

Chapter 2

HISTORY, DEVELOPMENT, AND REFORM

2.1 INTRODUCTION

Viewing Article 102 TFEU in context. Article 102 TFEU forms part of the Treaty of Rome (or the EC Treaty), signed in 1957 between the six original founding Member States. The EC Treaty did not merely create legal rights and obligations: the Court of Justice confirmed from the outset that it also created a “new legal order of international law.”¹ Article 102 TFEU therefore reflects a number of the underlying political, legal, economic, and social objectives of the EC Treaty. These objectives—and the new legal order that they formed part of—did not of course arise in a vacuum but were heavily influenced by the historical and political context and legislative intent of the drafters. Understanding the genesis of Article 102 TFEU, and its historical influences, is therefore a potentially important component of its application and interpretation today, as well as its evolution and reform.

But Article 102 TFEU has not stayed rooted in its historical origins: it is a living instrument. As the Community (and now EU) has developed and grown in confidence and scope, so too have its competition law provisions, and in particular Article 102 TFEU. Charting the development of Article 102 TFEU is a critical component to seeing Article 102 TFEU in its modern-day setting. Further, perhaps the most critical phase of all—the reform of Article 102 TFEU—has been underway for the last decade or so. This reform was intended to remove certain perceived excesses or gaps in the enforcement of Article 102 TFEU. It was also intended to replace legal assertion or formal categorisation with coherent theories of harm and evidence of anticompetitive effects reflecting greater economic rigour. This chapter addresses these various influences on Article 102 TFEU and its development and reform.

2.2 HISTORY OF ARTICLE 102 TFEU

The various influences on Article 102 TFEU. Perhaps surprisingly, the origins of the wording of Article 102 TFEU, and what its author(s) intended it to mean, are not particularly well researched.² But there is a good deal of consensus that at least five different sources had a significant impact on the drafting and intended meaning of the

¹ See Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 95.

² Two notable recent exceptions are P Akman, “Searching For The Long-Lost Soul Of Article 82 EC,” SRC Centre for Competition Policy and School of Law, University of East Anglia, *CCP Working Paper 07-5* and H Schweitzer, “The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119-163. Their research covered documents on the Rome Treaties’ negotiations held at the Historical Archives of the EU in Florence (called “Special Council of Ministers of the ECSC–The Rome Treaties Negotiations 1955-1957”), most of which are in German and French. See <http://www.warc.eui.eu/invpdf/invcm3>.

competition provisions. The first was the so-called “ordoliberal” school of thought that gained prominence in post-war thinking in Germany, as well as under German competition law. A second influence was the European Coal and Steel Community (ECSC) Treaty, which pre-dated the EC Treaty and contained a number of competition provisions that were transplanted, with modifications, to the EC Treaty. A third influence is the particular economic and political situation faced by Europe in the 1950s. A fourth influence—that in a sense straddles all other influences—is the legislative intent of the drafters of the competition law provisions of the EC Treaty. A final, and underestimated, influence was United States antitrust law, which reflected the involvement of several US lawyers, including antitrust lawyers, in the establishment of the Community and the drafting of its competition provisions.

a. Ordoliberal thinking. Establishing themselves in the 1930s, a small group of German economists and lawyers belonging to the so-called “Freiburg School” espoused a new form of liberal thought which concluded that the lack of an effective, dependable legal framework had led to the economic and political disintegration of Germany, particularly evident from the collaboration between the Nazi government and private cartels as vehicles for totalitarian control.³ They considered that a competitive economic system was necessary for a prosperous, free, and equitable society. Central to this was the establishment of a legal system to prevent the creation and misuse of private economic power. Post-war, several intellectual groups developed out of the Freiburg School such as ordoliberals, who believed, in particular, that social well-being was achievable only through an economic order based on competition where law would have the specific role of creating and maintaining the conditions under which competition could function properly.

Ordoliberal thinking on the goal of competition law was based on notions of “fairness” and that firms with market power should behave “as if” there was effective competition.⁴ This reflected a view that small and medium sized enterprises were important to consumer welfare and that they should receive some protection from the excesses of market power. Ordoliberal thought therefore considered that certain

³ For a discussion of the Freiburg School and Ordoliberal thinking and its effects on European and German competition law see DJ Gerber, *Law And Competition In Twentieth Century Europe: Protecting Prometheus*, Clarendon Press (1998). See also W Möschel, “Competition Policy From An Ordo Point Of View,” in A Peacock and H Willgerodt (eds.), *German Neo-Liberals And The Social Market Economy*, Macmillan (1989) p. 145; G Amato, *Antitrust And The Bounds Of Power*, Hart Publishing, (1997) p. 41; and W Eucken, *Grundsätze Der Wirtschaftspolitik*, Mohr Siebeck (1990) p. 254. For a shorter synthesis, see J Kallaugher and B Sher, “Rebates Revisited: Anticompetitive Effects And Exclusionary Abuse Under Article 82,” (2004) 25(5) *European Competition Law Review* 263.

⁴ See DJ Gerber, *Law And Competition In Twentieth Century Europe: Protecting Prometheus*, Clarendon Press (1998) p. 241. For an updated assessment see DJ Gerber, *Global Competition Law: Law, Markets, And Globalisation*, Oxford University Press (2010), 167-168. However, Gerber’s views of ordoliberalism are not universally accepted. For criticism see EJ Mestmäcker, “The Development Of German And European Competition Law With Special Reference To The EU Commission’s Article 82 Guidance Of 2008,” in *European Competition Law: The Impact Of The Commission’s Guidance On Article 102*,” LF Pace (ed.), Edward Elgar Publishing (2011), pp. 25-63. See also H Schweitzer, “The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119-163.

restrictions on dominant firm behaviour were necessary and appropriate. The basic notion was that firms with economic power should not engage in conduct that unfairly limited rivals' access to markets or production. Of course, dominant firms had to be allowed the commercial freedom to compete on the merits. In this regard, ordoliberal thinking developed a notion of performance-based competition (*Leistungswettbewerb*). For example, non-predatory lower prices, better quality products, or better service were all considered as legitimate ways of excluding rival firms and should be permitted, whereas conduct that was not performance-based competition (e.g., below-cost prices) should be prohibited.

Perhaps the best-known ordoliberal scholar was Walter Eucken. In a seminal 1949 article he argued for a "third way" between the two extremes of central State control of markets (*Zentralverwaltungswirtschaft*) and a *laissez faire* attitude of non-intervention (*Verkehrswirtschaft*).⁵ Ahlborn and Grave (quoting Eucken) describe Eucken's "third way" as follows:⁶

"The conclusion which Eucken and other ordoliberals drew from these insights was that the competitive order needed to be protected through a political and legal framework which would safeguard the efficient functioning of the competitive order and which would protect from any self-destructive tendencies. Here, Eucken foresees a clear separation of roles for the state and the private sector: 'The policy of competitive order does not leave the choice of market forms and monetary systems to the economy itself because the experience of the era of *laissez-faire* policy speaks for itself. The development of the framework in which businesses and households can plan and act freely is governed by the economic policy under which the framework is supervised. Businesses are free to choose what they produce, what technology they use, what raw materials they purchase and what markets they wish to sell on. . . Freedom of the consumer exists, but not the freedom to choose how to define the rules of the game or the forms which the economic process takes. This particularly falls within the field of *Ordnungspolitik* (order-based policy).'"

In addition to the influence of scholars such as Eucken, it also happened that many of the key figures involved in the foundation of the European Community were associated with the ordoliberal school of thought.⁷ Some commentators have therefore argued that the abuse concept contained in Article 102 TFEU originates from a distinctly German doctrine of economic philosophy that had developed separately from the American notion of economic efficiency that underpinned the Sherman Act 1890.⁸ It is argued for

⁵ The article was W Eucken, "Die Wettbewerbsordnung Und Ihre Verwirklichung," 2 *ORDO, Jahrbuch Fur Die Ordnung Von Wirtschaft Und Gesellschaft* 1-99 (1949). C Ahlborn and C Grave produced an abridged translation in Vol. 2(2) *Competition Policy International* 219 (2006) and an accompanying detailed analysis: see C Ahlborn and C Grave, "Walter Eucken And Ordoliberalism: An Introduction From A Consumer Welfare Perspective," *Competition Policy International*, Vol. 2(2) Autumn 2006, 197.

⁶ Ahlborn and Grave, *ibid.*, at 200-201.

⁷ These included Walter Hallstein, who became the first president of the European Commission, and Hans von der Groben, one of the two principal drafters of the Spaak Report—the document from which the EC Treaty was fashioned. See W Hallstein, *Europe In The Making*, George Allen and Unwin (1972); and Hans-Jürgen Küsters, *Die Gründung Der Europäischen Wirtschaftsgemeinschaft*, Nomos-Verlagsgesellschaft (1982) pp. 135-60.

⁸ DJ Gerber, "Law And The Abuse Of Economic Power In Europe," (1987) 62 *Tulane Law Review* 85. Schweitzer also makes the practical point that at the same time the influential German delegation

example that: (1) the importance of markets shares for dominance (and relatively low thresholds applied) under Article 102 TFEU; (2) the “special responsibility” of dominant firms;⁹ (3) the formalistic approach to many abuses; and (4) the control of exploitative abuses reflect the strong influence of ordoliberal thinking on Article 102 TFEU.¹⁰

But this is not universally accepted, and in any event, there is a danger of overstating the influence of ordoliberal thinking on Article 102 TFEU, at least today.¹¹ First, even *within* ordoliberalism, there was not necessarily a unity of views.¹² Second, an approach rooted in history would wholly or largely exclude the impact of antitrust economic thinking post-1960, which would be an extraordinary omission given, for example, the *volte faces* that have occurred in the legal treatment of tying abuses and many forms of vertical restraints in the intervening period. Third, there is consensus that competition law is generally focused on loss or damage to consumer welfare, albeit it is accepted that this may not require a direct demonstration of such effects *via* price increases or output reductions.¹³ It is difficult, albeit not impossible,¹⁴ to align a rather abstract notion of competition in ordoliberalism—which is not directly anyway, rooted in practices that harm consumers but involves wider notions of “economic freedom”—with a modern-day consumer welfare standard. Fourth, it appears unsatisfactory—and arbitrary in the case of abuses involving agreements—that the ordoliberal approach should materially influence Article 102 TFEU but have little or no analogue in the application of Article 101 TFEU. These two instruments should be consistent where

were involved in the drafting of the Treaty of Rome’s competition provisions, they were also involved in the elaboration of a new national competition law. So the latter fed into the former. See H Schweitzer, “The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119-163 at 134.

⁹ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para. 10. See generally Ch. 5 (The General Concept of an Abuse).

¹⁰ C Ahlborn and C Grave, “Walter Eucken And Ordoliberalism: An Introduction From A Consumer Welfare Perspective,” *Competition Policy International*, Vol. 2(2) Autumn 2006, 197, at 207-209.

¹¹ Thus, Schweitzer notes: “In fact, the degree of congruence between Article [102] and ordoliberal positions is difficult to determine. No fully developed ordoliberal position on the treatment of market dominance existed at the time the EC Treaty was negotiated.” See H Schweitzer, “The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119-163 at 133.

¹² Schweitzer (*ibid.*, at 134) notes that the conventional view of ordoliberal competition stating that dominant firms should behave “as if” there were competitive constraints “was not a proposition uniformly accepted by ordoliberals.” She adds that “certain scholars associated with the ordoliberal school...were among the most outspoken critics of the concept of ‘as if’ competition, and they were influential in ensuring that it never became part of German competition law.” See also EJ Mestmäcker, “The Development Of German And European Competition Law With Special Reference To The EU Commission’s Article 82 Guidance Of 2008,” in LF Pace (ed.), *European Competition Law: The Impact Of The Commission’s Guidance On Article 102*, Edward Elgar Publishing (2011), pp. 25-63.

¹³ See, most recently, under Article 102 TFEU Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-nyr.

¹⁴ See C Ahlborn and C Grave, “Walter Eucken And Ordoliberalism: An Introduction From A Consumer Welfare Perspective,” *Competition Policy International*, Vol. 2(2) Autumn 2006, 197, 210-211 and L Lovdahl Gormsen, “The Conflict Between Economic Freedom And Consumer Welfare In The Modernisation Of Article 82 EC,” (2007) 3(2) *European Competition Journal* 329.

possible.¹⁵ Finally, while there is debate about the *extent* of the Commission's and the EU Courts' transition towards an effects-based approach to Article 102 TFEU that is more firmly grounded in sound economic thinking, it appears undeniable that this process has *begun*. To that extent, the role of ordoliberal thinking is also likely to be further diminished.

b. Experience with the ECSC Treaty. The ECSC Treaty, created by the Treaty of Paris in 1951, was one of the principal developments that led to the Treaty of Rome in 1957.¹⁶ The idea was to pool the coal and steel industries of the signatories in an effort to place the essential factors of production under the control of a supranational organisation, which, it was thought, would reduce the prospects of another war in Europe. The ECSC was the institutional model for the European Community established by the Treaty of Rome, and included a Council of Ministers (representing national governments), a High Authority (equivalent to the Commission), an Assembly of national parliamentarians, and a Court of Justice. The drafting of the ECSC Treaty was charged to Jean Monnet, the leading architect of the various EC treaties.

Various objectives were set under the ECSC Treaty: to ensure that all comparably placed consumers in the market have equal access to sources of production; to ensure the establishment of the lowest prices without this resulting in higher prices being charged by the same undertakings in other transactions or in a higher general price level at another time; to promote expansion and modernisation of production; and to promote the growth of international trade.¹⁷ Monnet also called for a strong competition law on the grounds that this was necessary to achieve the broader integrative Community goals. Two competition law provisions, one prohibiting cartels and anticompetitive agreements and another dealing with concentrations and misuses of economic power, provided legislative support for these objectives.

At the time of the founding Community treaties, no European country—with the possible exception of Germany¹⁸—had any significant competition laws. Because there was no other relevant comparator, the competition provisions of the ECSC Treaty inevitably had an impact on those contained in the EC Treaty. Article 102 TFEU therefore contains similar wording to Article 66(7) ECSC.¹⁹

¹⁵ See Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365, para. 33.

¹⁶ The ECSC Treaty was signed by the governments of France, the West German Federal Republic, Italy, Belgium, the Netherlands and Luxemburg on 18 April 1951 in Paris, entered into force on 23 July 1952 and expired on 23 July 2002. For discussion of the ECSC Treaty see G Bebr, "The European Coal and Steel Community: A Political and Legal Innovation," (1953) 63 *Yale Law Review* 1.

¹⁷ Article 3 ECSC.

¹⁸ The German competition law, the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), was adopted in 1957 but its essential components were already in place by 1956.

¹⁹ Article 66(7) ECSC provided that, "if the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used."

c. The political and economic context in post-war Europe. It can also be argued with some force that an important influence on the competition law provisions of the EC Treaty was the particular political and social context in which Europe and the founding EU Member States found themselves in at the time. For example, given the preponderance, at the time, of undertakings that had received exclusive or special rights from their national governments, there was widespread fear that discrimination against foreign undertakings would be rife.²⁰ This was most likely one of the reasons why Article 102(c) included a specific non-discrimination clause. The result was of course very anticompetitive, but made some sense in the 1950s. The Spaak Report for example mentions the issue of price and non-price discrimination (e.g., delays, refusals to deal) as a key concern of the competition rules.²¹ Discrimination was said to be a particular problem in the context of monopolies.²² But of note is the Spaak Report's statement that the competition rules could not be expected to address all issues from day one and that they would necessarily have a dynamic or evolutionary aspect.²³ It therefore warned *against* rigidity.

d. Legislative intent. Recent research by Akman and Schweitzer sheds some interesting light on the post Spaak Report discussions that led to the eventual wording in what is now Article 102 TFEU and, therefore, the legislative intent of the provision.²⁴ Among the more notable points are: (1) the question whether to prohibit a dominant position itself or its abuse of it appears to have arisen, with the latter option ultimately having been taken; (2) perhaps most surprisingly, there is a suggestion that exclusionary abuse was *not* originally intended to be covered at all: only exploitation (or discrimination); (3) the drafters were well aware of the difference between protecting competitors and protecting competition; (4) the final provisions appear to be a compromise between the six delegations, with the German delegation having its way perhaps more than any other delegation; and (5) while the intention was to build up the strength of European industry, the concern that Europe should not insulate itself and build up barriers to entry was also noted.

e. Influence of US thinking and lawyers. A perhaps underestimated influence on the wording and meaning of Article 102 TFEU was the prominent role played by several

²⁰ The ECSC Treaty thus obliged steel and coal companies to publish and stick to their price lists, precisely to prevent discrimination. See J Temple Lang, "Anticompetitive Non-Pricing Abuses Under European And National Antitrust Law," in BE Hawk (ed.), *2003 Fordham Corporate Law Institute*, Juris Publishing, Inc. (2004), Ch. 14. Indeed, in practice, most cases arising under Article 102(c) have concerned direct and indirect nationality discrimination: see Ch. 15 (Abusive Discrimination).

²¹ See Rapport Des Chefs Délégation Aux Ministres Des Affaires Etrangères, 21 April 1956 (hereinafter, the "Spaak Report"), p. 53. The Spaak Report was the basis for a treaty-drafting meeting that took place in Brussels on 26 June 1956. An English summary is available, although it is rather condensed and misses important nuances: see The Brussels Report on the General Common Market, available at http://aei.pitt.edu/995/1/Spaak_report.pdf.

²² Spaak Report, *ibid.*, p. 55.

²³ Spaak Report, *ibid.*, pp. 56-57.

²⁴ See P Akman, "Searching For The Long-Lost Soul Of Article 82 EC," SRC Centre for Competition Policy and School of Law, University of East Anglia, *CCP Working Paper 07-5*, at pp. 22-28. See also H Schweitzer, "The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC," in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119-163.

US lawyers, including antitrust lawyers, in the establishment of the various Community treaties and the drafting of the competition provisions in particular. The reasons for this were both political and intellectual. Politically, at the time the ECSC Treaty was being negotiated, the United States was an occupying power in what was then West Germany. It was also a major influence in other European countries through the Marshall Plan, which was conditional, *inter alia*, on European countries dismantling trade barriers and creating conditions under which their own recovery could take place. The various Community treaties were a central part of this recovery. US influence on the background and drafting of the Community treaties was therefore significant.²⁵

At the same time, it is important to appreciate that there were and are differences between Article 102 TFEU and its analogue under US antitrust law, Section 2 of the Sherman Act.²⁶ Some of the reasons are historical and may therefore be less important

²⁵ See DL McLachlan and D Swann, *Competition Policy In The European Community*, Oxford University Press (1967) p. 196. In terms of intellectual inspiration, it so happened that Robert Bowie, a professor of antitrust law at Harvard University, who then worked in the office of the US High Commissioner for Germany, was given the task of drafting the competition provisions of the ECSC Treaty, which in turn had an impact on the wording of Articles 101 and 102 TFEU. According to Jean Monnet, these provisions, “drafted with great care by Robert Bowie, represented a fundamental innovation in Europe.” See J Monnet, *Mémoires*, Paris (1976) p. 413. In formulating the wording of these provisions, Bowie was “building unmistakably on American antitrust tradition.” See ML Djelic, “Exporting The American Model—Historical Roots Of Globalisation,” in JR Hollingsworth, KH Mueller, and EJ Hollingsworth (eds.), *Advancing Socio-Economics: An Institutional Perspective*, Rowman and Littlefield (2002). See also W Diebold, *The Schuman Plan*, Praeger (1959) p. 352, cited in DJ Gerber, *Law And Competition In Twentieth Century Europe: Protecting Prometheus*, Clarendon Press (1998) p. 339. According to Diebold, Bowie’s draft was rewritten in an European idiom, emerging as a “blend [of] several European approaches to cartel questions with elements drawn from American practice and experience” before being adopted. Other US lawyers were equally prominent at the time in elaborating the founding Community treaties. A number deserve specific mention. George Ball, an American lawyer and diplomat, was asked by the French government to help Jean Monnet think through the general direction and approach of the French recovery plan. Together with another lawyer, Eugene Rostow, he played a significant role in helping Monnet identify the key features of the American economic model for incorporation in the French plan. Ball and Rostow remained involved with Monnet and the strategic thinking that took place around the ECSC Treaty and Treaty of Rome. Robert Bowie acted as General Counsel to the American High Commissioner in Germany, John McCloy. As a personal friend of Monnet, McCloy agreed to lend Bowie to Monnet for a few months in 1950, during which time Bowie drafted the competition provisions of the ECSC Treaty. It is also notable that works describing and analysing US antitrust became increasingly common around this period, while groups of practising lawyers, bureaucrats and academics visiting the United States were impressed by how the antitrust laws operated. These broadly positive experiences provided a basis for the inclusion of analogous competition law provisions in the ECSC and Community Treaties.

²⁶ For more discussion of the differences between Article 102 TFEU and Section 2, see R Joliet, *Monopolisation And Abuse Of Dominant Position: A Comparative Study Of The American And European Approaches To The Control Of Economic Power*, Nijhoff (1970); BE Hawk, “Antitrust In The EEC—The First Decade,” (1972–1973) 41 *Fordham Law Review* 282; SM James, “The Concept Of Abuse In EEC Competition Law: An American View,” (1976) 92 *The Law Quarterly Review* 242; RE Bloch, HG Kamann, JS Brown, and JP Schmidt, “A Comparative Analysis Of Article 82 And Section 2 Of The Sherman Act,” paper submitted to the International Bar Association 9th Annual Competition Conference, 21–22 October 2005; H Schweitzer, “The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119–163; E Fox, “The Market Power Element Of Abuse Of Dominance—Parallels And Differences In

today. US antitrust law was borne of the desire to dismantle a number of cartels and conglomerates, or “trusts” as they were known, that had come to dominate late nineteenth century economic life in the United States, with adverse effects for consumers. The genesis of competition law in Europe was very different and reflected a desire to break down trade barriers and promote economic integration, in the hope that this would lead to a period of stability and peace in the post-war European environment. A second set of differences could broadly be described as philosophical. Section 2 adopts a more minimalist, or less interventionist, approach to enforcement than Article 102 TFEU. In other words, rightly or wrongly, the EU institutions appear to have greater confidence in their predictive assessments of markets. By contrast, the US agencies and courts appear to have less confidence in their predictive abilities,²⁷ and believe, probably correctly, that market forces are better overall at correcting inefficiencies than government or court interventions. The overriding fear is that excessive intervention could chill desirable market activity.

Finally, the substantive conditions of Article 102 TFEU and Section 2 of the Sherman Act also differ in certain respects. In particular, the difference in the language of the provisions show that the laws were conceived to allow government intervention in somewhat different circumstances. Article 102 TFEU aims to prevent powerful firms from using their power abusively, but the mere existence of dominance is not unlawful. Section 2, on the other hand, does not require a prior formal finding of a dominant position, but seeks to identify anticompetitive conduct that creates or threatens to create a monopoly. Another important difference is that Section 2 contained no corresponding provision to Article 102(a) on excessive pricing. Article 102 TFEU is also thought to diverge from Section 2 in the areas of predatory pricing (unlike Section 2, there is no need to show an ability to recoup losses under Article 102 TFEU), loyalty rebates (these are generally treated as lawful under Section 2, whereas under Article 102 TFEU they

Attitudes—US and EU,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 109-118; and BE Hawk, “Article 82 and Section 2: Abuse and Monopolising Conduct,” in *Issues In Competition Law And Policy 871* (ABA Section of Antitrust Law 2008). For an economic perspective, see FM Fisher, “Monopolisation Versus Abuse Of Dominant Position: An Economist’s View,” in BE Hawk (ed.), *2003 Fordham Corporate Law Institute*, Juris Publishing, Inc. (2004), Ch. 9.

²⁷ See, e.g., *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, (1993), where the US Supreme Court’s reluctance to treat price cuts as predatory was based, *inter alia*, on the concern that a strict rule could chill legitimate price competition. A more practical, and often overlooked, reason for a less interventionist approach under Section 2 is that the financial consequences of competition-law violations for defendants are generally much more serious than in Europe. Civil damages for Section 2 violations are three times the actual damage—so-called treble damages—whereas, in Europe, only single damages are, for now, the norm. Private antitrust litigation is also much more pervasive in the United States, which, again, helps explain a certain reluctance on the part of the government agencies to enunciate some of the broad principles established under Article 102 TFEU. It may also be that the more interventionist approach to competition law in Europe is justified by a greater incidence of State monopolies and other exclusive rights. Europe remains unique among global economic and political concentrations in that it is not composed of a single nation state, but several sovereign Member States. Sovereign nation states had, and continue to have, reasons of national interest that help explain a relatively high incidence of State measures that distort competition. Indeed, eliminating national restrictions of competition continues to be very important in Europe given the residual effects of Communist control on the economies of several recently-acceded States.

have in some cases been subject to a presumption of illegality), and refusals to deal (the duty to deal doctrine is more vibrant in Europe than in the United States).

2.3 DEVELOPMENT OF ARTICLE 102 TFEU

Overview of the various stages of development of Article 102 TFEU. Any synthesis of the development of Article 102 TFEU that seeks to identify distinct stages runs the risk of being arbitrary. Nonetheless, it is possible to make a meaningful distinction between different stages in the development of Article 102 TFEU. The first stage, lasting from the period of the adoption of EC Treaty in 1957 throughout most of the 1960s, was characterised by non-enforcement. The second phase, lasting from the late 1960s until the late 1970s, saw a more active enforcement policy and, significantly, a series of judgments that elaborated on the basic elements of abuse that still form the cornerstone of policy and practice today. A final phase lasting from the 1980s throughout most of the 1990s was characterised by a more interventionist approach by the Commission in which it developed several operational rules for specific abuses, building on the general principles established by the Court of Justice.

Phase #1: the early years of non-enforcement. The Commission's enforcement of Article 102 TFEU was practically non-existent in the years following the adoption of the EC Treaty. This is generally thought to have reflected two considerations. First, the practical application of Article 102 TFEU was unclear: the concept of abuse of a dominant position was not defined in the text of the EC Treaty; nor did any national competition law system explain how the concept should be interpreted or applied. While several European countries, such as France, Belgium, and Germany, had established national legislation based on the abuse principle, enforcement was extremely limited. Likewise, at the time Article 102 TFEU was enacted, Article 66(7) ECSC had never been applied either. The absence of defined criteria led some commentators to fear that Article 102 TFEU would ultimately become a dead letter.²⁸

A second obstacle to Article 102 TFEU enforcement was politically motivated. During the early period of European unification, many saw economic integration as the only means of dealing with the combined economic and political strength of the United States. European policy was focused on creating an integrated market in which European businesses, often "national champions," could grow to a sufficient size to compete with foreign companies. Accordingly, there was, in the early years, a lack of willingness to enforce Article 102 TFEU. Strict application meant that dominant European firms who were well-placed to compete against their US rivals could have been hampered in their ability to grow or compete internationally.²⁹

Phase #2: developing the framework for the application of Article 102 TFEU. Beginning in the late 1960s, the Commission sought to develop a basic framework for the application of Article 102 TFEU. The Commission's first statement concerning the

²⁸ See I Samkalden and IE Druker, "Legal Problems Relating To Article 86 Of The Rome Treaty," (1966) 3 *Common Market Law Review* 158–183.

²⁹ This policy can also be seen in the Commission's earlier permissive stance toward many horizontal agreements involving small and medium-sized companies. See BE Hawk, "Antitrust In The EEC—The First Decade," (1972–1973) 41 *Fordham Law Review* 234 and 268.

interpretation of the concept of an abuse—the 1966 Memorandum on Concentration—signalled that its reticence to apply Article 102 TFEU was on the wane.³⁰ Not long after the Memorandum on Concentration was published, the Commission and the Court of Justice sought to develop the concept of an abuse in several decisions and cases.³¹ In a series of cases relating to purported misuse of intellectual property rights the Court of Justice had its first opportunity to interpret Article 102 TFEU.³² The Court stated that, although the existence of these rights was not affected by the EC Treaty, their exercise may nevertheless fall under the prohibitions laid down in Articles 101 and 102 TFEU.

The 1970s saw a number of seminal judgments in which the principal elements of Article 102 TFEU were elaborated.³³ In *Continental Can*,³⁴ the Court of Justice held, somewhat controversially, that mergers and acquisitions could, in certain circumstances fall under the prohibition in Article 102 TFEU. This ruling is generally regarded as a striking example of judicial legislation intended to compensate for the fact that there were no Community rules on merger control at the time. But the Court also established two other important general principles: first, that the examples of abuses in Article 102 TFEU were not necessarily exhaustive and, second, that the concept of an abuse covered not only direct harm to competition, but also indirect harm in the form of conduct that adversely affects the structure of competition.³⁵ The following year, in *Commercial Solvents*,³⁶ the Court held that a dominant supplier of an essential raw material may have a duty to deal with a downstream customer that depended on it and that the dominant firm's self-interest in dealing only with its downstream subsidiary was

³⁰ The Memorandum on Concentration contained two basic principles aimed at answering the question: what constituted an abuse? According to the Memorandum, an abuse could only occur where there was a direct causal link between the firm's market power and its effect on the market, meaning that a dominant firm could use its position of dominance to obtain benefits that it could not obtain if it were exposed to effective competition. The second principle of interpretation is even broader—and less helpful—than the first, claiming that an abuse occurred when a dominant firm's conduct is incompatible with the objectives of the EC Treaty (para. 676). See *Mémorandum sur le Problème de la Concentration dans le Marché Commun* (December 1, 1965), reprinted in (1966) *Revue Trimestrielle de Droit Européen* 651–77, p. 670 (reprinted in (1966) 26 *Common Market Law Review* 1–30).

³¹ See also First Report on Competition Policy (1971), p. 74 (“In 1971 the European Commission's competition policy which, during the first decade had concentrated on the application of rules concerning agreements, entered the phase of application of Article [102]. As a result of considerable efforts made to define the interpretation and application of this important provision, and following a constant supervision of the market with a view to finding out whether there were threats of abuse of dominant positions, the Commission took its first two decisions in the *Gema* and *Continental Can* cases.”).

³² See Case 24/67, *Parke, Davis and Co v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55; Case 40/70, *Sirena Srl v Eda Srl and others* [1971] ECR 69; and Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* [1971] ECR 487.

³³ See H Schweitzer. “The History, Interpretation And Underlying Principles Of Section 2 Sherman Act And Article 82 EC,” in CD Ehlermann and M Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach To Article 82 EC*, pp. 119–163, at p. 138.

³⁴ See Case 6/72, *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215.

³⁵ *Ibid.*, para. 26.

³⁶ Joined Cases 6-7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] ECR 223.

not necessarily a defence. This case forms the basis of the current principles on refusal to deal under Article 102 TFEU.

Three subsequent cases in the 1970s laid the foundation for many of the basic principles under Article 102 TFEU. In *Suiker Unie*, the Court of Justice dealt with a wide range of abusive practices, including exclusive contracts, payments in return for not dealing with rival firms, discrimination under Article 102(c), and “limiting production” under Article 102(b).³⁷ The latter concept in particular had significant implications for the definition of exclusionary abuses. In *United Brands*,³⁸ the Court dealt with its first major case of abuse that affected market integration. *United Brands* was found guilty of a series of measures aimed at limiting competition between its distributors and retailers, including export bans, price discrimination, and threats to de-list distributors who dealt with rival firms. The case is also notable for its treatment of excessive pricing because the Court struck down the Commission’s finding due to inadequate proof. The final case, *Hoffmann-La Roche*, is among the more important cases under Article 102 TFEU, since it laid out the Court’s basic definition of an exclusionary abuse.³⁹

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and 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.”

The case also laid out the most comprehensive framework for exclusive dealing obligations, so-called fidelity rebates, loyalty rebates, and analogous practices such as English clauses under Article 102 TFEU.⁴⁰

Phase #3: significant intervention through elaboration of the general principles.

Although the basic concept of an abuse had been articulated by the Court of Justice in a series of cases in the 1970s, very few operational rules had been laid down by the Commission as a result. Throughout the 1980s and 1990s, the Commission, backed by the EU Courts, developed a number of rules for specific examples of abusive conduct. An important early case was *Michelin I*,⁴¹ where the Court of Justice laid down the detailed conditions for abusive loyalty discounts. The case is also notable for the Court’s formulation that, while “a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.”⁴²

³⁷ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Coöperatieve Vereniging “Suiker Unie” UA and others v Commission* [1975] ECR 1663, paras. 399, 482–483, and in particular paras. 523–527.

³⁸ Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

³⁹ Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para. 6.

⁴⁰ See generally Ch. 8 (Exclusive Dealing and Related Practices) and Ch. 9 (Loyalty Rebates and Related Practices).

⁴¹ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461.

⁴² *Ibid.*, para. 10.

In *AKZO*,⁴³ the Commission first laid down the conditions for predatory pricing. It concluded that prices below a firm's average variable costs—costs that vary with output—were presumptively abusive and that prices above average variable cost, but below average total cost—the sum of average variable and average fixed costs—could also be regarded as abusive if they were part of a plan to eliminate a competitor. A related rule concerning price squeeze abuses was laid down in *Napier Brown/British Sugar*.⁴⁴ There, the Commission ruled that the vertically-integrated dominant firm would be guilty of a price squeeze abuse against a downstream rival to whom it supplied an important input if the dominant firm's own business could not make a profit on the basis of the price charged by the dominant firm to the rival.

One of the most significant innovations by the Commission during this period was the adoption of an interventionist approach to the circumstances in which a dominant firm can be compelled to deal with rival firms. This doctrine was first developed in a series of cases concerning access to essential port infrastructure, airport facilities, and essential assets owned by a consortium of competing firms.⁴⁵ In *Bronner*, the Court of Justice sought to place clearer limits on the doctrine by insisting on proof that the input was non-replicable and truly essential for effective competition.⁴⁶ A controversial application of this doctrine concerned the case of intellectual property rights. Although the Court of Justice had confirmed in 1988 in *Volvo*⁴⁷ that the exercise of an intellectual property right might involve abusive conduct, the extension of that principle in *Magill*⁴⁸ to require dominant broadcasters to licence their television listings information to a publisher that wished to produce a new composite television guide generated enormous controversy. The outcome in that particular case was probably correct, but there was also widespread concern that valuable property rights could also be subject to mandatory sharing. Similar concerns were expressed following the *IMS Health* interim decision where the Commission, on admittedly unusual facts, concluded that an intellectual property right could be subject to a duty to share where the refusal to do so risked the elimination of competition.⁴⁹ The case was seen, with some justification, as running the risk of conflicting with the well-established principles of intellectual property laws.⁵⁰

⁴³ *ECS/AKZO*, OJ 1985 L 374/1, upheld on appeal in Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, paras. 72-73.

⁴⁴ *Napier Brown/British Sugar*, OJ 1988 L 284/41.

⁴⁵ See Ch. 10 (Refusal to Deal).

⁴⁶ Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7791.

⁴⁷ Case 238/87, *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211.

⁴⁸ *Magill TV Guide/ITP, BBC and RTE*, OJ 1989 L 78/43, confirmed on appeal in Case T-69/89, *Radio Telefis Eireann (RTE) v Commission* [1991] ECR II-485, Case T-70/89, *British Broadcasting Corporation and BBC Enterprises Ltd (BBC) v Commission* [1991] ECR II-535, and Case T-76/89, *Independent Television Publications Ltd (ITP) v Commission* [1991] ECR II-575, and further confirmed in Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann and Independent Television Publications Ltd (RTE & ITP) v Commission* [1995] ECR I-743.

⁴⁹ *NDC Health/IMS Health—Interim Measures*, OJ 2002 L 59/18.

⁵⁰ See Ch. 10 (Refusal to Deal).

2.4 THE REFORM OF ARTICLE 102 TFEU

2.4.1 The Road To Reform

Impetus for reform. The Commission's expansion of the concept of an abuse had become increasingly controversial over time. Some of that controversy stemmed from the inherent difficulty of distinguishing the type of exclusion that competition law encourages—legitimate competition—and unlawful exclusion. This is a debate that extends far beyond the EU.⁵¹ An abuse has been variously defined under Article 102 TFEU as conduct that does not amount to “competition on the merits”—that is by lower prices and better products,⁵² the “special responsibility” of a dominant firm not to restrain any remaining competition,⁵³ or conduct that is not “normal competition.”⁵⁴ Unfortunately, as discussed in Chapter Five (The General Concept of an Abuse), these definitions are largely conclusory and lack clear normative content that would allow a firm to determine *a priori* when its conduct might run afoul of the law. This lack of clarity surrounding the definition of an abuse stimulated a lively debate on what the standard for assessing exclusionary behaviour is or should be. In particular, the debate focused on the search for a single, unified standard that would define abusive conduct. Several different tests were proposed.⁵⁵ The detailed application of the various tests is discussed in Chapter Five, but it is sufficient to note here that a great deal of uncertainty exists regarding the relative merits of each test and how they would work in practice.

But the controversy surrounding the application of Article 102 TFEU was not confined to the inherent difficulty of verbalising a unified test that would define abusive conduct. Most of it concerned the Commission's *application* of Article 102 TFEU in practice. Several criticisms had been levelled. First, the law was unclear in important respects and certain ill-considered statements by the Commission, particularly on pricing abuses, suggest a broad definition of abusive conduct without clear limiting principles. Another reason for the lack of clarity is that there have been relatively few reported

⁵¹ In the United States, the Antitrust Modernisation Commission published a report on Section 2 of the Sherman Act which strongly advocated in favour of lesser enforcement. Among the more notable features of the report was its strong line on refusals to deal being presumptively legal and articulation of a “bright line” predation test for bundled rebates. See US Antitrust Modernisation Report, April 2007, Chapter I.C, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm. One of the first acts of the new administration under President Obama was to withdraw the report. See “Justice Department Withdraws Report On Antitrust Monopoly Law,” 11 May 2009, US Department of Justice press release, available at http://www.usdoj.gov/atr/public_press_releases/2009/245710.pdf.

⁵² See, e.g., Comments by Mario Monti on the speech given by Hew Pate, the (then) Assistant Attorney General, US Department of Justice, at the Conference “Antitrust in a Transatlantic Context,” Brussels, 7 June 2004 (“I think we can both agree that in competition the best should win on the merits, but only on the merits. Whenever dominant companies can use their market power to win in a market for reasons that are not related to the price or quality of their products, then we should consider intervening.”).

⁵³ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para. 87.

⁵⁴ Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para. 91.

⁵⁵ For a good overview of the main competing theories, see J Vickers, speech to the 31st conference of the European Association for Research in Industrial Economics, Berlin, 3 September 2004.

Article 102 TFEU decisions and cases at EU level—around 70 in just over fifty years of enforcement. The case law and practice had also arisen pragmatically, and to some extent haphazardly (largely in response to complaints to the Commission and appeals to the EU Courts against Commission decisions adopted on the basis of such complaints). With the exception of specialised Notices and guidance in the telecommunications and postal sectors,⁵⁶ the Commission had not attempted to develop any kind of general or comprehensive statement on abusive behaviour. Instead, the Commission and the EU Courts dealt with individual cases that were said to raise questions of abuse by reference to the facts of the specific case, seemingly without having any clear general analytical or intellectual framework for doing so. As a result, a number of basic questions were not answered or even discussed, because due to the accidents of litigation or otherwise, they did not arise in any of the cases that had been decided.

A second criticism of Commission practice is that it sometimes runs the risk of protecting competitors at the expense of competition.⁵⁷ One of the areas most criticised concerns conditional discounts, such as loyalty rebates and similar schemes.⁵⁸ Although there is some economic consensus that such schemes can, in certain circumstances, raise competition concerns, the position under Article 102 TFEU is that, following *Michelin II*⁵⁹ and *British Airways/Virgin*,⁶⁰ certain forms of rebates were effectively treated as *per se* illegal. In this circumstance, concern has been expressed that a strict rule on conditional above-cost discounts denies consumers the benefit of lower prices on the grounds that they would harm competitors.

A final criticism is that the influence of economics had not been felt as strongly under Article 102 TFEU as it has been under Article 101 TFEU and EU merger control law.⁶¹ Under Article 101 TFEU, the Commission had published a series of block exemptions and detailed guidelines that dealt with the treatment of vertical restraints,⁶² horizontal cooperation agreements,⁶³ and technology licensing.⁶⁴ In the area of merger control, the

⁵⁶ See Notice on the application of the competition rules to access agreements in the telecommunications sector—framework, relevant markets, and principles, OJ 1998 C 265/2; Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, 1998 OJ C 39/2.

⁵⁷ See, e.g., EM Fox, “We Protect Competition, You Protect Competitors,” (2003) 26(2) *World Competition* 149–165.

⁵⁸ See Ch. 9 (Loyalty Rebates and Related Practices).

⁵⁹ *Michelin*, OJ 2002 L 143/1, para. 216, and Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071

⁶⁰ Case T-219/99, *British Airways Plc v Commission* [2003] ECR II-5917.

⁶¹ See J Vickers, speech to the 31st conference of the European Association for Research in Industrial Economics, Berlin, 3 September 2004; A Fletcher, “Towards A More Economics-Based Approach To Article 82,” initial comments on an initial paper by the Competition Law Forum Review Group: *The Reform Of Article 82: Recommendations On Key Policy Objectives*, 15 March 2004.

⁶² See Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336/21 and Commission Notice—Guidelines on Vertical Restraints, OJ 2000 C 291/1. These documents have since been replaced by Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1, and Commission Notice—Guidelines on Vertical Restraints, OJ 2010 C 130/1.

⁶³ See Commission Notice—Guidelines on the applicability of Article 81 to horizontal cooperation agreements, OJ 2001 C 3/2 (since replaced by Communication from the Commission — Guidelines on

Commission had also published guidelines outlining the principles applied in its analysis of the most common type of merger cases—mergers between direct competitors.⁶⁵ These documents were prepared with extensive consultation, including with leading economists, and they reflected a clear willingness on the part of the Commission to embrace current economic thinking in the areas of agreements and mergers. No comparable documents existed under Article 102 TFEU, apart from a couple of specialised Notices in the telecommunications and postal sectors (which were not generally relied upon outside these specialised areas).

Another difficulty is that there was a disconnect between some of the economic thinking that underpinned the Commission's public documents under Article 101 TFEU and EU merger control on the one hand and its practice under Article 102 TFEU on the other. For example, in the area of vertical restraints, the Commission's guidelines under Article 101 TFEU recognise that exclusive dealing and analogous arrangements can have important procompetitive features. In essence, they encourage distributors to focus their promotional efforts on a single manufacturer and prevent other firms from "free-riding" on that manufacturer's success. Exclusive dealing may also have anticompetitive effects, but the guidelines recognise that it is necessary in each case to evaluate the net effects of the agreement.

By contrast, under Article 102 TFEU, a strict presumption of illegality had been applied to exclusive dealing arrangements and analogous schemes such as loyalty rebates.⁶⁶ Although this presumption has been relaxed somewhat in recent decisions,⁶⁷ the Commission has routinely rejected under Article 102 TFEU several procompetitive features of distribution arrangements that it accepted under Article 101 TFEU.⁶⁸ While the presence of dominance under Article 102 TFEU clearly affects the analysis, it cannot *a priori* mean that the procompetitive features of vertical restraints recognised under Article 101 TFEU are absent in an Article 102 TFEU case. At the very least, this dichotomy could give rise to arbitrary results depending on whether the case *happened* to be pursued under Articles 101 or 102 TFEU, which is obviously unsatisfactory.

the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11/1).

⁶⁴ Commission Regulation (EC) No 772/2004 of April 27, 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11; Commission Notice—Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ 2004 C 101/2. The legislation will be replaced with effect from 27 April 2014, also with new guidelines.

⁶⁵ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31/5.

⁶⁶ In *Hoffmann-La Roche*, for example, the Court of Justice stated that the concept of abuse "in principle includes any obligation to obtain exclusively from an undertaking in a dominant position, which benefits that undertaking." See Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para. 121 (emphasis added).

⁶⁷ Case T-65/98, *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653. But see *Intel*, Commission Decision of 13 May 2009, which appears to favour a strict approach.

⁶⁸ See Ch. 8 (Exclusive Dealing and Related Practices).

2.4.2 The Discussion Paper And Its Antecedents

Tacit acceptance of certain of the criticisms of Article 102 TFEU decisions. The Commission announced in 2003 that it would undertake a review of policy under Article 102 TFEU. The review was said to be prompted by several considerations that reflect many of the criticisms outlined above.⁶⁹ First, the Commission accepted that Article 102 TFEU has lagged behind Article 101 TFEU and EU merger control law in that there had been no reassessment and modernisation of policy and practice. In particular, the Commission accepted that, unlike Article 101 TFEU and merger policy, it had “never had a comprehensive reassessment of policy under Article [102] in the light of economic thinking.”⁷⁰ Second, Article 102 TFEU was an area in which predictable rules were important and was an area where there was little policy guidance. Certain commentators argued that the Commission should adopt guidelines on the most important practices, in particular pricing.⁷¹ Third, in an environment where national authorities and courts were increasingly responsible for applying Article 102 TFEU, a common set of core principles was important to ensure consistent enforcement. Finally, the Commission recognised that many companies operate on a global scale and that greater convergence with the competition policies of other major jurisdictions—in particular the United States—was desirable where possible.

Increasing economic input. The reform of Article 102 TFEU was given further impetus by the creation of the position and office of Chief Economist within DG Competition in 2003. While the office and role were not created specifically for Article 102 TFEU cases—the unit’s work straddles all areas of DG Competition’s activities—it is fair to say that the reform of Article 102 TFEU was one of the more prominent reasons for the creation of the unit. The Chief Economist reports directly to the competition Director General with: (1) guidance on economics and econometrics in the application of competition rules; (2) general guidance in individual competition cases from the early stages; and (3) detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis. Opinions, guidance, or final advice from the Chief Economist are not, however, made public. In order to develop and disseminate economic expertise and knowledge, the Chief Economist also interacts with the antitrust community in various ways.⁷²

⁶⁹ See P Lowe, speech at the 30th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, 23 October 2003. See also, N Kroes, “Preliminary Thoughts On Policy Review Of Article 82,” speech at the Fordham Corporate Law Institute, New York, 23 September 2005.

⁷⁰ Lowe, *ibid.*

⁷¹ See J Temple Lang and R O’Donoghue, “Defining Legitimate Competition: How To Clarify Pricing Abuses Under Article 82,” (2002) 26 *Fordham International Law Journal* 83, 85 (“It is on pricing issues that a clear and comprehensive statement of the legal and economic principles is most urgently needed, not only to guide the thinking of the Commission, companies, and their lawyers, but also for the guidance of national competition authorities which are intended, under the Commission’s proposals for decentralisation of Community competition law, to apply Article [102] more than they have in the past.”).

⁷² These include: (1) by establishing the Economic Advisory Group on Competition Policy (EAGCP)—a group of academic economists that advises the Commission on selected important policy

One of the first acts of the Chief Economist was to commission a report by the Economic Advisory Group on Competition Policy (EAGCP)—a group of around fifteen leading academic economists that advises the DG Competition on competition policy issues—to set out the case for an economic approach to Article 102 TFEU.⁷³ The EAGCP Report involved several notable departures from the decisional practice and case law under Article 102 TFEU: (1) a rejection of a form-based approach to Article 102 TFEU in favour of an effects-based approach;⁷⁴ (2) protecting competition only in so far as doing so would be in the interests of consumer welfare;⁷⁵ (3) analysis of the practice in question to see whether there is a consistent and verifiable economic account of significant competitive harm, both based on sound economic analysis and grounded on facts;⁷⁶ (4) a fundamental distinction between abuses in horizontal markets and vertical, or leveraging, abuses (with the latter being treated more leniently, all else equal);⁷⁷ and (5) an economic framework for specific practices that suggested procompetitive explanations that had hitherto been ignored or assumed away by the Commission (e.g., rebates, price discrimination).⁷⁸

The Discussion Paper. Following extensive consultation with the national competition authorities (NCAs), a discussion paper setting out the Competition Directorate's thinking on exclusionary abuses was published in December 2005.⁷⁹ The omission of exploitative abuses and discrimination abuses that did not arise in the context of exclusion was notable. The principal idea behind the modernisation of Article 102 TFEU is to bring it more in line with the type of economic analysis routinely applied under Article 101 TFEU and EU merger control; in other words, to apply “sound economic assessment.”⁸⁰ The Discussion Paper received over 100 comments, from diverse sources including law firms, NCAs, academics (including outside the EU), multinational companies, trade and industry associations, and consumer groups.⁸¹ The Discussion Paper was broadly welcomed, albeit it should be appreciated that this was against the backdrop of a low ebb in terms of the decisional practice and case law. There was then a public hearing on 14 June 2006 at which the

issues; (2) an annual internal one day event where DG COMP discuss past cases with EAGCP, in particular with regard to the appropriate usage of economic analysis; (3) a monthly public seminar, where external academic speakers present their latest work in the field of competition policy; (4) an internal luncheon, where DG COMP case handlers discuss economic analysis of cases in an informal setting; and (5) bilateral meetings between economists from Commission and the US antitrust agencies to discuss case work, in particular economic methodology. See LH Röller, “Using Economic Analysis To Strengthen Competition Policy Enforcement,” in P Bergeijk and E van Kloosterhuis (eds.), *Modelling European Mergers: Theory, Competition Policy And Case Studies*, Edward Elgar (2005).

⁷³ Report by the Economic Advisory Group on Competition Policy, “An Economic Approach To Article 82,” (July 2005).

⁷⁴ *Ibid.*, p. 6.

⁷⁵ *Ibid.*, pp. 8-9.

⁷⁶ *Ibid.*, p. 13.

⁷⁷ *Ibid.*, pp. 17-29.

⁷⁸ *Ibid.*, pp. 30-53.

⁷⁹ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005 (hereinafter, the “Discussion Paper”).

⁸⁰ See N Kroes, “Preliminary Thoughts On Policy Review Of Article 82,” speech at the Fordham Corporate Law Institute, New York, 23 September 2005.

⁸¹ Comments may be viewed at <http://ec.europa.eu/competition/antitrust/art82/contributions.html>.

Commission and other agency officials, and in-house and external lawyers, and economists discussed various aspects of the Discussion Paper.⁸²

The Discussion Paper extended to some 72 pages and could easily comprise a chapter in its own right. But the key points are:

1. *Dominance*.⁸³ The Discussion Paper placed greater emphasis than the decisional practice and case law on non-market share factors in the assessment of dominance, and in particular barriers to entry and expansion. The Commission thus recognised that high market shares did not signify much in the absence of barriers to entry and expansion and that low market shares did not exclude dominance if material barriers to entry and expansion existed. Buyer power, both as a constraint on seller power and as a possible source of dominance in its own right, were also given greater prominence. Finally, the position on collective dominance was brought more closely in line with the Commission's assessments under analogous issues under merger control.
2. *General framework for exclusionary abuses*.⁸⁴ The Discussion Paper clarified an obvious point that was sometimes overlooked in the decisional practice and case law: that superior products or performance can itself "exclude" but that is the essence of competition. Instead, the concern was to prevent exclusionary conduct which was likely to limit the remaining competitive constraints on the dominant firm, including entry of newcomers, so as to prevent consumers being harmed. The Discussion Paper also mentioned that the prohibition was on exclusionary conduct that produced actual or likely anticompetitive effects in the market, which could harm consumers in a direct or indirect way.
3. *The as-efficient competitor test as the cornerstone for pricing abuses*.⁸⁵ The Discussion Paper puts the as-efficient competitor test front and centre of the analysis for pricing abuses, the idea being that Article 102 TFEU should only protect competitors who are at least as competitive as the dominant firm, using the dominant firm's costs as a proxy for efficiency. It also suggested using average avoidable costs (AAC) and long-run average incremental cost (LRAIC) instead of the average variable cost (AVC) and average total cost (ATC) benchmarks applied in earlier case law such as *AKZO*.⁸⁶ In a potentially major shift from the decisional practice and case law, the Discussion Paper proposed a modified form of predatory pricing test for rebate practices. Grossly oversimplified, this segregated each customer's demand into "contestable" and "non-contestable" portions, with a price/cost test being applied to the share of the "contestable" demand required by an equally-efficient rival to remain viable.

⁸² The Discussion Paper Public Hearing programme and contributions may be viewed at <http://ec.europa.eu/competition/antitrust/art82/hearing.html>.

⁸³ Discussion Paper, paras. 20-50.

⁸⁴ Discussion Paper, paras. 54-60.

⁸⁵ Discussion Paper, paras. 61-68 (pricing abuses generally) and 134-170 (rebates).

⁸⁶ These cost concepts are discussed in detail in Chapter Six (Predatory Pricing).

4. *Efficiency defence*.⁸⁷ Perhaps the most significant development in the Discussion Paper, at least conceptually, was express recognition of an efficiency defence under Article 102 TFEU, along the lines of Article 101(3). While past case law suggested that a dominant firm could objectively justify certain conduct on efficiency grounds, the criteria for such an assessment had not been articulated in any detail. The Discussion Paper listed four conditions that essentially mirror those under Article 101 TFEU. Thus the dominant firm had to show that: (1) efficiencies were realised or likely to be realised as a result of the conduct concerned; (2) the conduct concerned was indispensable to realise these efficiencies; (3) the efficiencies benefited consumers; and (4) competition in respect of a substantial part of the products concerned was not eliminated. The defences of meeting competition and objective necessity were also confirmed in the Discussion Paper.⁸⁸

2.4.3 The Guidance Paper

Overview. In late 2008 the Commission published the Guidance Paper, or 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, to give its full title.⁸⁹ As with the Discussion Paper, only exclusionary abuses were covered and obviously important issues such as discrimination were excluded. The Guidance Paper is the culmination of a lengthy process of reform of Article 102 TFEU and the Commission deserves considerable credit in bringing it to fruition. The following sections deal with various aspects of the Guidance Paper. The first is to put in context the challenges faced by the Commission in elaborating the Guidance Paper, since these help inform the inevitable compromises that the Commission had to make. Second, an important point is the legal status, if any, of the Guidance Paper. Third, a high-level overview of the content of the main changes effected by the Guidance Paper is presented. Finally, some reaction to the Guidance Paper is set out.

The challenges faced by the Commission. The challenges faced by the Commission in elaborating the Guidance Paper should not be underestimated, and they also assist in understanding why and how compromises were made in the document. First, the Commission’s success rate in Article 102 TFEU cases was staggering—and asymmetrically better than other areas of Commission enforcement under EU competition law—with virtually no infringement decision having been overturned by the EU Courts on substantive grounds. Those few victories gained by appellants tended to concern procedural violations or questions of causation.⁹⁰ In imposing self-restraint

⁸⁷ Discussion Paper, paras. 84-82.

⁸⁸ Discussion Paper, para. 80 (objective necessity) and paras. 81-83 (meeting competition).

⁸⁹ An official copy was published in the Official Journal at OJ 2009 C 45/02.

⁹⁰ See, e.g., *Soda-Ash/Solvay*, OJ 1991 L 152/21, overturned on procedural grounds in Case T-32/91, *Solvay SA v Commission* [1995] ECR II-1825 (see also, similarly, and Case C-109/10 P, *Solvay SA v Commission* [2011] ECR I-nyr; *Trans-Atlantic Conference Agreement*, OJ 1999 L 95/1, on appeal Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275; and *AstraZeneca*, OJ 2006 L 332/24, largely upheld on appeal in Case T-321/05, *AstraZeneca v Commission* [2010] ECR II-2805 and Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

via the Guidance Paper, the Commission was thus limiting a freedom it had hitherto enjoyed under the decisional practice and case law. Most obviously, for the many practices under Article 102 TFEU that had previously been treated as unlawful on formalistic grounds or with little or no meaningful analysis of anticompetitive effects, the Commission had raised both the burden and standard for itself.

Second, as the Guidance Paper itself necessarily accepts, the Commission cannot overrule, ignore, or reinterpret the case law of the EU Courts under Article 102 TFEU.⁹¹ At the same time, a Commission document that did nothing more than summarise the pre-existing case law would have been self-defeating given that the main impetus for change was the unsatisfactory nature of the decisional practice and case law to begin with. The Commission thus faced the difficult challenge of needing to effect material change to the past approach while appearing to do so within the confines of the existing case law. As will be discussed in more detail below, the Commission has done this quite deftly by peppering the Guidance Paper with references to the case law and using this as a platform for proposing a significant shift in both enforcement policy and substantive standards.⁹²

Third, perhaps the single greatest challenge for the Commission was the tension between greater emphasis on an effects-based analysis in individual cases and legal certainty. Proponents of effects-based analysis often overlook that it comes at the price of legal certainty. In fact the situation is more complex since the choice is not simply between rules and discretion but in many cases also involves standards. For example, the as-efficient competitor test may be a standard for pricing abuses but it will need to be fleshed out into rules for, say, predatory pricing, rebates, and margin squeeze. Given that the Commission and NCAs (and courts) can only ever enforce a fraction of the law—with the result that most “enforcement” therefore occurs through counselling in firms’ day-to-day business activities—it can be argued with some force that legal certainty is more important than a counsel of perfection in effects or economics. Article 102 TFEU is, after all, a rule of law, not a principle of economics.

Embedded within this debate is the difficulty that the Guidance Paper was clearly also intended to guide the NCAs of 28 Member States in their enforcement of Article 102 TFEU. Many of these have quite different legal traditions in terms of administrative enforcement of competition and related laws, ranging from *dirigiste* views that place emphasis on centrist control to a more *laissez faire* approach. Recent political and economic history also differs markedly between older Member States and recently-acceded Member States from former Communist regimes. Member States also differ in size and resources and the powers of their NCAs to gather information are not harmonised. The same applies to national courts: an effects-based approach is highly fact-intensive and many legal systems provide for very limited disclosure of

⁹¹ Guidance Paper, para. 3.

⁹² More often than not, however, the footnotes adding references to the case law of the EU Courts do not appear to have a clear connection between the principle stated in the Guidance Paper and the case law said to support it. Indeed, given that the Guidance Paper is in large part a *reaction* to perceived gaps or excesses, it is difficult to see how the case law can easily be relied upon as support. But it was no doubt important, at least facially, that the Commission should be seen to embrace the current case law (or at least not expressly disavow it).

contemporaneous documents between litigants. All of these challenges affected the Commission's task and undoubtedly placed limits on it and led to compromises.

Finally, there were challenges in that the wording and scheme of Article 102 TFEU and the EU legislation that affects its enforcement places potential limits on the extent to which it can be modernised. Most obviously, there is no equivalent wording in Article 102 TFEU that remotely corresponds with Article 101(3). Fashioning the equivalent of Article 101(3) for Article 102 TFEU is not obviously easy in such circumstances.⁹³ In a similar vein, Article 102 TFEU does give reasonably clear express examples of abuses in its four clauses, and they cannot simply be ignored in favour of the most fashionable economics. In short, the Commission did not have, and should not have, *carte blanche*.

Legal status of the Guidance Paper. The Guidance Paper is a novel instrument: it is not said to be *guidelines* in the manner the Commission has done extensively under Article 101 TFEU and EU Merger Control.⁹⁴ Instead it is a Commission Communication which contains “guidance”—a concept not recognised in any of the legislative acts as set out in the EU Treaties. Superficially, it appears that the Guidance Paper has no particular status since it states as follows:⁹⁵

“This document sets 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 as regards 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 certain behaviour is likely to result in intervention by the Commission under Article [102].

This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article [102] by the Court of Justice or the [General Court] ... In addition, the general framework set out in this document applies without prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on grounds of lack of Community interest.”

This tentative and non-substantive language contrasts with Commission guidelines under Article 101 TFEU. For example the equivalent introductory passages to the Commission's Article 101(3) guidelines are much more forthright on the binding effect and the substantive content of the guidelines.⁹⁶

“The purpose of those guidelines is to set out the Commission's view of the substantive assessment criteria applied to the various types of agreements and practices. The present

⁹³ There are also issues as to the extent to which imposing some burden on a dominant firm to objectively justify its practices is consistent with Article 3 of Council Regulation 1/2003 which places the burden of proof on the Commission.

⁹⁴ The choice of instrument has been criticised. See LF Pace, “The Italian Way Of Tackling The Abuse Of A Dominant Position And The Inconsistencies Of The Commission's Guidance: Not A Notice/Bekanntmachung But A Communication/Mitteilung,” in LF Pace (ed.), *European Competition Law: The Impact Of The Commission's Guidance On Article 102*, Edward Elgar Publishing (2011), Ch. 5.

⁹⁵ Guidance Papers, paras. 2-3.

⁹⁶ Communication from the Commission-Notice-Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97, paras. 3-5.

guidelines set out the Commission's interpretation of the conditions for exception contained in Article [101](3). It thereby provides guidance on how it will apply Article [101] in individual cases. Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of Article [101](1) and (3) of the Treaty.

The guidelines establish an analytical framework for the application of Article [101](3). The purpose is to develop a methodology for the application of this Treaty provision. This methodology is based on the economic approach already introduced and developed in the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements. The Commission will follow the present guidelines, which provide more detailed guidance on the application of the four conditions of Article [101](3) than the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements, also with regard to agreements covered by those guidelines.”

Thus, the Guidance Paper does not purport to be normative, and in so far as it sets out a framework, it is said to be in the context of guiding the Commission's *enforcement* priorities and actions. It might therefore be suggested that the Guidance Paper simply tells one what types of issues the Commission might be interested in pursuing as a matter of setting administrative priorities (and why), but not more.

But this view of the Guidance Paper is oversimplistic and incorrect. The Guidance Paper is not merely policy- or enforcement-based: it has clear substantive and normative content. It is plainly a considered effort to effect substantive change to a number of areas of Article 102 TFEU and cannot therefore be dismissed merely as a projection of Commission enforcement priorities and action.⁹⁷ The most obvious way in which the Guidance Paper ought to bite is that in several places it sets out an exercise in self-restraint by the Commission that may create expectations *vis-à-vis* the Commission for how it will approach Article 102 TFEU. Where the Commission sets out a clear and unambiguous position—for example that conditional rebates that exceed the LRAIC of the relevant output in question do not have an anticompetitive foreclosure effect⁹⁸—and the other conditions for legitimate expectations are satisfied,⁹⁹ it can be argued that the dominant firm should have a *defence* against the Commission treating its conduct as an abuse (or, equivalently, the Commission's taking enforcement action against such conduct). There are numerous examples of such “voluntary self-restraint” being upheld against the Commission, in both competition¹⁰⁰ and other areas.¹⁰¹ Thus,

⁹⁷ See EJ Mestmäcker, “The Development Of German And European Competition Law With Special Reference To The EU Commission's Article 82 Guidance Of 2008,” in LF Pace (ed.), *European Competition Law: The Impact Of The Commission's Guidance On Article 102*, Edward Elgar Publishing (2011), pp. 25-63

⁹⁸ Guidance Paper, para. 43. However, the Commission adds the word “normally” which qualifies the statement. But presumably it would then be up to the Commission to at least explain why exceptional circumstances arose.

⁹⁹ See Case C-177/90, *Kühn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, paras. 13-14; and Case C-63/93, *Duff and Others v Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] ECR I-569, para. 20.

¹⁰⁰ It is settled law for example, that the Commission's Fining Guidelines create legitimate expectations as the modalities that the Commission should follow in calculating fines: see, e.g., Joined cases C-189/02 P, C-202/02 P, C-205/02 P-C-208/02 P and C-213/02 P, *ABB and others v Commission* [2005] ECR I-5425.

despite the Commission deliberately using the term Guidance Paper, it arguably ought to have a status akin to Commission guidelines in other areas.¹⁰²

There are two important caveats to the above view. First, as discussed in more detail in Section 2.4.4 below, it is not at all clear that the Commission regards itself as bound to apply the principles in the Guidance Paper that might be regarded as sufficiently clear and normative. If the Commission considers its own Guidance Paper to be facultative, then its binding effect would clearly be extremely limited in practice: at best confined to situations in which the Guidance Paper created a legitimate expectation that would grant a dominant firm a clear defence. Such examples will in practice be rare given the lack of precision in much of the Guidance Paper. A second related point is how the EU Courts will view the Guidance Paper, and in particular where it involves a degree of tension with the EU Courts' own case law. As discussed in Section 2.4.4, early signs in this regard are thus far mixed.

High-level overview of the Guidance Paper. Virtually each chapter in this work deals with aspects of the Guidance Paper, often at some length. To avoid prolixity, only a very high-level overview of the content of the Guidance Paper is provided here and the

¹⁰¹ See, e.g., Case T-105/95, *WWF UK (World Wide Fund for Nature) v Commission* [1997] ECR II-313, para. 55. The context is quite specific, however. The Council and the Commission formulated and agreed a Code of Conduct on public access to Commission and Council documents. In furtherance of this, the Commission then adopted Decision 24/90 on public access to Commission documents, under Article 1 of which the Code of Conduct was formally adopted. The text of the Code of Conduct was then set out in an Annex to the Decision. The legal basis for the decision was former Article 162 EC, which concerned the Commission's rules of procedure.

¹⁰² This raises an interesting question about the binding effect of the Guidance Paper on NCAs and national courts. Even if the Commission has undertaken an exercise in voluntary self-restraint, the NCAs clearly have not done so and national courts arguably cannot do so (since Article 102 TFEU is directly enforceable in national courts and national courts must decide the cases before them and have no general discretion to set enforcement priorities). But if the Guidance Paper has a status akin to Commission guidelines in other areas, then it can be argued that NCAs and national courts must, under their duties of "sincere cooperation" under Article 4(3) TEU, take the Guidance Paper into account, at least where there is no contrary rule of the EU Treaties or case law of the EU Courts preventing them from doing so. An analogy might be made with Commission recommendations and comments letters in the context of the EU Common Regulatory Framework for telecommunications, which, while not formally binding, are subject to the duty to take the "utmost account" of the Commission's position (essentially meaning that a departure from the Commission's position must be explained). Thus, while a Commission recommendation may not have *binding* legal effect, the Court of Justice has held that this does not mean that it has no legal effect. In particular, national courts and authorities are bound to take them into account "where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions." See Case C-322/88, *Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, para. 18. Interestingly, in its comments to the Commission on the reform, the Bundeskartellamt stated that it was "aware that the Article [102 TFEU] guidelines will have a practical impact on the application of Article [102 TFEU] in the ECN and the Member States of the European Union, and the Bundeskartellamt will consider the guidelines in its Article [102 TFEU] cases. Against this background we would prefer to state in the paper or future guidelines that the discussion paper or guidelines as such do not bind national competition authorities and national courts." The Guidance Paper did not take up this invitation.

reader is referred to chapters on specific practices for more detail:¹⁰³

1. *Reorientation of objectives?* Perhaps the single most important issue raised by the Guidance Paper is whether it has sought to reorient the core objectives of Article 102 TFEU. The clear focus is now said to be on those practices that cause most harm to consumers.¹⁰⁴ The important corollary of this is that competitors should not be protected from abusive conduct merely because they are competitors but only because their exit or marginalisation harms the competitive process.¹⁰⁵ Thus, it seems that, directly or indirectly, the focus has reoriented around consumers (including of course intermediate consumers).¹⁰⁶ This appears to be a subtle but important shift from the EU Courts' case law which has tended to place emphasis on harm to the structure of competition under Article 102 TFEU in a way that appeared analytically decoupled from observable harm to consumers.¹⁰⁷ Under the Guidance Paper, however, it appears that efficiency and consumer benefits/harm are assuming greater importance than market structure.¹⁰⁸ This issue is addressed in more detail in Chapter 5 (The General Concept of an Abuse).
2. *Dominance.*¹⁰⁹ The Guidance Paper indicates a more nuanced assessment of dominance than the case law suggests. Market shares are considered a useful "first indicator" rather than the beginning and end of the analysis. The paper also gives a more generous safe harbour than the case law, suggesting that below a 40% market share, dominance is unlikely. This ought to have a non-trivial practical impact since case law such as *BA/Virgin* gave the impression that dominance concerns are a distinct possibility at market shares below 40%.¹¹⁰ The issue of persistence of market shares is also rightly mentioned. But the most important clarification on dominance is the primary importance of barriers to entry and expansion. Buyer power is also given more prominence as a counterweight to seller power. Interestingly, collective dominance is not addressed whereas it was in the Discussion Paper.
3. *General framework for exclusionary abuses.*¹¹¹ The Guidance Paper introduced a new concept for exclusionary abuses generally, namely "anticompetitive foreclosure." This is said to describe a situation where

¹⁰³ For a detailed treatment of each section of the Guidance Paper, see E Rouseva, *Rethinking Exclusionary Abuses In EU Competition Law*, Hart Publishing (2010), Ch. 10.

¹⁰⁴ Guidance Paper, para. 5. See in this regard Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, [2012] ECR I-nyr, paras. 20, 22, and 24.

¹⁰⁵ Guidance Paper, para. 6.

¹⁰⁶ See to this effect 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, para. 63.

¹⁰⁷ See, e.g., Case T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601, para. 664.

¹⁰⁸ See L Ortiz Blanco and P Ibáñez Colomo, "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 LF Pace (ed.), *European Competition Law: The Impact Of The Commission's Guidance On Article 102,* Edward Elgar Publishing (2011), Ch. 4.

¹⁰⁹ Guidance Paper, paras. 9-18.

¹¹⁰ BA's share towards the end of the period of the abuse had dropped to 39%.

¹¹¹ Guidance Paper, paras. 19-22.

effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant firm whereby the dominant firm is likely to be in a position to profitably increase prices to the detriment of consumers. Evidence of such harm to consumers may be qualitative or quantitative. The Guidance Paper then added various “plus” factors that build on this basic definition:¹¹² (1) the strength of the dominant position; (2) the nature and extent of barriers to entry or expansion; (3) the relative strength of rivals and whether a strategically important rival is being singled out; (4) selectivity of the practice; (5) the extent of market coverage of the practice in question; (6) any evidence of actual foreclosure caused by the abusive conduct; and (7) direct evidence of exclusionary strategy *via* internal documents.

4. *The as-efficient competitor test as the cornerstone for pricing abuses.*¹¹³ The Guidance Paper retained the as-efficient competitor test as the general test for exclusionary pricing abuses. Like the Discussion Paper, the Guidance Paper expressed a preference for AAC/LRAIC over the AVC/ATC standards mentioned in the case law. In practice, the difference between the two sets of costs standards may be limited unless fixed, sunk, or common costs are significant. Advocating an equally-efficient competitor test is not, however, a major change in policy. First, this is the test which has been applied for some time in respect of predatory pricing and margin squeeze. Even before the Guidance Paper was published, the General Court had expressly ruled out looking at anything other than the dominant firm’s costs for reasons of legal certainty.¹¹⁴ Second, for rebates, the Guidance Paper test is not really an equally-efficient competitor test, at least for the most important and controversial category of rebates—so-called all unit, or retroactive, rebates. In simple terms, what the Commission proposes doing is to separate the dominant firm’s demand into a “contestable” and “non-contestable” portion, and to apply a type of price/cost test to the contestable part. The underlying logic is to estimate what share of a customer’s demand the dominant firm’s rival(s) might realistically be able to capture, and to apply a price/cost test for that relevant range, using the dominant firm’s effective price (including the rebate) and its costs. If the contestable share is less than 100%, then the Guidance Paper test for rebates is clearly not one based on competitors who are actually as efficient as the dominant firm. Indeed, the whole point of the test in such a setting is to take into account economies of scale that the dominant firm has but rivals do not (or to the same extent). This is a regulatory-type approach.
5. *Defences.*¹¹⁵ The Guidance Paper essentially followed the approach in the Discussion Paper on defences. It distinguished a defence based on objective

¹¹² Guidance Paper, para. 20.

¹¹³ Guidance Paper, paras. 61-68 and 134-170 (rebates).

¹¹⁴ Case T-271/03, *Deutsche Telekom AG v Commission* [2008] ECR II-447, para. 188. The Guidance Paper (para. 25) indicates that the Commission may use competitors’ costs or other costs if the dominant firm’s costs are not available. This must be of questionable correctness following *Deutsche Telekom*.

¹¹⁵ Guidance Paper, paras. 28-31.

necessity of a practice (e.g., health and safety) and those based on efficiencies. For the latter, essentially the conditions of Article 101(3) have been transposed into Article 102 TFEU. The dominant firm bears at least the evidential burden of asserting the relevant efficiency and providing some initial evidence of it. A major omission in the defences section is the defence of meeting competition in the context of pricing abuses. This area of law remains unacceptably unclear following *Wanadoo*.¹¹⁶

Reaction to the Guidance Paper. The Guidance Paper has been broadly welcomed. But this was against the backdrop of a decisional practice and case law that was considered formalistic and lacking in any meaningful analysis of economic principles or a robust and forensic demonstration of anticompetitive effects. So in a sense anything other than the *status quo ante* would have been welcomed. That said, the strides taken by the Commission in the Guidance Paper, given the challenges outlined earlier in this section, should not be underestimated. The Commission is clearly therefore to be commended.

A number of criticisms have nonetheless been made.¹¹⁷ The first, and probably most fundamental, is that the concept of anticompetitive foreclosure advanced in the Guidance Paper is both uninformative and potentially overinclusive.¹¹⁸ “Anticompetitive foreclosure” is said to “describe a situation where effective access of actual or potential competitors to supplies or markets 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.”¹¹⁹ This appears to have few limiting principles and, read literally, might even include situations where rivals exit the market or are marginalised simply because the dominant firm’s product is so obviously superior to theirs that consumers buy it exclusively or almost exclusively. This would be “foreclosure” in a broad sense but it is conduct that is the very essence of competition. There is very little articulation in the Guidance Paper of what is *anticompetitive*, and what distinguishes competition on the merits, or normal competition, from abusive conduct. The “plus factors” that the Commission lists in paragraph 20 of the Guidance Paper may or may not be *caused* by abusive conduct. For example, market exit by rivals may be due to the fact that consumers do not value its products or services.

¹¹⁶ *Wanadoo Interactive*, Commission Decision of 16 July 2003, upheld on appeal in Case T-340/03, *France Télécom SA v Commission* [2007] ECR II-107 and Case C-202/07 P, *France Télécom SA v Commission* [2009] ECR I-2369. See further Ch. 6 (Predatory Pricing).

¹¹⁷ The literature is vast on this topic. The two most prominent publications are: J Temple Lang and A Renda (eds.), *Treatment Of Exclusionary Abuses Under Article 82 Of The EC Treaty Comments On The European Commission’s Guidance Paper*, Final Report Of A CEPS Task Force, (2009) and *European Competition Law: The Impact Of The Commission’s Guidance On Article 102*, LF Pace (ed.), Edward Elgar Publishing (2011). For articles see J Temple Lang, “Article 82 EC: The Problems And The Solutions,” paper presented at the conference “Ten Years Of Mercato Concorrenza Regole,” Milan, 30 June 2009; J Temple Lang, “Commission’s New Guidance On Article 82 Is Flawed,” *Competition Law Insight*, 10 February 2009; and J Temple Lang, “Rebates, Price Discrimination And Refusal To Contract—The Commission’s Guidance Paper On Article 82,” *Europarættlig Tidsskrift* (2010) 47-78.

¹¹⁸ See J Temple Lang, “Article 82 EC: The Problems And The Solutions,” paper presented at the conference “Ten Years Of Mercato Concorrenza Regole,” Milan, 30 June 2009.

¹¹⁹ Guidance Paper, para. 19.

A second criticism is that the Guidance Paper shifts away from strict, and relatively precise, language and categorisation in the case law in favour of a much more fluid set of principles expressed at a very high level of aggregation. A good example is refusal to deal. This is perhaps the most exceptional application of Article 102 TFEU, and has been applied in only a small number of cases in over 50 years of enforcement, most of which have specific and unusual facts. The case law is generally based on an exceptional circumstances test—either expressly (in the case of intellectual property) or implicitly (for other types of property)—coupled with various stringent factors attached.

In the Guidance Paper, however, the Commission suggests that a duty to deal is justified on a more generalised basis, where: (1) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (2) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (3) the refusal is likely to lead to consumer harm.¹²⁰ While the Commission acknowledged the importance of property rights and preserving innovation incentives,¹²¹ the actual test it proposed is quite open-ended and lacking in precision or limiting principles. It suggested that a duty to deal could be justified simply where the benefit of sharing outweighs the costs. But this is not a correct statement of law since it ignores property rights, the absence of any duty to deal in general, and dynamic incentives.

A third related criticism is that the Guidance Paper does not in fact provide much practical guidance,¹²² and, worse, reopens many issues that, while perhaps unsatisfactory, were at least clear. (Businesses may actually prefer a rule that is incorrect but clear to one that is correct but highly complex.) For example, the test for conditional rebates is likely to be complex in many cases in practice. It requires an exercise of deciding, hypothetically, how much (if any) of a customer's demand is "non-contestable" and then, of the "contestable" portion of demand seeing what the "relevant range" is that could be supplied by a rival. A form of price/cost test is then applied to this share, taking into account the dominant firm's costs and rebates. And this must apparently be done for each affected customer. But it is perfectly possible that the dominant firm has never addressed its mind to these concepts¹²³ and could only do so with detailed information from customers or even rivals, which is hardly a practice that competition law should be encouraging. The *Intel* decision devoted over 150 pages just to determine this issue for only a handful of customers.¹²⁴ Of course any test for conditional rebates that did not take the formalistic approach to rebates in the decisional practice and case law *would* inevitably be less certain—this is the inevitable tension between an effects-based approach and legal certainty. But the Commission did not

¹²⁰ Guidance Paper, para. 81. Efficiencies are also mentioned, if raised by the dominant firm. The exceptional circumstances test is only mentioned once, and even then only in a footnote.

¹²¹ Guidance Paper, para. 75.

¹²² See L. Ortiz Blanco and P. Ibáñez Colomo, "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 L.F. Pace (ed.), *European Competition Law: The Impact Of The Commission's Guidance On Article 102*, Edward Elgar Publishing (2011), Ch. 4.

¹²³ Of course a consequence of the Guidance Paper is that these concepts may not start to appear in internal company assessments. But the fact that these were not concepts generally used by businesses is significant.

¹²⁴ *Intel*, Commission Decision of 13 May 2009.

need to put forward the test that it did in the Guidance Paper and that test is likely to create uncertainty in many cases. It involves a highly regulatory approach.

Fourth, because of an ambiguous standard applied for anticompetitive foreclosure, the Guidance Paper could have the effect of shunting cases very quickly into an assessment of efficiencies. The prospects of the dominant firm successfully raising such a defence are likely to be limited. As a practical matter, there are virtually no reported cases at EU level where such defences have been successful. This is not a function of the novelty of the Guidance Paper on this point since arguments on efficiency were raised in cases before the Guidance Paper was published.¹²⁵ The Guidance Paper makes no mention of this fact and gives no indication that the Commission will be genuinely open to permitting efficiency defences in real-world cases. A key difficulty is that the Guidance Paper's last condition for an efficiency defence—that the conduct does not eliminate all effective competition¹²⁶—does not sit well with a prior finding of dominance (which usually means an absence of effective competition).

Fifth, an unfortunate aspect of the Guidance Paper is that sections of it appear to have been inserted only or mainly to shore up the Commission's position in pending or anticipated appeals to the EU Courts. The better course would, clearly, be to allow decisions to stand or fall on their own merits on appeal. The difficulty is that part of the Guidance Paper cannot be amended in the event that the Commission is unsuccessful on appeal, which means that position statements which were considered appropriate by the Commission for a particular case are likely to be over-inclusive if applied more generally.

Two notable examples spring to mind. The first is the so-called “*Telefónica* exceptions.”¹²⁷ In *Telefónica*, the Commission rejected the argument that the conditions of the refusal to deal case law must also be satisfied in the case of margin squeeze, giving two reasons. First, it said that Telefónica had a regulatory duty to supply the upstream inputs under secondary EU telecommunications legislation. The Commission reasoned that the existence of this duty showed that, in imposing an access obligation, a balance had already been struck promoting competition and preserving *ex ante* incentives to invest and innovate in infrastructure. Second, the Commission stated that Telefónica's *ex ante* incentive to invest in its infrastructure was not affected since Telefónica's infrastructure was to a large extent the fruit of investments that were undertaken well before the advent of broadband in Spain and thus bore no relation to the provision of broadband services, including with the benefit of special or exclusive rights that shielded it from competition. In the Guidance Paper, the Commission added language that effectively replicates the two “*Telefónica* exceptions.” But neither

¹²⁵ See, *Wanadoo Interactive*, Commission Decision of 16 July 2003 and *Prokent/Tomra*, Commission Decision of 29 March 2006.

¹²⁶ Guidance Paper, para. 30, fourth indent.

¹²⁷ See E González-Díaz and J Padilla, “The *Linkline* Judgment - A European Perspective,” *Global Competition Policy*, April 2009, (1); D Geradin, “Refusal To Supply And Margin Squeeze: A Discussion Of Why The ‘Telefonica Exceptions’ Are Wrong,” Tilburg Law and Economics Center, 28 January 2011.

exception has any clear pedigree in the decisional practice and case law.¹²⁸

The second is the concept of a “naked restraint.” In the Guidance Paper, the Commission introduced for the first time the concept of a “naked restriction,” a practice that is so pernicious as to not require any assessment of its effects on competition. This language was intended to pave the way for the Commission’s subsequent *Intel* decision,¹²⁹ where the Commission found that Intel restricted the commercialisation of specific AMD-based products by HP, Acer, and Lenovo by making payments to the OEM in question to delay, cancel or in some other way restrict the commercialisation of specific AMD-based products. While it may be one thing to include in a Guidance Paper aspects that reflect the approach taken in a published Commission decision (as in *Telefónica*) it seems a step too far to use the Guidance Paper to give greater legitimacy to a future decision (as in *Intel*).

Finally, the Guidance Paper is more or less silent on new types of abuses. For example, Chapter Thirteen (Abusive Conduct and Standards) outlines a whole series of abuses where the Commission has expressed no view at all in the Guidance Paper. Nor is it the case that the practices in question arose after the publication of the Guidance Paper. Certain of them (e.g., exclusionary royalties) were the subject of complaints before the Commission for some time prior to the Guidance Paper being finalised. Similarly, Chapter Twelve (Exclusionary Non-Price Abuses) addresses a number of important abuses where the Commission’s position has not been articulated. The absence of any guidance on discrimination is also a major lacuna since this abuse can cause unnecessary difficulties in practice.

2.4.4 Looking Further Ahead

The challenges. The Guidance Paper is now just over four years old and it is still too early to offer a considered or definitive assessment of its impact or the extent of the Commission’s reforms of Article 102 TFEU more generally. This section therefore has a certain speculative element. Three issues are considered. First, some tentative comments can be made as to the extent to which the Guidance Paper is having practical impact. Second, the reform of Article 102 TFEU cannot meaningfully be looked at without also considering the role of the EU Courts in respect of Article 102 TFEU. The EU Courts continue to face more criticism in this area than perhaps other areas of EU competition law. Finally, a highly respected body of opinion continues to argue that deficiencies in the Commission’s procedures adversely affect the integrity of the application of EU competition law and Article 102 TFEU in particular.

a. Translating the Guidance Paper into reality. The evidence on the extent to which the Commission and EU Courts are willing to put the Guidance Paper principles on

¹²⁸ Indeed, the Commission said the opposite in *FAG-Flughafen Frankfurt/Main AG*, OJ 1998 L 72/30, paras. 97–98. In *TeliaSonera*, the Advocate General appeared to accept the first “*Telefónica* exception” but appeared doubtful as to the second. See Opinion of Advocate General Mazák in Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, paras. 17–21. However, the Court of Justice did not address this issue directly since it looked at the appeal from a different perspective. For a detailed discussion see further Ch. 7 (Margin Squeeze).

¹²⁹ *Intel*, Commission Decision of 13 May 2009, paras. 870–873.

exclusionary abuses front and centre of their analysis is thus far mixed.¹³⁰ In *Tomra*, the EU Courts considered the Guidance Paper to be of no relevance since it post-dated the Commission's decision in that case.¹³¹ This was technically correct but some tentative favourable reaction would clearly have been useful and appropriate, not least because the Commission's decision in that case purported to apply aspects of the analysis of rebates set out in the Discussion Paper (and, now, Guidance Paper).

More worryingly, in *Intel*, the Commission appeared to regard the new test for rebates set out in the Guidance Paper, and many of the Guidance Paper's statements on anticompetitive effects, as non-essential parts of the analysis. According to the Commission, the Guidance Paper is a statement of enforcement priorities rather than a normative basis on which anticompetitive foreclosure concerns could be excluded.¹³² The most that the Commission was prepared to say was that its decision "was in line with the orientations set out in the Guidance Paper."¹³³ The Commission is also defending the *Intel* case on appeal on the basis that the Guidance Paper test is not necessary and that, at least in the case of rebates conditional upon exclusivity, a foreclosure effect can be presumed without any separate showing of anticompetitive effects. It is clearly unhelpful for the Commission to develop a change in enforcement policy but then to refuse to make its new analysis a necessary part of its decision.

¹³⁰ It is beyond the scope of this work to identify every national decision or judgment that has referred to the Guidance Paper since its adoption. One case of note, however, is *Purple Parking Limited v Heathrow Airport Limited* [2011] EWHC 987 (Ch) in the English High Court where Mann J rejected the relevance of the Guidance Paper. He stated (para. 95): "However, as the document itself points out in paragraph 3, it is not a statement of the law, and paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate." But it is submitted that this conclusion is likely to be atypical. Most NCAs and national courts will likely find the Guidance Paper at least helpful, even if not strictly binding in all respects. In practice, NCAs and courts are most likely to cite the Guidance Paper where it tends to confirm conclusions that they have reached for other reasons. See, e.g., Case MPINF-PSWA001, *Flybe*, No Grounds for Action Decision of 5 November 2010 (Office of Fair Trading), footnotes 67, 236, para. 6.34. A majority of the authors in LF Pace (ed.), *European Competition Law: The Impact Of The Commission's Guidance On Article 102*, Edward Elgar Publishing (2011), considered that the Guidance Paper would be reasonably influential in their respective jurisdictions. See R Whish, "National Competition Law Goals And The Commission's Guidance On Article 82 EC: The UK Experience," in *European Competition Law: The Impact of the Commission's Guidance on Article 102 (ibid.)* Ch. 7 and C Prieto, "Anticipated Enforcement In France Of The Commission's Guidance On Article 82," in *European Competition Law: The Impact of the Commission's Guidance on Article 102 (ibid.)*, Ch. 6. In the same work, Ortiz Blanco and Ibáñez Colomo did not anticipate much use being made of the Guidance Paper under Spanish competition law, not for reasons of substantive disagreement but because the national competition law was at a relatively early stage of development (*ibid.*, Ch. 3). By contrast, Mestmäcker considered that aspects of the Guidance Paper would likely not be followed under German competition law because the law was somewhat different and considerably developed (*ibid.*, Ch. 2).

¹³¹ Case C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] ECR I-nyr, para. 73. See also Opinion of Advocate General Kokott in Case C-109/10 P, *Solvay SA v Commission* [2011] ECR I-nyr, para. 20.

¹³² *Intel*, Commission Decision of 13 May 2009, para. 916.

¹³³ *Ibid.*

However, in *Post Danmark*,¹³⁴ the Court of Justice made a number of statements that appear indirectly (if not directly) to endorse certain principles from the Guidance Paper. Thus the Court stated: (1) Article 102 TFEU covers conduct that “has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition;”¹³⁵ (2) price discrimination cannot of itself suggest that there exists an exclusionary abuse;¹³⁶ (3) to the extent that a dominant firm sets its prices at a level that covers its costs, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term;¹³⁷ (4) an apparent lack of anticompetitive effect may be relevant to whether conduct is abusive;¹³⁸ and (5) it is open to a dominant firm to provide justification for behaviour that is liable to be caught by the prohibition under Article 102 TFEU,¹³⁹ either because of objective necessity or efficiency that also benefit consumers.¹⁴⁰

This judgment has been heralded “as a new chapter in the epic tale of unilateral conduct control in European Union law.”¹⁴¹ This view may yet prove to be wishful thinking. It is certainly the case that the overall scheme of the judgment appears to echo key aspects of the Guidance Paper. But the concept of an equally-efficient competitor test was already well enshrined in the predatory pricing case law prior to *Post Danmark*. Similarly, the concept of objective justification was already recognised in the case law. Whether the Court’s comments on consumer detriment reflect a reorientation away from a focus on the structure of competition towards a consumer welfare efficiency standard also remains to be seen. Indeed, only two weeks after *Post Danmark*, the Court of Justice judgment in *Tomra* rejected the relevance of a price/cost test in the context of rebates¹⁴² and, further, upheld an approach based largely on formalistic reasoning.¹⁴³ Similarly, on the issue of anticompetitive effects, the Court held that the market coverage of the rebates was not strictly in point, reasoning that the foreclosure by a dominant firm could not be justified by showing that the contestable part of the market was still sufficient to accommodate competitors.¹⁴⁴ This is the precise opposite of what the Guidance Paper says.¹⁴⁵

b. Criticisms of “light touch” judicial review. While the substantive standards and tests that the Commission sets for itself under Article 102 TFEU are clearly important, the extent of rigorous judicial oversight is equally so. To state the obvious, placing

¹³⁴ Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-nyr.

¹³⁵ *Ibid.*, para. 24.

¹³⁶ *Ibid.*, para. 30.

¹³⁷ *Ibid.*, para. 38.

¹³⁸ *Ibid.*, para. 39.

¹³⁹ *Ibid.*, para. 40.

¹⁴⁰ *Ibid.*, para. 41.

¹⁴¹ E Rousseva and M Marquis, “Hell Freezes Over: A Climate Change For Assessing Exclusionary Conduct Under Article 102 TFEU,” *Journal of European Competition Law And Practice* (2012), pp. 1-19, at 19.

¹⁴² Case C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] ECR I-nyr, paras. 67, 73.

¹⁴³ *Ibid.*, para. 75.

¹⁴⁴ *Ibid.*, para. 42.

¹⁴⁵ See Guidance Paper, para. 20, which refers specifically to the extent of market coverage of the practice.

greater emphasis on an effects-based analysis and economic thinking is unlikely to achieve much in the absence of effective judicial review. This ought to mean proper forensic review of primary facts and a level of review of economic assessments that is not merely a “tick-box” analysis.

The Commission has enjoyed a staggering success rate in Article 102 TFEU appeals, and one that is asymmetrically better than other areas of competition law appeals. Data gathered in 2006 by the former Chief Economist, Damien Neven, record that the Commission’s success rate in Article 102 TFEU cases was 98%, compared to only 58% under the EU Merger Regulation and 75% in Article 101 TFEU cases.¹⁴⁶ More recent data from Ahlborn and Evans suggest a similar success rate.¹⁴⁷ While Neven attributes this disparity in success rates to the fact that appeals outside the Article 102 TFEU context typically look at the effects of practices and not their form, this is not a fully satisfactory response. The disparity between Article 101 and 102 TFEU appeals is striking, since most Article 101 TFEU cases concern admitted cartel infringements. More to the point, in Article 102 TFEU cases the EU Courts are clearly looking at issues of anticompetitive effects in more detail than before: the concern is that it appears to be making no difference to the outcome in those cases whereas it has in the areas of merger control and Article 101 TFEU. There is also some force in the argument that “whatever the origins of the Court’s restraint in judicial oversight of the Article [102] cases ... the Commission has currently virtually boundless discretion in shaping policy with respect to dominant firms.”¹⁴⁸

Equally, the Commission’s success rate in cases in the appeal courts in Luxembourg is not matched by the success rates of private litigants in national courts involving Article 102 TFEU or the success rates of NCAs applying Article 102 TFEU or its national law equivalent. This cannot be explained solely by the discretion the Commission enjoys over which cases to pursue. If anything, the incentives of private litigants should be at least as good in this regard, and probably more so in those national legal systems where the loser pays the winning side’s costs.¹⁴⁹

Unsurprisingly therefore criticism has been voiced about the robustness of judicial review of Commission decisions under Article 102 TFEU.¹⁵⁰ The EU Courts have

¹⁴⁶ D Neven, “Competition economics and antitrust in Europe,” p. 17, document available at http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf.

¹⁴⁷ C Ahlborn and D Evans, “The Microsoft Judgment And Its Implications For Competition Policy Towards Dominant Firms In Europe,” *Antitrust Law Journal* (2009) (Vol. 75) No. 3, pp. 887-932.

¹⁴⁸ *Ibid.*

¹⁴⁹ This would make for an interesting area of study and data. On a related issue in the United States, see JD Wright and AM Diveley, “Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence From The Federal Trade Commission,” *Journal of Antitrust Enforcement* (2013) 1(1): 82-103, at 103 (“Many appear to assume that agencies have courts beat on this margin. To our knowledge, while oft-cited as a reason to increase the discretion of agencies and the deference afforded them by reviewing courts, no one has provided empirical support for this claim. We seek to fill that gap, and contrary to the expertise hypothesis, we find the evidence suggests the Commission does not perform as well as generalist judges in its adjudicatory antitrust decision-making role”).

¹⁵⁰ See I Forrester QC, “A Bush In Need Of Pruning: The Luxuriant Growth Of Light Judicial Review,” in CD Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence And Its Judicial Review In Competition Cases* (2010), pp. 407-452.

developed a self-imposed restraint based on limited oversight of “complex economic assessments.”¹⁵¹ This is not objectionable in itself—on matters of economic policy of judgment there may not be a single “right” answer—but it has been suggested that the notion of limited deference has been distorted. While the initial notion of deference to Commission assessments had a decidedly narrow context,¹⁵² it has been expanded to comprise all manner of assessments by the Commission, including technical assessments where the Commission does not obviously possess any expertise or superior ability.¹⁵³

It has also been suggested that the EU Courts have been too unwilling in recent years to make use of their own rules of procedure on matters such as oral testimony, expert evidence (they can appoint their own expert(s)), and a willingness to inspect places and things that may be of relevance to the issues on appeal.¹⁵⁴ The issue of (limited) oral testimony is particularly important. Experience in litigation shows that documents read in context, with the benefit of oral explanation and testing from different parties, often have a quite different meaning to what one might suppose by merely reading the document cold. In legal cases, context is everything. It is also suggested that the EU Courts have not been rigorous enough in establishing a clear forensic hierarchy that distinguishes evidence according to its inherent value.¹⁵⁵ The best evidence in any case is clearly contemporaneous evidence. *Ex post* statements, particularly those made by rivals or customers with a vested interest in the outcome of a decision/appeal and which have not been tested in evidence, are of much less value.¹⁵⁶ The position is *a fortiori* in relation to anonymous evidence.

On Article 102 TFEU decisions specifically, the EU Courts’ evidential review have been quite mixed. In many cases, the EU Courts have engaged in extremely cursory analysis of anticompetitive effects, based largely on assumed, or inferential, effects. For example, in *BA/Virgin*, the Court of Justice concluded that the Commission had demonstrated a concrete anticompetitive effect of the rebates in question.¹⁵⁷ But there is

¹⁵¹ See, e.g., Case 42/84, *Remia and others v Commission* [1985] 2425, para. 34. For a detailed discussion see the contributions from Panel II in CD Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence And Its Judicial Review In Competition Cases* (2010), pp. 9-473, and in particular those by Judge Forwood, Judge (and now Advocate General) Wahl, and Judge Ó Caoimh from the EU Courts.

¹⁵² *Remia, ibid* (in *casu* duration of a non-compete clause and the doctrine of ancillary restraints).

¹⁵³ I Forrester QC, “A Bush In Need Of Pruning: The Luxuriant Growth Of Light Judicial Review,” in CD Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence And Its Judicial Review In Competition Cases* (2010), pp. 407-452.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid*.

¹⁵⁶ See *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB), Leggatt J (para. 8): “I approach the evidence on the basis that, as in almost every case where there is a contemporaneous documentary record, the documents provide the best evidence of what happened. Human memory is notoriously unreliable, and the strong interests and emotions to which disputes resolved through litigation give rise are powerful distorting factors, however honest and well-intentioned the witness. Indeed, the more patently honest and convincing the witness, the greater can often be the risk of placing reliance on their testimony.” The position is surely the same or even *a fortiori* with complainants before the Commission.

¹⁵⁷ Case C-95/04 P, *British Airways plc v Commission* [2006] ECR I-2331, para. 31. (“the Court further held not only that the bonus schemes at issue were likely to have a restrictive effect on the

no reference to what this “concrete” evidence was, and it is difficult to see what it could have been given that the Commission itself did not base its decision on such concrete effects. Similarly, in *Tomra*, the fact that the Commission’s diagrams in its decision that is said to illustrate the anticompetitive “suction” effect of the *Tomra* rebates—based on negative prices at the margin—contained multiple admitted errors was considered to be irrelevant by the EU Courts on appeal.¹⁵⁸ But the logical conclusion of those errors was that *Tomra*’s prices at the margin were *not* negative, and would therefore allow an equally-efficient rival to survive. For the Commission to posit anticompetitive effects based on rivals’ difficulties to match the prices seems hollow in such circumstances. Even if this did not vitiate all of the Commission’s analysis, it clearly affected, and undermined, *some* of it. The EU Courts’ approach in appeals against Commission decisions under Article 102 TFEU contrasts with their robust approach in reviewing Commission merger control decisions.¹⁵⁹

On the other hand, the EU Courts plainly have engaged in very detailed and sophisticated review of Commission decisions under Article 102 TFEU on occasion. The best recent example is *AstraZeneca*.¹⁶⁰ The General Court devoted over 260 paragraphs of its judgment dealing with the issues of market definition and dominance, and engaged in a degree of review that was extremely detailed whether or not one necessarily agrees with the outcome. Ordinarily one would think that such assessments were complex economic assessments *par excellence*. As impressive, the General Court engaged in a rigorous review on the issue of causation in respect of the second abuse of deregistration. While it accepted that *AstraZeneca*’s deregistration tactics were *capable* of restricting competition insofar as it related to delaying generic entry, it held that the Commission’s case insofar as it was alleged that deregistration prevented parallel trade had not been made out. The Court held that the Commission had to demonstrate that the public authorities in question were liable to withdraw, or did usually withdraw, parallel import licences following deregistration.¹⁶¹ In the case at hand, the Commission had established a causal link between deregistration and the revocation of parallel import licences in Sweden, but not in Denmark or Norway.¹⁶² Thus, the Court annulled the decision insofar as it was alleged that *AstraZeneca*’s deregistration had prevented parallel trade to occur in Denmark and Norway.¹⁶³

United Kingdom markets for air travel agency services and air transport, but also that such an effect on those markets had been *demonstrated in a concrete way by the Commission*.”) (emphasis added). Given that the Commission and EU Courts eschewed any need to demonstrate actual or likely anticompetitive effects with concrete evidence, it is difficult to see how this conclusion was justified.

¹⁵⁸ Case T-155/06, *Tomra Systems ASA and others v Commission* [2011] ECR II-4361, paras. 258 *et seq.*

¹⁵⁹ The best examples are Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585 and Case T-5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381, and Case T-80/02, *Tetra Laval BV v Commission* [2002] ECR II-4519, on further appeal in Case C-12/03, *Commission v Tetra Laval BV* [2005] ECR I-987.

¹⁶⁰ *AstraZeneca*, OJ 2006 L 332/24, on appeal Case T-321/05, *AstraZeneca v Commission* [2010] ECR II-2805 and Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

¹⁶¹ *Ibid.*, paras. 806-808.

¹⁶² *Ibid.*, para. 845.

¹⁶³ The General Court’s findings in this regard were upheld on appeal in Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

Overall, however, there is a lack of consistency in approach from the EU Courts under Article 102 TFEU. It is, for example, extremely difficult to reconcile the Court of Justice's apparent endorsement of the principles underpinning the Guidance Paper in *Post Danmark*¹⁶⁴ with its judgment, only two weeks later, in *Tomra*.¹⁶⁵ Indeed, a striking feature of the Article 102 TFEU case law is inconsistency between Court of Justice judgments in Article 267 TFEU preliminary references and appeals in direct actions. Most of the Article 102 TFEU cases that are generally regarded as progressive arise in the context of Article 267 TFEU preliminary references, and not direct actions.¹⁶⁶ It is equally difficult to reconcile the low intensity of the General Court's review in cases such as *BA/Virgin* with its robust approach in *AstraZeneca*. One sometimes has the impression that much depends on the composition of the individual chamber of the EU Courts that happens to deal with the particular case. There does not appear to be a single overall coherent direction or approach.

c. Criticisms of Commission procedure that may affect substantive implementation.

A final challenge that materially affects Article 102 TFEU decisions is the suggestion by highly respected practitioners that the Commission's procedures lack fitness for purpose in certain respects.¹⁶⁷ The essential elements of the Commission's procedures have remained in similar form since Regulation 17/62 in 1962.¹⁶⁸ The changes effected by Regulation 1/2003 were relatively minor in this regard.¹⁶⁹ In an attempt to address the concerns expressed, the Commission has made a number of changes to its procedures, such as having internal "peer review" teams in more difficult cases,¹⁷⁰

¹⁶⁴ Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, [2012] ECR I-nyr.

¹⁶⁵ Case C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] ECR I-nyr.

¹⁶⁶ See, e.g., Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7791; Case C-418/01, *IMS Health GmbH & Co OHG v NDC, Health GmbH & Co KG* [2004] ECR I-5039; Case C-52/09, *Konkurrenserketet v TeliaSonera Sverige AB* [2011] ECR I-527; and Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-nyr.

¹⁶⁷ See J Temple Lang, "Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003," *CEPS Special Report*, November 2011, http://aei.pitt.edu/32989/1/Reform_of_Commission_Procedure_in_Competition_Cases_with_cover.pdf; I Forrester QC, "Due Process In EC Competition Cases: A Distinguished Institution With Flawed Procedures," 34 *European Law Review* (2009) 817. The two practitioners have a combined total of around 80 years' experience of EU competition law enforcement, including from within the Commission itself and have acted in many of the leading cases (often on different sides). So their views carry particular weight and signify mature reflection. This debate is not new: see, e.g., F Montag, "The Case For A Radical Reform Of The Infringement Procedure Under Regulation 17," (1996) 8 *European Competition Law Review*, 428.

¹⁶⁸ EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 L 13/204.

¹⁶⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

¹⁷⁰ This involves selecting an internal "shadow" team to play devil's advocate on the core aspects of the case, leading to an internal debate. It is sometimes said to be influential. For a discussion see P Marsden, "Checks And Balances: EU Competition Law And The Rule Of Law," *Competition Law International*, February 2009. For an interesting comparative perspective, see J Baker, "My Summer Vacation At The European Commission," *The Antitrust Source*, September 2005.

adding oversight from the Chief Economist Unit,¹⁷¹ publishing Best Practices guidance on procedure for Article 101 and 102 TFEU cases,¹⁷² some tinkering with the role of the Hearing Officer,¹⁷³ and the creation of the post of European Ombudsman.¹⁷⁴ But these changes are relatively minor overlays on a procedure that has remained largely unchanged for decades. They do not address the following fundamental criticisms:¹⁷⁵

1. *The Commission as judge and jury.* The most fundamental criticism of the Commission's procedure is that it acts as "judge and jury," with the same officials drafting the Statement of Objections and the ultimate Decision.¹⁷⁶ Most of the officials are lawyers or economists and few if any will have had any training on making judicial-type assessments, including objective, forensic decision-making. The oral hearing before the Commission tends to be window-dressing because the same people presenting the Commission's case are also the decision-makers. The hearing is not public and involves no cross-examination of witnesses or any other real testing of evidence. The Commission's recent changes to its procedures, while commendable, do not address this fundamental issue. The "peer review panel" process is private and, while reputedly probing, does not require the panel to read and review all the evidence and arguments. Their report is not made available to the defendant. The same applies to the Chief Economist's opinion. The Hearing Officer deals only with procedural issues, and does not really deal with substantive legal or factual issues. The Ombudsman too is mainly limited to procedural issues and competition law is a very small part of the office's

¹⁷¹ See LH Röller, "Using Economic Analysis To Strengthen Competition Policy Enforcement" in P Bergeijk and E van Kloosterhuis (eds.), *Modelling European Mergers: Theory, Competition Policy And Case Studies*, Edward Elgar (2005).

¹⁷² See DG Competition, Best Practices On The Conduct Of Proceedings Concerning Articles 101 And 102 TFEU, OJ 2011 C 303/6. The most significant changes were the introduction of (voluntary) state of play meetings between the Commission and defendant(s) to give greater transparency on the stage of the Commission's proceedings. Three-way meetings between the complainant, Commission, and defendant were also proposed. For an overview see M Glader, "Best Practices In Article 101 And 102 Proceedings: Some Suggestions For Improved Transparency," *Competition Policy International*, April 2010 (1). On due process and EU competition law generally, see I Van Bael, *Due Process in European Union Competition Proceedings*, Wouters Kluwer (2011).

¹⁷³ See Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ 2011 L 275/29.

¹⁷⁴ See <http://www.ombudsman.europa.eu/en>.

¹⁷⁵ It bears emphasis that these criticisms are institutional or organisational, and are in no way reflective of DG Competition's (or the EU Commission's) officials, who are high calibre, extremely diligent, and of high integrity.

¹⁷⁶ In Case C-199/11, *Europese Gemeenschap v Otis NV and Others* [2012] ECR I-nyr, the Court of Justice held that Article 47 of the Charter of Fundamental Rights does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU resulting from a breach of the competition rules (*in casu* a cartel). In reaching this conclusion, the Court rejected criticisms of the Commission's "judge and jury" role (as well as the role of the College of Commissioners), finding that the existence of effective judicial review at national and EU level constituted sufficient protection. Leaving aside the fact that it was unlikely that the EU Courts would find their own appeal mechanisms ineffective, the case concerned an admitted cartel under Article 101 TFEU. This is fundamentally different to a strongly contested abuse finding under Article 102 TFEU, where greater concerns as to the effectiveness of judicial review arise.

overall work.¹⁷⁷

2. *The decision-making process is arcane.* The actual decision in an Article 102 TFEU case is taken by the College of 28 EU Commissioners. These are political appointees who will not have seen any of the evidence in the case and will typically have little or no detailed awareness of the issues that arise for their decision. Lobbying of Commissioners is rare nowadays but it does occur—usually in the cases that matter most. When lobbying does occur the submissions made are not part of the Commission’s case file and it is entirely unclear what influence they may have had on the outcome.
3. *The true decision-making process has become diffuse and lacking in transparency.* It is of course a democratic right of undertakings and individuals to lobby public institutions, and in particular legislative bodies. But lobbying tends also to be extensive in major Article 102 TFEU cases, and in a manner that lacks transparency. Commissioners, Commission officials, the Legal Service, and other Directorates-General may be lobbied but it is typically unclear who has been contacted and whether they have been influential.¹⁷⁸ The chain of command may be ignored so those with formal responsibility for decision-making may not be the ones who are most influential in the actual decision-making. Again, notes of meetings will not usually appear on the Commission’s case file. As one commentator notes “the procedure in practice has become less structured, less formal, and more diffuse.”¹⁷⁹

¹⁷⁷ A notable intervention by the Ombudsman was his decision in *Intel*. It concerned the Commission’s failure to keep a note of a lengthy meeting with a senior Dell executive. Dell was the most important customer in the whole case and the Commission’s decision relied extensively on evidence from Dell (including the individual concerned) to inculpate Intel. The meeting seemed particularly important because Dell’s CEO gave sworn evidence in proceedings involving Intel in the United States that appeared to contradict assessments made by the Commission in the decision. The Ombudsman found that the failure to keep a note constituted maladministration. He did not, however, make any finding as to whether the Commission had infringed Intel’s rights of defence. See Decision of the European Ombudsman Closing His Inquiry Into Complaint 1935/2008/FOR Against the European Commission of 14 July 2009.

¹⁷⁸ This echoes an unsourced comment from Henry Kissinger: “Who do I call if I want to call Europe?”

¹⁷⁹ See J Temple Lang, “Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003,” *CEPS Special Report*, November 2011, http://aei.pitt.edu/32989/1/Reform_of_Commission_Procedure_in_Competition_Cases_with_cover.pdf. The same author, using Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, forced the Commission to publish its internal Manual of Procedure, which can now be found at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf. Following publication, he criticised the Manual of Procedure in certain respects, including: (1) it does not deal with submissions to other parts of the Commission in competition cases, which has been a feature of some recent (and controversial) decisions; (2) it does not deal with the legal principle of good administration, including in particular the need to take notes of meetings; (3) it does not refer to the Charter on Fundamental Rights, which is now part of EU law; and (4) it does not deal with due process and impartiality. See J Temple Lang, “The Strengths And Weaknesses Of The DG Competition Manual Of Procedure,” *Journal of Antitrust Enforcement* (2013) 1(1): 104-131.

4. *Record fines and significant discretion.* The levels of fines in many recent Article 102 TFEU cases have been staggering, with Intel fined €1.06 billion in 2009 and Microsoft paying a similar cumulative amount for its various transgressions in respect of tying and interoperability abuses. This has led one commentator to say, probably correctly, that “the amount of the fines imposed by the Commission ... exceed fines imposed by the public authority in any democracy of which I am aware for any offence.”¹⁸⁰ While the Commission has published Fining Guidelines,¹⁸¹ it is well-known anecdotally that the Competition Commissioner often decides the headline figure, himself/herself, with officials then tasked with working back to that figure using the Fining Guidelines.
5. *Commission procedures not compliant with the European Convention on Human Rights.* It is frequently argued that the Commission’s procedures do not correspond with the standards laid down in Article 6 of the European Convention on Human Rights (ECHR).¹⁸² As a leading commentator notes:¹⁸³

“the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR. Condemned parties have often invoked these arguments before the Community courts, so far with little success. The number of cases has grown and the concerns become more strident as the penalties have become fiercer.”

This view is shared by others.¹⁸⁴ Concerns in this regard have become more pressing given greatly increased fines in recent years and the increasing role of the Commission as a lead enforcement agency in major abuse cases such as *Microsoft*, *Intel*, and *Google*. Moreover, the Charter of Fundamental Rights is now fully part of EU law,¹⁸⁵ and guarantees as a minimum the ECHR rights. It is also envisaged that the EU will soon become a party to the ECHR.¹⁸⁶

¹⁸⁰ I Forrester QC, “Due Process In EC Competition Cases: A Distinguished Institution With Flawed Procedures,” 34 *European Law Review* (2009) 817.

¹⁸¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2. See Ch. 18 (Remedies) for more detail.

¹⁸² This also assumes that the Commission’s procedures are not purely administrative in nature but have sufficient quasi-criminal character to fall within Article 6 ECHR. The better view is that Article 6 ECHR is engaged. See Ch. 1 (Introduction, Scope of Application, and Basic Framework) for more detail.

¹⁸³ Forrester, *ibid.*

¹⁸⁴ Temple Lang, *ibid.*

¹⁸⁵ See Article 6 TEU. The Charter has the same legal value as the EU treaties.

¹⁸⁶ Accession became a legal obligation under Article 6(2) TEU. A final draft of the accession agreement was presented on 5 April 2013. The Court of Justice will, however, need to render an opinion on the compatibility of the accession with EU law. As discussed in Chapter 1 (Introduction, Scope of Application, and Basic Framework), the EU Courts, the EFTA Court, and the European Court of Human Rights have taken a series of steps even before accession to subject Commission proceedings and judicial review of competition decisions to many of the obligations reflected in Article 6 ECHR. See Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-nyr; Case C-407/08 P, *Knauf Gips KG v Commission* [2010] ECR I-6375; Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, judgment of 12 April 2012, not yet reported (EFTA Court);

These deficiencies must at least have an indirect impact on the *substantive* application of Article 102 TFEU. The implication is that the undoubted discretion vested in the Commission may not be subject to effective procedural safeguards in certain respects. All else equal, this is likely to expand the jurisdiction and impact of Article 102 TFEU, and in ways that would likely not occur in the presence of better or fairer procedures. It is also likely to result in an over-inclusive, or at least more haphazard, application of Article 102 TFEU since there may be insufficient internal checks and balances of the end-product as manifested in Commission decisions.

The basic solution to the problem is reasonably clear: that the prosecutorial and decision-making elements of the process should be split. One commentator suggests that “the only way in which these criticisms could be satisfied without an amendment of the EU Treaties would be to give the General Court (formerly the Court of First Instance), instead of the Commission, the power to adopt prohibition decisions and to impose fines in competition cases.”¹⁸⁷ This solution is not as radical as it seems: it was actually proposed by the European Parliament as early as 1981.¹⁸⁸ A Treaty amendment could do the same thing or go even further in terms of institutional redesign.

and Case 43509/08, *A. Menarini Diagnostics SRL v Italy*, judgment of the European Court of Human Rights of 27 September 2011.

¹⁸⁷ See J Temple Lang, “Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003,” *CEPS Special Report* (November 2011), at 194.

¹⁸⁸ See Resolution on the Tenth Report of the Commission of the European Communities on Competition Policy, OJ 1982 C 11/78.