



In brief: abuse of dominance in European Union

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Abuse of dominance

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Holding or acquiring a dominant position is not unlawful under EU competition law. A dominant company infringes article 102 of the Treaty on the Functioning of the European Union (TFEU) only if it abuses its dominance to restrict competition.

Article 102 of the TFEU does not define the concept of abuse. Instead, it lists four categories of abusive behaviour:

- article 102(a) prohibits directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- article 102(b) prohibits limiting production, markets or technical developments to the prejudice of consumers;
- article 102(c) prohibits applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- article 102(d) prohibits making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Broadly, the categories of abuse can be grouped into (1) exclusionary abuses (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition) and (2) exploitative abuses (where a dominant firm uses its market power to extract rents from consumers). Exclusionary abuses are by far the most common type of abuse (although the Commission and national authorities have begun to pursue more exploitative abuse cases).

The definition of abuse has largely grown out of the case law and been fleshed out in the Revised Guidance Paper and Draft Guidelines. The classic formulation of an abuse is behaviour "which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition" (*Hoffmann-La Roche*, paragraph 91).

Not all conduct that negatively affects rivals is anticompetitive. It is a normal and desirable part of the competitive process that companies that have less to offer customers leave the market. Accordingly, the courts have emphasised that "not every exclusionary effect is necessarily detrimental to competition. Competition on

the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient" (case C-209/10, *Post Danmark I*, ECLI:EU:C:2012:172, paragraph 22; case C-413, *Intel*, EU:C:2017:632, paragraph 134). This is because competition rules do not "seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market" (*Intel*, paragraph 133).

The challenge for agencies and undertakings alike in abuse of dominance cases is therefore to distinguish between abusive conduct and vigorous competition on the merits.

Case law qualifies certain categories of conduct as "by nature" abuses (such as exclusive dealing). The Court of Justice's 2017 *Intel* judgment brings important clarity to the treatment of these abuses: by nature abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This entails, in particular, an assessment of rivals' efficiency because competition law does not seek to protect inefficient rivals. In addition, even if the conduct does produce exclusionary effects, the Commission (or court) must determine whether those effects "may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer" (*Intel*, paragraph 140). Accordingly, by nature abuses are not the same as *per se* infringements.

Outside the "by nature" exceptions, the Commission has to perform a fully fledged effects analysis. This will apply, for example, to tying, product design, pricing abuses and refusals to supply. An effects analysis for exclusionary conduct requires proving at least the following four elements.

First, the dominant company's abusive conduct must adversely impact an effective competitive structure (Revised Guidance Paper, paragraph 19).

Second, the abusive conduct must cause the anticompetitive effects (case C-23/14, *Post Danmark II*, ECLI:EU:C:2015:651, paragraph 47). According to the Court of Justice of the European Union, proving a "causal link is one of the essential constituent elements of an infringement of competition law which it is for the Commission to prove" (case C-48/22 P, *Google Shopping*, ECLI:EU:C:2024:726, paragraph 224). Proving causation should usually require comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur (Revised Guidance Paper, paragraph 21).

Third, the anticompetitive effects must be reasonably likely (case T-201/04, *Microsoft*, ECLI:EU:T:2007:289, paragraph 1089). If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place (case T-70/15, *Trajektna luka*, ECLI:EU:T:2016:592, paragraph 24).

In the *Servier* judgment, the General Court found that it would be paradoxical to permit the Commission to limit its assessment to likely future events in a situation where the alleged restrictive conduct has been implemented and its actual effects observed (case T-691/14, *Servier*, EU:T:2018:922). While those findings relate to article 101 of the TFEU, the same reasoning should apply to article 102 of the TFEU because the concept of a restriction of competition is the same, as the English High Court found in *Streetmap v Google* ([2016] EWHC 253).

Fourth, the anticompetitive effects must be sufficiently significant to create or reinforce market power (Revised Guidance Paper, paragraphs 11 and 19).

The Draft Guidelines identify certain factors that can be relevant to its assessment of, first, whether conduct departs from competition on the merits and, second, whether the conduct is capable of having exclusionary effects. In particular, according to the Draft Guidelines (paragraph 53 ff), factors relevant to whether conduct departs from competition on the merits include whether:

- the conduct fulfils the requirement of a specific legal test deemed by the case law as falling outside the scope of competition on the merits (such as tying, exclusive dealing or refusals to supply);
- the conduct holds no economic interest for the dominant undertaking, except that of restricting competition (ie, a naked restriction);
- the dominant undertaking prevents consumers from exercising their choice based on the merits of the products, including product quality;
- the dominant undertaking provides misleading information to administrative or judicial authorities or other bodies, or misuses regulatory procedures, to prevent or complicate competitors' market entry;
- the dominant undertaking violates rules in other areas of law (for instance, data protection law) and thereby affects a relevant parameter of competition, such as price, choice, quality or innovation;
- the dominant undertaking's conduct consists of, or enables, biased or discriminatory treatment that favours itself over its competitors;
- the dominant undertaking changes its prior behaviour in a way that is considered as abnormal or unreasonable in light of the market circumstances at stake, such as an unjustified termination of an existing business relationship; and
- a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position.

Factors relevant to whether conduct is capable of producing exclusionary effects include:

- the dominant undertaking's position;
- the conditions on the relevant market;
- the position of the dominant undertaking's competitors;
- the extent of the allegedly abusive conduct;
- the position of customers or suppliers;
- evidence of an exclusionary strategy; and
- evidence relating to actual market developments.

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. Article 102 of the TFEU covers both exclusionary abuses (such as tying, refusal to supply or exclusive dealing) and exploitative abuses (such as excessive pricing or imposing unfair trading conditions).

The Commission's enforcement activity over the past two decades has generally focused on exclusionary abuses, and the Draft Guidelines only cover exclusionary conduct. The Commission has more recently made clear that it would like to increase its caseload on exploitative abuses. In 2016, Commissioner Vestager announced that the Commission will seek to "intervene directly to correct excessively high prices". National authorities in the UK, Italy, France and Germany are also pursuing – or have pursued – exploitative abuse cases.

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

There is case law suggesting that it is unnecessary to show a causal connection between dominance and the abuse (case 6/72, *Continental Can*, ECLI:EU:C:1973:22, paragraph 27). These cases are quite old, however, and it is generally expected today that the Commission must demonstrate a connection between the dominant

position and the abusive conduct. In *Tetra Pak II*, the court held that article 102 of the TFEU "presupposes a link between the dominant position and the alleged abusive conduct" (case C-333/94, *Tetra Pak*, ECLI:EU:C:1996:436 (*Tetra Pak II*), paragraph 27).

In exceptional circumstances, an abuse may occur on an adjacent market to the dominant market (*Tetra Pak II*). For this to apply, there must be "close associative links" between the adjacent market where the conduct occurs and the dominant market. More generally, in leveraging abuses (such as tying or refusal to supply), the abuse occurs on the dominant market, but produces effects on a neighbouring (usually non-dominant) market.

Irrespective of the above, the Commission must still prove causation in fact. In particular, it must show that the abusive conduct actually causes the posited anticompetitive effects (usually by reference to an appropriate counterfactual). In *AstraZeneca*, the court confirmed that "a presumption of a causal link . . . is incompatible with the principle that doubt must operate to the advantage of the addressee of the decision finding the infringement" (case C-457/10, ECLI:EU:C:2012:770, paragraph 199).

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Even if conduct is found to constitute an abuse and to restrict competition, a company can always attempt to show that its conduct is objectively justified. This applies for all abuses, including "by nature" abuses.

The dominant company bears the evidentiary burden to substantiate an objective justification. It is then for the Commission to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the "justification put forward cannot be accepted" (*Microsoft*, paragraph 688). In *Intel*, the Court of Justice confirmed that the Commission must examine whether the benefits the conduct at issue creates outweigh its alleged restrictive effects (*Intel*, paragraph 140).

Conduct may be justified if it is either objectively necessary or produces efficiencies that outweigh the restrictive effects on consumers (*Post Danmark I*, paragraph 41; Revised Guidance Paper, paragraph 28). The Revised Guidance Paper notes that "the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking" (paragraph 28). The EU courts have also held that a dominant company may justify its conduct based on legitimate "commercial interests" (*United Brands*, paragraphs 189–191). In *Motorola* and *Samsung*, for example, the Commission accepted that it is legitimate for a holder of standard essential patents to seek injunctions against patent users that are not "willing licensees" (case AT.39985, *Motorola*, 29 April 2014; and case AT.39939, *Samsung*, 29 April 2014).

The Draft Guidelines distinguish between "objective necessity" defences and "efficiency" defences. The former "must be based on evidence that the behaviour of the dominant undertaking was objectively necessary to achieve a certain aim" (paragraph 168). An objective necessity defence will be accepted only if the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim (case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, paragraph 103). The proportionality condition is not met where the same aim could be achieved through means that are less restrictive of competition.

Under an efficiency defence, the dominant undertaking is required to "demonstrate that the exclusionary effects resulting from the dominant undertaking's conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers" (Draft Guidelines, paragraph 169). To prove an efficiency defence, the dominant undertaking must show to the requisite standard of proof that the following four cumulative conditions are fulfilled:

- that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and on the interests of consumers in the affected markets;
- that those gains have been, or are likely to be, brought about as a result of the conduct;
- that the conduct is necessary for the achievement of those efficiency gains; and
- that the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

As to exclusionary intent, this is not a necessary element of an abuse because an abuse is "an objective concept" (*Hoffmann-La Roche*, paragraph 91). That said, evidence as to the company's intent may be useful in interpreting its conduct (Draft Guidelines, paragraph 70(f)). As the Court of Justice held in *Tomra*, "the existence of any anticompetitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused" (case C-549/10, P *Tomra*, ECLI:EU:C:2012:221, paragraph 20).

Specific forms of abuse

Types of conduct

Rebate schemes

The grant of rebates is generally pro-competitive. But certain forms of rebates may constitute an abuse if applied by a dominant company. The concern is that the dominant company exploits its larger base of sales to offer discounts in ways that preclude smaller (but equally efficient) rivals from competing for the contestable portion of a customer's demand.

The case law generally distinguishes between three categories of rebates: rebates based on volumes of purchases, rebates conditioned on exclusivity and loyalty-inducing rebates.

The first category of rebates – forward-looking volume-based rebates – are presumptively lawful (*Hoffmann-La Roche*, paragraph 90; case T-203/01, *Michelin v Commission*, ECLI:EU:T:2003:250 (*Michelin*), paragraph 58). This reflects gains in efficiency and economies of scale.

The second category – rebates conditioned on exclusivity – has been condemned in a number of cases, including *Hoffmann-La Roche*, *Michelin* and *British Airways*, as presumptively unlawful. The *Intel* judgment clarifies that while exclusive dealing remains presumptively unlawful, if firms submit evidence that the conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This is not merely a procedural requirement: if the dominant firm submits plausible evidence, the Commission must properly review that evidence and demonstrate that the conduct will nonetheless exclude equally efficient rivals.

The third category – loyalty-inducing rebates - requires a full assessment of circumstances to analyse whether the rebate is likely to foreclose equally efficient competitors or make it more difficult for purchasers to choose their sources of supply (*Post Danmark II*, paragraphs 30–32).

The relevant circumstances include whether the rebates are individualised or standardised; the length of the reference period; the conditions of competition prevailing on the relevant market; the proportion of customers covered by the rebate; and whether the rebate is ultimately likely to foreclose an equally efficient competitor.

In addition, whether a rebate is retroactive or incremental is an important part of the assessment of all the circumstances. The Commission and EU courts take a strict approach to retroactive rebates (which pay discounts retroactively on past purchases over a reference period if the customer meets predefined quantity targets). The concern is that the rebate creates a suction effect that makes it less attractive for customers to switch small

portions of incremental demand to rivals (Revised Guidance Paper, paragraph 40). Incremental rebates, on the other hand, do not create the same suction effect and are considered less of a concern (although they can still be problematic depending on the other factors set out above).

Tying and bundling

Tying occurs when a supplier sells one product, the "tying product", only together with another product, the "tied product". Five conditions must be established for a finding of abusive tying (*Microsoft*):

- the tying and tied goods are two separate products;
- the undertaking concerned is dominant in the tying product market;
- customers have no choice but to obtain both products together;
- the tying forecloses competition; and
- there is no objective justification for the tie.

Typically, one of the main issues is establishing whether two components constitute separate products or an integrated whole. In *Microsoft*, the court held that this assessment must be based on a number of factors, including "the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also . . . commercial practice" (paragraph 925).

Another important issue in tying cases is proving the tie has the effect of foreclosing competition. In *Microsoft*, for example, the Commission acknowledged that "a closer examination of the effects that tying has on competition" was required and that there were "good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition" (paragraphs 841 and 905–926). The Commission then demonstrated that Microsoft's tying of Windows Media Player with Windows had the actual effect of foreclosing qualitatively superior rival media players (paragraphs 819, 949–950). The court, for its part, reviewed the Commission's analysis of "the actual foreclosure effects of Microsoft's abusive conduct" (paragraphs 971, 1010 and 1057). In *Google Android*, the General Court held that "close examination of the actual effects or further analysis . . . was required before it could be concluded that the tying in question was harmful to competition" (case T-604/18, *Google LLC and Alphabet, Inc v European Commission*, ECLI:EU:T:2022:54, paragraph 295). An effects-based analysis was required to "reduce the risk that penalties may be imposed for conduct which is not actually detrimental to competition on the merits" and to "clarify the gravity of the conduct".

A company could achieve the same effect as tying by ostensibly offering a stand-alone version of the tying product alongside a tied version, but at a price that realistically means customers will not purchase the stand-alone version. This is referred to as mixed bundling.

The Revised Guidance Paper states that these bundled discounts should be assessed not under the tying framework described above, but in the same way as other forms of pricing abuse, by allocating the discounts fully to the price of the non-dominant tied product (paragraph 60). According to the Revised Guidance Paper, if that calculation results in a price below the dominant company's long-run average incremental costs (LRAIC) of supplying the tied product, the discount is anticompetitive – unless equally efficient rivals can replicate the bundle.

In 2025, the Commission adopted binding commitments in the Microsoft Teams case. The Commission had concerns that Microsoft anticompetitively tied Teams to its dominant SaaS productivity suites, foreclosing rivals. The commitments include a requirement to offer EEA customers Office 365 and Microsoft 365 without Teams at a reduced price, while committing not to provide higher discount rates for bundled versions

Exclusive dealing

The Draft Guidelines define exclusive dealing as "various forms of obligation to purchase or sell all or most of a customer or a supplier's requirements from/to the dominant undertaking" (paragraph 78).

The concern is that the exclusivity condition enables the dominant company "to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share" (case T-286/09, *Intel*, EU:T:2014:547, paragraph 93). A threshold question is therefore whether the clause involves the company leveraging a non-contestable share of demand.

If leveraging of a non-contestable share is established, the next question is to determine whether the condition constitutes exclusivity. The test is whether the purchaser has "to obtain all or most of their requirements exclusively from the dominant undertaking" (*Intel*, paragraph 72).

As to what "all or most of their requirements" actually means, 70% to 80% of a purchaser's requirements will constitute "most" and therefore be considered as exclusivity (*Hoffmann-La Roche*, paragraph 83). Similarly, the Vertical Restraints Block Exemption refers to an exclusive agreement as one where a buyer must purchase more than 80% of its requirements from the seller (article 1f).

Exclusivity arrangements are considered presumptively unlawful. Under the framework of the Court of Justice's *Intel* judgment, however, firms can submit evidence that the conduct is not capable of restricting competition and the Commission must then assess all the circumstances to determine whether the conduct is abusive.

Predatory pricing

Predatory pricing arises when a dominant company prices its products below cost such that equally efficient competitors cannot viably remain on the market.

A two-stage test applies to classify predatory pricing as abusive: first, pricing below average variable cost (AVC) is presumptively abusive (*Akzo*, paragraph 71); second, pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor (*Akzo*, paragraph 72).

The Draft Guidelines, however, indicate that alternative benchmarks may "better capture the relevant dominant undertaking's costs, depending on the circumstances" (paragraph 110) – in particular, LRAIC and average avoidable costs (AAC). In practice, however, this makes little difference because AVC and AAC will usually be the same, and ATC and LRAIC are good proxies for each other (Revised Guidance Paper, paragraph 27, footnote 2).

Recoupment (that is, the ability of the dominant firm to raise prices once other competitors have been foreclosed and thus recoup its costs associated with predatory pricing) is not a formal precondition of predatory pricing under article 102 of the Treaty on the Functioning of the European Union (TFEU) (case C-202/07, *France Telecom*, ECLI:EU:C:2009:214). The Revised Guidance Paper, however, suggests that the Commission will likely assess the impact of below-cost pricing on consumers as part of its analysis (paragraphs 69–71).

Price or margin squeezes

A margin squeeze occurs when a vertically integrated company sells an input to its downstream rivals at a high price and, at the same time, prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market.

This is abusive in EU law when "the difference between the retail price charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market"

(Commission in case COMP/C-1/37.451, *Deutsche Telekom*, paragraph 107, upheld on appeal by the General Court, confirmed in *TeliaSonera Sverige*, paragraphs 31–34 and case C-295/12 P, *Telefónica*, ECLI:EU:C:2014:2062, paragraph 75).

Margin squeeze cases were originally viewed as instances of a constructive refusal to supply. The Court of Justice's judgments in *TeliaSonera Sverige*, *Slovak Telekom* and *Telefónica* have held that it is not necessary to establish the legal conditions for an abusive refusal to supply in these cases. This has also been confirmed by the Revised Guidance Paper, which includes margin squeeze as a conduct separate to refusal to supply (paragraph 90). The judgments treat margin squeeze practices as akin to predatory pricing behaviour, particularly as they analyse the margin squeeze under article 102(a) of the TFEU. To end the margin squeeze, the dominant company is not forced to provide access to its facilities in a situation where it did not provide access originally; rather, it only needs to change the level of prices to remove the squeeze.

Refusals to deal and denied access to essential facilities

Generally, dominant companies are free to decide whether to deal (or not) with a counterparty. As Advocate General Jacobs confirmed in *Bronner*, it is "generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business" (case C-7/97, *Bronner*, ECLI:EU:C:1998:264, paragraph 57). Refusal to supply cases have generally concerned alleged exclusion of rivals (ie, refusals to deal that may eliminate competition). As a practical matter, in the absence of a competitive relationship between the customer and the dominant company, a refusal to supply an actual or potential customer is very unlikely to infringe article 102 of the TFEU.

Even when dealing with rivals, however, a refusal to supply products or access to facilities can be found abusive only in exceptional circumstances. The following three conditions need to be met for this to be the case (case C-7/97, *Bronner*, ECLI:EU:C:1998:569; joined cases 6/73 to 7/73, *Commercial Solvents*, ECLI:EU:C:1974:18; cases T-374/94 et al, *European Night Services and Others*, ECLI:EU:T:1998:198):

- the requested input must be indispensable (ie, it is an essential facility);
- the refusal to supply is likely to eliminate competition in the downstream market; and
- there is no objective justification for the refusal.

If the refusal involves intellectual property, the refusal to license must also prevent the emergence of a new product (case C-418/01, *IMS Health GmbH & Co*, ECLI:EU:C:2004:257 (*IMS Health*); cases C-241/91 to C-242/91, *Magill*, ECLI:EU:C:1995:98; and *Microsoft*).

A refusal to supply can be express or constructive (ie, the dominant company insists on unreasonable conditions for granting access to the facility).

The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are "technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult" to compete without access to the input (*Bronner*, *IMS Health*).

If there are "less advantageous" alternatives, that means the input is not indispensable. For example, in *Bronner*, access to newspaper distributor Mediaprint's delivery network was not indispensable because Bronner could have used kiosks, shops and post. Mediaprint's refusal to grant access was therefore not abusive.

For this reason, past essential facilities cases have typically involved state-funded natural monopolies such as ports (case IV/34.689, *Sea Containers v Stena Sealink*), airport facilities (case IV/35.613, *Alpha Flight Services/Aéroports de Paris*), gas pipelines (case IV/32.318, *London European – Sabena*, 4 November 1988),

essential inputs for downstream products such as basic chemicals (*Commercial Solvents*) or interoperability information (*Microsoft*).

In the *Android Auto* case (Case C-233/23), the CJEU ruled that a dominant platform's refusal to enable interoperability with a third-party app can constitute an abuse if such interoperability would enhance the app's attractiveness to consumers, and the platform is open. The Court held this may apply even if the technology is not indispensable to the app's commercial operation, marking a potential shift from the strict *Bronner* indispensability criteria in digital platform contexts.

Predatory product design or a failure to disclose new technology

Product design

Product design should only be found abusive in exceptional circumstances. Either the design must have no redeeming value and serve only to exclude competition or there must be additional factors that impede rivals' ability to compete independently.

In the first scenario, the design must be introduced solely to render rivals' products incompatible or to exclude rivals from the market. A good example is the changes in transmission frequencies in *Decca Navigator* that deliberately caused rival devices to malfunction (case IV/30.979, *Decca Navigator Systems*, 21 December 1988).

In the second scenario, the design change must create barriers that hinder rivals from reaching customers through their own means. In the *Microsoft* tying case, for example, Microsoft's tie foreclosed competing media players from access to third-party PC original equipment manufacturers (OEMs) as a distribution channel. Microsoft, therefore, prevented rivals from reaching users independently of Microsoft via PC OEMs.

In the absence of a barrier to independent competition, a product improvement ought not to infringe article 102 of the TFEU. As Bo Vesterdorf, former president of the General Court, explained in comments on the *Microsoft* judgment: "a technical development or improvement of . . . products is to the advantage of competition and thus to the advantage of consumers" (B Vesterdorf, 'Article 82 EC: Where Do We Stand after the Microsoft Judgment?', *Global Antitrust Review*, 2008).

Failure to disclose IP

The Commission has found that an intentional and deceptive failure to disclose relevant intellectual property (IP) during a standard-setting process may contribute towards an abuse (case COMP/38.636, *Rambus*). This is known as a "patent ambush".

In this scenario, the abuse actually constitutes the claiming of royalties for use of the IP after the IP is incorporated in the standard. This is because the company will not hold a dominant position at the time of its failure to disclose IP; it only achieves dominance once the IP is (deceptively) incorporated into the standard.

Price discrimination

Unlawful price discrimination under article 102(c) of the TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions.

Abusive price discrimination requires a number of elements:

- the dominant company must enter into equivalent transactions with other trading parties;
- the company must apply dissimilar conditions to these equivalent transactions (case C-174/89, *Hoche*, ECLI:EU:C:1990:270, paragraph 25); and
- the discrimination must restrict competition downstream (ie, on the relevant market where the customers are competing) by excluding equally efficient competitors (case C-525/16, *MEO*, ECLI:EU:C:2018:270).

If there are legitimate commercial reasons for the discrimination, there is no abuse (case C-322/81, *Michelin*, ECLI:EU:C:1983:313, paragraph 90). Price discrimination abuses are relatively rare under article 102 of the TFEU. Price discrimination will generally only be found to be abusive if it is part of a strategy to drive rivals out of the market.

Exploitative prices or terms of supply

Exploitative abuses, such as excessive pricing, fall under article 102(a) of the TFEU. This provides that an abuse may consist of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".

Excessive pricing cases are rare; the leading case is *United Brands*. There, the court held that a price is excessive if "it has no reasonable relation to the economic value of the product supplied" (*United Brands*, paragraph 250).

This is assessed by a two-stage test: first, the difference between the dominant company's costs actually incurred and the price actually charged must be excessive; second, the imposed price must be either unfair in itself or when compared to the price of competing products (*United Brands*, paragraphs 251–252; case COMP/A.36.568/D3, *Port of Helsingborg*, 23 July 2004, paragraph 147).

In the Latvian copyright society case, the Court of Justice (and Advocate General Wahl) provided guidance on the conditions under which the imposition of high prices by a dominant firm might infringe article 102(a). The Court of Justice found that to identify unfair prices, comparisons with prices in neighbouring member states may be appropriate, provided that the reference countries are selected "in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis" (case C-177/16, *AKKA/LAA*, ECLI:EU:C:2017:689, paragraph 51). The Court of Justice also confirmed that excessive prices need to be significantly and persistently above the competitive level.

Recently, the Commission has explicitly framed interventions against digital platforms in exploitative terms, citing unfair trading conditions in its decision fining Meta regarding *Facebook Marketplace* and its investigation into Apple's App Store anti-steering rules.

Abuse of administrative or government process

Misuse of administrative or government processes may constitute an abuse. In December 2012, the Court of Justice upheld the Commission's decision finding that AstraZeneca had committed an abuse by misusing patent and regulatory procedures to boost its patent protection and exclude new entrants (case C-457/10, *AstraZeneca*, ECLI:EU:C:2012:770).

AstraZeneca's abuse consisted of two elements: first, it submitted false and misleading statements to patent offices in various member states to extend its patent protection for the drug omeprazole. Second, it withdrew market authorisations of certain drugs so that new entrants could not rely on them. Even though this conduct was lawful under the relevant EU directive, it still constituted an abuse of competition law because it was pursued with an anticompetitive strategy of excluding rivals from the market.

These cases are relatively rare. However, the theory of harm experienced a revival in 2024, where the Commission fined Teva for alleged artificial extension of patent protection by misusing the European Patent Office's rules and procedures on certain patents, which constituted an abuse of dominant position. The Commission found that Teva's approach to patent filings, enforcement and withdrawals allowed it to artificially prolong legal uncertainty regarding its patents and potentially hinder market entry by competing medicines. (The Commission's infringement decision also set out concerns that Teva hindered market entry by making

disparaging claims about competing products.) It remains to be seen whether the *Teva* decision signals a broader resurgence of the patent process misuse theory of abuse or if these cases will remain isolated instances in the Commission's enforcement record.

Mergers and acquisitions as exclusionary practices

"Concentrations" (including mergers and acquisitions) with an EU dimension are covered exclusively by the EU Merger Regulation. If applicable national thresholds are met at the member state level, concentrations that do not have an EU dimension are assessed by member state competition authorities.

But this is not to say that acquisitions falling outside the EU Merger Regulation cannot constitute an abuse. As far back as 1973, in *Continental Can*, the Court of Justice of the European Union (CJEU) held that an abuse of dominance could "occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition". This doctrine, which extended to concentrations, predated the EU Merger Regulation. Since the Regulation entered into force, however, the principle had not been invoked to unwind a completed merger.

In case AT.39612, *Perindopril (Servier)*, 9 July 2014, for example, the Commission investigated a series of acquisitions by Servier of rival technologies – which Servier then did not use – to produce Perindopril. The Commission found that these strategic, blocking acquisitions constituted an abuse of a dominant position under article 102 of the TFEU. In December 2018, the General Court annulled the article 102 part of the decision, primarily because the Commission committed a series of errors in defining the relevant market and therefore wrongly concluded that Servier was dominant.

A recent CJEU judgment revives the principle set out in *Continental Can*. The judgment arose from a preliminary reference from the Paris Court of Appeal, which asked the CJEU to confirm whether the EU Merger Regulation precludes assessments of concentrations under article 102 of the TFEU, the EU's abuse of dominance provision. In the French court, a company called Towercast had complained that the acquisition of Itas by TDF constituted an abuse of TDF's dominant position in the upstream and downstream wholesale markets for digital transmission of terrestrial television services.

The CJEU held that although the EU Merger Regulation "introduces an ex ante control for concentration operations with a Community dimension, it does not preclude an ex post control of concentration operations that do not meet that threshold". It follows from the Regulation's context that 'certain concentrations may both escape an ex ante control and be subject to an ex post control'. The CJEU based its findings on the primacy of article 102 of the TFEU, which is a treaty provision that is directly applicable in member states, over the EU Merger Regulation. Under this ruling, concentrations that do not meet EU or national merger control jurisdictional tests could still be assessed as abuses of dominance.

Finally, if a transaction ultimately results in a dominant position (whether reviewed by the Commission or not), the Commission could later investigate the company if it suspected the company was abusing that dominance.

Other abuses

The categories of abuse under article 102 of the TFEU are not a closed or exhaustive set. Other abuses found in the past include:

- disparaging a competitor's product through dissemination of misleading claims (as in the Commission's 2024 fine against Teva for hindering market entry and uptake of competing, cheaper medicine, including by implementing a systematic disparagement campaign against a competing medicine for the treatment of

multiple sclerosis, by spreading misleading information about its safety, efficacy and therapeutic equivalence with Teva's own treatment);

- removing competing products from retail outlets (*Irish Sugar*);
- bringing frivolous litigation (case T-111/96, *ITT Promedia*, ECLI:EU:T:1998:183);
- seeking and enforcing injunctions based on standard essential patents (case AT.39985, *Motorola*, 29 April 2014; case AT.39939, *Samsung*, 29 April 2014; and case C-170/13, *Huawei*, ECLI:EU:C:2015:477);
- petitioning for the imposition of anti-dumping duties on rivals (case T-2/95, *Industrie des poudres sphériques*, ECLI:EU:T:1998:242); and
- restricting cross-border trade (as in the Commission's 2019 *AB InBev* decision where the Commission claims that AB InBev pursued a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands and to import it into Belgium).

New abuses, however, cannot be postulated without limitation. If a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish the abuse need to be satisfied. The application of the relevant legal conditions turns on the substance of an objection, not the form. The terminology used to describe the conduct is not relevant. What matters is what the conduct constitutes as a substantive matter.

Also, exclusionary abuses must bring about anticompetitive foreclosure according to the relevant criteria. This includes erecting barriers to independent competition, causation, a reasonably likely anticompetitive effect and creating or reinforcing a dominant position.

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