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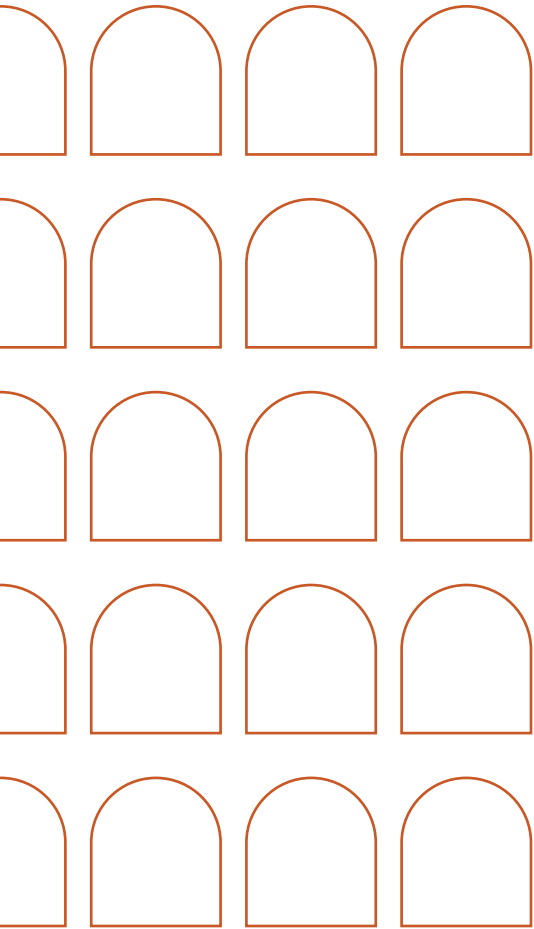
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RSC 2023/62
Robert Schuman Centre for Advanced Studies
Centre for a Digital Society

WORKING PAPER

**Exploitative Abuses: The Scope and the
Limits of Article 102 TFEU**

Giorgio Monti and Alexandre de Stree

European University Institute
Robert Schuman Centre for Advanced Studies
Centre for a Digital Society

Exploitative Abuses: The Scope and the Limits of Article 102 TFEU

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Abstract

This paper establishes the scope and principles for the application of Article 102 TFEU to exploitative abuse, in light of the increased interest in applying this provision against dominant digital platforms. After establishing the policy challenges to using competition law to address unfair conduct by dominant undertakings, we show the importance of establishing precise scope and limiting principles. By a comprehensive study of Commission decisions and judgments of the European Court of Justice that pertain to exploitative abuse we derive limiting principles for each type of abuse and then generalise these into some overarching principles for all exploitative abuse cases. We test these limiting principles against decisions of the German and French competition authorities in cases considering the terms of trade between platforms and press publishers. Finally, we examine the design of remedies and reflect on the imposition of procedural remedies to address exploitative abuses and the opportunities and risks this generates.

Keywords

Art. 102 TFEU; exploitative abuses; unfair trading conditions; digital platforms; antitrust remedies

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Exploitative Abuses: The Scope and the Limits of Article 102 TFEU

Giorgio Monti* and Alexandre de Stree**

1. Introduction

An abuse is exploitative when the dominant firm takes advantage of its superior position to extract benefits it would not otherwise receive. According to some early scholarship, the sole function of Article 102 TFEU was to keep in check a dominant firm's capacity to take advantage of its dominant position.¹ However, the case-law soon revealed that the real enforcement priority for the Commission was conduct by which dominant undertakings exclude rivals from the market.² As the case-law has evolved the European Court of Justice (ECJ) has clarified that the emphasis is on the protection of the competitive process as a means to achieve efficient outcomes and not the protection of specific firms.³

However, from time to time enforcement action is taken against dominant firms for taking advantage of their dominant position as a means to enrich themselves directly. The purpose of this paper is to explore the case-law on exploitative abuse and elicit principles which allow us to draw the scope of this kind of abuse. Drawing boundaries is necessary to ensure that when competition authorities or courts review allegations of exploitative abuse they use their discretion in a principled manner: not every business conduct that is - or appears to be - unfair is necessarily an abuse of a dominant position under competition law. In cases of exclusionary abuse, for example, we often see that some conduct is forbidden only when it is likely to exclude a rival as efficient as the dominant firm. The application of this "as efficient competitor" standard limits the risk of Type 1 errors, i.e. condemning a conduct which is not welfare detrimental. Conversely, we must also be wary of principles which incapacitate agencies from taking exploitative cases, risking Type 2 errors i.e. not condemning a conduct which is welfare detrimental.⁴

There is good reason to hold this discussion today because there is increasing attention given by antitrust agencies to excessive pricing in certain markets (e.g. the recent spate of cases on pricing of pharmaceuticals)⁵ and there is a policy concern that digital platforms may be exploiting their gatekeeper power.⁶ We have also seen a regulatory response to this in the form of regulation of B2B relationships, something that has largely been left unregulated for a number of years as the EU legislator took the view that there was little need to interfere in the freedom of contract between formally equal undertakings.⁷ As regulatory efforts towards certain digital platforms are set to increase,⁸ this is an opportune time to tease out the limits of Article 102 TFEU when it comes to exploitative abuses.

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1 Joliet, *Monopolization and Abuse of a Dominant Position* (1970).

2 See *Europemballage and Continental Can v Commission*, Case 6/72, EU:C:1973:22, para 12 for an early indication and Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

3 Compare *Istituto Chemioterapico Italiano and Commercial Solvents Corp v Commission*, Joined cases 6 and 7-73, EU:C:1974:18 where it appears that the Court was protecting a small firm against a large US rival with *Post Danmark v Konkurrencerådet*, Case C-209/10, EU:C:2012:172, paragraph 22 where the Court states that competition on the merits may lead to the elimination of less efficient firms.

4 Baker 'Taking the Error Out of Error Cost Analysis' (2015) 80(1) *Antitrust Law Journal* 1 for discussion of the error-cost framework.

5 Monti and Hancher, 'Excessive Pricing in Pharmaceuticals: Perspectives from EU Antitrust and Regulation' in Sauter, Canoy and Mulder (eds) *EU Competition Law and Pharmaceuticals* (2022)..

6 Crémer, de Montjoye and Schweitzer, *Competition policy for the digital era*, Report to the European Commission, March 2019.

7 Stuyck, Addressing unfair practices in business-to-business relations in the internal market (2011) Briefing Paper for the European Parliament.

8 For the pharma sector see for example 'Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns' (Press Release, 21 February 2021); for the approach in Italy see OECD, Excessive Pricing in Pharmaceutical Markets – Note by Italy (28 November 2018) DAF/COMP/WD(2018)106. On digital platforms, see Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

The paper is structured in the following way: in section 2, we discuss the pros and cons of using competition law to address exploitative conduct by dominant firms. This policy-based discussion suggests caution in the application of Article 102 TFEU. In section 3 we develop this from a legal perspective and make the case for the importance of finding limits by which to determine whether conduct constitutes an exploitative abuse. Then, section 4 is a review of the major categories of exploitative abuse that have been discussed in the case law and we explore how the Commission and the Court of Justice of the EU have begun to identify limiting principles to each. Section 5 zooms in on a new market context where exploitative abuses were considered in the framework of the reform of copyright law in the EU. Section 6 contains a brief discussion of remedies. This is a somewhat under-examined aspect of competition law but remedies matter for two reasons. First, there is no point designing a complex theory of abuse of dominance if the antitrust agency cannot then identify a remedy that removes the anticompetitive risk. Second, the design of remedies should be calibrated carefully to ensure that the remedy is proportionate and no more than necessary to resolve the competition problem. Section 7 draws on the previous sections to set out a catalogue of limiting principles that we consider to be consistent with the case-law and suggest how these might be refined so as to render a coherent framework for exploitative abuse.

2. Pros and Cons of taking an exploitative unfair practices case under competition law

2.1. Substantive issues

There are arguments in favour of the application of exploitative abuse cases. Exploitative abuse is one of the most direct violations of the consumers' interest that antitrust policy aims to protect and there are some exceptional circumstances where the structure of the market and existing regulation would lead to exploitative conduct that could only be remedied by competition law.

However, there are also several objections against the application of competition law to exploitative abuse cases, in particular excessive pricing cases.⁹ Exploitative abuse cases may undermine the investment incentives of new entrants. Indeed, competition law applies to sectors where in principle market forces are free to operate. Unlike sectors characterised by legal barriers to entry or where market failures are such that one cannot assume that competition works properly, competition authorities deal with sectors where one can presume that free entry should be able to erode dominant positions over time. To some extent, prices also play an important role in this process, as they convey signals to potential entrants: in particular, high prices may indicate that a market is profitable, and trigger entry into the industry, thereby reducing the market power of a dominant firm and decreasing prices. Excessive pricing actions may therefore have the effect of breaking this process, and while in the short run they might be beneficial in that they could reduce prices, in a long run perspective they would be detrimental because they may impede entry that could otherwise take place. Furthermore, this may also have the effect of depriving consumers of more variety, to the extent that new entrants would supply substitutable but different products and services with respect to those of the dominant firm. Similar arguments apply to other forms of unfair conduct: if the incumbent offers terms and conditions that customers dislike, this opens the possibility for new entrants to compete by setting better terms.

Excessive price actions may also undermine the investment incentives of the dominant firms. High prices and profits should be seen in general as the reward for a firm's efforts, innovations and investments, and firms indeed invest and innovate precisely because they are able to appropriate the benefits from their risky investments. Hence, however beneficial excessive price interventions may be *ex post*, if a competition authority pursued a policy of resorting to excessive pricing actions, this policy would have important negative effects *ex ante*, by lowering expected returns,

⁹ Motta and de Streel, Excessive Pricing in Competition Law: Never say Never? in Swedish Competition Authority (ed), *The Pros and Cons of High Prices* (2007), 14. See also the different contributions in Ehlermann and Marquis (eds), *European Competition Annual 2007: A reformed Approach to Article 82* (2009).

and therefore discouraging firms' investments in all the economy.¹⁰ This objection is particularly relevant in highly dynamic industries where innovation plays a crucial role. Another common objection to the use of exploitative abuse cases by competition authorities is that it is difficult to determine whether a conduct is unfair. This leads to unclear criteria for the standard of proof and therefore, legal uncertainty for the firms, which may in turn undermine investment incentives.

It is possible to alleviate some of the difficulties mentioned above with carefully calibrated intervention standards which are based on the decision theory economic framework. Antitrust intervention against exploitative abuses may have high costs of type I errors because intervention may distort incentives to invest and innovate for dominant and small firms while the costs of type II errors may be small because the markets usually self-correct. In addition, there are high risks of errors. Therefore, the standard of intervention against exploitative abuse should be sufficiently high and, in principle, higher than the standard of intervention against most of the exclusionary abuses.

2.2. Institutional issues

An additional common objection against excessive price action is that it would lead to regulation of firms' transactions (prices or other conditions), which is difficult to implement by a competition authority. Indeed, intervening in an occasional way on the conditions set by a dominant firm does not solve the problem forever (on the contrary, to the extent that it may discourage entry, it may even exacerbate it and make it permanent). As a result, either the competition authority or a court should continue to monitor the industry – but in this way it would convert itself into a *de facto* regulator and would have to sacrifice important resources – or would have to resign to see its intervention as ineffective, since market conditions change over time and the dominant firm would adjust its prices to them.

Moreover, competition authorities – unlike sectoral regulators – have no experience and no role in telling firms the conditions under which they should trade. Besides, from a legitimacy perspective, antitrust institutions and procedures are not very appropriate to allow for a structured and open discussion on the appropriate level of prices or fairness of the practices.¹¹ These considerations suggest that the design of remedies to address exploitative abuses is particularly demanding, a point which we return to in section 6.

3. Exploitative abuse: making sense of the Treaty and the case-law

3.1 The need for an interpretative key

Read with modern eyes, the four examples of abuse identified in the Treaty make little sense – if we read these literally, as suggested below, we see an enforcement paradigm that does not even come close to our contemporary understanding of EU competition law.

(a) *Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions:* the focus here is on fairness, while modern competition law would be concerned about terms that reduce economic welfare. Having said this, the Commissioner for competition Vestager has emphasised the role fairness plays in competition enforcement, but it remains unclear what sort of enforcement paradigm can be built on this notion.¹²

¹⁰ This important conflict between *ex ante* and *ex post* approaches has been explicitly recognised in *Slovak Telekom v. Commission*, Case C-165/19P, EU:C:2021:239, para.47.

¹¹ In the same vein, Larouche, *Competition Law and Regulation in European Telecommunications* (2000) Moreover, exploitative abuse cases may have a strong “political” dimension, in the sense that politicians, under the pressure of consumers/electors, may want to have low prices for basic goods or services. They may then require that the Administration or the independent antitrust authority regulates the prices, although there is no market failure justifying such intervention. Some may argue that it is better for the antitrust authority to come in because it would create less damage to the market mechanisms than the Administration which may be less in tune with market economics. We disagree and consider that, outside market failure, an antitrust authority lacks political legitimacy to intervene on the market.

¹² Dunne, *Fairness and the Challenge of Making Markets Work Better* (2020) 84(2) *Modern Law Review* 230.

Read literally a price could be unfair because it is set arbitrarily, or perhaps because the contract terms do not make it clear what the price is. An unfair trading condition could be anything that places the buyer at a disadvantage, for example clauses that limit the seller's liability. This makes Article 102(a) TFEU look more like a consumer law provision and indeed the term unfairness is generally defined in consumer law instruments.¹³ Often the view is taken that consumer law and competition law deal with two different market failures: competition law keeps markets open while consumer law protects the purchaser when she buys a specific product. It is the latter that usually deals with unfair terms.¹⁴

(b) Limiting production, markets or technical development to the prejudice of consumers: this example is perhaps a bit closer to our modern understanding of competition law, but it requires more specification. Is it about the dominant company being lazy and reducing output or refusing to carry out R&D, thus harming the consumer, or is it also about the dominant company keeping rivals out of the market? Furthermore, the notion of 'limiting markets' might be read as signalling an exclusionary abuse.

(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage: this looks at harm up- or downstream. For example, if a manufacturer sells to some shops at a price lower than that which it sells to others, then the trading partners who receive the higher price are disadvantaged. This type of secondary-line injury is often seen as not being the sort of harm that competition law should be concerned about. This provision is similar to the prohibition found in the Robinson-Patman Act in the US, where applying competition law to secondary-line injury has been criticized for tending to protect less efficient traders.¹⁵

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts: this could be a tying agreement, but again note that there is no specification to explain why this is an abuse. A dominant manufacturer of tires could ask each buyer to buy a bottle of water for each set of tires and this could fall within the prohibition.

With reference to these illustrations based on a literal reading of the examples provided in Article 102 TFEU we can appreciate that the Commission, but more particularly the European Court of Justice, had a lot of work to do in specifying the precise scope of Article 102 TFEU. The Court made matters even more complex for itself by indicating early on that the list of abuses found in the Treaty was not exhaustive. In 2000 it recalled this: '[i]t is settled case-law that the list of abusive practices contained in Article (102 TFEU) is not an exhaustive enumeration of the abuses of a dominant position prohibited by the Treaty.'¹⁶ While the Court has been happy to extend the scope of application of Article 102, it has done less to explain the basis of the prohibition or its limits.¹⁷ We start by considering how the Court has sought to deal with these matters when faced with exclusionary conduct.

13 Article 3(1) of the Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (UCTD), OJ [2005] L 149/22, as amended by Directive 2019/2161 defines *B2C unfair term* as follows: 'a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'; Article 5(2) of the Unfair Commercial Practice Directive (UCPD) defines a *B2C unfair practice* when: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'.

14 Monti, 'The revision of the consumer acquis from a competition law perspective' (2007) 3(3) *European Review of Contract Law* 295 for discussion of this division of labour.

15 Antitrust Modernization Commission, Report and Recommendations (2007), recommending a repeal of the Robinson-Patman Act. (https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm).

16 *Compagnie Maritime Belge Transport and Others v Commission*, Joined Cases C-395/96 P and C-396/96 P, EU:C:2000:132, para 112, by reference to *Continental Can* (above n 2) paragraph 26.

17 For academic commentary discussing Article 102, see among many, Akman, *The Concept of Abuse in EU Competition Law* (2015); Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011); Rousseva *Rethinking Exclusionary Abuses in EU Competition Law* (2010).

3.2 The direction of travel in exclusionary abuse

As is well-known the Commission used the early years to test the limits of its antitrust powers, and most of the time the Court ratified an extensive interpretation of Article 102 TFEU.¹⁸ For instance, a merger by a dominant undertaking can constitute an abuse of a dominant position (*Continental Can*),¹⁹ a refusal to continue to deal with a client constitutes an abuse of dominance (*Commercial Solvents*),²⁰ Article 102 applies even if the dominant undertaking is fighting a price war with other entrants (*United Brands*),²¹ Article 102 applies to discount schemes that make planning by customers more complicated (*Michelin*).²² This early case-law was largely informed by a concern about market power and by a philosophy that saw competition law as the protector of the competitive process. It was also observed that the case-law could at times focus more on the form of the abuse rather than its effects. In cases concerning discounts, the loyalty-inducing nature of a discount was investigated, rather than its capacity to exclude rivals. Finally, the Commission is always capable of discovering new practices that fall within Article 102 – margin squeeze or the abuse of the regulatory process are two examples of this.²³

For the purposes of this paper, we observe how since the mid-2000s the Commission has embarked on an approach that seeks to place some limits on the scope of exclusionary abuse. This effort culminated in a *Guidance Paper on Enforcement Priorities*.²⁴ In spite of its title, many see this as a codification of a particular and economic-based understanding of Article 102. Gradually, it seems that the ECJ is coming to accept a modification of its previous case-law – this is most notable in *Intel* where the Court stated explicitly that its earlier case-law needed further clarification and where it has set out an approach which is in line with that in the *Guidance Paper*.²⁵ Recent case-law confirms the increased influence that the principles in the *Guidance Paper* have had on the Court.²⁶ At the same time it is fair to say that the Court is not quite as radical as the Commission's *Guidance Paper* in its embrace of the more economics-based framework.

We are now entering in a third phase of the application of Article 102 TFEU. In March 2023 the Commission announced a reform of the *Guidance Paper* as well as a process by which the *Guidance Paper* would be replaced by *Guidelines*.²⁷ This review process is informed by a concern that the current limiting principles may have constrained the application of Article 102 TFEU. Time prevents a detailed analysis of this new initiative but, as we will discuss further below, when limiting principles become too uncomfortable for the competition authority, there is political pressure to remove them.

What are some of the limiting principles that we find in the field of exclusionary abuse? First, the Commission became aware that a more sophisticated inquiry into market power is required to focus its enforcement action against undertakings that have the capacity to exclude rivals from the market. This means it is less likely that firms with shrinking market shares are going to be found to fall within the scope of Article 102. Similarly, the more sophisticated approach to market definition avoids Type 1 errors resulting from narrow markets. Decisions like *United Brands*, *Michelin 2* or *British Airways* are unlikely given the modern analytical framework favoured by the Commission.

18 Arnulf, *The European Court of Justice* (1999) observing how the ECJ gave the Commission leeway in the early days.

19 Above n 2.

20 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, Joined Cases 6 and 7/73, EU:C:1974:18.

21 *United Brands v Commission*, Case 27/76, EU:C:1978:22.

22 *NV Nederlandsche Banden Industrie Michelin v Commission*, Case 322/81, EU:C:1983:313.

23 *Deutsche Telekom v Commission*, Case C-280/08P, EU:C:2010:603 and *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83.

24 Above n 2.

25 *Intel v Commission*, Case C-413/14 P, EU:C:2017:632, paragraph 138. And see the application of this in *Intel v Commission*, Case T-286/09 RENV.

26 In addition to the *Intel* judgment, the recent case-law in *Servizio Elettrico Nazionale v AGCM*, Case C-377/20 EU:C:2022:379, para 20 and *Unilever v AGCM*, Case C 680/20, EU:C:2023:33 para 51, where the ECJ makes explicit reference to the *Guidance Paper*.

27 Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2023] OJ C 116/1.

Second, the Commission has tried to articulate a general principle applicable to price-based abuses of dominance. Price-based conduct is condemned when it risks harming a rival as efficient as the dominant undertaking. Applied to rebates, the application of this principle replaces the approach found in the early case-law where rebates were found abusive for a variety of reasons (e.g. loyalty or discrimination) and place an emphasis on their exclusionary potential only. However, debates continue over what the appropriate principle could be that serves as a general theory of all conduct that is an abuse.²⁸

Third, in some kinds of abuse (e.g. refusal to deal) it seems that some formulations of the constitutive elements of abuse have been designed. A refusal to deal is an abuse when: (i) the product is indispensable; (ii) the refusal eliminates competition in a downstream market; (iii) the refusal is not justifiable.²⁹ In creating a tight category one can then limit the Commission's discretion. However, this approach has not proven entirely successful. In subsequent cases this standard has not been strictly applied.³⁰

Fourth, the Court has increasingly recognized that dominant undertakings are given the same right to defend their conduct as non-dominant firms. The case law has now effectively read the requirements of Article 101(3) into the notion of objective justification in Article 102 TFEU.³¹

Summing up: the first and fourth principles noted above are well-settled and serve to contain the Commission's powers in an appropriate manner. The first allows for a better approach to case selection, the latter allows the dominant undertaking a chance to explain the positive effects of its conduct. However, the Commission and the Courts have struggled over the formulation of an all-encompassing theory of harm. As the second and the third principles suggest, there are formulas by which abuse is tested, some of these (e.g. rebates) where the approach resembles what a US antitrust lawyer would recognise as a quick look rule of reason, some (e.g. refusal to deal) where there is a checklist of factors, and some other types of conduct (e.g. predatory pricing) which are analysed in a form-based manner. Accordingly, there are specific limiting principles for each type of abuse. This is not entirely satisfactory from the perspective of coherence since establishing some abuses may be more complex than others even if the anticompetitive effects may be the same. However, this is how the case-law has evolved.

We now turn to see whether similar principles may be found in the case-law on exploitative abuse and whether it is possible to achieve superior limiting principles in this field.

4. Exploitative conduct – Scope and limits in the case-law

In this section the main categories of exploitative abuse are examined. The Commission's practice and the Court's case-law are treated successively and an attempt is made to see what underlying principles apply to each kind of abuse. This bottom-up exercise also allows us to identify a number of general limiting principles that apply to all kinds of exploitative abuse: these are summarised in subsection 4.6.

4.1 Excessive pricing

Excessive pricing is the clearest manifestation of an exploitative abuse. This abuse fits neatly within the competition law paradigm in that it addresses the deadweight loss imposed by monopoly pricing and also prevents unfair transfers from consumers – thus whether the preferred benchmark is total or consumer welfare, targeting this practice makes sense.³² However, as explained in section 2,

28 Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011) ch.3, Monti 'Rebates after the General Court's 2023 Intel Judgment' (2023) 60(1) CMLRev 107.

29 *Bronner*, Case C7/97 EU:C:1998:569.

30 Dunne, 'Dispensing with Indispensability' (2020) 16(1) *Journal of Competition Law & Economics* 74 for discussion. See also the discussion in *Slovak Telekom v Commission*, Case C-165/19 P, EU:C:2021:239.

31 Most recently, see Intel (above n 25) paragraph 139.

32 Gilo, 'A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms' in Jenny and Katsoulacos (eds) *Ex-*

the arguments against the use of competition law are also well-established: high prices can be an incentive for other firms to enter, determining what prices are excessive is often extremely difficult, and remedying excessive pricing which amounts to price regulation is not perceived to be the job of a competition authority.³³ Furthermore, the presence of excessive prices may be an indicator that the competition authority has under-enforced Article 102 by not identifying exclusionary practices that created the opportunity for the dominant undertaking to raise prices profitably. In what follows we discuss the Commission's enforcement policy and the legal standard by which excessive pricing is evaluated. These two perspectives help reveal the limits to this type of abuse.

(a) Commission practice

If we turn to the Commission's decisions, we find five cases where excessive prices were found, but none of these are purely about excessive pricing.³⁴ The most well-known decision is *United Brands*, penalizing a range of features of the Chiquita banana distribution system. The dominant company forbade distributors from selling bananas while green so they could not be transported and 'this maintain[ed] an effective market segregation.' The result was that the prices which distributors paid varied significantly (by as much as 30 to 50%). 'Such a practice has the effect of tending to maintain substantially differing price levels in each of the Member States in question.' Arbitrage is made impossible by the prohibition of selling bananas while green so that 'distributor/ripeners are accordingly placed at a competitive disadvantage.' Thus far the Commission identifies as an abuse a set of restraints that segment the internal market, consistent with the high value the Commission places on securing integrated markets.³⁵ Furthermore the prices set for some distributors were also unfair: 'prices charged for the substantial quantities sold to customers in Germany, Denmark, the Netherlands and the BLEU [Belgium and Luxembourg] are considerably higher, sometimes by as much as 100%, than the prices charged to customers in Ireland.' Prices were also higher than those set by other banana producers.³⁶ While on appeal the Court quashed the finding of excessive pricing, it is important to see that the key concern in the Commission's decision was the segmentation of national markets: the price levels were the result of a campaign that allowed *United Brands* to price discriminate by breaking up the common market. This decision therefore is an application of the European market integration imperative.

Two other decisions taken at around the same time are also motivated by market integration: in both *General Motors and British Leyland* the Commission found that national law granted the manufacturer the exclusive right to issue a certificate of approval for its brand of vehicles. Both manufacturers set higher rates for this service for cars that were imported from outside their jurisdiction (Belgium and the UK respectively) and the Commission found that this was an abuse.³⁷ The Court supported this as a matter of law, explaining that there is an abuse when the price is excessive in relation to the economic value of the service provided and the price 'has the effect of curbing parallel imports by neutralizing the possibly more favourable level of prices applying in other sales areas of the Community, or by leading to unfair trade in the sense of Article [102(2)(a)].'³⁸ Again, market integration was the dominant concern.

The fourth decision condemning excessive pricing is in a reply to a notified agreement.³⁹ This concerns the market for the collection of waste packaging in Germany, where one undertaking, DSD,

cessive Pricing and Competition Law Enforcement (2018).

33 See the contributions in Swedish Competition Authority *The Pros and Cons of High Prices* (2007).

34 We omit the recent *Aspen* decision (above n 8) and *Gazprom* as these are discussed below in section 6.

35 Monti, 'Keeping Geo-Blocking Practices in Check: Competition Law and Regulation' (2021). Available at SSRN: <https://ssrn.com/abstract=3789176>

36 Case IV/26699 – *Chiquita* [1975] OJ L95/1.

37 Case IV/28.851 - *General Motors Continental* [1975] OJ L 29/14,, Case V/30.615 – *British Leyland* [1984] OJ L207/11.

38 *General Motors Continental NV v Commission*, Case 26/75, EU:C:1975:150, paragraph 12. On the facts of this case, the Commission lost because there had only been five instances where the excessive price was set and those customers had been reimbursed. The decision in BL was upheld: *British Leyland Public Limited Company v Commission*, Case 226/84, EU:C:1986:421.

39 For millennials: under Regulation 17/62 parties uncertain about the legality of their agreements were able to notify these to the Commission who could issue a decision authorizing the agreement or take less formal steps. This case is unusual for the notification led to a finding of infringement.

held a dominant position. One of the terms in its agreement with customers concerned the price for its service which was calculated on the basis of the amount of packaging which used the 'Green Dot' label, whose trademark belongs to DSD, and not on the basis of how much of that packaging was subsequently collected by DSD. This was seen as an abuse of dominance from two perspectives: first it was unfair because the 'price charged for a service is clearly disproportionate to the cost of supplying it.' Second, the price was also exclusionary because customers would not have an incentive to use another collection service for part of its waste since by doing so the customers would be paying twice for the same service. The clause thus strengthened the dominant position of DSD and excluded potential entry.⁴⁰

Finally, the Commission found prices excessive in *Deutsche Post AG*. Here the Commission explained that excessive prices fall within Article 102 if they have 'the effect of curbing parallel trade or of unfairly exploiting customers.'⁴¹ On the facts, both effects were found to exist: Deutsche Post overcharged customers but the conduct in question also stifled the development of an internal market for liberalized postal services. As we show in section 4.3 below the practices also had exclusionary effects.

The Commission has also refused to investigate a number of excessive pricing allegations. The formal reason is that the parties had not brought sufficient evidence.⁴² What emerges from this list of infringement decisions is that the Commission has been reluctant to take a 'pure' excessive pricing case. Rather, the excessive price is linked to a type of conduct that is closer to the Commission's enforcement priorities: market segmentation and foreclosure of rivals.

Cases with excessive pricing as the central claim have also arisen in national courts, especially when clients of collecting societies complained about the licensing fees.⁴³ More recently some competition authorities have taken action to address excessive prices of pharmaceuticals.⁴⁴ Prices in this sector are regulated at times and when it comes to both regulation and competition enforcement, a delicate balance needs to be struck between keeping an incentive to innovate (which militates in favour of tolerating higher prices) and the cost society pays for medicines. This accounts for the choice competition authorities have made to tackle excessive prices when the patent has expired or where the dominant firm was not the one who invested in developing the technology: the innovation argument is less pressing here.⁴⁵

(b) ECJ case-law

The key precedent remains *United Brands*. Here, the Court provided a two-stage test to determine if prices were excessive: (i) price is excessive in comparison to the economic value of the product and (ii) the price is unfair either in itself or when compared to competing products.⁴⁶ This phrasing is not a model of clarity, but it suggests a fairly demanding approach.

To satisfy the first stage we need an economic test that allows us to determine what a competitive price would be (i.e., the competitive benchmark). The second stage is a policy-based criterion that allows us to determine if the price is too high relative to the competitive benchmark.⁴⁷ This means that high prices are tolerated, but the competition authority has to make a value judgment as to when the price is well above that level of tolerance.

40 Case COMP D3/34493 — *DSD* [2001] OJ L166/1, paras 111-115.

41 Case COMP/C-1/36.915 — *Deutsche Post AG — Interception of cross-border mail (2001)* OJ L 331/48, para 155, with reference to *General Motors* (above n 37).

42 Case COMP/A.36.568/D3 — *Scandlines Sverige AB v Port of Helsingborg* (23 July 2004), Case 37761 *Euromax/Imax* (25 March 2004), Case No COMP/39.886 — *Ryanair/DAA-Aer Lingus* (17/10/2013) where in addition to considering evidence about whether fees were excessive reference is made to the regulatory process as a means for preventing excessive pricing.

43 The latest in this series is *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World, Wecandance* Case C-372/19, EU:C:2020:959.

44 Report from the Commission to the Council and the European Parliament, 'Competition Enforcement in the Pharmaceutical Sector (2009-2017)' (2019).

45 Calcagno, Chapsal and White, 'Economics of Excessive Pricing: An Application to the Pharmaceutical Industry' (2019) 10 *Journal of European Competition Law and Practice* 166.

46 *United Brands* (above n 21) paras. 250-253.

47 *Gilo* (above n 32).

Applying the first stage allows for different methods: when considering manufactured goods, a comparison with the cost of production may be adequate to determine what a competitive price would be. When it comes to intangibles as in licensing fees set for broadcasting music, comparisons with the fees charged in other jurisdictions are appropriate provided one controls for differences between the jurisdictions and one selects the most appropriate comparator. An important aspect of the more recent case-law is that the determination of the benchmark price requires the use of multiple comparisons in order to establish that the prices are indeed excessive.⁴⁸

The second stage has been examined recently in *AKKA/LAA*. The Court of Justice held that once it has been determined that the price is excessive and above the benchmark then one should consider if the prices are appreciably higher than the benchmark (a potential indication of abuse) and then one should consider if the prices are kept at this high level for a certain length of time. A temporary price increase is not an abuse of a dominant position.⁴⁹ This tries to generate a degree of objectivity in the second stage, which may reveal some discomfort with the notion of 'fair' pricing.

More generally, what emerges from the case-law is that the Court gives some leeway to the dominant undertaking to determine its pricing policies. It does so in two ways: first, it does not require the precise identification of an excessive price (i.e. it does not say that the profit margin cannot be greater than 20%). Second, it does not require the dominant firm to find a method of calculating prices which reduces the risk of excessive prices to zero. This may be seen in the *Kanal 5* litigation. The question arose whether the method for calculating royalties was sufficiently accurate. Licensing fees for music are often set arbitrarily by considering the square footage of the bar/club wanting to play the music. The ECJ expressed itself in this manner: a price schedule may be excessive when 'another method exists which enables the use of those works and the audience to be identified and quantified more precisely and that method is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without however leading to a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright.'⁵⁰ In other words, the seller must make sure that the method for setting fees is not arbitrary but some account is taken of the cost of finding the appropriate price. Furthermore, the Court is open to considering justifications for high prices, which allow the dominant firm the opportunity to explain its business model and the reason for the price schedule.⁵¹

4.2 Unfair trading conditions

(a) Commission practice

Some commentators mistakenly include cases in this category where the abuse is exclusionary (e.g. *Microsoft 1994*, *Tetra Pak II*, and *AAMS v Italy*). Even some of the collecting societies cases which are challenged for unfairness (e.g. *GEMA*) may be read as being about exclusion: the agreement between collecting society and members made it difficult for members to switch to other collecting societies. This should not be surprising. As we have seen with excessive pricing, the Commission's priority is to focus on practices which hinder rivals, or, frequently, which hamper the integration of the market. Cases where the abuse is only exploitative are rare.

48 *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* Case C-177/16, EU:C:2017:689, para 43 and *SABAM v Weareone.World* Case C-372/19, para.32.

49 *Ibid.*, paras 55-56.

50 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, C-52/07, EU:C:2008:703, paragraph 40 as recalled in *SABAM v Weareone.World* Case C-372/19, para.52.

51 *AKKA/LAA* above n 48 paras.59-60.

(b) ECJ case-law

BRT v SABAM is the leading case where the Court gives guidance on establishing that trading conditions are unfair. Here the dominant collecting society demanded: (i) a global assignment of copyright; and (ii) assignment, by the author, of all present and future rights. The society was able to exercise those rights for five years after the member withdrew from the society. It should be obvious that if a competition authority were to consider these facts, the theory of harm would be about the exclusionary potential of these practices (indeed, in parallel to this litigation the Commission had taken issue with SABAM's terms for their exclusionary force and in response the collecting society had agreed to amend its terms).⁵² Nevertheless, from the position of the plaintiff (as this judgment stems from private litigation), the harm is to its commercial interests, so the issue arose about how far this practice could be characterised as exploitative abuse.

The Court's approach is that a balance must be struck between the rights of the authors to exploit their work on the one hand, and the need for collecting societies to set up a business model that allows for the effective management of the authors' works. It was also relevant, said the ECJ, that the collecting societies were improving the bargaining position of authors against 'major exploiters and distributors of musical materials.'⁵³ It follows from this that the collecting society should have some freedom to request a generous assignment of rights from its members in order to 'carry out its activities on the necessary scale.'⁵⁴ As a result, the operative part of the judgment reads:

The fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article [102] imposes on its members obligations which are *not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.*⁵⁵

The key to this standard is proportionality: a term is fair even if it disadvantages the other party provided that the term is necessary for the successful operation of the collecting society. Just like in cases of excessive pricing the Court is at pains to create an objective standard by which to test the fairness of terms and the emphasis here is whether there is a significant inequality in the exchange.

Importantly the Court states that an assessment of the legality of the agreement must be carried out 'bearing in mind both the intrinsic individual effect of those clauses and their effect when combined.'⁵⁶ This qualification is extremely significant because one should not judge the unfairness of a specific term (as one would in the field of consumer law, for example) but the unfairness of the transaction as a whole. If we apply this reasoning in the framework of an excessive price case, it suggests that one should not just consider the contractual price but also all the factual circumstances of the case,⁵⁷ including the terms and conditions that accompany it in order to determine whether the price is excessive.

4.3 Discrimination

(a) Commission practice

Discrimination is an abuse which is catalogued in Article 102(c) TFEU. As we suggested above this provision appears to deal with secondary line injury: the monopolist treats two customers differently, harming one of the two.⁵⁸ However the Commission has taken a much wider interpretation of the reasons why a dominant undertaking's discrimination is anticompetitive. An excellent illustration

⁵² See on this the discussion by AG Mayras in Case 127/73, *BRT v SABAM (BRT-II)* EU:C:1974:25.

⁵³ *BRT v SABAM*, judgment of the Court (Ibid.) Paras 8-9.

⁵⁴ Ibid., Para 10.

⁵⁵ Ibid., Para 15 (our emphasis).

⁵⁶ Ibid., paragraph 16.

⁵⁷ *SABAM v Weareone World* Case C-372/19, para.29.

⁵⁸ Today the Court opts for a more refined approach, see *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, Case C-525/16, EU:C:2018:270.

of the breadth of this notion is found in *Deutsche Post AG*.⁵⁹ The Commission was faced with a scenario where businesses took advantage of the fact that posting letters from the UK to Germany was cheaper than posting the same letter from a German address to another German address. This was partly due to some failure in the international regulation of the cross-borders postal tariffs which led to the pricing of mail coming from other countries at a price below its costs. Deutsche Post noticed this practice and took steps to intercept and delay letters that it suspected took advantage of the better process offered by the British Post Office and demanded that the senders pay a surcharge. The Commission found four different reasons why DPAG's conduct constituted an abuse of dominance, one of which was discrimination.⁶⁰ The discrimination was simple: DPAG would select some of the letters sent from the UK and delay those it suspected were sent under instructions from a German business which wanted to take advantage of the lower rates. Since the cost of delivering all mail packages was the same, there was no justification for the discrimination.

When it came to explaining why discrimination constituted an abuse of dominance, the Commission gave three reasons. First, it explained that this practice could place traders at a competitive disadvantage, for example if there were two mail order companies sending catalogues from the UK and one had its catalogues seized by DPAG then it would be placed at a competitive disadvantage vis-à-vis its rival. This falls squarely with Article 102(c).⁶¹ Second, it explained that this discrimination also had exclusionary effects: it made the British Post Office artificially less competitive than DPAG. If the practice were to continue, traders would no longer take advantage of British Post Office's better terms.⁶² Third, the Commission found that discrimination would also affect consumers: the senders of mail who would pay more and the recipients of mail whose post is delayed.⁶³

Obviously, this decision was motivated by the Commission's wish to ensure that postal services were opened to competition and that an internal market for such services could operate. But there is also case-law where discrimination is harmful solely on the basis that it damages the internal market. The most well-known is probably the EUR 1.000 fine imposed on the organizers of the 1998 Football World Cup in Paris because it made it very difficult for consumers outside France to buy tickets to matches. The effect of this 'was to discriminate against residents outside France, which indirectly amounted to a discrimination against those consumers on grounds of nationality, contrary to fundamental Community principles.'⁶⁴ The organizers were unable to provide any justification for this practice.⁶⁵

(b) ECJ case-law

The ECJ had earlier explained the nature of this abuse in *GVL v Commission* where the German copyright collecting society had refused to offer its services to any foreign artist who did not have a tax domicile in Germany. GVL sought to justify this blanket refusal by saying that it was unable to check the existence of these artists' rights. However, the Court found the blanket ban disproportionate because it prevented the possibility of individual artists being able to show that they held such rights that merited protection. "Such a refusal [to manage rights] by an undertaking having a de facto monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of the first paragraph of Article (102 TFEU)."⁶⁶ This is fairly categorical, but it follows from the importance of integrating markets that is a defining feature of EU competition law.

⁵⁹ Above n 41.

⁶⁰ The others were: refusals to supply (the theory of harm was exclusionary: the British Post Office would lose business which would go to DPAG, see above n 41 paragraph 151), excessive pricing and the limitation of production, markets and technical development.

⁶¹ DPAG (above n 41) paragraphs 131. The Commission also explained that the indirect relationship between the sender and DPAG sufficed to treat them as trading partners for the purposes of Article 102(c), see para 130

⁶² DPAG para 132.

⁶³ DPAG para 133.

⁶⁴ Case IV/36.888 - *1998 Football World Cup* [2000] OJ L5/55, paragraph 102.

⁶⁵ The recent *InBev* decision is also motivated by a view that consumers were entitled to buy cheap beer thanks to parallel trade. This is discussed in Monti above n 35.

⁶⁶ Case 7/82 *GVL* EU:C:1983:52, para 56.

In a more recent judgment examining discrimination, the ECJ gave a more nuanced interpretation of Article 102(b) TFEU. A broadcaster complained that the dominant collecting society sold performance rights at discriminatory prices. The ECJ held that there would be an abuse only if there was discrimination and that this caused a competitive disadvantage to the party paying the higher fee. In order to test for the ability of the discrimination to cause a competitive disadvantage, a wide range of factors are to be considered, including 'the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors.'⁶⁷

In explaining how this test is to be applied, the ECJ made three considerations that are relevant when exploring the limits of Article 102. The first is that the party complaining of discrimination was one of the largest clients of the collecting society hence it should have some bargaining power. Second, and related, the legal framework regulating collecting societies seemed to provide that if there is no agreement on the level of fees then the dispute should go to arbitration. Thus, there is a better placed forum to determine the appropriateness of the fees. Third, the Court observed that since the collecting society was not active in the downstream market where the competition harm was supposed to have taken place, then it is not clear what could motivate the collecting society to harm one of its clients: if price discrimination led to the exit of one client the collecting society might make less revenue. In sum, this judgment suggests a more cautious stance when examining the potential of a dominant firm to discriminate successfully. It calls into question the earlier case-law.

4.4 Limiting production, markets and technical development

(a) Commission practice

The Commission takes the view that a variety of effects may be caught under Article 102(b) TFEU. First, a reduction in output leading to price increases (textbook monopoly conduct).⁶⁸ Second, it may apply to the dominant undertaking limiting the conduct of its customers (e.g. in *Suiker Unie* the conduct condemned was a prohibition on distributors to sell sugar in certain geographical markets).⁶⁹ Third, conduct may exclude rivals. In some instances, for example in the DPAG case discussed above, the Commission found more than one effect resulting from the conduct of the dominant undertaking. Fourth in *British Telecommunications* the dominant firm's steps to prevent the development of telex forwarding business was condemned because it led to 'the maintenance of obsolete systems' which limited technical development, harming consumers.⁷⁰ This is a somewhat unusual case because BT implemented a policy to restrict the telex forwarding business at the request of other countries who were losing revenue because their telex charges were too high and users went to the UK where a number of businesses took advantage of the lower rates. What is unusual is that the dominant undertaking derived no direct benefit from its conduct.

(b) ECJ case-law

Given the wide sweep of this provision it is not easy to identify a discrete set of legal principles. For example, a refusal to deal and an export ban could both constitute a limitation of production, but the constitutive elements of abuse of dominance differ as between the two.

If we focus on conduct that would not likely fall under any other recognized heading of abuse, however, we might discern the following. First, the firm's dominance is well-protected by state regulation or high entry barriers. Indeed, some of the leading cases deal with firms holding exclusive rights.

⁶⁷ MEO above n 58, para 31.

⁶⁸ DPAG (above n 41) paragraph 168, by reference to *Hofner & Elser*, discussed below.

⁶⁹ Joined Cases 40-48, 50, 54-56, 111, 113 and 114-173 *Coöperative Vereniging (Suiker Unie) UA and Others v Commission* paras 396-398.

⁷⁰ Case IV/29.877 - *British Telecommunications* [1982] OJ L360/36, para 34. Upheld in *Italy v Commission*, Case 41/83, EU:C:1985:120.

Second, the conduct has to be egregious. This comes out quite clearly in *Hofner and Elser v Macrotron*.⁷¹ At the time of the litigation, the Federal Office for Employment held the exclusive right to bring prospective employees in contact with employers. Hofner and Elser had started a business that would compete with the Federal Office, and they specialized in headhunting executives. Macrotron had hired *Hofner* to provide such services but refused to pay, alleging that Hofner was acting illegally since only the Federal Office could provide such services. The Court agreed that it was lawful for Germany to create a statutory monopoly to discharge public services (with reference to Article 106 TFEU) however it also held that this could infringe Article 102(b) in certain circumstances, for instance:

A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is *manifestly not* in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.⁷²

In other words: a poorly performing monopoly is tolerated, but a monopoly that is manifestly incapable of satisfying consumer demand is abusing its dominant position. As with the other abuses catalogued above, some inefficiency is tolerated. The reasons for this stance are not explained by the Court, however we may venture to explain this in the following ways. First, the Court may take the view that this approach avoids the risk of type 1 errors if one were to tackle every conduct that deviates from what we would expect in a competitive market. Second, the Court may balance the importance of protecting competition with the freedom of the dominant firms: it may not wish to second-guess the business choices made until it is clear that the conduct is patently unjustifiable.

4.5 Unfairly low purchase prices

A final category of exploitative abuse cases is found when the dominant undertaking buys goods or services at prices that are unfairly low, taking advantage of its buying power. These, like excessive pricing cases, have not been prioritised by the Commission. However, the Court has had occasion to offer some preliminary indications of when this conduct may be an abuse in *CICCE v Commission*.⁷³ The applicant, an association of filmmakers, complained that TV stations were buying the rights to show films at prices that were too low. At the time of the dispute (the early 1980s) the three TV stations in question held exclusive rights to broadcast and the allegation was that they dominated the market collectively. The Commission refused to take up the case because it did not consider that, on a quick look at the facts, there could be a finding of abuse. On appeal the Court upheld the Commission's decision not to continue and in doing so set out some limiting principles. It noted however that this judgment was the review of a preliminary decision of the Commission, so the analysis is not based on a full appraisal of the facts.⁷⁴

In spite of this limitation, the judgment is very clear as to how a case such as this should be brought. The Court notes that the market value of each film is likely to be different (a filmmaker would expect a higher fee for a popular film than for something that appeals to a small niche only), and that the filmmaker will try and recoup the costs of shooting a film not only by licensing this to TV stations but also by showing the film in cinemas. It follows that it is not enough for the complainant to state that the average fee that TV stations pay to secure a film license is lower than the cost of making the film. It will necessarily be the case that, even in the 1980s, most of the recoupment of the costs of production will be made in the licenses to cinemas. The Court requested additional evidence which demonstrated that the license fees paid varied considerably from film to film.⁷⁵

⁷¹ *Höfner and Elser v Macrotron GmbH*, Case C-41/90, EU:C:1991:161

⁷² *Ibid.*, Para 31.

⁷³ *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission*, Case 298/83.

⁷⁴ *Ibid.*, paragraph 21.

⁷⁵ *Ibid.*, paragraph 25.

As a result the applicant could not rely on the average level of license fees or on the proportion of a TV company's budget allocated to film licensing as evidence that the prices were too low. Conversely the right approach is to consider the price paid per film and then examine how much of that film's costs were recouped through other distribution channels to even stand the chance of convincing the Commission to investigate. It is submitted that even with this amount of evidence it may be very hard to bring these claims for it is not the responsibility of the TV companies to make sure that they pay an amount adequate to ensure that the filmmaker breaks even. The TV company would be expected to pay the market price, which will depend on the film's likely popularity.

This is a significant judgment which again shows the importance of placing the conduct complained of in its proper legal and economic context. Two specific aspects are significant: (i) the entire value chain of film distribution matters when examining if the prices paid by TV stations is too low; (ii) it is not the responsibility of any one buyer in the value chain to ensure that the filmmakers breakeven: the commercial risk remains with them.

4.6 Takeaways

While there are only a relatively small number of judgments to consider, three common principles emerge from the case-law. The first is that the dominant undertaking is afforded some leeway in designing its commercial strategy: a price somewhat above cost is allowed, a practice which is somewhat inefficient is not an abuse, and a business method that secures payment by some rough-and-ready calculation is not an abuse even if in an ideal world the dominant undertaking could do better in calculating the income that would compensate it adequately. Therefore, only conduct of a certain seriousness is captured. This may be explained doctrinally by reference to a *de minimis* principle, or it may be the result of the Court wanting to avoid Type 1 errors and not wishing to second guess ostensibly legitimate business choices of dominant firms.

The second is that the Court seeks to derive objective standards to determine exploitation: we see this in the case-law on excessive pricing where recently even the fairness requirement is explained by reference to criteria such as duration and magnitude. It is also part of the proportionality standard that often serves to draw the line between abuse and conduct that is authorised.

Third, the analysis is fact-specific. No conduct is prohibited on its face: it is always a question of degree. Conduct is not exploitative *per se* but only if, having regard to the legal and economic context, the dominant undertaking secures an anticompetitive advantage at the expense of the counter-party.

In addition, considering the Commission's enforcement policy, we see that a number of the cases are not merely about exploitation: the conduct in question is also harming the integration of markets or contributing to foreclosure of rivals. Cases where exploitation is the sole basis of enforcement are rare.

5. The case of publishers v digital platforms

The increased activism of certain competition agencies in digital markets have led to a spate of cases which push the boundaries of antitrust. We focus here on two cases which have come up with reference to unfair practices by dominant online platforms. These are rendered more complex given the intersection between competition and regulation.

5.1. Germany

In the German Google case, publishers sought to avail themselves of a 2013 German law giving them copyright protection on news snippets and images. The German Competition Authority summarised Google's response in this way: 'Google asked the publishers represented by VG Media – but not other publishers – to confirm that they agreed to have short text excerpts (so-called snippets) displayed in Google services at no publishing fee and that they were authorised to declare

such agreement effective (hereafter: opt-in declaration). Furthermore, if the publishers did not opt in, Google stated that it would curtail the display of hits on their websites in its results lists in such a way that only the linked headline but no small snippets and preview images would appear. This would imply that there would be no entry in Google's image search. Subsequently most of the publishers instructed VG Media to opt in on their behalf.⁷⁶ The Bundeskartellamt did not think that Google's reaction constituted an abuse of a dominant position by discriminating between publishers: it began by stating that Google was free to operate its search engine and rank results as it wished. However, this freedom was subject to some limits, for example if the results were not ranked by relevance. However even in this context Google remained able to explain its ranking choices. On the facts the competition authority took the view that Google's actions were designed to avoid liability under the new German legislation and thus its conduct was probably objectively justified.⁷⁷

The complaining parties then petitioned the Berlin Regional Court, which also held that while it was possible that Google held a dominant position in the market for search engines, there was no abuse.⁷⁸ The reasoning of the German court boils down to the finding that the arrangements create a win-win situation: Google benefits through the advertising revenue generated, the users through the help they receive when searching for specific information, and the press publishers through the increased advertising revenue they receive from increased traffic due to readers who visit the publishers' pages after finding them on Google search results. This mutually satisfactory solution would be lost if Google had to pay fees to the publishers as well. This judgment is important: while it comes from a first instance court, it occurs in a setting where the German legislation anticipated the more recent Copyright Directive⁷⁹ in which the EU legislator sought to proceed in a similar manner to the German legislator, conferring additional property rights on publishers which they can assert against platforms.

5.2. France

The first Member State to transpose the new Copyright Directive, France, has seen a recourse to competition law in a scenario which the Directive was expected to address.⁸⁰ The gist of the Directive is to confer a new related right (*droit voisin*) to news publishers, who may use it to secure payment from those wishing to reproduce this content but neither the Directive nor the French Law require that those using very short extracts or hyperlinks must pay the publisher.⁸¹

Following this law coming into force, Google informed all publishers that it would stop showing snippets (longer than 'very short extracts') from articles unless the publisher electronically confirmed they wanted Google to show snippets. Most publishers accepted this variation of terms and there was no payment. The French National Competition Authority (NCA) took issue with this because there was no individual negotiation. It issued an interim injunction and ordered Google to negotiate with press agencies and publishers to establish a remuneration package.⁸² Subsequently commitments proposed by Google were accepted by the French competition authority on 22 June 2022.⁸³ Here we provide an assessment of the competition concerns and the construction of the abuse of dominance by the French competition authority and the Paris Court of Appeal. As will be seen, the manner

76 An English Language Case summary was published on 26 April 2016, and we rely on this here. (http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf?__blob=publicationFile&v=2).

77 Ibid.

78 LG Berlin, judgment of 19.02.2016, Az. 92 O 5/14 Kart, Link: <http://tmd.in/u/1694>.

79 Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29, OJ [2019] L 130/92.

80 Loi 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse.

81 What strikes one is that the new Article L. 211-3-1 of the French Law introduced by the 2019 Law makes specific reference to the importance that the snippet exception must not undermine the rule. This integrates into the French Law what was merely a recital (n.58) in the Directive stating that: 'it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive.'

82 Décision n° 20-MC-01 du 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse. (hereinafter Decision 20-MC-01).

83 Décision n° 22-D-13 du 21 juin 2022 relative à des pratiques mises en œuvre par Google dans le secteur de la presse. (hereinafter Decision 22-D-13)

in which the conduct was characterised as an abuse of dominance is not very convincing and the analysis of the competition concerns does not reflect the principles found in the EU case-law discussed in section 4 above.

It would appear that the parties making the competition complaint against Google forfeited their rights to benefit from the protection offered by the new law by agreeing not to be paid. In these circumstances one must be sceptical about the validity of a claim in competition law. Were the parties unable to object and seek negotiation? When observing that Google was linking titles, could they not seek payment if this was not covered by the exception in the law? What probably prevented publishers from doing so is each publisher's uncertainty as to what others would do: there are many publishers and just one Google. If any one publisher was to hold out for some licensing fee from Google while the rest agreed to the terms, then the others would see their items linked and would make economic gains at the expense of the challenger who would have to wait until negotiations were complete.

More generally, a first order question that arises when considering the cases against a dominant platform is whether the plaintiff should really be basing their claim on competition law. Should the publishers have refused to accept Google's offer and alleged that it infringed the new copyright law? Two ways of approaching this question may be considered.

First, had the snippets been removed, this would not constitute an infringement of copyright law because there would be no copyrighted material displayed. Second, if the publishers had instructed Google to leave snippets in, this would be unlikely to constitute a copyright infringement because the Paris Court of Appeal has held that the technical parameters set by publishers to allow the display of snippets 'amounts to an authorisation to use their content' and could thereby foreclose copyright claims.⁸⁴

Second, AG Pitruzzella has noted that cases of excessive pricing often come to be considered under Article 102 when it so happens that in the specific facts there is no sector-specific regulation.⁸⁵ This is also reflected in the case-law on excessive pricing for pharmaceuticals where the prices rise after the expiry of statutory controls. However, here, one might expect that the publisher's first port of call would be the domestic court who could determine whether the conduct in question constituted an infringement of the new neighbouring rights laws. The parties forfeited this route by accepting Google's offer.

Nevertheless, an agreement which is otherwise valid may still be challenged for infringing competition law. And inspired by previous instances where competition law has been used to redress the failures of a poorly regulated market, the French NCA, upheld by the Paris Appeal Court, ruled that Article 102 TFEU may apply to Google's conduct in the market for general search engines where it holds an 'extraordinary' dominant position.⁸⁶ Three theories of harm were considered: (1) Google's possible use of a dominant position to impose unfair trading conditions, (2) the imposition of discriminatory conditions, and (3) the circumvention of the Law on Related Rights which implemented the Copyright Directive. The NCA's finding that there may be a potential abuse has been confirmed by the Court of Appeal of Paris in its decision of October 2020. The Court focuses on the first theory of harm and agrees with the NCA that the conduct of Google deprives the publishers and press agencies of any possibility to negotiate a remuneration for their new related rights, which, given the super dominance of Google, could amount to an exploitative abuse. We now assess each of the three theories of harm.

84 *Société Google LLC et al v Le Syndicat d'Éditeurs de la presse magazine and others*, judgment of 8 October 2020, n.21, Cour d'Appel de Paris, para 236 (hereinafter *Google v SPEM* and others)

85 Opinion in *SABAM v Weareone World*, Case C-372/19, EU:C:2020:598.

86 Decision 20-MC-01, para 172; *Google v SPEM and others* (above n 84) para 103.

(a) Unfairness

When considering the imposition of unfair trading conditions, the NCA refers to the BRT v SABAM judgment discussed above (4.2) but also considers a passage from another judgment (United Brands), which is about exclusionary abuse and so appears to have no bearing.⁸⁷ Granted, the passage is relevant insofar as it explains that even in cases of anticompetitive exclusion, the defendant may act reasonably to protect its interests but little is added by reference to this. The NCA states that this type of abuse has two elements: (a) the imposition of certain terms which (b) are unfair. At a general level, we might quibble with the first element, because it is just a clarification that there is a causal link between dominance and abuse (i.e. if the publishers had bargaining power or alternatives then there would be no possibility for the dominant undertaking to impose terms).

Both criteria are met according to the French NCA: Google's change of policy was unilateral and placed the news publishers in a situation of 'extreme coercion' which is contrary to the aim of the Law on Related Rights.⁸⁸ And the terms are unfair, the NCA found, because Google gets an economic benefit which according to the Law on Related Rights should be transferred to the publishers.⁸⁹ Thus for both limbs of the test, the reference is the new Law: the legislator, says the NCA, gives to the publishers and press agencies the possibility to be paid by Google, hence the refusal to negotiate payment amounts to an abuse of dominance.

This reasoning is novel and does not follow directly from the existing case-law. In BRT, the ECJ suggested balancing the two competing interests: SABAM provides copyright owners a benefit in exchange for some consideration on their part. In the present context, Google provides publishers a benefit (visibility online) in exchange for the ability to generate advertising revenue from that visibility. The question from the perspective of the BRT case-law is whether this exchange is fair and whether the dominant undertaking takes a much larger benefit than is necessary to confer the benefit on the publisher. In this respect, the fact that a national law provides that publishers are entitled to negotiate a greater value transfer from Google does not, at least according to the NCA, affect the interpretation of Article 102.

Furthermore, as intimated by the Court in the CICCE judgment (discussed in section 4.5), the conduct of the dominant undertaking depends also on the revenue that publishers secure from other sources. It might then be that the conduct could be an abuse vis-à-vis certain publishers for whom the ability to negotiate for extra revenue is essential for their commercial survival, but not an abuse vis-à-vis other publishers whose profits from other sources are sufficient. As we saw in section 4, a case-by-case assessment is key to determining if a practice is unfair because it depends on the specific economic context of each bilateral relation.

A potentially stronger argument may arise if publishers receive no revenue in exchange for allowing Google to display long extracts on the search page because the user does not click on the publisher link to read the full story. Arguably in this context the bargain appears uneven.⁹⁰ However, one would still want to assess evidence over a given period of time to measure how much revenue a publisher receives from allowing Google to post its content and whether what Google secures in return represents a fair exchange. Recall that unfairness which is episodic is not seen as an abuse of dominance.⁹¹

⁸⁷ This is paragraph 189 of *United Brands* (above n 21) which is written in the context of a refusal to supply.

⁸⁸ Decision 20-MC-01 para 200; *Google v SPEM and others* (above n 82), para 103.

⁸⁹ Decision 20-MC-01 para 203; *Google v SPEM and others*, para 104.

⁹⁰ Decision 20-MC-01, para 212.

⁹¹ This is derived from *AKKA/LAA* (above n 48) when the ECJ states that pricing is unfair if it is fixed at excessive amounts for a considerable period of time for a large number of customers.

(b) Discrimination

The second theory of harm is that Google discriminates because by paying every publisher nothing it avoids individual negotiations which would lead to different publishers being paid different amounts depending on the criteria established in the Law. This consideration is quite brief and avoids discussion of the ECJ's judgment in MEO which is important in placing limits on Article 102(c). As discussed above (4.3), in MEO the complaint was that the dominant collecting society discriminated between two downstream broadcasters. The ECJ explained that proof of discrimination is not sufficient: it must be shown that this causes a distortion of competition between the broadcasters. Discrimination must be shown to have an 'effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation.'⁹² Similarly here, the non-payment must reveal that some publishers suffer harm while others do not. However, the premise of the NCA may be that non-payment is harmful to the publishing industry as a whole, because each publisher would expect to receive different remuneration. In other words, the discriminatory effect is harmful per se, irrespective of any exclusionary risk. As noted above, however, the ECJ has only applied this per se prohibition in discrimination cases that involve market segmentation. It follows that this theory of harm is flawed for three main reasons: first because it does not follow the precedent set in MEO; second because ultimately the requirement on the dominant firm is to negotiate with each publisher: provided the negotiation process entered into is the same for all publishers then the outcome cannot be challenged as discriminatory; third even if one were to agree that non-discriminatory conduct would require a dominant firm to engage in individual negotiations with each publisher that lead to differentiated payments based on objective criteria, more is needed to show that these were likely to lead to different payments to publishers of such a magnitude as to place some at a competitive disadvantage compared to others.

(c) Circumvention of the "spirit" of the Law

Finally, the NCA takes the view that Google's conduct circumvents the Law on Related Rights and this constitutes an abuse of dominance. The reasoning appears to contain two distinct circumventions. The first is that 'Google is using the possibility afforded by the Law on Related Rights to grant free licences to establish a general principle of non-remuneration for the display of protected content on its platform.'⁹³ This statement is somewhat curious. The right conferred by the Law on Related Rights is a right to bargain, not the right to be paid. The first circumvention seems to focus more on the result (no remuneration) than on the right the publishers have. This appears to reflect the French NCA's view that the Law on Related Rights entitles the publishers to revenue, whereas property rights usually only grant the holder a right to exclude others and those rights may be transferred without payment. It would be surprising if a law creating a property right were to require that any transfer of property must be paid for. It is even more surprising that the competition authority, in an interim ruling, should feel competent to interpret a law it has no power to enforce.

The second circumvention, according to the NCA, is that Google does not communicate all the information to the publishers according to Article L. 218-4 of the Law on Related Rights so that bargaining can take place. Arguably this is not just a circumvention of the Law but a breach of it. However, as observed above, the NCA has no powers to determine an infringement of this Law, thus the claim is framed as an abuse of a dominant position by assuming that Google's conduct does not infringe the law as such but its method of compliance harms competition.

In earlier cases the ECJ has confirmed that the misuse of intellectual property rights may amount to an abuse of a dominant position. This has occurred in situations where the dominant undertaking sought to exclude rivals. The leading case, cited by the French NCA, is *AstraZeneca* where the lawful deregistration of a marketing authorization which made it more costly for a rival manufacturer of generic medicines to enter the market constituted an abuse of dominance. The ECJ began with

⁹² MEO (above n 58), para 37.

⁹³ Decision 20-MC-01(above n 82) , para 243.

noting the special responsibility that dominant undertakings have to not harm rivals means that ‘it cannot therefore use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market.’⁹⁴ According to some commentators, this judgment refers specifically to the pharmaceutical sector and the following five limiting principles have been suggested: (i) assess the impact of this conduct on the degree of generics competition; (ii) consider whether the new drug introduced by the dominant company is better than the one for which it withdrew the marketing authorization; (iii) consider if there are legitimate reasons why the dominant undertaking does not sell both old and new versions of the same drug; (iv) whether the dominant undertaking would have made the same decision in the absence of generic competition; (v) consider internal documents evidencing a plan to reduce generics competition.⁹⁵ The justification for introducing these limiting principles is that otherwise any creative interpretation of the law by a dominant undertaking could result in an abuse of a dominant position.

Accordingly, it may not be so obvious that the circumvention of a law can also constitute an exploitative abuse: after all, every undertaking will interpret the law in a manner that maximizes its profits. Otherwise, every time a dominant undertaking interprets its tax obligations in a manner that reduces its tax burden, for example, this would entail an abuse of dominance. Therefore, if we wish to transplant *AstraZeneca* into the framework of exploitative abuse, we need some limiting principles.

The following three considerations may be suggested. The first is whether the conduct at hand would not be covered by an existing abuse concept. As the NCA itself has argued, Google’s interpretation of the law appears to yield the imposition of unfair terms. If so then there is no added value in finding another theory of abuse that overlaps directly with an established category. The categories of abuse may not be closed but there is little value added if we create new categories for no good reason since they just overlap with existing abuses. From this perspective, this third theory of harm has little added value.

The second is that the *AstraZeneca* precedent may be read as indicating that the focus of inquiry is on the effects of the conduct and on the intention of the dominant undertaking, but not on the legality of *AstraZeneca*’s actions under the relevant law. This moves one away from a theory of harm based on an infringement of the spirit of the law and towards one based on likely effects of conduct.

The third consideration would be the extent to which the relevant law can provide a remedy to the parties that have been injured. The point here is not that the NCA has the right to interpret the new Law on Related Rights, only that the NCA can ask itself the question of whether, if there is an infringement of the Law on Related Rights, the party who suffers harm is capable of being compensated by showing this infringement. This is not a controversial legal question: it should be clear if a remedy is available, assuming there is an infringement. In other words, we apply competition law when it is shown that the harm in question cannot be covered by another regulatory framework. As indicated above, some of the NCA’s concerns appear to be that the procedures prescribed by the law have not been followed, but this would give the publisher a basis to complain under the Law on Related Rights and there would be little value in conferring an additional right based on competition law if the complaint under the regulatory regime has not been made. Conversely, it may be suggested that, in the absence of effective remedies under the Law on Related Rights, competition law may apply to impose an obligation on a dominant company to negotiate. However, we are still unclear whether the duty is to initiate a negotiation or to participate if it is initiated by the other party. We discuss this point below in section 5.3.

⁹⁴ *AstraZeneca v Commission*, Case C-457/10 P, EU:C:2012:770, para 134.

⁹⁵ O’Donoghue and Padilla, *Law and Economics of Article 102 TFEU*, 2nd ed (2013), pp. 669-670.

(d) Anti-competitive effects

The French NCA decision also contains an interesting reflection on anticompetitive effects. It begins by taking the view that there is no need to establish effects when dealing with the imposition of unfair trading conditions but then continues anyway to establish likely effects. This posture evidences some uncertainty about the nature of the exploitative abuse it found, and it is worth exploring this question here.

Modern competition law is premised on the need to reveal either an effect or that effects are likely: in restrictions by object the likely effect is so clear that there is no requirement to show it. In terms of the kind of effect, we cannot here rely on harm to the competitive process as we do for exclusionary conduct: the dominant player is merely taking advantage of its position to extract rent. One can suggest that the effect is on total welfare: higher prices, unfair terms, unproductive conduct all reduce economic welfare by causing a misallocation of resources. Alternatively, one might focus on the illegitimate transfer from the weaker party to the stronger one. The ECJ does not appear to have settled the kind of effect required for exploitative abuses. Those advocating the more economic approach would rather focus on harm to economic welfare, those more wedded to the text of the Treaty may prefer focusing on the unfairness of the transfer.

From this perspective, the approach of the French NCA is curious. The NCA, upheld by the Court of Appeal of Paris,⁹⁶ explains that, by depriving the publishers of the possibility of negotiating a remuneration for their new related rights, Google's conduct degrades the legal and economic situation of those publishers. This appears defensible. Subsequently, going further, the NCA opines that the harm to publishers leads to a weaker press sector and a reduction in public debate and the proper functioning of democratic society.⁹⁷ However, this is the purpose of the Law on Related Rights, not the purpose of competition law. This seems to be further evidence that the NCA is using Article 102 to strengthen the working of the Law on Related Rights rather than finding an abuse of dominance as such.

Furthermore, the NCA, upheld by the Court of Appeal of Paris,⁹⁸ considers that Google's conduct might also prove exclusionary: if smaller search engines pay for publishers' content while Google does not, this would place them at a competitive disadvantage. This may be so but then a different approach to the theory of harm was required that focused on exclusionary effects. This, however, seems to be a feature of a number of Commission decisions we have reviewed above as well: assessing a course of conduct as having both exclusionary and exploitative effects. This is not improbable, but it is imperative to distinguish the two considerations and explain what the legal requirements are for both and what economic evidence exists to demonstrate the two anticompetitive effects. Moreover, before concluding that there is an exclusionary risk one should examine what other search engines or social media sites might negotiate with publishers: they may make use of the new law to devise a new way of showing news that is more attractive than that of the incumbent.

In sum, the better view would seem to be that effects should be shown, even if in certain instances (e.g. excessive pricing) proof of the abuse is itself an indicator that the conduct has harmful effects.

(e) Implications of the decision

At a practical level, the pathway to compliance for Google is to negotiate with publishers and make an offer. Nothing prevents the offer from being that no payment is owed on the basis that the use of a snippet does not confer on Google any additional benefit and/or that publishers make gains from users clicking on the link. If a publisher agrees to grant Google a free license then this is not evidence of an abuse, provided this agreement is in the framework of a negotiation. If negotiations fail, nothing should prevent Google from removing a publisher's snippets from its search engine. In other words, the antitrust action does not guarantee remuneration, just a process of negotiation between publishers and Google.

⁹⁶ *Google v SPEM and others* (above n 82), para 131.

⁹⁷ Decision 20-MC-01 (above n 82) para 267.

⁹⁸ *Google v SPEM and others* (above n 82), para 131.

5.3 Takeaways

The litigation discussed here is unique: a law was passed to create new property rights and competition law was subsequently invoked to try and fill a gap when Google's conduct led to a result the legislator did not necessarily expect.⁹⁹ Moreover, the application of the rules on exploitative abuse by the French NCA deviated from the established case-law. At a high level we can notice that all previous instances of abuse considered by the Commission or the ECJ were about the end result: prices were too high, harming the buyers, or prices were discriminatory, harming those who paid more, or terms were unfair, harming the party who was asked to give too much away for too few benefits. In contrast here the French NCA faulted the dominant undertaking for a procedural infringement: the failure to engage in negotiations. This does not fall within established categories of abuse and as discussed above none of the three categories of abuse deployed by the NCA are convincing.

At best, the approach taken might be supported by reference to the Huawei judgment of the ECJ, however the legal and economic context of that case is quite remote to what we find here. In brief, the owner of a standard essential patent (SEP) (in this case Huawei) had made a general undertaking via a standard-setting organisation to license the SEP on fair, reasonable and non-discriminatory (FRAND) terms. The SEP owner wished to obtain an injunction to stop a rival (ZTE) from using the SEP because the latter was not paying a license. The question for the ECJ was whether seeking an injunction could be seen as an abuse of a dominant position, since it would exclude the rival from the market. The ECJ's reply was that, having regard to the background discussed above, ZTE had a legitimate expectation that Huawei would offer to issue a license on FRAND terms. The ECJ then explained that this did not oblige Huawei to conclude a contract but rather created an obligation to negotiate. Only if negotiations failed could Huawei seek an injunction. The ECJ also set out a suggested set of procedural steps that should be taken imposing duties both on the SEP owner: (i) Huawei should inform ZTE that it was using patents without a license; (ii) ZTE should then express a willingness to negotiate, (iii) Huawei is then expected to make an offer, (iv) ZTE then should respond in good faith. If negotiations break down then Huawei would be entitled to an injunction without infringing Article 102.¹⁰⁰ In a subsequent judgment the UK Supreme Court held that the four steps set out by the ECJ constitute a safe harbour: if the patent owner complies with this framework then it will be entitled to an injunction but the patent owner may be entitled to proceed in a different manner.¹⁰¹ The key is for the court to consider whether the patent owner has asserted its rights abusively or has shown itself willing to negotiate a license. Importantly, the infringers also have obligations to negotiate in good faith.

Applied to the French NCA's approach one might have suggested that the new copyright rules impose a duty on a digital platform to negotiate with publishers. However, this hypothetical extension of Huawei is problematic. In Huawei the duty to initiate negotiations is with the dominant undertaking because it is the holder of the patent rights and had agreed to negotiate. In the context of the new copyright rules the onus is on the publishers (who hold the rights) to initiate negotiations, not on the platform. Asking the platform to initiate negotiations over price, when it has already received consent for some use,¹⁰² seems to stretch the special responsibility of dominant undertakings to breaking point. Furthermore, it is a duty which would be owed to an indeterminate class of publishers that the platform has no ability to identify *ex ante*. At most, one can ask the platform to participate in negotiations in good faith, but only once they have been initiated by the publishers. In other words, the platform benefits from a safe harbour: until the publisher requests a negotiation based on the Law on Related Rights, the dominant platform has no obligation to negotiate and can assume that

99 In a similar vein, see the discussion by Colangelo, *Enforcing Copyright Through Antitrust? A Transatlantic View of the Strange Case of News Publishers Against Digital Platforms* TTLF Working Papers n.66 (2020).

100 *Huawei v. ZTE*, Case C-170/13, EU:C:2015:477.

101 *Unwired Planet International Ltd and others v Huawei Technologies (UK) Co Ltd and others* paragraph [2020] UKSC 37, paragraph 153.

102 On this point, see the Paris Court of Appeal in *Google v SPEM* (above n 82), para 236.

the publisher consents to the acts of the platform. Only once a publisher initiates negotiation does the dominant platform have a duty to negotiate. This is the extent to which one might find it possible to apply Article 102 TFEU to the facts that were considered by the French NCA.

Conversely, an approach obliging the dominant platform to initiate negotiations risks going too far because it links the notion of abuse to the sort of conduct that, the NCA claims, the legislator of the Law on Related Rights was entitled to expect of undertakings subject to the Law. This is problematic because it places the NCA in a position to determine what compliance with the copyright law is (when this is surely the job of a national court or of the relevant sector-regulator if one is available) and because it extends the special responsibility of dominant undertakings to the stage of negotiation with customers without setting particularly clear parameters about how the negotiation is to be conducted. These difficulties are the reason that the scope of exploitative abuse is best left to consider the effect of the dominant firm's conduct on the market. On the other hand, when designing remedies to address exploitative abuses, a procedural remedy may be desirable, as we discuss below.

6. Remedies

6.1 Remedy design

Save for cases concerning excessive pricing, the Commission has not spent much time discussing remedies. This is because the Commission is not expected to do more than declare what course of conduct is forbidden. Once a business has to modify one aspect of its contract, it may need to redesign the commercial agreement as a whole. Sometimes this can have drastic consequences: after the Commission decided that the distribution agreement between Grundig and Consten was anticompetitive, Grundig bought Consten. Likewise, Parker Pen bought all of its distributors to escape the application of Article 101.¹⁰³ Thus, on the one hand the principle of free enterprise should mean that the Commission declares what conduct is offensive, but on the other hand it allows the defendant to comply with the law in the way they wish. From this perspective a remedy which is prescriptive is problematic.

However, in cases of excessive pricing the Commission has been more interventionist, even if in the early case-law the approach of the Commission was not particularly sophisticated. In *United Brands* the Commission took the view that UBC should cut prices charged to customers in Denmark and Germany by at least 15% and to then inform the Commission twice yearly for two years of the prices charged to its customers in the Belgo-Luxembourg Economic Union, Denmark, Germany, Ireland and the Netherlands.¹⁰⁴ However there is no discussion as to why this would be a reasonable price. In *British Leyland* the remedy was just to bring the infringement to an end and inform the Commission of the measures taken.¹⁰⁵ Presumably the obligation is simply to align the price to the one set for domestic cars.

In *DSD* the remedy was more sophisticated because the Commission attempted to ensure that the price paid by DSD customers allowed them the capacity to buy similar services from other suppliers. DSD was prevented from charging a license fee for unused packaging, provided that the customer could show how the rest of the packaging was disposed of.¹⁰⁶ The idea is that the customer would pay in proportion to the services used.

More recently the Commission has issued two commitment decisions addressing excessive pricing considerations, one in the gas supply market (*Gazprom*) and one in the market for an off-patent pharmaceutical (*Aspen*). Since these are commitment decisions, there is little to draw on to discuss the application of the legal standard to determine the competition concern, but the remedy

¹⁰³ Monti *EC Competition Law* (2007) p.41.

¹⁰⁴ Chiquita (above n 36) Article 3(ii).

¹⁰⁵ Above n 36, Article 3.

¹⁰⁶ Above n 39, Articles 3 and 5.

is worth exploring. In Aspen the remedy under consideration is a commitment to reduce prices by a given amount, while in Gazprom gas purchasers are given a right to negotiate a lower price. It is not particularly clear why different approaches were taken: after all, for both goods there are repeated contracts with weak buyers. Economic conditions may change so fixing a price today for a relatively long period of time (Aspen's commitment is to set a maximum price which is 73% lower than the current price for the next ten years – this seems excessive and may result either in prices that remain too high or too low depending on how the market develops). This makes the approach in Gazprom preferable: customers have a right to demand a lower price, the determination of the lower price is regulated by certain benchmarks, and if there is no agreement then an arbitrator will impose a competitive price.

These two cases allow us to make the following suggestions. The first is that contrary to what some believe, it is not always possible for dominant firms to understand what prices are reasonable, so that a finding that a price is excessive is not self-enforcing.¹⁰⁷ This is even more so when we are dealing with intangibles where the marginal cost of production is not a helpful indicator. However, it also shows that the Commission can delegate the process of price formation to the parties first, and subsequently to an arbitrator. Thus, designing an effective remedy while respecting the commercial freedom of the dominant undertaking is possible.

However, this is not without raising any concerns. In a recent episode, the Italian NCA opened proceedings against Meta with a concern that Meta infringed the new law prohibiting abuse of economic dependence. A brief overview of the facts at hand is necessary to see another questionable use of competition law to impose procedural obligations.¹⁰⁸

Meta has had a longstanding arrangement with the Società Italiana degli Autori ed Editori (SIAE), the major collecting society in Italy and a former incumbent in that market. The licensing agreement provided for royalty payments from Meta to SIAE. During ongoing renegotiations Meta wished to change the way royalties were calculated and SIAE complained that Meta had refused to provide relevant information and had threatened no longer to broadcast the music of rights holders represented by SIAE. A complaint was made to the Italian NCA. It should be noted that the basis for negotiations between a collecting society and licensees are provided for in secondary EU Law, in particular Article 16(1) of Directive 2014/26 which opens the market for collective management organisations provides as follows:

Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information.

In other words, SIAE already has a legal basis to assert its rights. As with the French NCA's handling of the Google case, it is not clear why competition law should serve to supplement these pre-existing obligations. At any rate, even with a finding of abuse of economic dependence, the obligation which would be imposed on Meta would remain purely procedural and effectively duplicate the duties already found in secondary law. At best, antitrust powers are used to bring Meta back to the negotiating table more expeditiously.

107 Contra see Gilo (above n 32) above who takes the view that a well-constructed legal standard does not require ex post price control.

108 Case A559 - *Meta/SIAE*, Provvedimento n. 30570, Bolletino n.14 (11 April 2023), p.14

6.2 Remedy design in case of publishers v digital platforms

In the Google case examined above, the French NCA imposed the following injunctions on Google:¹⁰⁹

- enter into negotiations in good faith with press publishers and agencies who so desire for a period of three months from the request of the publisher or the press agency;
- provide the necessary information for the transparent assessment of the remuneration foreseen by the new Law on Related Rights;
- ensure that during negotiations neutrality is ensured and the indexing, classification and presentation of protected content by Google is not affected;
- ensure respect for a principle of strict neutrality of negotiations on any other economic relationship that may exist between Google and press publishers and agencies;
- send to the French NCA regular reports on the modalities of implementation of the decision.

Thus, the NCA mostly imposed procedural safeguards in order to ensure that Google could not behave unfairly during the negotiations with the press publishers and the agencies. Like in other cases, such as *Gazprom*, the remedies are thus mostly procedural.¹¹⁰

A similar set of procedural obligations has now been made binding. The French NCA accepted Google's offer of commitments in 2022. It is beyond the scope of this paper to discuss the details of the commitments but certain aspects of the commitment decision are worth remarking upon as they help give context to the decision as well as to the nature of the obligations.

First, it is remarkable that the Ministry responded to the market test. This may evidence a political background that underpins the decision. More generally, it is worrying that the state should participate in a market test when the remedy does not have a direct effect upon the State's conduct in the market.

Second, the French NCA stated clearly that the procedural obligations do not mean that publishers are entitled to be remunerated. However, in saying this the French NCA also reveals the weak foundation of the whole case: "la *Loi sur les droits voisins* ne confère pas aux éditeurs et agences de presse un droit à rémunération garantie."¹¹¹ The slip here is the reference to the Law on Neighbouring Rights. If the competition concern is an infringement of Article 102 TFEU then the statement should refer to this legal basis. This points to the fact that the decision uses competition law in order to enforce a regulatory obligation.

6.3 Quantification

Even if we were to agree with the French NCA's conclusion that Google has an obligation to negotiate with publishers, we still need to consider whether the publishers are entitled to remuneration at all and how the result of this bargain would be assessed under competition law principles. As we have noted competition law can apply when terms in an agreement are unfair or when the purchase price paid by the dominant undertaking is too low. However, we have also seen that in these settings the Court asks for a holistic assessment of the legal and economic context. What might be relevant for discussing the legality under competition law of the outcome of these negotiations?

¹⁰⁹ Assummarised by the French NCA at: <https://www.autoritedelaconurrence.fr/en/press-release/remuneration-related-rights-press-publishers-and-agencies-autorite-fines-google-500>

¹¹⁰ In a subsequent decision, the French NCA condemn Google for not having complied with those injunctions: Decision 21-D-17 of 12 July 2021 on compliance with the injunctions issued against Google in Decision 20-MC-01 of 9 April 2020.

¹¹¹ Decision 22-D-13 (above n 83), para 215.

In our view it is important to consider the relationship between Google and publishers generally. First, Google's general search engine and Google News serve to direct traffic to the publishers. The search engine crawls the web and looks for relevant content. A publisher could easily prevent this crawling (e.g. with a standardized robots.txt file), however if they do not do so it is because they secure economic gains from appearing in search results.¹¹²

Second, it may be relevant to consider how far publishers invest in search engine optimization, i.e. whether they make efforts to ensure that their web pages are higher up in the search ranks.¹¹³ This again shows that publishers gain from exposure in search results and from the pro-active stance that search engines take in finding content.¹¹⁴ The economic gains that are provided via Google's search services are relevant in determining what fee, if any, should be paid by Google under the new Law.

Third, one might even suggest that attention is paid to whether publishers lose advertising income from the choice of advertisers to use brand safety technology.¹¹⁵ This technology emerged when advertisers became worried that their ads would be placed next to content that would devalue the brand. However, reports suggest that the technology used by ad tech vendors to prevent this means that some ads are not shown next to news content which is erroneously identified as unsafe for the brand. The result is a loss of income for news publishers.¹¹⁶ This may suggest that the cause for reduced advertising revenue is not caused only by Google's alleged unwillingness to pay, but the use of technology by advertisers which has adverse consequences for publishers. This effect should also be taken into account in considering the antitrust issues under discussion.

Taking this wider economic context into account may yield a result that publishers are owed nothing because Google's business model already serves to compensate them fairly and some of the losses are caused by other technologies,¹¹⁷ or have been the result of the pandemic as a result of which the French government has instituted measures to rescue firms in the sector.¹¹⁸ At any rate, in calculating the revenue owed to publishers, one should consider the benefits that publishers receive from Google absent payment.

To put this more polemically: it seems clear that this new law was conceived as one way of rescuing the newspaper industry. The internet has made this industry's original business model less viable because advertisers spend less on newspapers and spend more money online. However, rather than designing a tax that would shift revenue from platforms to publishers, the legislator tried to achieve this result by creating additional property rights for publishers. As the events in France show, this effort backfired. From this perspective the use of competition law is an attempt to correct the legislator's failure to come up with a means of redistributing income. It is then clear that at this high level the use of competition law to engage in redistribution may raise legitimacy issue.

An objection to this position is the following: the new Law creates an additional property right over certain specific forms of content. Therefore, the revenue that a publisher makes because its links show up on Google search and are clicked by users is not relevant to assess the remuneration that a publisher is entitled to under the Law, where Google now extracts snippets. Nor is it relevant that publishers actively seek inclusion in search results. These considerations are irrelevant to the property right which is now protected here. However, the judgment in *CICCE* discussed in section

112 Spanish Competition Authority "Proposal concerning the modification of article 32.2. Of the proposal that modifies the consolidated text of the code of intellectual property" (16 May 2020), available [here](#) in Spanish, pg. 7 ("Insofar as the publishers do not introduce into their pages the simple measures that would prevent news aggregation, there would be indications of the interest of those publishers so that these activities are not discontinued, implicitly showing that they consider them to be in their particular interests.") (convenience translation from the original Spanish).

113 Bundeskartellamt Decision B6-126/14 Google v VG Media (25 April 2016), paragraph 138. available [here](#).

114 T. Hirche, 'EU Commission Tried to Hide a Study that Debunks the Publisher's Right as Ineffective' (3 January 2018) <https://ancillary-copyright.eu/news/2018-01-03/eu-commission-tried-hide-study-debunks-publishers-right-ineffective>

115 The Importance of Brand Safety in Digital Advertising—It's Not What You Think, Forbes, 19 June 2020.

116 Adalytics, 'Tens of thousands of news articles are labeled as unsafe for advertisers' (February 2021) <https://adalytics.io/blog/tens-of-thousands-of-news-articles-are-labeled-as-unsafe-for-advertisers>

117 It has been reported that between 2003 and 2019 newspaper revenues have shrunk significantly and 44% of this is accounted for by print classifieds revenue. Accenture, *Western Europe News Media Landscape Trends* (2021) p.6.

118 Décision n° 22-D-13 du 21 juin 2022 (above n 83) p.14.

3.5 above goes against this position: there the Court considered that the revenue generated via licensing a film to cinemas was relevant to assess whether TV broadcasters were paying too little for licensing to the dominant to the film makers. Likewise, in a setting where Google is asked to pay publishers, a fair exchange must be assessed by reference to the value chain as a whole and the gains that publishers make outside of the agreement with Google. To do otherwise would be to ask the dominant firm to pay an amount which unjustly enriches the beneficiary. And it is clear that an order of compensation that causes unjust enrichment is not allowed as a matter of EU Law.¹¹⁹

Another reading may be the following: using Article 102 allows one to identify the amount a dominant search engine should pay a press publisher in order to ensure a fair exchange between the parties. However, it may well be that when applying the copyright laws the measure of fairness is different. If we turn to the recitals of the first copyright directive (upon which the new one draws), we find that 'Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'¹²⁰ Likewise the new copyright Directive refers to the same concern: 'online use of [press publishers'] publications to the providers of those kinds of services, mak[e] it more difficult for them to recoup their investments.'¹²¹ A question to be discussed is whether the remuneration demanded by these articles should be judged by the principles we have identified above (i.e. having regard to the other benefits that the press obtains from a platform) or whether a different criterion is required by the legislation. This is not an antitrust question, thus again it shows the risk of using competition law to try to engineer a result that was meant to be safeguarded by a different legal instrument.

In sum, it may be suggested that a competition authority is wise in imposing only a procedural remedy to ensure that a dominant undertaking does not exploit its dominant position. Such a remedy serves to ensure that there is greater equality of bargaining power between the two sides so that a fair deal is reached. However, once the dominant undertaking has complied with the procedural obligations, the competition authority should not deal with the outcome. This is for two reasons: first generally speaking the remedy is designed to facilitate a resolution that is mutually beneficial, so no more tinkering by the NCA should be allowed afterwards. This goes back to the general policy discussion that NCAs are not suited to act as price regulators. Second, specifically with respect to the Google case in France, depending on the specific circumstances of the case, it may be arguable that the overall outcome can be that press publishers are not entitled to any remuneration once the wider economic context is applied.

7. Deriving limiting principles

On the basis of the discussion above, we set out a list of limiting principles for the application of Article 102 to exploitative abuse cases. These principles derive from our normative views on when it would be appropriate to intervene (so they help explain how a competition authority should exercise its prosecutorial discretion) and what the legal standard should be once the authority proceeds with a case; we think a number of these principles are confirmed by the case-law discussed in this paper.

At a high level, these principles are designed to ensure that Article 102 is applied to conduct which fits within its sphere by identifying its proper role. The role of the more economics-based approach is also reflected in our principles: as we have seen the ECJ's recent case-law on excessive pricing seems sensitive to this development. Conversely, as discussed in section 6 above, the French NCA appears to extend Article 102 TFEU without regard to any limiting principle.

119 See e.g. Joined cases C-192/95 to C-218/95 *Société Comateb and others v Directeur général des douanes et droits indirects* EU:C:1997:12 para 27: 'a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment.'

120 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, recital 10.

121 New Copyright Directive (above n 79), recital 54.

(a) Dominance criteria

The degree of dominance which is required for exploitative abuse should be higher than that which we find for cases of exclusionary abuse. This “super dominance” also needs to be enduring which implies that the exploitation may continue as the market will not self-correct, in particular with the entry of new firms attracted by the profit made as a result of the exploitative abuse. One of us has gone so far as to suggest that for the purposes of excessive pricing one should not just observe the share of the market but also: (i) the presence of high and non-transitory entry barriers; (ii) the linkage between dominance and the conferral by the state of special or exclusive rights; (iii) the presence, in the past, of exclusionary practices that have not been condemned; and (iv) the absence of a dedicated system of sector-regulation.¹²² These criteria are helpful because they reveal in which settings competition law has to step in to deal with exploitative practices: neither the market nor another regulator can address the concern at hand. This explains why so many cases are taken against collecting societies and actual or former state monopolies. These criteria are found in nearly all the cases we have surveyed, with the exception of United Brands and possibly DSD where in theory other suppliers could enter. However, as noted, these two cases are not ones where the Commission focused on exploitation, but rather they are decisions which are more concerned with the exclusionary potential of the dominant firm’s actions.

(b) The concept of exploitative abuse

The concept of exploitation generally: Exploitation is found when the dominant undertaking secures a significant advantage at the expense of the customer with whom it deals. Expressed differently, the transaction between a dominant undertaking and its customer is exploitative where the former secures a disproportionate amount of the gains by harming the latter. This is necessary but not sufficient to find an abuse. Nearly all the cases show that exploitation has a beneficial effect on the dominant firm. An exception is BT where the dominant undertaking sought to provide a benefit to its partners in other countries.

Effects and the theory of harm: The Commission tends to show an effect in its decisions, but the notion of anticompetitive effects is fairly broad. In some cases, the effect is inefficient allocation of resources or productive inefficiency. In other cases, it is damage to other market players, for example DPAG reveals that the prohibition of discrimination in Article 102 protects the interests of traders, competitors and consumers. The approach needs clarification. Exploitation may reduce economic welfare (the total size of the pie) and/or involve an unfair transfer from certain economic actors to the dominant undertaking (the distribution of the pie). Competition law should focus mainly on efficiency and mostly leave distribution to other policies, which are often decided at the national level given that the heterogeneity of preferences tends to be higher on distribution than on efficiency.

Causation: in cases of exclusionary conduct, the causal link between dominance and abuse is not always required, but a link is needed between dominance and the anticompetitive effects. A firm may be successful in excluding rivals even if it does not use its market power (e.g. if customers ask for rebates the granting of such discounts by a dominant undertaking can still amount to an abuse of a dominant position). However, for the purposes of exploitative abuse, there must be a causal link between dominance and abuse: the unfair treatment is meted out successfully only when the consumer or customer has no alternative but to deal with the dominant firm. Indeed, for the most part, viable exploitative abuse claims can arise only when the party who is exploited has no choice but to deal with the dominant undertaking.

The need for balancing: the law requires one to strike a balance between the two parties to the transaction. In cases of excessive price, the ECJ does not condemn any price above cost: dominant players are free to take advantage of their position and make super-normal profits. Likewise, for conduct which appears unfair to one side, an abuse is only found when balancing the interests of the two sides. For example, when it comes to unfairly low prices offered by a dominant buyer, one has

¹²² Motta and de Stree, Above n 9.

to assess other sources of revenue of the party making the complaint, and when it comes to Google offering to pay nothing for showing snippets this may be the fair outcome in light of the revenue publishers secure from referral traffic. This explains the role of proportionality in a number of the cases: in cases about unfair terms, this gives the ECJ a basis for balancing the competing interests of the collecting society (maximizing profits and operating for the benefit of its members) and those of the artists (maximizing its revenues). In other words, no conduct is punished per se: any of the forms of conduct penalized in the cases noted here might be reasonable under certain circumstances.

Reasonableness and tolerance for business error: building on the point above, determining whether the conduct chosen by the dominant firm is reasonable in the circumstances should not allow the competition authority to second-guess the business choices of the dominant firm. For example, when thinking about whether the conduct of the dominant firm is the least restrictive means of achieving a legitimate business objective, it is easy, in retrospect, to identify a less restrictive way of arranging a business. For example, if I am concerned about ensuring that dangerous goods like chainsaws are only sold to responsible buyers then I might prevent online sales. However, there may be less restrictive ways of ensuring that the sale is to a trustworthy person than banning online trade.¹²³ This may be so but businesses should not be required to come up with the least restrictive option, provided that their approach is reasonable. This principle can be seen in cases relating to the way collecting societies compute the revenue owed by those who buy music licenses: the dominant player is not required to find the most accurate way of calculating the royalties due. Likewise, in the Google decision in Germany discussed in section 5.2 above, the German competition authority indicated that the dominant undertaking was free to make an offer to news publishers that it would not pay license fees in light of the additional revenue these entities made as a result of Google search. This was a reasonable assumption by the dominant firm and as a result, it cannot constitute an abuse of dominance.

The importance of a holistic assessment: unfairness pertains to the transaction as a whole and not to the specific form of conduct. It is remarkable to note that even in the early case-law the ECJ eschewed a formalistic approach, but called for an assessment of practices in their legal and economic context. A practice might look egregious but it may well be reasonable given the business model. A collecting society's restrictive membership conditions might actually serve to ensure that the collecting society is able to operate for the benefits of its members, for example. Google's refusal to pay a license may not be problematic if publishers gain revenue by having their links displayed on Google's search engines.

The role of objective justification: As noted above, no conduct is restrictive per se, thus the plaintiff has to give a reasoned argument that the conduct exploits the customer in a harmful way. Moreover, the defendant has to be offered the opportunity to justify the conduct in question. This may be achieved by showing any of the following: (i) the overall balance is positive (the Google Germany case discussed above goes in this direction); (ii) the practice is justified by the costs incurred by the dominant firm; (iii) the practice serves to address another market failure; (iv) conduct is necessary to guarantee the delivery of a service of general economic interest.¹²⁴ In the decided cases objective justifications were not successful, but this is due to the clear anticompetitive nature of the conduct, rather than on the Commission's sceptical approach to efficiencies.

As we have indicated, few of these principles were followed by the French NCA, which instrumentalised competition law to address an issue which was politically salient in France. The NCA pays lip service to the case-law of the ECJ even in the more fully-reasoned abuse category, that of unfairness: little is done to place the conduct in its economic context –the conduct is condemned for appearing egregious. However, the case-law reveals that while this might offer a starting point, closer attention to the economic context, regard for the dominant undertaking's exercise of commercial

¹²³ This example draws from a distribution agreement challenged by the French NCA, see Paris Court of Appeal, Oct. 17th, 2019, No. RG 18/24456, Stihl.

¹²⁴ A possible justification may be found in Article 106(2) as well, see e.g. *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS and Citicorp Kartenservice GmbH* Joined cases C-147 and 148/97, EU:C:2000:74.

choices, and a balancing of the interests of the two sides are necessary steps before finding an abuse. Even in interim proceedings one is entitled to expect greater attention to these issues, not least when a new category of abuse is discussed.

(c) Availability of effective remedies

An exploitative abuse case should not be brought if the competition authority is unable to solve effectively the dispute. Thus, the competition authority should be able to impose an effective remedy and be able to monitor its implementation. Also, for reasons of efficiency and proportionality of the public intervention, competition law should not substitute or duplicate existing regulation and remedies. Thus, competition authorities should not intervene against an exploitative abuse if such abuse could be remedied with an existing regulation. This raises questions as to why the French NCA chose to intervene when the Law on Neighbouring Rights already existed to safeguard the interests of publishers.

In testing the effectiveness of a remedy, one looks to whether the new conduct removes the exploitative effects. In order to judge this, one has to consider the economic context within which the abuse took place. However, for many abuses (e.g. excessive pricing) it may not be easy to design a remedy that delivers on substance. In this context, one might look favourably at the procedural remedies that were inserted in the *Gazprom* commitment decision and in the Google decisions of the French NCA: in these two instances the focus was on instituting a process whereby one can reasonably expect that the outcome would remove the exploitative effects. It leaves the NCA or Commission with the duty to monitor the procedures, a remedy which does not require constant supervision and where the result is achieved by the two sides.

Nevertheless, one must remain concerned where competition law is utilised to create procedures to facilitate the formation of contracts when legislation, such as that providing for 'droit voisins', specifically confers rights to publishers which they may already assert against others. Competition law should not be called upon as a solution to other people's regulatory failures.¹²⁵

¹²⁵ On a similar theme see Podszun, 'Can competition law repair patent law and administrative procedures? *AstraZeneca*' (2014) 51(1) CMLRev 281.

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