The Significance of Article 102 of the Treaty on the Functioning of the European Union in the Assessment of Distribution Contracts

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Abstract

In addition to article 101 of the TFEU, the abuse of a dominant position prohibited by article 102 of the TFEU is important for the analysis of the conformity of distribution contracts towards the UE Competition Law. The clauses of the distribution contracts often contain practices that are likely to represent an abuse of a dominant position, censured by article 102 of the TFEU. In fact, one of the types of conduct qualified by article 102, (b) of the TFEU as abuse of a dominant position is the limitation of "production, distribution or technical development to the prejudice of consumers", covering not only restrictive practices resulting from the dominant company's internal behavior, but also conducts which, by conditioning third parties, pursue such restrictive purposes. Exclusive purchase obligations and loyalty and fidelity discounts are of relevance in the distribution context. Tying also arises, frequently, in the context of distribution, and is frowned upon, according to article 102, (d) of the TFEU, if the company is using the dominant power in one market to obtain an advantage in another market, excluding rivals. Bundling and multi-product rebates, so common in distribution, are also practices that may constitute exclusionary conduct by dominant companies. The existence of abusive behavior regarding price, namely, the use of predatory pricing, excessive pricing or margin squeezes, prohibited by article 102, (a) of the TFEU is also common in distribution. The refusal to supply products and services is an abuse that may result from the clauses in distribution contracts and the way distribution networks are built, with the intention of excluding rivals, with particular emphasis when related markets are concerned. On the other hand, it can be one of the instruments to prevent parallel imports, segmenting the internal market, which will be severely censured by the CJEU. Vertical restrictions can also be considered an abuse of a dominant position if they correspond to unfair commercial conditions, expressly referred to in article 102, (a) of the TFEU as far as prices are concerned, and to a discriminatory treatment of commercial partners, through unequal conditions that put them at a disadvantage in competition, present in article 102, (c), which includes, for example, loyalty discounts. The European Union case law, in turn, has reflected the concern of the competition authorities in the analysis of abusive behavior of companies towards distributors and suppliers. In this paper, considering the relevance recognized by the Commission and European Union case law to exclusionary conduct in distribution and the correspondence of some of these abuses with vertical restraints, we will analyze exclusionary conduct, referring, whenever justified, exploitative abuses and market segmentation.

Keywords: *competition law, distribution contracts, vertical restraints, art. 102 of TFUE.*

JEL Classification: K21, K22, K33

1. Introduction

In addition to art. 101 of the Treaty on the Functioning of the European Union (TFEU), the abuse of a dominant position prohibited by art. 102 is important for the

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analysis of the conformity of distribution contracts in light of the competition law order[2].

The clauses of the distribution contracts often contain practices that are likely to represent an abuse of a dominant position, censured by art. 102 of the TFEU.

In fact, one of the types of conduct qualified by article 102, al. b) of the TFEU asabuse of a dominant position consists in the limitation of *"production, distribution or technical development to the prejudice of consumers"*, covering not only the restrictive practices resulting from the dominant company's internal behavior, but also conducts which, through the conditioning of third parties, pursue such restrictive purposes[3].

Of particular relevance in the distribution context are exclusive purchase obligations and loyalty and fidelity discounts.

Tying also arises, frequently, in the context of distribution, and is frowned upon, according to article 102, (d) of the TFEU, if the company is using the dominant power in one market to obtain an advantage in another market, excluding rivals.

Bundling and multi-product rebates, so common in distribution, are also practices that may constitute exclusionary conduct by dominant companies.

The existence of abusive behavior regarding price, namely, the use of predatory pricing, excessive pricing or margin squeezes, prohibited by article 102, (a) of the TFEU is also common in distribution.

The refusal to supply products and services is an abuse that may result from the clauses in distribution contracts and the way distribution networks are built, with the intention of excluding rivals, with particular emphasis when related markets are concerned.

On the other hand, it can be one of the instruments to prevent parallel imports, segmenting the internal market, which will be severely censured by the CJEU.

Vertical restrictions can also be considered an abuse of a dominant position if they correspond to unfair commercial conditions, expressly referred to in article 102, (a) of the TFEU as far as prices are concerned, and to a discriminatory treatment of commercial partners, through unequal conditions that put them at a disadvantage in competition, present in article 102, (c), which includes, for example, loyalty discounts.

The European Union case law, in turn, has reflected the concern of the competition authorities in the analysis of abusive behavior of companies towards distributors and suppliers[4].

These abuses have traditionally been subdivided between exploitative abuses and exclusionary abuses.

However, neither this classification nor those that have been proposed in the meantime are watertight, since the same conduct may correspond to the direct exercise by the company of market power over customers and, at the same time, have the purpose of excluding rivals, such as, for example, the refusal to contract. On the other hand, a conduct, such as the imposition of predatory pricing, may be a retaliatory conduct, punishing a firm and, at the same time, excluding rivals. Price discrimination can also, on the one hand, amount to exploitation of a group of consumers, while at the same time

[2] For this reason, this analysis of art. 102 TFEU will not consider the abuse of dominant position resulting from merger operations.

[3] Miguel Moura e Silva, *O abuso de posição dominante na nova economia,* Almedina, Coimbra, 2010, p. 145.

[4] Cfr. Judgment of the ECJ of 13.02.1979, *Hoffmann-La Roche & Co. AG v. Commission*, Proc. 85/76, ECR. 1979, p. 461.

excluding rivals in relation to the group where a lower price was charged. Also conduct aimed at segmenting the market, such as refusal to deal to prevent parallel imports or geographic price discrimination, may have the effect of excluding rivals, in relation to protected territories, and exploiting consumers by charging higher prices[5].

The relevance recognized by the Commission and European Union case law to exclusionary conduct in distribution, the correspondence of some of these abuses with the vertical restraints to which we dedicate this dissertation, lead us to structure or exposure around exclusionary conduct, referring, where justified in the context of distribution, to exploitative abuses and market segmentation[6].

It is in this context that we have decided to include an approach, albeit brief, to the most revealing aspects of this regime.

Articles 101 and 102 of the TFEU assume, in European Union competition law, the function of guardians of effective competition in the market, and it is based on this argument that their simultaneous application to restrictive agreements has been justified.[7] In this sense, article 101, number 3 of the TFEU, considering the assumptions on which it depends, cannot exempt restrictive agreements that constitute an abuse of dominant position[8]. However, an undertaking with a dominant position may, given the verification of the requirements of article 101(3) of the TFEU, be the object of an individual exemption, and article 102 of the TFEU does not apply in this situation[9].

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[5] Cfr. Alison Jones, Brenda Sufrin, *EU Competition Law*, 4th ed., Oxford University Press, Oxford, 2011, p. 364 and Joanna Goyder, Albertina Albors-Llorens, *EC competition law*, 5th edition, Oxford University Press, 2009, p. 315. This classification of exploitative and exclusionary abuses is the most common in the doctrinal treatment, and seems to be accepted by the *Commission, as results from the Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, JO C 45, 24.2.2009, pp. 7-20. Cfr. Alison Jones, Brenda Sufrin, EU *Competition Law*, cit. pp. 386 and Sandra Marco Colino, *Competition law of the EU and UK*, Oxford University, Oxford, 7th ed, 2011, pp.256 and ff.

[6] Bearing in mind that the same conduct may simultaneously fall into different categories of abuses, or example, price discrimination may represent an exploitative abuse and for market segmentation purposes, just as refusal to contract may be an exclusionary abuse and an abuse by market connection, when it is used by a dominant firm in the primary market to reduce the competition it faces in the secondary market. Cfr. Miguel Moura e Silva, *O abuso de* posição *dominante*, cit., p. 302.

[7] Judgment of the ECJ of 16.03.2000, Proc C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, cit. paragraphs 33 and 130. As we have already emphasized, the scope of Art. 101 is wider than that of Art. 102, reflecting the greater tolerance for unilateral conduct within the company as compared to external conduct evident in vertical restraints. This difference in treatment reflects the distinction between internal conduct based on property rights and external conduct based on contracts, with the benefit of competition on merits to the detriment of contractual competition. Alan J. Meese, *Monopolization, Exclusion and the Theory of the Firm*, Minn Law Rev., Vol. 89, 2005, pp. 791-792, 802-805. Thus, it is understandable that, as already mentioned, the degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102 TFEU. See Guidelines on the application of paragraph 3 of art. 81st, point 26 and *Communication on vertical guidelines*, paragraph 97 (https://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf).

[8] Guidelines on the application of paragraph 3 of art. 81st of the Treaty, point 106 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):EN:HTML), *Communication on vertical guidelines*, paragraph 127.

[9] Cfr. ECJ judgement of 14.02.1978, *United Brands Company and United Brands Continentaal BV v. Commission*, *Proc* 27/76, cit, paragraphs 39 and 90, CFI [TG] of 30.09. 2003, *Atlantic Container Line AB and Others v. Commission*, Joined Cases T-191/98, T-212/98 to T-214/98, [2003] ECR II-3275, paragraph 1456, emphasizing that since the exemption requires the verification of all the conditions for the application of Article 101(3), its individual grant affects the application of Article 101(3). In the same sense, Judgment of the CFI [GC] of 26.02.2005, *Laurent Piau v. Commission, Case* T-193/02, ECR 2005, p. II-209,

As was the case with art. 101 of the TFEU, a less formalistic approach to art. 102and more grounded in economic theory was also called for, with emphasis on the publication of *the "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*" in 2005 and the *Commission Communication - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*.

Before we analyze the most relevant abusive conducts in distribution, a brief tourthrough the requirements of abuse of dominant position is necessary.

2. The significance of article 102 of the TFEU in the assessment of distribution contracts

2.1. Abuse of dominant position. Requirements

The application of article 102 TFEU is dependent on the existence of three requirements: the effect on trade between member states, the existence of a dominant position and the abuse of that dominant position in the internal market or in a substantial part of it[10].

2.1.1. Affectation of trade between member states. Remission

Regarding the affectation of trade, we refer to the considerations made about article 101 of the TFEU, in 2.1.2

2.1.2. Dominant position

The jurisprudence has defined the dominant position as "*the position of economic strength held by an undertaking, which gives it the power to prevent effective competition from being maintained on a substantial part of the relevant market, affording it the power to behave independently of its competitors, its customers and ultimately of consumers*"[11], not being required, however, to have eliminated all

paragraphs 117 and 119. This was also already the CFI's position [TG] in its Judgment of 10.07.1990, *Tetra Pak Rausing SA v. Commission*, Proc. T-51/89, ECR [1990] p. Ibid. 1990 p. II-309, paragraph 28, although in paragraph 30 itis pointed out that this was already the case when the block exemption is at issue, given the lack of concrete verification of the assumptions of art. 101, paragraph 3 of the TFEU. However, in recent years, the simultaneous application of these two standards to vertical restraints has been questioned by the doctrine, although it has not yet been echoed by the Commission and the jurisprudence of the European Union. At the origin of this position, is the modernization of article 101 of the TFEU, in particular, the relevance recognized to market power, the pursuit of consumer welfare, in a broad sense, by both regulations andthe absence of a criterion that clearly distinguishes the scope of application of Articles 101 and 102 to vertical restraints, beyond the formal criterion of dominance. In this sense, we highlight the seminal articleby Ekatarina Rousseva, *Modernizing by eradicating: How the Commission's new approach to Article 81 EC dispenses with the need to apply Article 82 EC to vertical restraints*, C.M.L. R., Vol. 42, n.º 3, 2005, pp. 587 and following, later developed in *Rethinking exclusionary abuses in EU competition Law*, cit., pp. 431 and ff.

[10] Cfr. ECJ Judgment of 18.02. 1971, Sirena Srl v. Eda Srl and others, Proc 40-70, ECR. 1971, p. 69, paragraph15.

[11] Cfr. Judgment of the Court of 8.6.1971, Proc. 78/70, *DeutscheGrammophonc. Metro*, Colect. 1971, p. 183, where a first definition of a company in a dominant position is put forward. It is worth highlighting the

competition.[12] The independence of the firm is associated with the absence of effective competitive pressure, one indication of which is the firm's ability to increase prices above the competition level, profitably, for a significant period of time.

This notion reveals that the concept of dominant undertaking has as a precondition the determination of the relevant market, which includes the definition of the product market and the geographic market, in the same terms already explained in the analysis of article 101 of the TFEU.

Once the relevant market has been established, the next step is to determine the market share, which has been found by case law and the Commission to be a useful indication of the structure of the market and the relative importance of the various undertakings operating on it[13].

The existence of market share above 50% allows the presumption of dominance, and the shares set between 50% and 40% require a detailed analysis in which other factors are considered, such as market structure, the existence of barriers to entry,and the purchasing power of buyers[14].

As a rule, market shares below 40% are rarely associated with positions of dominance[15].

The Commission notes that experience tends to show that the higher the market share and the longer the period of time during which it is maintained, the more likely it

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contributions made by Lawyer - General Roemer for the subsequent definitions of a company in a dominant position, namely, market power and independence in the face of pressure from rivals and other economic agents. Cfr. Miguel Moura e Silva, *O abuso* de *posição dominante*, cit. p. 50. Sentence of the Court of Justice of14.02. 1978, *United Brands Company and United Brands Continental v. Commission,* Proc 27/76, cit. 461, paragraph 38, ECJ judgement of 15.12.1994, *Gøttrup-Klim and Others v Dansk Landbrugs Grovvareselskab AmbA,* Proc C-250/92, ECR 1994 p. I-05641, ECR 1994 p. I-05641. 1994 p. I-05641, paragraph 47.

[12] See Judgment of the ECJ of 14.02.1978, *United Brands Company and United Brands Continentaal BV v. Commission,* Proc 27/76, cit. paragraph 113. The Commission also accepts that it is possible to conclude that there isno actual competitive constraint, even if some actual or potential competition remains. Cf. *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraph 10.

[13] In the case law, see Case 27/76 *United Brands Company and United Brands Continental v. Commission,* judgment of 14.02.1978, paragraphs 109-110, pointing out that market share alone does not make it possible to conclude that there is a dominant position; economic power and the number of competitors mustbe considered. In the same sense, Judgment of the Court of 13.02. 1979, *Hoffmann-La Roche & Co. v. Commission,* Proc 85/76, cit, paragraphs 39-41, ECJ judgment of 3.07.1991, *AKZO v Commission, Proc* C-62/86, ECR 1991, p. I-3359, paragraph 60; CFI judgment of 12.12. 1991, *Hilti AG v Commission,* ECR 1991, p. II-1439, paragraphs 90, 91 and 92; TPT judgment of 30.01.2007, Proc T-340/03, *France Télécom v Commission,* ECR 2007, p. II-107, paragraph 100. Recently, the Commission in Case no: COMP/M.4513 concerning the merger of *Arjowiggins* and *Zanders Reflex,* paragraph 363, accepted the existence of pro-competitive effects even if a 50% market share was at stake, as David Bailey, Laura Elizabeth John (eds.), *European Community Law of Competition,* Oxford University Press, 2018, p. 184. This share has to be interpreted according to the specific conditions, the market dynamics and the degree of product differentiation.

[14] Cfr. judgment of 13.02.1979, *Hoffmann-La Roche*, cit., para. 41; ECJ judgment of 3.07.1991, *AKZO Chemie BV v. Commission,* Case C-62/86, cit., para. 60, CFI judgment of 28.02.2002, *Atlantic Container Line AB and others v. Commission, Case* T-395/94, [2002] ECR II-00875, paragraph 223. If competitors have market shares of 5%, the likelihood that a 45% market share is indicative of a dominant position increases. See Joanna Goyder, *EU distribution law*, Hart Publishing, Oxford and Portland, Oregon, 2011, p. 41.

[15] *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraph 14.

is that this is an important signal of dominanceand possible abusive conduct[16].

Market share is not the only factor to be considered in the definition of a dominant position, being necessary, even in the most extreme cases, above 50% or below 40%, to analyze all the factors that may be sufficient to limit the behavior of the company, such as the market structure, the existence of barriers to entry and the purchasing power of buyers, to which we have already referred. In fact, the existence of a dominant position usually results from the combination of several factors that, taken alone, would not necessarily be determinant[17].

The abuse of a dominant position may be individual, when one company is involved, or collective, when two or more companies are involved, provided that they appear on the market "*as a single entity and not in their individuality*"[18].

Abuse of collective dominance thus requires that two or more undertakings, economically independent, adopt on a relevant market the same course of action in the market and act to an appreciable extent independently of the other competitors, their customers and ultimately of the consumers[19].

The case law has found it necessary in determining the existence of a collective dominant position to assess the correlation factors existing between them, which may result from agreements entered into by them, for example, cooperation agreements, as well as property rights leading the undertakings to coordinate their policies in the market[20]. In some markets, the market structure may have characteristics that lead firms to consider it possible and economically reasonable, and therefore preferable, to adopt market behavior that aims to sell at higher prices on a lasting basis[21].

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[16] Cfr. Guidelines on the Commission's priorities in applying Article 82, paragraph 15 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF). In case law, Judgment of the ECJ of 16.03.2000, Compagnie Maritime Belge Transports and Dafra-Lines v. Commission, Joined cases C-395/96 P and C-396/96 P, cit, paragraph 119; Judgment of the CFI [GC] of 7.10.1999, Irish Sugar v Commission, Proc T-228/97, [1999] ECR II-2969, paragraph 186, Judgment of the GC of 1.07. 2010, AstraZeneca AB and AstraZeneca plc v Commission, Proc T-321/05, [2010] ECR II-02805, paragraph 242.

[17] Cfr. ECJ Judgments of 14.02. 1978, United Brands v Commission, Proc 27/76, cit., paras 65 and 66 and CFI [TG] of 12.12.1991, Hilti v Commission, T-30/89, cit, paragraph 90, Judgment of the GC of 1.07. 2010, AstraZeneca AB and AstraZeneca plc v Commission, Proc T-321/05, ECR 2010 p. II-02805, paragraphs 252-254, 278, even if the share is the result of the competitive advantage resulting from the first mover status in innovation in the pharmaceutical sector.

[18] Judgment of the CFI [TG] of 10.03. 1992, Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v. Commission, Joined Cases T-68/89, T-77/89 and T-78/89, ECR. 1992. p. II-01403, paragraph 31.

[19] Judgment of the Court of 31.03.1998, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, Joined Cases C-68/94 and C- 30/95, ECR [1998], p. I-01375, point 221. 1998, p. I-01375, paragraph 221.

[20] Cfr. Judgment of the Court of Justice of 16.03.2000, *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission*, Joined Cases C-395/96 P and C- 396/96 P, [2000] ECR I- 01365, paragraphs 39-45. The existence of an agreement is however, not indispensable and collective dominance may derive from other factors, in particular from the analysis of the market structure as well as from. Nor is it sufficient to conclude that they act jointly, independently of customers, competitors and consumers. Cf. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, cit., paragraphs 44.

[21] Cfr. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF), point 39. Cfr. Miguel Moura e Silva, *O abuso de* posição *dominante*, cit. pp, 106-135, 140. Cf. the ECJ Judgment of 10.07.2008, Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala), Proc C-413/06 P, ECR, 2008 p. I-04951,

The case law on oligopolistic markets requires three requirements for the existence of collective dominance, namely, first, each member of the dominant oligopoly must be able to know the conduct of the other members in order to ascertain whether or not they adopt the same course of action; second, it must be possible for the situation of tacit coordination to endure over time, i.e. there must be an incentive not to depart from the common course of action on the market; third, in order to show the existence of collective dominance sufficiently, the Commission must also show that the foreseeable reaction of actual and potential competitors and consumers does not jeopardize the outcome expected from the common course of action[22].

2.1.3. The abuse of a dominant position

The application of art. 102 requires, in addition to a dominant position, that it be shown that the conduct of the company is abusive, in the internal market or in a substantial part of it[23].

The existence of a dominant position, from the Union's legal and competition perspective, places a special responsibility on the undertaking not to infringe, by its conduct, effective and undistorted competition in the common market and is not in itself objectionable[24].

In this sense, practices are prohibited by art. 102 of the TFEU which, despite being commonplace conduct in the market and lawful when used in a competitive market, cannot be admitted because it concerns a market in which, due to the dominant position held by one of the companies, competition is restricted[25].

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points 125 and 129, in assessing this criterion, stresses that "a mechanical reaction consisting of looking at each of these criteria in isolation and ignoring the overall economic mechanism of hypothetical tacit coordination" must be avoided, and calls for an approach based on the analysis of possible plausible coordination strategies.

[22] CFI Judgment [TG] of 6.06. 2002, Airtours plc v. Commission, Proc. T-342/99, ECR 2002, p. II- 02585, point 62, CFI Judgment of 26.01. 2005, Laurent Piau v. Commission, Proc. T-193/02, ECR 2005, p. II-00209, point 111. On the difficulties posed by these criteria, see Miguel Moura e Silva, *O abuso de posição dominante*, cit., pp. 140 and ff.

[23] The requirement that the abusive conduct must cover at least a substantial part of the internal market, taking into consideration the volume of trade and the geographical area, has been considered by the doctrine to be an approximation to the de minimis rule. Cf. Joanna Goyder, *EU distribution law*, cit., p. 42.

[24] ECJ judgments of 9.11.1983, N.V. Nederlandsche Banden-Industrie-Michelin v Commission, Case 322/81, ECR. 1983, p. 03461, paragraphs 10 and 57, of 2.04.2009, France Télécom v Commission, C-202/07 P, ECR, p. I-2369, para 105 and case law cited therein. As in the case of individual dominance, the fact that there is a collective dominant position does not deserve any particular censure, the responsibility of not jeopardizing effective competition in the market by the conduct it adopts falls on the company. The same is extended to the abuse of collective dominance. Cf. Judgment of the Court of Justice of 16.03.2000, Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v. Commission, Joined cases C-395/96 P and C-396/96 P, cit., paragraph 8.

[25] Some commercial activities, while helping to improve the production or distribution of products and having a positive effect on competition in a market in equilibrium, may, if carried out by an undertaking holding a dominant position in the relevant market, restrict it. Cf. Judgment of the CFI of 23.10.2003, Van den Bergh Foods Ltd v. Commission, Proc T-65/98, cit. Arguing that this is one of the examples where the application of Article 102 is manifestly redundant, since, if an economic analysis is conducted, both lead to the same conclusions, Ekatarina Rousseva, *Modernizing by eradicating: How the Commission's new approach to Article 81 EC dispenses with the need to apply Article 82 EC to vertical restraints*, cit., pp. 634-637. In a more restrictive perspective, in which Joliet is highlighted, it was defended the necessity of the existence of a "causality link" between the dominant position and the assumed behavior, in the sense

In the absence of a definition of abuse in art. 102 of the TFEU, this concept isthe result of the jurisprudential construction of the courts of the European Union, and is *"an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened, thereby hindering the maintenance of the degree of competition still existing in the market or the development of that competition by means other than those which condition normal competition in products or services based on the transactions ofeconomic operators*"[26].

It follows from this notion that the application of Article 102 TFEU often requires an assessment of the effect of an undertaking's conduct on the structure of competition in a given market. However, this prohibition has been justified by consumer protection, covering not only practices likely to harm consumers directly, but also those which harm them through their impact on an effective structure of competition[27].

Now, based on this premise, recognized by the case law, it has been held by the Commission that the conduct may be abusive even if the dominant undertaking's conduct does not have any effect on the structure of competition, provided that it directly

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that the practices covered by art. As an argument, the literal element of art. 102, then art. 86 of the Treaty, was pointed out, when it said "abuse of a dominant position in the common market". In this perspective, the use of the economic power conferred by a dominant position would only correspond to an exploitation 2369, paragraph 105 and case law cited therein. As in the case of individual dominance, the fact that there is a collective dominant position does not deserve any particular censure, the responsibility of not jeopardizing effective competition in the market by the conduct it adopts falls on the company. The same is extended to the abuse of collective dominance. Cf. Judgment of the Court of Justice of 16.03.2000, Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v. Commission, Joined cases C-395/96 P and C-396/96 P, cit., paragraph 8.

[26] See ECJ Judgment of 13.02.1979, Hoffmann-La Roche & Co. AG v Commission, Proc 85/76, cit, paragraph 157, CFI Judgment of 9.9.2009, Clearstream Banking AG and Clearstream International SA v Commission, Proc T-301/04, ECR 2009, p II-03155, paragraph 143, GC Judgment of 1.07.2010, AstraZeneca AB and AstraZeneca plc v Commission, Proc T-321/05, cit. paragraph 493. Article 102 of the TFEU sets out, in a general clause, the prohibition of the abuse of a dominant position in the internal market or in a substantial part of it, listing, by way of example, a set of abusive practices, corresponding to (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, distribution or technical development to the prejudice of consumers; (c) applying, in relation to trading partners, unequal conditions in the case of equivalent services thereby placing them at a disadvantage in competition; (d) making the conclusion of contracts subject to acceptance, by the other contracting parties, of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The Portuguese legislator, as regards the abuse of dominant position, has followed German law, whose influence is clear to see in the consecration of the figure of abuse by refusal of access to an essential infrastructure in article 6 of Law nr. 18/2003, nr. 3, al. b), which is maintained in article 11, nr. 1, al. b) of Law nr. 19/2012. This provision is considered by Miguel Moura e Silva to be of doubtful utility, since the so-called theory of essential infrastructures is a creation of the European Commission's practice and of European jurisprudence, with sufficient support in the general clause of abuse, as well as in al. b) of article 102 of the TFEU. Miguel Moura e Silva, *As práticas restritivas da concorrência na lei n.º 19/2012 – novos desenvolvimentos*, disponível em http://www.concorrencia.pt/vPT/Noticias_Eventos/Conferencias_e_ Seminarios. On the scope of the prohibition of refusal of access to networks and infrastructures in national law, see Miguel Moura e Silva, *O abuso de posição dominante*, cit., pp 372 ff.

[27] In this sense, ECJ Judgments of 21.02.1973, Continental Can, Proc. 6/72, ECR 1973, p. 215, paragraph 26, of 16.12.1975, Suiker Unie and Others v Commission, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, ECR, p. 563, points 526 and 527, of 17.02. 2011, Konkurrensverket v. TeliaSonera Sverige AB, Proc. C-52/09, ECR 2011, p. I-00527, point 24.

harms the interests of consumers[28].

However, it is still excessive to sanction practices commonly adopted in the market without producing an effect on the structure of competition, especially when the intention does not matter for the assessment of abuse and only matters the fact of being a company with a dominant position[29].

The application of Article 102 presupposes the existence of a connection between the dominant position and the allegedly abusive conduct.

However, it is particularly difficult to establish such a link when the conduct produces effects in a market other than the dominated market, even if the two markets are related[30] , even though it is settled case law that the abusive effect may be produced in a market other than the one where the undertaking holds a dominant position[31].

The case law argues that, in the case of different but related markets, only special circumstances can justify the application of Article 102 of the TFEU to behavior on the related, non-dominated market that has effects on that same market[32].

2.2. Specific forms of abuse most relevant to distribution contracts

Of particular relevance to distribution contracts is abusive conduct with exclusionary effect, as conduct whereby the dominant firm excludes rivals by means other than competition on the merits of the goods or services they supply.[33]

The Commission, in the wake of the *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses"* published in 2005, as a central objective of art. 102 in the analysis of exclusionary conduct, the protection of competitors, but the competitive process, thus admitting that competitors who underperform for consumers in terms of price, range of supply, quality and innovation end up being excluded from the market. The commitment to ensure that dominant firms do not harm effective competition by foreclosing the market to rivals in an anticompetitive way, producing adverse effects on consumer welfare by influencing product prices, quality and variety, is, however, underlined[34].

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[28] Commission Decision of 20.07.1999, Case IV/36.888 - 1998 Football World Cup, OJ L 005 of 08/01/2000, p. 0055 - 0074, paragraph 100.

[29] It may only be relevant in the assessment of predatory pricing. Cf. Joana Goyder, *EU distribution law*, cit., p.42.

[30] In the application of Article 102 TFEU to conduct whose effects have occurred on markets other than the dominated market, the judgments of the Court of Justice of 6.03.1974, Istituto Chemioterapico Italiano and Commercial Solvents v. Commission, cit. 1996, p. I-05951, para 27, of 3.07.1991, AKZO v Commission, C-62/86, paras 45 and 63, and CFI [TG] judgment of 1.04.1993, BPB Industries Plc and British Gypsum Ltd v Commission, T-65/89, ECR II-389, paragraphs 92, 93 and 96.

[31] The importance of defining the relevant market when related markets are involved is illustrated by the recent TG judgment of 15.12.2010, Confédération européenne des associations d'horlogers- réparateurs (CEAHR) v Commission, Case T-427/08, ECR 2010, p. II-05865.

[32] Cfr. ECJ Judgment of 14.11.1996, Tetra Pak International SA v. Commission, Case C-333/94, paras 29-31.

[33] See *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraph 6.

[34] Ibid, paragraph 6. The concept of "consumers" for the purposes of applying Art. 102 to abusive exclusionary conduct encompasses all direct and indirect users of the products affected by the conduct, including intermediate producers using the goods as an input, as well as distributors and final consumers of both the immediate product and products made available by intermediate producers. Consumer detriment

The notion of "*anticompetitive* foreclosure" corresponds to situations where the dominant firm's conduct restricts or prevents actual or potential competitors from effectively gaining access to supplies or markets, thereby enabling it to profitably increase the price it charges consumers[35].

Along with the anticompetitive foreclosure of the market comes consumer harm[36].

This approach focuses on the exclusionary effects on competition, as opposed to the previous approach, where the focus in condemning exclusionary abuses was on the form of the conduct[37].

In finding that an allegedly abusive conduct leads to anticompetitive foreclosure, the Commission will look at a broad range of factors such as the position of the dominant

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can be established both based on qualitative evidence and, where possible, quantitative evidence, either at the intermediate level or at the level of final consumers, or at both levels. Cf. *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, point 19, footnote 15.

[35] The criterion chosen by the Commission to measure the foreclosure effect is the equally efficient rival exclusion test, proposed by Richard A. Posner, *Antitrust law*, 2nd ed., 2001, University of Chicago Press, pp. 193 and ff. Price increases, corresponds for the purposes of the Guideline on Commission priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 11, to the power to maintain prices above the competitive level, being prices, productivity, innovation, variety, or quality of goods and services, to the advantage of the dominant firm and to the detriment of consumers.

[36] Cfr. Alison Jones, Brenda Sufrin, *EU Competition Law*, cit., p. 378.

[37] The DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, cit., points 4, 54 and 55, was a forerunner in the defense of an effects - based analysis in the application of Article 102 of the TFEU, associating the exclusionary conduct to the market foreclosure effect, which, while on the one hand, was welcomed by all those who called for the abandonment of formalism, was criticized for not having support in European Union case law, characterized by a formal analysis, which disregarded the analysis of the effects of the conduct. Cf. Ekaterina Rousseva, *Rethinking exclusionary abuses in EU Competition Law*, Hart Publishing, Oxford and Portland, Oregon, 2010, p. 362. It is also assumed as an objective of art. 102 of the TFEU the protection of competition with a view to the development of consumer welfare and the efficient allocation of resources. Liza Lovdahl Gormsen, *A principled approach to abuse of dominance in European Competition Law*, Cambridge University Press, 2010, pp.157-158. In the *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, cit. a large part of the proposals of the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses are accepted, even if in a more flexible and less detailed form. As far as orientation towards consumer welfare is concerned, the title alluding to the Commission's priorities, which was criticized by legal scholars (Ekaterina Rousseva, *Rethinking exclusionary abuses in EU competition Law*, cit, p. 362) was understood as a means to mitigate the affirmation of the welfare of the consumer as an objective to guide the application of art. 102, thus avoiding the conflict with the European legal and competition order, especially the jurisprudence. Liza Lovdahl Gormsen, *A principled approach to abuse of dominance in European competition law*, cit., pp.157-159. This Commission guidance has the potential to have laid the foundations of the effects-based approach to article 102 of the TFEU, with the consequent decrease in legal certainty and increase in administrative costs, cf. Ekaterina Rousseva, *Rethinking exclusionary abuses in EU competition law*, p. 364. On the negative impact on legal certainty, cf. Martin Andreas Gravengaard and Niels Kjærsgaard, *The EU Commission guidance on exclusionary abuse of dominance-and its consequences in practice*, ECLR, 2010, p. 286. However, this approach does not generate unanimity, with Liza Lovdahl Gormsen, *Why the European Commission's enforcement priorities on article 82 EC should be withdrawn*, E.C.L.R., 2010, p. 46; Liza Lovdahl Gormsen, *A principled approach to abuse of dominance in European competition law*, cit. pp.59-83.

undertaking[38], the conditions on the relevant market, including barriers to entry and expansion, the existence of economies of scale and/or scope and network effects, the position of the dominant undertaking's competitors, enabling it to assess the degree of effective competition, including the realistic, effective and timely strategies that competitors are likely to deploy; the position of the customers or input suppliers, in particular whether they are targeted by the conduct which may have significance for the entry or expansion of competitors, thereby increasing the likelihood of anticompetitive foreclosure, consideration should also be given to any strategies available to customers or input suppliers which could help counteract the conduct of the dominant undertaking[39]; the extent of the alleged abusive behavior[40]; any evidence of actual market closure[41] and other direct evidence ofany exclusion strategy, which includes internal documents[42].

Section 102, unlike section 101, does not contain a provision identical to section 101(3), with the consequence that once the conduct is found to be abusive, it cannot be exempted.

The jurisprudence, however, began early on to admit the possibility that the company may present an objective and proportional justification for the abusive practice, allowing the application of art. 102 to be excluded[43].

Here, too, health or safety reasons related to the nature of the product in question are admitted as justification, with the proviso that it is for the public authorities to define

[38] In general, the stronger the dominant position, the greater the likelihood that behavior protecting that position will lead to anti-competitive market foreclosure. Cfr *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraph 20.

[39] See GC judgment of 1.07. 2010, AstraZeneca AB and AstraZeneca plc v Commission, Case T-321/05 ECR. 2010 p. II-02805, point 268, in which AZ, as holder of the first marketing authorizations, managed to implement a strategy of excluding competing generic products in view of the inability of public authorities to influence the entry of less expensive generic products in the case of customers, those who react best to offers from alternative suppliers, those who represent a particular means of product distribution or enjoy a suitable location for a new company or those who exert greater influence on the behavior of other customers. Regarding suppliers of means of production, those with whom the company in a dominant position has concluded exclusive supply agreements are of particular importance, as they may be the most likely to respond to the demand of customers who are competitors of the company in a dominant position, in a market downstream, or to produce a specific type of product or benefit from locations that are suitable for new businesses. See *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraph 20.

[40] In general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 20.

[41] For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may be increased or its decline may be delayed. For similar reasons, actual competitors may have been marginalized or may have exited the market or attempts by potential competitors to enter the market may have failed. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 20.

[42] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 20.

[43] This does not mean that, since the agreement involves a dominant company, if the conditions of article 101, n.º 3 of the TFEU are met, the agreement benefits from exemption, and article 102 is not applicable. In this sense, Judgment of the ECJ of 18.02.1971, Sirena Srl v. Eda Srl and others, Proc. 40-70, ECR 1971, p 00069, paragraph 17.

and enforce health and safety standards, and it is not for the dominant company to take measures on its own initiative to exclude products that it considers, rightly or wrongly, dangerous or inferior to its own product[44].

The dominant undertaking may also justify conduct that leads to foreclosure of competitors, invoking efficiencies that are sufficient to outweigh the anti-competitive effects, without harming consumers. In this respect, the burden of proving both the objective justification for the conduct and the efficiencies falls on the undertaking, and it is for the Commission to make the final assessment of whether or not the conduct in question is objectively necessary and whether, on the basis of the analysis of theapparent anticompetitive effects and the efficiencies claimed or demonstrated, it is likely to result in consumer harm[45].

Efficiencies claimed by the dominant undertaking where exclusionary abuses areat stake, according to the Commission*'s Guidance on the Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, must be backed by evidence, with a sufficient degree of probability, that the following cumulative requirements are fulfilled: they must depend on the conduct, where technical improvements in the quality of goods or a reduction in the cost of production or distribution are included; they must be indispensable, there being no less anti-competitive alternatives that would produce the same efficiency gains; they must outweigh any possible negative effect on competition and consumer welfare in the affected markets and, finally, the conduct cannot eliminate effective competition by eliminating all or part of the actual or potential sources of competition[46].

We will now look at some specific forms of exclusionary abuses that have a closer connection with the scope of our dissertation, complementing this examination with reference to abusive practices with other effects, whenever necessary.

2.2.1. Exclusive agreements

Exclusive purchase obligation and rebate arrangements, which fall within the broad notion of exclusive dealing used by the Commission, can be used by an undertaking to foreclose competing undertakings, or at least limit the access and expansion of competitors in the market where it is dominant. The anti-competitive effect in some situations, as already mentioned in relation to vertical restraints, results from the cumulative effect derived from the application of this obligation to many buyers.

In the exclusive purchasing obligation, relevant for the application of article 102 TFEU, the customer undertakes to purchase, on a given market, the products

[44] This proportionality test is clear from the ECJ's ruling of 14.02.1978, United Brands Company and United Brands Continental BV v. Commission ("Bananas Chiquita"), Proc 27/76, point 189, in admitting the company's right to take action to protect its interests as far as is reasonable. The safety reasons put forward by Hilti for tying the marketing of cartridge tapes to its nails, calling into question the products of its competitors, were rejected.

[45] The company, because it is naturally better placed than the Commission to disclose its existence and prove its relevance, must raise the objective justification during the administrative procedure and provide arguments and evidence in that regard. Cf. Judgment of the ECJ of 15.03.2007, British Airways plc v Commission of the European Communities. C-95/04 P, ECR p. I- 2331, point 69 and CFI judgment of 17.09.2007, Microsoft Corp. v. Commission, Proc T-201/04. ECR 2007, p II-03601, point 1144.

[46] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 30.

exclusively or to a large extent only from a dominant undertaking.

The anticompetitive effects of an exclusive purchasing obligation used by a dominant undertaking are most likely to be felt by potential competitors that are unable to enter the market, or by competitors that are not in a position to compete for the full supply of the customers, either because the dominant undertaking's products are established on the market with final consumers or because a significant part of demand can only be provided for by the dominant supplier.

In addition, the length of the duration of the exclusive purchasing obligation is relevant to the assessment of the validity of the obligation, since it may make it difficult toswitch suppliers, even if the market is competitive, and the longer the duration of the obligation, the more likely there is a foreclosure effect[47].

It is in this context that case law tends to reconcile the exclusive purchase obligation to an abuse of a dominant position, extending the same treatment to loyalty rebates recognized by the producer in return for the exclusive purchase obligation, regardless of whether they are accompanied by an exclusivity pact[48].

The case law distinguishes these discounts, which it deduces to an abuse of a dominant position, from quantity discounts. The latter, which are linked exclusively to volume of purchases from a dominant producer, are usually considered lawful because they are based on efficiency gains and economies of scale[49].

However, fidelity rebates will also be allowed if they have an objective justification and if the dominant company shows that they are indispensable to produce efficiency gains that benefit the consumer[50].

The Commission in its *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* adopts a distinct classification, creating a broader category, conditional rebates, designed to reward customers for specific purchasing behaviour over a period

[47] However, if the dominant undertaking is a trading partner of all or a significant part of the customers, even a short-term obligation to purchase may have the effect of anticompetitive foreclosure. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 36.

[48] See Judgment of the Court of Justice in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 518; Judgment of the Court of Justice in Case 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR 85/76, paragraphs 89 and 90. In both cases, rebates were dependent on exclusive sourcing from the dominant undertaking. In Hoffmann-La Roche, exclusivity obligations were also envisaged and were considered not only to restrict freedom of choice but also to eliminate almost entirely the possibility of rivals being able to sell to Roche's customers. Finally, it was also said to discriminate in violation of Article 102(c), then Article 86 of the Treaty, by subjecting purchasers to different prices depending on whether they bought from Roche or from rivals. Judgment of the General Court of 9.09.2010, Tomra Systems ASA and Others v European Commission, Proc T- 155/06, ECR 2010, p. II-04361, paragraphs 295-301, in the wake of the Van den Bergh Foods judgment against the Commission, cited above paragraphs 84 and 160, reconfirms the signing of 49 agreements between 1998 and 2002 between Tomra and a number of supermarket chains, some of which formally qualified as exclusive agreements because they contained exclusivity clauses, while others contained such de facto clauses based on quantity commitments and individual retroactive rebate schemes, to an abuse of a dominant position with the effect of foreclosing the market tonew entrants while at the same time weakening and ultimately eliminating competition.

[49] Judgment of the ECJ of 9.11. 1983, N.V. Nederlandsche Banden-Industrie-Michelin v. Commission, Case 322/81, cit., paragraph 71.

[50] GC Judgment of 17.12. 2003, British Airways Plc v. Commission, Proc. T-219/99, [2003] ECR II-05917, paragraphs 246 and 247.

of time in relation to a certain threshold. Within this category are progressive discounts, corresponding to the discount on products purchased above the fixed threshold, while retroactive discounts are granted on all purchases, concluding thatboth can produce actual or potential foreclosure effects similar to exclusive purchasing obligations[51].

The Commission's justification is that conditional rebates prevent rivals from competing on a level playing field for the entire demand of each individual customer. In that sense the conditional rebate may allow the quantity that the customer would in any event purchase from the dominant undertaking (the non-contestable portion) to serve asa lever to decrease the price paid for the quantity for which the customer may prefer to find substitute products (the contestable portion)[52].

Retroactive discounts are considered more burdensome, as they make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this decision results in the loss of retroactive discounts[53].

The Commission considers that the relevant factor in assessing the loyalty enhancing effect of a rebate is the foreclosing effect of the rebate system on actual or potential competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold is set, the greater the incentive not to use suppliers and the more likely it is that actual or potential competitors will be foreclosed[54].

Also, with regard to exclusive agreements, in this broad sense which includes exclusive purchasing agreements and discounts, the company is entitled to present an objective economic justification, in the assessment of which all circumstances of the individual case must be taken into account[55].

In assessing efficiencies, the *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,* which requires the fulfilment of the requirements of Article 101(3) TFEU, accepts that rebate systems may be justified by cost advantagesto the benefit of consumers[56].

In general, progressive rebate systems have a superior effect in encouraging vendors to produce and sell a higher volume compared to retroactive rebate systems[57]. You are also more likely to get advantages of the discount system applied according to

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[51] This distinguishes them from predatory pricing which always involves sacrifice. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 37, footnote 26.

[52] See Judgment [GC] of 17.12. 2003, British Airways Plc v. Commission, proc. T-219/99, ECR 2003, p. II-5917, paragraphs 277 and 278.

[53] It is therefore necessary to examine whether and to what extent competitors have realistic and effective strategies at their disposal, such as the ability to also use a 'non contestable' portion of the buyer's demand as leverage to reduce the price for the relevant range. The absence of such strategies may lead the Commission to conclude that the rebate system is likely to foreclose even equally efficient competitors.

[54] Cfr. Judgment of the ECJ of 9.11.1983, N.V. Nederlandsche Banden-Industrie-Michelin v. Commission, (Michelin I), Proc. 322/81, [1983] ECR 3461, paras 70-73. Cfr. Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 40.

[55] Judgment of the ECJ of 9.11.1983, N.V. Nederlandsche Banden-Industrie-Michelin v. Commission (Michelin I).

[56] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraphs 30 and 46.

[57] Already discussed CFI Judgment [TG] of 30.09. 2003, Manufacture française des pneumatiques Michelin v. Commission, Proc. T-203/01, ECR 2003, p. II-04071, paragraphs 56 to 60, 74 and 75.

a standardized rather than an individualized volume.

For exclusive purchasing agreements it has to be ascertained whether they benefit specific customers and are necessary for the dominant company to make certain specific investments[58].

2.2.2. Tied sales and bundling

The dominant firm may also try to foreclose its competitors in distribution agreements through tying and bundling practices.

As we have already seen, tying covers situations where customers that buy one product (the tying product) are obliged to also buy another product from the dominant undertaking (the tied product), and the tying can be fixed contractually or result from technological dependence, when the tying product is designed in such a way that it only works properly in conjunction with the tied product.

Bundling, in the Commission's terminology, refers to the way products are offered and priced by the dominant undertaking. As mentioned above, in the case of pure bundling the products are only sold together in fixed proportions, while in mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the total sum of the prices of the separately sold products is higher than the bundled price[59].

Tying and bundling can harm consumers by foreclosing the market for the tied orbundled product, and indirectly, in the tying market and one of the bundled markets.

The Commission for the application of Article 102 requires that the undertaking is dominant in the tying market and in one of the bundled markets[60].

In addition to dominance, the tying and tied products must be distinct products and it must be likely that the tying practice could produce an anticompetitive foreclosure effect[61].

As regards distinct products and foreclosure, we refer to the Commission's analysis of tying as a vertical restraint, which we will discuss in connection with the franchise agreement.

Tying is also a vertical restraint covered by Article 101(1) TFEU when it gives rise to a single branding type of obligation in respect of the tied product.

With regard to bundling or package selling, a company may have a dominant position in one or more products in the group. The greater the number of products in the bundle, the greater the likelihood of anticompetitive foreclosure[62].

A multi-product rebate may be anticompetitive on the tying and tying markets if the rebate is such as to prevent equally efficient competitors offering only some of the

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[58] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 46.

[59] Erik Hovenkamp, Herbert Hovenkamp, *Exclusionary bundled discounts and the Antitrust Modernization Commission*, Antitrust Bull., Vol. 53, 2008, p. 517.

[60] In the specific situation of tying in after-markets, the test used is that the firm must be dominant in the tying market and/or the tied after-market. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 34.

[61] These requirements were required in the CFI Judgment [TG] of 17.09.2007, Microsoft Corp. v. Commission, Proc T-201/04.cit. in particular, at paragraphs 842, 859-862, 867 and 869, 919 to 922.

[62] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 54.

components from competing against the discounted product group[63].

The Commission accepts that these tying and bundling practices can lead to savings in production or distribution to the benefit of customers, as well as reduce transaction costs for consumers who would otherwise be forced to purchase the components individually.

The Commission further accepts that combining two independent products into anew single product may make it more profitable for such a product to enter the market tothe benefit of consumers and allow the supplier to pass on the efficiencies resulting fromproducing or buying large quantities of the tied product[64].

2.2.3. Predatory behavior

Predatory pricing is also abusive exclusionary conduct falling under Article 102(a)TFEU as long as there is a risk of eliminating competitors.

In the Union's jurisprudential notion, a dominant undertaking engages in predatoryconduct when it deliberately bears losses or deliberately foregoes profits in the short term,so as to foreclose or be likely to foreclose one or more of its actual or potential competitorswith a view to strengthening or maintaining its market power, thereby causing consumerharm.

European courts use two methods of analysis to determine the existence of predatory pricing.

Thus, prices that are lower than the average of the variable costs, or when lower than the average of the total costs, are considered predatory, provided that the predatory intent is demonstrated[65].

Contrary to what happens in North American jurisprudence, the possibility or probability of *recoupment of* the initial losses is not considered, nor is the justification that the purpose of the price decrease is to align with the prices charged by competitors and to recover the losses suffered[66].

In assessing the existence of anticompetitive foreclosure, the Commission uses the analysis of the equally efficient competitor to determine whether that behavior is

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[63] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraphs 59-61.

[64] Ibid, paragraph 62.

[65] Judgment of the ECJ of 3.07.1991, AKZO Chemie BV v Commission, Proc C-62/86, ECR [1991], p. I-03359, points 64, 71 and 72. 1991, p I-03359, paras 64, 71 and 72.

[66] The fact that the Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, at paragraph 70, refers to the possibility that the predatory undertaking may do more harm to consumers if it can reasonably expect its market power after the predatory practices have ceased, is greater than it would have been had it not engaged in those practices, does not necessarily correspond to a recoupment of the sacrifice suffered, given that this depends on specific circumstances, such as acquired market power and barriers to entry, as noted by Ekaterina Rousseva, Rethinking exclusionary abuses in EU Law, cit., p. 408. Cfr. ECJ Judgment of 2.04. 2009, France Télécom SA v. Commission, Proc.C-202/07 P. ECR 2009, p. I- 02369, points 11-112 and CFI [TG] Judgment of 6.10.1994, Tetra Pak International SA v. Commission, Proc.T-83/91, ECR 1994, p. II-00755, point 44. 1994, p. II-00755, paragraph 44. In American case law, see Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (509 U.S. 209 [1993]) Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

likely to be harmful to consumers[67].

The Commission, in this sense, wants to investigate whether and to what extent the alleged practice reduces the likelihood of competition between competing companies[68].

The Commission does not make proof of anticompetitive foreclosure resulting from the predatory conduct dependent on foreclosing competitors, but accepts the possibility that the dominant undertaking may choose to prevent its competitors from competing aggressively against it, preferring them to align their prices on those set by the dominant undertaking rather than eliminate them from the market altogether[69].

Consumers may be harmed as a result of predatory conduct if the dominant undertaking can reasonably expect its market power after the predatory conduct has ceased to exist to be greater than it would have been had it not engaged in such conduct, thereby extracting a benefit from its sacrifice[70].

In principle, it is unlikely that predatory pricing gives rise to efficiencies. However, provided that the Commission's requirements for evidence of efficiencies in exclusionary conduct are substantiated, the Commission is open to the question whether the low pricing enables the undertaking to achieve economies of scale or efficiencies related to expanding the market[71].

This exclusionary abuse is associated with another abusive conduct, included in the abuses of exploitation, which refers to price discrimination, provided for in the prohibition of art. 102 c), which refers to the application, in relation to commercial partners, of unequal conditions in the case of equivalent services, thereby placing them at disadvantage in competition[72].

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[67] The purpose of this analysis is to verify whether a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the predatory conduct in question. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraphs 25 to 27.

[68] For example, the dominant undertaking may engage in predatory conduct aimed at influencing the expectations of potential entrants and thereby deterring them from entering the targeted market by distorting market signals regarding profitability. If the competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant firm could adversely affect the competitor's performance, thereby seriously undermining its access to finance in the future. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 68.

[69] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 69.

[70] The dominant firm can limit losses if it focuses predatory behavior on a specific group of consumers. On the other hand, the dominant undertaking is less likely to engage in predatory conduct if the low price is applied generally and over a long period of time. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraphs 72 and 73.

[71] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 74.

[72] One of the sectors where this second effect of price discrimination is often felt is in the transport sector. Accordingly, Portugal's conduct in charging differentiated landing fees for the same number of landings with aircraft of identical type, depending on whether the flights involved are domestic or international, thereby favoring those carriers which, to a greater extent than others, provide domestic transport, amounts to an abuse of a dominant position, since it entails unequal treatment of equivalent transactions, which places international transport undertakings at a competitive disadvantage. República Portuguesa v. Commission, Proc C-163/99, ECR 2001, page I-02613, paragraphs 64 and 75. Along the same lines, but with regard to the differentiation of charges applied to companies which provide catering and handling services to third

In this category can be included, among others, dual pricing systems according to nationality, in which more than the protection of competition is of particular importancethe fact that they lead to market segmentation[73]. However, this does not mean that in Which, however, does not mean that in certain situations this price duality is not objectively justified[74].

Still within the scope of exploitative abuses, which are connected to price abuses and which can also be used to promote market sharing, excessive prices can be charged[75].

This notion has as its reference the economic value of the service provided, and an excessive price is one that does not reasonably correspond to the economic value of the service provided.

It is an abuse that has received little attention from the Commission, given the difficulties underlying its assessment, especially given the complexity of defining the concepts of fair price and economic value of the service provided[76].

2.2.4. Refusal to supply and margin squeeze

Another conduct that may be sanctioned by article 102, (b) with points of intersection with distribution concerns the refusal to sell certain products or provide services.

Indeed, the dominant firm, by refusing to sell or provide a service can limit output, either directly when it refuses the good or service, or indirectly when it refuses to supply a competing firm in the downstream or upstream market[77].

The Commission is aware that this behavior requires careful analysis, since privateautonomy allows a company to decide whether or not to contract with another and in freedom, accepting that each company must have the right to choose its business partnersand freely dispose of its assets[78].

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parties in relation to those which do not, see Court Judgment of 24.10. 2002, Aéroports de Paris v. Commission, Proc C-82/01 P, ECR 2002, page I-09297, points 114-116. These decisions follow the position of the Court of Justice in the field of maritime transport. Cf. Judgment of 17 May 1994, Corsica Ferries Italia Srl v. Corpo dei piloti del porto di Genova, Proc. C-18/93, ECR. 1994 p. I-0178.

[73] Judgment of the Court of 14.02.1978, United Brands Company and United Brands Continentaal BV v. Commission, Proc. 27/76, ECR 1978, p. 207, point 234, on discriminatory pricing practices between customers from different Member States. Cf. Judgment of the CFI of 7.10. 1999, Irish Sugar plc v. Commission, Proc T-228/97, ECR 1999, p. II-02969. 1999, p. II-02969, point 191 concerning cross-border rebates.

[74] Cfr. ECJ Judgment of 11.12. 2008, Kanal 5 Ltd and TV 4 AB v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa, Proc C-52/07, ECR 2008, p. I-09275.

[75] Court Judgment of 14.02.1978, United Brands Company and United Brands Continentaal BV v. Commission, paragraph 250.

[76] See in this sense the Commission decision of 23.07.2004 in case COMP/A.36.568/D3 - Scandlines Sverige AB v Port of Helsingborg. As noted by Miguel Moura e Silva, *O abuso de posição dominante,* cit., p. 298, n.º 429, there is a connection between this abuse and margin squeeze, since it corresponds to the imposition of unfair prices by excess, but, since we are following, for methodological reasons, the systematization proposed by the Commission in the Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 75 and following, we will analyze this conduct when we examine the refusal to supply.

[77] See Miguel Moura e Silva, *O abuso de posição dominante,* cit., p. 304.

[78] The imposition of such an obligation, even against fair remuneration, may dissuade the company from investing and innovating and may therefore harm consumers. See Guidance on the Commission's

Thus, European law only intervenes when exceptional circumstances occur, whichis when the dominant company's behavior results in the elimination of competition in thedownstream market, without such a refusal being objectively justified[79].

Competition problems, as a rule, arise when dominant firms compete with the buyer to whom they refuse to sell in a "downstream" market[80].

The concept of refusal to supply covers a wide range of practices, such as refusal to supply products to new or existing customers, thus distinguishing the initial refusal to contract from refusal to maintain the link, refusal to license intellectual property rights, including cases where the secondary market for spare parts is concerned, particularly relevant for this dissertation because of the automotive sector[81].

As we have already had occasion to emphasize, it is settled case law that, although intellectual property rights confer special protection in the context of the exercise of such rights by a dominant company, their exercise does not automatically meet the requirements required for abuse of a dominant position, namely abuse and effect on trade between member states[82].

However, the court, in compliance with art. 36 TFEU, advocates limiting these rights whenever their exercise jeopardizes the maintenance of effective competition in an important part of the internal market.

In the automobile sector, it is to be admitted that the exercise by a dominant company of the exclusive right deriving from ownership of an intellectual property right

may be prohibited by Article 102 in specific circumstances if it gives rise to abusive behavior, among which is the arbitrary refusal to supply spare parts to independent garages[83].

However, also in this sector, the abuse of a dominant position appears dependent on proof of abusive conduct, and the mere fact that the company benefits from the exclusive right granted by law, a right whose substance is to be able to prevent the

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Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 75.

[79] The objective justification was developed, exactly, regarding the refusal to supply. Cfr., in this sense, Miguel Moura e Silva, *O abuso de posição dominante*, cit., p. 72 and ff.

[80] The term "downstream market" refers to the market for which refused input is essential for the production of a product or the provision of a service. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 76. One of the first decisions of the Court of Justice to qualify the refusal of a dominant company to supply products to a regular customer who is a competitor on the downstream market as an abuse of dominant position, under the terms of art. 102 TFEU, is the already much cited judgment on the appeal brought by Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation to annul the Commission's condemnatory decision on grounds of abuse of dominant position. Cf. Judgment of the Court of Justice of 6.03.1974, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission, Joined cases 6 and 7-73, European Court Reports 1974 page 00223.

[81] Stopping a supply to punish customers for turning to competitors or refusing to supply customers who do not accept tying are examined by the Commission in the light of the principles set out in the sections on exclusive dealing and tying and bundling. See *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraphs 77-78.

[82] See Judgment of the Court of 18.02. 1971, Sirena Srl v. Eda Srl and others, Case 40- 70, ECR. 1971 p. 69, paragraph 16.

[83] The ECJ, in its judgment of 31.05.1979, Hugin Kassaregister AB and Hugin Cash Registers Ltd v. Commission, Proc. 22/78, Recueil 1979, p. 01869, is in touch with the Commission's first decision finding a refusal to supply spare parts to be an abuse of a dominant position.

manufacture and sale of protected products by unauthorized third parties, has not been considered an abusive form of elimination of competition[84].

The Commission does not consider it necessary that the refused product has already been marketed, but it is sufficient that there is demand from potential purchasers and that a potential market for the product in question can be identified. Likewise, it is not necessary that there is actual refusal on the part of the dominant undertaking; "constructive *refusal*" is sufficient[85].

The Commission makes the censure of a refusal to supply subject to three requirements: i) the refusal must relate to a product or service objectively necessary for effective competition on a downstream market, ii) it must result in the elimination of effective competition on the downstream market, and finally, iii) it must be likely to cause consumer harm[86].

These criteria are extended to cases of disruption of previous supply and refusal by the dominant undertaking to allow further supplies of a good or service, with more seriousness attached to the termination of an existing supply arrangement, in particular in the presence of specific investments in that business relationship in order to be able to use the product the supply of which was subsequently refused. In such a situation, it is for the dominant undertaking to show how the changed circumstances have caused the continued provision of supply to jeopardize the remuneration which it considered appropriate. This difference in treatment is justified by the fact that the duty to contract in the context of a stable and long-lasting relationship is more straightforward, given the dominant company's special responsibility not to degrade competition, than when it comes to the start of a contractual relationship. In this second hypothesis, the duty to contract must have a broader scope, while at the same time presenting a more fragile and loose nexus with the special responsibility of the dominant company[87].

The Commission accepts that a refusal to supply may be necessary to obtain an adequate return on the investment that is essential to develop the activity of providing the means of production, and considers the impact that the obligation to supply, or structural changes arising from it, may have on the ability to innovate. In such a case, the burden of proving the negative impact that the supply obligation may have on the undertaking's levels of innovation lies with the undertaking[88].

The dominant undertaking, instead of refusing to supply, may engage in a margin squeeze, whereby an undertaking which is dominant on the market for a precursor product and itself uses some of its output to produce a more elaborate product and sells the surplus of the precursor product on the market, sets the sales price of the precursor product to third parties at such a level that the third parties do not have a sufficient processing margin to remain competitive on the market for the processed product. In this sense, the dominant

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[84] Judgment of the ECJ of 5.10.1988, AB Volvo v Erik Veng, point 11 and Judgment of the ECJ of 5.10.1988, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault*, paragraph 15.

[85] Implied refusal could, for example, take the form of undue delays or other practices leading to a degradation of the supply of the product as well as involving the imposition of unreasonable conditions in return for the supply. See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 79.

[86] See *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, paragraphs 80-88.

[87] Ibid, paragraph 84.

[88] Ibid, paragraph 80.

undertaking may charge a price for the product on the upstream market which, compared to the price charged on the "downstream" market, does not allow even an equally efficient competitor to operate profitably in the downstream market on a lasting basis[89].

Refusal to sell is also linked, as an exploitative abuse, to market sharing when itspurpose is to prevent parallel imports.

One of the first cases before the Court in which refusal to supply was linked to theban on parallel trade was the oft-referenced *United Brands, in* which the issue was that since 1967 *United Brands had* prohibited its distributors from reselling green bananas, which, given the high perishability of the products in question, made it impossible to transport ripe bananas over long distances.

This issue is brought before the courts when, in 1973, the Danish company Olesen, having been refused supplies of *Chiquita* bananas by *United Brands*, was faced with refusing distributors in other member states on the basis of that clause.

The Court found that, apart from the fact that this obligation indirectly contributed to strengthening and consolidating UBC's dominant position, it had the same effect as an export ban, since it made it almost impossible to trade in UBC green bananas, branded or otherwise, either within a single Member State or between Member States[90].

Although justified by a concern for product quality, the Court found that this amounted to an abuse of a dominant position prohibited by art. 102 TFEU, since it limited supply, to the detriment of consumers and affected trade between member states, in particular by separating national market[91].

The Court of Justice does, however, emphasize that a dominant company is not obliged to meet orders that are out of the ordinary, but also recognizes the possibility that refusal is justified by the protection of its commercial interests[92].

One of the sectors where refusal to supply in order to prohibit exports will fall under Art. 102 TFEU, after some difficulties by the Commission in demonstrating the existence of an agreement required by Art. 101 TFEU, is the pharmaceutical sector.

One of the first cases in which the Court of Justice was seized with the application of art. 102 TFEU to the refusal of pharmaceutical companies to fully satisfy orders placed with them by pharmaceutical wholesalers with the aim of limiting the export activity of these wholesalers, reducing the losses resulting from parallel marketing, was the case between *Syfait* and GlaxoSmithKline[93].

In that regard, Advocate General Jacobs, in the conclusions presented in this case, referring to European Union case-law on the reconduction of the refusal to supply to an abuse of a dominant position, argued that the fact that a dominant pharmaceutical company refuses in their entirety orders sent to it by wholesalers of pharmaceutical products, even if it has the intention of restricting parallel trade, does not necessarily

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[89] See Judgment of the CFI of 30.10.2000. Industrie des poudres sphériques SA v. Commission, Case T-5/97, [2000] ECR II-03755, paragraph 178. In this judgment, paragraph 179, proof of an abusive price on raw material is considered essential, and it is not required that a producer, even in a dominant position, does not sell its products below production costs.

[90] Cfr. Court Judgment of 14.02.1978, United Brands Company and United Brands Continentaal BV v. Commission, paragraph 134.

[91] Ibid, paragraphs 159 and 161.

[92] Ibid, paragraph 182.

[93] Judgment of the ECJ of 31.5.2005, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) v. GlaxoSmithKline, Case C 53/03, ECR 2005, p. I 4609.

constitute abusive conduct. Although the conduct described is linked to the intention to eliminate a source of competition on the market of the importing Member State, to which must be added a partitioning of the market contrary to the internal market, Advocate General Jacobs considered it essential, from the outset, to ascertain the factual and economic context, with particular regard to the regulatory framework, given the sector in question[94]. On the other hand, following case law, he accepted that the conduct could have an objective justification[95].

The national regulation of pricing and distribution in the sector, the impact that parallel trade is likely to have on pharmaceutical companies by virtue of the economic characteristics of the sector, in particular by reducing the incentive to innovate, and the finding that parallel trade does not always result, given the specificities of the European pharmaceutical industry in price competition beneficial to consumers and to Member States, the first buyers of pharmaceutical products, led Advocate General Jacobs to conclude that such a restriction on supplies by a dominant pharmaceutical company in order to prevent parallel trade could be a reasonable and proportionate measure to protect the commercial interests of that company[96].

This issue will be raised again in the Judgment of the Court of Justice in the case of *Sot. Lélos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proïonton,,* the Court taking a different view from that of Advocate General Jacobs in holding that, regardless undertaking which is dominant on the national market in certain medicinal products to meet normal orders placed by those wholesalers on the ground that the latter participated in the parallel export of those medicinal products to other Member States constituted an abuse of a dominant position prohibited by Article 102 TFEU[97].

In this decision, it is clear that a refusal to supply in order to restrict parallel exports must be considered *prima facie* abusive, without curing the analysis of the effects on competition, thus reserving to it a more demanding treatment than the one given by the courts to the refusal to supply current or former customers or to the licensing of intellectual property rights[98].

In an approximation to the prohibition/exemption dichotomy of Article 101 TFEU,conduct will only not be prohibited by Art. 102 if an objective justification is

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[94] Conclusions of Advocate General Jacobs submitted on 28.10.2004, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and others v GlaxoSmithKline plc and GlaxoSmithKline AEVE. Proc. C-53/03, ECR 2005, p. I-04609.

[95] It is very interesting to note that the Advocate General, in paragraph 72, rejected the two- stage analysis that the distinction between abuse and its objective justification seems to mean, arguing that the prohibition/exemption dichotomy that guides article 101 of the TFE is not at issue in article 102 of the TFEU and in which, as we have seen, the analysis of anticompetitive effects and pro-competitive benefits at two distinct moments is based, which we have already opportunely criticized. However, although we prefer to accept that certain types of conduct of companies with dominant position do not fit at all in the category of abuse, we adopt this phased analysis followed by the jurisprudence.

[96] Conclusions of Advocate General Jacobs presented on 28.10.2004, paragraph 100.

[97] Judgment of the Court of Justice of 16.09.2008, Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE, Joined Cases C-468/06 to C-478/06 [2008] ECR I-07139.

[98] The Court disregarded regulation in the pharmaceutical sector, stating that the company cannot rely on the premise that the parallel exports it wishes to limit are of only minimal use to end consumers (paragraph 57).

provided[99].

This decision clearly departs from the caution shown by case law and the Commission in dealing with refusal to contract, even when a dominant company isinvolved, by recognizing that the compression of the right to the autonomy of the will, onwhich is based the right of companies, even dominant ones, to freely choose the personsand entities with whom they wish to contract, by asserting a duty to contract can only be based on the provisions of article 102 of the Treaty, in exceptional circumstances[100].

Again, once again, the integration of the internal market prevails, an argument that, at this stage of the construction of the European project, should have already lost, in our opinion, over the economic approach oriented to the consumer's well-being embraced by the European competition law, since, as we have mentioned, parallel trade does not always favor consumers, especially in the pharmaceutical market, given its specificities.

3. Conclusion

Abusive behavior with an exclusionary effect is of particular relevance to distribution contracts, as behavior through which the dominant company excludes rivals by means other than competition based on the merit of the goods or services they provide.

The company in a dominant position restricts or prevents effective access by current or potential competitors to sources of supply or markets, thus allowing it to profitably increase the price charged to consumers.

Exclusive purchasing and discount agreements can be used by a company to exclude competing companies from the market, or at least limit the access and expansion of competitors in the market in which it is dominant.

The anti-competitive effects of the exclusive purchasing obligation used by a dominant company are felt, above all, on potential competitors that are unable to enter the market or on competitors that are not in a position to compete for the complete supply of customers, given the implantation of the dominant company's products on the market among final consumers or because a significant part of the demand can only be satisfied by the dominant supplier.

The dominant company may also try to exclude its competitors from the market, in the context of distribution contracts, through practices of tying and grouping sales.

The Commission, in order to apply Article 102, requires the company to have a dominant position in the tying market and in one of the grouped markets.

In addition to the dominance position, tying and tying products must be separate

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[99] See Judgment of the Court of 16.09.2008, Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE, paragraph 76.

[100] The Judgment of the Court of Justice of 16.09.2008, Sot. Lélos kai Sia EE and others against GlaxoSmithKline AEVE Farmakeftikon Proïonton, cit., paragraph 66, states emphatically that art. 102 of the TFEU will apply to the practices of companies in a dominant position aimed at avoiding parallel exports from one Member State to other Member States, since, by partitioning national markets, they neutralize the advantages of effective competition in terms of supply. and prices that these exports provided to final consumers in those other States, with national price regulation being devalued, in paragraphs 61 to 63, on the basis of the possible influence that pharmaceutical companies may have on price setting, even in countries where state control on prices is higher, although it is recognized in point 67 that it could be an incentive for parallel trade.

products and it must be probable that the tying practice could produce an anti-competitive foreclosure effect.

Predatory pricing is also an abusive exclusionary behavior, covered by article 102 (a) of the TFEU, provided that there is a risk of eliminating competitors.

Consumers may be harmed as a result of predatory behavior if the dominant undertaking can reasonably expect that its market power, after the predatory practices have ceased, will be greater than it would have been if it had not adopted such practices, and would benefit from their sacrifice.

Other conduct liable to be sanctioned by art. 102 (b) with points of intersection with distribution concerns the refusal to sell certain products or provide services.

Other conduct liable to be sanctioned by art. 102 (b) with points of intersection with distribution concerns the refusal to sell certain products or provide services.

In fact, the dominant company, by refusing to sell or provide a service, may limit production, either directly when it refuses the good or service, or indirectly when it refuses to supply a competing company in the downstream or upstream market.

The Commission accepts that the refusal to supply may be necessary to obtain an adequate return on investment, essential to develop the activity of supplying the means of production, as well as considering the impact that the obligation to supply or the resulting structural changes could have on the innovation capacity. In this case, the onus is on the company to prove the negative impact that the obligation to supply could have on its levels of innovation.

Despite the distinction between exploitative and exclusionary abuses, we have shown that the same conduct can correspond to the direct exercise by the company of market power over customers and, at the same time, have the objective of excluding rivals, such as, for example, refusing to in hiring. On the other hand, conduct such as predatory pricing can be retaliatory conduct, punishing a company while excluding rivals. Price discrimination can also, on the one hand, correspond to the exploitation of a group of consumers, while at the same time excluding rivals from the group in which a lower price was charged. The conduct aimed at market segmentation, in which the refusal to contract with the aim of preventing parallel imports or geographic price discrimination, can also have the effect of excluding rivals, in relation to protected territories, and the exploitation of consumers through higher prices.

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