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The Special Responsibility of Super Dominant Undertakings
– Economically Defensible?

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THE SPECIAL RESPONSIBILITY OF SUPER DOMINANT UNDERTAKINGS

— ECONOMICALLY DEFENSIBLE?

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The objective of article 102 of the Treaty on the Functioning of the European Union (TFEU) is to maintain effective competition on the European market. Therefore, a special responsibility not to distort competition has been imposed on dominant undertakings.² The assessment is form-based, which has resulted in an extended special responsibility imposed on super dominant undertakings, as opposed to dominant undertakings. However, I argue that this is not motivated from an economic, effect-based point of view. This study purports to show that a change towards an effect-based approach under article 102 TFEU is more in line with the objectives of the provision and therefore desirable.

I. INTRODUCTION

The main objective of article 102 TFEU (hereafter article 102) is to protect consumers from harm.³ In order to fulfil this objective, competition must be upheld by protecting the market from foreclosure. A foreclosed market may result in unmotivated high prices or low output from undertakings, which can harm consumers.⁴ Hence, to ensure the maintenance of an open market, a *special responsibility not to harm competition* has been imposed by the EU on dominant undertakings.⁵

As opposed to the special responsibility of undertakings in a dominant position, undertakings in a super dominant position appear to have an extended special responsibility not to harm competition.⁶ Thus, the scope of the special responsibility is related to the degree of dominance of the undertaking, and

¹ Graduate student at the Faculty of Law, Uppsala University. The article is a revised version of the author's essay *EU Competition Policy and Super Dominance – "Special Responsibility" or Merely a Forced Sharing of One's Sandbox*, written during the graduate course, Advanced EU Law and the Internal Market, Uppsala University, spring 2013.

² The concept "undertaking" is defined in article 101 TFEU, as almost anyone engaged in an economic activity.

³ DeBurrá, G. & Craig, P., *EU Law, Text, Cases and Materials*, fifth edition, Oxford 2011, p 1043.

⁴ DeBurrá, G. & Craig, P., p 1043.

⁵ DeBurrá, G. & Craig, P., p 1011.

⁶ Szyszczak, E., *Controlling Dominance in European Markets*, Fordham International Law Journal, (2011), 33 (6), p 1738, p 1756 f.

increases when the position of a dominant undertaking verges on monopoly.⁷ The Court of Justice of the European Union (CJEU) has never used the term "super dominance". The term was introduced by Advocate General (AG) Fennelly in the opinion in *Compagnie Maritime Belge*⁸ to describe an undertaking that "enjoys a position of such overwhelming dominance verging on monopoly [...]"⁹. The expression has not been recognised by the CJEU. However, synonyms such as "extensive dominant position"¹⁰, and "quasi-monopoly"¹¹ have been used. A very large market share is the most important prerequisite in order to determine super dominance.¹² In practice, a market share of 90% is required.¹³ However, the number is not definite: other factors such as the competitive structure of the market and barriers to entry are also taken into account in the assessment.¹⁴

The extended special responsibility of super dominant undertakings has been outlined in case law. The Court of First Instance¹⁵ stated in *Tetra Pak* that the scope of the special responsibility of dominant undertakings is determined by the *special circumstances* in each case.¹⁶ Further, the CJEU concluded in *Irish Sugar* that a questionable pricing policy in conjunction with the *extensiveness* of the undertaking's dominance (a market share of 85–90%) constituted an abusive behaviour.¹⁷ In *Compagnie Maritime Belge*, AG Fennelly stated in the opinion, that a behaviour leading to a foreclosure of competition by a super dominant undertaking "could not be consonant with the *particularly onerous special obligation* [my emphasis] affecting such a dominant undertaking not to impair further the structure of the feeble existing competition."¹⁸ Support for

7 Whish, R. & Baily, D., *Competition Law*, seventh edition, Oxford 2012, p 188.

8 Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission of the European Communities* [1996] ECR II-1201.

9 Opinion of Advocate General Fennelly, delivered on Joined Cases C-395/96 P and C-396/96 P, C.M.L.R., (2000), 4 (1076), p 137.

10 Case T-228/97 *Irish Sugar plc v Commission of the European Communities* [1999] ECR II 02969, para 185.

11 Case 333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-05951 para 121.

12 Szyszczak, E., p 1756.

13 Whish, R. & Baily, D., p 187 ff.

14 As always in the assessment done under article 102.

15 Presently known as the General Court.

16 Case T-83/91 *Tetra Pak International SA v Commission of the European Communities*, judgment of 6 October 1994, para 114 f.

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

18 Opinion of Advocate General Fennelly, delivered on Joined Cases C-395/96 P and C-396/96 P, C.M.L.R., (2000), 4 (1076), p 137.

this approach can be found in Neelie Kroes¹⁹ remarks on the ruling in *Microsoft* whereby she claimed that super dominant undertakings cannot abuse their position by excluding competitors.²⁰

Thus, super dominant undertakings have to act in accordance with an extensive special responsibility not to distort competition, much due to the large market share that a super dominant position entails. However – as discussed in the following – to impose an extended special responsibility on undertakings is not always economically motivated and irreconcilable with the main objective of article 102.

2. THE DIFFERENCE BETWEEN THE FORM-BASED AND THE EFFECT-BASED APPROACHES

Dominant undertakings are considered to be largely immune to competitive pressures. To compensate for the presumed lack of competition, a dominant undertaking has "a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".²¹ This view derives from the ordo-liberalistic ideology, from which EU competition law has received its main features. According to ordo-liberalists, the mere existence of dominant undertakings is a threat to competition.²² Ordo-liberalistic influence on EU competition policy has resulted in a form-based approach to the assessments under article 102. In order to assess whether certain behaviour is abusive, the form-based approach focuses on describing the types of conduct that are prohibited, rather than the economic effect certain behaviour might have.²³ Furthermore, if there is a deficiency of effective competition on the market, a dominant undertaking should act *as if* competition was in fact constraining that market.²⁴ Additionally, it is noteworthy that according to the Commission's guidance paper, the existence of an intention to harm competition shall be assessed on a case-by-case basis.²⁵

19 Neelie Kroes was the European Commissioner for Competition at the time of the T-201/04 *Microsoft v Commission of the European Communities*, judgment of 17 September 2007.

20 Kroes, N., European Commissioner for Competition Policy, *Introductory remarks on CFI ruling on Microsoft's abuse of dominant market position*, Press conference, Brussels, 17th September 2007 (hereafter Kroes, N., Press release 2007).

21 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 03461, p 57.

22 Kavanagh, J., Marshall, N. & Niels, G. "Reform of Article 82 EC – Can the Law and Economics be Reconciled?" in Ezrachi, A. (ed.) *Article 82 EC: Reflections on its Recent Revolution*, Oxford 2009, p 2. (hereafter Kavanagh et al).

23 Kavanagh et al, p 1.

24 Vickers, J., *Abuse of Market Power*, *The Economic Journal*, (2005), 115 (504), p 244, p 246.

25 Communication from the Commission — Guidance on the Commission's enforcement

Many scholars have expressed a wish for change towards a more economic, effect-based approach.²⁶ The assessment under the effect-based approach focuses on the actual economic effect on the market caused by potentially abusive behaviour. Economic analysis over the last three to four decades has shown that a market can function well even with large players present, providing an alternative view on this area of competition law, which differs from the ordo-liberalistic view. The special responsibility of super dominant undertakings has effectively become superfluous.²⁷ The Commission has recognised the dichotomy between the form-based and the effect-based approaches in the guidance paper. The guidance paper acknowledges that the economic effect, rather than the form of certain behaviour, should be the yardstick for the assessment of abuse of dominance.²⁸ However, the influence of the ordo-liberal ideology established in case law has led to a somewhat inconsistent application of the effect-based approach.²⁹

Compared to the rigid form-based approach, the dynamic effect-based approach is more compatible with the objective of article 102. Arguably, if the effect-based approach were to be fully recognised by the EU, the special responsibility imposed on super dominant undertakings would be diminished to only include abuses that actually hamper the market and cause consumer harm. A change towards the effect-based approach would increase the stringency of competition law and enhance consumer protection, thus supporting the main objective of the competition provisions. This development is welcomed since there is no economic justification for an extended special responsibility, solely based on a super dominant position.

3. MARGIN SQUEEZE AND REFUSAL TO SUPPLY

A margin squeeze occurs when a dominant supplier also acts on the associated down-stream market and sets the price on the wholesale product for its competitors as well as its own retail price. The margin between the wholesale price and the retail price is set at such low level, that competitors are pushed out of the market. The assessment is conducted by comparing the dominant undertaking to an equally efficient competitor on the down-stream market and ana-

priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02) para 65 f. The guidance paper is not a legally binding document.

26 Kavanagh et al, p 1.

27 Kavanagh et al, p 3 and Allendesalazar Corcho, R., *Can We Finally Say Farewell to the "Special Responsibility" of Dominant Companies?*, European University Institute, Robert Schuman Centre for Advanced Studies, 2007 EU Competition Law and Policy Workshop/Proceedings, (2007).

28 Kavanagh et al, p 8.

29 Kavanagh et al, p 9 f.

lysing whether the competitor will be able to compete on a lasting basis. The fact that a dominant undertaking is making losses due to its low retail price, indicates that a margin squeeze exists.³⁰ The economic effect on the market is negative, since loss of competition is expected on the down-stream market due to the behaviour of the dominant undertaking. Therefore, the method of assessment makes sense from an economic point of view.³¹

The CJEU stated in *TeliaSonera* that the illegality of a margin squeeze depends on whether there are any anti-competitive effects.³² As well as in the case of margin squeezes, refusal to supply by a dominant undertaking can be anti-competitive since it is in control of goods or services, to which competitors require access in order to compete effectively. Refusal of access to a product that is indispensable for competitors, has an anti-competitive effect and hampers competition. Margin squeeze and refusal to supply are very likely to be exclusionary if conducted by a super dominant undertaking.³³ Competitors dependent on the delivery of goods or services that the super dominant undertaking refuses to supply, are forced out of the market, hence reducing the choices available to consumers. Further, competition is essential for driving the development forward. Consequently, the incentive to research and produce superior products decreases with a deficit of competition on the market.³⁴

The CJEU has embraced the effect-based approach in relation to these practices. However, in some aspects the effect-based and the form-based approaches coincide since these cases involve a direct link between anti-competitive effects and super dominance. Effectively, there is a strict responsibility for super dominant undertakings to be cautious and not engage in this kind of activity. Super dominance is not abusive *per se*; abusive behaviour is always a prerequisite for abuse of dominance under article 102. However – as illustrated above – the conduct will be deemed anti-competitive if engaged in by a super dominant undertaking, since the anti-competitive effect is considered to follow from its super dominant position. In conclusion, greater responsibility is imposed on super dominant undertakings than on dominant undertakings. The greater special responsibility is economically motivated and protects consumer interests and is therefore in line with the objective of article 102.

30 C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, C.M.L.R., (2011), 4 (18), para 63.

31 Vickers, J., p 8.

32 C-52/09 *TeliaSonera*, para 64.

33 Kavanagh et al, p 4.

34 Szyzszak, E., p 1759 f.

4. PREDATORY PRICING AND ABILITY TO RECOUP LOSSES

4.1 PREDATORY PRICING

As stressed in the foregoing, EU competition law has been criticised for embracing a formalistic approach, generally neglecting questions concerning the economic effects of certain conduct. As a result, the pricing policy of super dominant undertakings is deemed abusive in a greater number of situations than the pricing policy of dominant undertakings.

The formalistic view on what conduct is abusive was consolidated by the CJEU in *Akzo*.³⁵ The CJEU concluded that pricing below average variable costs (AVC) should always be considered unlawful, since it implies that the undertaking is making a loss and therefore has an intention – a priori – to exclude competition. Prices below average total cost (ATC) but above AVC are considered abusive if an intention to eliminate competition is proven, as confirmed in *Tetra Pak*. The existence of an intention to harm competition is assessed on a case-by-case basis.³⁶ However, the economic effect on the relevant market in each case is not regarded. Furthermore, pricing above AVC but below ATC is normally considered beneficial for the market, and thus economically motivated since it is merely competition on merits.³⁷

The CJEU contradicted the economically motivated view in favour of the form-based approach in *Compagnie Maritime Belge*. In that case, a super dominant undertaking decreased its prices below the prices of its main competitor, but not below its own costs. The CJEU held that since the undertaking had a market share over 90%, its conduct combined with the degree of dominance substantially fettered competition. According to the court, the conduct constituted anti-competitive behaviour, despite the fact that the price was set above ATC, a conduct normally deemed unable to foreclose competitors and thus not abusive.³⁸

4.2 RECOUPMENT OF LOSSES

The US anti-trust rules concerning predatory pricing are more effect-based compared to the formalistic EU price/cost relation approach. US law requires a reasonable prospect of recoupment of losses in order to convict an undertaking for predatory pricing practices. Recoupment of losses, or the recoupment test, is triggered when an undertaking lowers its prices in order to exclude

35 C-62/86 *Akzo Chemie BV v Commission of the European Communities* [1991] ECR I-3359.

36 Guidance paper, para 65–66.

37 Whish, p 188.

38 Guidance paper, para 67.

competition. When a competitor is eliminated, the recoupment test is fulfilled if the undertaking is able to increase the prices to a level that enables it to recover its losses.³⁹ Whilst the recoupment test ultimately leads to an assessment of the effects on consumer interests, the focus of the equivalent EU law is on the potential elimination of competitors (indirect consumer harm).⁴⁰ Possibility to recoup losses, although always necessary in US law in cases of predatory pricing, is not a prerequisite in EU law in the assessment of abusive behaviour.⁴¹ The CJEU motivates its legal position by stating that whenever there is an exclusionary risk, predatory pricing shall be penalised. There is no possibility to postpone action until actual elimination of competition has occurred if undistorted competition is to be maintained.⁴²

The recoupment test is effect-based and does not concern itself with the size of the market share. Effectively, there is no economic rationale behind the extended special responsibility imposed on super dominant undertakings in relation to predatory pricing. The CJEU's approach cannot be motivated by consumer protection. Therefore, if the CJEU were to embrace the recoupment test, there would be no special responsibility imposed on super dominant undertakings in addition to that imposed on dominant undertakings. Instead, the scope of the special responsibility of super dominant undertakings would relate to the economic effect of their behaviour.

The relation between the recoupment test and super dominance was addressed in *Tetra Pak II*. Referring to US anti-trust law, Tetra Pak claimed in the General Court, that in addition to an intention to harm competition, making losses on sales could only be exclusionary if the undertaking has a reasonable prospect of recouping the losses.⁴³ The question of the recoupment test's place in EU law was generally ignored at this point. The courts (the CJEU agreed with the General Court) stated that Tetra Pak's intention to harm competition was proven, and that the *special circumstances in the case* meant that there was no need to show that Tetra Pak would have a reasonable possibility to recoup its losses.⁴⁴ The General Court referred specifically to the market strength possessed by the dominant undertaking.

39 *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company*, (2007) 549 U.S. 312.

40 Kavanagh et al, p 5.

41 C-202/07 P *France Télécom SA v Commission of the European Communities* [2009] ECR I-02369.

42 C-333/94 *Tetra Pak II*, para 44.

43 Case T-83/91 *Tetra Pak*, para 143.

44 Case T-83/91 *Tetra Pak* (General Court), para 150 and C-333/94 *Tetra Pak II* (CJEU), para 39–41.

However, in *France Télécom*⁴⁵, which concerned a dominant undertaking, the CJEU referring to *Tetra Pak II*, concluded that there was no obligation for the Commission to prove recoupment of losses in order to establish that the conduct was abusive. According to the opinion of AG Mazák in *France Télécom*, the General Court incorrectly referred to *Tetra Pak II*.⁴⁶ In the latter, the CJEU referred to the specific circumstances of the case, which differed in *France Télécom*.⁴⁷ Moisejevas agreed with AG Mazák, that the special circumstances mentioned by the CJEU in *Tetra Pak II* were most likely confined to the fact that Tetra Pak held a super dominant position, a position that was not held by *France Télécom*.⁴⁸ Kavanagh et al argues that the opinion of AG Mazák is in line with the effect-based objectives presented by the Commission in the guidance paper, regretfully not embraced by the CJEU.⁴⁹

Consequently, I believe that if the opinion of AG Mazák is recognised, a heavier burden would be placed on super dominant undertakings in comparison to dominant undertakings. Whilst the latter would benefit from the recoupment test, the super dominant undertakings would not have this advantage, causing the special responsibility of super dominant undertakings to expand even more without any economic rationale. In that respect, the ruling leads to a consistency in the assessment of predatory pricing, albeit not in favour of the effect-based approach. I argue that it would have been preferable if the CJEU fully embraced the effect-based approach. Effectively, both dominant and super dominant undertakings would be subject to the same assessment, leading to increased stringency in EU competition law.

5. EXTENDED SPECIAL RESPONSIBILITY IN ADJACENT MARKETS

A super dominant undertaking does not only have a special responsibility when acting on its own market, but also when operating on other markets to which there is an associate link, as illustrated in the following.⁵⁰ Tetra Pak held a quasi-monopolistic position on the aseptic market. The undertaking used its position in the aseptic market to gain a stronger position in the non-aseptic market. Consumers that bought aseptic products also often bought non-asep-

45 C-202/07 P *France Télécom*.

46 Opinion of Advocate General Mazák delivered on 25 September 2008 in Case C-202/07 P *France Télécom SA v. Commission*.

47 C-333/94 *Tetra Pak II*, para 39–41.

48 Moisejevas, R. *Recoupment of Losses by the Dominant Undertaking, which Allegedly Have Used Predatory Pricing and Legality of Actions*, Jurisprudence, (2010), 120 (2), p 289, p 292 f, available at www3.mruni.eu/ojs/jurisprudence/article/view/1077, retrieved 20 February 2014.

49 Kavanagh et al, p 2.

50 C-333/94 *Tetra Pak II*, para 24–25 and T-201/04 *Microsoft*, para 526 ff.

tic products, creating a connection between the markets. With reference to this connection – the associate link – the CJEU stated that it was not necessary for the Commission to prove that Tetra Pak held a dominant position in the non-aseptic market in order for the conduct to be abusive. The super dominance that Tetra Pak had in one market – the aseptic – imposed a special responsibility on the adjacent market – the non-aseptic.⁵¹

In *Microsoft*, the undertaking used its power on the market for operating systems for personal computers (Windows) in order to gain a stronger position on the market for work group server operating systems. By refusing to reveal the interoperability information of Windows to third party software developers, no one other than Microsoft could develop work group server operating systems compatible with Windows. Microsoft thereby leveraged its market power to an adjacent market, essentially in the same way as Tetra Pak did, although Tetra Pak did this by giving discounts on its non-aseptic products.⁵²

In both cases, the CJEU pointed out the link between the adjacent markets and emphasised how the undertakings used their super dominant position on one of the markets in order to increase their market share on the other. The courts concluded that there was a causal link between the behaviour of the super dominant undertakings and the anti-competitive effects of their conduct. From *TeliaSonera*, it is evident that such a link also exists in cases concerning market squeezing.⁵³

With the current legislative framework, super dominant undertakings are more likely to be convicted for abusive behaviour than dominant undertakings. In theory, effects of the use of market power to potentially foreclose competitors on an adjacent market is not exclusive to super dominant undertakings. Such behaviour could also be exclusionary if conducted by a dominant undertaking. However, dominant undertakings have not yet been imposed with this extended special responsibility. As Neelie Kroes pointed out, this kind of super dominance is rare; therefore the situation described in the cases presented above rarely occurs.⁵⁴ When a super dominant undertaking uses its market power in order to benefit from its position on an adjacent market, there is a potential exclusionary effect on competition in that market. Accordingly, the CJEU extended the special responsibility to include adjacent markets on

51 C-333/94 *Tetra Pak II*.

52 Straetemans, A., *The EU Microsoft Case – Not as Soft a Case*, Jura Falconis, (2007–2008), 44 (4), p 563.

53 C-52/09 *TeliaSonera*, para 83 ff.

54 Kroes, N., Press release 2007.

which the undertaking concerned might not even have a dominant position. In *Tetra Pak II* and *Microsoft*, the CJEU stretched the applicability of article 102 beyond the scope of its wording, which explicitly requires a dominant position in order for the article to be applicable. I suggest that if the effect-based approach is embraced, this unmotivated difference in the special responsibility imposed on dominant undertakings as opposed to super dominant undertakings would not exist. From a consumer protection perspective this is preferable. Furthermore, the foreseeability increases when assessing the undertakings positions and behaviour on the different markets.

6. CONCLUSIVE DISCUSSION

Dominant undertakings have a special responsibility not to distort competition. The special responsibility is more extensive in relation to super dominant undertakings than to dominant undertakings. This responsibility must be respected not only on the super dominant undertaking's own market, but also on adjacent markets to which there is an associate link. The Commission and the CJEU have moved towards a more effect-based approach when assessing abuse, especially when it comes to abuse consisting of market squeeze and refusal to supply. However, there are still formalistic elements remaining, the policy toward predatory pricing being the most conspicuous.

Only time will tell if the EU will fully embrace the effect-based approach. Recently, the Commission had an opportunity to make a decision that could have lead to a new approach concerning the special responsibility of super dominant undertakings. Google, with a market share of over 90% on the European market for general web search, was accused of abusive behaviour under article 102.⁵⁵ However, the Commission announced on the 5th of February 2014 that the dispute between the Commission and Google is to be settled through binding commitment; the European Courts are thus not to be involved.⁵⁶ Although a change towards the effect-based approach is desirable, it is not easily achievable since it requires abandonment of the case law presented above.⁵⁷ If this approach were to be adopted, the scope of the special responsibility in relation to super dominance would diminish. The effect-based approach is more stringent, focusing more on the economical effects for consumers. Therefore, the ultimate goal of anti-trust rules – to protect consumers

55 The European Commission, *Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns*, European Commission - IP/13/371, Brussels 25 April 2013.

56 Almunia, J., Vice President of the European Commission responsible for Competition Policy, *Statement on the Google investigation*, European Commission - SPEECH/14/93, Brussels 5 February 2014.

57 Allendesalazar Corcho, R., p 6.

from harm – corresponds better with the effect-based approach than the currently dominant form-based approach, making a change towards the former desirable. 