

# The Law on Abuses of Dominance and the System of Judicial Remedies

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## I. Introduction

### A. Generalities

Article 102 TFEU<sup>1</sup> has attracted considerable scholarly attention in the past few years. It is difficult to avoid the impression that the substantive elements of the provision<sup>2</sup> are yet to be defined with precision. The view that the notion of abuse lacks a clear meaning and purpose became so widespread in the mid-2000s that the European Commission (hereinafter the ‘Commission’) issued a ‘Guidance Paper’ setting out the circumstances in which it is likely to take action against dominant firms.<sup>3</sup> In spite of this effort, considerable uncertainty remains about the exact boundaries of Article 102 TFEU. This is in part due to the fact that the Guidance Paper is in several respects at odds with the case-law of the Court of Justice of the EU (hereinafter the ‘ECJ’), and in part to the fact that the Commission has been quick to venture beyond the relatively limited material scope of the document.<sup>4</sup>

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<sup>1</sup> In accordance with Art 102 TFEU: ‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States [...]’.

<sup>2</sup> The following substantive elements can be derived from the letter of Art 102 TFEU: (i) a dominant position, enjoyed in (ii) a substantial part of the internal market; and (iii) an abuse (iv) affecting trade between Member States. The single most important substantive elements are the notion of dominance and, in particular, that of abuse.

<sup>3</sup> Guidance on the Commission’s enforcement priorities in applying Art 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ( [2009] OJ C45/7); hereinafter, referred to as the ‘Guidance Paper’.

<sup>4</sup> The Commission clarified that behaviour that is deemed abusive as a result of its exploitative effects on customers and consumers (such as excessive pricing) or as a result of its negative impact on market integration is not covered by the Guidance. The Commission has taken action against dominant firms on these two grounds in recent years. In November 2009, the authority closed the proceedings opened against Qualcomm, based on claims that the firm had not licensed its technologies on fair, reasonable, and non-discriminatory conditions. See ‘Antitrust: Commission

The literature of recent years has focused on the discussion and the critical analysis of the case-law and on the formulation of normative principles for the enforcement of Article 102 TFEU.<sup>5</sup> Relatively fewer studies have attempted to identify the reasons behind the evolution of the notion of abuse. The authors of these studies tend to refer to the intellectual background that influenced the EU competition law system in its early years.<sup>6</sup> For some reason, the trademark features of the case-law—such as the preference for legal pigeon holes and the alleged disregard of efficiency considerations—have come to be attributed to the ideas of the Ordoliberal School.<sup>7</sup>

Explaining a whole line of case-law and administrative practice as the expression of a particular school of thought is not an easy task from a methodological standpoint. An ever-present risk is that its main tenets are distorted beyond recognition so that they conform to the aspects of the case-law they are said to

closes formal proceedings against Qualcomm' (MEMO/09/516, 24 November 2009). The impact of the allegedly abusive behaviour on market integration has been equally prominent in some cases concerning the energy sector. See in particular *German Electricity Wholesale Market* and *German Electricity Balancing Market* (Joined Cases COMP/39.388 and COMP/39.389) Commission Decision of 26 November 2008 [2009] OJ C36/8. The application of discriminatory conditions on rivals or customers within the meaning of Art 102(c) is another line of conduct that is not covered as such in the Guidance Paper.

<sup>5</sup> It is virtually impossible to provide an exhaustive overview of the recent literature in the field. Significant works reflecting on (or having contributed to) the reform of Art 102 TFEU include P Akman, *The Concept of Abuse in EU Competition Law* (Hart Publishing, 2012); C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008); F Etro and I Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (Oxford University Press, 2010); A Ezrachi (ed), *Article 82 EC: Reflections on its recent evolution* (Oxford University Press, 2009); G Monti, 'Article 82 EC: What future for the effects-based approach?' (2010) 1 *Journal of European Competition Law and Practice* 1; R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011); R O'Donoghue and J Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006).

<sup>6</sup> See in particular L Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010); P Marsden, 'Some Outstanding Issues from the European Commission's Guidance on Article 102 TFEU: Not-so-faint echos Ordoliberalism', in F Etro and I Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (Oxford University Press, 2010); C Ahlborn and J Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law', in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008), 55–101.

<sup>7</sup> The Ordoliberal School emerged in the 1930s in the context of the rise of the Nazi regime. Ordoliberals emphasized the importance in a free society of a market economy based on the price system. The adoption of competition rules (and its enforcement by strong, independent administrative agencies) was an important theme in their overall constitutional vision. This position is explained (at least in part) by the concentration of economic wealth and power that accompanied the consolidation of Nazi power. One of the important factors that seems to have contributed to the recent revival of the ordoliberal theme in contemporary competition law scholarship is the work by D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, 1998), which has been widely cited and has served as a source of inspiration for many subsequent works. Articles providing a general overview of Ordoliberalism abound. One example is H Rieter and M Schmolz, 'The Ideas of German Ordoliberalism 1938–45: Pointing the way to a new economic order' (1993) 1 *The European Journal of the History of Economic Thought* 87.

explain. Not surprisingly, this is the very criticism voiced by some of the most prominent German scholars, who regret to see the emergence of ordoliberalism—or a caricature thereof—as something akin to a catch-all category to which authors resort whenever they attempt to make sense of the peculiarities of Article 102 TFEU case-law.<sup>8</sup>

This approach is problematic at least for another reason, which inspired the preparation of this article. If one assumes that ordoliberalism explains the evolution of Article 102 TFEU, then it is difficult to see how it can explain Article 101 TFEU case-law—which deals with agreements that restrict competition<sup>9</sup>—at the same time. The attributes of the former are not present in the latter, even though they are the product of the same era and have been enforced in parallel with one another over a period of fifty years. The divergent evolution of the two provisions suggests that the ideas of the abovementioned school are widely misunderstood and/or that their actual impact on case-law has been overestimated. If Article 102 TFEU rulings tend to be formalistic, their Article 101 TFEU counterparts are a model of flexibility and are based on a solid understanding of the rationale underlying the commercial strategy under consideration. Where Article 102 TFEU case-law dismisses the need to establish the effects in concreto of a particular practice, Article 101 TFEU case-law requires a careful assessment of its impact on the relevant market.<sup>10</sup>

<sup>8</sup> See in particular E-J Mestmaecker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008', in L Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar, 2011); and H Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC', in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart, 2008).

<sup>9</sup> Article 101(1) TFEU prohibits as 'as incompatible with the internal market [...] all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. In accordance with Art 101(3) TFEU, the prohibition set out in the first paragraph may be declared 'inapplicable'. It is for the parties to the agreement to show that it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit', and that it does not 'impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives' nor does it afford them 'the possibility of eliminating competition in respect of a substantial part of the products in question'.

<sup>10</sup> Arguably, the divergent status of exclusive dealing arrangements (that is, those arrangements whereby the supplier requires its distributors not to sell products competing with its own) illustrates this idea more eloquently than any other practice. In Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, the ECJ held that exclusive dealing is prohibited by its very nature under Art 102 TFEU. In Case C-234/89, *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935, by contrast, the ECJ held that the question of whether an exclusive dealing system is restrictive of competition within the meaning of Art 101(1) TFEU depends on whether the relevant market is foreclosed to other suppliers and on whether the system under examination contributes significantly to the observed foreclosure. The contradiction between the two provisions became dramatically apparent in Case T-65/98, *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, as the exclusive dealing arrangement was examined simultaneously under the two provisions.

This article proposes an alternative explanation of the evolution of the contentious notion of abuse of dominance that, it is submitted, is more compelling. It examines whether, and to what extent, the actual and perceived substantive differences between Articles 101 and 102 TFEU can be attributed to the imperfect nature of the EU system of judicial remedies. A careful analysis of competition cases since the 1960s suggests that the procedural avenue through which a particular case is brought before EU courts has a decisive impact on the manner in which the substance of the provisions is shaped. Put differently, the nature of the proceedings seems to influence the behaviour of EU courts, which by extension influences, over time, the evolution of the law.

Preliminary reference procedures<sup>11</sup> (the ECJ being required to provide an interpretation of primary EU law to the referring court to enable the latter to solve a dispute at the national level) provide an ideal setting in which to lay down precise principles concerning the interpretation and enforcement of legal provisions. A steady stream of preliminary rulings made it possible to clarify, from the early days of EU competition law, the logic underpinning the pivotal element of Article 101(1) TFEU, which is the notion of restriction of competition. As a result, substantive standards have developed in an incremental manner, building on, and expanding, the logic of pre-existing principles. By the same token, EU courts have routinely reacted when the Commission has deviated from the principles underlying these standards.

The general tone and approach to the notion of abuse was instead set in the context of annulment actions<sup>12</sup> brought against Commission decisions between the early 1970s and the early 1980s. Genuinely meaningful and illuminating preliminary references with a potential to clarify the scope of Article 102 TFEU came only later in time, from the mid-1980s, and this sparingly. An analysis of the case-law suggests that EU courts are significantly less inclined to lay down precise guiding principles defining the scope of substantive legal notions in this context. In addition, they are seemingly not concerned with ensuring that administrative action remains within the limits that would logically derive from the relevant precedents. In turn the Commission, as one would expect from an administrative authority, is often inclined to stretch the boundaries of the notion of abuse. The combination of these two factors seems to lead to the inconsistent enforcement of the provision and to the observed fluctuation of substantive standards.

<sup>11</sup> See Art 267 TFEU, by virtue of which the ECJ enjoys 'jurisdiction to give preliminary rulings concerning' both 'the interpretation of the Treaties' and 'the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.

<sup>12</sup> Pursuant to Art 263 TFEU, the ECJ 'shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'.

The judicial review of competition law decisions has become a source of controversy in recent years. Claims that EU courts are overly deferential towards the Commission are increasingly frequent among practitioners. The hypothesis explored in this article contributes to this debate by widening its scope and significance. If the degree of scrutiny of Commission decisions by EU courts indeed has an impact on the evolution of law, then its implications would be more profound and far-reaching than is commonly understood. The issue of judicial review, which is assumed to revolve around procedural considerations, becomes, once its dynamic dimension is considered, one of substance as well.

## **B. A Note on Methodology**

### *(i) Case Search and Cut-off Date*

Given the nature of the hypothesis that is tested in this piece, every effort has been made to consider all Article 102 TFEU rulings delivered by EU courts. The primary search point was the Curia website (<<http://curia.europa.eu>>), which makes it possible to select judgments by proceedings (eg annulment action, appeal, preliminary reference), by topic (eg ‘competition, ‘state aids’), and by text. Search on the Curia website (combining different criteria) was complemented with a search on the comprehensive database of competition judgments found on the DG Competition website<sup>13</sup> and with some specialized volumes.<sup>14</sup> The cut-off date for the analysis is 31 July 2013,<sup>15</sup> and the ECJ judgment on appeal in *AstraZeneca*<sup>16</sup> the last to be considered. This same approach was followed with regard to case-law on Article 101 TFEU and in the field of merger control.

### *(ii) Case Selection*

The analysis of the case-law is based on the premise that such an exercise can only yield meaningful conclusions (about the rate of annulment of decisions; about the different styles of reasoning) if like cases are assessed and compared. Thus only rulings handed down in the context of preliminary references, on the one hand, and annulment actions brought by defendants in the administrative proceedings against prohibition decisions, on the other, are part of the analysis.

<sup>13</sup> See <<http://ec.europa.eu/competition/court>>.

<sup>14</sup> R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011); R O’Donoghue and J Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006).

<sup>15</sup> The original cut-off date was 31 December 2012. The data was checked again on 31 July 2013 using the same tools and the results would have remained unaltered (no new judgments on Art 102 TFEU were delivered during the period). A complete list of the judgments considered in the analysis is presented in Appendix I.

<sup>16</sup> Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission* [2012] (ECJ, 6 December 2012).

Other proceedings (eg actions for failure to act) and, more generally, third-party actions are thus disregarded. As a result, the quantitative analysis of the rate of annulment of Commission decisions in Article 102 TFEU and merger control proceedings yields, it is submitted, a more accurate picture than the one that is provided in previous statistical accounts, discussed below, which were not explicit about this distinction. For instance, to the extent that third-party applications are significantly more likely to be dismissed,<sup>17</sup> prior work may have overestimated the rate of dismissals before EU courts. The data from merger control case-law, which is used as a benchmark to evaluate some of the claims made in relation to Article 102 TFEU case-law, have been gathered following the same approach. Although less common than in other areas of EU law, applications for annulment are sometimes not joined when more than one party brings an action against the same Commission decision.<sup>18</sup> As shown in the online appendix, parallel applications have been considered as a single item in the quantitative analysis, even though they are often dealt with, from a formal standpoint, as separate cases. Again, this is a factor that is not explicitly considered in previous studies and that contributes to the robustness of the conclusions.

### (iii) Case Coding

Previous quantitative studies did not systematically differentiate the judgments by court or by grounds of annulment, in spite of the informative value of the distinction. Only some of them distinguish between annulment on substantive and procedural grounds. Instead of this approach, it seemed more logical to rely on the categories traditionally used in administrative law. Thus cases have been coded based on whether the annulment of the Commission decision is the consequence of an error in fact or an error in law (typically relating to the legal characterization of facts by the Commission). Some cases were annulled on atypical grounds, unrelated, as such, to the interpretation or the application of Article 102 TFEU (due process considerations, as in the *Solvay* saga;<sup>19</sup> the

<sup>17</sup> The truth behind this intuition has been established empirically by D Geradin and N Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', in J Derenne and M Merola (eds), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 2012).

<sup>18</sup> See *Magill* (Case T-76/89 *Independent Television Publications Ltd v Commission* [1991] ECR II-575; Case T-69/89 *Radio Telefís Éireann v Commission* [1991] ECR II-485; and Case T-70/89 *British Broadcasting Corporation and BBC Enterprises Ltd v Commission* [1991] ECR II-535); *General Electric/Honeywell* (Case T-209/01, *Honeywell International, Inc v Commission* [2005] ECR II-5527 and Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575); *Ryanair/Aer Lingus* (Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457 and Case T-411/07 *Aer Lingus Group plc v Commission* [2010] ECR II-3691); and *Telefónica* (Case T-336/07 *Telefónica, SA and Telefónica de España, SA v Commission* [2012] nyr and Case T-398/07 *Spain v Commission* [2012] nyr).

<sup>19</sup> Case T-57/01 *Solvay SA v European Commission* [2009] ECR II-4621 and Case C-109/10 P *Solvay SA v Commission* [2011] (ECJ, 25 October 2011).

interpretation of Article 106(1) TFEU, as in *DEI*,<sup>20</sup> the powers of the Commission to delegate powers to a trustee, as in *Microsoft*,<sup>21</sup> or to examine a merger after the project is abandoned by the parties, as in *MCI/WorldCom*.<sup>22</sup> The difficulty of distinguishing between issues of law and of fact is a well-known leitmotif in administrative law. In any event, the reasons why a case is understood to involve an issue of law or of fact are provided in detail in footnotes to the main text.

## II. The Problem with the Notion of Abuse

The ongoing controversies relating to the interpretation and enforcement of Article 102 TFEU revolve, by and large, around the definition of the boundaries of the notion of abuse. Dominant positions are not prohibited under the provision. It is thus in light of the former notion that the line between lawful and unlawful conduct is drawn. The relevant case-law has been criticized ad nauseam (and occasionally praised) for ignoring, and thus for being frequently at odds with, economic principles. This line of criticism (and occasional praise) does not point—it is submitted—to the most fundamental problem relating to the case-law on the notion of abuse. It is also somewhat simplistic in that it implies that rulings are more monolithic than they actually are. References to efficiency are far from non-existent, and the ECJ has in some cases explicitly relied on the sort of analytical tools that are found in mainstream economic literature.

In reality, the problem with the notion of abuse as understood by EU courts has little to do with the fact that a particular, allegedly misguided (or inspired in a particular school of thought), approach is relied upon, but with the fact that multiple substantive standards co-exist, overlapping and contradicting one another. As a result, it is difficult to anticipate how a particular case will be decided, as the precedents that would logically apply to it may become irrelevant if the Commission chooses to rely on an alternative substantive standard or methodological approach. It is against this background that one must understand frequent claims about legal uncertainty and the unfettered discretion enjoyed by the Commission when applying Article 102 TFEU.

### A. The Co-existence of Multiple Substantive Standards

EU courts do not examine Article 102 TFEU cases in light of a single unifying logic and seem, to this day, unconcerned with ensuring across-the-board consistency in the interpretation of the notion of abuse. The outcomes of particular cases, and the lenses through which they are analysed, vary widely depending on

<sup>20</sup> Case T-169/08 *Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission* [2012] nyr.

<sup>21</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.

<sup>22</sup> Case T-310/00 *MCI, Inc v Commission* [2004] ECR II-3253.



a number of factors. In some cases an abuse has been established on the basis of subjective considerations, in the sense that the application of Article 102 TFEU was triggered by the alleged anticompetitive intent of the dominant firm. In other cases, objective considerations alone were truly relevant in the analysis. The determinant factor under the latter was not so much the motivation behind the contested strategy, but its impact on the competitive process.

Where the abusive nature of the behaviour is assessed by reference to subjective factors, the actual impact of the practice on competition becomes irrelevant. In cases relying on this approach Article 102 TFEU has applied irrespective of whether rivals were likely to retain their ability and incentive to compete in the marketplace. The case-law that relies on objective considerations, in turn, does not endorse a single standard of proof, which varies from one practice (and even one case) to another. In some rulings, the ECJ seemed satisfied when presented with evidence that the contentious practice had the potential, in the abstract, to foreclose competition. In other cases, the ECJ has required evidence that such an outcome was a likely one in the specific economic context in which the practice had been implemented.

Figure 1 seeks to illustrate the fluctuation of substantive standards in Article 102 TFEU case-law. It is helpful to think of these as a composite of two factors. The horizontal axis captures the continuum between cases in which the intent of the dominant firm proved determinant to establish an abuse and those in which objective considerations marked the dividing line between prohibited conduct and lawful competition on the merits. At one extreme one can identify cases such as *Irish Sugar* (border rebates) and *Compagnie Maritime Belge*, the outcome of which can only be meaningfully explained by the weight given by EU courts to subjective factors (that is, the alleged exclusionary intent of the dominant firms).<sup>23</sup> At the other extreme, there are cases in which objective considerations alone were genuinely relevant.<sup>24</sup> Halfway between the two, judgments like *AKZO* set out a test primarily informed by objective factors that can be modulated if there is evidence of anticompetitive intent.<sup>25</sup>

The vertical axis, in turn, depicts fluctuations regarding the nature and the quality of the evidence relating to the impact of the practice on competition.

<sup>23</sup> See Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, paras 173–193 (all references to *Irish Sugar* in the remainder of the piece refer to this aspect of the judgment) and Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA and Dafralines A/S v Commission* [2000] ECR I-1365. In the first of these cases, the behaviour (a policy of selective price-cuts along the border) was deemed abusive insofar as it was found to constitute a strategy aimed at preventing the entry of competing suppliers established in other Member States. In the second case, the ‘fighting ships’ strategy was put in place by the liner conference to respond to market entry.

<sup>24</sup> These cases include *Magill* (n 18) ECR 743, which was reiterated in Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039; and Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-9555; and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527.

<sup>25</sup> Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.



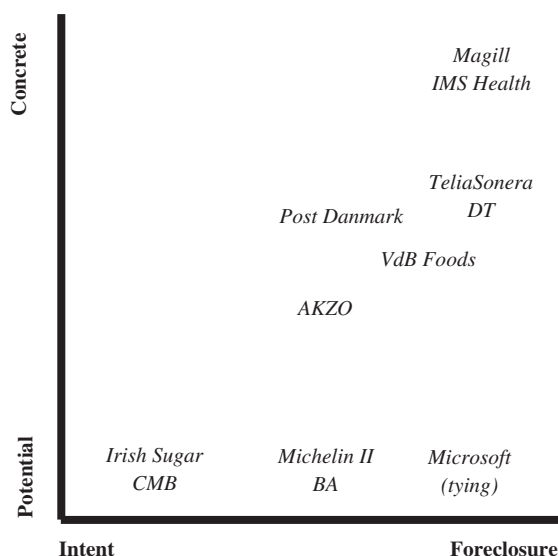


Figure 1: The Fluctuation of Substantive Standards in Article 102 TFEU

At the top right corner, one can identify the case-law on refusals to deal, which requires concrete and objective evidence that the practice leads to the ‘elimination of competition’ for Article 102 TFEU to apply. From that point, the approach of EU courts greatly fluctuates from one practice to another. In some cases, it is only necessary to show that the practice has, in the abstract, the potential to harm competition. This is true of the case-law on exclusive dealing and loyalty rebates. Very much the same can be said about the case-law of tying practices following the GC judgment in *Microsoft*.<sup>26</sup> Where this standard applies, it is not necessary to show that rivals have actually been (or are likely to be, in light of the context in which the practice is implemented) foreclosed from the relevant market.<sup>27</sup> There are, on the other hand, cases where the application of Article 102 TFEU depends on the effects in concreto of a practice on competition. The likelihood of these effects is established by relying on more or less accurate proxies. The *AKZO* test applied to price-cuts, which amounts in essence to establishing whether equally efficient competitors would retain the

<sup>26</sup> *Microsoft* (n 21), in particular paras 976–1090.

<sup>27</sup> See in particular Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331; Case C-549/10 P *Tomra Systems ASA and others v Commission* [2012] (ECJ, 19 April 2012), paras 37–49; and Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* (*Michelin II*) [2003] ECR II-407, paras 235–246.

ability and the incentive to remain on the market, is one;<sup>28</sup> the principles set out for the assessment of 'margin squeeze' claims (which seems to put greater emphasis on concrete anticompetitive effects) is another.<sup>29</sup>

The fact that substantive standards vary across practices is a clear source of concern. Arguably more problematic is the fact that a similar degree of fluctuation can be observed even when individual practices are examined in isolation. Consider the example of price cuts. The corollary to the principles set out in *AKZO* is that dominant firms are free to compete aggressively on prices so long as these are sufficient to recoup costs.<sup>30</sup> This impression was recently confirmed in *Post Danmark*, in which the ECJ seemed to imply that a policy of selective price cuts put in place by a dominant firm is only abusive where it can be established that it is predatory within the meaning of *AKZO*.<sup>31</sup> A different approach has been adopted, however, in other cases where similar (if not virtually identical) practices were at stake. Both in *Compagnie Maritime Belge* and *Irish Sugar*, a policy of selective price cuts was deemed abusive even though there was no evidence that the firms in question were pricing below average total costs.<sup>32</sup>

Consider the example of refusals to license intellectual property rights. In *Magill* and *IMS Health*, the ECJ held that such behaviour can only be deemed abusive in 'exceptional circumstances', which would require evidence of the indispensability of the input to which access is requested; that lack of access

<sup>28</sup> *AKZO* (n 25), paras 71 *et seq.* According to this ruling, the pricing policy of a dominant firm is deemed abusive where the prices are set below the average variable costs. Where the prices charged are below average total costs, but above average variable costs, an abuse may be established if the exclusionary intent of the dominant firm can be shown to motivate the behaviour. This rule is obviously inspired from the so-called Areeda-Turner test, presented in P Areeda and DF Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 *Harvard Law Review* 697. When these authors explain the rationale behind the test proposed, they point out (p 712) that 'pricing below marginal cost [for which they rely on average variable costs as a proxy] greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist'. A similar explanation is given by the Commission in paras 26–27 of the Guidance Paper.

<sup>29</sup> In para 32 of *TeliaSonera* (n 24), the ECJ explained that a margin squeeze may occur, *inter alia*, where 'the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users'. More importantly, it clarified in para 66 that 'in the absence of any effect on the competitive situation of competitors, a [margin squeeze] cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice'. These same ideas were already expressed in *Deutsche Telekom* (n 24).

<sup>30</sup> In such a scenario, the practice could only lead to the exclusion of rivals that are not as efficient as the dominant firm. In para 70 of the *AKZO* (n 25), the ECJ held that not all forms of price-based competition are acceptable under Art 102 TFEU, and then went on to consider the two circumstances cited above.

<sup>31</sup> Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] (ECJ, 27 March 2012).

<sup>32</sup> *Compagnie Maritime Belge* (n 23) paras 96–97 and 112–121; *Irish Sugar* (n 23), para 182.

to it results in the 'elimination of competition'; and that it prevents the emergence of a 'new product' for which there is potential consumer demand.<sup>33</sup> In the *Microsoft* saga, the General Court (hereinafter the 'GC') upheld the Commission decision, which was grounded on ostensibly less stringent conditions. To add confusion to the matter, it did so in an ambiguous manner, as it formally endorsed the substantive standards set out in previous cases, on the one hand, and declared that it would be departing from them, on the other.<sup>34</sup>

## B. Legal Uncertainty

Legal certainty suffers when the case-law lacks a unifying rationale. Cases like *Microsoft* or *Compagnie Maritime Belge* show that precedents are not reliable predictors of the outcome of future rulings, in the sense that firms cannot exclude that lower (or simply different) substantive standards than those endorsed in previous cases will be subsequently applied by the Commission. Minute factual differences between cases seem to justify divergent methodological approaches and outcomes. In this same vein, the *formal label* with which a case is brought before an authority or a court (for instance, the fact that the case is not said to concern, from a strictly formal standpoint, a refusal to deal, but, say, a case of abusive discrimination within the meaning of Article 102(c) TFEU) seems to have a significant impact on the substantive analysis of the practice under consideration.

This is the context in which the adoption of the Guidance Paper, mentioned in the introduction, must be understood. Interestingly, and for the very reasons mentioned above, it is unclear whether this document can lead to any long-term improvements from the perspective of legal certainty. In the Guidance Paper, the Commission does not hesitate to interpret the case-law on refusals to license intellectual property rights in a way that loosens the conditions set out by the ECJ in *Magill* and *IMS Health*, thereby contributing to the uncertainty created by the GC judgment in the first *Microsoft* case.<sup>35</sup> It would seem, in addition,

<sup>33</sup> *Magill* (n 18), paras 48–58; and *IMS Health* (n 24), paras 34 *et seq.*

<sup>34</sup> *Microsoft* (n 21). The reasoning of the ECJ appeared to suggest that the conditions set out in *Magill* and *IMS Health* were endorsed as the relevant benchmark for the assessment of Microsoft's alleged refusal to license interoperability information to its rivals (para 336 of the judgment). On the other hand, it held in para 647 that one of the conditions (that is, the requirement that the refusal to license an intellectual property right prevents the emergence of a new product) 'cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of [Article 102(b) TFEU]' and therefore established the existence of an abuse in the light of a different test, related to the limitation of technical development.

<sup>35</sup> Guidance Paper, paras 75–90. In its reinterpretation of the conditions set out in *Magill* and *IMS Health*, the Commission no longer refers to the 'indispensability' of the requested input, but to its 'objective necessity', which is more or less strict depending on the circumstances of the case at hand. Similarly, where the two abovementioned cases require that the refusal to deal prevents the emergence of a 'new product', the Commission refers to 'consumer harm', which is to be established, again, on a case-by-case basis.

that the document is not an effective device to limit administrative discretion in a meaningful way. The analysis of the Commission in its second *Microsoft* decision is not easy to reconcile with the logic of the document, even though the two were issued within just a few months' difference.<sup>36</sup> More recent developments suggest that this tendency may very well continue, if not deepen, in the future. The proceedings opened against Google in November 2010, for instance, give the impression that the circumstances in which the Commission may require a dominant firm to deal with rivals on regulated terms and conditions are likely to be progressively loosened even relative to the principles set out in the Guidance Paper (which in themselves relax the standards set by the ECJ in the relevant case-law).<sup>37</sup>

More generally, the impression that virtually any practice put in place by a dominant firm can potentially violate Article 102 TFEU is difficult to escape. EU courts have interpreted the provision in a very expansive manner. In *Continental Can*, the ECJ held that the abusive conduct need not be the manifestation of the dominant position enjoyed by the firm.<sup>38</sup> In other words—and contrary to what one could reasonably infer from a literal reading of the provision—it is not necessary to show a link between the two for Article 102 TFEU to come into play. This means, in practice, that a dominant firm may be found to abuse its position if, for instance, it provides misleading information before an intellectual property agency, as was the case in *AstraZeneca*.<sup>39</sup> The ECJ has in fact gone as far as to accept the idea that, in 'special circumstances', Article 102

<sup>36</sup> *Microsoft (Tying)* (Case COMP/39.530) Commission Decision of 16 December 2009 [2010] OJ C36/7. The Guidance Paper requires (in para 20) that convincing evidence of foreclosure is established. It was particularly difficult for the Commission in this case to show that the allegedly abusive behaviour, which consisted of the tying of the Windows operating system with its affiliated web browser (Internet Explorer) had the potential to exclude rival web browsers. If this was already apparent at the time of the decision, the trend towards increased and fiercer competition has clearly deepened since then. If the Commission was able to come to the preliminary conclusion that Microsoft was abusing its dominant position and thus to extract commitments from the firm it is because the GC did not require evidence of foreclosure in the first ruling on the first decision of the saga, but simply evidence that Internet Explorer enjoyed an 'artificial distribution advantage' over rival products.

<sup>37</sup> 'Antitrust: Commission probes allegations of antitrust violations by Google' (IP/10/1624, 30 November 2010). See *Foundem v Google* (Case AT.39.740), ongoing. While it is not obvious to deduce from the information provided by the Commission what the exact theory of harm is in this case, requiring remedies from the firm in this case would imply that it is under a duty to give non-discriminatory access to its rivals. This would mean, in turn, that the strict conditions set out in *Magill* and *IMS Health* (which, as seen above, set out the 'exceptional circumstances' under which a dominant undertaking may be forced to deal with a rival) would have to be established in this case. In the context of the *Google* case, it seems particularly difficult to establish these conditions given the nature of the market in which this behaviour is implemented. For a discussion of the reasons why the abovementioned 'exceptional circumstances' would not be present in this case, see DA Crane, 'Search Neutrality as an Antitrust Principle' (2011) Public Law and Legal Theory Working Paper Series No 256, available at <<http://www.ssrn.com>>.

<sup>38</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215, para 27.

<sup>39</sup> Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805.

TFEU may apply where the allegedly abusive practice takes place on a market other than the one on which the firm enjoys a dominant position.<sup>40</sup>

### C. Formalistic Assessment of Practices

What is notable about the lack of concern with consistency in the interpretation and enforcement of Article 102 TFEU is that EU courts have overtly refused to address the internal contradictions in the case-law when explicitly invited to do so. This reluctance became apparent in *TeliaSonera*. One of the questions raised by the national court was that of whether refusals to deal and the so-called ‘margin squeeze’ abuses should be subject to the same substantive standards. A margin squeeze is just a formal label used to refer to constructive refusals to deal by vertically-integrated firms, that is, to situations in which a dominant firm supplies a given input to third parties on such conditions that make it uneconomic for the latter to operate.

Consistency requires that the same conditions apply to evaluate the abusive nature of the constructive and outright refusals to supply (one would logically assume that if a firm is entitled to refuse to deal with a competitor in the first place, it is also entitled to supply its inputs on conditions that make it impossible for rivals to compete, and vice versa). This (relatively intuitive and straightforward) idea was endorsed by the Commission in the Guidance Paper.<sup>41</sup> However, the ECJ took a formalistic approach to the matter instead and concluded that a ‘margin squeeze’ to deal may violate Article 102 TFEU even when the conditions under which an outright refusal would be deemed abusive are not established.<sup>42</sup> The Court considered that the application of the same substantive standards in the two scenarios would ‘reduce the effectiveness of Article 102 TFEU’.<sup>43</sup>

One of the consequences of the marked formalism in the assessment of potentially abusive practices is that simplistic, if not misguided, ideas about the logic behind business conduct become entrenched in the case-law. Consider the example of exclusive dealing obligations. In *Hoffmann-La Roche*, the ECJ assumed that, when dominant firms require their customers not to sell brands competing with their own, they do so with a view to excluding their rivals from the market.<sup>44</sup> Decades of economic research make it very clear that such an

<sup>40</sup> See Case C-333/94 *Tetra Pak International SA v Commission* (*‘Tetra Pak II’*) [1996] ECR I-5951, para 27.

<sup>41</sup> See in this sense para 80 of the Guidance Paper.

<sup>42</sup> *TeliaSonera* (n 24), paras 55–59.

<sup>43</sup> *Ibid*, para 58, where the ECJ held that ‘if Bronner were to be interpreted otherwise, in the way advocated by *TeliaSonera*, that would, as submitted by the European Commission, amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU’.

<sup>44</sup> *Hoffmann-La Roche* (n 10), para 90: ‘Obligations of this kind to obtain supplies exclusively from a particular undertaking [...] are incompatible with the objective of undistorted competition within

assumption is incorrect. As the ECJ itself acknowledged in *Delimitis*, which set out the substantive standards for the assessment of the very same practice under Article 101(1) TFEU, there are several, well-established and procompetitive reasons why firms might resort to exclusive dealing.<sup>45</sup> However, the substantive conclusion that followed logically from the original (and erroneous) assumption made in *Hoffmann-La Roche*, which is the unqualified prohibition of exclusive dealing when implemented by dominant firms, has remained unaltered in case-law. This is so in spite of the fact that the GC has occasionally conceded that the said assumption does not faithfully reflect the complexity of market dynamics.<sup>46</sup>

#### D. Judicial Deference and Administrative Discretion

A look at the rate of success of annulment actions against Commission decisions helps understand and put in perspective the generalized perception among commentators and practitioners that it is distinctly rare to see an Article 102 TFEU decision annulled before the GC.<sup>47</sup> Figure 2 seeks to refine and complement previous statistical accounts.<sup>48</sup> As explained above, it presents the outcome of all

the common market, because [...] they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.'

<sup>45</sup> *Delimitis* (n 10), paras 10–12, where the ECJ explains, in particular, that exclusive dealing arrangements 'entail for the supplier the advantage of guaranteed outlets, since, as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods' and that they 'also have advantages for the reseller, inasmuch as they enable him to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market'. For an economic analysis detailing the efficiency-based explanations behind exclusive dealing, see eg O'Donoghue and Padilla, *The Law and Economics of Article 82 EC* (Hart, 2006), 352–7.

<sup>46</sup> The GC has occasionally acknowledged that exclusive dealing arrangements can be explained on efficiency grounds. See in particular Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* ('*British Plasterboard*') [1993] ECR II-389, paras 66–67 and *Van den Bergh Foods* (n 10), para 159.

<sup>47</sup> See in particular the statistics provided by C Ahlborn and D Evans, 'The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe' (2008–2009) 75 *Antitrust Law Journal* 887; D Neven, 'Competition Economics and Antitrust in Europe' (2006) 48 *Economic Policy* 741; and D Geradin and N Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', in J Derenne and M Merola (eds), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 2012). These figures contrast with those presented by P Larouche, 'The European Microsoft Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evants' (2008–2009) 75 *Antitrust Law Journal* 933. The most exhaustive and sophisticated quantitative analysis of the judicial review of the legality of Union acts is arguably the piece by T Tridimas and G Gari, 'Winners and Losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001–2005)' (2010) 35 *European Law Review* 131.

<sup>48</sup> The studies presented by both Ahlborn and Evans, on the one hand, and Neven, on the other, focus on the record of annulment proceedings before the GC, thereby disregarding appeals before the ECJ, and the prior record of annulments before the creation of a court of first instance in 1989 (which, as seen in Figure 2, provides useful information). The criteria used to classify the judgments are also different. What matters for the purposes of the classification used below is whether the Commission decision is annulled on factual grounds alone or on the legal characterization of facts

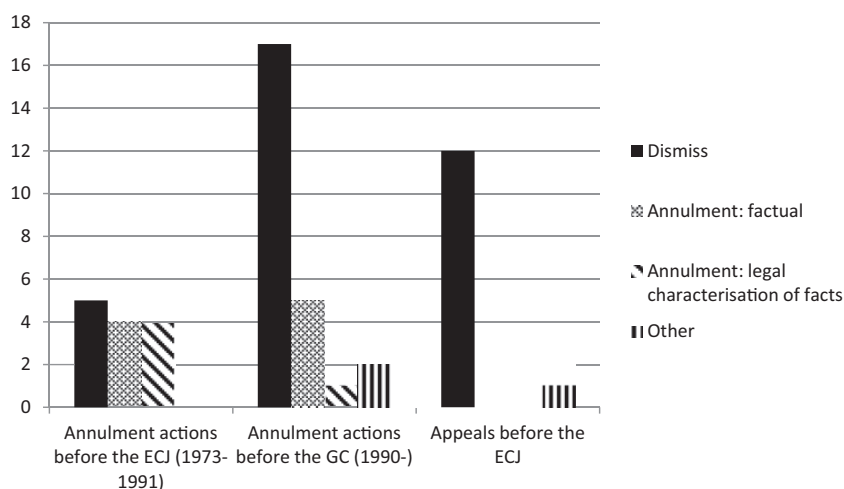


Figure 2: Rate and Profile of Annulments in Article 102 TFEU Cases

annulment actions (and of appeals against GC judgments) challenged by defendants in the administrative proceedings (that is, decisions establishing an infringement of Article 102 TFEU). It appears that decisions were routinely annulled in abuse of dominance cases before the creation of the GC, and this, both on legal and factual grounds.<sup>49</sup> In the years that followed, annulments have remained relatively commonplace, in contradiction with what is sometimes claimed or implied by stakeholders. What is truly exceptional is, it would seem, the paucity of Commission decisions annulled on substantive grounds. It has been possible to identify only one such judgment, rendered in 1992 (and this in relation to the interpretation of the notion of collective dominance).<sup>50</sup>

(that is, the way in which the facts, as established by the Commission, are appropriately qualified as abusive within the meaning of Art 102 TFEU).

<sup>49</sup> The cases annulled include *Continental Can* (n 38); Case 26/75 *General Motors Continental NV v Commission* [1975] ECR 1367; Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* ('BP') [1978] ECR 1513; Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869; and Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* ('Michelin I') [1983] ECR 3461. One may also consider *AKZO* (n 25), registered before the creation of the GC and rendered in 1991, as well as Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* [1975] ECR 1663, in which Art 102 TFEU was applied alongside Art 101 TFEU.

<sup>50</sup> Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992] ECR II-1403. While the GC confirmed the principle whereby Art 102 TFEU applies to abuses of collective dominance, it made it clear that establishing a collective dominant position cannot amount to 'recycling' (para 360 of the judgment) 'the facts constituting an infringement of Article [101]'.



Figure 2 reveals that the typical Article 102 TFEU decision is (partially) annulled on factual grounds alone.<sup>51</sup> The figures show, in addition, that the ECJ has set aside a single GC judgment on appeal, and this on due process grounds, as such unrelated to the interpretation of Article 102 TFEU.<sup>52</sup>

It is often claimed that this attitude contrasts greatly with that seemingly displayed in the context of Article 101(1) TFEU or in the field of merger control. As far as the former is concerned, it is far from exceptional to see EU courts annulling Commission decisions over a disagreement about the exact boundaries of the substantive notions of agreement or concerted practice,<sup>53</sup> or, as will be seen in greater detail below, over the way in which restrictions of competition are assessed.<sup>54</sup> Likewise, commentators and practitioners often point to the fact that the GC and the ECJ have regularly annulled merger decisions taken by the Commission, on substantive grounds, including the scope

<sup>51</sup> The GC judgment in *British Plasterboard* (n 46) was partially annulled insofar as the Commission had failed to establish that the infringement had taken place in July 1985. The same is true of *Irish Sugar* (n 23); of Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container AB and others v Commission* [2003] ECR II-3275 (the Commission failed to take the implications of the regulatory context into consideration, as far as one of the abuses is concerned; and was unable to show that the behaviour of new entrants was the result of an instigation of the collectively dominant firm, as far as the second abuse is concerned); of Case T-66/01 *Imperial Chemical Industries Ltd v European Commission* [2010] ECR II-2631 (the Commission failed to establish that the abuse had started in 1983); and of Case T-321/05 *AstraZeneca* (n 39)—it was not established that the conduct was capable of restricting parallel imports in some of the Member States. The partial annulment of the Commission decision in *Microsoft*, in turn, did not relate to the interpretation of Art 102 TFEU, but to the powers of the authority to delegate the monitoring of the implementation of the decision to an independent trustee.

<sup>52</sup> The cases considered are Case C-53/92 P *Hilti AG v Commission* [1994] ECR I-667; Case C-310/93 P *BPB Industries plc and British Gypsum Ltd v Commission* [1995] ECR I-865; *Magill* (n 18); *Tetra Pak II* (n 40); *Compagnie Maritime Belge* (n 23) (in this case the fines were annulled); Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297; *British Airways* (n 17); Case C-202/07 P *France Télécom SA v Commission* ('Wanadoo') [2009] ECR I-2369; Case C-385/07 *Der Grüne Punkt – Duales System Deutschland GmbH v Commission* [2009] ECR I-6155; *Deutsche Telekom* (n 24); and *Tomra* (n 27); Case C-457/10 P *AstraZeneca* (n 16). In 2011, the ECJ set aside the GC judgment in the sui generis *Solvay* saga (n 19), notable for the procedural irregularities plaguing action by the Commission. These concerned the access to the file and the right to a hearing and are thus unrelated to the application of Art 102 TFEU as such. The *Alrosa* case, in turn, concerned the application of Art 102 TFEU, but the dispute before EU courts related to the interpretation of Art 9 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] L1/1. See Case C-441/07 P *Alrosa Company Ltd v Commission* [2010] ECR I-5949.

<sup>53</sup> See for instance 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 *A. Ahlström Osakeyhtiö and others v Commission* ('Woodpulp II') [1993] ECR I-1307; Joined Cases C-2/01 P and C-3/01 P *Bayer v Commission* (*Adalat*) [2004] ECR I-23, and Case C-74/04 P *Volkswagen AG v Commission* [2006] ECR I-6585.

<sup>54</sup> See in particular Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015; Case T-328/03 *O2 (Germany) GmbH & Co. OHG v Commission* [2006] ECR II-1231; as well as the disagreements manifested in the *Glaxo Spain* saga: Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291; Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969.

of the notion of collective dominance,<sup>55</sup> or the relevant framework for the assessment of conglomerate mergers.<sup>56</sup>

To the extent that the substantive findings of the Commission have been systematically upheld by EU courts, dominant firms may have an incentive to avoid lengthy proceedings with little chances of success (beyond seeing the decision partially annulled on factual grounds) and reach a negotiated solution instead. This incentive would be greatly exacerbated by the ever-growing amount of fines for competition law violations, which is very marked across the whole of the discipline and in the specific context of Article 102 TFEU.<sup>57</sup> It is therefore unsurprising to note that since the adoption of Regulation 1/2003, an important number of Article 102 TFEU proceedings have been settled with commitments offered by the dominant firm(s).<sup>58</sup>

An analysis of specific cases suggests that firms are indeed willing to settle even when genuine doubts persist as to the applicability of Article 102 TFEU to the factual scenario under consideration. Examples in this regard abound, and, if anything, seem to be becoming increasingly frequent. The *Rambus* case was closed in 2009 with commitments, in spite of the fact that it would have been difficult for the Commission to show that the firm was truly dominant on the relevant market (at the very least, this conclusion would have required resorting to a novel and untested theory).<sup>59</sup> In 2010, the Commission launched

<sup>55</sup> Case T-342/99 *Airtours v Commission* [2002] ECR II-2585; and Case T-464/06 *Independent Music Publishers and Labels Association v Commission ('Impala')* [2006] ECR II-2289.

<sup>56</sup> Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

<sup>57</sup> The increase in the amount of fines in competition law cases is a widely discussed phenomenon. See for instance Wouter Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the ECHR' (2010) 33 *World Competition* 5. To illustrate the increase in the level of fines in Art 102 TFEU cases, suffice it to compare the EUR 6.8 million fine imposed in *Virgin v British Airways* (Case IV/D-2/34.780) Commission Decision of 14 July 1999 [2000] OJ L30/1 and the EUR 19.76 million fine imposed in *Michelin* (Case COMP/E-2/36.041/PO) Commission Decision of 20 June 2001 [2002] OJ L143/1 with the EUR 1.06 billion fine imposed less than a decade later in *Intel* (Case COMP/C-3/37.990) Commission Decision of 13 May 2009 [2009] OJ 2009 C227/13.

<sup>58</sup> *Coca-Cola* (Case COMP/A.39.116/B2) Commission Decision of 22 June 2005 [2005] OJ L253/21; *De Beers* (Case COMP/B-2/38.381) Commission Decision of 22 February 2006 [2006] OJ L205/24; *Distrigaz* (Case COMP/B-1/37.966) Commission Decision of 11 October 2007 [2008] OJ C9/8; *German Electricity Wholesale Market and German Electricity Balancing Market* (Joined Cases COMP/39.388 and COMP/39.389) Commission Decision of 26 November 2008 [2009] OJ C36/8; *RWE Gas Foreclosure* (Case COMP/39.402) Commission Decision of 18 March 2009; *GDF* (Case COMP/39.316) Commission Decision of 3 December 2009 [2010] OJ C57/13; *Rambus* (Case COMP/38.636) Commission Decision of 9 December 2009 [2010] OJ C30/17; *Microsoft (Tying)* (Case COMP/39.530) Commission Decision of 16 December 2009 [2010] OJ C36/7; *Long Term Electricity Contracts France* (Case COMP/39.386) Commission Decision of 17 March 2010 [2010] OJ C133/5; *Swedish Interconnectors* (Case COMP/39.351) Commission Decision of 14 April 2010 [2010] OJ C142/28; *E.ON Gas* (Case COMP/39.317) Commission Decision of 4 May 2010 [2010] OJ C278/9; *ENI* (Case COMP/39.315) Commission Decision of 29 September 2010 [2010] OJ C352/8; *Standard & Poor's* (Case COMP/39.592) Commission Decision of 15 November 2011 [2012] OJ C31/8; and *IBM Maintenance Services* (Case COMP/39.692) Commission Decision of 13 December 2011 [2012] OJ C18/6.

<sup>59</sup> See *Rambus* (n 58), paras 18–26. The Commission claimed that the contentious technology represents more than 90 per cent of the worldwide production of DRAMs. On that basis, the

an investigation concerning Apple's favouring its 'native programming tools and approved languages' over rival products such as Adobe Flash.<sup>60</sup> The closing of the case, once Apple changed its commercial policy in a way that addressed the concerns raised, left important questions unanswered. It is not easy to understand why the Commission believed that the behaviour in question was an issue of concern.<sup>61</sup>

### III. A Procedural-Institutional Hypothesis

#### A. Elements of the Hypothesis

There are several factors with the potential to influence the outcome of proceedings before EU courts (or any other court, for that matter). Objective differences concerning the nature and the logic of the different procedural avenues count among these factors. In more concrete terms (and just to name the two that have contributed the most, by far, to shaping EU competition law), the outcome of any given case may vary depending on whether it reaches the courts in the form of a preliminary reference or, instead, in the form of an annulment action against a Commission decision. This may be so, in particular, because the incentive to disregard the relevant precedents may not be the same in the two cases, and because EU courts may be less willing to lay down explicit substantive standards in one case than in the other.

The purpose and starting point of each of the two procedural avenues is markedly different. The very point of preliminary references, on the one hand, is to provide principles and guidance to national courts when applying, *inter alia*, Articles 101 and 102 TFEU.<sup>62</sup> Annulment actions, on the other, concern the 'review' of the 'legality' of Commission decisions in accordance with Article 263 TFEU. The hypothesis explored hereinafter assumes that the courts' incentive to disregard the relevant precedents is greater in the context of the latter.<sup>63</sup> By the same token, it is assumed that EU courts are more reluctant

authority came to the conclusion that 'Rambus held a dominant position on the market at the point when it started asserting its patents'.

<sup>60</sup> 'Antitrust: Statement on Apple's iPhone policy changes' (IP/2010/1175, 25 September 2010).

<sup>61</sup> The market for Smartphones has in fact been found to be competitive in the latest decisions. See in this sense the *Google/Motorola Mobility* (Case COMP/M.6381) Commission Decision of 13 February 2012 [2012] OJ C75/1.

<sup>62</sup> The level of detail and specificity given to national courts varies depending on a number of factors. For an analysis of the question, see T Tridimas, 'Constitutional Review of Member State Action: The virtues and vices of an incomplete jurisdiction' (2010) 9 *International Journal of Constitutional Law* 737.

<sup>63</sup> This idea is, in turn, based on the assumption that the ECJ has, as a matter of principle, an incentive to commit to the principles laid down in the relevant precedents. This assumption has been explored in political science, and authors tend to answer in the affirmative. For an overview of this question, see AS Sweet, 'The European Court of Justice', in P Craig and G de Búrca, *The Evolution of EU Law* (2nd edn, Oxford University Press, 2011), ch 6. See also G Garrett, D Kelemen, and

to provide precise guidance when this same procedural avenue is followed. The intuition behind these assumptions is relatively straightforward. In the context of an annulment action, the analysis is not performed afresh (as would be true in the case of a preliminary reference), insofar as it takes the contested interpretation of the provision offered by the Commission as a starting point. This divergence may impact on the behaviour of EU courts in two main ways.

To the extent that an annulment procedure concerns the 'review' of a decision, courts may not systematically seek to define the substantive scope of a provision (or may do so only implicitly), in contrast with what the ECJ is required to do in the context of a preliminary reference. Alternatively, courts may limit themselves to laying down vague and malleable ideas about the nature of the provision under consideration that cannot as such be the basis of a set of predictable or practicable principles. In the context of annulment proceedings, EU courts may behave, for all practical purposes, as if the task of interpreting the legal provision had been delegated to the Commission. This may be so in spite of the fact that, in the EU legal system, the latter does not enjoy any degree of discretion regarding the definition of the legal scope of Treaty provisions.<sup>64</sup>

On the other hand, one would expect the Commission to be naturally inclined to stretch and explore the outer boundaries of competition law provisions. As a consequence, the decisions it adopts may deviate from (if not ignore) the substantive standards set out in the relevant precedents or may seek to interpret them expansively. For instance, the Commission may adopt a prohibition based on the abstract potential of a practice to eliminate competition even though the principles deriving from previous cases would require concrete evidence of foreclosure. Similarly, it may rely on intent considerations where previous cases emphasize objective ones alone. To the extent that such deviations are perceived as a manifestation of the policy priorities of the Commission (or, similarly, to the extent that the line between the two is often thin in practice) EU courts may tolerate them in the context of annulment proceedings.

These objective differences between the two procedural avenues may lead to divergent outcomes in individual cases. The very same factual scenario could be assessed in light of one substantive standard or another depending on the path through which the case reaches EU courts. However, this work is primarily concerned with the cumulative impact that the said divergent outcomes have on the evolution of the law. From a dynamic perspective, it appears that the substance of a provision may be fleshed out in a substantially different manner depending on whether annulment actions dominate over preliminary references, or vice versa.

H Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 *International Organization* 149, and AS Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004).

<sup>64</sup> For a comparative analysis of this question, see P Craig, *EU Administrative Law* (Oxford University Press, 2006) 435 *et seq.*

The line between lawful and unlawful agreements within the meaning of Article 101(1) TFEU is drawn by reference to the notion of restriction of competition. In this sense, this notion can be said to be the functional equivalent of that of abuse under Article 102 TFEU. The instances in which agreements are likely to have as their object or effect a restriction of competition were set out in a steady stream of preliminary rulings rendered between the mid-1960s and the early 1990s. These judgments constitute a suitable benchmark against which the parallel evolution of the notion of abuse can be assessed. In spite of the remaining (and unavoidable) uncertainties, the picture that results from the case-law on restrictions of competition is a remarkably consistent one that contrasts with the multiplication and fluctuation of substantive standards observed in the context of Article 102 TFEU. The principles set out by the ECJ in early rulings proved resilient to subsequent attempts by the Commission to deviate from them.

The case-law on merger control, in turn, is useful to test some of the intuitions underlying the above hypothesis. This is an area which, due to the division of powers between the EU and its Member States, can only be developed in the context of annulment proceedings. One would therefore expect the relevant case-law to share the features of its Article 102 TFEU counterpart. A close look at the case-law reveals that, if anything, the tendency to defer to the Commission on the part of EU courts is more marked and systematic in the field of merger control. In addition, an analysis of the instances in which these same courts have refined or altered the substantive standards advanced by the Commission is useful to shed light on the likelihood that a similar attitude is observed in Article 102 TFEU cases.

## B. The Shaping of the Notion of abuse

Between 1964 and 1984, a total of thirteen preliminary references concerning the substantive aspects of Article 102 TFEU reached the ECJ. Of these, only the question referred in the latest one (*CBEM-Telemarketing*<sup>65</sup>) was capable of providing useful guidance for future cases. In the previous twelve cases, references to Article 102 TFEU were indirect and not relevant for the outcome of the dispute, or concerned relatively basic questions that did not contribute to the clarification of the elusive boundaries of the provision. Many of the first references did little more than confirm that an intellectual property right does not as such confer a dominant position, and that the exercise of these rights does not as such amount to an abuse of this position.<sup>66</sup> Some other references concerned the

<sup>65</sup> Case 311/84 *Centre belge d'études de marché - Télémarketing v SA Compagnie luxembourgeoise de télédiffusion and Information publicité Benelux* ('CBEM-Telemarketing') [1985] ECR 1125.

<sup>66</sup> Case 24/67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 81; Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69; Case 96/75 *EMI Records Limited v CBS Schallplatten GmbH* [1976] ECR 913 (see, in this same vein, Case 86/75 and Case

applicability of Article 102 TFEU where state legislation is a source of competition distortions.<sup>67</sup>

Figure 3 depicts the chronological context in which the substantive elements of Article 102 TFEU, including the notion of abuse, were fleshed out. Ten founding judgments, brought before the ECJ in the context of annulment proceedings against Commission decisions, were rendered in the decade separating *Continental Can* and *Michelin I*.<sup>68</sup> These judgments introduced a series of ideas and attitudes that explain much about the particular evolution of the notion of abuse and that would not be altered, but reinforced, when the first meaningful preliminary references reached the Court.

It is not possible to discern from these early judgments anything remotely close to a rationale informing the interpretation of the notion, and this is true even of those cases where the Commission decision was annulled on substantive grounds. In *BP* and *General Motors*, where this was the case, the ECJ did not question the fact that the practices identified by the Commission could amount to an abuse, but considered the particular circumstances around the case to challenge the legal characterization of the facts by the Commission.<sup>69</sup> In *Hoffmann-La Roche*, the ECJ hinted at a definition of the notion based on a two-step test. First, the Court held that only conduct departing from ‘normal competition’ (or, if one prefers, ‘competition on the merits’, an alternative expression used by the GC in *Irish Sugar*<sup>70</sup>) may be caught by Article 102 TFEU.<sup>71</sup> In addition, this same definition suggested that an abuse is an objective concept that requires concrete evidence of the effects of the behaviour on competition.

51/75); Case 102/77 *Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1978] ECR 1139.

<sup>67</sup> Case 90/76 *S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale* [1977] ECR 1091; Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac* [1977] ECR 2115.

<sup>68</sup> *Continental Can* (n 38); Joined Cases 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223; *General Motors* (n 49); *Suiker Unie* (n 49); Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207; *BP* (n 49); *Hoffmann-La Roche* (n 10); *Hugin* (n 49); Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission* [1983] ECR 483; *Michelin I* (n 49).

<sup>69</sup> In *General Motors*, the ECJ took account of the fact that the firm had been entrusted with tasks that did not fall under its normal remit and that it quickly rectified its behaviour. In *BP* the ECJ considered the surrounding economic context (the oil crisis during the 1970s) in its analysis of the allegedly abusive behaviour.

<sup>70</sup> *Irish Sugar* (n 23), para 111.

<sup>71</sup> *Hoffmann-La Roche* (n 10), para 91: ‘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.’

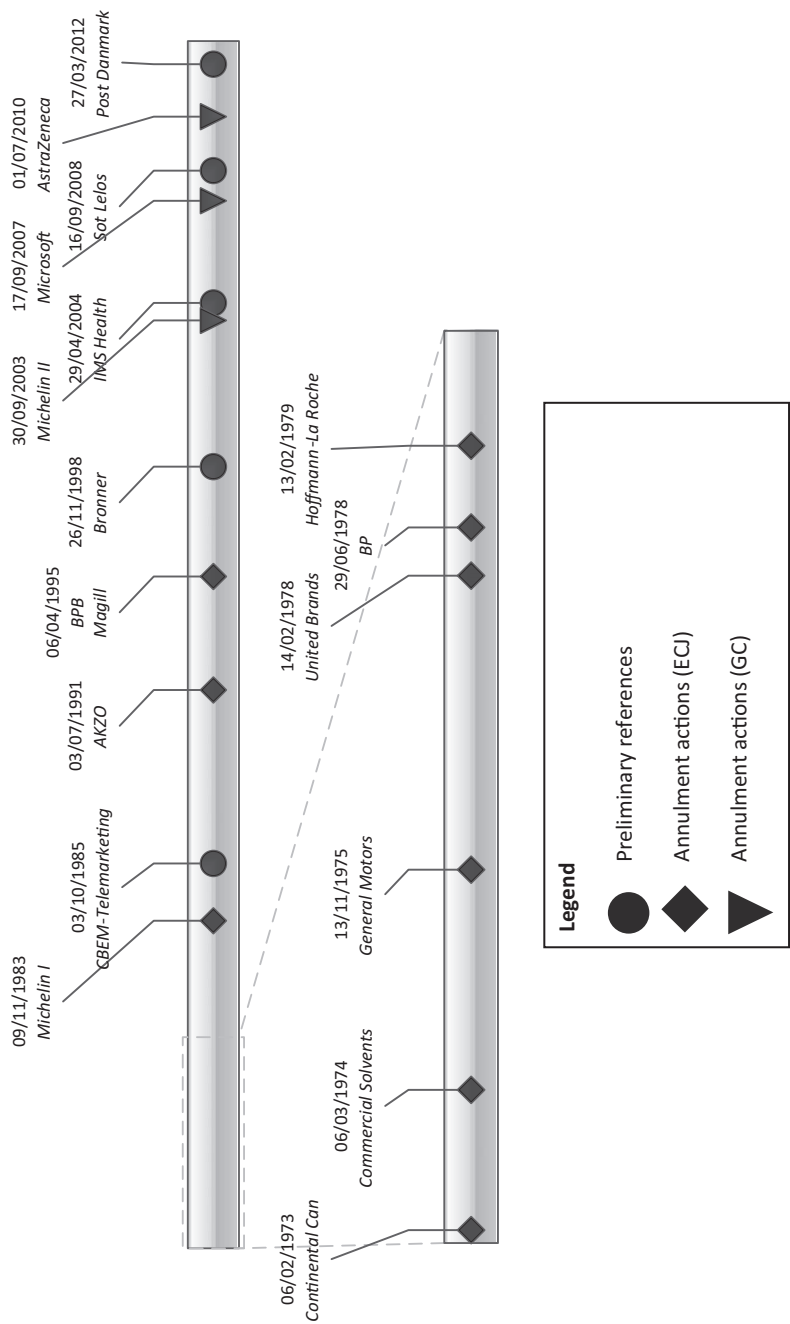


Figure 3: Timeline of Leading Article 102 TFEU Cases



While the definition has consistently been reiterated, it has never been given a specific or practicable meaning and remains elusive, thus favouring substantive inconsistencies. The observed elusiveness is first of all the consequence of the failure of the ECJ to make explicit the criteria used to draw the line between competition on the merits and abusive forms thereof. As discussed above, in *Hoffmann-La Roche* the ECJ drily stated, in contrast with the lucid and extensive analysis of the same practice found in *Delimitis*,<sup>72</sup> that exclusive dealing and the award of loyalty rebates do not constitute a manifestation of normal competition.

In subsequent cases, conduct has been pigeonholed as departing from the ideal of 'competition on the merits' in an equally axiomatic manner. In its analysis of the tying dimension of the first *Microsoft* decision, the GC took the view that the practice enabled the firm to gain market share on the market for media players without having to compete on the merits. The GC never explained what it meant by the expression, nor was it clarified why integrating two complementary products (which is typically a source of efficiency gains) would not be a form of competition on the merits. In *AstraZeneca*, the ECJ merely declared that one of the practices under consideration (that is, the provision of misleading information to a patent agency) was 'manifestly not consistent with competition on the merits'.<sup>73</sup>

In *Hoffmann-La Roche* the ECJ confirmed<sup>74</sup> that loyalty rebates and exclusive dealing are abusive irrespective of their impact on the market structure, which is tantamount to saying on the basis of their form alone. This conclusion dismissed the idea, hinted at in the tentative definition of abuse given by the ECJ in the very same judgment, that only conduct having appreciable effects on competition would trigger the application of Article 102 TFEU. The apparent conflict between these two positions was solved, as seen above, by declaring that the potential, in the abstract, of the contested behaviour to exclude competition is sufficient to establish an abuse of dominance.<sup>75</sup> As a consequence of this position, action by the European Commission is typically subject to a very low standard of proof. If there are fluctuations between cases and across practices in this regard, this is by and large the consequence of variations in the threshold

<sup>72</sup> Ibid, para 89. The ECJ distinguished between loyalty rebates and quantity rebates, based on the assumption that only the latter are justified on economic grounds. A logical implication of the reasoning in *Delimitis* (n 10), is that loyalty rebates may be justified as a means to secure outlets for its product and thus recoup fixed costs. A formalistic distinction between different types of rebates would thus be misguided. For an economic overview of this question, see D Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 *Journal of Competition Law & Economics* 149.

<sup>73</sup> See Case C-457/10 P *AstraZeneca* (n 16), para 98. At first instance, the GC merely declared that the conduct 'constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition', without ever explaining the rationale behind this conclusion. See Case T-321/05 *AstraZeneca* (n 39), para 255.

<sup>74</sup> See also *Suiker Unie* (n 49), paras 510–528.

<sup>75</sup> See n 17.

of evidence to which the Commission itself commits in its practice, and which seems to have become more stringent over time.<sup>76</sup>

In *Michelin I*, the ECJ introduced another fundamental building block in the form of the oft-repeated leitmotif whereby a dominant undertaking has a 'special responsibility not to allow its conduct to impair genuine undistorted competition'.<sup>77</sup> This idea has played a pivotal role in providing an additional line of justification for the expansion of the scope of Article 102 TFEU in cases where genuine doubts remained as to the abusive nature of the conduct under examination. Doubts in this sense may arise where action by the Commission contradicts the logic of existing precedents, as was the case in *Irish Sugar* and *Compagnie Maritime Belge*, mentioned above;<sup>78</sup> where the enforcement of Article 102 TFEU appears to contradict the limits that would derive from a literal reading of the provision, as in *Tetra Pak II* and *AstraZeneca*;<sup>79</sup> or where there are factual circumstances suggesting that the behaviour of the dominant firm is nothing but a manifestation of competition on the merits.<sup>80</sup> Thus the practical role of this principle has been to shield the discretion of the Commission when enforcing Article 102 TFEU (and not to constrain it within a set of boundaries defined in advance, as one would logically expect from a court ruling on appeal). It is difficult to see how such a malleable concept could have been introduced and reiterated by EU courts outside the specific context of annulment proceedings, in which the concern with the policy priorities of the Commission is significantly more likely to influence the outcome of cases.<sup>81</sup>

<sup>76</sup> Suffice it to compare the standard of proof to which the Commission committed in rebate cases, where the Commission has traditionally been satisfied establishing the loyalty-inducing effect *vis-à-vis* customers, with that endorsed in other contemporary decisions. The Commission Decision in *Michelin* (n 57, in particular paras 332–343) contrasts greatly with the standard endorsed in margin squeeze cases, which are based on the ability and the incentive of equally efficient competitors to remain on the market. See in this sense *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision of 21 May 2003 [2003] OJ L263/9. The attitude of the GC when the legality of the latter was challenged is particularly revealing about the attitude of EU courts, as it did not seek to dispute the theory of harm chosen by the Commission. See Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477, paras 166–167. The Guidance Paper can be seen as a culmination of this process. This document can be seen as a pre-commitment device to a higher standard of proof across the board (see in this sense para 20 of the document).

<sup>77</sup> *Michelin I* (n 49), para 57.

<sup>78</sup> *Irish Sugar* (n 23), paras 182 and 191; and *Compagnie Maritime Belge* (n 23), paras 114–121.

<sup>79</sup> *Tetra Pak II* (n 40), para 24; and T-321/05 *AstraZeneca* (n 39), paras 355 and 358.

<sup>80</sup> See eg Case T-51/89 *Tetra Pak Rausing SA v Commission* ('*Tetra Pak I*') [1990] ECR II-309, para 37 (concerning the acquisition of a technology which was subject to a block exemption); *British Plasterboard* (n 46), para 67 (concerning, as seen above, the fact that exclusive dealing may be explained on efficiency grounds); *Deutsche Telekom* (n 24), para 83 (in relation to the crucial involvement of the national regulator in the allegedly abusive conduct); *Wanadoo* (n 52), para 105 (concerning the need to show the ability of the dominant firm to recoup the losses while engaged in a predatory pricing strategy, as logical consistency would require).

<sup>81</sup> A search on the ECJ website reveals that this idea was relied upon for the first time by the ECJ in the context of a preliminary ruling only in 2011, in *TeliaSonera* (n 24)—and this by reference to *Wanadoo*, which was itself an appeal against a GC ruling.

The vagueness around the definition of abuse, and the unwillingness to lay down precise principles to differentiate between legitimate and prohibited conduct, remained unaltered when the first meaningful preliminary rulings were delivered by the ECJ. One of the reasons why these rulings did not have a significant impact on the approach of the ECJ to Article 102 TFEU relates to the fact that the vast majority of references are of little importance from a qualitative perspective. Very often, they concern the application of competition law to government activities and State-owned enterprises. As a result, many of the judgments deal with the applicability of competition law, that is, with the question of whether the activity before the ECJ is economic in nature.<sup>82</sup> When the notion of abuse is at stake, the issue is often so closely related to the nature of state legislation that the behaviour of the dominant firm is of secondary importance. Thus in a number of cases state legislation was found to be incompatible with Articles 106 and 102 TFEU insofar as it discriminated against non-nationals.<sup>83</sup> In other cases, the ECJ found that the undertaking enjoying exclusive rights is led to abuse its position, as is the case, in particular, where it is manifestly incapable of satisfying the demand.<sup>84</sup>

In the limited number of qualitatively important preliminary rulings, the ECJ interpreted Article 102 TFEU in line with the ideas developed in previous annulment rulings. In *CBEM-Telemarketing*, the question raised was that of whether the fact for a television station to reserve a neighbouring activity to its own subsidiary amounts to an abuse of dominance. A positive answer to this question would have had far-reaching consequences (the dominant firm would have been compelled to deal with a rival). To the extent that this is the case, one could have expected a carefully crafted and nuanced answer. The ECJ, however,

<sup>82</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979; Case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA* [1997] ECR I-1547; Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* [2002] ECR I-691; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-4863; Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513; Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* [2011] (ECJ), 3 March 2011; Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* [2012] (ECJ), 12 July 2012.

<sup>83</sup> Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477; Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075; Joined Cases C-147/97 and C-148/97 *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS and Citicorp Kartenservice GmbH* [2000] ECR I-825; Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission, and Mobilkom Austria AG* [2003] ECR I-5197.

<sup>84</sup> Case C-260/89 *Elliniki Radiophonia Tileorasi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1989] ECR I-2925; *Höfner* (n 82); Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889; Case C-55/96 *Job Centre coop. arl.* [1997] ECR I-7119; Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.

simply referred to the judgment in *Commercial Solvents*, in which it held that ceasing supplies to a customer is abusive within the meaning of Article 102 TFEU insofar as it affords the dominant undertaking the possibility to eliminate downstream competition.<sup>85</sup>

The ECJ has done little to clarify the scope of Article 102 TFEU even where conflicting precedents were relevant for the outcome of a particular preliminary reference. In *Bronner*,<sup>86</sup> the ECJ examined whether it is abusive for an allegedly dominant publisher to refuse to deal with a rival. When the question was raised and decided (in 1996 and 1998, respectively) the Court had to reconcile the nebulous and potentially far-reaching statement in *Commercial Solvents* with the ruling in *Magill* (on appeal against a Commission decision), which set out ostensibly stricter conditions.<sup>87</sup> The ECJ simply referred successively to both lines of case-law and seemed to endorse the principles of the latter, albeit implicitly and through the use of speculative language, without ever addressing the rationale behind the choice made.<sup>88</sup>

The ECJ was confronted with a similar scenario in *Post Danmark*.<sup>89</sup> The behaviour at stake in that case could have been examined under two contradictory lines of case-law. As mentioned above, one could reasonably infer from *AKZO* that a dominant firm is entitled to compete aggressively so long as price cuts remain above costs. On the other hand, *Irish Sugar* and *Compagnie Maritime Belge* suggest that even above-cost price cuts can be abusive if, in particular, exclusionary intent can be established. AG Mengozzi acknowledged the internal contradictions in the case-law and sought to reconcile them by interpreting *Irish Sugar* and *Compagnie Maritime Belge* as exceptional cases and *AKZO* as laying down the general rule.<sup>90</sup> The ruling was based on the principles of the latter case alone, and is notable for the emphasis placed on concrete evidence of the foreclosure of equally efficient competitors.<sup>91</sup> On the other hand, it was narrowly defined around the specific facts of the case and does not completely clarify existing ambiguities in the case-law.<sup>92</sup> As a result, it cannot be excluded that the Commission successfully resorts to 'special circumstances' in the near future to justify departing from *AKZO*.

<sup>85</sup> *CBEM-Telemarketing* (n 65), para 25.

<sup>86</sup> Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeiengesellschaft mbH & Co. KG* [1998] ECR I-7791.

<sup>87</sup> See n 14.

<sup>88</sup> *Bronner* (n 86), in particular paras 39–41, in which the ECJ refers to the applicability of the *Magill* conditions to the facts of the case on speculative terms. In para 38, the ECJ seems to imply that *CBEM-Telemarketing* and *Commercial Solvents* do not contradict *Magill*.

<sup>89</sup> *Post Danmark* (n 31).

<sup>90</sup> Opinion of AG Mengozzi in Case C-209/10 *Post Danmark* (n 31), in particular paras 94–95.

<sup>91</sup> *Post Danmark* (n 31), paras 35–39.

<sup>92</sup> The ECJ simply pointed out, in para 29 of the judgment, that evidence of anticompetitive intent had not been established in the course of the proceedings at the national level.

The procedural background behind the preliminary reference in *Post Danmark* is arguably more illuminating than the legal outcome itself. The dispute that would eventually reach the ECJ arose in the context of administrative proceedings before the Danish competition authority (*Konkurrencerådet*). The analysis of the latter, which concluded that the incumbent postal operator had abused its dominant position, is very much in line with that displayed by the Commission (and subsequently upheld by EU courts) in cases like *Irish Sugar*, *Michelin I*, *Michelin II*, and *British Airways*. Accordingly, it was based on claims that the selective price cuts could not be justified on economic grounds and that it placed some customers at a competitive disadvantage. Given the conduct displayed by EU courts in past cases, one cannot help but wonder whether the outcome of the ruling would have been the same had the initial decision been adopted by the Commission and not by its national counterpart.

The reasoning in some preliminary rulings suggests that the ECJ is concerned with preserving the policy choices of the Commission, even when doing so comes at the price of inconsistencies in the interpretation and enforcement of Article 102 TFEU. It has been mentioned above that the ECJ held (in contradiction with the position taken by AG Mazak<sup>93</sup>) in *TeliaSonera* that a ‘margin squeeze’—that is, a constructive refusal to supply—may be abusive in spite of the fact that an outright refusal would not violate Article 102 TFEU.<sup>94</sup> The relevance given to the ‘effectiveness’ of the provision when reaching this conclusion can only be properly understood, it is submitted, if one considers that the enforcement activity of the Commission in the telecommunications sector—which became a policy priority area for the Commission as soon as it was fully liberalized in the late 1990s—has relied heavily on constructive refusals to deal by incumbent operators, and in particular on ‘margin squeeze’ abuses.<sup>95</sup>

### C. The Assessment of Restrictions of Competition under Article 101(1) TFEU

The general approach of EU courts to the definition of ‘restrictions of competition’ within the meaning of Article 101(1) TFEU was set out in three seminal judgments rendered in the 1960s in the context of preliminary reference

<sup>93</sup> Opinion of AG Mazak in Case C-52/09, *TeliaSonera* (n 24).

<sup>94</sup> *TeliaSonera* (n 24), paras 55–59.

<sup>95</sup> Since the late 1990s, the Commission has taken frequent action against incumbent operators in the sector, in particular in reaction to ‘margin squeeze’ claims. See in particular *Deutsche Telekom* (n 24); Case T-336/07 *Telefónica* (n 18). The latter judgment was pending when the *TeliaSonera* ruling was rendered. See also Case COMP/39.523—*Slovak Telecom*, ongoing. Other landmark cases in the telecommunications sector, which were not based on margin squeeze claims but which amounted to an outright refusal to supply, include *Wanadoo* (n 52) (based on a predatory pricing claim in a context similar to the one at stake in the three cases mentioned above); and *Telekomunikacja Polska* (Case COMP/39.525) Commission Decision of 22 June 2011 [2011] OJ C324/7, which concerned different and more far-reaching strategies to block access to new entrants to retail communications markets.

procedures.<sup>96</sup> The fundamental insight from these rulings is, first and foremost, that the limitation of the contractual freedom of the parties and—by extension—their subjective intent are as such insufficient to establish a restriction of competition. A meaningful conclusion in this sense can only be reached, as explained in *Brasserie de Haecht*,<sup>97</sup> in light of objective factors, and more precisely following a careful assessment of the nature of the agreement and of the economic context in which it is concluded. This analysis may reveal, as the ECJ held in *Société Technique Minière*, that, absent cooperation, the parties would not have been able to achieve the objectives pursued by the agreement;<sup>98</sup> or that its impact on competition is insignificant, as in *Völk*.<sup>99</sup>

It is on the basis of these foundational principles (that is, on the basis of the idea that a restriction of competition is an objective concept to be established on a case-by-case basis) that practicable rules for the interpretation and the enforcement of Article 101(1) TFEU were progressively crafted. The counterfactual analysis introduced in *Société Technique Minière* has been relied upon and given a concrete meaning in different contexts. In cases like *Metro I*, *Remia*, and *Pronuptia*, the ECJ made it clear that some vertical restraints may not be caught by Article 101(1) TFEU altogether if they are an integral element of an agreement that is itself pro-competitive.<sup>100</sup> In turn, the framework to examine the significance of the restriction of competition, already sketched in *Brasserie de Haecht*, was developed in the *Delimitis*, a preliminary ruling of 1991.<sup>101</sup> As confirmed in subsequent judgments, this exercise demands that the relevant market is defined and that the position of the parties in that market is established.<sup>102</sup> Similarly, the categories of agreements that are *prima facie* deemed to violate Article 101(1) TFEU by their very nature were identified early in time. In *Consten-Gründig*, which was delivered immediately after *Société*

<sup>96</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235; Case 23/67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen* [1967] ECR 525; Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295.

<sup>97</sup> The ECJ pointed out in the judgment that ‘it would be pointless to consider an agreement, decision or practice by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation’.

<sup>98</sup> *Société Technique Minière* (n 96): ‘The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking.’

<sup>99</sup> In *Völk* (n 96), the ECJ held that an agreement ‘falls outside the prohibition in article [101] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question’.

<sup>100</sup> Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875; Case 42/84 *Remia BV and others v Commission* [1985] ECR 2545; and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

<sup>101</sup> *Delimitis* (n 10).

<sup>102</sup> For a very clear example in which market shares were relied upon to establish a restriction of competition, see Case T-86/95 *Compagnie générale maritime and others v Commission* [2002] ECR II-1011.



*Technique Minière*, the ECJ identified agreements devised to restrict parallel trade.<sup>103</sup> This conclusion was extended to cartels<sup>104</sup> ('naked' price-fixing agreements between competitors) and to vertical agreements providing for resale price maintenance.<sup>105</sup>

The style of the above rulings differs substantially from that found in cases examined under Article 102 TFEU. If the latter, as seen above, tend to be laconic and often rely on unqualified assumptions about business motivations, the analysis of restrictions of competition within the meaning of Article 101(1) TFEU considers at length the rationale behind the agreement in question as well as the context in which it is implemented. Prior to evaluating the precise effects of the agreements on the relevant market, the ECJ sought to understand, just to mention three examples, the reasons why a supplier would impose single-branding obligations on a retailer (in *Delimitis*), why manufacturers of particular products would want to set up a selective distribution system (in *Metro I*), or resort to franchising (in *Pronuptia*). By the same token, an analysis of the nature of the agreement and of the context in which it is implemented may lead to the conclusion that an agreement that is in principle restrictive of competition by its very nature may not be caught by Article 101(1) TFEU. *Coditel II*<sup>106</sup> (examined below) and *Erauw-Jacquery*,<sup>107</sup> both of which concerned agreements expressly aimed at restricting parallel trade, are two very clear examples in this regard.

The overall picture that results from the evolution of the case-law is—at the very least in relative terms—remarkably consistent. Far from the dispersion of substantive standards that is found under Article 102 TFEU, cases (including those brought before the ECJ in the context of annulment proceedings) share a discernible logic. A look at Figure 4 helps understand the reasons behind the divergence between Article 101 TFEU and Article 102 TFEU case-law on this fundamental point. It appears, first, that preliminary references have proved to

<sup>103</sup> See Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429). This position has been consistently upheld, most recently in *Glaxo Spain* (Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *Glaxo Spain GlaxoSmithKline Services Unlimited v Commission* ('Glaxo Spain') [2009] ECR I-9291) and Joined Cases C-403/08 and C-429/08, *Premier League Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] (ECJ, October 4, 2011). See also Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949; Case 19/77, *Miller International Schallplatten GmbH v Commission* [1978] ECR 131; Case 319/82 *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG* [1983] 4173; and Case 86/82 *Hasselblad (GB) Limited v Commission* [1984] ECR 883.

<sup>104</sup> The idea that cartel agreements restrict competition has been clear since the very early cases. See in this sense Case 57/69 *Azienda Colori Nazionali—ACNA SpA v Commission* [1972] ECR 933, paras 84–85.

<sup>105</sup> The ECJ treats vertical price-fixing as a horizontal price-fixing cartel, and thus considers that it is restrictive of competition by its very nature. See in particular Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015.

<sup>106</sup> Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* ('*Coditel II*') [1982] ECR 3381.

<sup>107</sup> Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919.



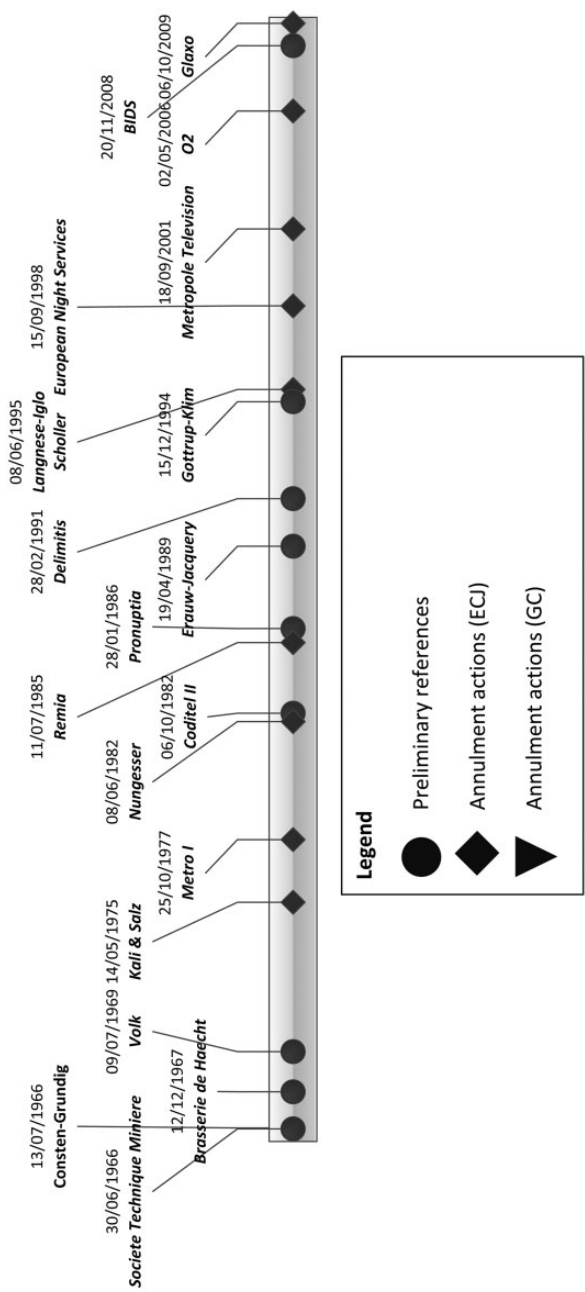


Figure 4: Timeline of Leading Article 101 TFEU Cases

be substantially more important, in qualitative terms, than annulment actions in the definition of restrictions of competition. These references have frequently arisen in the context of commercial disputes between parties to widespread and, as a rule, efficiency-enhancing commercial transactions (exclusive distribution, single-branding, franchising, joint purchasing), which naturally called for guiding principles to draw the line between mere limitations of contractual freedom and restrictions of competition. Administrative action by the Commission under Article 101 TFEU, in turn, has traditionally focused on obvious violations of the first paragraph of this provision, and more precisely on cartels and parallel trade restrictions. Thus only in a handful of high-profile annulment actions has the restrictive nature of the agreement been genuinely contentious.

Until the mid-1990s, the Commission favoured in its decisions an understanding of Article 101(1) TFEU that was clearly at odds with the applicable case-law. It is notorious that, for a long time, the Commission had a marked tendency to interpret the provision in a very broad manner, which afforded it wide powers to define its policy towards firm cooperation. Agreements were indeed found to be restrictive of competition merely on account of the fact that they limited the contractual freedom of the parties. As a result, virtually any form of cooperation between independent firms, except those deemed *de minimis* under the *Völk* doctrine, was potentially caught by Article 101(1) TFEU.

The expansive interpretation of Article 101(1) TFEU favoured by the Commission amounted in essence to the same formalism and legal uncertainty already observed in the context of Article 102 TFEU. In contrast with the fluctuation of substantive standards observed in relation to the latter, and in spite of the attempts of the Commission to deviate from them, EU courts remained faithful to the principles set out in *Société Technique Minière* and subsequent rulings. Thus the ECJ annulled a decision as far back as 1975, on grounds that the Commission had not carefully considered the counterfactual.<sup>108</sup> The *Nungesser* judgment<sup>109</sup> marks a significant milestone in the case-law. The ECJ annulled the Commission decision—which addressed the status of exclusive territorial licensing agreements, a similar issue as that raised in *Coditel II*,<sup>110</sup> decided at much the same time—insofar as it was based on the idea that an agreement limiting the contractual freedom of the parties to the agreement is necessarily restrictive of competition.<sup>111</sup>

This trend was not discontinued by the GC, which has regularly examined since the 1990s whether the Commission had considered the counterfactual in

<sup>108</sup> Joined Cases 19 and 20/74 *Kali und Salz AG and Kali-Chemie AG v Commission* [1975] ECR 499.

<sup>109</sup> *Nungesser* (n 54).

<sup>110</sup> *Coditel II* (n 106).

<sup>111</sup> *Nungesser* (n 54), paras 53–58. See also *Breeders' rights—Maize Seed* (Case IV/28.824) Commission Decision of 21 September 1978 [1978] OJ 1978 L286/23.

its decisions. *European Night Services*<sup>112</sup> and *O2*<sup>113</sup> are two emblematic examples that stand out in this regard. Even in those cases where the Commission decision was upheld, the GC reiterated the principles stemming from previous cases.<sup>114</sup> This is particularly apparent in several of the GC judgments in which single-branding agreements were at stake, the origin of which is to be found in a series of Commission decisions in which the principles set out in *Delimitis* were re-interpreted in a manner that contradicted the plain meaning of the judgment.<sup>115</sup>

#### D. Lessons from Merger Control Case-law

By definition, the scope of Regulation 139/2004 can only be defined in the context of annulment proceedings against Commission decisions.<sup>116</sup> Comparing the evolution of Article 102 TFEU with the case-law interpreting Articles 2(2) and 2(3) of, successively, Regulation 4064/89<sup>117</sup> and 139/2004<sup>118</sup> is thus a useful exercise. The comparison is all the more interesting if one considers the alleged activism on the part of the GC in the field of merger control, which, as mentioned above, is often said to contrast with the attitude displayed by EU courts in the context of Article 102 TFEU.

An immediately apparent feature of the case-law on merger control, and which is somewhat at odds with perceived wisdom, is the marked tendency to refer to the margin of discretion enjoyed by the Commission in relation to 'complex economic assessments'. The explicit recognition of the leeway enjoyed by the latter in this regard was manifested earlier in time in the field of merger control and is, it would seem, more pronounced and systematic than in the context of Article 102 TFEU. If anything, this rhetoric of judicial deference

<sup>112</sup> Case T-374/94 *European Night Services Ltd and others v Commission* [1998] ECR II-3141.

<sup>113</sup> *O2* (n 54).

<sup>114</sup> See, in general, *metropole television*.

<sup>115</sup> See Case T-7/93 *Langnese Iglo GmbH v Commission* [1995] ECR II-1533, para 99; and Case T-9/93 *Schöller Lebensmittel GmbH & Co. KG v Commission* [1995] ECR II-1611, para 76; and *Van den Bergh Foods* (n 10), para 83. For a critical analysis of the original Commission decisions, and the way in which they distorted the principles deriving from *Delimitis*, see J Veltrop, 'Tying and Exclusive Purchasing Agreements under EC Competition Law' (1994) 31 *Common Market Law Review* 549.

<sup>116</sup> In accordance with Art 21(2) of Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, the Commission has sole jurisdiction over the application of EU merger control legislation to operations having an 'EU dimension' within the meaning of Art 1. National and EU do not share the competence over the application of this test, as is the case of Arts 101 and 102 TFEU.

<sup>117</sup> Pursuant to Art 2(3) of Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1990] OJ L395/1: 'A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'

<sup>118</sup> Art 2(3) of the Regulation 139/2004: 'A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.'

seems to have been imported into the latter from merger control.<sup>119</sup> Where an aspect of a Commission decision is said to involve a ‘complex economic assessment’, it is subject to a limited review standard,<sup>120</sup> and thus will only be annulled if a manifest error of assessment can be established.<sup>121</sup> Even landmark judgments in the field of merger control, such as the appeal against the decision in *Tetra Laval*, examined the Commission decision under this standard.<sup>122</sup>

An analysis of the outcome of annulment actions against merger prohibitions shows, on the other hand, that there is also some truth in what seems to be a widespread perception. Figure 5 reveals that, of the ten prohibition decisions that have been challenged on appeal by at least one of the merging parties, four have been annulled by the GC. Three of these decisions were annulled (in full) on substantive grounds,<sup>123</sup> in contrast with Article 102 TFEU case-law, where annulment actions have only been partially upheld (and this on factual grounds alone) in the past two decades. The difference in the profile of annulments seems to be explained by the standard of proof to which action by the Commission was made subject in the three abovementioned judgments. This contrasts with the practices for which no evidence of anticompetitive effects is required to establish an abuse of dominance.

The relatively high standard of proof observed in the field of merger control, in turn, reflects the willingness of the GC to interfere with the legal standards set by the Commission. In *Airtours* and *Tetra Laval*—two judgments that have had dramatic and lasting consequences for the assessment, respectively, of collective

<sup>119</sup> A reading of the case-law indeed suggests that the systematic references to the margin of discretion enjoyed by the Commission and the control for manifest errors alone in the context of Art 102 TFEU seem to replicate what had become a well-established practice in the field of merger control by 2002, as is apparent from *Tetra Laval*. See, in the field of merger control, Joined Cases C-68/94 and C-30/95 *France and others v Commission* [1998] ECR I-1375, paras 223–224; Case T-221/95 *Endemol Entertainment Holding BV v Commission* [1999] ECR II-1299, para 106; Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753, para 164. The vocabulary used by the GC in contemporary cases like *Irish Sugar* (n 23), *Michelin II* (n 27); *British Airways* (n 27) does not make explicit references to ‘complex economic assessments’ or to the discretion enjoyed by the Commission in relation to them. Such references seem to have been introduced in 2007, with Case T-340/03 *France Télécom SA v Commission* (*‘Wanadoo’*) [2007] ECR II-107 (paras 129 and 163); and, in particular, with *Microsoft* (n 21), paras 84–90. See also Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-31555, paras 47 and 93–95.

<sup>120</sup> As explained by the GC in *Microsoft* (n 21), para 88: ‘in so far as the Commission’s decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission’s’.

<sup>121</sup> As a result, and as explained in para 87 of the judgment, the role of EU courts where ‘complex economic assessments’ are involved is limited to ‘checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers’.

<sup>122</sup> *Tetra Laval* (n 56), paras 132, 140. See also *Impala* (n 45), in particular paras 364–390 and 463–474. In both cases, the GC found that the Commission had made manifest errors of assessment.

<sup>123</sup> These cases include *Tetra Laval* (n 56), *Airtours* (n 55), and Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071.

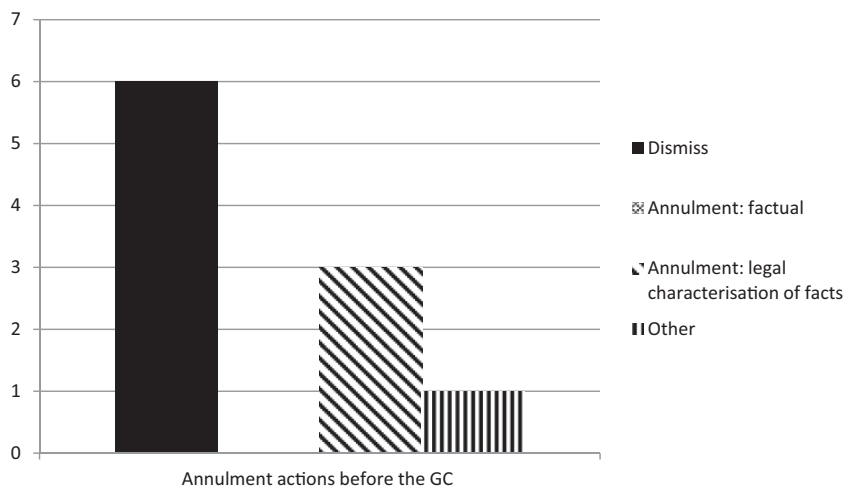


Figure 5: Rate and Profile of Annulments in Merger Control Cases

dominant positions and non-horizontal mergers—the claims made by the Commission were found to fall below the requisite standards once the legal framework was refined and clarified by the GC. In the former, the GC identified three conditions as being necessary to establish a collective dominant position.<sup>124</sup> The position of the Court departed from the approach favoured by the Commission insofar as it made the legal notion less ambiguous by bringing it more clearly in line with the economic idea of tacit collusion.<sup>125</sup> In *Tetra Laval*, the same court introduced a set of principles for the assessment of conglomerate mergers, which were based on the idea such operations are only rarely a source of competition concerns, as a result of which a prohibition decision must be based on a theory of harm establishing the factors leading to the leveraging of a dominant position from one market to a neighbouring one.<sup>126</sup>

<sup>124</sup> *Airtours* (n 55), para 62. Pursuant to the first condition, ‘each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy’; pursuant to the second, ‘the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market’; and to the third, it is necessary to ‘establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy’.

<sup>125</sup> See in this sense J Briones and J Padilla, ‘The Complex Landscape of Oligopolies under EU Competition Policy: Is Collective Dominance Ripe for Guidelines?’ (2002) 24 *World Competition* 307.

<sup>126</sup> *Tetra Laval* (n 56), paras 146–162, where the GC examines the specific features of conglomerate mergers and how the assessment needs to be adapted accordingly. This same logic was then

It is unusual to see EU courts laying down an explicit substantive standard departing from, or refining, that endorsed by the Commission in the context of Article 102 TFEU. But this does not mean that landmark examples of fundamental importance do not exist. The reasoning of the Commission and that of the ECJ in *Magill* diverge substantially in their scope and degree of sophistication. Even though it was eventually upheld, the open-ended and vague reasoning of the original decision was transformed on appeal into a set of strict cumulative conditions that are satisfied only in exceptional circumstances.<sup>127</sup> Similarly, there are important differences between the way in which predatory pricing claims in *AKZO* were assessed by the Commission and the principles finally laid down by the ECJ (this is so in spite of the fact that the decision was annulled on factual grounds alone).<sup>128</sup> While the Commission proposed (and this by reference to the ideas set out in *Hoffmann-La Roche* and *Continental Can*) to rely on a holistic approach that would take account both of subjective and case-specific considerations, the ECJ endorsed, as seen above, a somewhat stricter variation on the Areeda-Turner test.<sup>129</sup>

There is a factor common to these four judgments that may explain why EU courts were more inclined to second-guess the substantive principles set out by the Commission. In the cases mentioned above, the legal analysis of the Commission (i) contradicted mainstream economic principles (ii) that had been converted into a set of clear and practicable rules by the time of the judgment. The impressionistic stance under which collective dominance was assessed by the Commission in *Airtours* distorted well-established and uncontroversial economic principles that had already been set out in the 1992 version of the US Horizontal Merger Guidelines.<sup>130</sup> Likewise, the Areeda-Turner test was a well-established standard for the assessment of predatory pricing when the *AKZO* judgment was rendered in 1991. In turn, a factor that is not always considered when the *Magill* judgment is examined is the obvious resemblance between the conditions laid down by the ECJ and the conclusions drawn by Areeda in his most influential 1990 article on the so-called 'essential facilities' doctrine.<sup>131</sup> Finally, and as far as *Tetra Laval* is concerned, the idea that

transferred to vertical mergers in Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575, in particular paras 295–305.

<sup>127</sup> Suffice it to compare para 23 of *Magill TV Guide v ITP, BBC and RTE* (Case IV/31.851) Commission Decision of 21 December 1988 [1989] L78/43, which does not refer to a single precedent as authority, with paras 48–58 in *Magill* (n 18).

<sup>128</sup> *AKZO* (n 25), paras 63–74. The Commission defended in the case (para 64) that Art 102 TFEU 'does not make costs the decisive criterion for determining whether price reductions by a dominant undertaking are abusive'.

<sup>129</sup> See n 28.

<sup>130</sup> See Section 2.1 of the 1992 Horizontal Merger Guidelines, available at <<http://www.ftc.gov/bc/docs/horizmer.shtm>>.

<sup>131</sup> P Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 *Antitrust Law Journal* 841. In the conclusion to this article, Areeda emphasized the importance of limiting to exceptional circumstances the instances in which dominant players are required to deal with their

conglomerate mergers are generally innocuous (if not beneficial) for competition, and do not in themselves lead to an increase in market power, had long been part of the mainstream by the time of the ruling.<sup>132</sup>

Thus the single most important lesson one can draw from the above interpretation of merger control case-law is that EU courts are more likely to lay down explicit substantive standards in the context of annulment proceedings where the position of the Commission contradicts clearly articulated consensus positions. One can think of similar examples in Article 101 TFEU case-law. Suffice it to mention *Woodpulp II*, where the ECJ clarified, following lengthy proceedings in which it sought expert economic advice, that tacit collusion is as such insufficient to establish a restriction of competition.<sup>133</sup> From this perspective, mainstream economics can be seen, first and foremost, as an effective tool to limit administrative discretion. It is not by chance that a Chief Competition Economist position (supported by an office and by an advisory group of leading academics) was created in the aftermath of—and as a direct consequence of—the annulment of three merger decisions in 2002.<sup>134</sup> An additional conclusion that follows when the case-law is examined in this light is that the standard of review of Commission decisions on substantive grounds does not vary significantly across provisions, which is a point that different members of the GC have publicly reiterated since the mid-2000s.<sup>135</sup>

#### IV. Conclusions

This article has explored how procedural factors have influenced the definition of the substantive boundaries of Article 102 TFEU. In one sense, this reads like an irrelevant endeavour, as it is obvious that substance and procedure are always

competitors. In addition, the author identified three of the conditions that are apparent in the ECJ judgment, namely the indispensability of the input for a new entrant to operate on the downstream market; the need to show that the compulsory licensing obligation improves significantly the conditions of competition (as would be the case where a new product is put on the market); and the lack of an objective justification for the behaviour ('legitimate business purpose always saves the defendant').

<sup>132</sup> See in this sense H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, 2005), 31–9 and 207 *et seq.*

<sup>133</sup> *Woodpulp II* (n 53). The question of whether parallel conduct can be explained by factors other than explicit collusion between competitors is, again, a point that had long been settled in economic literature.

<sup>134</sup> L-H Röller and PA Buigues, 'The Office of the Chief Competition Economist at the European Commission', available at <<http://ec.europa.eu>>.

<sup>135</sup> See in particular M Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2 *Journal of European Competition Law and Practice* 295; H Legal, 'Standards of Proof and Standards of Judicial Review in EU Competition Law' in B Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute 2005* (New York, 2006), 107–16; and B Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 *European Competition Journal* 3.



and by definition intertwined. Because it is the task of EU courts to define the scope of Treaty provisions, their behaviour necessarily influences the way in which the law evolves. In another sense, the project is novel insofar as the relationship between the two has never been studied systematically in the literature. The analysis above suggests that the evolution of a provision may be very different depending on whether preliminary references dominate over annulment proceedings, and vice versa.

One of the implications of this conclusion is that the undeniable flaws in Article 102 TFEU case-law would not be the consequence of the entrenched reluctance of EU courts to endorse an effects-based approach to competition law enforcement, or of their lack of openness to the most modern analytical approaches to the discipline. Quite to the contrary, a look at Article 101(1) TFEU case-law shows that EU courts often display a remarkable grasp of the motivations behind business conduct, and that this grasp may be manifested in a flexible interpretation of the provision when deemed justified. Cases like *Tetra Laval* and *Airtours*, on the other hand, show that EU courts do not hesitate to endorse mainstream economic consensus positions.

Nothing in the letter or the structure of Articles 101 and 102 TFEU justifies the divergent evolution of the provisions. The abstract and general wording of the two can comfortably accommodate multiple interpretations along the form-based/effects-based continuum. As mentioned above, the Commission favoured, in the early years of EU competition law, a rigid and all-encompassing interpretation of Article 101(1) TFEU which, if anything, was more similar to the current features of Article 102 TFEU case-law than to the approach and logic of judgments like *Pronuptia* or *Delimitis*.<sup>136</sup> If the Commission advanced a formalistic interpretation of the two provisions, then the different attitude displayed by EU courts becomes a more plausible explanation for their divergent evolution over time.

The institutional architecture through which competition law is enforced has attracted much attention from scholars and practitioners in the past few years. It is regularly claimed that the combination of the prosecution and adjudication functions within the Commission, together with the observed deferential attitude adopted by EU courts, gives very substantial leeway for the former to interpret and apply competition law provisions in an opportunistic manner. The rise of commitment decisions as a privileged means to settle cases would show, from this perspective, the extent to which the Commission is able to extract concessions from firms even when the existence of an infringement (or the proportionality of the remedies to put an end to the infringement) is far from clear.

<sup>136</sup> V Korah, 'EEC Competition Policy—Legal Form or Economic Efficiency' (1986) 39 *Current Legal Problems* 85; and B Hawk, 'System Failure: Vertical restraints and EC competition law' (1995) 32 *Common Market Law Review* 973.

This article contributes to this debate by examining the dynamic implications of the current institutional setup. The cumulative effects of incremental differences in terms of outcome in individual cases may lead, over time, to stark divergences in the substance of provisions. Put differently, the procedural and institutional concerns identified by authors may eventually be substantive in nature, as the legal principles become vague and fluctuate from one case (and from one practice) to another. If this is so, one could very well claim that debates on the reform of EU competition law should be refocused so that they no longer revolve exclusively around economics, or the (top-down) definition of the objectives that should guide enforcement.

Disagreement about the goals of EU competition law or about the appropriate role of economic analysis in the definition of substantive standards is natural. One cannot seriously claim that there is a single correct interpretation of Article 102 TFEU, or one stemming logically from the letter of the provision. On the other hand, the idea that the law on abuses of dominance should be predictable and be applied consistently across practices, and the idea that the outcome of a case should not depend on the procedural avenue through which it reaches courts are, this author hopes and assumes, uncontroversial ones. Much could be gained if the debates about the substantive standards refocused around such fundamental legal questions, with which judges are familiar and which remind us that this is first and foremost a legal discipline. Likewise, it would be useful if discussions on the judicial review of the administrative action were less abstract and considered not only the factors and attitudes that influence decision-making in practice but also dynamic (and thus substantive) implications.

## Appendix—Data used in Charts 1 and 2

ARTICLE 102 TFEU: ANNULMENT ACTIONS BEFORE THE EUROPEAN COURT OF JUSTICE			
	Case	Outcome	Grounds
1	Case 6/72, <i>Europemballage Corporation and Continental Can Company Inc. v Commission</i> [1973] ECR 215	Annulment (total)	Factual
2	Joined Cases 6 and 7/73, <i>Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission</i> [1974] ECR 223	Dismiss	-
3	Case 26/75, <i>General Motors Continental NV v Commission</i> [1975] ECR 1367	Annulment (total)	Legal
4	Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, <i>Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission</i> [1975] ECR 1663	Annulment (partial)	Factual
5	Case 27/76, <i>United Brands Company and United Brands Continentaal BV v Commission</i> [1978] ECR 207	Annulment (partial)	Legal
6	Case 77/77, <i>Benzine en Petroleum Handelsmaatschappij BV and others v Commission ('BP')</i> [1978] ECR 1513	Annulment (total)	Legal
7	Case 85/76, <i>Hoffmann-La Roche &amp; Co. AG v Commission</i> [1979] ECR 461	Fine reduction	-
8	Case 22/78, <i>Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission</i> [1979] ECR 1869	Annulment (total)	Legal
9	Case 7/82, <i>Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission</i> [1983] ECR 483	Dismiss	-
10	Case 322/81, <i>NV Nederlandsche Banden Industrie Michelin v Commission ('Michelin I')</i> [1983] ECR 3461	Annulment (partial)	Factual
11	Case 41/83, <i>Italy v Commission ('BT')</i> [1985] ECR 873	Dismiss	-
12	Case 226/84, <i>British Leyland Public Limited Company v Commission</i> [1986] ECR 3263	Dismiss	-
13	Case 62/86, <i>AKZO v Commission</i> [1991] ECR I-3359	Annulment (partial)	Factual

## ARTICLE 102 TFEU: ANNULMENT ACTIONS BEFORE THE GENERAL COURT

	Case	Outcome	Grounds
1	Case T-51/89, <i>Tetra Pak Rausing SA v Commission</i> (' <i>Tetra Pak I</i> ') [1990] ECR II-309	Dismiss	-
2	Case T-76/89, <i>Independent Television Publications Ltd v Commission</i> [1991] ECR II-575	Dismiss	-
	Case T-69/89, <i>Radio Telefís Éireann v Commission</i> [1991] ECR II-485	Dismiss	-
	Case T-70/89, <i>British Broadcasting Corporation and BBC Enterprises Ltd v Commission</i> [1991] ECR II-535	Dismiss	-
3	Case T-30/89, <i>Hilti AG v Commission</i> [1991] ECR II-1439	Dismiss	-
4	Joined Cases T-68/89, T-77/89 and T-78/89, <i>Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission</i> [1992] ECR II-1403	Annulment (partial)	Legal
5	Case T-65/89, <i>BPB Industries Plc and British Gypsum Ltd v Commission</i> (' <i>British Plasterboard</i> ') [1993] ECR II-389	Annulment (partial)	Factual
6	Case T-83/91, <i>Tetra Pak International SA v Commission</i> (' <i>Tetra Pak II</i> ') [1994] ECR II-755	Dismiss	-
7	Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, <i>Compagnie maritime belge transports SA and Compagnie maritime belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmbH &amp; Co. and Nedlloyd Lijnen BV v Commission</i> [1996] ECR II-1201	Fine reduction	-
8	Case T-229/94, <i>Deutsche Bahn AG v Commission</i> [1997] ECR II-1689	Dismiss	-
9	Case T-228/97, <i>Irish Sugar plc v Commission</i> [1999] ECR II-2969	Annulment (partial)	Factual
10	Case T-139/98, <i>Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Commission</i> [2001] ECR II-3413	Dismiss	-
11	Case T-128/98, <i>Aéroports de Paris v Commission</i> [2000] ECR II-3929	Dismiss	-
12	Case T-203/01, <i>Manufacture française des pneumatiques Michelin v Commission</i> (' <i>Michelin II</i> ') [2003] ECR II-407	Dismiss	-
13	Joined Cases T-191/98, T-212/98 to T-214/98, <i>Atlantic Container Line AB and Others v Commission</i> [2003] II-3275	Annulment (partial)	Factual
14	Case T-65/98, <i>Van den Bergh Foods Ltd v Commission</i> [2003] ECR II-4653	Dismiss	-
15	Case T-219/99, <i>British Airways plc v Commission</i> [2003] ECR 5917	Dismiss	-

(continued)

ARTICLE 102 TFEU: ANNULMENT ACTIONS BEFORE THE GENERAL COURT

	Case	Outcome	Grounds
16	Case T-340/03, <i>France Télécom SA v Commission</i> ('Wanadoo') [2007] ECR II-107	Dismiss	-
17	Case T-151/01, <i>Der Grüne Punkt - Duales System Deutschland GmbH v Commission</i> [2007] ECR II-1607	Dismiss	-
18	Case T-201/04, <i>Microsoft Corp. v Commission</i> [2007] ECR II-3601	Annulment (partial)	Other
19	Case T-271/03, <i>Deutsche Telekom AG v Commission</i> [2008] ECR II-477	Dismiss	-
20	Case T-301/04, <i>Clearstream Banking AG and Clearstream International SA v Commission</i> [2009] ECR II-31555	Dismiss	-
21	Case T-57/01, <i>Solvay SA v European Commission</i> [2009] ECR II-4621	Fine reduction	-
22	Case T-66/01, <i>Imperial Chemical Industries Ltd v Commission</i> [2010] ECR II-2631	Annulment (partial)	Factual
23	Case T-321/05, <i>AstraZeneca AB and AstraZeneca plc v Commission</i> [2010] ECR II-2805	Annulment (partial)	Factual
24	Case T-155/06, <i>Tomra Systems ASA and Others v Commission</i> [2010] ECR II-4361	Dismiss	-
25	Case T-336/07, <i>Telefónica, SA and Telefónica de España, SA v Commission</i> [2012] nyr	Dismiss	-
	Case T-398/07, <i>Spain v Commission</i> [2012] nyr	Dismiss	-
26	Case T-169/08, <i>Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission</i> [2012] nyr	Annulment (total)	Other
	Case T-421/09, <i>Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission</i> [2012] nyr		

## ARTICLE 102 TFEU: APPEALS BEFORE THE EUROPEAN COURT OF JUSTICE

	Case	Outcome	Grounds
1	Case C-53/92 P, <i>Hilti AG v Commission</i> [1994] ECR I-667	Dismiss	-
2	Case C-310/93 P, <i>BPB Industries plc and British Gypsum Ltd v Commission</i> [1995] ECR I-865	Dismiss	-
3	Joined Cases C-241/91 P and C-242/91 P, <i>Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission</i> ('Magill') [1995] ECR 743	Dismiss	-
4	Case C-333/94, <i>Tetra Pak International SA v Commission</i> ('Tetra Pak II') [1996] ECR I-5951	Dismiss	-
5	Joined Cases C-395/96 P and C-396/96 P, <i>Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission</i> [2000] ECR 1365	Dismiss	-
6	Case C-82/01 P, <i>Aéroports de Paris v Commission</i> [2002] ECR I-9297	Dismiss	-
7	Case C-95/04 P, <i>British Airways plc v Commission</i> [2007] ECR I-2331	Dismiss	-
8	Case C-202/07 P, <i>France Télécom SA v Commission</i> ('Wanadoo') [2009] ECR I-2369	Dismiss	-
9	Case C-385/07, <i>Der Grüne Punkt - Duales System Deutschland GmbH v Commission</i> [2009] ECR I-6155	Dismiss	-
10	Case C-280/08 P, <i>Deutsche Telekom AG v Commission</i> [2010] ECR I-9555	Dismiss	-
11	Case C-109/10 P, <i>Solvay SA v Commission</i> [2011] nyr	Sets aside	Other
12	Case C-549/10 P, <i>Tomra Systems ASA and others v Commission</i> [2012] nyr	Dismiss	-
13	Case C-457/10 P, <i>AstraZeneca AB and AstraZeneca plc v Commission</i> [2012] nyr	Dismiss	-



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MERGER CONTROL: ANNULMENT ACTIONS BEFORE THE GENERAL COURT

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	Case	Outcome	Grounds
1	Case T-221/95, <i>Endemol Entertainment Holding BV v Commission</i> [1999] ECR II-1299	Dismiss	-
2	Case T-102/96, <i>Gencor Ltd v Commission</i> [1999] ECR II-753	Dismiss	-
3	Case T-22/97, <i>Kesko Oy v Commission</i> [1999] ECR II-3775	Dismiss	-
4	Case T-342/99, <i>Airtours v Commission</i> [2002] ECR II-2585	Annulment (total)	Legal
5	Case T-310/00, <i>MCI, Inc v Commission</i> [2004] ECR II-3253	Annulment (total)	Other
6	Case T-209/01, <i>Honeywell International, Inc v Commission</i> [2005] ECR II-5527	Dismiss	-
	Case T-210/01, <i>General Electric Company v Commission</i> [2005] ECR II-5575	Dismiss	-
7	Case T-310/01, <i>Schneider Electric SA v Commission</i> [2002] ECR II-4071	Annulment (total)	Legal
8	Case T-5/02, <i>Tetra Laval v Commission</i> [2002] ECR II-4381	Annulment (total)	Legal
9	Case T-87/05, <i>EDP—Energias de Portugal, SA v Commission</i> [2005] ECR II-3745	Dismiss	-
10	Case T-342/07, <i>Ryanair Holdings plc v Commission</i> [2010] ECR II-3457	Dismiss	-
	Case T-411/07, <i>Aer Lingus Group plc v Commission</i> [2010] ECR II-3691	Dismiss	-

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