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Introduction

A. The problem

Article 102 prohibits any abuse by one or more undertakings of a dominant position within the internal market. It is a fundamental element of the economic law of the European Union. However, its objective and scope are undefined. Therefore, since the very first cases that it had to decide, the Court of Justice has had to adopt a teleological approach to its interpretation.[1] A teleological interpretation of Article 102 is the only way to give substantive content to the provision by turning the open-textured concept of abuse into operational tests that are neither arbitrary nor the expression of discretionary policy choices but the outcome of an hermeneutic process solidly anchored to the rule of law. However, the determination of the objective of Article 102 within the wider context of the Treaty or Treaties as in force at the relevant time has always been a legally complex and politically difficult exercise. The EU courts have often shied away from a robust analytical approach to identifying the goals of EU competition law by hiding themselves behind formulas derived from the text of the Treaties. Following the structure of the Treaties, Article 102 has, therefore, been construed as a provision aimed at ensuring that competition is not distorted. Undistorted competition has in turn been understood as aiming to achieve the general objectives of the Union.[2] While this interpretive process is correct, the case law has done little more than quote extracts from the Treaties without exploring the rationale for its conclusions.[3] As a result, the objective of EU competition law, and of Article 102 in particular, has been left obscure. This has led to the development of principles and tests under Article 102 that may appear to lack a coherent analytical underpinning and adopt formalistic approaches to different types of conduct that are potentially anti-competitive. Since the mid-1990s, the case law on EU competition law has come under increasing criticism by those who argued that competition law, and, therefore, also Article 102, should be concerned with economic welfare or efficiency and not with the protection of competition defined as

[1] eg Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 (*Continental Can*), paras 24–29.

[2] eg Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* (17 February 2011) (*TeliaSonera*), paras 20–22.

[3] ibid. See also the case law on dominance, eg Case 27/76 *United Brands Co and United Brands Continentaal BV v Commission* [1978] ECR 207, paras 63–65.

a pluralistic market structure. The European Commission went along with this view. In a number of guidelines, the guardian of the Treaties appears to have made a conscious policy decision to interpret Article 101 as a provision mainly concerned with the protection of consumer welfare.[4] The Court of First Instance was sympathetic to this approach[5] but was rebuked by the Court of Justice.[6] This state of affairs has had significant implications for the prevailing discourse on the law on Article 102, especially in the English-language literature and economic circles. Commentators have focused on the need to interpret Article 102 as protecting consumer welfare and have reproached the EU courts for continuing to adopt a formalistic, structuralist, or 'ordoliberal' approach to abuse of dominance.[7] To respond to these criticisms, the Commission attempted a process of 'modernization' of Article 102. In 2005, it published a Discussion Paper on exclusionary abuses.[8] While this was never the stated policy position, the natural outcome of such an exercise would have been the publication of guidelines inspired by the same principles as those on Article 101. Instead, after a considerable amount of time had passed, the Commission issued a Guidance on Article 102, which is limited to setting the Commission's enforcement priorities in relation to exclusionary abuses and does not purport to be a statement of the law on Article 102.[9] The Guidance adopts a consumer welfare approach which appears to be broadly consistent with the policy on Article 101 and mergers. However, because it is neither based on a teleological interpretation of Article 102 nor does it follow the case law, such an approach raises more problems than it solves. Given that the Commission appears to have made a choice, it becomes even more important to understand the objective of Article 102. Only once the objective has been identified, can the legal tests for dominance and abuse be understood and developed consistently with the teleological hermeneutics that the case law mandates. That is the aim of this book.

[4] eg Commission Notice—Guidelines on Vertical Restraints [2000] OJ C291/1, now replaced by the Guidelines on Vertical Restraints [2010] OJ C130/1; Communication from the Commission—Notice—Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 (Guidelines on Art 101(3)).

[5] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969.

[6] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

[7] It would be pointless to cite here the vast literature on this topic, which is discussed throughout this book. See, as illustrative of the trends highlighted in the text, C Ahlborn, DS Evans, and JA Padilla, 'The Antitrust Economics of Tying: A Farewell to Per Se Illegality' (2004) 49 Antitrust Bull 297; J Kallaugher and B Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82' (2004) 25 ECLR 263; M Motta and A de Streel, 'Excessive Pricing and Price Squeeze under EU Law' in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (Oxford, Hart Publishing 2006) 91.

[8] European Commission, DG Comp, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' (Brussels, December 2005) (the 'DG Comp Discussion Paper on Art 102').

[9] Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ('Guidance on Art 102') [2009] OJ C45/7.

B. The method

The analysis in this book is carried out in a way which is different from the current approaches to Article 102 in at least three ways.

First, this book adopts an integrated and holistic approach to the analysis of the objective and the tests of Article 102. To understand Article 102, it is necessary to study its objective and the dominance and abuse tests across the whole spectrum of exclusion, exploitation, and discrimination. Any results arrived at by focusing only on exclusionary abuses would be inherently suspect because they would lack the benefit of the understanding of important areas of application of Article 102. In this holistic approach to Article 102, the EU courts and the Commission have not been sufficiently supported by the literature. There are a myriad articles and book chapters on individual aspects of Article 102 but, by their very nature, such contributions cannot provide the integrated analysis of the objective and tests that a holistic approach requires. The few, very valuable, English-language monographs on the subject are also limited in scope. They have either not provided a thorough normative and legal analysis of the objective of Article 102[10] or have focused on exclusionary abuses only.[11] As a consequence, their conclusions lack the foundation of either a solid teleological interpretation of Article 102 or a holistic approach to exclusion, exploitation, and discrimination seen as different aspects of the same objective and analytical foundations. Also different from this book are contributions with a stronger focus on the objective but without an integrated analysis of the full implications of the identification of the objective of Article 102 for the development of the legal tests of anti-competitive exclusion, exploitation, and discrimination.[12] This book rests on the methodological premise that in order to reach robust conclusions on how Article 102 should be applied, it is necessary to accomplish both tasks: that is, to identify, on the basis of a thorough normative and legal analysis, the objective of Article 102 and to study the tests that apply to all types of abuses in the light of the objective in question. In carrying out both tasks, the method is both deductive and inductive. Certain principles, for instance that less efficient competitors must not be protected under Article 102, can be derived directly from its objective. Other principles, for instance those that apply to determining whether below-cost prices are abusive, must be understood by reviewing the case law in the light of the objective of Article 102. This method produces interesting results, above all the conclusion that the case law of the EU courts is not at all out of line with the

[10] E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford, Hart Publishing 2010) and R O'Donoghue and AJ Padilla, *The Law and Economics of Article 82 EC* (Oxford, Hart Publishing 2006).

[11] Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law*; LL Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge, CUP 2010) 113–149.

[12] Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law*.

objective of Article 102. On the contrary, the EU courts have developed a coherent framework of principles and tests that form a solid fabric on which to build a predictable and effective abuse of dominance regime. This is not to say that the case law is perfect as it is. This book will recommend significant changes in vast and hugely important areas of the law such as conditional above-cost rebates, tying, market-distorting discrimination, and exploitation. But these changes are incremental and not revolutionary because they represent developments, often radical and controversial, but developments nevertheless: not an abandonment of the fundamental values and principles that the EU courts have correctly indentified as underpinning Article 102.

Secondly, this book examines the objective and principles of Article 102 within the framework of the Treaties. The point may seem obvious but the analysis of the objective of the EU competition rules is all too often driven by policy considerations and not by the values which the Member States have enshrined in the Treaties as the foundations of the European polity. In the development of the competition tests, there is often an undisclosed assumption that the competition rules are special and insensitive to the overall system of EU law. However, nothing could be more wrong. The competition rules are explicitly linked to the objectives of the European Union, and the EU courts approach competition issues in much the same way as they would approach other issues, for instance in the area of the free movement of goods and services. This way of understanding Article 102 produces significant results, perhaps the most important of which is that the TFEU competition rules, and Article 102 in particular, do not have the objective of promoting or protecting consumer welfare, not even as one of several objectives. Article 102 has one overarching objective: to maximize long-term social welfare, this being understood as the sum of producer and consumer surplus incorporating the values and the positive and negative preferences of society. But the relevance of the contextualization of EU competition law goes beyond the debate on its objective. It reveals, for instance, that the general framework of Article 102 is based on the principle of proportionality, which has implications for the distinction between prima facie tests and defences, for the varying intensity of anti-competitive effect required under different abuse tests, and for the way in which objective justification defences are examined.

Thirdly, this book analyses Article 102 not only from a legal perspective but also under the lense of economics. It does so, however, in a way which is different from many studies in this field. The aim of the interdisciplinary approach in this book is not to assess the law against the yardstick of given economic theories or models; neither is it to understand whether the law reflects one given economic school of thought or another, or perhaps a combination of several, and in what proportion. These are relevant aspects of the analysis but not the most important ones. Instead, the adopted methodology reverses the relationship between law and economics on the assumption that a society based on the rule of law has chosen its economic values by creating a given legal framework. As a result, economics serves two purposes, one external and one internal to the legal process. In

its external role, economics verifies whether the law is fit to achieve its intended objective. In its internal role, economics contributes to shaping legal tests in order to enable them to achieve their intended purposes. These two roles of economics mean that it is necessary to make value choices from among economic theories on the basis of the model of society that the competition rules enact or reflect. On this basis, economics provides key insights to understanding the law on predation, tying, conditional rebates, and discrimination, albeit this approach does not necessarily lead to the conclusions that the proponents of the 'more economic' or 'effects-based' approach to Article 102 would expect. To give only a few examples, this book concludes that the current law on predation is correct and recoupment should not be a necessary element of the test, and that tying should be examined under an intent test.

C. The structure of the inquiry

This book is divided into five Parts. The first is devoted to a purely normative analysis of the objective of competition law and the tests for abuse of dominance. The analysis is based on economics, political economy, and modern philosophy. This separation of the normative analysis from the legal hermeneutics has three advantages. First, it avoids the contamination of the legal interpretation with normative values or choices. If the legal interpretation yields results that are inconsistent with the optimal normative standards, the solution is to change the law not to distort its interpretation. Secondly, it allows the normative analysis to perform its external role in a transparent way: the results of the legal analysis can be compared with the results of the normative analysis simply by juxtaposing the results in Part I and the results in Parts II and III. Thirdly, it allows the normative analysis to perform its internal function effectively: assuming the objective of the law is consistent with the normatively optimal objective, the legal tests may be developed by importing principles from Part I into Parts II and III.

Part II sets out the legal analysis of the objective and the general framework of Article 102. Chapter 4 identifies the objective of EU competition law and Article 102 in particular, coming to the conclusion that consumer welfare is not a relevant objective of EU competition law. Instead, the Treaties establish that long-term social welfare is the objective of the competition rules. The Court of Justice has clearly recognized this.[13] Market integration, economic freedom, and fairness or equality of opportunities are legal norms that must be understood in the light of this objective. But how does Article 102 give effect to the long-term social welfare objective? Chapter 5 sets out the conceptual and contextual premises of the tests under Article 102. These are the development of proportionality as an analytical

[13] Case C-52/09 *TeliaSonera* paras 20–21; Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] ECR I-9011, para 42; Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859, para 25.

structure and the application of the principle of proportionality in EU law in general and under Article 101 in particular. The chapter goes on to analyse the proportionality test under Article 102 and the key principles that shape the concept of abuse, namely the definition of abuse in the case law, the meaning of effective competition, and the 'doctrine' of the special responsibility of the dominant undertaking. Finally, the chapter examines the causal link between dominance, conduct, and effect. Part III develops the tests for the assessment of potential abusive conduct. Chapters 6 to 8 examine the three tests that the EU courts have applied to determine whether conduct is prima facie abusive under Article 102: the intent test (or tests), the as efficient competitor test, and the consumer harm test. The analysis is carried out by test and not, as is normally done, by abuse. This approach allows for the detection of the main themes in the complex case law of the EU courts and for parallels to be drawn between the principles relevant to abuses that have traditionally been seen as different, such as, for instance, predation and tying or margin squeeze and conditional rebates. Overall, these chapters demonstrate that the case law of the EU courts relies on a set of values and assumptions that are consistent with both the objective of Article 102 and the normative standards identified in Part I. The main problem with the case law is that it fails to articulate clear narratives capable of giving the law the required level of legitimacy, coherence, and predictability. These chapters also identify the main areas where the case law is in need of being reviewed because it is not consistent with the objective of Article 102. Chapter 9 analyses the often neglected topic of defences. Here, too, an abuse-by-abuse approach is rejected. After a discussion of the burden of proof and the standard of anti-competitive effects, Chapter 9 deals with two types of defence: proportionality defences and objective justification. Objective justification is understood to comprise an efficiency defence and a social welfare defence. This new taxonomy provides a more robust basis for a balancing of the benefits of potentially anti-competitive conduct against the harm it causes. Currently, the scales lean too heavily in favour of finding an infringement and against the consideration of the long-term benefits of conduct by dominant undertakings. The Guidance on Article 102 reinforces this trend. This approach is, however, inconsistent with the objective of Article 102 and should be restored to a more balanced position.

Part IV examines dominance. In the standard treatment of Article 102, dominance is discussed before the abuse. This is also what happens in practice, for reasons of expediency and judicial economy: an undertaking which is not dominant, cannot commit an abuse. However, the analytic of the concept of dominance logically follows the definition of abuse. Only if it is clear what abuse means, is it possible to understand why an abuse can only be committed only by certain undertakings that Article 102 considers to be dominant. Dominance itself is a complex concept. Article 102 and the case law would appear to suggest that there is a unitary concept of dominance. Instead, there are three: single dominance, which is discussed in Chapter 10, and non-oligopolistic and oligopolistic collective dominance, which are both discussed in Chapter 11.

Part V brings together the different strands of the analysis developed throughout the book. Chapter 12 sets out the main conclusions. It does so in three ways: (a) by setting out the main reasoning of the book, from the identification of the normative objective of competition law to the development of the tests; (b) by setting out the main principles and tests developed in the analysis so as to present a coherent analytical framework for the assessment of abuse under Article 102; and (c) by pointing out the main areas in the case law of the EU courts and in the enforcement practice of the Commission that need to be reviewed in order to bring the current application of the law into line with the purpose and principles of Article 102.