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Dominance after Twenty Years: Chrysalis Thoughts

The annual series of books sitting on my bookshelf, published under the auspices of the European University Institute, is testimony to the rich contribution which these summer indulgences have made to the literature of competition law since 1995. Boccaccio and Chaucer mastered the technique of bringing together diverse characters who were willing to while away the hours in exchanging ideas, legends, love stories and morality tales. While it is unlikely that the 20 volumes will be regarded as timeless literature, they can well be read as faithful chronicles of the competition law times. It has been a demanding privilege to participate in this emulation of past literary efforts; my personal contributions have often been critical of how the rules are enforced.

The years have brought together officials, teachers, judges, practitioners and economists, including Commissioners, heads of agency, as well as adversaries who had survived celebrated combats. The talk has been frank and rich. Speaking personally, I recollect the one devoted to reform and decentralisation in 2000 as well as the session devoted to the reform of Article 102 (in 2007), when many of the actors in the Microsoft case shared their experiences. I was also flattered that one Director General (Alexander Schaub) referred to my intervention as revealing “a chamber of horrors”. All honour to the great progenitor, Claus Dieter Ehlermann.

1 Queen’s Counsel at the Scots Bar; Honorary Professor, University of Glasgow; White & Case, Brussels. Warm thanks are expressed to Zena Prodromou, Cilu Mathew, Leah Novak and other colleagues, who have cheerfully contributed to this paper. The opinions expressed are wholly personal.
2 Giovanni Boccaccio, author of Decameron.
3 Geoffrey Chaucer, author of The Canterbury Tales.
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I have tried to be dispassionate in writing this paper, in the hope that by the time it is published any whiff of partisanship will be imperceptible. Obviously, I express my personal opinions and obviously these can change. And, equally obviously, they may be wrong or right.

Article 102 TFEU was born in Rome as Article 86, transmuted into Article 82 by the EC Treaty and rebranded as Article 102 by the Treaty of Lisbon. The words have not changed but their significance for big companies has changed a great deal. We now see dominant undertakings held to higher standards of pro-competitive conduct than before as well as stricter “moral” expectations not due to the competition rules. We should realize and accept that new legal and quasi-legal obligations emerge for enterprises quite regularly. This trend has matched society’s expanding and unpredictable expectations of corporate citizens.

There is a longstanding hesitancy in European competition law over whether to trust market forces and refrain from intervening, or whether to protect. That is a real, profound and difficult choice. There is a noisy debate over the goals of intervention: does European competition law protect competitors or competition? This is often an alternative way of discussing the merits of the case, by suggesting that the complainant does not deserve help from the competition rules. I suggest that the Commission, for all that it is accused of helping European competitors (or rivals from the United States), against US technological giants, does not seem to be nationally partisan. It is more ready than its US counterparts to intervene to preserve the process of competition, or to achieve a restructuring of the competitive platform. US judges have a much bigger role in shaping American competition law by their decisions in civil antitrust cases.

In what follows, I will discuss the changing landscape of expectations for dominant companies. I will argue that dominance – said to be an objective concept – often seems to emerge through legal and economic creativity, notably by using well-targeted market definitions. Furthermore, categories of abuses can be discovered where none previously existed. That is another way of saying that the law evolves, but to note that competition law is not the only source of new economic offences for large firms.

**Novel corporate obligations and standards**

“Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.”

This is how Lord Chancellor Thurlow put it around 1792, when these words may well have been true. But we have come a long way since then. The size, power and influence of large corporations are very evident; but it is no longer the case that they are immune from challenge. Two months before the writing of this paper, it was speculated that Apple would soon surpass a market capitalization of $1 trillion. This is an unimaginably large amount of money, rivalling the wealth of armies, cities or small governments, even if it is true that public authorities are always stronger than private enterprises. The reputation of such companies is a very valuable asset for them.

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4 The quotation has more than one version. “Corporations have no soul to save and they have no body to incarcerate” and “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”

It is increasingly accepted that large companies must be accountable in ways and circumstances that are not predictable to them or to their lawyers. It is not the case that new legal duties arise only pursuant to the competition rules. I will offer two examples, one from the old days and one from this year. I begin with an analogy, a comparison.

(1) Product liability

Some fifty years ago, the German pharmaceutical company Chemie Grünenthal was authorized to place on the market a medicine called Contergan, for pregnant women, to ease morning sickness. Contergan was highly effective. It was sold in other markets as Thalidomide. Although the manufacturer claimed that all available tests had been carried out to ensure its safety, thousands of women in a small number of countries gave birth to babies suffering deformities, notably missing limbs or abnormal limbs, a condition now known as dysmelia.6 Grünenthal and those who distributed the medicine in other countries claimed that they were blameless since they had done all appropriate tests before launching the product (the adequacy of the tests was disputed in only a few countries). Various compensation mechanisms and regimes have been established over the years for those affected by Contergan and other Thalidomide drugs.

In the early days it was by no means evident that the prosperous manufacturer of a well-developed drug should expect to be liable if, despite great care, the medicine turned out to be dangerous. That is no longer the case, either socially or legally.

The manufacturer argued that since it had taken all due care in developing and testing the products and since it had satisfied all regulatory requirements, it should not be held liable for the unimaginable problems encountered by the families affected. Various schemes to give some level of support have been established in Germany and elsewhere, but the inadequacy of the sums is not really doubted. The Thalidomide tragedy was one factor which led to an alteration in the law. The crash of a Turkish Airlines aircraft shortly after take-off in Paris due to an imperfectly designed cargo hold door was another.7 The problems encountered by Thalidomide victims to obtain ex gratia payments in the UK, Germany and elsewhere were widely noted, but compensation was at best moderate. The story focussed public attention on the absence of a remedy for victims in some countries, and the inconsistency of remedy between countries.

The problems of injury to a citizen due to a defective product are well known to legal science. The purchaser in good faith consumes or uses a dangerous product, and injury ensues. What should be the legal consequences? The 1804 French Code Civil (Belgium and Luxembourg's were similar) established an (almost) irrefuttable presumption of bad faith on the part of the supplier of a defective product. Other civil law countries (Italy, Spain and Greece) granted a right to restitution of the sum paid, but did not create a right to indemnification for damage suffered. And the UK, Germany and several other Member States had an intermediate approach based on tort law principles. Donoghue v Stevenson,8 the Scottish case about the

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6 Those who wish to know more about the challenges of living with dysmelia today may consult the website http://www.dysmel.org.
consequences of finding a decomposed snail in an opaque bottle of ginger beer whose manufacturer had no contract with the consumer of the ginger beer, and Grant v Knitting Mills,9 in which the plaintiff sued an Australian knitting company whose woollen garments had an excess of sulphite causing dermatitis, were the basis (IA: should this read "basis", or "formed the basis of") of UK law, which turned on whether there had been negligence (negligence could be inferred by the use of res ipsa loquitur). There was generally no liability in the absence of proof of fault, proof which ordinary people often lacked the resources or knowledge to establish.

A number of cases arose in Germany, where the producer asserted that it had taken all proper care, and despite that care damage had occurred. One case involved fowl pest vaccines which had infected, rather than properly immunized, chickens. Others concerned a child who was injured by an exploding bottle of mineral water, and yet another concerned an exploding tyre. In each case, the question was whether the producer (diligent, careful, well-equipped) should escape liability by demonstrating the absence of fault. The Bundesgerichtshof in effect reversed the burden of proof in the Fowl Pest case, on the grounds that it would be unjust for the plaintiff to produce convincing evidence that the producer had been negligent. Thus the reversal of the burden of proof in Germany and different but not inconsistent legal developments in other countries meant that injured parties had more rights under civil law by, say, 1975 than they had previously enjoyed.

The EC Product Liability Directive, work on drafting which began in 1968, entered into force from 1985 and established a new, common legal basis of liability, namely that the questionable product did not offer "the safety which a person is entitled to expect".11

There was much anxiety that the advent of no-fault liability would lead to the emergence of a compensation culture, litigious excesses parallel to those in the United States, and an unfair and economically risky burdening of "innocent" corporations with unpredictable liabilities. These fears have not materialized, but the law has unquestionably changed greatly.

The Directive was applied in 2001 in the case of A & Others v National Blood Authority.12 The claimants were infected with hepatitis C as a result of blood transfusions which helped save their lives but which contained undetectable contaminations. The UK had implemented the Product Liability Directive by passing the Consumer Protection Act 1987. Section 4(1)(e) of the Act provided that a defendant could escape liability by showing:

"that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control".

This differed from the wording of Article 7(e) of the Directive, which provided that:

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9 Grant v. Australian Knitting Mills, Ltd., 1936 App. Cas. 85 (appeal taken from Austl.)
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“The producer shall not be liable as a result of this Directive if he proves......that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered”.

Thus, one fundamental issue was:

“was the state of scientific and technical knowledge such that the existence of the defect could not to be discovered as provided by Article 7(e)?”

The available testing mechanisms for hepatitis C were not reliable. There existed so-called “surrogate tests”, the most useful one of which examined the levels of a particular enzyme produced in the liver, high levels of which suggested there could be a risk of hepatitis. Another screening test was unreliable as to its sensitivity (not detecting all it should, false negatives) and its specificity (detecting those it should not, false positives). The defendant blood agency therefore argued that they should escape liability under Article 7(e) because the defect was simply not discoverable. On this basis, if a patient were to believe that the bag of blood could be guaranteed free of impurities, the patient was simply mistaken and was hoping for something unrealistic.

The claimants relied on the wording of the Directive, claiming that it was reasonable for a patient to consider a contaminated bag of blood did not offer the safety which a reasonable person could expect. The court considered a decision of the Bundesgerichtshof concerning a young girl injured by an exploding mineral water bottle which had a very fine hairline crack. The crack had not been discovered in spite of state-of-the-art technical and supervisory procedures. The Bundesgerichtshof had categorised the bottle as an “Ausreisser” (outlier) and concluded that the producer was liable even though the child’s parent could not point to a specific failure on the manufacturer’s part. To quote Burton J,

“if the risks are known, unavoidability of the defect in the particular product is no answer.”

Thus, we have witnessed an expansion of a corporation’s liability for its products. New rules emerged to catch manufactured goods that do not match consumer expectations, even if these expectations may be unrealistic. Thus product liability law has moved from depending on proof of negligence, to a reversal of the balance of proof, to full liability without fault. One can detect (I boldly suggest) a similar evolution in the burdensomeness of the rules as to dominance. Firms are more likely to be found dominant and have more difficulty in predicting what will be an abuse.

(2) Tax practices

The second phenomenon is much more recent and relates to the tax practices of large corporate groups operating in numerous countries. We have recently witnessed in the UK a number of critical media and political reports about large multinational companies, such as Amazon, Google and Starbucks, benefitting from generous tax reductions. Prime Minister Cameron said

“Some people say to me, ‘Well, it’s all within the law; you’re obeying the law, it’s okay’. Well, actually there are lots of things that are within the law we don’t do
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because actually we have some moral scruples about them and I think we need this debate about tax too."13

When senior executives from the same three corporations appeared before the UK Public Accounts Committee, they were mauled on television by political leaders who grasped the chance to accuse companies who seemed to have been fiscally greedy. Chairwoman Margaret Hodge MP called for a boycott of their products:

"We're not accusing you of being illegal, we're accusing you of being immoral."14

Ultimately, the public agitation culminated in a probe by the Commission into the legality of generous tax rulings in light of EU State aid rules. Ex-Competition Commissioner Joachim Almunia declared that:

"...[A]ggressive tax planning is contrary to the principles of the Single Market, even under the present distribution of competences between the EU and its Member States. A limited number of companies actually manage to avoid paying their proper share of taxes by reaching out to certain countries and shifting their profits there. In those cases where national laws or tax administration decisions permit or encourage these practices, there might be a State aid component involved and I intend to go to the bottom of it."15

Thus Starbucks decided to make a payment of £20 million over two years towards UK tax which it did not owe legally but which it chose to pay voluntarily as a gesture of good citizenship.16 Could this be compared to a commitment under Article 9 to conclude a weak but persistent prosecution of an abuse case?

Competition rules evolve also

Thus large and successful enterprises which deal with the public are not immune to pressures, or to the heat of criticism. The law evolves with respect to the products and services they offer. Product purity, health and safety at the workplace, sexual harassment and other topics can be the subject of liability. The rules are becoming more interventionist, more detailed, more prescriptive, and often establish fierce punishments in case of breach.

The law on competition is not so different. I submit that, as corporations are expected to contribute to society, new competition rules arising out of a dominant market position could be seen as one more sign of changing times. Dominance brings with it enhanced responsibilities and it has come to be expected that this may result in new obligations.

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Calibrating the antitrust machine

Do we favour doctrine, which is rigid but foreseeable, or interpretation of broad principles based on observation of actual facts, which is unpredictable? Between the alternatives of clear, per se rules and the uncertainty of broader rules with malleable outcomes, the esteemed scholar and senior official Wouter Wils strongly advocates the former option, arguing that:

"It is often said that the EU case-law on abuse of dominance is 'form-based', with the strong suggestion that this is something undesirable."

"It is far from clear what exactly is meant by the case-law being 'form-based'."

"If it means that the case-law classifies business practices in certain categories [...] and provides a corresponding test of legality, it is difficult to see what could be wrong with that."

"All human thinking and human language uses categories. There is no way this could be avoided. It is not possible to conceive a workable interpretation of Article 102 TFEU that would not make some use of categories. What matters is that the categories used are economically and legally sound, and that they are clear, foreseeable and administrable. Under this test, the EU case-law does very well, and certainly much better than the alternative advocated by the proponents of the so-called 'more economic approach'."

"Clear, per se rules in competition law are analogous to the law prohibiting driving under the influence of alcohol. Certain stakeholders may not like the fact that the law exists, but it is clear enough for vehicle drivers to know whether their behaviour is within the ambit of legality. Similarly, one could argue that, while undertakings may not derive pleasure from the duties arising out of their dominant position, as long as it is clear what those duties are, they will be able to operate profitably."

Every time a novel decision is made, it will be built upon. And a reason often advanced against innovative competition rules is that once a principle has been established, new theories will carry it further. Floodgate arguments (if this theory is not stopped, floods of unmeritorious cases will arrive) should be fallacious because they say “don’t decide this case on its merits or you will be tempted to take a bad decision next time”. Now, clarity is indeed a merit. However, the clarity of a rule does not make it a good rule. On the one hand, while I think we exaggerate the desirability of legal certainty, since businesses are accustomed to living in a world of little economic certainty, there is a cost associated with strict rules. Benefits flow, or may flow, from harsh competition between market operators. No benefits are likely to flow from tolerating higher levels of alcohol in the blood of drivers. So we should not excuse overly severe standards on the grounds that the standard is clear. However, it is naive to imagine that clever lawyers will not build new cases upon any legal innovation.

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The best illustration of the dynamism of competition law is the evolution of the law on compulsory licensing over about fifteen years, from Volvo/Veng through Magill to IMS/NDC and finally Microsoft. I describe the details of that evolution more fully below. In short, I had represented the Commission in the appeals in Magill, which involved the upholding of the Commission's condemnation of a refusal to licence a weak (my word) Irish copyright right. The ECJ produced an elegant solution to a problem of national law, but the implications of that judgment caused some consternation. Speaking at a meeting organised by the Department of Justice in 2002, I dismissed as exaggerated fears of legal catastrophe in relation to compulsory licensing:

"Predictions of dire consequences for IP right holders due to the uncertainties created by Commission decisions have not been borne out in practice. In substantive result I think the current situation is thus far not alarming. Other than those exceptional cases, which I think are in large measure corrective action by competition authorities to aberrant national copyright cases, compulsory licensing of IP rights on competition grounds is almost unknown in European law. These cases probably represent a corrective reaction by competition authorities to a national right covering questionable or doubtful subject matter, coupled with discriminatory use of the IP right, to prevent competition from emerging or to prevent the emergence of a stronger or equal competitor after having allowed a small measure of competition."22

However, as we now can observe the slope of history, a modest clarification in Volvo/Veng and a precise formulation of a breach in Magill expanded into a very open-ended potential obligation in Microsoft. My remarks to the Department of Justice were wrong.

What is the Point?

The first argument that I attended in the European Court of Justice was the appeal by Commercial Solvents against the condemnation and fine imposed by a Commission decision in the case of ICI/Commercial Solvents. The story sounded rather shocking. The supplier of a chemical had been in negotiations to acquire a customer; the negotiations broke down and the supplier decided as a reprisal to cut off the customer from supply of a chemical upon which its business depended. There was a whiff of moral reproach in the air. I was only a young spectator at the oral argument, but I was not surprised that the Commission's condemnation prevailed.

When introducing students to the concept of dominance and abuse, I have often used the analogy of the jungle. The elephant is obliged to go carefully through the forest, for fear of killing or gravely injuring smaller creatures. I also said that an abuse of dominance case always contained an element of moral reproach. The labels of the categories of abuse are indeed morally coloured: exploitative and exclusionary (discriminatory appears to be

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20 Judgment in IMS Health v NDC Health, C-418/01, EU:C:2004:257.
22 http://www.whitecase.com/Publications/Detail.aspx?publication=241#VYvxGvmxpB4
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forgotten). The specific abuses of “unfair prices”, “discriminatory pricing”, “tying”, “predatory pricing” or “refusal to supply” are intrinsically morally as well as economic.

Now, we honour robust competition, and we accept that competition on the merits must involve winners and losers. It is not the purpose of the competition rules to protect specific competitors but to preserve competition. The Commission should not be the handicapper of a horse race who wishes to see a close finish. Putting it differently, the function of Article 102 should not be fairness, but welfare, and these notions have been reinforced since about 2007.

But what then is the meaning of the “special responsibility”? Along the same lines, the infringement of Article 102 is said to be an objective concept:

“an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

As we all know, size is not illegal in and of itself. But the fortunate company

“irrespective of the reasons for which it has such a dominant position, has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.” Put otherwise, dominant undertakings have specific obligations and may, accordingly, be deprived of the right to adopt courses of conduct which are not in themselves abuses and which would be acceptable if adopted by a non-dominant undertaking.

There are plenty of reassuring statements from Advocates General

“the primary purpose of Article [102] is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors ...” (Advocate General Jacobs)

And

24 A third category of abuse is described in Article 102(c) TFEU, which appears to prohibit discrimination and which is neither exclusionary nor exploitative. This type of behaviour is no longer one of the Commission’s priorities, although discrimination of various kinds was on the minds of the drafters of the Treaty of Rome. On this subject, see “The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security”, European University Institute Competition Law Annual 2000: The Modernisation of EC Antitrust Policy, Claus-Dieter Ehlermann and Isabela Atanasiu (Editors), Hart Publishing 2001


This applies generally to all of the competition provisions of the Treaties; Case C-8/08 T-Mobile Netherlands and ors v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529, at para. 38.
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"Article [102], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected."²⁹ (Advocate General Kokott)

But on the other hand

"[a]lthough it is true ... that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it."³⁰ (Advocate General Fennelly)

These are gracious, national, helpful expressions, but it must also be said that reconciling the different ends of the spectrum in an actual case is difficult and the outcome impossible to predict. The Telia/Sonera version is attractive and careful, but still leaves much to be decided.

"[w]hile Article 102 TFEU does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market, and while, a fortiori, a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned [...] it remains the case that, in accordance with settled case-law, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the internal market."³¹

Dominance brings with it the burden of tolerating other creatures in the jungle. But it is not easy to avoid acting as an elephant if one is an elephant. If technology or success or regulation happen to have delivered a great advantage, the dominant player may be pressed to alter its policies because the market will function better that way. Yet the decision finding a breach will be phrased as an abuse, an economic crime.

I suggest that dependence is a concept which deserves more attention than it gets. A patient may be dependent on the pharmaceutical company that produces the sole available medicine to cure her rare indication. A passenger or a business may be dependent on the dominant airline that connects isolated islands to the mainland. The chemical producer needs a raw material. The wholesaler wants to offer a full range of goods. It is on occasions of dependence that dominant undertakings may take advantage of their market position and exploit consumers by imposing unfair terms and by adopting unfair practices. The more dominant the undertaking, the weaker the consumer, the reasoning goes. In the absence of dependence, does a dominant company owe a special responsibility to the complainant?

²⁹ Case C-95/04P British Airways v Commission [2007] ECR 1-2331, at para. 68 of her opinion (emphasis in original).
The notion of consumer exploitation may involve the abusive exercise of market power, in terms of price, output, or limitation of choice. The wording of Article 102 refers to "unfair purchase or selling prices" and to "limiting production... to the detriment of consumers". Thus, if the computer manufacturer were to forbid the use of software made by independents, consumers could suffer by limited choice and higher prices.

As the Court put it in Continental Can,32 Article 102:

"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".33

Article 102 TFEU thus catches exclusionary practices that tend to eliminate competition by ensuring that other players do not have access to the market place, by preventing them from bringing their own products into the market and by rendering them totally dependent on the dominant undertaking’s toleration. Market success should normally attract new entrants. Market power, however, brings with it the ability to distort the natural competitive process by enabling the dominant firm to prevent the emergence and survival of other players. It is the fierce competitive landscape that determines who succeeds and who fails in each market. If rivals fail to prosper, the question will arise of whether this was due to abusive practices. Dominant undertakings commonly argue that the failure of others to enter or stay in the market is due to their being just not able to resist the competition.

The application of 102: foreseeability

To what extent can a firm foresee whether its behaviour is vulnerable to Article 102? There should be reasonable clarity and predictability as to when an undertaking will be found to be abusing its dominant position. The accusation is quasi-criminal wrong-doing. But sometimes the accusation will shade into being regulatory.

The ECJ has held that a dominant position is:

"[...] a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately its consumers."34

In Hoffmann-La Roche, the Court seemed to qualify this statement by holding that:

"Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."35

Furthermore, the Court said:

33 Ibid., para. 12.
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"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

This definition of the scope of Article 102 and its application has been cited and recited almost verbatim several times in the EU case law and decisional practice.

Intention, purpose, good faith and objectivity

There is a tension between the "objective" nature of the infringement, and the (alleged) relevance of what I have called morality. If the law is enforced to punish unfair actions, is this inconsistent with the notion of objectivity? The Australian statute purports to rely on purpose and intent. But in fact it is applied to reflect objective economic goals rather than moral ones. Aggressive intent is however easily confused with anti-competitive conduct. The European and American cases frequently rely on e-mails and triumphalist rhetoric to show that conduct was wilful, or in bad faith. E-mails mysteriously induce garrulous ill-reflected blurs of frank opinion, which will never disappear. They are often embarrassing and they are commonly cited in decisions. How should an e-mail saying "Death to our competitors!" be considered in a competition case?

It is also true that the venerable Sherman Act was passed as a response to morally outrageous economic conduct, including frauds, bribery and other behaviour which today would be unimaginable for any respectable enterprise. So the history of competition law shows us that the early rules were rooted in protecting the weak and the consumer against gross economic – shall I say it? – oppression and even wickedness. But the US favours Darwinian competition. I quote Judge Easterbrook in Ball Memorial Hospital,

"competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally ... [but] the antitrust laws are for the benefit of competition not competitors."

I am perfectly certain that on both sides of the Atlantic, it will continue to occur that frank (and bitterly regretted) e-mails will be invoked to show dark purposes, while at the same time the objectively verifiable nature of the infringement is asserted. A showing of wilful intent by frank hasty messages will remain too attractive not to quote, even if objective factors should be more important.

Public enforcement

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The substantive law in Europe and the US has been significantly shaped by process. European abuse cases have nearly always involved public enforcement. Major concessions in the form of commitments rather than condemnations have been extracted from “dominant” players such as car manufacturers (constrained to deliver trade secrets about the functioning of their cars to independent repair shops) and energy suppliers (constrained to propose the restructuring of energy distribution market). The famous abuse cases in Europe, such as United Brands, Hilti, Magill, Microsoft, Akzo, and perhaps IMS do not have obvious US counterparts; indeed US public enforcement of abuse theories has become rare. The US Microsoft case was largely a defeat for the government, and the break-up of the Bell telephone monopoly is generally regarded as having been a failure in that it delivered poorer technical innovation and the judicially fractured pieces of the Bell family subsequently remerged into less satisfactory units. There were new regional monopolies which delivered modest technical quality. So US public enforcement of notions analogous to Article 102 is quite modest.

The notion of super dominance: the expanding universe of liability

According to the doctrine originally established under Michelin I, a dominant undertaking has:

"a special responsibility not to allow its conduct to distort genuine competition on the common market."

Such a responsibility is more arduous where a company’s market shares are particularly high. For years the Commission pursued cases against Tetra Pak, a world leader in the field of packaging and packaging technology. It found that Tetra Pak had abused its dominant position in the aseptic sector (for UHT milk in particular) in order to establish a dominant position in the non-aseptic sector (for fresh milk). The Court noted Tetra Pak’s “quasi-monopoly” was a mitigating circumstance in light of which the scope of the special responsibility imposed on an undertaking must be considered.

Similarly, in Irish Sugar, the Court made reference to the undertaking’s “extensive dominant position”, thus indicating that the Commission’s case was heavily based on the special responsibilities that exceptionally high market shares entail. Along the same lines, in a case involving liner conference members with a 90% share of the market, Advocate General Fennelly coined the term “super-dominance”. In his opinion in Compagnie Maritime Belge, he found that they owed a “particularly onerous special obligation” not to preclude the emergence of new or additional competitors. Though the Court did not use the word “super-dominant”, it upheld the Commission’s targeting of undertakings with exceptionally high market shares as a special responsibility to make room for new entrants.

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42 Ibid.
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high market shares on the premise of the special responsibilities their special market position entailed.

In Microsoft, the Commission noted a 90% market share amounting to an "overwhelmingly dominant position". The CFI also made reference to Microsoft’s “quasi-monopoly”.

In Napp Pharmaceutical, the UK Office of Fair Trading found that the company had abused its dominant position by charging excessively low prices for the supply of SRM tablets to hospitals, but excessively high prices to the community sector. Napp had 90% market share and only one competitor. When Napp challenged the decision, the Competition Appeal Tribunal referred to Advocate General Fennelly’s idea:

"that the special responsibility of a dominant undertaking is particularly onerous where it is a case of a quasi-monopolist enjoying 'dominance approaching monopoly', 'super dominance' or 'overwhelming dominance approaching monopoly'."

It would thus appear that a company enjoying super-dominance may find that it is under especially heavy pro-competitive obligations. What are the safeguards that assure a hypothetically super-dominant undertaking that the way in which it organizes and implements its business plan is in line with the special duties read into Article 102 TFEU? How could such a super-dominant company foresee what the enforcer might read into its special responsibilities? Does a super-dominant company’s compliance with the prescriptions of Article 102 TFEU rest on the fundamental principles of predictability or must it engage in an educated guess? The text of Article 102 TFEU imposes instead a dichotomy: a firm is either dominant, or it is not. The notion of super-dominance, or any other degrees of market power, is not to be found in the text. Whether or not such a situation is satisfactory, companies must proceed in the knowledge therefore that, as their market shares go up, so potentially do their “special responsibilities”.

Objectivity v. creativity - defining the markets and absolute offences

Tomra was a Norwegian producer of machines in which users could place recyclable empty drink containers in return for a deposit. Tomra was not a large company, even by the moderate standards of a small country. In 2006, the Commission found that Tomra had abused its dominant position in the market for such reverse vending machines (RVMs). A fine of €24 million was imposed.

Tomra’s use of retroactive rebates was said to tie its customers in and limit the size of the remaining market on which competitors could compete. Tomra argued that the agreements at issue did not foreclose a sufficient portion of the market to be capable of restricting competition. Indeed, if customers wanted choice, and if there were a number of alternative

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42 Case COMP/C-3/37.792 Microsoft.
43 Ibid, paragraph 435.
44 Case T-201/04 Microsoft v Commission, paragraph 353.
sources of machines, even the outrageous contractual terms proposed by Tomra would maybe not do much harm. On this point, the ECJ held:

"the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand."

On the facts, a 40% market share amounted to a substantial part of the market. However, the Court’s emphasis on the customer’s right to benefit from “whatever degree of competition is possible” makes it imaginable that anticompetitive foreclosure could be found despite a lower market share.

Objectivity v. creativity – defining the product market

A narrow market definition is another way to classify companies as dominant for the purposes of Article 102. We well remember the seminal case of United Brands, in which the Court singled out bananas for having:

="certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enables it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick."

In Hugin, the Court defined the market as narrowly as the brand of the product. Hugin produced cash registers and their spare parts, but declined to continue supplying parts to Liptons, a small company which repaired cash registers. Thus the relevant product market was not that for spare parts required by the owners of Hugin machines, but for spare parts needed by general repairers and servicers of the machines.

This approach was followed in the case of CICCRA v Renault, where it was held that the market for spare parts for cars was distinct from the market for cars. This would lead to the surprising result that a small car manufacturer with negligible market share could be found dominant on the market for the supply of spare parts.

It is not surprising that an industrial giant risks being held dominant. It is more surprising that a smaller enterprise is held to be burdened by the constraints of dominance. Such a conclusion may follow when a narrow market has been chosen as the relevant one for examining the controversial conduct. Bananas are uniquely appropriate for babies and elderly people who lack teeth. The manufacturer of a successful machine may be said to be

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48 Case C-549/10 P Tomra Systems ASA and others v European Commission, paragraph 42.
49 Case 27/76 United Brands v Commission [1978] ECR 207
50 Ibid, paragraph 31.
51 Case 53/87, CICCRA v Renault [1998] ECR 6039
dominant with respect to its replacement parts or diagnostic equipment in the aftermarket, as we saw in Hugin/Lipton or Hilli. In Continental Can, the market was cans for different market segments, as opposed to cans for meat and fish. Michelin involved replacement tyres for heavy vehicles, excluding tyres for vans and lighter vehicles. In recent cases in the pharmaceutical sector, the question has arisen of whether the analysis of a relevant market should consider the class of medicines which compete with each other in seeking the approval of prescribing doctors, or should instead consider the particular properties of a single molecule from the patient's viewpoint. The effect of defining the market narrowly is to bring within the reach of Article 102 each medicine in the class, viewed individually. Thus their uniqueness as to an individual patient would override their possible interchangeability from the physician's viewpoint. Success in competing with other medicines of the same family would not be the relevant criterion.

The same question can arise at national level. Thus, for example, in Plavix, the French Competition Authority, when considering a branded drug that prevents relapses in cardiovascular diseases, stated that the relevant market consisted only of products with the active ingredient clopidogrel, even though there were numerous competing medicines based on the same mode of action. Similarly, in Subutex, the French Competition Authority also narrowed the product market down to the relevant molecule, buprenorphine.

Objectivity v. creativity — how new abuses can emerge

Competition law evolves to catch as abusive patterns of conduct which were hitherto safe. In what follows, I will examine the development of Article 102 in relation to compulsory licensing, margin squeeze, inducement and rebate schemes.

Compulsory licensing of IP rights: how Volvo v Veng became Microsoft

That one competition law innovation can lead to others is evident when we look at the development of European compulsory licensing cases. In Volvo v Veng, the ECJ considered for the first time whether a refusal to license intellectual property rights could be considered an infringement of Article 102 TFEU.\(^2\) Volvo held a UK registered design right on the body panel shapes of Volvo 200 cars. Veng, a supplier of replacement car parts, imported replacement panels for front wings, manufactured without Volvo's authority, and marketed them in the United Kingdom. Veng argued that Volvo's refusal to license him to manufacture the panels constituted an abuse of a dominant position. The dispute was referred to the ECJ, which issued a judgment containing two famous paragraphs:

"It must also be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position."

\(^2\) Case 238/87 Volvo v Veng ECR (1988) 6211.
EUI – 2015 EU Competition Policy Workshop

So the right holders' lobby was reassured. Innovation was safe and need not to be shared. Then came the second paragraph:

“It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 82 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.”

So the enforcement and consumer lobby was reassured. These two paragraphs pleased everyone. On the one hand, the holder of a right was entitled as a general principle lawfully to refuse to license it. On the other hand, in some circumstances the refusal could be illegal. A greedy refusal could be challenged.

Following Volvo/Veng we could say that a bare refusal to licence was not an infringement, but a refusal with aggravating circumstances might be an infringement. In 1985, the Courts faced compulsory licensing again. The Irish magazine Magill TV Guide wished to reprint "listings", information from three television broadcasters (BBC, RTE, ITV) on their daily programmes in order to compile a multi-channel weekly television guide. Such a product did not exist in Ireland, where TV addicts instead had to purchase three separate in-house television guides. Newspapers published side-by-side information on the three broadcaster’s programmes only on a day-to-day, not a weekly basis. The listings were sent free of charge to every newspaper in the country, subject to the condition that the information could be published only one day at a time.

Following the publication of its first issue, the broadcasters obtained an order from the Irish High Court to prevent Magill from publishing further issues, claiming that their listings were protected by copyright. Magill complained to the Commission that the refusal to license by the three broadcasters amounted to abuses of their dominant positions. In 1988, the Commission adopted a decision ordering them to enter into negotiations with Magill for a license on reasonable and non-discriminatory terms.

The CFI, and ultimately the ECJ, upheld the decision. The Commission relied on the utilitarian routine, publicised nature of the copyrighted material and doubted its eligibility for copyright protection. The Irish High Court found that copyright did exist. The broadcasters replied that the Commission was using competition law to change national law. There were plenty of multi-channel TV guides in other countries, so the desirability of a multi-channel guide was evident. But what was to be the rationale for the intervention of the competition law?

The Court of Justice found a good formula. In short, the broadcast companies were using their copyright to prevent the emergence of a new product which consumers wanted and which the broadcasters would not supply:

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53 Ibid, paragraphs 8 and 9.
“[...] the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct”.  

It found that such exceptional circumstances existed in the present case because:

1. “[...] the appellants [...] were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide”;

2. “The appellants’ refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand”;

3. “[...] there was no justification for such refusal.”

The Magill judgement was met with significant controversy and debate. Did this case signal the end of copyright? Some believed so. But for about a decade, no further crisis occurred. Then came IMS. IMS owned a system which provided data on deliveries of medicines to pharmacies by wholesalers, presented in a geographic format according to a map of Germany along post code lines called a “1,860 brick structure”. The system had been developed in conjunction with the pharmaceutical industry, which follows closely how many packets of medicine are delivered in each of hundreds of defined geographic districts. The key to the monitoring was thus a map of Germany drawn up to match patterns of medical prescriptions and pharmaceutical deliveries. When competitor NDC launched a service with a similar appearance to that of IMS, IMS relied on copyright to seek an order from a German court to preclude NDC from using any map of Germany derived from the IMS version. IMS lost before the Commission and was ordered to licence, but won interim measures against the decision from the President of the CFI.

In a subsequent preliminary reference on the same topic from a German court, the ECJ found that a refusal to license will amount to abusive conduct if:

1. “The refusal in question concerned a product [...] the supply of which was indispensable for carrying on the business in question”;

2. The refusal is “such as to exclude any competition on a secondary market”;

3. It will “prevent[s] the emergence of a new product for which there is potential consumer demand”;

4. It is “not justified by objective considerations”.

The Court added that merely imitating an existing product would not suffice to justify a compulsory licence. The product of the licence must be new. The Commission decision on IMS caused further commotion, but the ECJ decision was much more cautious. When I

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55 Ibid, paragraph 53.
56 Ibid, paragraph 54.
57 Ibid, paragraph 55.
58 Case C-418/01 IMS Health Inc. v Commission [2004] ECR 1-5039, paragraph 37.
EUI – 2015 EU Competition Policy Workshop

spoke at the Department of Justice on – roughly speaking – whether European competition law was out of control, I did not believe there was a big risk for innovation:

"It would be unimaginable to me that a truly innovative piece of technology (a pharmaceutical patent or novel software code, for example) would be treated in such a manner.”

Firstly, then came the next step. The Commission held that Microsoft had abused its dominant position on the market for server operating systems by failing to say yes when asked to disclose information requested by a competitor on how certain features of its future server operating system would function when launched.

On appeal, the General Court appeared to broaden the criteria laid down in Magill and IMS. Firstly, as to test (2), it moved from “all competition”, an absolute term, to the relative term of “competition”. Secondly, as to test (1), it relaxed the indispensability test to one of economic indispensability. In other words, although competitors might have had access to the market without the data, the fact that doing so would not be economically viable for them was sufficient to satisfy the requirement of indispensability. And there was a relaxation as to the new product criterion: the abusive conduct was to be analysed in terms of its impact on technical development, rather than in terms of whether it prevented the emergence of a specific new product.

Thus, my estimations in 2002 that Magill was a small, contained, instance of compulsory licensing were disproved. Instead, it became a significant milestone on a much longer road. The creation of what may initially appear to be a clear-cut rule, can ultimately lead to a series of surprises. The pendulum may swing back or swing further.

One can say that if the rules are too unpredictable, companies might decide that cautious compliance with Article 102 involves too many uncertainties to be worth the commercial sacrifice. I am unsure how valid is the suggested fear. The potential penalties faced by dominant undertakings are then regarded as a tax on doing business very successfully. That would be an evidently unfortunate development, but it can also be observed that large companies take compliance very seriously, as the consequences of a condemnation can be enormous.

However, there are voices calling for prudence, particularly concerning a dominant firm’s duty to deal. In Oscar Bronner, Advocate General Jacobs argued that:

"In the long term 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. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus, while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for

60 Case COMP/C-3/37.792 Commission v Microsoft
61 Case T-201/04 Microsoft v Commission, paragraph 563.
62 See Vesterdorf, B.
63 Case T-201/04 Microsoft v Commission, paragraph 647.
64 Case C-779/11 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co ECR I-7791.
a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it."65 (Emphasis added.)

Advocate General Jacobs also went on to say that:

"Where [...] exclusive rights are granted for a limited period, that in itself involves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity. It is therefore with good reason that the Court has held that the refusal to license does not of itself, in the absence of other factors, constitute an abuse."66 (Emphasis added).

On balancing the need to promote competition by granting (intellectual) property rights and protecting against abuses of such control by limiting the scope and duration of such rights, Advocate General Poiares Maduro has said:

"A balance should be kept between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with competitors."67

In relation to copyright in particular, in Magill, Advocate General Gulmann (who favoured over-ruling the contested decision) recommended a similar balancing exercise:

"It must not be forgotten that to a certain extent copyright law —like other intellectual property rights —also serves to promote competition. That was, in particular, stressed by the Commission in its comments in connection with the adoption of its proposal for a Council directive on legal protection of computer programmes [...] in which it pointed out that copyright represented an incentive for the investment of intellectual and economic resources and thus helped to promote technical development in the interests of society."68

The closest the US Courts have come to recognizing a general duty to deal is in Aspen Skiing,69 where the defendant had been unwilling to renew a joint cooperation for ski tickets, even with compensation at retail price. The Supreme Court found that liability under Section 2 of the Sherman Act will only exist where a voluntary — and therefore presumably profitable — course of dealing is terminated in a way that suggests anticompetitive intent.

Excessively intrusive rules, or a broad duty to deal, can deter the risk appetite of individuals as well as companies, as the rewards of being the first or the best in their sectors diminish.

65 Opinion of Advocate General Jacobs in Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co ECR I-7791, paragraph 57.
66 Ibid. paragraph 62.
67 Opinion of Advocate General Poiares Maduro in Case C-109-03, KPN Telecom BV v Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) [2004] ECR I-1273, paragraph 53
The challenge faced by the EU, therefore, is to be abstemious in its expansion of its antitrust rules; not because expanding rules may ruin a corporation or cause unemployment, but rather so as not to handicap innovation and prejudice the welfare of the community at large. EU antitrust laws are unique in that they must balance the pursuit of European values, including market integration, with the pursuit of a competitive economy. The law has unquestionably got tougher over the past twenty years. I will now offer three other examples of evolving abuses.

(1) Squeezed into surprise

O'Donoghue and Padilla note that:

"Margin squeeze cases were a rarity under Article 102 TFEU between 1960-2000. The decisional practice and case law was limited to an interim measures decision (National Carbonising) and a final decision in which a margin squeeze was merely only one of several abuses found (Napier Brown/British Sugar).

In fact, the Commission (followed by the Court) had previously rejected a naked margin squeeze claim in Industrie des Poudres Sphériques.

But on 21 May 2003, the European Commission decided to impose a fine of €12.6 million on Deutsche Telekom for abuse of dominance on the premise of a stand-alone margin squeeze abuse. In particular, the Commission found that Deutsche Telekom had committed:

"abuse [...] in the form of a margin squeeze generated by a disproportion between wholesale charges and retail charges for access to the local network. The charges in both cases are subject to sector-specific regulation [...], but Deutsche Telekom has a commercial discretion which would allow it to restructure its tariffs further so as to reduce or indeed to put an end to the margin squeeze [...]. The margin squeeze therefore constitutes the imposition of unfair selling prices within the meaning Article 82(a) of the Treaty.

The Commission went even further than this, proclaiming in recital 180 that:

"by proving the existence of a margin squeeze, the Commission has therefore done enough to establish the existence of an abuse of a dominant market position."

Deutsche Telekom marked the birth of margin squeeze as a stand-alone abuse. In its early years, this offence lived largely unrestrained, with the only official statement by the Commission on margin squeeze abuses reading as follows:

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94 Case COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG OJ 2003 (L 263) 9, recital 57.
95 Ibid.
96 However, the then Court of First Instance and later the Court of Justice culled the creative zeal of the enforcer and rejected the argument that margin squeeze was a per se abuse.
"A price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company.... In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)." 77

In 2009, the Guidance Paper78 was released, stating that:

"Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market[...], does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze'). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking [...]." 79

The Commission has concluded a number of patent settlement agreements concluded between pharmaceutical companies and generic companies. These brought litigation to an end.

Notice on the application of the competition rules to access agreements in the telecommunications sector framework, relevant markets and principles, OJ 1998 C 265/2.

Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7.

Ibid, paragraph 80. We must expect further difficult cases in this area.

Case C-209/10 Post Danmark A/S v Konkurrencerådet C/205050/10 C/205050/10

(Emphasis added.)
end but involved the renouncing of otherwise available legal rights to challenge the patents judicially. Should the agreements be regarded as infringements?

An interesting new category of abuse has been identified: inducement. When a dominant player entered into unlawful agreements with smaller players, it committed the new abuse of "inducement" in that it encouraged them to commit an anticompetitive action. This constituted an independent abuse. The debate continues.

(3) Rebates revisited

A good place to start when assessing the treatment of rebate schemes by the EU institutions is the seminal case of Hoffman-La Roche. The Commission held that Hoffmann-La Roche had abused its dominant position in the market for various vitamins through exclusivity terms and fidelity rebates in agreements with purchasers. The case poisoned relations between Switzerland and the EC for years. The informant, Stanley Adams, was arrested and jailed in Switzerland for economic espionage and his wife took her own life when he was away. On appeal, the ECJ held that:

"An undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 86 of the treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate."

Thus the ECJ held that exclusive purchasing obligations are prohibited. It linked such agreements to fidelity rebates by holding that:

"The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements - whether the quantity of its purchases be large or small - from the undertaking in a dominant position."

Finally, the ECJ distinguished traditional linear quantity rebates — which are lawful — from fidelity rebates, stating that:

"The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers."

European law on rebates has been unique ever since, and has not become less controversial. There have been numerous cases.

In British Airways, the General Court articulated a strong presumption of anticompetitive conduct in relation to loyalty rebates, claiming that:

"[British Airways] can have had no interest in applying its reward schemes other than ousting rival airlines and thereby hindering maintenance of the existing level
EUI – 2015 EU Competition Policy Workshop

of competition or the development of that competition on the United Kingdom market for air travel agency services."

And:

"[British Airways] cannot accuse the Commission of failing to demonstrate that its practices produced an exclusionary effect. In the first place, for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect." 

Now, while rebate schemes may carry anti-competitive effects, there remain several pro-competitive reasons for employing them. Lower prices are normally welcome, and defendant companies routinely speak warmly of the merits of vigorous price competition.

The 2009 Guidance on the Commission’s Article 102 Enforcement Priorities appears to record possible pro-competitive effects of rebates, stating that:

"Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking."

It also declared that:

"Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking." (Emphasis added.)

Shortly before the publication of the 2009 Guidance Paper, the Commission issued its Statement of Objections to Intel. Intel had been found by the Commission to be abusing its dominant position by offering rebates or other payments to incentivize customers to buy from Intel. The facts were hotly contested. Though in theory the 2009 Guidance Paper did not apply to this case, for the first time the Commission made explicit reference to the “as efficient competitor” test it had set out.

On appeal, the General Court categorised the rebates in question as exclusivity rebates. It upheld the Commission’s finding that these rebates were capable of restricting competition, but also pointed to case law to state that:

83 Ibid, paragraph 293.
85 Ibid, paragraph 22.
EUI – 2015 EU Competition Policy Workshop

"[...] the Commission was not required to provide an exact quantification of the level of the part of those rebates which was provided in consideration for exclusivity. It was able to prove merely that some part of those rebates was conditional upon exclusivity."

The debate about Intel continues vigorously, with the exchanges between Messrs Venit and Wils as a classic duel between experts. 87

The pricing practices of Nordic post offices have given rise to several interesting debates before the EFTA and EU courts. 88 The Post Danmark case 89 was at first the occasion for a mild relaxation of the classical doctrine:

"[Article 102 TFEU ] must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests." 90 (Emphasis added).

However, in Post Danmark II, Advocate General Kokott favours a more traditional approach: 91

"In particular, the Court will have to clarify in this case whether, for the purposes of assessing the anti-competitiveness of rebate schemes from the point of view of Article 82 EC, it is legally necessary to carry out a price/cost analysis in which the commercial conduct of the dominant undertaking is compared with that of an equally efficient competitor (the 'as-efficient-competitor' (AEC) test). The question also arises whether the exclusionary effect of the rebate scheme operated by a dominant undertaking must exceed some form of appreciability (de minimis) threshold in order for it to be classified as anti-competitive."

"As the Commission has rightly commented, rebates granted by dominant undertakings sometimes conceal anti-competitive practices which are only superficially the expression of a favourable offer, closer inspection showing them

86 Case T-286/09 Intel Corp. v Commission, paragraph 453.
89 Judgment in Post Danmark A/S v Konkurrencerådet, C-209/10, EU:C:2012:172, para. 44.
90 Ibid, paragraph 44.
91 Opinion of Advocate General Kokott on Post Danmark II, C-23/14 (not yet reported), paragraph 44.
EUI – 2015 EU Competition Policy Workshop

to have little to do with genuinely low prices, and can be very damaging to competition.”

“27. While it is true that rebate schemes operated by dominant undertakings do not attract a general assumption of abuse which those undertakings must disprove, the distinction to be drawn in the case of such rebates between legitimate competition on the merits, on the one hand, and anti-competitive commercial conduct, on the other, is none the less usually a delicate matter requiring careful examination.”

“29. For the purposes of assessing the rebate scheme operated by a dominant undertaking from the point of view of Article 82 EC, however, it is ultimately immaterial whether the scheme can be assigned to a traditional category of rebate (in particular, quantity rebates or loyalty rebates). The decisive criterion is, rather, whether, in providing an advantage not based on any economic supply justifying it, the rebates seek to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition. In short, what matters is whether the dominant undertaking grants rebates which are capable of producing on the relevant market an exclusionary effect which is not economically justified (that is to say, by the passing-on of a cost saving to customers). Moreover, subparagraph (c) of the second paragraph of Article 82 EC in particular also prohibits dominant undertakings from granting discriminatory rebates applying dissimilar conditions to equivalent transactions with other trading parties.”

“32. It goes without saying here that neither the dominant undertaking’s wish to increase its turnover nor its desire to plan its business better can be regarded as constituting an economic justification for granting rebates where these are capable of producing an exclusionary effect.”

“37. For, in this way, even relatively modest variations — whether upwards or downwards — in the turnover figures relating to the products of the dominant undertaking have disproportionate effects on co-contractors. So it is that such a rebate scheme usually has a loyalty-building effect, which may also be described as a suction effect. It makes it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and thus, ultimately, to secure the suction to itself of the contestable part of demand on the relevant market.”

“39. If it can also be demonstrated that the dominant undertaking pursued an exclusionary intent, this will be a strong additional indication that the rebate scheme applied by it is abusive. Such an exclusionary intent or strategy is not, however, a mandatory precondition for a finding of infringement of Article 82 EC. Since abuse of a dominant position is an objective concept, the mere fact that, in the present case, Post Danmark states that it did not act with exclusionary intent does not therefore in any way protect the undertaking from a finding of abuse within the meaning of Article 82 EC.”

Once again, the debate goes on.

Once again, the debate goes on.
EUI – 2015 EU Competition Policy Workshop

The precautionary principle

To conclude, I draw an analogy with the precautionary principle. The best approach for rational decision-making is to look at all possible outcomes, not only the worst outcome, and to consider the likely consequence of action, including the risks associated with a prohibition. The entire problem should be examined taking into account every available piece of information. This should involve considering all probable events, all available regulatory decisions, and all the combinations of decisions and events which might occur. Moreover, the decisions should be capable of being rationally updated from time to time. Errors (too bold, too cautious, wrong problem) should be capable of being reversed.

The precautionary principle preaches that where scientific knowledge is ‘insufficient, inconclusive or uncertain’, society may properly act conservatively to eliminate the ‘danger’ provisionally; whereas if scientific knowledge were complete, a formal risk assessment could be completed and an informed decision taken definitively. But real life does not correspond to these chosen alternatives: the normal condition of the well-informed expert is to be neither perfectly knowledgeable nor perfectly ignorant. The normal condition is to have some data about which not all experts will agree. If the level of knowledge is characterized as imperfect, the precautionary principle may be applied and it will be legitimate to be ‘tough’, cautious, conservative, risk-averse, protective of the public, and so on. In this climate, it will seem reasonable to ban the product until matters become clearer. A ban in such circumstances will be based on the assertion that knowledge is ‘inadequate’, when that inadequacy may reflect an ideological debate rather than an incomplete picture. Worse, perfect knowledge is virtually unattainable (and only a fool would believe he had attained it). This means that for many, many products it will be impossible to show that there are no risks; ergo, a ban might be reasonable. The ban may be described as provisional, but in many cases its application will be permanent. A product once prohibited can hardly ever be rehabilitated.

One problem of the precautionary principles relates to the setting of standards. A standard may mean selecting a maximum level of a dangerous substance in a product used frequently in daily life; it may mean choosing whether to accept any presence of that substance; or it may mean deciding to ban a product in light of dangers possibly associated with it. The decision-maker has to choose whether to allow products which contain some level of a substance deemed harmful. What level to allow? Is a fidelity rebate always bad and incapable of being excused if associated with significant market power? Should cadmium or dioxin or aflatoxin be wholly absent, or should a certain presence be tolerated? Ill-applied, the precautionary principle could deny society access to valuable products which might prolong active life, make work easier, improve food production or enhance enjoyment.

Some conclusions

It is not at all surprising that Article 102 catches entities and behaviours in circumstances not dreamt of by the drafters in 1956. The Treaty of Rome was an economic constitution, which stated with monumental brevity big principles. Constitutional documents commonly develop in ways which their drafters did not expect. European law has become more likely to favour an intervention than the US law. Trends come and go in all areas of law, so evolution is neither surprising nor undesirable. Predictability is however desirable, and it is wise to recollect that an institutional setting of “Danger” can have a deleterious effect on risk-taking.

The tightening of the rules regarding dominance is parallel to stricter (and less predictable) standards in other sectors.
EUI – 2015 EU Competition Policy Workshop

There is a tension between the notion of standards being objective and the relevance of intention, the "moral" element which is often present in big cases.

Complainants have a substantial role to play and are likely to present their plight in a manner which relies on both the economic necessity of intervention and the deplorable and reckless conduct of the dominant player. That makes fact finding challenging and will present the enforcer with delicate choices.

Modern businessmen and women are used to surprises. Dominant companies are likely to be substantial and are certainly accustomed to challenges and novel risks. But combatting those risks has a cost. It is not desirable that endless creativity be deployed to catch smaller prey for actions which they do not regard as potentially controversial.

It is desirable that European competition law continues to develop. I do suggest that we should do better at reviewing progress. Have we got better, more prosperous, safer, cleaner or more efficient because of the successful conclusion of an abuse-of-dominance case? Has welfare been enhanced by the measure or the remedy? Has the remedy been well-crafted? If nothing has changed, does that mean that the remedy was wrong or the dominant player was tricky or that the theory of the case was mistaken? Has the rejected complainant died or prospered?

I have two suggestions for the future. First, good fact-finding is absolutely crucial; yet the adequacy of the European Commission's procedures is widely doubted. It is not inappropriate to consider whether a greater degree of confrontation between opposing views can be built into the decision-making process. Second, we should learn from past cases whether intervention (or non-intervention) led to good results.

It is not a bad thing to have a competition law which matches the European tradition of favouring decent economic conduct and a pragmatic flexible approach to verifying the truth.