13. The special responsibility of dominant undertakings

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I. INTRODUCTION

The first time the European Court of Justice (hereinafter, the CoJ) spoke of a dominant firm's special responsibility was in *Michelin*. The applicant complained about the Commission's finding that the quality of its product and services were indicators that it had a dominant position. It took the view that this penalized a firm's commercial success. While affirming that these factors were legally relevant, the Court conceded that

> 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 dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.[2]

Given the context in which this passage is found (a discussion of dominance), the Court could not have intended to use this as an interpretative key about the notion of abuse. Instead, this statement proved useful for the Court to signal that dominance does not imply an infringement automatically.[3] Ten years later, the Court of First Instance (now, General Court) and subsequently the CoJ began to refer to an abridged version of the quoted passage, focusing only on the special responsibility that a dominant firm has to not impair undistorted competition, and situated the *Michelin* dictum in the framework of its discussion of whether conduct is an abuse of dominance.[4] This recast indicated a renewed importance of the concept. Being now related to the notion of abuse, an evolving element of Article 102 of the Treaty on the Functioning of the European Union (TFEU) than the notion of dominance, the concept of special responsibil-

[1] The opinions expressed are strictly personal; they do not represent the views of the European Commission or any of its services. The law in this chapter is stated as of 15 December 2021. Just before publication, we were kindly allowed to introduce a reference to Case C-680/20 *Unilever Italia Mkt. Operations* EU:C:2023:33.

[2] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* EU:C:1983:313, para 57.

[3] In the context of undertakings that are granted special or exclusive rights the Court came very close to recognizing automatic infringements when state regulation made an abuse of dominance inevitable. The high-water mark of this approach is Case C-320/91 *Criminal Proceedings against Paul Corbeau* EU:C:1993:198. This doctrine was used strategically to liberalize markets.

[4] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* EU:T:1993:31, para 67. The first court case to use this passage in the context of abuse is Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA v Commission* EU:C:2000:132, where para 57 of the ruling in *Michelin* (n 2) is quoted twice, first in a discussion of dominance (para 37) and second in a discussion of abuse (para 85) when examining if the dominant undertaking was responsible for the conduct or if this was required by regulation.

ity becomes more complex and intriguing. Moreover, this recast makes pertinent the question of how exactly dominance, which is the basis for the responsibility, is relevant for the responsibility to materialize. It therefore also transforms the static concept of dominance into a more dynamic concept, whereby the degree of market power matters.

Contrary to what is sometimes assumed, the CoJ's reference to the notion of special responsibility is not ubiquitous. It is only since 2009 that reference to the dominant firm's special responsibility emerges with more frequency in the Court's case law,[5] but even then the CoJ only refers to it in 10 out of some 19 judgments that dealt with aspects of Article 102 TFEU.[6] Two events might account for the increased use of the notion: first, the Member States, with the Lisbon Treaty, appeared to have demoted the role of competition policy by placing the notion of 'undistorted competition' in a Protocol, and second, the Commission issued a guidance paper on enforcement priorities for exclusionary abuse, suggesting a reinterpretation of the concept of abuse along the philosophy of the more economic approach that the Commission had embraced for other antitrust rules.[7] These events shaped the Court's evolving interpretation of Article 102 TFEU. The CoJ was quick to explain that the Treaty amendments had no impact.[8] Although the Court has taken longer to rule on the implications of the new approach canvassed in the Guidance Paper (which sets out the Commission's enforcement priorities), there is little doubt left that this document has had a certain impact on how judges developed the law on abuse.[9] In developing the notion of exclusionary abuse since the release of this Guidance, the Court makes frequent references to special responsibility to assist its reasoning. Notably, the Court has not referred to the special responsibility in exploitative abuse cases. A simple explanation is that exploitative abuses are not about breaching the duty not to 'impair genuine undistorted competition' but about extracting benefits from an already distorted competition. Another possible explanation is that in view of the market power required

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[5] We focus on the CoJ here because it is the institution tasked with the final interpretation of the Treaty.

[6] These are the judgments where the Court makes reference to special responsibility: Case C-202/07 P *France Télécom v Commission* ECLI:EU:C:2009:214, para 105; Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603 (hereinafter *Deutsche Telekom I*), para 83; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, para 24; Case C-209/10 *Post Danmark A/S v Konkurrenceråde*t ECLI:EU:C:2012:172 (hereinafter *Post Danmark I*), para 23; Case C-457/10P *Astra Zeneca AB and Astra Zeneca plc v Commission* EU:C:2012:770, paras 134 and 149; Case C-23/14 *Post Danmark A/S v Konkurrenceråde*t ECLI:EU:C:2015:651(hereinafter *Post Danmark II*), para 71; Case C-413/14 P *Intel v Commission* EU:C:2017:632, para 135; Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* EU:C:2020:52, para 153; Case C-165/19 P *Slovak Telekom v Commission* EU:C:2021:239, para 40; Case C-152/19 P *Deutsche Telekom v Commission* EU:C:2021:238, para 40.

[7] Treaty on the Functioning of the European Union (TFEU), Protocol 27 on the Internal Market and Competition; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (hereinafter Guidance Paper).

[8] *TeliaSonera* (n 6) paras 20–24.

[9] In contrast the academic community has explored the possible implications of the Guidance Paper extensively. For some early discussions, see eg P Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) 73 Modern Law Review 605; G Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of Competition Law and Practice 2.

for such abuses and the gravity of exploitation as such, there is no need for a reminder that such conduct is unacceptable.[10]

Some consider that emphasis on the role that the notion of special responsibility has is exaggerated. It is clear that the special responsibility is not the basis upon which one can find an abuse.[11] The conclusion that the passage is a 'statement of the obvious' is hard to resist.[12] However, there are certain aspects of the notion of abuse of dominance for which the dictum in *Michelin* proves helpful in interpreting the boundaries of Article 102 TFEU. In an earlier judgment (*Hoffmann-La Roche*) the Court suggested that dominant undertakings should be subject to stricter rules than non-dominant undertakings, because, in the presence of dominance, the degree of competition in the market is already weakened and therefore any further interference with the market structure is likely to distort competition.[13] As we explain below this accounts for some fairly wide obligations that dominant undertakings have sometimes been asked to carry.

The idea of subjecting a powerful undertaking to stricter rules is not alien to the US jurisprudence. The emblematic *Alcoa* case is often seen as a manifestation of this idea and has not remained without criticism.[14] That said, the notion of special responsibility, much like other contentious phrases in EU antitrust law (eg competition on the merits), finds no ready twin in US antitrust. The closest the Supreme Court has come to the notion of special responsibility seems to be a dictum by Scalia J in *Kodak*: 'Behavior that might otherwise not be of concern to the antitrust laws … can take on exclusionary connotations when practiced by a monopolist.'[15] However this is simply a reaffirmation that the monopolization offence requires a finding of monopoly power before one moves to explore if the conduct infringes Section 2 of the Sherman Act.

This chapter is structured in a manner that allows for a demonstration of how the various references the Court makes to the *Michelin* dictum concerning special responsibility have affected the evolution of the notion of exclusionary abuse. Section II discusses what the Court means by genuine undistorted competition. This allows the presentation of how the Court has used the *Michelin* obligation to move the interpretation of abuse away from a predominantly

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[10] For example, excessive pricing raises concerns only in markets with an entrenched dominant position where entry and expansion of competitors could not be expected to ensure effective competition in the foreseeable future. See OECD Policy Roundtables, Excessive Pricing, 2011 (EU report), available at https://www.oecd.org/competition/abuse/49604207.pdf, accessed 19 January 2023. However, a reference to the special responsibility of dominant undertakings can also be found in some Commission decisions on exploitative abuses. See eg Case AT.40394 *Aspen*, decision of 10 February 2021, paras 78–9.

[11] This is in line with the bulk of the literature, eg R Nazzini, *The Foundations of European Union Competition Law* (Oxford 2011) 174 noting that the Court 'was not laying down a test for abuse'.

[12] R Whish and D Bailey, *Competition Law* (9th edn, Oxford 2018) 198. I Lianos, 'Categorical Thinking in Competition Law and the "Effects-Based" Approach in Article 82 EC' in A Ezrachi (ed), *Article 82 EC: Reflections on its Recent Evolution* (Hart 2009) 24–30 goes further to discuss why such a special responsibility should exist in the first place since the same anticompetitive harm can also be caused by non-dominant undertakings.

[13] Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, paras 91 and 120.

[14] *United States v Aluminum Co of America* 148 F2d 416 (2d Cir. 1945). See eg JE Lopatka and PE Godek, 'Another Look at Alcoa: Raising Rivals' Costs Does Not Improve the View' (1992) 35 The Journal of Law & Economics 311.

[15] *Eastman Kodak Co v Image Technical Services, Inc* 504 US 451, 488 (1992).

form-based approach to a state where today the default position is that an abuse requires a 'qualified' effects analysis, with a restricted category of conduct judged restrictive by object. Section III explores the link between dominance and abuse and, in particular, how the holding of a dominant position impacts the assessment of different types of conduct and what the interplay between market power and abusive behaviour is. Section IV discusses whether the *Michelin* obligation is proscriptive (a responsibility not to allow) or also prescriptive (a responsibility to behave in a particular way). Section V considers the impact that regulation has on the scope of the special responsibility.

II. GENUINE UNDISTORTED COMPETITION

A. Towards a Qualified Effects-Based Approach

The duty not to impair genuine undistorted competition is the essence of the special responsibility set out in *Michelin*. Read together with the definition of abuse in *Hoffmann-La Roche*, this duty means a dominant undertaking must not restrict the competition that remains in the market, nor its potential growth.[16] However, the notion of competition that the EU Courts endorsed has been the subject of contestation. At a high level, the debate about the meaning of the notion of a restriction of competition for the purposes of exclusionary abuse is about the kind of competitive process that Article 102 TFEU is meant to protect. Broadly, and with the risk of simplification, two viewpoints have been shaping the debate. According to the first, the competitive process is hindered when the conduct alters the existing market structure, namely, it excludes or marginalizes one or more competitors regardless of the importance of those competitors for the effectiveness of competition. This approach is supported by the argument that, when there is dominance, any further restriction of competition becomes problematic and therefore there is no need for further analysis. On the second view, conduct is an abuse only if the harm to the competitive process is capable of leading to harm to consumers.[17] This requires an assessment of whether the restriction of competition is significant enough to cause harm to consumers. Both views can probably find support in the seminal statement in *Continental Can* that Article 102 TFEU is 'not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure'[18] as well as in the General Court's clarification in *British Airways* that 'competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected'.[19] The first view is often associated with a form-based approach and the second with an effects-based approach.

It appears that over the years the CoJ has moved gradually towards the second position. For example, in some more recent case law, when describing the impact of the conduct, the

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[16] *Hoffmann-La Roche* (n 13) para 91.

[17] On these debates see generally L Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance* (Cambridge University Press 2010); E Deutscher and S Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11 Competition Law Review 181.

[18] Case 6/72 *Europemballage and Continental Can v Commission* EU:C:1973:22, para 26.

[19] Case T-219/99 *British Airways v Commission* EU:T:2003:343, para 264.

Court, intentionally or not, has omitted the word 'structure', and referred only to conduct that is detrimental to consumers 'through the impact on effective competition'.[20] On one occasion, the Court even added to the classical definition of abuse in *Hoffmann-La Roche* – repeated in case law for decades – that the effects of hindering competition have to be 'to [the] detriment of consumers'.[21] Indications for this trend are likewise found in the much more inquisitive consideration by the Court of 'all the circumstances' of the investigated case,[22] and in the acknowledgement that 'not every exclusionary effect is necessarily detrimental to competition'.[23] This development was flagged in the Commission's Guidance on enforcement priorities, which suggested that '[a]ccording to the case-law, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case'.[24] Not long ago, in *Post Danmark II*, the CoJ expressly held that the assessment of abuse 'seeks to determine whether the conduct of the dominant undertaking produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests'.[25]

This trend was confirmed by *Intel*, the ruling of the CoJ on exclusionary abuse which has attracted most attention in the present era. Here, the notion of special responsibility is cited to explain

> why Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits.[26]

The Court echoes *Post Danmark I*'s statement that the exclusion of inefficient rivals may not constitute an abuse of dominance.[27] Shortly after the ruling in *Intel*, in *MEO* the Court applied a similar principle to secondary line price discrimination. It clarified that, for Article 102(c) TFEU to apply, the dominant undertaking's conduct has not only to put a trading partner on a downstream market at a disadvantage, but the disadvantaged trading partner has to be at least as efficient as its competitors.[28] While the practical implementation of this suggestion raises numerous questions – for example, which competitors should be used as a reference point for efficiency, and how a dominant undertaking can know which of its trading partners is efficient or not – the point that the Court seems to have wanted to make is that harm to a trading partner becomes a concern only if that trading partner is relevant for the effectiveness of the competitive process and ultimately to consumers.[29]

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[20] See *Post Danmark I* (n 6) para 20; *TeliaSonera* (n 6) para 24; Joined Cases C-468/06 to C-478/06 *Sot Lélos kai Sia and Others* EU:C:2008:504, para 68, and *Deutsche Telekom I* (n 6) para 176.

[21] See *Post Danmark I* (n 6) para 24.

[22] *TeliaSonera* (n 6) para 28; *Post Danmark I* (n 6) para 26.

[23] *Post Danmark I* (n 6) para 22; *TeliaSonera* (n 5) para 43; *Intel* (n 6) para 134.

[24] Guidance Paper (n 7) para 9.

[25] *Post Danmark II* (n 6) para 69.

[26] *Intel* (n 6) para 136.

[27] *Post Danmark I* (n 6) para 22.

[28] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* EU:C:2018:270, para 31.

[29] See R Horvath, L Peeperkorn, E Rousseva, 'The Preliminary Ruling in MEO: Closing the Circle of Article 102 TFEU' (2020) 11 Journal of European Competition Law & Practice 35; R O'Donoghue QC and J Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2020) 986.

The move to an effects-based approach seems to be supported also by the fact that some years ago the Court made space for an efficiency defence under Article 102 TFEU. The defence replicated the conditions of Article 101(3) TFEU and made it clear that the efficiency brought by the dominant undertaking has to benefit consumers.[30] If the distortion of competition were unrelated to consumer harm, it would have made little sense to make the defence contingent upon consumers receiving benefits from the claimed efficiencies.

There is little doubt that a shift to a qualified assessment of the competitive process implies an increased evidentiary burden for the party proving the abuse. However, this burden is mitigated by the fact that proving potential (as opposed to actual) effects is in principle sufficient for finding an abuse. The CoJ has made it clear that, although negative actual effects on competition are usually a strong indication for an abuse, showing such effects is not a prerequisite for the application of Article 102 TFEU.[31] Already in *British Airways* the Court held that conduct can be regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to all the circumstances of the case, to lead to a distortion of competition and that in such circumstances the Commission cannot be required in addition to adduce proof of an actual quantifiable deterioration in the competitive position of the business partners.[32] In *TeliaSonera* and in *Post Danmark II* the Court expressly held that, in order to establish whether a practice is abusive, that practice must have an anticompetitive effect on the market, but the effect does not necessarily have to be concrete, and 'it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors' who are at least as efficient as the dominant undertaking.[33] Indeed, requiring actual effects would have rendered Article 102 TFEU a toothless instrument, as a belated intervention, which waits for competition to be actually distorted can have limited remedial effect.

It is worth noting that, unlike in Article 101 TFEU case law, where the EU Courts have referred to the 'capability' and 'likelihood' of an agreement to restrict competition in order to distinguish between the two categories of harmful practices (restriction by object and restrictions by effect) in the Article 102 TFEU case law the same terminology does not seem to have the same purpose. On occasion, the Courts have referred to the tendency or the capability of conduct to produce negative effects as being synonymous.[34] In *Post Danmark II* the Court, after referring to the capability of the conduct to restrict competition, held that 'only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article [102 TFEU]',[35] echoing the General Court's view in *British Airways* that it is sufficient to demonstrate that the conduct 'tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect'.[36]

The upshot of the evolution of the case law described above is that the default setting for establishing an exclusionary abuse is what may be termed a qualified effects standard, that is, an assessment that identifies as problematic only restrictions of the competitive process that

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[30] Case C-95/04 P *British Airways v Commission* EU:C:2007:166, para 86. See E Rousseva, 'Efficiency Defence under Article 102 TFEU: Retrospectives and Prospectives' Concurrences No 2-2014.

[31] Case C-549/10P *Tomra Systems ASA v Commission* EU:C:2012:221, para 79.

[32] *British Airways* (n 30) para 145. This was reiterated in *MEO* (n 28) para 27.

[33] *TeliaSonera* (n 6) para 64; *Post Danmark II* (n 6) para 66.

[34] *British Airways* (n 30); *Tomra* (n 31).

[35] *Post Danmark II* (n 6) para 67.

[36] *British Airways* (n 19) para 293.

are (at least potentially) harmful to consumers. The Court does not require proof of actual effects, nor does it require a quantification of the effects on consumer welfare, let alone an application of a price-cost as efficient competitor test for all conduct which falls under Article 102 TFEU. Instead, the special responsibility of dominant undertakings means that they may not engage in conduct whose potential effect is the exclusion of efficient competitors, that is, competitors that contribute to the effectiveness of competition.

B. The Receding Space of Abuses by Object

In view of the development described in the previous section a question that merits discussion is whether there is conduct that can be considered abusive by its nature, similar to the restrictions by object under Article 101 TFEU. In particular because the effects-based approach has been applied to conduct at times considered abusive by object (eg tying and margin squeeze).[37] This trend continued with *Intel*. In this case the CoJ developed the case law on exclusivity rebates – traditionally considered abusive by their nature – by suggesting that the defendant has two ways of countering the presumption of the abusive nature of these rebates. First, it may provide supporting evidence that the rebates are incapable of harming competition. If so, then the Commission must carry out an effects-based analysis. Second, the undertaking may show that the conduct benefits from the efficiency defence.[38] More generally, the Court left the impression that, for Article 102 TFEU to apply, at least potential anticompetitive effects need to be proven.[39]

In the current authors' view, despite these developments, there is still a range of practices that would not warrant the assessment of effects.[40] For instance, one question with which the Court in *Intel* did not deal with is whether there are naked restrictions (eg prohibiting customers to even try a competitor's product), which as described in the Commission's Guidance Paper are forms of conduct that 'can only raise obstacles to competition'.[41] Drawing on the Guidance Paper, Nazzini has argued that the case law contains a category of instances of 'naked exclusion'.[42] Examples of this kind of conduct include a patent holder's misleading a patent office or a dominant company removing a rival's product by buying it from retailers.[43] To this one must add conduct that partitions the internal market, where the Court issued a very strongly worded reminder as to why this is an abuse:

> there can be no escape from the prohibition laid down in Article [102 TFEU] for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member

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[37] See respectively Case T-201/04 *Microsoft v Commission* EU:T:2007:289 and *Telia Sonera* (n 6).

[38] *Intel* (n 6) paras 138–9 for the first approach and para 140 for the efficiency defence.

[39] *Intel* (n 6) paras 133–7.

[40] Cf Lianos (n 12) and P Ibanez Colomo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) 53 Common Market Law Review 709.

[41] Guidance Paper (n 7) para 22.

[42] R Nazzini, 'Abuse of Dominance: Exclusionary Non-Pricing Abuses' in I Lianos and D Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing 2013) 482–4.

[43] Respectively *Astra Zeneca* (n 6) and Case T-228/97 *Irish Sugar v Commission* EU:T:1999:246, paras 226–35. However, at least with respect to *Astra Zeneca* it is also possible to read the CoJ's ruling as justifying a finding of abuse on the basis of the likely effects of the conduct, see *Astra Zeneca* (n 6) paras 106–9.

> State to other Member States, practices which, by partitioning the national markets, neutralise the benefits of effective competition in terms of the supply and the prices that those exports would obtain for final consumers in the other Member States.[44]

Taking all these claims together, they seem to suggest that there remains conduct that can be found abusive without demonstrating its anticompetitive effects. As effects do not matter for finding an abuse, dominant undertakings cannot argue in their defence that the effect of their conduct is negligible. From this perspective, one can argue that not engaging in such conduct entails greater responsibility than the duty not to engage in conduct which can produce potential negative effects.

C. Increasing Space for Special Responsibility

Although the scope of abuses that are anticompetitive by their nature might have shrunk, this does not mean that there is no scope for novel abuses and thus for an expansion of the special responsibility. In fact, an approach that is more attentive to the economic context allows the Court to clarify the scope of abuse of dominance and when necessary to identify new types of abusive conduct in a measured manner. For example, in *Slovak Telekom*, the CoJ distinguished between an abuse consisting of a dominant company's refusal to share the infrastructure that it has developed for its own business needs with its downstream competitors and an abuse consisting of a dominant company's offering of its product on the downstream market under unfair conditions which dissuade competitors.[45] The Court clarified that while in the first scenario it has to be shown that the refused access or product is indispensable for competition downstream, in the second scenario this is not a requirement. The second scenario can possibly include situations where the dominant undertaking has already de facto offered the product, where it is obliged by regulation to do so,[46] or where its business model cannot be profitably run without sharing infrastructure it has developed with competitors downstream.[47] Similarly in the context of the licensing of standard essential patents (SEPs), the Court identified a setting where a refusal to license intellectual property rights could constitute an abuse but where the test set out in *IMS Health* need not be followed.[48] Finally, as discussed in section III.B below, in *UK Generics*,[49] the Court suggested a new form of abusive behaviour which consists of a series of anticompetitive agreements connected by a common exclusionary strategy.

Thus far, this chapter has argued that the special responsibility placed on dominant undertakings has undergone transformation at the hands of the EU Courts. First, it was shifted from being a consideration relating to dominance to one relevant to considering the notion of abuse

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[44] *Sot Lélos* (n 20) para 66. In contrast Advocate General Colomer considered that there are no per se abuses (para 76).

[45] *Slovak Telekom* (n 6) paras 49–50.

[46] *Slovak Telekom* (n 6) and Case T-814/17 *Lietuvos geležinkeliai AB v Commission* ECLI:EU:T:2020:545. An appeal is pending at the time of writing.

[47] As it is the case with Case AT.39740 *Google Search (Shopping)* (27 June 2017), upheld in Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:T:2021:763.

[48] Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp and ZTE Deutschland GmbH* EU:C:2015:477, para 53. The general approach to refusals to license is set out in Case C-418/01 *IMS Health v NDC Health* EU:C:2004:257.

[49] *Generics* (n 6).

in the 1990s. Second, during the last decade the CoJ has gradually moved away from stating that this responsibility is to refrain from certain types of conduct to a qualified effects standard. The effects which matter are the likely harm to consumers or a meaningful harm to the competitive process. In US parlance, Article 102 TFEU no longer protects competitors.[50] As a result restrictions by object are now few and far between. This, however, does not mean that the special responsibility shrinks. New types of behaviour have been identified as problematic for competition and have led to the expansion of the material scope of the special responsibility.

III. THE LINK BETWEEN DOMINANCE AND ABUSE

There is a widespread understanding that Article 102 TFEU does not require that abuse be causally connected to the defendant's dominant position. Support for this position is usually sought in *Continental Can* and *Hoffmann-La Roche* where the CoJ suggested that the question of a causal connection was immaterial since the strengthening of a dominant position can be an abuse regardless of the methods and means used to attain it.[51] However, these rulings do not mean that dominance and abuse can or should be delinked. If that were the case, imposing a special responsibility on dominant undertakings would make little sense. Rather, the explanation given by Vogelenzang several decades ago about the relationship between dominance and abuse is scrupulous and remains valid today.[52] According to Vogelenzang, as the abuse consists of two elements – an act and its consequences – the link between dominance and abuse can be manifested in two ways: in some cases as dominance being the means for the conduct to take place, but in others, the link is manifested in that the dominance is necessary either for the negative effects to arise or for their strengthening. *Continental Can* and *Hoffmann-La Roche* fall in the second category.

With a view to seeking the rationale for the special responsibility, this section first explores dominance as a necessary condition for practices to be considered anticompetitive. It then shows that with the evolution of the assessment under Article 102 TFEU, as outlined in Section II.A, the degree of dominance has become increasingly important for assessing the harmful effects of practices and therefore also for the special responsibility dominant undertakings bear. Finally, the section shows that, even in cases where the scrutinized conduct could fall under the prohibition of both Articles 101 and 102 TFEU, the Commission and the EU Courts have chosen to apply Article 102 TFEU. As will be argued below, although in these instances the role of dominance for finding an infringement is far less obvious, the choice of the Commission and the EU Courts to apply Article 102 TFEU has nevertheless been informed by the understanding that dominant undertakings bear a special responsibility and was guided by healthy pragmatism.

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[50] This paraphrases *Brown Shoe v US* 370 US 294, 320 (1962). For a comparative account predating the evolution discussed here, see EM Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 World Competition 149.

[51] *Continental Can* (n 18) para 27; *Hoffmann-La Roche* (n 13) para 91.

[52] P Vogelenzang, 'Abuse of a Dominant Position in Article 86: The Problem of Causality and Some Application' (1976) 13 Common Market Law Review 61. See also E Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart 2010) 75–9.

A. The Relevance of the Degree of Dominance for the Assessment of the Effects of Abusive Behaviour

Many practices that could constitute abuse if carried out by a dominant undertaking would be unobjectionable when carried out by non-dominant firms. This is because, in the absence of market power, these practices are not capable of excluding competitors in an anticompetitive way. If non-dominant companies nevertheless adopt such market behaviour, its effects are likely benevolent.

The most obvious example is predatory pricing, that is, pricing at a level that entails a sacrifice of profits in the short run to eliminate competition and increase profits in the longer run.[53] In principle, any company, dominant or not, can sell below cost. However, a non-dominant company would not have the capacity to sell below cost long enough to drive competitors out of the market. Even if it succeeds to do so, it would be unable to recoup the losses incurred when it raises its prices.[54] Other examples of practices that are unobjectionable if carried out by non-dominant companies are refusal to supply and margin squeeze, as well as other forms of constructive refusals to deal which now the CoJ itself commonly refers to as imposing unfair conditions.[55] Absent dominance, a company taking such actions is more likely to lose than gain anything from such conduct.

In *TeliaSonera* the CoJ held that, as a general rule, the degree of dominance is not relevant for finding an abuse because Article 102 TFEU does not envisage any variation in form or degree in the concept of a dominant position but also clarified that this does not mean that the undertaking's strength in the market is irrelevant.[56] The risk of anticompetitive effects, and thus of an abuse, is greater the more dominant the undertaking is. For example, when an undertaking is an unavoidable trading partner it faces no competition for at least a large part of the demand. The non-contestable part of the demand confers a competitive advantage which allows the company to exclude competitors without sacrificing profits. The greater the degree of dominance, the larger the non-contestable share and the more difficult for competitors to compete.

Similarly, the greater the dominance, the greater the possibility of the dominant undertaking's conduct to cover a greater part of the market and to foreclose. In *Intel* the Court expressly pointed out the market share covered by the conduct as an important element of finding an abuse in the context of rebates when the Commission is required to examine their effects.[57]

Moreover, some conduct only constitutes an abuse when the degree of market power is significant and where mere dominance will not suffice. The most obvious category is refusals to deal where the abuse may only be committed where the dominant undertaking holds infrastructure or goods that are indispensable for market access. The same applies to above-cost prices. According to AG Mengozzi the reason the Court has confirmed as abusive the setting of prices above costs was that the dominant undertaking expressed an intent to exclude, its

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[53] M Motta, *Competition Policy* (Cambridge University Press 2004) 412.

[54] In the US, courts have acted on allegations for predatory pricing by companies with small market shares but recoupment has not been established; see eg *Brooke Group Ltd v Brown & Williamson Tobacco* 509 US 209 (1993), the alleged predator, Brown & Williamson, held only 12 per cent of the relevant cigarette market.

[55] *Slovak Telekom* (n 6) para 50.

[56] *TeliaSonera* (n 6) paras 80–81.

[57] *Intel* (n 6) para 139.

dominance was close to monopoly and the above cost price cuts were part of a large range of abusive conduct whose cumulative effect was harmful.[58]

Finally, the degree of dominance may affect what tests must be applied to establish an abuse. In *Post Danmark II*, the Court held that having a large market share, combined with structural advantages resulting from a statutory monopoly on a related market, obviates the need for applying an as-efficient-competitor test because such structure of the market makes the emergence of an as-efficient competitor practically impossible.[59] Although, after *Post Danmark II*, in *Intel* the Court affirmed the principle that Article 102 TFEU applies as long as a dominant company excludes an equally efficient competitor, this aspect of the ruling in *Post Danmark II* can hardly be considered overruled given the specific situation described for which the test would be unsuitable.

Bringing all these observations together, the degree of dominance frequently determines the scope of the special responsibility.

B. Abuse of Dominance when Conduct also Infringes Article 101 TFEU

When an anticompetitive agreement is concluded and one of the undertakings occupies a dominant position, formally the conditions of Articles 101 and 102 TFEU would be satisfied and in principle both provisions can apply. Early on, the CoJ held that in such circumstances the Commission is entitled to decide whether to proceed under Article 101 or Article 102 TFEU by considering the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market(s) in which they operate.[60] However, this recommendation was somewhat vague. Since then, three patterns have emerged. The first results from the Court's gradual alignment of the effects-based approach in Articles 101 and 102 TFEU. The consequence of this has been that in these settings it makes no difference whether one pursues such conduct as an anticompetitive agreement or as an abuse of dominance. However, as a matter of practice the Commission has opted for using Article 102 TFEU. The second pattern is derived from the Commission's practice of borrowing from the notion of restriction by object in Article 101 TFEU to inform a finding of abuse of dominance. This has been applied in particular in cases of agreements containing territorial restraints. These two developments are discussed in sections III.B.1 and III.B.2. They pose a challenge to the notion of special responsibility because one could argue that it would also have been possible to pursue such conduct using Article 101 TFEU. The third pattern is the parallel application of Articles 101 and 102 TFEU, which is discussed in section III.B.3.

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[58] *Post Danmark I* (n 6) paras 90 to 93, drawing on *Compagnie maritime belge transports* (n 4) and *Irish Sugar* (n 43). In *Google Shopping* (n 47) para 183, the General Court made specific reference to Google's 'superdominant position' and indicated that this degree of market power meant that 'it was under a stronger obligation not to allow its behaviour to impair genuine, undistorted competition on the related market for specialised comparison shopping search services'.

[59] *Post Danmark II* (n 6) para 59: 'On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible'.

[60] *Hoffmann-La Roche* (n 13) para 116.

1. The extension of the effects-based assessments from Article 101 TFEU to Article 102 TFEU

Exclusive dealing and tying agreements are good examples of the first trend. It is settled case law that exclusivity agreements are analysed by reference to their effects when considered under Article 101 TFEU.[61] Moreover, they are block exempted when the supplier's and buyer's market share each does not exceed 30 per cent and the duration of the non-compete clause does not exceed five years.[62] The factors relevant to assessing market power under Article 101 TFEU are the same factors that are considered when assessing dominance.[63] Under Article 102 TFEU exclusivity agreements, with or without rebates, have been traditionally considered anticompetitive by their nature (corresponding to 'by object' infringements under Article 101).[64] However, as discussed in section II.B above, after the ruling in *Intel* exclusivity rebates have become subject to an effects-based assessment on the condition that parties submit during the administrative proceedings evidence that their practice is incapable of foreclosing competition. After the more recent ruling in *Unilever* the same principle also applies to exclusivity obligations without rebates.[65] If they do so, the analysis under Article 102 TFEU becomes essentially the same as that carried out under Article 101 TFEU.

Tying agreements are block exempted from the application of Article 101 if each party's market remains below the 30 per cent market share thresholds, and if not block exempted can be found harmful only if their anticompetitive effects can be shown. While initially tying was considered abusive by its nature under Article 102 TFEU,[66] after the rulings in *Microsoft*[67] and *Intel*,[68] there is little doubt left that its effects need to be shown for an abuse to be found. In sum, there has been a convergence in the assessment of exclusivity rebates and tying carried out under Articles 101 and 102 TFEU. A quick overview of the Commission practice demonstrates that, whenever a dominant undertaking embarked on exclusivity or tying practices, the Commission has a clear preference to apply Article 102 TFEU.[69] Indeed, the application of Article 101 TFEU to such practices appears rather exceptional.[70] However, it does not appear that this choice, especially in view of the evolution of the case law, is necessarily determined by the position of the companies or the nature of the reciprocal undertakings entered into as suggested in *Hoffmann-La Roche* in the 1970s. This is because the market power, which determines the position that an undertaking occupies, is relevant under both provisions. The

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[61] Case C-234/89 *Delimitis v Henninger Bräu* EU:C:1991:91; Case C-345/14 *Maxima Latvija* EU:C:2015:784.

[62] Commission Regulation (EU) No 330/2010 of 20 April 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 [2010] OJ L102/1.

[63] See Commission Guidelines on Vertical Restraints [2010] OJ C130/1, paras 134–7.

[64] *Hoffmann-La Roche* (n 13); *Intel* (n 6) para 137.

[65] See Case C-680/20 *Unilever Italia Mkt Operations* EU:C:2023:33, paras 47–50.

[66] Case C-53/92 P *Hilti AG v Commission* EU:C:1994:77; Case C-333/94P *Tetra Pak International SA v Commission* EU:C:1996:436.

[67] Case T-201/04 *Microsoft Corp v Commission* EU:T:2007:289.

[68] *Intel* (n 6).

[69] See eg Case AT.40153 *E-book MFNs* (4 May 2017); Case AT.40099 *Google Android* (18 July 2018); Case AT.40220 *Qualcomm* (24 January 2018).

[70] Article 101 TFEU has been applied to tying practices in Case AT.39230 *Rio Tinto Alcan* (20 December 2012) and Case Nos IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited* [1989] OJ L246/1, however, in parallel with Article 102 TFEU.

nature of the reciprocal undertakings entered into does not appear a determinative factor either. Distributors are often under economic pressure exercised by their suppliers but this has not been a reason not to apply Article 101 TFEU.[71] Conversely, the Court has on many occasions held that a dominant undertaking may be liable for an abuse, even if the contract constituting the abusive behaviour is requested by the dominant undertaking's customers.[72]

The Commission's choice for Article 102 TFEU in these cases is pragmatic and appears to make enforcement more rational. First, the Commission has indicated that '[t]he degree of market power normally required for a finding of an infringement under Article 101(1) of the Treaty is less than the degree of market power required for a finding of dominance under Article 102 of the Treaty'.[73] Therefore, if dominance is proven it can be assumed that the market power needed for the application of Article 101 TFEU is also met. As has been pointed out by commentators, where dominance is established, Article 102 TFEU can be seen as *lex specialis* and take precedence over Article 101 TFEU which would be *lex generalis*.[74] Furthermore, because the notion of dominance is well developed in case law and practice with sufficiently clear parameters, the finding of dominance is more difficult to contest than the finding of a significant degree of market power required for the application of Article 101 TFEU.

Second, as the finding of dominance implies that the degree of competition is limited, the proof of any further restriction of competition may often be sufficient to justify the application of Article 102 TFEU.

Third, if the contractual practice is one of a series of anticompetitive practices in which the dominant undertaking is engaged – some involving agreements, some not – it makes more sense to rely on one provision which can catch all aspects of the behaviour. In such circumstances the application of Article 102 TFEU can better capture the entirety of the anticompetitive strategy, especially if the practices constitute a single and continuous infringement.[75]

Finally, there are a number of procedural efficiencies if Article 102 TFEU is applied. They derive from the fact that there is only one investigated company and thus one undertaking as a party to the administrative proceedings. This means, for example, having only one statement of objections, one decision, fewer confidentiality claims during the proceedings and in the context of the publication of the decision. Moreover, in certain circumstances if the dominant company has concluded various agreements with many different customers, even their identification and association to the proceedings could be challenging and entail significant administrative resources.

2. Applying Article 102 TFEU instead of Article 101 TFEU in by object restrictions

A similar pattern emerges in recent Commission practice where it appears that the notion of restrictions by object is imported into Article 102 TFEU. In *BEH*, the Commission had concerns that BEH was abusing its dominant position on the unregulated wholesale market

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[71] See the discussion on this point in Rousseva (n 52) 435–40.

[72] *Intel* (n 6) para 137; *Hoffmann-La Roche* (n 13) para 89.

[73] *Rio Tinto Alcan* (n 70) para 97.

[74] O'Donoghue and Padilla (n 29) 51. One can draw a similar conclusion from the ruling in *Unilever* (n 65) paras 26–32.

[75] See eg *Google Android* (n 69); Case AT 37.990 *Intel* (13 May 2009).

for the supply of electricity in Bulgaria, by including in its wholesale supply contracts destination clauses which limited the buyers' freedom to decide where to resell the electricity they purchased.[76] Depending on the destination clause some wholesalers could export the electricity, others could sell it only in Bulgaria. The Commission had concerns that these were territorial restrictions on the resale of electricity which impeded trade in electricity between Bulgaria and neighbouring Member States, and hindered the development of a wider regional wholesale market within the EU.[77] Similarly, in *Gazprom*, the concerns were that territorial restrictions might have prevented the free flow of gas across the investigated Central and Eastern European gas markets and fragmented and isolated these markets along national borders.[78] The reasoning of the Commission in the decisions in the two cases – both resolved with binding commitments on the dominant undertakings – was very similar. The Commission first observed that the practices at hand could amount to territorial restrictions which were in principle prohibited under Article 101 TFEU as having an anticompetitive object. Second, the Commission recalled that *Hoffmann-La Roche* allows it to choose which provision to apply. Third, the Commission relied on case law such as *United Brands* and *Suiker Unie* to illustrate that Article 102 TFEU could be used to prohibit practices that partition markets along national borders.[79] In both decisions, the Commission made the point that behaviour that raises barriers to trade between Member States, and consequently to the internal market, constitutes a restriction by object which obviated the need of showing even potential effects. While pointing out that it was not required by law to show effects, the Commission nonetheless outlined the potential effects on competition resulting from the territorial restrictions.[80]

This line of Commission decisions is an interesting trend of development but the relevance of the special responsibility is far from being obvious. This is because in these cases dominance is neither a precondition for the practice to amount to an infringement, nor for the strengthening of its harmful effects. More generally, the question is why these agreements are pursued under Article 102 and not Article 101 TFEU.[81] These Commission decisions have not been challenged by the parties and have not been reviewed by the EU Courts. Nevertheless, some reflections are offered next in attempting to identify the rationale for the Commission's choice for Article 102 TFEU.

First, it can be argued that the approach taken in these decisions is a logical continuation, or even a consequence, of the alignment of the effects-based assessment under Articles 101 and 102 TFEU. There is no obvious reason why the alignment should be reserved only for restric-

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[76] Case AT.39767 *BEH Electricity* (10 December 2015).

[77] ibid, para 67.

[78] Case AT.39816 *Upstream gas supplies in Central and Eastern Europe* (24 May 2018), para 61.

[79] In Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114 to 173 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* EU:C:1975:174, a dominant sugar refinery was found to have violated Article 102 TFEU by threatening to stop sugar supply unless the distributors complied with its restrictive export policy. In Case 27/76 *United Brands v Commission*, EU:C:1978:22, a contractual provision imposed by United Brands on wholesalers not to sell bananas while they were still green had the effect of partitioning the market along national lines.

[80] More recently a similar approach was applied in *InBev* with respect to restrictions on the import of beer products between the Netherlands and Belgium, where the Commission noted that also for the purposes of Article 102 TFEU such conduct is by its very nature capable of restricting competition. Case AT.40134 *InBev beer trade restrictions* (13 May 2019), para 219.

[81] For a critical view of the application of Article 102 instead of Article 101 to various practices, see O'Donoghue and Padilla (n 29) 49–51.

tions by effects especially in the light of *Budapest Bank* where the CoJ held that the same anticompetitive conduct can be regarded as having both as its object and effect the restriction of competition, within the meaning of Article 101 TFEU.[82] The Court recalled that restrictions by object do produce effects but because of the sufficient degree of harm they entail, it is unnecessary to analyse and prove these effects.[83] From this perspective, one can argue that, when a dominant undertaking concludes an agreement that is restrictive by object, the harmful effect is even greater, and as effects do not need to be proven under Article 101 TFEU, a fortiori they do not need to be demonstrated under Article 102 TFEU. More importantly, from a practical point of view, it makes little sense to assess the effects of conduct under Article 102 TFEU if it is clear that the same restriction of competition under Article 101 TFEU will be considered to reveal a sufficient degree of harm even in the absence of dominance.

Another, probably simpler explanation is that the Commission exercises its prosecutorial discretion to determine whether to pursue an infringement action against the dominant undertaking only or also against all its co-contractors.[84] As mentioned above, there are numerous procedural efficiencies to gain if Article 102 TFEU is the chosen legal basis.

3. The collective effect of individual by object agreements for an infringement of Article 102 TFEU

The EU Courts have not excluded the parallel application of Articles 101 and 102 TFEU to the same anticompetitive practice, provided that the application of Article 102 TFEU is not based on a mere recycling of the facts that were used to find an infringement of Article 101 TFEU and that there is an additional element justifying its application.[85] In *UK Generics* the CoJ considered a scenario where each pay for delay agreement between the originator and generics manufacturers was a discrete infringement of Article 101 TFEU for which both sides were to blame. However, the Court explained that it was also possible that, in addition to a number of agreements each having anticompetitive effects, the dominant undertaking who held the process patent could be found to have infringed Article 102 TFEU 'for the possible additional damage that strategy may cause to the competitive structure of a market'.[86] The Court observed that the possible cumulative effects of the various agreements and the fact that the conclusion of those agreements was part of an overall contract-oriented strategy may have a significant foreclosure effect on the market, depriving the consumer of the benefits of entry into that market of potential competitors. Put differently, one can apply Articles 101 and 102 TFEU together, but each provision challenges distinct, albeit related, conduct. In the operative part of the judgment, it seems as if the Court makes the application of Article 102 TFEU conditional upon the finding of such additional harm.[87] This approach appears much more

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[82] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank and Others* ECLI:EU:C:2020:265.

[83] ibid, paras 33–5.

[84] It is worth recalling that the EU Courts have made clear that it is legitimate for the Commission to find an infringement against only one undertaking amongst several undertakings that are in a similar position. See *British Airways* (n 30) para 66; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others v Commission* EU:C:1993:120, para 146.

[85] Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and others v Commission* EU:T:1992:38, para 360; Case T-51/89 *Tetra Pak v Commission* ECLI:EU:T:1990:41, para 24.

[86] *Generics* (n 6) para 147.

[87] *Generics* (n 6) para 172, indicating that Article 102 applies 'provided that that strategy has the capacity to restrict competition and, in particular, to have exclusionary effects, going beyond the specific anticompetitive effects of each of the settlement agreements that are part of that strategy'.

convincing than the approach taken years ago in *Van den Bergh Foods*. In the latter case, the Court of First Instance (now, General Court) upheld the parallel application of both Articles to the same exclusivity agreements, justifying the application of Article 102 TFEU on top of Article 101 TFEU with the argument that the dominant position enabled the undertaking to induce its retailers to agree to the exclusivity clauses.[88] It was far from clear why and how such inducement could trigger the application of Article 102 TFEU but would not fall under Article 101 TFEU. Economic pressure, and the absence of interest in the agreement, are also characteristic of practices falling under Article 101 TFEU and 'inducement' has been a reason for an agreement to be found restrictive of Article 101 TFEU elsewhere.[89]

4. Towards a coherent relationship between Articles 101 and 102 TFEU

On the one hand, it can be argued that the evolution charted above ensures greater consistency in the application of competition law. On the other hand, the similarity of the analytical framework for dominant and non-dominant firms in cases where the theory of harm is vertical foreclosure or market disintegration appears to call into question the 'special' responsibility of dominant undertakings, since all firms have a duty to avoid conduct of that nature. However, it appears that the Commission's choice to apply Article 102 TFEU instead of Article 101 TFEU is made with some practical considerations in mind, in particular the presence of well-established criteria under Article 102 TFEU and the convenience of addressing a single actor. Furthermore, when it is clear that the dominant undertaking is orchestrating a set of commercial contracts whose cumulative effect is anticompetitive while the other parties to these agreements are often disadvantaged by this market design, it makes no sense to find them responsible for anticompetitive agreements.

IV. A RESPONSIBILITY TO BEHAVE IN A PARTICULAR MANNER

The dictum in *Michelin* establishing a special responsibility imposes a requirement to forbear certain forms of conduct. Dominant undertakings may not price below cost, enter into exclusivity agreements or engage in tying, for example. A dominant undertaking seeking to defend itself against new entry is also limited in the steps that it may take to keep rivals out.[90] In certain limited instances, however, the special responsibility means that the undertaking is required to act in a specific manner to avoid being found to have abused its dominant position. An extreme manifestation of this point is found in *Baltic Rail*. The dominant undertaking dismantled some railway track ostensibly because of defects and, contrary to its regulatory duties to ensure safe and interrupted traffic, did not proceed to repair it. This had the result

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[88] Case T-65/98 *Van den Bergh Foods v Commission* EU:T:2003:281, para 162. In this case, a dominant ice cream supplier required its retailers to use the freezers it supplied exclusively for its brand of ice cream. As retailers had no space for a second freezer in their shop, this clause amounted to exclusivity agreements. In a commitment decision (*Rio Tinto Alcan*, n 70) the Commission pursued both lines in parallel. However, given the preliminary nature of competition assessments in this type of procedure such duplication appears justified.

[89] See Rousseva (n 52) 455.

[90] The so-called meeting competition defence is very narrowly cast.

of foreclosing market access to a rival provider of freight services. According to the General Court, the dominant undertaking

> should have taken into account its responsibility under Article 102 TFEU and avoided eliminating all prospect of the Track being returned to service in the short term by means of a staggered reconstruction, by complying with its duty to minimise disturbance on the rail network by restoring the normal situation following a disturbance.[91]

Another example of this category of obligation is the 'duty to negotiate' established by the CoJ in *Huawei*. This case concerns disputes between the holder of a standard essential patent (SEP) and implementers who use the patent to develop products downstream. Some context is necessary to explain the role of competition law. The SEP holder in this case had participated in a standardization procedure and made a promise to license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms. This procedure is designed to ensure that patent holders receive a fair reward and that implementers are incentivized to take licences and develop innovative products downstream. Moreover, it is designed to avoid two risks. First, the risk of hold-up (ie the SEP owner refusing to license until the price is high enough). Second, the risk of hold-out (ie the would-be licensee dragging out negotiations on the right price). In an ideal world this system maximizes welfare by optimizing incentives to innovate up- and downstream, by increasing the number of licences, thereby facilitating market entry, and by reducing transaction costs. However, many imperfections remain when this system operates, not least that the validity of some patents is disputed. In *Huawei* the SEP holder sought to secure an injunction against the implementer who was using the SEP without a licence. The question was whether seeking an injunction for a patent infringement could, given the legal and economic context of the case, constitute an abuse of a dominant position. According to the CoJ the FRAND commitment that the dominant undertaking made created a legitimate expectation on would-be licensees that there would be negotiations on a licence. Consequently, the Court held that the dominant SEP holder seeking an injunction would abuse its dominant position unless, before seeking an injunction, it tried to negotiate a licence. It started from the premise that the participation in a standard-setting procedure leading to a FRAND commitment created legitimate expectations that licenses would be granted.[92] Consequently, 'in order to prevent an action for a prohibitory injunction or for the recall of products from being regarded as abusive, the proprietor of an SEP must comply with conditions which seek to ensure a fair balance between the interests concerned'.[93] The Court went so far as to prescribe a model for how the SEP holder and implementers should behave.[94]

The common denominator in these two examples is that, when a dominant undertaking has engaged in certain forms of conduct which are not themselves abusive (eg dismantling rail track for safety reasons or promising to license on FRAND terms), it then has a responsibility to act in specific ways so as not to harm competition.

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[91] *Lietuvos geležinkeliai AB* (n 46) para 223.
[92] *Huawei* (n 48) para 52.
[93] ibid, para 55.
[94] ibid, paras 61 to 71.

V. THE ROLE OF REGULATION

In *Michelin* the CoJ intimated that Article 102 TFEU was neutral: all dominant undertakings have a special responsibility, irrespective of the reasons for which they hold a dominant position. Indeed, even state-owned undertakings are bound by Article 102 TFEU.[95] Similarly, undertakings subject to regulation are not absolved from the duty to comply with the competition rules if the regulation leaves them the possibility to take autonomous commercial decisions.[96] However, case law suggests that the nature of the special responsibility is affected by regulation.

This is particularly clear in cases where utilities markets have been opened to competition.[97] For the purposes of this chapter, the significance of these developments is twofold: first, there exist a number of former monopolies that achieved their dominant position as a result of state support, and second, EU regulation is designed to open markets to competition and reverse the state privileges that dominant undertakings received for many years. These past and present regulatory efforts combined have an effect on the application of competition law.

In the context of refusals to deal, recall that in the absence of regulation a dominant undertaking is only under a duty to deal with rivals under very restrictive conditions, notably where access to the dominant undertaking's assets is essential. In cases where the dominance is protected by intellectual property rights the party requiring the licence must further undertake to introduce a new product.[98] These criteria are rough and ready ways to balance competition and the incentive to innovate. Matters change in a regulatory context. First, if legislation imposes a duty to deal then 'the necessary balancing of the economic incentives … has already been carried out by the legislature at the point when such a duty was imposed'.[99] Similar considerations apply when there is (or has been) a legal monopoly and 'the undertaking has not invested in the construction of the infrastructure, which was built and developed with public funds'.[100] In *Baltic Rail*, both of these features were present. The undertaking was dominant in the market for the management of railway infrastructure and in the downstream market for the provision of rail transport services for oil products. It used its dominant position upstream by removing portions of railway track so that a rival in the downstream market was unable to provide services. In this setting the General Court held that it was unnecessary to apply the normal refusal to deal test because the railway lines had been built using public funds and in managing railway infrastructure the dominant undertaking was under statutory duties to give

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[95] See eg Case C-351/12 *OSA*, EU:C:2014:110, para 86. Matters differ if the state obliges an undertaking to act in a manner which constitutes abuse. In this context, only the state is infringing EU competition law.

[96] *Deutsche Telekom I* (n 6) paras 80–81, 92.

[97] See generally A Manganelli and A Nicita, *The Governance of Telecom Markets* (Palgrave 2020) ch 1.

[98] Or contribute to technical development, see *Microsoft* (n 37) para 647, by reference to Article 102(b) TFEU. For criticism, see J Killick, 'IMS and Microsoft Judged in the Cold Light of IMS' 2004 1 Competition Law Review 23.

[99] *Lietuvos geležinkeliai AB* (n 46) para 92.

[100] ibid, para 93.

access to third parties.[101] In such circumstances, the infringement of Article 102 TFEU only requires a showing that the conduct impedes market entry.[102]

These considerations also applied in the CoJ's assessment of exclusionary conduct in *Slovak Telekom*.[103] The Court held that there is no need to show that access to the local loop was indispensable for entry into the downstream market of broadband internet access in cases where the dominant undertaking had already given access and what was contested was whether the terms of access were exclusionary.[104] This was particularly so in this instance because the Slovak telecom regulator had (on the basis of EU Law) imposed an obligation on the incumbent to give access to its upstream infrastructure so as to stimulate competition in the downstream market for retail broadband services.[105] Furthermore, the Court recalled that Slovak Telekom had rolled out its infrastructure under the protection of the state: Slovak Telekom had exclusive rights and funded the construction of its infrastructure via monopoly rents.[106] In these circumstances, there is no need for a competition law assessment that balances the dominant undertaking's property rights and society's incentives to invest on the one hand with the promotion of competition on the other.[107]

Thus far, the regulatory framework has influenced the dominant undertaking's special responsibility when it engages in (or refuses to engage in) commercial relations with rivals. It remains to be seen if there are other settings where the regulatory framework is decisive to the scope of the special responsibility. For example, in *Post Danmark I*, the Court indicated that, '[w]hen the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account'.[108] However, it is not clear how the past existence of a legal monopoly can inform an assessment of whether below-cost prices or other similar forms of exclusionary conduct are capable of harming competition. It may be that a former legal monopoly might have deeper pockets and therefore would be able to sustain a predatory pricing campaign for longer, or that its longer presence in the market makes some customers unwilling to switch to a new entrant. However, these are specific aspects that can be considered case-by-case: indeed, as shown above the special responsibility of dominant undertakings depends in part on the legal and economic context.

VI. CONCLUSION

The special responsibility of dominant undertakings today is quite different from that which existed at the time of *Michelin*. In its original formulation, it was an affirmation that domi-

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[101] ibid, paras 94 and 95.

[102] ibid, para 99. This approach ratifies the Commission's position in the Guidance Paper (n 7) para 82.

[103] *Slovak Telekom* (n 6).

[104] ibid, para 59.

[105] ibid, paras 56–8.

[106] ibid, para 55.

[107] But see N Dunne, 'Competition Enforcement and Regulatory Alternatives' (OECD 2021) DAF/COMP/WP2/WD(2021)22 10 expressing concerns that this judgment opens up dominant undertakings to the risk of limitless liability. We consider this risk remote: the Court would not, for example, countenance a finding of abuse when a dominant company infringes environmental law.

[108] *Post Danmark I* (n 5) para 23.

nance was not prohibited but only its abuse. Gradually, the Court utilized the notion of special responsibility to shape the concept of abuse itself. As a result the subsequent evolution of the concept of special responsibility has been intertwined with the evolution of the notion of abuse.

For this reason this chapter first offered a snapshot of this evolution, showing that most forms of conduct are currently assessed for the likelihood of their impact on the effectiveness of the competitive process. Save for naked abuses, exclusive supply obligations without rebates, and practices that partition the internal market, for the majority of conduct that falls within the purview of Article 102 TFEU one must show at least potential negative effects. For some forms of conduct which are deemed restrictive by object the dominant undertaking is now empowered to bring evidence to challenge this conclusion and require that potential negative effects be shown. As a result, the concept of special responsibility is no longer identified with a duty to abstain from a blacklist of conduct. This is not to say that the notion of abuse is now settled. Even within the new formulation, new kinds of abusive conduct may be identified for which special responsibility arises. From this perspective, neither the scope, nor the importance of the concept of special responsibility is shrinking.

Second, the chapter sought to clarify why special responsibility is borne only by dominant undertakings. For this reason it explored the possible links between dominance and abuse. It illustrated that the special responsibility arises when dominance is either a necessary condition for a restriction of competition to take place or for stronger anticompetitive effects to occur. The chapter also reflected on the possible overlapping application of Articles 101 and 102 TFEU to contractual practices that involve a dominant player, which raises questions about the very essence of the concept of special responsibility: how can it be special if non-dominant undertakings have the same duties? However, it appears that in cases of overlap the emerging practice is to apply Article 102 TFEU. The chapter flagged a range of reasons which justifies this choice: dominance is a well-established concept which more easily explains the negative effects of contractual practices; the application of Article 102 TFEU allows for procedural efficiencies; Article 102 TFEU appears a more suitable tool in instances where the dominant firm orchestrates a course of conduct involving a series of agreements and unilateral conduct whose cumulative effect is exclusionary.

Finally, while the concept of special responsibility suggests a uniform set of principles applicable in all abuse cases, this chapter showed that there are circumstances where the obligation is more onerous. First, the degree of dominance is relevant to identifying certain practices as abusive. Second, firms whose dominance results from the state granting them special rights and dominant firms which are subject to sector-specific regulation both bear additional special responsibilities that other dominant firms do not have. Finally, in limited circumstances, the special responsibility does not just prohibit certain conduct but requires dominant undertakings to act in ways that facilitate competition.