



**Stanford – Vienna  
Transatlantic Technology Law Forum**

A joint initiative of  
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# **European Union Law Working Papers**

**No. 46**

**Scope of Article 102 TFEU: Protection of  
Competition or Protection of Competitors?**

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**2020**

# European Union Law Working Papers

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## **Suggested Citation**

This European Union Law Working Paper should be cited as:  
Bianca Simina Duca, Scope of Article 102 TFEU: Protection of Competition or Protection of Competitors?, Stanford-Vienna European Union Law Working Paper No. 46, <http://tflf.stanford.edu>.

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## Abstract

The present paper aimed to tackle the question whether the goal of Article 102 TFEU is to protect competition on the market or the competitors of the dominant undertaking. Since it is a rather difficult question which raises many issues, which even the responsible institutions rarely succeed in answering, a straightforward conclusion is difficult to draw.

The paper has presented an extensive background on the enforcement policy of Article 102 in the EU and the main theses revolving around the debate *protection of competition v protection of competitors*, with the aim of better understanding the approach of the European Commission and of the EU Courts in dominance abuse cases. It has been shown that the initial scopes of the rules on dominance abuse had little to do with such discussions. Instead, Article 102 has been used as an instrument to achieve certain political goals and to further promote and strengthen the internal market. The text of Article 102 alone says little about its aims. It is the inconsistent caselaw of the European Commission and of the EU Courts that has sparked the debate which represents the main topic of the present paper.

The European Commission has become aware of the fact that there are certain issues arising in cases involving Article 102, namely that such cases lack effects analysis, are not orientated towards achieving increased consumer welfare and seem to be more concerned with protection of competitors. Therefore, the European Commission, in 2005, has announced that it will pursue a more economic approach as regards Article 102 cases, meaning that the fining decisions will be based on thorough economic and market analysis. However, it seems that the results of this modernization process are yet to be delivered. The *Microsoft* decision issued shortly after the proclamation of the "more economic approach" is only one of the negative examples demonstrating an exact opposite approach.

Furthermore, the list of cases failing to demonstrate effects on the market seems to increase with the 3 recent Google decisions. The Google cases are also perceived as rather disappointing because the European Commission seems, once again, to be more concerned with protection of the competitors of the dominant undertaking, rather than pursuing an effects-based analysis of the alleged abusive conduct in question.

Indeed, it looks like Article 102 comes to protect (also) competitors, but it is unfair to say that it protects *only* competitors. It rather seems that the European Commission considers protection of competitors as an immediate, facile instrument for finding abusive conducts and not necessarily as a *per se* goal. Moreover, it is not unlikely that the enforcement policy of Article 102 is further influenced by various subsidiary goals. The Google decisions demonstrate this. Google is a big American tech company which poses some threats to the well-being of the European internal market and to the very existence of actual or potential competitors in the digital market. Issues like privacy and competition in the digital markets have been under the review of the European Commission for some time already. And the Google decisions have served their purpose, which is to demonstrate that the EU praises healthy competition on such markets, including the existence of competitors. After all, can we talk about competition where there are no more competitors left because the dominant undertaking has systematically driven these out of the market?

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## I. INTRODUCTION

The aim of the present paper is to analyze and evaluate the general purpose of Article 102 of the Treaty on the Functioning of the European Union (hereinafter “**Article 102 TFEU**” or “**Article 102**”), by considering various perspectives and theses, as well as its application in landmark cases of the European Commission and EU Courts. The analysis will be conducted by assessing the objectives of Article 102, in particular whether its scope was and is to protect *competition* or rather, as many critics assert, *competitors*.

The objectives of competition law have not always been straightforward and have still not been settled. In the absence of elaborated legal texts, it was the European Courts and the European Commission that have contributed to the development of the goals of EU competition law. According to the General Court, “*The ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers*”.<sup>1</sup> Allegedly, the main and ultimate goal of competition law and of rules on dominance abuse is the achievement of a high degree of consumer welfare in the internal market.

However, different perspectives and theories have cast a shadow over an effective application of competition rules, especially since the European Union struggles between a homogenous enforcement at the level of the Union and the application of national competition rules of the various Member States. Rules on dominance present a particular lack of homogeneity across the EU, since Member States are not precluded from enforcing stricter rules as the ones laid down by community law. Furthermore, even a unitary application at EU level of Article 102 has been proven to be difficult. Thus, possibly, Article 102 TFEU, which deals with unilateral conduct of dominant firms and the prohibition of

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<sup>1</sup> Cases T-213/01 and T-214/01 *Österreichische Postsparkasse und Bank für Arbeit und Wirtschaft v. Commission* [2006] ECR II-1601, para 115.

abusive behavior of such firms, has faced controversy and criticism the most amongst competition rules.

The recurrent complaint towards European competition policy in general, and regarding abuse of dominance in particular, has been that the European Commission and the EU Courts are rather inclined, when applying Article 102, to worry more about the protection of **competitors**, rather than with **protection of competition**. On the occasion of the controversial Microsoft Decision<sup>2</sup>, the Assistant Attorney General for Antitrust of the US Department of Justice stated that “*In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors.*”<sup>3</sup> Simply put, the European Institutions would be more interested in protecting competitors, efficient or less efficient ones. The eventual issue with such an approach lays in the fact that competition rules in the EU are not applied considering a consumer welfare goal, meaning, the scopes of competition rules would not be to enhance consumer wellbeing in the internal market.

Article 102 itself does not say much about any precise objective(s) and the EU institutions do not provide a clear guidance either.<sup>4</sup> The problem with abuse of dominance cases in the EU has previously been recognized by the European Commission, which, in its attempt to modernize the approach of Article 102, has issued in 2009 a Guidance Paper.<sup>5</sup> Supposedly, the paper attempted to react to repeated criticism that the application of Article 102 in the EU has a rather formalistic approach, without relying on a sound economic analysis, but also for protecting competitors instead of competition.<sup>6</sup> The modernization

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<sup>2</sup> Case T-201/04 *Microsoft Corp v European Commission* [2007] ECR II-03601.

<sup>3</sup> US Department of Justice, ‘Assistant Attorney General for Antitrust, Thomas O. Barnett, issues Statement on European Microsoft Decision’ (2007) <[https://www.justice.gov/archive/atr/public/press\\_releases/2007/226070.htm](https://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm)> accessed 08.08.2019.

<sup>4</sup> Pinar Akman, *The Concept of Abuse in EU Competition Law. Law and Economic Approaches*. (Hart Publishing 2012) 1.

<sup>5</sup> 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 [2009] OJ C 45 (hereinafter “**Guidance Paper**”).

<sup>6</sup> Akman (n 4) 2.



process was supposed to lead to a “more economic approach” in dominance abuse cases. The previous Discussion Paper of the European Commission from 2005, which was the starting point of the later adopted Guidance Paper, affirmed in its preamble that "with regard to *exclusionary abuses*, the objective of Article 102 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources".<sup>7</sup> Hence, from the Commission’s perspective, even the application of competition provisions on exclusionary abuses have as an immediate scope to protect competition. The term “competition” has not been however precisely defined.

While the Commission undertook the difficult mission to reshape the application of provisions on abuse of dominance towards a more economic approach, the Court of First Instance issued in 2007 its decision in the Microsoft appeal, which reinstated a rather formalistic approach of Article 102 to the detriment of a more effects-based approach: the Court affirmed that no effects-based analysis was required, even though the Commission had in fact taken into consideration such an analysis, when it conducted its assessment on Microsoft’s abusive behaviour.<sup>8</sup> Furthermore, this decision has allegedly focused on preserving competition on the market by preserving the power of other players to compete, in other words, by protecting competitors, without ultimately considering the actual or potential effects of the abusive conduct of Microsoft as regards consumers.

The debates around the purpose of Article 102 have not ceased, on the contrary, have escalated in the context of the recent discussions regarding the scope of competition policy in the digital markets and in the context of the three decisions of the Commission imposing hefty fines on Google for various abusive conducts in the internal market. In particular, Google allegedly abused its dominant position by: (i) giving illegal advantage to own

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<sup>7</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses [2005] 3.

<sup>8</sup> Case T-201/04 - *Microsoft Corp v European Commission* [2007] ECR II-03601.

comparison shopping service;<sup>9</sup> (ii) illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine;<sup>10</sup> (iii) illegal practices in online advertising.<sup>11</sup> At the time of writing, only the Google Shopping decision has been published by the Commission, therefore this decision will be analyzed in further details in Chapter V of the present paper.<sup>12</sup> What these decisions have in common is the apparent concern with preserving the possibility of other companies, competitors of Google, to compete 'on the merits' – therefore, inter alia, with protection of competitors.

Former Commissioner for Competition, Neelie Kroes, stated the following in 2005, as regards the objectives of Article 102: “*My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to void consumers harm.*”<sup>13</sup> The message seemed quite clear at the time, but recent developments in the Commission case-law had quite the opposite effect and reinstated the concern that Article 102 aims in fact to protect competitors and is not applied with a consumer welfare scope. As a comparison, Commissioner Vestager, on the occasion of announcing the third fine for Google on 20 March 2019, has asserted the following:

*“Today the Commission has fined Google €1.49 billion for illegal misuse of its dominant position [...]. Google has cemented its dominance [...] and **shielded itself from competitive pressure** by imposing anti-competitive contractual restrictions on third-party websites. This is illegal under EU antitrust rules. The misconduct **denied other companies***

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<sup>9</sup> European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (2017) <[http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm)> accessed 08.08.2019.

<sup>10</sup> European Commission, 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (2018) <[http://europa.eu/rapid/press-release\\_IP-18-4581\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4581_en.htm)> accessed 08.08.2019.

<sup>11</sup> European Commission, 'Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising' (2019) <[http://europa.eu/rapid/press-release\\_IP-19-1770\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1770_en.htm)> accessed 08.08.2019.

<sup>12</sup> *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 [2017] OJ C9/17 (hereinafter “**Google Shopping Decision**”).

<sup>13</sup> Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (Speech at the Fordham Corporate Law Institute, New York, September 2015) <[http://europa.eu/rapid/press-release\\_SPEECH-05-537\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en)> accessed 08.08.2019 .

*the possibility to compete on the merits and to innovate - and consumers the benefits of competition.*<sup>14</sup>

To the audience it may seem, at a first sight, that protection of competitors remains a strong focus of the policy on abuse of dominance in the EU.

All in all, the present thesis aims to examine the underlying purposes of Article 102. The debate revolving around the scope of article 102 has intensified recently, in the context of the Google decisions of the Commission, so the topic of the paper, although not new, remains relevant for the competition law community. One subsidiary goal of the paper, besides exploring the scope of Article 102 – protection of competition or protection of competitors, is to challenge the question itself: is the answer to the question protection of competition or protection of competitors so indispensable for a successful enforcement policy of Article 102?

## **II. COMPETITION V. COMPETITORS – WHY THE CONTROVERSY?**

### **1. Origins of the debate**

In the literature it has been argued that decisions of the Commission and of the CJEU have assimilated protection of competition in the internal market with the protection of the economic freedom of the other market participants.<sup>15</sup> This led to the idea that, when it comes to dominance abuse cases, one of the main goals of competition policy is the protection of the dominant undertaking's competitors' presence on the market.

But why is the controversy around protection of competitors so important for the internal market? As this paper will show, the initial goals of Article 102 in the European

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<sup>14</sup> European Commission, 'Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising' (2019) <[http://europa.eu/rapid/press-release\\_IP-19-1770\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1770_en.htm)> accessed 08.08.2019.

<sup>15</sup> Marta Zalewska-Glogowska, *The More Economic Approach under Article 102 TFEU. A Legal Analysis and Comparison with US Antitrust Law*. (Nomos Verlagsgesellschaft 2017) 102.

Community were market integration and protection of competition, which, at a very initial stage, could have also meant protection of competitors just for the sake of having competition and a competition structure. But with the development of the internal market and consolidation of competition rules, strict per se protection of competitors has become unnecessary, especially if it is pursued without a consumer welfare ultimate goal, or even at the expense of the well-being of consumers.

The debate was long, and criticism was frequent, that the Commission and the CJUE would rather protect competitors, instead of competition, by conserving an artificial form of rivalry in the market and that Article 102 would wrongly not focus on improving consumer welfare in the internal market.<sup>16</sup> And the criticism came not only from voices within the European Community, but also from the other side of the Atlantic. US Antitrust Law is allegedly more concerned with consumer welfare and when it comes to dominance abuse cases, it prides itself that it protects competition on the market, ultimately enhancing consumer welfare on the market, and not competitors of the dominant undertaking. The arguably two different approaches have led to frictions between the EU and US and have intensified with the application of important fines on giant American tech companies, i.e. Microsoft and Google.

The case of Microsoft is particularly relevant for emphasizing the two sides of (almost) the same coin. The computer software developer has been under the scrutiny of antitrust authorities in both the US and in the EU for a quite extended period of time, from the nineties to the mid-2000s. Whereas the Microsoft cases in the US ended only in settlements, in the EU, Microsoft was awarded a substantial fine for similar abusive conducts. The different outcomes of similar investigations had a great impact on the controversy surrounding Article 102.

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<sup>16</sup> Ackman (n 4) 52.

The main illegal conduct of Microsoft investigated in the US is related to the tying of the Internet Explorer search engine to the Microsoft Windows operating system. Computer manufacturers and users were thus precluded from removing Internet Explorer from the operating system. Furthermore, computer manufacturers were compelled to display Microsoft Internet Explorer more prominently on the desktop of the computers, as a default browser. Following a lengthy investigation, the case ended in settlements: Microsoft would no longer prohibit computer manufacturers and vendors from adding competing internet browsers to the computers.<sup>17</sup> Furthermore, Microsoft would have to disclose to other software vendors or manufacturers how its operating system (i.e. Windows) functions and interoperates with other products. This would eventually permit Microsoft's competitors to use Windows for designing and using their own programs.<sup>18</sup> However, Microsoft was still able to bundle Internet Explorer with Windows, under the condition that users can remove it later, keeping its function as a "default" browser. In the end, Microsoft did not receive any fine in the US for the abusive conducts.

The situation was different for Microsoft in the EU, where it was heavily fined by the European Commission for approximately similar practices. The Microsoft decision of the European Commission (and the subsequent case law of the ECJ) will be analyzed in further details in Chapter IV of the present paper, however some preliminary comments can be made in this Chapter, in order to emphasize the importance of the debate on the scopes of Article 102.

Microsoft was fined for the following two conducts: (i) for the "refusal to supply" information to competitors, information which would have enabled competing operating systems to function with Microsoft's operating system; (ii) for tying the Windows Media

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<sup>17</sup> *United States v. Microsoft Corp.*, 231 F.Supp.2d 144, 202 (D.D.C. 2002) 171-175.

<sup>18</sup> *Ibid* 186-195.

Player to Microsoft Windows. The latter conduct is strikingly similar with the illegal conduct of Microsoft in the US. But, as already mentioned, the investigations carried out in the EU lead to a different outcome, namely to a very high fine. Following the decision of the Commission in 2004, in spite the criticism it had drawn, the ECJ has ultimately upheld the prohibition decision and confirmed the approach of the Commission. The issue at stake was the fact that, especially as regards the conduct referring to the bundling of the Windows Media Player, consumers have ultimately not been harmed. This was later demonstrated when Windows started commercializing "Windows XP N", a version of Windows XP without the pre-installed WMP. As it turned out, computer manufacturers were not interested in purchasing such a Windows version and reportedly consumers had not a preference for Windows XP N either.<sup>19</sup> The Commission seemed at that time to only render an obsolete decision, with disregard of actual consumer preferences and to focus on protecting the competitors of Microsoft.

It could be argued however that the two Microsoft cases in the US and in the EU do not have in fact different outcomes, but just that the method of "punishment" was different. While the US accepted the settlements of Microsoft and were appeased with a "slap on the hand", likely because of political and commercial considerations, the EU was just firmer in its approach – however in both cases, Microsoft's conducts were found to be abusive and following the proceedings, Microsoft had to eventually change how it runs its business.

The controversy however persisted – the only sound conclusion that could be drawn from the European Microsoft case was that in the EU, the rules on dominance abuse are used to protect competitors, instead of competition to the ultimate benefit of consumer welfare.

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<sup>19</sup> Aoife White, Windows without media player is sales bust, Microsoft says, The Seattle Times Company, (2006), <[http://old.seattletimes.com/html/microsoft/2002951324\\_microsofteu25.html](http://old.seattletimes.com/html/microsoft/2002951324_microsofteu25.html)> accessed 08.08.2019.

## 2. Question at stake – what does "protection of competition" mean?

But what does in fact protection of competition stand for? This is arguably one core problems of the debate, because, indeed, competition as such is hard to define and the term was in fact rarely given a definition by legal texts or case law. Decisions of the Commission often refer to “competition on the merits” – for example in *Astra Zeneca v Commission*,<sup>20</sup> the ECJ stated that a dominant firm should not eliminate competitors from the market other than by means which are considered as compatible with competition on the merits.<sup>21</sup> The term "competition on the merits" has been further defined by the Commission as following: “Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.”<sup>22</sup>

According to this view, there will be no abuse of the dominant undertaking if "less efficient competitors" are driven out of the market by potentially harmful conducts, only "as efficient competitors" are to be protected by means of competition rules.

However, in practice, does protection of competition not also involve protection of the other market participants? Does competition not also suppose a large number of market participants? Surely, healthy competition without competitors on the market is rather difficult to imagine.<sup>23</sup> This paper will attempt to demonstrate that protection of competition as such cannot successfully be achieved without (some sort) of protection of competitors and the Commission is not entirely wrong when pursuing such an approach. In the end, consumer welfare, which ought to be in some's opinion the ultimate goal of competition rules, is also achieved when there is healthy rivalry on the market. Harm on the competition

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<sup>20</sup> Case T-321/05 *Astra Zeneca AB and Astra Zeneca plc v European Commission* [2010] ECR 2010 II-02805.

<sup>21</sup> Richard Whish and David Bailey, *Competition Law* (9th Edition, Oxford University Press 2018) 204.

<sup>22</sup> Case C-209/10 *Post Danmark A/S v Konkurrenseradet* [2012] para 22.

<sup>23</sup> Ackman (n 4) 44.

structure can eventually lead to harm to consumers. This idea was expressed by the ECJ in *Continental Can*: “[Article 102] is not only aimed at practices which may cause damages to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.”<sup>24</sup> Ultimately, an effective competition structure can be better achieved when there is competition as such on the market, which might involve numerous market participants.

The question also remains relevant in the context of the Digital Economy where dominance of the tech giants has become the rule and where such dominance will only continue to increase and spread to neighboring markets. An illustrative example in this regard is Alphabet, the mother company of Google, which now owns, besides Google, YouTube and Android, plus other important companies which are in the process of developing different AI systems. Or Facebook which owns WhatsApp and Instagram and has an enormous market power when it comes to personal data of consumers. Such dominant tech firms already escape “usual” competition rules and just make the application of competition law more difficult. Under such circumstances, terms like “consumer welfare” and “consumer harm” are also hard to define and to envisage, since most of the services provided are free for the consumers, as the paper will show in chapter III, subchapter 3. It is hard to tell how the future of such markets will look like, but for the present moment, such companies face little to no competition (since they have little or no competitors!). The paper will try to argue that it is not entirely wrong, to some extent, to protect competitors from abusive conducts of dominant undertakings which aim to hinder their access to the market, even without an ultimate consumer welfare purpose.

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<sup>24</sup> Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 1973 – 00215 (hereinafter “Continental Can”).



### III. OVERVIEW ON ARTICLE 102 TFEU

#### 1. Short analysis of the legal text of Article 102

Article 102 TFEU is concerned with the unilateral conduct of dominant firms, which act in an abusive manner in the internal market and lays down the following provisions:

*“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*

*(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

*(b) limiting production, markets or technical development to the prejudice of consumers;*

*(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(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.”*

The text is drafted in a sufficient explicit manner as to provide some guidance regarding abusive conducts and what the Treaty could understand under the term “abuse” and vaguely enough as to permit further developments and interpretations under case law.

For the direct purposes of this paper, the definition provided by the European Commission on its website pertaining to “Abuse of a dominant position” is also of interest. According to this definition, *“a company can restrict competition if it is in a position of strength on a given market. A dominant position is not in itself anti-competitive, but if the*

company exploits this position to **eliminate competition**, it is considered to have abused it.”<sup>25</sup> In fewer words than Article 102 has put it, the Commission has given a short outline of the meaning of abuse of dominance: there ought to be abuse when the company with the strong position eliminates competition on the market. It could therefore be interpreted, from the short definition provided by the Commission, that the core aim of abuse of dominance policy in the EU is protection of “competition”. However, surprisingly, the German version of the same webpage provides something slightly different: “[...]. Wenn das Unternehmen seine Stellung jedoch dazu benutzt, Mitbewerber auszuschalten, wird dies als Missbrauch angesehen.”<sup>26</sup> This translates as “[...], if the company uses its position to **eliminate competitors**, it is considered to have abused it” The difference lies within the meaning of abuse – while the English version refers to protection of “competition” when talking about abuse of dominance, the German version seems to understand that the aim of the abuse of dominance policy is mainly protection of “competitors”.

There are already two main issues arising from the slightly different versions of the definition of “abuse of dominance”, considering that there has been no mistake made when drafting and translating the website of the Commission: (i) why is there a difference at all?; (ii) could we understand that “competitors” is an interchangeable term for “competition” in the context of abuse of dominance? Of course, the short definition provided by the Commission is not legally binding and does not influence in any way the outcomes of the application of Article 102, however, it is a good starting point for noticing the discrepancies arising from the very understanding of the concept of abuse of dominance in the EU and the main objectives when considering anticompetitive behavior of a dominant firm as an abuse.

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<sup>25</sup> European Commission, 'Delivering for consumers: Abuse of a dominant position' (2012) <[http://ec.europa.eu/competition/consumers/abuse\\_en.html](http://ec.europa.eu/competition/consumers/abuse_en.html)> accessed 08.08.2019.

<sup>26</sup> European Commission, 'Informationen für den Verbraucher: Missbrauch einer marktbeherrschenden Stellung' (2012) <[http://ec.europa.eu/competition/consumers/abuse\\_de.html](http://ec.europa.eu/competition/consumers/abuse_de.html)> accessed 08.08.2019.

In order to answer the first question, the German Act against Restraints of Competition (“**German Competition Act**”) might provide some useful guidance.<sup>27</sup> When it comes to abuse of dominance, the German Competition Act seems to be more prominently concerned with exclusionary abuses, rather than with exploitative ones, meaning more concerned with abuses which do not present a direct consumer harm, but prevent the enfolding of competition<sup>28</sup>, and harms the competitors of the dominant undertaking.<sup>29</sup> According to Paragraph 19 of the German Competition Act, an abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services: (1) directly or indirectly *impedes another undertaking in an unfair manner* or directly or indirectly *treats another undertaking differently* from other undertakings without any objective justification; [...] (4) *refuses to allow another undertaking access* to its own networks or other infrastructure facilities against adequate consideration [...]. German competition law has developed a separate, further understanding on the meaning of abuse than the one which exists at EU level. The very first type of abuse listed in § 19 of the German Competition Act is concerned exclusively with protection of competitors on the market. This view on dominance abuse could be explained by taking into account the ordoliberal foundations of German competition law. The Competition policy of ordoliberalism allegedly focuses on protection of the market process and legitimization of economic freedom.<sup>30</sup> It also includes the right of access of other undertakings on the market, in lack of competition constraints.<sup>31</sup>

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<sup>27</sup> German Act against Restraints of Competition – ‘Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013 (BGBl. I S.1750, 3245), das zuletzt durch Artikel 10 des Gesetzes vom 12. Juli 2018 (BGBl. I S. 1151) geändert worden ist’ <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=3)> accessed 08.08.2019.

<sup>28</sup> Richard Whish and David Bailey, *Competition Law* (9th Edition, Oxford University Press 2018) 208.

<sup>29</sup> Akman (n 4) 6.

<sup>30</sup> Akman (n 4) 55.

<sup>31</sup> Whish (n 21) 201.

Article 102 has not escaped heavy criticism that it has also preserved some of the ideas and concepts of the ordoliberal policy, as some commentators have put it, especially in the light of case law of the Commission and EU Courts where competition rules have been frequently applied with much consideration as regards competitors.<sup>32</sup> However, when looking strictly at the text of Article 102, it does not suggest in any way that the drafters of the provision had preponderantly the protection of competitors in mind. Moreover, there are clear differences between the concept of abuse of dominance of the German Competition Act, which it can be argued that it has some of its roots in the ordoliberal policy and which explicitly acknowledges protection of competitors as a main goal of the German competition rules, and the concept of abuse presented in Article 102. What the European institutions have developed when it comes to the concept of abuse of dominance it's a different story that doesn't necessarily involve the precise scopes of the enforcement policy of Article 102, but rather different political goals and aims throughout the time.

The enforcement of Article 102 gets even more problematic when we consider the fact that rules on dominance abuse are not homogenous in the EU and across the Member States. According to Recital 8 of the EU Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("**Regulation 1/2003**"), Member States may still adopt and apply on their territory stricter rules on dominance abuse than the ones laid down by EU law. Moreover, such "stricter" rules may also refer to abusive conducts of dominant undertakings towards economically dependent undertakings. According to this Recital 8 of Regulation 1/2003, "Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include

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<sup>32</sup> Whish (n 21) 21.

provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings."

Article 102 is applied, as a minimum standard requirement, when trade between Member States is affected, according to Article 3 of Regulation 1/2003.<sup>33</sup> The example of Germany is illustrative also in this regard, since the German Act against Restraints of Competition provide such stricter rules. Paragraph 19 is such an example, which prohibits dominant undertakings to hamper the economic opportunities of other undertakings in the market (including the dominant's undertakings rivals).<sup>34</sup> This is a result of previous political considerations in Germany, according to which the "competitive opportunities" of small and medium-sized rival undertakings must also be protected.<sup>35</sup>

The lack of harmonization across the EU is, most likely, a result of long disagreements as regard the scopes of competition rules on dominance abuse (as they will be presented in the next sub-chapter). Member States have shared similar views on the prohibition of cartels, but not also on the meaning of abuse. While some Member States would encourage a vast unfolding of the conducts of dominant undertakings on the market, other Member States may perceive that, in order to have healthy competition on the market, small businesses ought to receive protection against potential abuses of dominant undertakings.

This is however no longer a solution for the business model of undertakings in the present, thus such lack of harmonization has been consistently criticized by numerous stakeholders. The Report on the Functioning of Regulation 1/2003 specifically acknowledged the issue and briefly presents the comments of business and legal

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<sup>33</sup> Ernst-Joachim Mestmäcker, 'The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008' in Lorenzo Federico Pace, *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar Publishing, 2011), 32.

<sup>34</sup> Ibid 33.

<sup>35</sup> Ibid.

communities on the matter: "*the divergent standards [regarding unilateral conduct] fragment business strategies that are typically formulated on a pan-European or global basis.*"<sup>36</sup> The matter is to be further assessed, however up to the present time, no amendments have been proposed or even taken into consideration.

All in all, Article 102 TFEU remains a very controversial subject and its application in the EU is rather incoherent and fragmented and the reasons for that have much to do with the clash between internal policies of members states and political developments of the European Union. With that in mind, the next chapter will offer an overview of the evolution of Article 102, as to better understand its starting point and further developments.

## **2. Overview on the evolution of Article 102**

Competition policy in the internal is strongly correlated with the development of European Union law, it has not appeared and evolved independently, and its goals are intertwined with the goals regarding the development and preservation of the internal market. *Protocol No 27*, which is part of the EU Treaties, provides that "the internal market [...] includes a system ensuring that competition is not distorted".<sup>37</sup>

From the beginning, it can be noted that EU competition law and its goals follow the goals and policies of European Union law in general. Furthermore, some commenters have observed that Article 101 and 102, as main instruments of competition policy in the EU, are not only concerned with competition matters, but also aim to implement industrial, social and political policies.<sup>38</sup> Therefore, it is only natural that the goals of competition law,

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<sup>36</sup> Communication from the Commission to the European Parliament and the Council, 'Report on the functioning of Regulation 1/20013' COM (2009) 206 final (2009), 22.

<sup>37</sup> Protocol No 27 on the internal market and competition [2008] OJ C 115.

<sup>38</sup> P Jebsen and R Steven, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union' [1996] 64 *Antitrust Law Journal* 443, 446; Ackman (n 4) 51.

including the goals of Article 102 have shifted and evolved according to the goals of the Union and the evolution of the internal market throughout time.

This chapter will provide a short overview of the origins and developments of Article 102 in the EU. It will firstly summarize the initial views of the founding fathers of the EU as regards the concepts of dominance and abuse of dominance and the initial goals of Article 102 in the internal market. Then it will briefly focus on the concept of “consumer welfare” as a primary goal of the enforcement of Article 102 in the EU. Following, it will shortly analyze the demand for a “more economic approach” in dominance abuse cases. It will be also assessed if, at any time, the enforcement of Article 102 had the aim of protection competition or competitors.

## 2.1. Initial goals of Article 102

The founding members of the European Community allegedly regarded competition policy as an instrument for promoting the European market integration.<sup>39</sup> “Efficiency” was also an important component, since the aim of the common market project was to avoid unnecessary use of resources.<sup>40</sup> Of course, debates around competition rules were integrated in the political frame of the time and of the envisaged common single market. Competition was considered not as an end in itself, but only as a means to achieve other objectives of the treaties.<sup>41</sup> The initial Articles 101 and 102 were allegedly envisaged to support the main objective of the Community, which was “progressive integration and unification of Member States.”<sup>42</sup>

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<sup>39</sup> Ariel Ezrachi, ‘EU Competition Law Goals and The Digital Economy’ [2018] Oxford Legal Studies <<http://dx.doi.org/10.2139/ssrn.3191766>> accessed 08.08.2019.

<sup>40</sup> Ackman (n 4) 76.

<sup>41</sup> Ackman (n 4) 89.

<sup>42</sup> Zalewska (n 15) 26.

As regards the concept of abuse of dominance, the initial discussions were mainly opposing two different views: on the one hand, the French perspective, which promoted that dominance should be *per se* considered as unlawful and on the other hand, the German view, according to which monopolies and oligopolies should not be prohibited, but to be subject to some control, namely to the test of abuse.<sup>43</sup> The second view eventually prevailed, so Article 102 was not construed as to prohibit a dominant position in itself, mainly due to *efficiency* reasons, since Europe at the time was in need of strong undertakings to further develop the economy of the internal market.<sup>44</sup>

However, as incipient as the debates were at that point, the problem of protecting competition v. protection of competitors had come up already at the first stages. One author has analyzed the *travaux préparatoires* of the first draft of competition rules and commented on the Note proposed by Hans von der Groeben, the president of the Common Market Group, observing that: “the intention of the drafters of the competition rules was not to prohibit the practices by which rivals are excluded out of the market: ‘exclusionary abuses’ [...] Exclusionary practices were to be combated only when they constituted ‘unfair competition’ and if ‘unfair competition’ was to be regulated in the Treaty, this was to be done separately from the rules on competition.”<sup>45</sup>

Allegedly, ‘exploitative abuse’ was the only type of abuse envisaged to be prohibited under Article 102.<sup>46</sup> Moreover, it appears that the drafters did not consider harming rivals, *i.e.* harm to competitors, as a harm to competition.<sup>47</sup> Eventually such view on dominance abuse has been overturned by the ECJ, which in its decision in *Continental Can* affirmed that

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<sup>43</sup> *ibid* 81.

<sup>44</sup> *ibid* 96.

<sup>45</sup> Ackman (n 4) 84.

<sup>46</sup> *ibid* 94.

<sup>47</sup> *ibid* 97.



Article 102 does not only apply to exploitative practices, but also to exclusionary practices which strengthen the dominant position on the market.<sup>48</sup>

As already seen in the previous chapter, the text of Article 102 does not take into consideration the specific goal of protecting competitors and the drafters of the legal provision allegedly have also not considered this at the moment of founding the EU competition rules. The main idea which prevailed was to integrate the internal market, to promote efficiency while avoiding harm on consumers. It was more the EU Courts that have expanded the initial goals of Article 102 and have made the scopes of the enforcement policy less clear. Article 102 has later been part of a larger modernization process which started around the year 2005, process which was meant to bring a “more economic approach” in dominance abuse cases, as a result of frequent criticism that the Commission was too formalistic and was not considering economic effects on the market of the possible abusive conducts when enforcing Article 102. The next subchapter will briefly cover the main points of this “modernization” process.

## 2.2. More economic approach

### 2.2.1. Introductory remarks

The Commission has attempted to change its course of action, towards a more economic approach, as a result of criticism as regards its former too formalistic approach of competition enforcement in dominance abuse cases. The more economic approach is envisaged to assess each specific case based on the anti- and pro-competitive effects of the conduct on the market (effects-based approach), rather than on the form or the “intrinsic nature” of the conduct in question (form-based approach).<sup>49</sup> For the direct purposes of this

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<sup>48</sup> Continental Can (n 24).

<sup>49</sup> Zalewska (n 15) 16.

paper, it is important to take into consideration this step of the evolution of the enforcement policy of Article 102 in the EU, since one of the issues which triggered the development towards a “more economic approach” was the frequent criticism that Article 102 was too formalistic and that it aimed to protect competitors, rather than competition, without considering an ultimate scope of consumer welfare.<sup>50</sup> Therefore, the “more economic approach” tendency should have, at least in theory, also dealt with the latter issue and shift the aim of the enforcement policy of Article 102.

Many decisions involving dominance abuse cases also show that there was little emphasis of the Commission and of the EU Courts on evaluating the effects of the conduct on the market and regarded alleged anticompetitive conducts on the market as *per se* abuses. For example, in *Michelin II*<sup>51</sup> and *Irish Sugar*<sup>52</sup> the General Court considered that, when applying Article 102, establishing anticompetitive object would be equivalent to establishing anticompetitive effect.<sup>53</sup> It has also been argued that the Commission (and ultimately also the EU Courts which have validated the Commission’s approach) does not conduct an effects-based analysis of the alleged anti-competitive conduct on the market, what could in fact be more harmful for consumers than the actual conduct in question.<sup>54</sup> For example, in loyalty rebates cases, a strict *per se* rule could in fact be harmful to consumers by denying them the benefit of lower prices.<sup>55</sup>

In order to address these concerns, the Commission has proposed a series of documents, including a Discussion Paper and a Guidance Paper. Furthermore, the Lisbon Treaties ought to have also reformed the fundamentals of Article 102. The principle according

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<sup>50</sup> *ibid* 70.

<sup>51</sup> Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR 2003 II-04071.

<sup>52</sup> Case T-228/97 *Irish Sugar plc v Commission of the European Communities* [1999] ECR 1999 II-02969.

<sup>53</sup> Ackman (n 4) 131.

<sup>54</sup> Zalewska (n 15) 71.

<sup>55</sup> *ibid* 70.

to which one of the objectives of EU law is the achievement of "undistorted competition" is no longer embedded in the text of the treaties, but as an external protocol, i.e. Protocol No.27, which should have reoriented the goals of competition law in the EU and the scopes of Article 102.

### 2.2.2. Guidance Paper of the Commission

The reform of Article 102 started with establishing an Economic Advisory Group on Competition Policy (EAGP), which, in 2005, issued a report advocating for the “an economic approach to Article 102” and arguing “in favor of an economics-based approach to Article 102, in a way similar to the reform of Article 101 and merger control.”<sup>56</sup> Moreover, it has advocated for “an effect-based rather than a form-based approach to competition policy.”<sup>57</sup> The economic approach proposed by the EAGP Report “implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes (for example, exclusive dealing, tying, etc.) but rather will be based on the assessment of the anti-competitive effects generated by business behaviour”.<sup>58</sup>

The issue with protection of competitors is also acknowledged and taken into account, being one of the main reasons for the demand of an economic effect approach of Article 102: “*An economic approach to Article 82 focuses on improved consumer welfare. In so doing, avoids confusing the protection of competition with the protection of competitors and it stresses that the ultimate yardstick of competition policy is in the satisfaction of consumer needs.*”<sup>59</sup> Therefore, the more economic approach would have as a

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<sup>56</sup> Report of the EAGP: An economic approach to Article 82 [2005], available at [http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf) (hereinafter “EAGP Report”).

<sup>57</sup> *ibid* 2.

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid*.

result (and as an aim) consumer welfare and such consumer welfare standard would avoid altogether the friction between the aims of protecting competition and protecting competitors, since the ultimate aim of Article 102 will no longer be either competition protection or competitors protection, but consumer welfare. So, the issue should be overcome by eliminating the debate from the start. The ultimate aim of Article 102 would be achieving and enhancing consumer welfare in the internal market. As the EAGP Report puts it, “the standard for assessing whether a given practice is detrimental to ‘competition’ or whether it is a legitimate tool of ‘competition’ should be derived from the effects of the practice on consumers”.<sup>60</sup> Therefore, protection of competition would only be a means to an end.<sup>61</sup> The ultimate result to be achieved is consumer welfare. Moreover, the EAGP Report clearly states that “protection of competitors” is not the objective of Article 102: *“competitors themselves should not be protected from competition by the authority’s intervention”*.<sup>62</sup>

Following the EAGP Report, in the process towards a “more economic approach”, the Commission drafted in 2005 a Discussion Paper open for public consultation, regarding exclusionary abuses.<sup>63</sup> Under this paper, when it comes to exclusionary abuses, *“the objective of Article 102 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources”*.<sup>64</sup> Therefore, the immediate scope of Article 102 would be protection of competition – and not protection of competitors, but only to achieve the result of consumer welfare. Therefore, it is consumer welfare that would be the ultimate goal of competition enforcement. The

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<sup>60</sup> EAGP Report (n 47) 8.

<sup>61</sup> Michael Albers, ‘Der more economic approach bei Verdrängungsmisbräuchen: Zum Stand der Überlegungen der Europäischen Kommission’, *Marktmacht und Missbrauch* (Nomos Verlagsgesellschaft mbH & Co KG 2007).

<sup>62</sup> EAGP Report (n 47) 9.

<sup>63</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) (hereinafter “**Discussion Paper**”).

<sup>64</sup> *ibid* 4.

Discussion Paper further adds, as regards protection of competition vs. protection of competitors, that the aim of Article 102 is: “*not to protect competitors from dominant firms’ genuine competition based on factors such as higher quality, novel products, opportune innovation or otherwise better performance, but to ensure that these competitors are also able to expand in or enter the market and compete therein on the merits, without facing competition conditions which are distorted or impaired by the dominant firm*”.<sup>65</sup>

Although the Discussion Paper clearly dismisses protection of competitors as a direct scope of Article 102, it does seem however that some protection of competitors is necessary in order to achieve competition on the market, i.e. in those cases where the dominant undertaking does not compete on the merits and where the dominant undertaking impedes the access or expansion of competitors in an abusive manner.

The “modernization” of Article 102 concluded with the adoption of the Guidance Paper in 2009 by the Commission, which, like the Discussion Paper, deals only with exclusionary abuses of dominant undertakings and aims to focus on those types of conducts which are “most harmful to consumers”.<sup>66</sup> Therefore, the emphasis of the more economic approach is also strongly related to consumer harm and consumer welfare. As regards the issue of protection of competitors, the Guidance Paper states the following: “*The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and **ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide***”.<sup>67</sup>

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<sup>65</sup> *ibid* 54.

<sup>66</sup> Guidance Paper, para 5.

<sup>67</sup> Guidance Paper, para 6.

Apparently, the initial view that protection of competitors is under no circumstances the object of Article 102 has shifted with the last Guidance Paper issued by the Commission, which acknowledges that some sort of protection of competitors is part of the overall protection of the competitive process. Abusive exclusion of competitors from the market by the dominant undertaking, by other means than competing on the merits, is to be avoided in order to achieve healthy competition on the market. However, the Commission does clarify in the same paragraph that the goal is to protect “an effective competitive process” and not simply competitors just for the sake of protection of competitors.

### 2.2.3. Protocol No. 27

Some considerations about Protocol No. 27 on the Internal Market and Competition ("**Protocol No. 27**") annexed to the European Union Treaties are also worth mentioning in the context of the more economic approach. Protocol No. 27 does not introduce new competition rules, but merely replaces the former Article 3(1)(g) of the Treaty establishing the European Community ("**EC Treaty**"). Thus, the norms providing that the internal market "includes a system ensuring that competition is not distorted" are no longer embedded in the content of the present EU Treaties but are attached as a Protocol. Although the current Protocols form an integral part of the Treaties and have the same legal value as the Articles of the Treaties, the modifications have raised some considerable debates at the time, especially regarding the ultimate scopes of competition law in the EU and scopes of rules on dominance abuse.

The principle laid down in former article 3(1)(g) has been the cornerstone of many ECJ cases that have considered that "undistorted competition" is "a fundamental objective" or "fundamental provision" of EU law.<sup>68</sup> The main idea behind the reform of the Lisbon

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<sup>68</sup> Ben Van Rompuy, 'The impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts.' (Competition Policy International Antitrust Chronical, 2011) 3.

Treaty was to eliminate the concept that competition rules represent a *per se* objective of EU law. Competition rules should, after the reform of the Lisbon Treaty, ultimately only be a means to serve the well-functioning of the internal market. The adoption of such modifications was saluted as a victory for the future of competition law and its roles in the internal market, as former French President Nicolas Sarkozy stated: "*We have achieved a major reorientation of the Union's objectives. Competition is no longer an objective of the Union or an end, but a means to the benefit of the internal market.*"<sup>69</sup>

The structural change should also have had an impact on dominance-abuse rules. Thus, if the treaties no longer provide that competition rules have as an objective the protection of undistorted competition, this should also be reflected in the enforcement policy of Article 102. The apparent shift would have left in the past the rigid *per se* approach of the Commission and of the ECJ in cases involving dominance abuse and made more room for a more economic approach, based on actual effects of potentially abusive conducts on the internal market.<sup>70</sup>

However, not all commenters have shared the same opinion and have also taken into account the fact that competition rules have never been a *per se* objective of the European Union, but, as previously seen in Chapter III.2.1., only an instrument to achieve integration of the internal market.<sup>71</sup>

Firstly, the ECJ has only equated the former Article 3(1)(g) of the EC Treaty with the new Protocol No. 27 and has not downgraded its role. For example in the case *TeliaSonera* from 2011 the ECJ held that: "*It must be observed at the outset that Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon, is*

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<sup>69</sup> Ibid 1.

<sup>70</sup> Ibid 6.

<sup>71</sup> Ibid 5.

to include a system ensuring that competition is not distorted."<sup>72</sup> The ECJ does not consider that the principle of preserving an undistorted competition is now of less importance because it is embedded in a Protocol and no longer in the text of the treaties.

Furthermore, the post-Lisbon case law on Article 102 has not changed considerably as to involve a more effects-based approach. The very recent Google Shopping Case is an illustrative example in this regard, where the Commission has reiterated once again the message of the leading case *Continental Can*, which was interpreted that it implies that EU competition rules protect the competition structure as a value in itself:<sup>73</sup> "*Article 102 of the Treaty and Article 54 of the EEA Agreement prohibit abusive practices which may cause damage to consumers directly, but also those which harm them indirectly through their **impact on an effective competition structure.***"<sup>74</sup> In line with the approach of the ECJ, the Commission also does not consider Protocol 27 to represent a fundamental change as regards the scopes of competition rules.

#### 2.2.4. Brief conclusions on the more economic approach

The “more economic approach” movement embarked on an ambitious mission to reform the enforcement policy of Article 102 in the EU. It advocated for an effects-based approach in dominance abuse cases, for a case-by-case analysis and for a consumer-welfare benchmark. By establishing a consumer welfare standard in abuse cases, the debate around protection of competitors and protection of competition would cease. The Commission also wanted to make clear that protection of competitors is not the main goal of its competition policy.

However, the actual success of this reform is yet to come, as this paper will show. One of the main issues with the “more economic approach” is the clash of the Commission’s

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<sup>72</sup> Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, 20.

<sup>73</sup> Van Rompuy (n 69) 7.

<sup>74</sup> Google Shopping Decision (n 12), 332.



approach with that of the ECJ's. The Court of Justice seems to adopt a broader view as regards the purposes of Article 102 in the internal market, besides the central-piece of consumer welfare, and considers that competition rules are not only designed to protect "immediate interests" of competitors or consumers, but also the structure of the market and therefore competition as such.<sup>75</sup> The long-awaited shift towards an effects-based approach has also not taken place with the reform of the Lisbon Treaties. Protocol No. 27 has not had the expected "success" with the Commission and the ECJ, which still rely on the principle of "undistorted competition" as a fundamental objective of EU law. Article 102 is still far from being applied based on substantial effects on the market and from focusing on promoting consumer welfare.

Chapter 3 below will analyze in depth the consumer welfare benchmark and how it is reflected in the enforcement policy of Article 102 and why ultimately the consumer welfare goal has not actually stuck with the Commission and with the EU Courts, although it has been highly promoted by the Commission as the standard for a modern, more economic approach in dominance abuse cases.

### 2.3. Consumer welfare goal

The debate revolving around the scope of Article 102 can get even more complicated when the role of "consumer welfare" is included in the analysis. "Consumer welfare" refers to "users" in a broad sense, therefore including other "business users" that are affected by the anticompetitive behaviour of the dominant firm.<sup>76</sup> Allegedly, despite the friction between protection of competition / protection of competitors, in some commenters' opinion, consumer welfare remains the ultimate goal of competition law enforcement in the EU:

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<sup>75</sup> Case C-8/08 T-Mobile Netherlands et al. v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529; Joined Cases C-501, 513, 515, 519/06 GlaxoSmithKline et al. v Commission [2009] ECR I-9291.

<sup>76</sup> European Commission 'Competition policy for the digital era' (2019) 3.

“competition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare.”<sup>77</sup> However, case-law involving Article 102, and particularly on exclusionary abuses does not frequently consider “consumer welfare” as an ultimate scope.

The Commission, on the occasion of the attempt to reform the enforcement policy of Article 102 in the EU, has issued an elaborated Guidance on its enforcement priorities (previously analyzed in Chapter 2.2.), however, only as regards to exclusionary abuses. This paper also brings up the term “consumer welfare” as being one of the goals of competition protection. This paper states the following: “*The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not **impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare**, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as **limiting quality or reducing consumer choice**.*”<sup>78</sup>

The above-cited provision compresses in a single sentence multiple idea regarding the goals of the enforcement policy of Article 102, in particular concerning exclusionary abuses. It refers to concepts such as protection of competition (“do not impair effective competition”), protection of competitors (“foreclosing competitors”) and *consumer welfare*. It is rather difficult to understand what the Commission envisaged as regards the scope of Article 102 when it drafted the provision. One author has considered that the provision could be interpreted in two ways – according to the first thesis, the Commission, in order to identify an abuse, would require an analysis on the likely effect on consumer welfare, thus consumer welfare would be the ultimate scope of Article 102.<sup>79</sup> According to the second view,

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<sup>77</sup> P Lowe, ‘Preserving and Promoting Competition: A European Response’ 2006 (2) (Summer) EC Competition Policy Newsletter 1.

<sup>78</sup> Guidance Paper, para 19.

<sup>79</sup> Ackman (n 4) 133.

consumer harm would only be an “expected consequence of foreclosing rivals in an anticompetitive way”.<sup>80</sup>

This provision, if only taken singularly and not corroborated with other provisions or decisions of the Commission and of the EU Courts, could in fact answer the question of the present thesis in a simple way: the main goal of competition enforcement is protection of “effective competition”, but when it comes to exclusionary abuses, protection of competition is also achieved when competitors are not foreclosed (thus, via protection of competitors). Poor competition on the market by means of foreclosure of competitors would result in consumer harm, just as the way Ackman has put it, an *expected outcome* of deficient competition on the market. According to this assumption, protection of competitors would only be one part of a larger goal of Article 102, which is in fact, competition protection, and consumer welfare would be the natural outcome of sound competition on the market.

The Guidance paper was drafted at a time when the Commission pursued “a more economic approach” (as seen in the previous chapter) and tried to introduce in the legal analysis of Article 102 a more effects-based analysis, focusing on conducts that are harmful to consumers: *“In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings”*.

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<sup>80</sup> *ibid.*

<sup>81</sup> Guidance Paper, 5

However, this does not mean that the Commission attempted to introduce “consumer harm” as an ultimate benchmark for finding an abuse under Article 102 when it comes to exclusionary abuses, as some authors claim.<sup>82</sup>

Decisions of the European Courts come to support this view, that indeed, the immediate goal of competition enforcement as regards Article 102 is protection of competition (or also expressed as protection of the “competitive process” or of the “competition structure”) and consumer welfare is a rather remote scope of Article 102. For example, in *Telia Sonera*, the ECJ stated that that the goal of competition rules is to prevent “**competition from being distorted** to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union”.<sup>83</sup> In the case *British Airways*, Advocate General Kokott asserted that Article 102 is envisaged not only for the protection of immediate interest of competitors or consumers, but for **the protection of the market structure** and **ultimately competition** as such.<sup>84</sup> In the same decision, the ECJ upheld the view that the requirement of *consumer harm* is unnecessary when it comes to the enforcement of Article 102.<sup>85</sup>

Consumer welfare could indeed count as a more distant aim of competition law; the immediate scope of Article 102 is rather the protection of competition. Especially as regards exclusionary abuses, meaning those type of abuses that do not damage consumers directly, in the way exploitative abuses do, the role of Article 102 is to protect the effective competition structure, therefore competition as such, not consumers or competitors.

Of course, if things were that simple, the present paper would no longer serve a purpose. Indeed, the approach of the Commission and of the EU Courts was and is

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<sup>82</sup> Zalewska (n 15) 55.

<sup>83</sup> Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00 [76].

<sup>84</sup> Opinion of Advocate General Kokott in Case C-95/04 *British Airways plc v Commission* [2007] ECR I-2331, 68.

<sup>85</sup> Case C-95/04 *British Airways plc v Commission* [2007] ECR I-2331, 106.

inconsistent and remains rather unclear, especially because the Courts also accept that “consumer welfare” is still one of the aims of Article 102.<sup>86</sup> During the process of “modernizing” Article 102, at the time when the Commission was drafting the Guidance Paper, the *Microsoft* Case was being analyzed by the General Court. *Microsoft* is the perfect example to demonstrate the incoherence that dominates the enforcement of Article 102, which is why the next chapter will analyze it in more detail. Although the Commission argued at the time for a “more economic approach” and attempted to focus more on cases which “are most harmful to consumers”, therefore on cases which present some indices of consumer harm, it seemed that in *Microsoft*, the Commission, and further on, the European Courts, did not consider an actual consumer harm and rather found a *per se* infringement of the rules on dominance abuse.

Moreover, the very recent report published by DG Comp, ‘Competition policy in the digital era’ also briefly tackles the issue of the standard of consumer harm in digital markets, stating that “even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains”.<sup>87</sup> Firstly, the report officially acknowledges that “consumer harm” is a difficult instrument for establishing an abuse, since it is not always easy to determine direct consumer harm / lack of consumer welfare gains. Secondly, the report suggests that the burden of proof as regards abuse cases should be inverted. It is not the Commission that has to demonstrate that the abusive conduct has led to less consumer welfare on the market, but it is for the dominant undertaking to show that its potential abusive conduct has led to “clearly documented consumer welfare gains”, and therefore it shall not count as an abuse. Furthermore, the report

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<sup>86</sup> Ackman (n 4) 112.

<sup>87</sup> European Commission (n 64) 3.

implies that consumer harm is one “expected outcome” of an alleged abusive conduct, as argued before, and not the ultimate goal of the Article 102 enforcement policy.<sup>88</sup>

In the long-run, it seems that one of the main concerns about the scopes of Article 102 would remain protection of competitors on the market, rather than consumer welfare. The “consumer welfare” benchmark is rather difficult to assess when there is no “classic” harm done to consumers – for example higher prices. This is a particular issue in the digital markets, recently targeted by the Commission, where it was argued that tools of competition policy must be “adapted to the new environment”.<sup>89</sup> Because consumers in the digital markets usually do not pay for services they use, it is difficult to evaluate harm done to them by eventual abuses of dominant firms.

In the Google Shopping Decision, the Commission stated that “while users do not pay a monetary consideration for the use of general search services, they contribute to the monetization of the service by providing data with each query”.<sup>90</sup> So even in the situation of “free” services, abuses can occur, however the question remains **what** is harmed by the conduct of the dominant undertaking.

One author argued that in digital markets, the parameters that must be taken in consideration for assessing the effects on competition are *quality, innovation* and *choice*.<sup>91</sup> Thus, consumer harm in digital markets could mean harm on quality, innovation or choice. This seems indeed to be an approach also pursued by the Commission. In the press release announcing the second fine imposed on Google for abusive conducts related to the Android software, the European Commissioner, Margarethe Vestager, affirmed that “Google’s practices harmed *competition* and *further innovation* in the wider mobile space, beyond

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<sup>88</sup> Ackman (n 4) 133.

<sup>89</sup> European Commission (n 64).

<sup>90</sup> Google Shopping Decision (n 12).

<sup>91</sup> Ioannis Kokkoris, ‘The Google Saga: Episode I’ (2018) 14 European Competition Journal 462 <<https://doi.org/10.1080/17441056.2018.1540457>>[464].

just internet search”.<sup>92</sup> Allegedly, there was harm on competition and harm on innovation. So, is “harm on innovation” the new form of consumer harm? It is rather difficult to tell. Google was fined also for being innovative – in the Google Shopping Decision, its comparison algorithm allegedly aimed to improve the consumer’s experience and deliver the most relevant results for their queries and was still found to have had an abusive conduct. In the same decision, consumer harm was barely considered. The conduct of Google in question aimed to favor its own comparison shopping service to the detriment of competing services – so the harm on the market was more a *harm on competitors*. Such an approach has in fact been already criticized by some authors, which claim that the Commission should have proven consumer harm which would result from the exclusion of competitors on the market.<sup>93</sup>

It seems, from the recent decisions of the Commission (not yet confirmed by the EU Courts), that consumer welfare is not the benchmark for abuse cases under Article 102 on which the Commission relies on. One reason might be that concepts like “consumer welfare” and “consumer harm” are difficult in such innovative markets. To illustrate the complexity of the subject, the German competition authority, the Bundeskartellamt has recently shown a very creative approach when fining Facebook and has found consumer harm under the form of illegal use of consumer data.<sup>94</sup> It is quite clear that the Commission still not relies on “consumer harm” as a benchmark for assessing Article 102 cases and does not consider it as the goal of competition law enforcement.

The next chapter will focus on the Microsoft Decision of the ECJ, since it is one of the most relevant decisions regarding abuse of dominance and regarding the concept of

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<sup>92</sup> European Commission (n 10).

<sup>93</sup> Kokkoris (n 81) [473].

<sup>94</sup> Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources* <[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07\\_02\\_2019\\_Facebook.html?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568)> accessed 08.08.2019.

“protection of competitors” which is also a final ruling, since the recent Google Shopping decision is, at the time of writing, only at an appeal stage at the General Court. The Microsoft decision, as already mentioned, firstly illustrates the clash between the old, formalistic approach of “per se cases” under Article 102 and the attempt to modernize Article 102 by introducing a “more economic approach” and, furthermore, it raises questions regarding the goals envisaged by the Commission and the EU Courts when it comes to the application of Article 102.

#### IV.MICROSOFT

The *Microsoft* Decision is relevant for the purposes of this paper for several reasons. Firstly, the decision has reignited the debate in the EU regarding “protection of competition” vs. “protection of competitors”. Furthermore, it has given the impression that one of the main concerns of the Commission and of the EU Courts remains the preservation of rivalry in the market by protecting competitors.

Microsoft’s conduct has been previously investigated in the US by the Federal Trade Commission (“FTC”) for unlawful tying of the “Internet Explorer” Web Browser to the “Windows 95” and the “Windows 98” operating systems.<sup>95</sup> The proceedings against Microsoft in the States have mostly ended in settlements, thus not having a great impact on antitrust law, as the European proceedings as regards the abusive conducts of Microsoft have had. On the occasion of the ECJ’s decision, upholding the Commission’s fine for Microsoft, the Assistant Attorney General for Antitrust of the US Department of Justice stated that “*In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors.*”<sup>96</sup>. He had thus asserted that EU competition law is concerned

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<sup>95</sup> United States of America, Appellee v. Microsoft Corporation, Appellant, 253 F.3d 34 (D.C. Cir. 2001).

<sup>96</sup> US Department of Justice, ‘Assistant Attorney General for Antitrust, Thomas O. Barnett, issues Statement on European Microsoft Decision’ (2007)  
<[https://www.justice.gov/archive/atr/public/press\\_releases/2007/226070.htm](https://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm)>.



with preservation of rivalry and protection of competitors and is not applied with a consumer welfare scope.

Secondly, the ruling of the ECJ was issued at a time when the Commission attempted to reform its approach on the application of Article 102, towards a “more economic approach”, based on the effects on the market of the abusive conduct of the dominant undertaking. However, the General Court adopted a more form-based approach, rather than following the guidance of the Commission for a more effects-based approach and it also rejected “consumer welfare” as a strict, ultimate benchmark of Article 102.

The Microsoft Decision deals in fact with 2 separate abusive conducts on the market of client operating systems: (1) refusal to provide computer protocols that would have permitted competing server operating systems to function with Microsoft’s client and server operating systems (a form of “refusal to supply”); (2) tying of the Windows Media Player (“WMP”) to Microsoft Windows (a “tying” conduct). Both conducts are relevant for the present assessment, since both were found to be abusive since they affected Microsoft competitors’ ability to compete on the market. As regards both illegal conducts, the Commission (and ultimately the ECJ) seemed to be more concerned with protection of competitors. The facts of the two abusive conducts will be briefly presented, together with a short legal analysis that will highlight the main issues at stake, especially the problem pertaining to the alleged main concern that the EU Courts focus on protecting competitors.

## **1. Refusal to supply**

The Microsoft case debuted with a complaint of Sun Microsystems, a competitor of Microsoft on the market for operating systems, filed with the Commission. Microsoft had refused to provide Sun Microsystems with information that would have enabled Sun’s operating system to interoperate with Microsoft Windows. In this context, Microsoft was

found to have abused its dominant position by refusing to supply its with ‘interoperability information’ and to authorize the use of such information for developing and distributing products competing with Microsoft’s product.<sup>97</sup>

Microsoft has attempted to argue that the protocols embedding such interoperability information were protected by intellectual property rights and that “ordering Microsoft such specifications and allow their use by third parties in their products would constitute an interference with Microsoft’s intellectual property rights.”<sup>98</sup> The Commission did not object to that, acknowledging that such disclosure could indeed restrict the intellectual property rights of Microsoft, however it argued that abuses of dominance can also occur in cases of refusal to license intellectual property rights.<sup>99</sup> In any case, the Commission did not find that the issue at stake was about a refusal to license source code, but a refusal to “disclose specifications [of the relevant protocols] and allow their use for the development of compatible products.”<sup>100</sup>

Moreover, Microsoft attempted to put forward an objective justification for its conduct, related to its incentives to invest in research and development, an argument that was also later used by Google (Chapter V of the present paper will provide further details). Microsoft argued that it had made significant investments in designing such protocols and their success was just a normal outcome of the investments. The obligation to supply such information with its competitors could only reduce its incentives to further invest in research and development.<sup>101</sup> In the end, Microsoft attempted to argue that the obligation to share information related to its protocols with its competitors would only harm innovation on the

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<sup>97</sup> Case T-167/08 *Microsoft Corp. v European Commission* [2012] OJ C-171/2008 [hereinafter “**FCI Microsoft Decision**”] para 192.

<sup>98</sup> *Microsoft* (Case COMP/C-3/37.792) Commission Decision 2007/53/EC [2004] OJ L32/2007 (hereinafter “**Microsoft Commission Decision**”) 190.

<sup>99</sup> *ibid* 546.

<sup>100</sup> *ibid* 572.

<sup>101</sup> FCI Microsoft Decision paras 666, 667.

market. However, the General Court has rejected such an argument, because “Microsoft merely put vague, general and theoretical arguments on this point”<sup>102</sup> and it failed to specify “the technologies and or products to which it referred.”<sup>103</sup>

Harm on innovation is regarded from two different perspectives: the perspective of Microsoft related to its own incentives to innovate and the perspective of the GC, that takes the side of Microsoft’s competitors and argues that Microsoft’s conduct (refusal to supply its competitors with information) impedes the other companies to remain competitive on the market. In this way Microsoft's conduct would harm innovation. It has been argued that the ECJ has rather cared for Microsoft *competitors'* incentives to innovate, rather than Microsoft’s attempts to put forward innovative products on the market.<sup>104</sup>

Thus, the core issue of the case had much, if not everything, to do with protection of competitors. The Court of First Instance (“CFI”), when assessing the appeal of the Commission Decision, asserted that Article 102 applies not only when there is no more competition on the market, but also when the abusive practice could eliminate competition in the future. According to the CFI, “*the expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that **[Article 102] does not apply only from the time when there is no more, or practically no more, competition on the market** [emphasis added]. If the Commission were required to wait until **competitors** were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.*”<sup>105</sup>

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<sup>102</sup> *ibid* 698.

<sup>103</sup> *ibid*.

<sup>104</sup> Ackman (n 4) 125.

<sup>105</sup> CFI Microsoft Decision 561.

Interestingly, the approach of the Court is to give “competition” and “competitors” the same, and if not precisely the same, a very similar meaning. Where there are no more competitors, where the competitors are eliminated, there is no longer “competition on the market”. Therefore, in order to preserve competition on the market, it would be necessary to also focus on competitors and to also act in cases where competitors are “endangered” by abusive conducts of the dominant undertaking. Furthermore, the CFI confirms the approach of the Commission, which also acknowledges the predictions that competition would / could be eliminated in the future as a test for finding an abuse.

Consumer harm has also (marginally) been brought up by the CFI, under the form of limitation of technical development. The CFI confirmed the Commission’s findings that Microsoft’s abusive conduct, namely the refusal to supply the relevant information to its competitors, had in fact “limited technical development to the prejudice of consumers within the meaning of Article 102.”<sup>106</sup> As regards this particular allegation, Microsoft attempted to argue, as it previously had on the occasion of the Commission’s decision, that no effects on consumer harm have been demonstrated by the Commission, but ultimately the CFI rejected the argument.<sup>107</sup> Whether it did so because it believed that the Commission had actually demonstrated effects on consumer harm or because it found an effects-analysis as not necessary remains unclear.

## **2. Tying of the WMP**

Regarding the second Article 102 infringement, Microsoft had abused its dominant position in the client operating system market by making its Microsoft software available to computer manufacturers and eventually customers *only* with the media player. In the Commission’s decision, it was argued that “pure bundling” was constituting an abuse, but not “mixed

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<sup>106</sup> CFI Microsoft Decision 648.

<sup>107</sup> *ibid.*

bundling” not, meaning that the Commission did not object to Microsoft offering Windows with and without a Media Player, but it was abusive that Microsoft offered Windows only with the Media Player included.<sup>108</sup> The conduct enabled Microsoft to become leader, with WMP, on the market for streaming media players.<sup>109</sup> The conduct is strikingly similar with the one investigated in the US, namely the tying of Internet Explorer to Windows, however the Commission's investigation did not end in settlements like in the US.

The Commission attempted on the occasion of this decision to pursue an effects-based approach and didn't categorize the tying as a per se abuse. It concluded that having pre-installed a full-fledged media player on the PC (for free), a user would feel less inclined to buy a second media player, for which it would have to pay more money since usually similar third-party media players are not offered for free.<sup>110</sup>

As regards the possible effects of the anticompetitive conduct on the market, the Commission analyzed alternative distribution channels to pre-installation of software, such as downloading, but it concluded at that time that downloading is not a channel which is as efficient as pre-installation.<sup>111</sup> It argued that guaranteed installation, i.e. pre-installation, of a media player on a user's PC is of particular importance “in a situation of limited resources and cost constrains” and that downloading alone would not allow the distribution of competing products of similar quality than that of the WMP.<sup>112</sup> It would also be more complicated and inconvenient for many users to download a further media player and therefore most users would stick to WMP just for this reason.<sup>113</sup>

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<sup>108</sup> Christian Ahlborn and David Evans, ‘The Microsoft Judgment and Its Implications for Competition Policy towards Dominant Firms in Europe’ (2008) 75 Antitrust Law Journal.

<sup>109</sup> Microsoft Commission Decision 1071.

<sup>110</sup> *ibid* 847.

<sup>111</sup> *ibid* 859.

<sup>112</sup> *ibid* 861.

<sup>113</sup> *ibid* 866, 867.

On the matter of alternative distribution channels, the Commission concluded that “the ubiquitous presence of the WMP code [by means of pre-installation] provides it with a significant competitive advantage, which is liable to have a harmful effect on the structure of competition in that market.”<sup>114</sup> Interestingly, although the decision is quite clearly addressing the issue of protection of competitors, i.e. competing media players in this particular situation, the Commission still considers that the abusive conduct of Microsoft had a harmful effect on **competition**. There are more and more indices that the Commission’s approach in *Microsoft*, ultimately confirmed by the ECJ, was to consider protection of competitors if not as equivalent to protection of competition, at least as a part of the overall goal of protection of competition.

The decision of the Commission reflects of course the state of the art and technological progress as of 2004, before the real implosion of the internet. If the decision were issued today, it is not unlikely that it would have a different outcome, if the Commission were indeed to analyze effects on the market of the abusive conduct. But of course, it cannot be expected for the Commission and for the Courts to make such an exercise of imagination and to foresee possible future effects and outcomes of a conduct on the market. Tying of Windows and the WMP may seem trivial today, but, in the view of many, including the Commission’s and ultimately the ECJ’s, it was a serious, millions-of-euros, issue at the time.

### **3. Competition law issues and lessons from the Microsoft Case**

From the viewpoint of many authors, there seems to be more than one single issue with the Microsoft decision. Surely, the main issue remains that the Commission’s and ultimately the ECJ’s primer concern when it comes to the enforcement policy of Article 102 to

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<sup>114</sup> *ibid* 878.

exclusionary abuses is that it rather aims to protect competitors on the market and ultimately, that it reflects “ordoliberal thinking”.<sup>115</sup> This particular problem is strongly linked with the lack of interest for finding consumer harm in order to establish abuse on the market.

As already mentioned, in *Microsoft* the ECJ has somehow equated protection of competition on the market with protection of competitors. To be more precise, it has suggested that the existence of more competitors on the market, that are able to compete with the dominant undertaking would lead to better competition. The incapability of Microsoft’s competitors to remain competitive on the market (or to just remain on the market) has been suggested it would lead to the outcome that effective competition would be hindered.<sup>116</sup> In this regard, the court stated, about Microsoft’s refusal to supply information about its protocols to its competitors, that “*should it be established [...] that the existing degree of interoperability does not enable developers of non-Microsoft work group server operating systems to remain viably on the market for those operating systems, it follows that the maintenance of effective competition on the market is being hindered.*”<sup>117</sup>

However, the critics asserting that in the Microsoft case the only concern was with preserving Microsoft competitors' presence on the market are not entirely correct. It is indeed important to have more actors on the market, more than just the dominant undertaking, but only because eventually there would be less *choice for consumers* on the market. Therefore, there would be a subsequent goal to protection of competitors – underneath, the enforcement policy of Article 102 would be about more choice for consumers, more innovation for consumers – ***more consumer welfare***. Perhaps it is not the correct method to equate a larger number of competitors on the market with more consumer welfare on the market, this has been however how it was proceeded in *Microsoft*, and how

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<sup>115</sup> Alhorn and Evans (n 109) 10.

<sup>116</sup> Ackman (n 4) 138.

<sup>117</sup> CFI Microsoft Decision 229.

the EU Commission has proceeded later on in the Google cases, as this paper will subsequently show.

Moreover, the Commission has indeed attempted to demonstrate the effects on the market of the abusive conducts of Microsoft, in line with its “more economic approach”. For instance, as regards the second abusive conduct of Microsoft, namely the tying of the WMP with the Windows software, the Commission conducted an analysis on the effects of the abusive conduct and found that: (1) the distribution system of Microsoft for WMP, namely via pre-installation, was more efficient than the distribution systems available for competing media players;<sup>118</sup> (2) such an advantage had as a result that content and application providers were more likely to adopt the WMP format – such conclusion being supported by “relevant market data”<sup>119</sup>; (3) in the end, due to “network effects”, the conduct would only lead to an increasing market power of the WMP.<sup>120</sup>

However, it was the ECJ that rejected the approach and held that display of proof of actual effects on the market is not necessary for finding an abuse. The court has actually rejected the Commission’s attempt to move from a per se finding of an abuse towards a more effect-based approach that would involve an assessment of harm to consumers:<sup>121</sup> As regards the tying of the WMP, the court held that: *“the Commission’s findings [...] are in themselves sufficient to establish that the fourth constituent element of abusive bundling [i.e. foreclosure of competition] is present in this case. Those findings are [...] based [...] on the nature of the impugned conduct, on the conditions of the market and on the essential features of the market and on the essential features of the relevant products.”*<sup>122</sup>.

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<sup>118</sup> Microsoft Commission Decision 843-878.

<sup>119</sup> *ibid* 944.

<sup>120</sup> *ibid* 946.

<sup>121</sup> Alhorn and Evans (n 109) 9.

<sup>122</sup> CFI Microsoft Decision 1058.



Similar approaches such as the ones in Microsoft are to be found in the recent decisions of the Commission fining Google, which will be tackled in the next chapter. In all three Google cases the main competition law issues also revolve around the scopes of Article 102 and more precisely whether Article 102 is applied with the goal of preserving rivalry in the market and thus whether the main concern is protecting actual or potential competitors of Google. Discussions about the consumer-welfare benchmark and effects-based approach have also been brought into light once again and involve even further elements and difficult situations to assess, given the context of the digital markets where Google is active on.

## V. THE GOOGLE TRILOGY

### 1. Introduction

Over a timespan of less than two years, the Commission has announced hefty fines imposed on Google for abusive conducts in several markets where it was found dominant. The decisions of the Commissions are the result of very lengthy investigation procedures, culminating with billion-euros fines. However, as jaw-dropping high the fines might seem, they are only proportionate with the size and revenues of Google. The decisions pertained to three different alleged abusive conducts of Google:

- (1) abuse of market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service (“hereinafter **Google Shopping Decision**”);<sup>123</sup>

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<sup>123</sup> European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (2017) <[http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm)> accessed 08.08.2019.

(2) abusive practices (no less than three!) imposed on Android device manufacturers and mobile network operators to strengthen dominance of Google's search engine (hereinafter "**Google Android Decision**");<sup>124</sup>

(3) abusive practices on online advertising, namely restrictive clauses in contracts with third-party websites which prevented Google's rivals to place their search adverts on such websites (hereinafter "**Google AdSense Decision**").<sup>125</sup>

At the time of writing the present paper, only the Google Shopping Decision has been published by the Commission, thus the focus of the present analysis will mainly be on this decision, which reveals the most about the Commission's approach towards Google. The other two decisions, more precisely the press releases announcing the imposition of fines, will also be briefly tackled, since they give strong indices about the most recent enforcement policy of the Commission as regards Article 102 and especially as regards the role of Article 102 in the Digital Market.

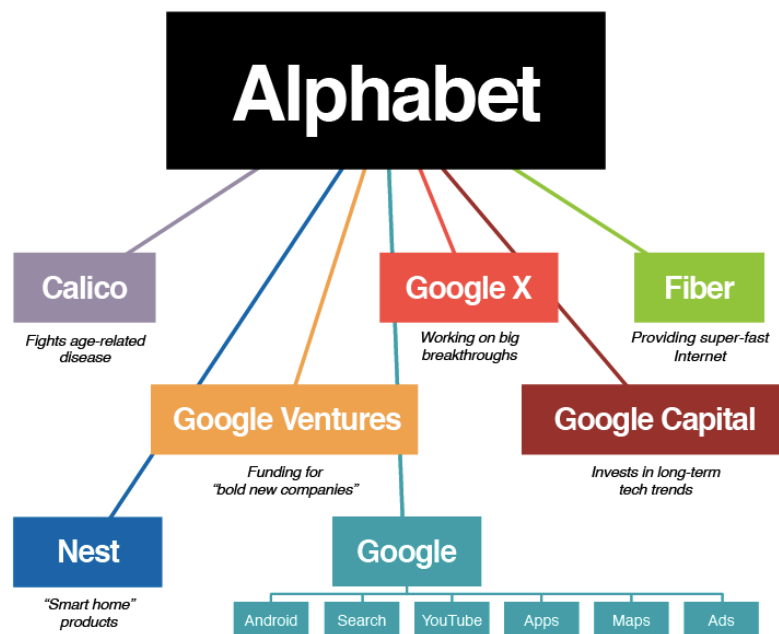
To better understand the essential aspects of the decisions rendered by the Commission, it is important first to briefly analyze the Google company and its main activities. As of 2015, Google was part of a restructuring process and was integrated into a larger group of companies, controlled by Alphabet, a holding company, with no consumer products of its own.<sup>126</sup> The graphic below shows the structure of Alphabet, i.e. the companies that are under the umbrella of Alphabet / Google:

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<sup>124</sup> European Commission, 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (2018) <[http://europa.eu/rapid/press-release\\_IP-18-4581\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4581_en.htm)> accessed 08.08.2019.

<sup>125</sup> European Commission, 'Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising' (2019) <[http://europa.eu/rapid/press-release\\_IP-19-1770\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1770_en.htm)> accessed 08.08.2019.

<sup>126</sup> David Goldman 'What is Alphabet ... in 2 minutes' (*CNN Business*, 11 August 2015) <<https://money.cnn.com/2015/08/11/technology/alphabet-in-two-minutes/index.html>> accessed 08.08.2019 .



Graphic: CNNMoney;<sup>127</sup> Source: Company filings

The main conclusion that can be drawn when seeing the graphic is that the mother company of Google, Alphabet, is very big. It has a vast presence in the Digital Market and focuses tremendously on further expanding – for instance throughout Google X or Google Ventures. The Google company per se also controls a fair share of the internet products consumers use daily, such as Google Search, Google Maps or Android. Only by owning a smartphone running on Android, the consumer is exposed to a whole range of Google products. At the time when the Commission started the investigations, Google didn't have such a strong market presence, but by taking such a long time for issuing a decision, the Commission has been witnessing the expanding process of Google, this aspect being perhaps of relevance when analyzing the Google decisions.

One further aspect worth mentioning is related to the network effects present on digital platforms such as Google. There are always two sides to every such platform. For example, for Google, that also carries out a strong advertising business, consumers that are

<sup>127</sup> 'What is Google's new Alphabet?' (CNN Tech) <<https://money.cnn.com/interactive/technology/what-is-googles-new-alphabet/index.html>> accessed 08.08.2019.

using Google products, i.e. Google Search, Google Shopping, Google Maps etc., and give away their personal data are on one side of the platform, whereas the companies searching to advertise their products via Google and interested in the data collected by Google, place themselves at other side of the platform. Network effects occur when a good's utility is a result of the number and quality of other agents using that good.<sup>128</sup> In the example mentioned above, the Google products remain of utility for the companies searching to advertise their business via Google as long as Google provides them with data which are collected from the users. If Google succeeds to attract users (i.e. to gain traffic), then advertisers are also interested in Google's products. If Google manages to attract most users, then advertisers, which help Google remain profitable to a large extent, would very likely be interested to only deal with Google and not with other search engines / comparison shopping services etc. This would eventually drive those competitors of Google out of the market, since they would not be able to finance themselves any longer, such as Google does, via advertisements. This is also why "protection of competitors" might seem as an immediate goal of the European Commission especially as regards abuses cases in digital markets, the markets where Google is active.

## **2. Google Shopping Decision**

In June 2017, the Commission announced its first decision fining Google "for abusing dominance as a search engine by giving illegal advantage to its own comparison shopping service."<sup>129</sup> Furthermore, allegedly, it did so by "demoting the comparison shopping

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<sup>128</sup> Dirk Auer and others, 'ICLE Response to the European Commission's Public Consultation on "Shaping Competition Policy in the Era of Digitalisation". Why Sound Law and Economics Should Guide Competition Policy in the Digital Economy.' International Law Center for Law&Economics <https://laweconcenter.org/resource/icle-response-to-the-european-commissions-public-consultation-on-shaping-competition-policy-in-the-era-of-digitalisation/> accessed 08.08.2019.

<sup>129</sup> European Commission (n 123)

services of competitors.”<sup>130</sup> Google was found by the Commission to be dominant in the general internet searches market, however the abusive conduct allegedly took place on a neighboring market, the “comparison shopping market.”<sup>131</sup>

The abusive conduct is somehow unusual and does not fit the regular types of exclusionary abuses (bundling, predatory pricing, margin squeeze, duty/refusal to deal, essential facilities doctrine), not even the type of exclusionary abuse found in Microsoft, namely refusal to license intellectual property rights or to provide interoperability information.<sup>132</sup> What Google did was to give an “illegal advantage” to its own Google product, the comparison shopping service, the advantage being a “prominent placement to its own comparison shopping service”, and at the same time demoting rival services.

Just like in the case of Microsoft, Google had previously also been subject of an antitrust investigation in the United States by the Federal Trade Commission. The investigation of the FTC focused on conducts carried out by Google by means of which it would have unfairly favored its own content on the Google results pages, at the same time demoting its competitors' content from the respective results.<sup>133</sup> The name given to the alleged anticompetitive practice was “search bias”.<sup>134</sup> The inquiry of the FTC focused on whether Google had purposely manipulated its “search algorithms” in order to hinder potential competition of other vertical search engines.<sup>135</sup>

The analysis of the FTC focused also on the market for shopping comparison services and on this subject the FTC observed that Google’s conducts had indeed demoted some of the competing comparison shopping services. However, it also assessed whether

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<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> Whish and Bailey (n 21) 216.

<sup>133</sup> Statement of the Federal Trade Commission Regarding Google’s Search Practices *In the Matter of Google Inc.* FTC File Number 111-0163 January 3, 2013 [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf) 1.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.* 2.

Google had as a main purpose to eliminate competition on the market or, on the contrary, whether Google's main goal was to "improve the quality of its search product and the overall user experience"<sup>136</sup> since the users would be presented with a more variety of websites on the first results pages. It concluded that in fact Google's pursuit was to innovate and improve the quality of the search results for the users and eventual negative consequences on competitors were only incidental and were only a result of "competition on the merits and of the competitive process that the law encourages."<sup>137</sup> The FTC's investigation found that Google's conducts do not represent an antitrust infringement, moreover, by means of such conducts, Google had in fact improved the quality of the Google search services.<sup>138</sup> Thus, the American approach towards Google was to analyze the alleged anticompetitive conduct primarily through the lenses of the consumer welfare benchmark and to offer primacy to consumer welfare and to innovation, as part of the larger consumer welfare goal.

The investigation carried out by the European Commission involving a similar alleged anticompetitive conduct in the European Union had a totally different outcome for Google. The abusive conduct found by the Commission involved the "favourable positioning and display, in Google's search results pages, of Google's own comparison shopping service compared to competing comparison shopping services."<sup>139</sup>

Google Shopping is a part of Google's specialised search services. When a user inserts a query, the service shows offers from various merchant websites, which in turn, users are able to subsequently compare and further to directly click on and purchase.<sup>140</sup> Google entered the market for comparison shopping services in 2002 with a product called "Froggle", however, the product was considered as not very successful at the time, including

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<sup>136</sup> *ibid.*

<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.* 3.

<sup>139</sup> Google Shopping Decision (n 12) 76.

<sup>140</sup> *ibid.* 26.

by Google. It was a free product, since merchants did not pay to be listed on Froogle as it gained its revenues by means of advertisements.<sup>141</sup> Subsequently, for marketing purposes, Google renamed its service as “Google Product Search” and ultimately as “Google Shopping” in 2012. The newly branded service also presented a different business model, where merchants pay Google when their product is clicked on by users in Google Shopping.<sup>142</sup>

The overall business model relies to a great extent on traffic in order to remain competitive as the Commission describes it in the fining decision. More traffic on the Google Shopping page would lead to more clicks and to an increased number of retailers that are interested in placing their products on the comparison shopping platform.<sup>143</sup> More traffic would also allow “machine learning effects”, thereby improving the service for users<sup>144</sup> and would also permit the comparison shopping service to “carry out experiments aimed at improving their service.”<sup>145</sup> It seems that the Commission has indeed considered the innovative drive of Google and its attempts to improve its products for a better consumer experience. But allegedly, the problem with Google Shopping was that it gained such traffic in an unfair manner, by means of increasing traffic from Google’s general search results, as opposed to the other comparison services on the market and at the same time, by unjustly decreasing traffic from Google’s general search results to competing comparison services.<sup>146</sup> It has achieved that by implementing a series of algorithms that have had two effects, as the Commission briefly describes it in the press release announcing the fine:

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<sup>141</sup> *ibid* 27.

<sup>142</sup> *ibid* 32.

<sup>143</sup> *ibid* 444-446.

<sup>144</sup> *ibid* 447.

<sup>145</sup> *ibid* 448.

<sup>146</sup> *ibid* 452.

- when a user initiates a query in the Google search engine in relation, where that query would normally trigger results provided by Google Shopping, the results of Google Shopping are displayed at the top;
- the selective criteria of some algorithms implemented on the Google’s search service have as a result that rival comparison shopping services are demoted, whereas Google shopping is not subject to such algorithms.<sup>147</sup>

It seems that the Commission has advanced a theory on a new type of abuse, that doesn’t fit the general pattern of a “usual” form, but without explicitly and rigorously defining it. It has simply stated that “Google has abused its dominance by **giving its own comparison shopping service an illegal advantage.**”<sup>148</sup> The FTC has called the similar conduct of Google as a “search bias” and some authors have used the term “self-preferencing.”<sup>149</sup> It has been argued that the Commissions would suggest that Google, as a dominant firm, would have a duty to refrain from a series of conducts, such as preferencing its own search results over those of its competitors.<sup>150</sup>

The decision has reignited debates about the enforcement policy of Article 102 by the Commission and about concepts such as “consumer welfare”, “competition on the merits”, and ultimately the criticism that Article 102 aims primarily to protect competitors of the dominant firm.

In Google, the special characteristics of the market must also be taken into account, namely that the alleged abusive behaviour of Google is conducted in a so-called *digital market*, where normal parameters that are usually taken into account for assessing effects on

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<sup>147</sup> European Commission (n 123).

<sup>148</sup> *ibid.*

<sup>149</sup> Pablo Ibanez Colombo 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2019) <<https://chillingcompetition.com/2019/04/24/self-preferencing-yet-another-epithet-in-need-of-limiting-principles/>> accessed 08.08.2019.

<sup>150</sup> Ioannis Kokkoris, ‘The Google Saga: Episode I’ (2018) 14 European Competition Journal 468 <<https://doi.org/10.1080/17441056.2018.1540457>>.



competition and on the market structure and ultimately on consumer welfare, such as price, expressed in monetary terms, or quantity, do not play a very important role. In such markets, the actual benchmarks for assessing competition effects would rather be quality of the products, innovation and choice for consumers.<sup>151</sup>

Google's decision has been criticized in the literature for many reasons, one of them being that the Commission has not properly assessed whether Google's conduct had in fact a negative impact on competition and on consumer welfare. In one author's opinion, the Commission has failed to prove that Google's alleged anticompetitive conduct lead to consumer harm which would have been a result of exclusion of competitors from the market.<sup>152</sup> Under this perspective, one of the benchmarks for assessing consumer harm in the markets where Google is active, is innovation and better quality of products to the benefit of consumers.

The issue at stake is that Google has repeatedly argued, just like in front of the FTC, that its conduct is supposed to provide consumers with better search results when using the comparison shopping service. The rationale behind the special algorithms was to present the users with the most accurate results for their queries, depending on their preferences.<sup>153</sup> In this regard, Google argues that the adjustment mechanisms were necessary in order to maintain the usefulness of the search results – *“an inability to demote low-quality sites would not serve competition or consumers [...] as it would expose Google to a flood of low-quality results [...] to the ultimate detriment of users.”*<sup>154</sup>

Moreover, the way Google organizes and structures its data and formats would aim to improve the experience for the users by *“providing users with the most relevant and useful*

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<sup>151</sup> ibid 464.

<sup>152</sup> ibid 473.

<sup>153</sup> ibid 471.

<sup>154</sup> Google Shopping Decision (n 12) 197.

*search results possible.*”<sup>155</sup> As per Google’s view, its conduct only improved the shopping comparison product for the ultimate benefit of consumers, even though one side effect was that competitors were likely to be less visible on the platform.

However, the Commission did not share the same view and did not find that the abusive conduct of Google had an objective justification or that the efficiency claims could be argued. The problem found by the Commission wasn’t related to the fact that Google had implemented some special algorithms (the so-called “adjustment mechanisms”) for its own shopping comparison service, but, in essence, it was related to the fact that Google did not apply the same mechanisms to competing comparison shopping services.<sup>156</sup> Subsequently, Google’s conduct was abusive also because it didn’t allow the positioning and display in the same way of the results from Google’s comparison service and from the competing comparison services.<sup>157</sup> Therefore, the issue at stake considered by the Commission was that the improvements of the Google shopping services and the adjustment mechanisms were added *at the expense of the competitors*, who had less access on the market only because of Google’s conduct.

As regards “consumer harm”, the Commission had a different view than the FTC had in the Google case in the US. The innovation benchmark also plays a role, but from a somehow reversed perspective. The Commission found that there is consumer harm because there was **less choice** on the market (and ultimately less innovation for consumers in the long-run). According to Commissioner Margarethe Vestager, Google’s conduct “denied European consumers a genuine choice of services and the full benefits of innovation.”<sup>158</sup> It was a similar result with the one found in *Microsoft*.

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<sup>155</sup> *ibid.*

<sup>156</sup> *ibid* 198.

<sup>157</sup> *ibid.*

<sup>158</sup> European Commission (n 123).

When it comes to the “innovation” benchmark, the view of the Commission seems to be that when there are more competitors on the market, it is more likely that ultimately there will be more innovation and more consumer welfare. It is not only about the innovative drive of a single undertaking which already has the means to remain competitive and to further grow (as already seen, Alphabet is omnipresent on the internet and already has the means and incentives to further invest in innovative products), but also about the survival of the others, which, in the future, might be able to pose competitive restraints and could also push the market boundaries further with new or better products.

Indeed, there might be a problem when the Commission does not really demonstrate the effects of the conduct as regards the foreclosure of competitors, and it only considers that it would be sufficient to demonstrate that the conduct is capable of hindering the access of competitors to the market.<sup>159</sup> However, direct consumer harm is rather difficult to establish, especially in a world where consumers are not really presented with alternatives to Google (as a search engine) and they are more likely to prefer Google products.

Thus, any assessment on “consumer harm”, which relies on benchmarks such as innovation and more qualitative products in cases of digital platforms, could only lead to ambiguous results. Google might indeed offer the best product on the market, might indeed offer the consumers the best experience when using a comparison shopping service, but how about *competition*? In the end, if it is only Google that remains on the market because its conducts have systematically pushed competitors out of the market, where is the guarantee that it will preserve its innovative drive after there is no more competition on the market? Google is surely an extreme case and its behaviour unfolds on a market where it is already by-far leader, however the arguments remain valid for similar Article 102 cases.

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<sup>159</sup> Kokkoris (n 145) 470.

Thus, it seems that in order to protect (future) competition on the market, the Commission used as an instrument in Google Shopping the protection of immediate rivalry, the protection of competitors. A similar approach is likely to occur in the Google Android and Google AdSense decisions, which the paper will further tackle briefly, although at the time of writing the present paper only the press releases announcing the imposition of further fines on Google are available.

### **3. Google Android Decision**

In July 2018 the Commission announced it had imposed a 4.3 billion euros fine on Google for illegal restrictions imposed on Android device manufacturers. Up to the present date, it is by far the highest fine imposed by the Commission in abuse of dominance cases. Android is a free mobile operating system that belongs to Google / Alphabet. “Free software” means that the source code of Android software is published online, for users to access, use or modify it. However, Google retains some type of proprietary software (i.e. software that is not “free” or “open-source”) that it licenses to mobile manufacturers. The modified versions of Android made by users are called “Android forks”. The alleged abuse consists in fact of 3 separate conducts in relation with Android<sup>160</sup>:

- i. Tying of the Google Search app and browser app to Google’s App store: in order for the Android device manufacturers to get from Google the Google App store (the Play Store), which is considered as a “must-have” app, the manufacturers must pre-install the Google search app and the “Chrome” browser app;
- ii. Illegal payments made by Google to manufacturers for exclusive pre-installation on Android devices of the Google Search app: the manufacturers were therefore less likely to pre-install other search apps on the mobile devices running on Android;

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<sup>160</sup> European Commission (n 124).

- iii. Obstruction of the Android device manufacturers to sell “mobile devices running of alternative versions of Android that were not approved by Google (so-called Android Forks).”<sup>161</sup>

According to Commissioner Margarethe Vestager, Google’s alleged illegal practices “have denied rivals the chance to innovate and compete on the merits” and furthermore, have “denied the European consumers the benefits of effective competition in the important mobile sphere.”<sup>162</sup> Apparently, the Android decision will tackle similar issues as the ones in Google Shopping, first of all protection of rivalry on the market and thus of competitors, but also “harm on innovation”, under the form of harming the innovative drive of competitors.

### 3.1. Tying of the Google Search app and of Chrome Browser

As regards the first alleged abusive conduct, it seems that it has a great degree of similarity with the abusive tying of the WMP in Microsoft. Android phones come with the already pre-installed Google search app and with pre-installed Google Chrome browser, therefore the Commission considered that users are unlikely to download other search or browser apps. Thus, a consumer would stick with the browser app already provided, even if technically it wouldn’t be costly, complicated or time-consuming for an Android phone user to do just download another search browser from the app store. Allegedly the conduct prevented competitors of Google in the market for general internet search service to compete.

Google apparently tried to bring arguments related to efficiency gains, namely that the conduct was meant to monetise its investments in Android, since Android is in fact an “open-source” software and Google publishes its source code online for free (“free” also from a pecuniary point of view). However, it seems, from the press release alone, that the

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<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

Commission rejected Google's arguments, considering that Google already achieves substantial revenues only from the Google Play Store (its app store) and furthermore because it has the possibility to collect a significant amount of data which it can further monetise via its advertising business.

A few remarks regarding the Commission's response to Google's defensive arguments might be of importance. Firstly, it is somehow peculiar that the Commission argues that a company has already achieved enough revenue and it's excessive if it tries to monetise a product that it normally offers for free. This will definitely raise a lot of debate, if the published decision will make references to such a line of thought, and criticism especially from the American homologues which might not be pleased with the fact that the Commission would impede an American company to monetise one of its successful products. Especially since the product in question benefits innovation on the market and ultimately consumers. In the same context, it will also be interesting to see if the Commission has actually carried out an analysis on the market and if it has checked whether revenues made by Google via Android or via its other flagship products can be considered as 'sufficient' in order for Google to not need the extra revenues achieved by means of the tying conduct.

Secondly, the Commission refers to the amount of personal data that Google is able to collect via its products and which are of great value for the company as it enables it to further develop its search and advertising business. This could in fact be the key to the Commission's decision and the most important argument. The fact that Google has an incredible extent of access to data of its users via multiple of its products, not only by means of Google search, but also via its other services which are pre-installed on mobile phones running on Android, i.e. Google Maps and Google Mail, might pose a great threat for the future of competition and ultimately for consumers. Such a control over personal data, which

Google can subsequently monetize by means of the advertising business could allow Google to grow and further expand and drive competitors out of several markets, since they would eventually lack the means to finance themselves, to further innovate and even to resist and compete with Google.

Furthermore, in the Press Release, the Commission states that Google's conduct has "prevented rival search engines from collecting more data from smart mobile devices, including [...] mobile location data, which helped Google to cement its dominance as a search engine."<sup>163</sup> However, whether the Commission has indeed carried out a more in-depth analysis in this regard, or whether it has just resumed itself to simply stating that Google gains significant revenue from monetizing data, remains to be seen when the decision of the Commission is published.

### 3.2. Illegal payments for the pre-installation of Google Search.

The second abusive conduct found was also in connection with the pre-installation of Google Search on Android mobile devices. The devices' manufacturers were offered significant financial incentives by Google in order to exclusively pre-install Google Search on all devices running on Android they produce. The conduct would have eventually had the same end-result, namely it would have eventually driven out competitors from the market, since, as the Commission claims in the press release, "a rival search engine would have been unable to compensate a device manufacturer or mobile network operator for a loss of the revenue share payments from Google and still make profits."<sup>164</sup>

### 3.3. Obstruction of development of alternative Android operating systems

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<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

Google has allegedly also impeded device manufacturers to install other versions of the Android operating than the one developed by Google, i.e. Android forks. Manufacturers could only install the Play Store and Google Search on the devices they produced if they didn't develop or sell devices running on alternative versions of the Google Android. Such conduct has foreclosed competitors to introduce new apps and services via the alternative Android operating systems and has ultimately led to less innovation on the market.

All in all, the Google Android Decision is revolving around two main themes: protection of competitors and harm on innovation for the consumers. Once again, it seems that the approach the Commission is taking is to consider protection of rivalry on the market as a crucial instrument in order to protect future competition on the market and to preserve consumer welfare, under the form of choice and innovation. However, new, interesting elements can also be observed. The Commission also tackles the issue that Google collects a very large amount of data from consumers which puts its competitors at a disadvantage. It remains to be seen whether the Commission will develop an actual theory around this aspect that should be taken into account in dominance abuse cases occurring on digital markets.

#### **4. Google AdSense Decision**

In short, in the most recent case of the Commission as regards Google's abusive practices, announced in March 2019, Google has abused its market dominance on the market for the brokering of online search adverts by imposing restrictive clauses in contracts with third-party websites, which prevented Google's rivals from placing their search adverts on these websites.

Google, by means of its product *AdSense for Search*, acts as an intermediary between advertisers and website owners; some websites (e.g. newspapers, travel sites etc.) have a search function embedded and when such a search function is used, the website delivers



both search results and search adverts, which appear alongside the search result. What Google did, was to include exclusivity clauses in the contracts with such websites (with publishers) which prohibited the respective publishers from placing any search adverts from competitors on their search results pages. This amounts in fact to an exclusive supply obligation. Later, the exclusivity clauses were replaced with "premium placement clauses", which requested publishers to reserve the most profitable space on their search results pages for Google's adverts. Furthermore, publishers had to reserve a minimum number for the Google adverts. Google also included clauses requiring publishers to seek written approval before making changes to the way in which rival adverts were displayed.

Again, Google's conduct was found to have prevented its rivals to compete (on the online search advertising intermediation market) and to have "harmed competition and consumers, and stifled innovation". It is however not yet clear, in lack of the published decision of the Commission, to which extent consumers were actually harmed. Ms. Vestager refers to the fact that consumers were harmed because they were denied "the benefits of competition".<sup>165</sup> This is an even more vague statement regarding the scopes of Article 102 than the ones in previous decisions involving Article 102. It does not even involve anymore elements such as "less of choice for consumers". The statement is also rather confusing, and it doesn't transmit much. The "ground-breaking" message of the Commission is that consumer harm lies in the lack of competition on the market which is caused by the conduct of the abusive conduct of the dominant undertaking.

Furthermore, the main focus of the decision seems once again to be that the competitors of Google were denied the "possibility to compete on the merits and to innovate".<sup>166</sup> Thus, protection of competitors seems indeed to be the immediate concern of

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<sup>165</sup> European Commission (n 125).

<sup>166</sup> Ibid.

the Commission, or at least the test it uses for establishing abuse. Consumer welfare as a goal remains in the background of the enforcement policy of Article 102 in the EU.

## **5. Conclusions on the Google cases**

With the Google fines, the Commission has had the opportunity to demonstrate once again its stand regarding the application of Article 102 in the EU. Many authors believe the Commission has failed to deliver credible results. Nonetheless, the Commission should be given credit for acting in a bold, courageous manner.

First, the Commission has had an opposite approach to that of the competition authority in the United States. Google had previously been under antitrust review in the US, however there its conducts were found not to hinder competition, but to bring forward innovations for the ultimate benefit of consumers. Thus, very similar conducts of Google, which were cleared in the US for not being anticompetitive, were heavily fined in the EU. The Commission must have surely been fully aware of the consequences of such an approach, since it has eventually displeased many of the parties involved. The approach in question also raises questions as to the legal certainty of competition rules in the EU. Surely companies will begin to question the rightness of the Commission in dominance abuse cases, since at a first glance, the Commission's approach lacks an effective legal basis.

Secondly, the discussion around protection of competitors and protection of competition has been deepened. The Commission's officials have apparently in vain argued throughout the time that it is competition that Article 102 aims to protect, to the ultimate benefit of increased consumer welfare on the market. The most obvious result of the three Google decisions is that the Commission is equally concerned with protection of the dominant firm's competitors and their survival on the market.

A less obvious result is that the Commission seems to be concerned with protection of competitors even at the expense of consumer welfare because the fines imposed on Google may ultimately have undesired consequences for the consumers in the internal market. For example, as regards the illegal conducts involving the Android operating system, Google has already announced its intentions to charge the device manufacturers separately for the Play Store and other Google apps (and ultimately the consumers), since it cannot longer offer it as preinstalled on Android operating devices and it claims it has to monetize somehow its investments in developing Android and keeping it as an open source software<sup>167</sup>. Having to pay extra for Google apps, the device manufacturers will probably be less incentivized to make investments in better quality products in the long run. Therefore, not only the Commission may have spent little time and effort with assessing the effects of the abusive behaviour of Google involving the Android operating system, as some critics argue, but furthermore, the Commission's decision would actually have adverse effects on innovation and on consumer welfare.

However, the Commission's approach in Google should not be considered as a rule in cases involving Article 102. There are very special circumstances in the case of Google. Google is indeed very big, almost monopolistic in many markets where it is present, faces little to no competition and the market prospects reflect that Google will continue to expand and remain the sole market actor for a long time to come. Moreover, Google acts in a so-called "digital market", where the development of special competition rules seems to be necessary and where a "consumer harm test" is difficult to implement.

Ultimately Google has also a special position since it has access to an immensely amount personal data of the consumers. Furthermore, one of the Commission's and the EU's

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<sup>167</sup> Jacob Kastrenakes and Russel Brandom 'Google app suite costs as much as \$40 per phone under new EU Android deal' (2018) <<https://www.theverge.com/2018/10/19/17999366/google-eu-android-licensing-terms>> accessed 08.08.2019.

concerns has recently been consumers' privacy, so the Commission's attempt to include this aspect in their antitrust analysis should come to no surprise. In the end, such a "power" over personal data of users would only help companies like Google (such as Apple, Amazon or Facebook) to only become bigger and drive competitors out of markets where standard parameters like price or volumes play no role. In such cases, the big tech companies seem to have an additional *special responsibility*, going beyond the responsibility as dominant firms only.

Therefore, the Commission had a very difficult task when assessing Google's conducts and it was bound to be creative, to push further the boundaries of competition rules as they are known in the present. In the absence of instruments for accurately assessing consumer harm, the Commission used a simplistic (arguably too simplistic!) parameter such as protection of competitors. It has considered that a market without competitors is a market with no competition, where one possible outcome would be consumer harm. Surely, it is a *per se* approach, for which the Commission has been many times criticized, but, as markets become more and more complex, one must think of the alternatives. Eventually, even the US antitrust authorities have acknowledged the fact that Google has indeed a considerable market power, going beyond its main function as search engine, and might pose threats to competition and eventually to the well-being of consumers and are prepared to take stricter actions in the future.<sup>168</sup>

## VI. CONCLUSIONS

The present paper aimed to tackle the question whether the goal of Article 102 TFEU is to protect competition on the market or the competitors of the dominant undertaking. Since the

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<sup>168</sup> Nick Statt 'Google is facing an imminent antitrust investigation from the US Justice Department' (2019) <<https://www.theverge.com/2019/5/31/18648052/google-us-justice-department-doj-investigation-antitrust-search>> accessed 08.08.2019.

question at stake raises quite numerous difficulties and issues which even the responsible institutions with the competition enforcement policy in the EU rarely succeed in answering, a straightforward conclusion is rather difficult to draw.

The paper has presented an extensive background on the enforcement policy of Article 102 in the EU and the main theses revolving around the debate *protection of competition v protection of competitors*, with the aim of better understanding the approach of the Commission and of the EU Courts in dominance abuse cases. It has been shown that the initial scopes of the rules on dominance abuse in the EU had little to do with such debates. Instead, Article 102 has been used as an instrument to achieve certain political goals and to further promote and strengthen the internal market. The text of Article 102 alone also says little about its possible scopes. It is the inconsistent case law of the Commission and of the EU Courts that has sparked the debate which represents the main topic of the present thesis.

The Commission has become aware of the fact that there are certain issues arising in cases involving Article 102, namely that such cases lack effects analysis, are not orientated towards achieving increased consumer welfare and seem to be more concerned with protection of competitors. Therefore, in 2005 the Commission has announced that it will pursue a more economic approach as regards Article 102 cases, meaning that the fining decisions will be based on thorough economic and market analysis. However, it seems that the results of this modernization process are yet to be delivered. The *Microsoft* decision issued shortly after the proclamation of the "more economic approach" is only one of the negative examples demonstrating an exact opposite approach in cases involving Article 102.

Furthermore, the list of cases failing to demonstrate effects on the market got longer by adding the three recent Google decisions. The Google cases are also perceived as rather disappointing because the Commission seems, once again, to be more concerned with

protection of the competitors of the dominant undertaking, rather than pursuing an effects-based analysis of the alleged abusive conduct in question.

The concern that the enforcement policy of Article 102 in the EU is not oriented towards achieving consumer welfare on the market persists as well. The Google cases fail in bringing more certainty as regards precise goals of the Commission when applying Article 102 and especially as regards whether consumer welfare is indeed a test used in dominance abuse cases. In Google Shopping, the Commission refers to the fact that the abusive conduct of Google has "deprived European consumers of the benefits of competition on the merits, namely genuine choice and innovation".<sup>169</sup> Thus, the test for abuse is not consumer harm *per se*, but it also involves elements such as choice and enhanced product innovation.

Consumer harm seems to be only the outcome of a faulty competition structure on the market and consists in lack of choice for consumers and in lack of innovation. It is not the first time that consumer harm is equated with "less choice for consumers" and this has already concerned numerous authors. An author expressed such a concern already before the Google decisions were rendered by the Commission, namely that "choice" may become a synonym for "more competitors" and this in turn would lead to a stronger focus on protection of competitors in Article 102 cases.<sup>170</sup>

The Google cases confirm such an approach. Although innovative, Google is (super) dominant and pushes its rivals out of the market which in turn results in less consumer choice. The Commission therefore seems to consider that sound competition on the market can be achieved when there is rivalry on the market and thus more choice for consumers. Furthermore, rivalry would also enhance innovation on the market. In this line

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<sup>169</sup> European Commission 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet' (2017) <[https://europa.eu/rapid/press-release\\_MEMO-17-1785\\_en.htm](https://europa.eu/rapid/press-release_MEMO-17-1785_en.htm)> accessed 08.08.2019.

<sup>170</sup> Ackman (n 4) 291.

of thought, more choice for consumers and increased innovation would result in consumer welfare on the market. But the (immediate) test for abuse is still protection of competitors.

Indeed, it looks like Article 102 comes to protect (also) competitors, but it is unfair to say that it protects *only* competitors. It rather seems that the Commission considers protection of competitors as an immediate, facile instrument for finding abusive conducts and not necessarily as a *per se* goal. The question at stake doesn't actually revolve around protection of competitors vs. protection of competition, since protection of competitors is only one part of the bigger overall goal of "protection of the market structure". In my view, after completing the research, I arrived to the conclusion that competition and competitors are interchangeable terms and are just different ways to express the main idea, that Article 102 is applied in a static manner, with clear-cut objectives, without considering market effects.

The actual dilemma remains whether Article 102 is or should be applied using the consumer harm test. Maybe the Google cases are not the most insightful ones in this regard and, although very recent, should not be perceived as a standard. This is because, when it comes to Google, a series of brand new elements related to the digital market come into the equation that have not been previously considered, such as problems involving strong network effects and data privacy of consumers.

It is my opinion that in the Google cases the Commission has eventually considered consumer welfare as a scope, although maybe not directly. The arguments in the Google Shopping case are quite vague, but the arguments in the Google Android decision should be interesting to follow. In Google Android the apparent focus on protection of competitors is even higher, but the Commission in the press release announcing the fine imposed on Google has brought up the fact that Google gathers a lot of data from the consumers which allows it to make profits via advertisements. It would be interesting to see how much the

Commission has focused on this aspect, that Google functions on a business model where consumer data is vital. Google has enormous access to consumer data, via consumer's mobile phones (i.e. via the Google Chrome Browse, Google Maps, Google Email or Youtube) and it has thus a far bigger advantage than any of its actual or potential competitors.

At this point in time, entry barriers in the markets where Google is active on are extremely high and we cannot even talk about *potential* rivalry. This is why, in my view, the Commission has considered that competition in such markets must be given an impulse to function, namely to fine Google for attempting to drive competitors out of the market, even if Google's conducts have not proven yet to bring actual harm on consumers. If it is only Google that remains on the market, what guarantee can there be that Google keeps pushing for the better products on the market or worse, that will not attempt to distort the market, business environment or even the free choice of consumers.

Many commenters agree that the enforcement of EU competition law has been too formalistic in Article 102 cases, including in the latest Google cases. Although the Commission and the EU Courts might have been formalistic in the past and might have possibly committed errors of judgement based on lack of effects analysis of the potential abusive conducts (possibly even in Microsoft with the tying conduct of the WMP), I believe that this is not the case as regards the Google decisions. Eventually, protection of competitors could remain one of the tests in dominance abuse cases. Being too strict about the boundaries of the scopes of Article 102 and trying to fit them into a particular category, the critics dismissing protection of competitors as an instrument make the same mistake as the Commission and the EU Courts have allegedly made throughout the time: they are being too formalistic.



Eventually the Google decisions have served their purpose, which is to demonstrate that in the EU healthy competition is praised, including the existence of competitors. After all, can we talk about competition where there are no more competitors left because the dominant undertaking has systematically driven these out of the market?

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