

THE CONCEPT
OF ABUSE IN EU
COMPETITION LAW

LAW AND ECONOMIC
APPROACHES

Pınar Akman

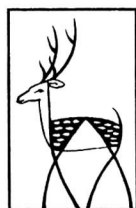


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THE CONCEPT OF ABUSE IN EU COMPETITION LAW

The objective(s) of Article 102 TFEU, what exactly makes a practice abusive and the standard of harm under Article 102 TFEU have not yet been settled. This lack of clarity creates uncertainty for businesses and, coupled with the current state of economics in this area, raises an important question of legitimacy. Using law and economic approaches, this book inquires into the possible objectives of Article 102 TFEU and proposes a modern approach to interpreting 'abuse'. In doing so, this book establishes an overarching concept of 'abuse' that conforms to the historical roots of the provision, to the text of the provision itself, and to modern economic thinking on unilateral conduct. This book therefore inquires into what Article 102 TFEU is about, what it can be about and what it should be about regarding both objectives and scope.

The book demonstrates that the separation of exploitative abuse from exclusionary abuse is artificial and unsound. It examines the roots of Article 102 TFEU and the historical context of the adoption of the Treaty, the case law, policy and literature on exploitative abuses and, where relevant, on exclusionary abuses. The book investigates potential objectives, such as fairness and welfare, as well as the potential conflict between such objectives. Finally, it critically assesses the European Commission's modernisation of Article 102 TFEU, before proposing a reformed approach to 'abuse' which is centred on three necessary and sufficient conditions: exploitation, exclusion and a lack of an increase in efficiency.

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This book is a culmination of my thinking in the area of abuse of a dominant position. The origins of the book can be traced back to my doctoral research, which I conducted at the University of East Anglia from 2004 to 2007. I must, therefore, first thank those who supported me throughout my PhD. Professor Morten Hviid and Dr Michael Harker were great supervisors and have had to discuss the subject matter of this book with me more than anyone else without showing any signs of boredom. The thesis was examined by Professor Richard Whish and Professor Brenda Sufrin, whom I must thank for their greatly appreciated comments. I am grateful to Professor Alastair Mullis, who gave me the idea and the opportunity to do a PhD in the UK; his constant support over the years has always made a difference. Similarly, I thank Gareth Thomas, who has been instrumental in my staying in the UK after the PhD to continue with this research. I also thank Dr Andrew Scott, who supervised my thesis (albeit briefly) in the very early days. Last but not least, my thanks go to my former colleagues at the University of Ankara Law School, particularly at the Department of Commercial Law headed by Professor Sabih Arkan, for all their support at the time.

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Pınar Akman

Norwich, 12 July 2011

Note to the Reader

The Treaties of Rome refer to the European Economic Community (EEC) Treaty and the European Atomic Energy Community (EURATOM) Treaty, both of which came into force on 1 January 1958. The Maastricht Treaty – Treaty on European Union TEU (1993) – brought the EEC, EURATOM and the European Coal and Steel Community (ECSC) under one umbrella, namely the European Union and renamed the EEC as the European Community (EC). The EC Treaty was renumbered by the Treaty of Amsterdam which entered into force on 1 May 1999. The Treaty of Lisbon which entered into force on 1 December 2009 amended and renumbered the TEU. With the Treaty of Lisbon, the EU has replaced and succeeded the EC. The EC Treaty was renamed the Treaty on the Functioning of the European Union (TFEU).

In this book, the most recent numbering is used and the old provision numbers in quotations are replaced by the new numbers within square brackets. When referring to the rule now found in Protocol 27 on the Internal Market and Competition, unless the reference is made to this provision in the current time, the book uses Article 3(1)(g) EC as the reference. The one exception to this is found in chapter eight where the reference is made to Article 3(f) EEC since the issue therein is the particular text which the drafters agreed on in 1957.

The Treaty of Lisbon has also renamed the Court of First Instance (CFI) as the General Court (GC). In this book, reference is made to the GC even if at the relevant time the court was called the CFI. The GC and the Court of Justice (ECJ) make up the Court of Justice of the European Union (CJEU).

The law is stated as of 1 July 2011.

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