based Approach?*, 1 Journal of European Competition Law & Practice (2010) 2.
29. *See the Article 102 Guidance Paper*, at 3.
30. *See* Judgment of 6 October 2015 in Case C-23/14, *Post Danmark A/S v. Konkurrencerådet* ("*Post Danmark II*"), at 52.