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Introduction

1. The book's aim

This book identifies some of the uncertainties surrounding the application of Article 82 (formerly Article 86) of the EC Treaty.[1] These are: (i) What is the underlying purpose of Article 82? (ii) Is it necessary to demonstrate actual or likely anticompetitive effects in the marketplace when applying Article 82 and what effects are relevant? (iii) How can dominant undertakings defend themselves against a finding of abuse? These uncertainties led the European Commission (the 'Commission') to initiate a review of Article 82.[2] At the eighth annual conference of the European University Institute in Fiesole in June 2003, former Competition Commissioner Monti announced that the Commission had started an internal review of its policy on abuse of a dominant position. Director General Lowe confirmed the initiation of the review a couple of months later.[3] It became clear early on in the review period that the Commission was keen to emphasise that the aim of Article 82 is consumer welfare.

As will be demonstrated, the Commission and Community Courts, the European Court of Justice (the 'ECJ') and the European Court of First

[1] For simplicity a reference to Article 82 will be made throughout notwithstanding that some of the cases mentioned refer to Article 86, which was the number of the article before the enactment of the Treaty of Amsterdam on 1 May 1999. Quotations will remain in their original form.

[2] The equivalent provision to Article 82 in the US is the Sherman Act Section 2. It falls outside the scope of this study to consider US law in detail; US antitrust will be subject to discussion as such only in relation to consumer welfare in chapter 2. However, it is worth noting that the enforcement of the Sherman Act Section 2 has, like Article 82, been subject to recent review. In June 2006, the Department of Justice ('DOJ') and the Federal Trade Commission embarked on a year-long series of joint hearings. In September 2008, the DOJ issued a report, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*. The report was withdrawn on 11 May 2009.

[3] That an internal review was initiated was confirmed in October 2003 by DG COMP's Director General Lowe at the annual conference of the Fordham Corporate Law Institute. Available at: http://ec.europa.eu/competition/speeches.

Instance (the 'CFI')[4] have interpreted case law in the light of many objectives. For example, Article 82 has been used as a tool in the Commission's broader effort to liberalise markets in sectors which were previously monopolies, such as the postal sector.[5] Given that objectives other than consumer welfare are relevant within Article 82, the book considers whether the sole focus on consumer welfare is legitimate. From the beginning of the Commission's review, it was assumed that the aim of Article 82 is consumer welfare. At the annual conference at Fordham in 2005, Competition Commissioner Kroes argued that the main and ultimate objective of Article 82 is to protect consumers:[6]

> First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm … I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 82 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market.

This was echoed in the DG Competition ('DG COMP') *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (the '*Discussion Paper*') in December 2005.[7] The *Discussion Paper* declared that it wanted to protect competition by enhancing consumer welfare: '[w]ith regard to exclusionary abuses the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[8] Director General Lowe confirmed this view in his speech at the Federal Trade Commission and Antitrust Division Hearings on Section 2 of the Sherman Act.[9] However, this narrow focus on protecting competition only to promote consumer welfare and allocative efficiency may not be entirely in tune

[4] For the sake of clarity, references to the ECJ or CFI will be made individually where appropriate. The term 'Community Courts' will be used when referring to the CFI and the ECJ when they are discussed together.

[5] OJ [2001] L331/40 *Deutsche Post AG*.

[6] N. Kroes, 'Preliminary Thoughts on Policy Review of Article 82', 23 September 2005, the Fordham Corporate Law Institute New York. Available at: http://ec.europa.eu/competition/speeches.

[7] DG COMP's *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (December, 2005). Available at: http://ec.europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf. DG COMP has received 107 replies to the public consultation on the Discussion Paper, these are available at: http://eceuropa.eu.int/comm/competition/antitrust/others/article_82_contributions.hml.

[8] *Discussion Paper*, supra note 7, paras. 4 and 54.

[9] P. Lowe. 'Remarks on Unilateral Conduct', 11 September 2006, Washington, DC, 3 and 6.

with jurisprudence or with the normative structure of the competition rules of the EC Treaty:[10]

> As the law now stands, however, the competition rules contained in the Treaty have a constitutional status and may be interpreted as shaping a *law of economic liberty* from restraints of competition and abuses of private economic power, not only a *law of economic efficiency*. Thus, an efficiency-orientated approach to the Community competition rules may not be in tune with the current normative structure.

Whilst the discussion of objectives is not new, it is necessary. Amato points out that 'it requires a frank discussion [of the goals of competition], because it is doubtful that we all agree on the goals of competition. Generally, however, we refrain from discussing it openly, and ambiguities remain.'[11] This book takes a different turn from the usual discussion of objectives, by questioning whether the Commission's chosen objective of consumer welfare is legitimate. Whilst the review of Article 82 has been going on for many years and has been comprehensive, there has been little focus on the legitimacy of consumer welfare. This objective becomes even more problematic if it conflicts with other objectives. Hawk has highlighted such potential conflict:[12]

> The major policy issue concerns the possible tension between efficiency considerations on the one hand and the Article 86 [now Article 82] market integration and fairness policies on the other hand. To date that tension has largely been resolved in favour of the latter. Whether this will continue may depend on the EEC's willingness to acknowledge the tension and resultant possible trade-offs between allocative efficiency (or consumer welfare according to many economists) and protection of individual firms (or distributive concerns according to many economists).

There is a lack of thorough debate about the potential conflict a focus on consumer welfare may create.[13] Whilst the Commission embraces the objective of consumer welfare, its success in practice depends on whether the Commission can reconcile the objective of consumer welfare with other possible conflicting objectives pursued under Article 82.

[10] J. B. Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford: Hart Publishing, 2002) 1. Emphasis added.

[11] Panel discussion on competition policy objectives in C. D. Ehlermann and L. L. Laudati (eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford: Hart Publishing, 1998) 3.

[12] B. E. Hawk, 'The American (Anti-trust) Revolution: Lessons for the EEC' 9(1) *European Competition Law Review* (1988) 53, 81.

[13] With the exception of, for example, F. Engelsing, P. Marsden and D. Möller, 'A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: a "dialectic" on Competing Approaches' 2 (special supplement) *European Competition Journal* (2006)

The International Competition Network (ICN)'s report on the *Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, published in May 2007, outlined the following relevant objectives for unilateral conduct on the basis of the responses received: ensuring an effective competitive process; promoting consumer welfare; maximising efficiency; ensuring economic freedom; ensuring a level playing field for small and medium-sized enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatisation and market liberalisation; and promoting competitiveness in international markets.[14] Set against these, the one-dimensional view focusing on maximising economic efficiency in the form of consumer welfare raises a myriad of problems.

The Commission's one-dimensional view on consumer welfare has been moderated to some extent. In answering the questionnaire to the ICN's working group on unilateral conduct, the Commission said that the objective of unilateral conduct is protecting competition by reducing or eliminating the obstacles to economic change and development, which is fundamental to the broader political aim of the Community, which is the process of integration in economic unions and free-trade areas.[15] This goal is articulated in the EC Treaty[16] as well as being judicially recognised.[17] Moreover, the Commission's *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (the '*Guidance Paper*') of 3 December 2008, published in the C-series of the Official Journal,[18] accepts that Article 82 is not only about consumer welfare, but also about other objectives.

211–27; O. Budzinski, 'Monoculture versus Diversity in Competition Economics' 32(2) *Cambridge Journal of Economics* (2008) 295–324; L. L. Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' 3(2) *European Competition Journal* (2007) 329–44; C. Ahlborn and C. Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' 2(2) *Competition Policy International* (2006) 196.

[14] The report is available at: www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf.

[15] The Commission's submission to ICN's questionnaire is available at: www.international-competitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-questionnaire-and-responses.

[16] Articles 2 and 3 EC.

[17] For example, Case 226/84 *British Leyland plc v. Commission* [1986] ECR 3263; Case 26/75 *General Motors Continental NV v. Commission* [1975] ECR 1367; Case 27/76 *United Brands Company v. Commission* [1978] ECR 207. These are just a few of the cases where market integration considerations had an influence on the outcome.

[18] OJ [2009] C45/7 *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* ('*Guidance*

However, the *Guidance Paper* does not say which objective is the more important one in case of a conflict, so ambiguities remain.

This study will consider whether consumer welfare conflicts with other objectives. A tension between economic freedom[19] and consumer welfare is identified. Consumer welfare takes a neo-classical position whereas economic freedom, as derived from ordoliberalism, values freedom of competition as a fundamental right to ensure individual economic freedom in the market. The study will consider whether economic freedom is considered a fundamental right in the Community legal order. If economic freedom is considered a fundamental right there, then the Commission's priority of a utilitarian goal of consumer welfare is violating a fundamental right.

Instead of a comprehensive review of the underlying purpose of Article 82, the modernisation debate has mainly focused on the Commission's methodology due to the uncertainty about the necessity to examine effects of dominant undertakings' conduct. One of the primary reasons for initiating the review was a greater appreciation of micro-economic theory on the part of the policy-makers and the Commission's perception that the rules under Article 82 must be sufficiently responsive to sound economics. One of the overall conclusions from the 2003 annual conference in Fiesole was that the concept of abuse does not lend itself easily to *per se* rules, and that a rule of reason approach is normally preferable. Another conclusion was that legal formalism should be abandoned in favour of the analysis and evaluation of economic effects.[20] The initiation of the policy review came after growing criticism of the application of Article 82 and, in particular, the insufficient attention to economic principles and apparent lack of rigour of the Commission's policy in this area of law.[21] Some argued that the interpretation of Article 82 was still influenced by old-fashioned formalistic and legalistic principles attributed to

Paper'). This book refers to the paragraphs of the *Guidance Paper* published on DG COMP's webpage on 3 December 2008 in case the numbering is different in the version published in the Official Journal.

[19] Freedom of competition and economic freedom are used interchangeably throughout, as they mean the same, which is that the economic system should allow all individuals the freedom to participate in the marketplace unimpaired by the power of other companies.

[20] C. D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual* 2003: *What is an Abuse of a Dominant Position?* (Oxford: Hart Publishing, 2006).

[21] For example, J. Ratliff, 'Abuse of Dominant Position and Pricing Practices: A Practitioner's Viewpoint' and D. Ridyard, 'Article 82 Price Abuses: Towards a More Economic Approach' in Ehlermann and Atanasiu, supra note 20; D. Waelbroeck, '*Michelin II*: A *Per Se* Rule against Rebates by Dominant Companies?' 1(1) *Journal of Competition Law and Economics* (2005) 149, 151.

ordoliberalism.[22] This criticism goes to the heart of the objective of economic freedom (which played a central role in the ordoliberal conception of competition policy).[23]

The study will demonstrate that the Community Courts examine the conduct's harmful effects in some cases, but not in all. Sometimes harmful effects are assumed. The study will highlight the advantages and disadvantages of such assumptions. Relying on assumptions may not be a good idea, unless they are supported by a solid economic theory of how competition is harmed in the market. This is particularly true if the assumptions are conclusive, as it deprives dominant undertakings of the ability to defend themselves. However, the alternative of adopting an effects-based approach in all cases also has some drawbacks. For example, it is likely to create more 'type I errors' and fewer 'type II errors'.[24] A type I error is where a given hypothesis, e.g. that an undertaking has committed an infringement, is rejected although it is true. A type II error is where a hypothesis is accepted, but an alternative hypothesis, e.g. that an undertaking has not committed an infringement, is true.[25] In the first situation (type I) the competition authorities have confidence in the robustness of markets to withstand abuse of a dominant position and do not intervene even though intervention would have been justified. The boundary of public power is set as far ahead as possible to see whether the market can take care of itself – and thereby run the risk of 'private

[22] J. Kallaugher and B. Sher, 'Rebates Revisited: Anticompetitive Effects and Exclusionary Abuse under Article 82' 5 *European Competition Law Review* (2004) 263, 268; see also D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, 1998); W. Möschel, 'Competition Policy from an Ordo Point of View' in A. Peacock and H. Willgerodt (eds.), *German Neo-liberals and the Social Market Economy* (London: Macmillan, 1989) 142.

[23] Not all share the view that case law and practice do not, or even should in all respects, reflect modern economic thinking. Professor Eilmansberger is one of them even though he criticises the lack of a clear, coherent, conceptual basis in decisions concerning exclusionary abuses: see T. Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anticompetitive Abuses' 42 *Common Market Law Review* (2005) 129, 131.

[24] These are sometimes also known respectively as false negatives and false positives.

[25] Some scholars have identified a 'type III error' which occurs when you get the right answer to the wrong question. In competition law terms, this can be equated with wrong enforcement priority decisions. Type III errors risk over-enthusiastic enforcement activities and can give rise to spurious or speculative complaints from competitors. This in turn gives rise to a form of regulatory drag which is, in principle, just as harmful as unnecessary regulation, wasting resources ultimately to the detriment of consumers. It is also problematic in terms of business planning and strategy, since enforcement which is unpredictable has a cooling effect on commercial behaviour. See Report from IBC conference, *Advanced EC Competition Law* (4–5 May 2006) 64–5.

power' being abused – and thereby accept the risk of private power. In the second situation (type II) the competition authorities have little faith in the robustness of the market and seek to prevent the risk of private power emerging – and thereby run the risk of intrusion by 'public power' – by activating intervention in the markets earlier.[26] In a type II error, competition authorities intervene in circumstances where intervention is not justified. When enforcing Article 82, the Commission has been criticised for being too intrusive when seeking to prevent the risk of private power from emerging.[27]

2. The structure of the book

Given the focus on consumer welfare, chapter 2 considers how economists define the concept of consumer welfare and its relation to allocative, productive and dynamic efficiency. It demonstrates that consumer welfare is concerned with consumer surplus and allocative efficiency. It examines whether Article 82 allows for efficiencies to be advanced despite the lack of an exemption provision like Article 81(3). Despite Article 82's lack of a bifurcate structure between a prohibition and an exemption, dominant undertakings can advance objective justifications. Chapter 3 examines whether case law supports the objective of consumer welfare. It discovers that Article 82 not only aims at promoting consumer welfare, but also seeks to endorse other objectives. The Community Courts rarely articulate their stand on the underlying purpose of Article 82 and, if they do, it is unclear what exactly is meant by these objectives, so ambiguity remains. A consequence of many objectives being considered important is the possibility of a conflict between them. Chapter 4 discusses whether a potential conflict arises between some of the objectives. It finds that there may be a conflict between economic freedom and consumer welfare. Chapter 5 discovers that case law only allows dominant undertakings to advance such justifications based on objective factors going beyond their control and public policy considerations, which do not necessarily

[26] Former Competition Commissioner Monti has said: '[E]nshrined in the Treaty is … an open market economy with free competition … Personally I believe that an open market economy does not imply an attitude of unconditional faith with respect to the operation of market mechanisms': see M. Monti, 'European Competition Policy for the 21st Century', *International Antitrust Law and Policy* (Fordham Corporate Law Institute, 2000) 257.

[27] A criticism acknowledged by P. Lowe, 'New Challenges in Europe', 24 June 2005, King's College London.

include efficiencies. It finds that the Commission and the Community Courts do not always engage in an analysis of effects, but instead make assumptions in some cases that conduct by dominant firms will result in harmful effects. In such cases, efficiencies become illusory. To address the uncertainties surrounding the application of Article 82, the Commission has issued a *Guidance Paper*. Chapter 6 examines whether the *Guidance Paper* clarifies some of the doubts. The *Guidance Paper* emphasises that it is not a statement of law; however, it may still have certain effects for undertakings. The *Guidance Paper* does not address all the uncertainties highlighted in the chapters. Thus, chapter 7 recommends a simple way forward to create more certainty in the application of Article 82.

3. The interpretation of Article 82

Article 82 is the mechanism used in the European Community[28] to control the abuse of a dominant position.[29] The provision is aimed at

[28] In the 1950s, Germany, France, Italy and the Benelux Countries (the Netherlands, Belgium and Luxembourg) decided to establish a system of joint decision-making on economic issues. They formed the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). These three communities – collectively known as the European communities – formed the basis of what is today the European Union (EU). The European Community, which is the most important of the three European communities, was originally founded on 25 March 1957 by the signing of the Treaty of Rome under the name of the European Economic Community. The 'Economic' was removed from its name by the Maastricht Treaty in 1992, which also established the EU. The Maastricht Treaty effectively made the European Community the first of three 'pillars' of the EU, the so-called Community (or Communities) pillar. The first pillar corresponds to the European Community, the second comprises the common foreign and security policy (CFSP) and the European security and defence policy (ESDP) and the third consists of police and judicial cooperation in criminal matters. The establishment of the EU in 1992 did not cause the European Community to disappear. It remains part of the EU under the designation 'European Community'. The terminology 'Community' and 'EU' will be used interchangeably. EU law is defined as '[t]he law governing the structure, organs, and functioning of the Council of Europe and other European organizations or institutions; further the law contained in the conventions and agreements of the Council of Europe and the instruments of other European organizations or institutions': see F. W. Hondius, 'The New Architecture of Europe and *Ius Commune Europaeum*' in B. de Witte and C. Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer Law International, 1992) 215.

[29] If and when the Lisbon Treaty is ratified and comes into force the Treaty of Rome will become the Treaty on the Functioning of the European Union (TFEU). The 'European Community' terminology, which was kept in part after 1992, will be replaced with 'European Union' throughout the TFEU. Article 82 EC will be renumbered Article 102 TFEU. However, it is unknown when – if ever – the Lisbon Treaty will be ratified. Thus, this study will continue to refer to Article 82.

eliminating abusive conduct by prohibiting any abuse by one or more undertakings of a dominant position in a market in so far as it affects trade between Member States. It forms part of the competition provisions established by the Treaty of Rome in 1957,[30] along with Articles 81 and 83–9 EC.[31] Article 82 is the subject of this study, with discussion of the other provisions included only where relevant. The text of Article 82 is as follows:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 82(2) has not been interpreted as an exhaustive enumeration, but as a list of examples. This emerges from the wording 'in particular' of Article 82(2) as well as case law.[32] Article 82 does not distinguish between exploitative and exclusionary abuse.[33] Yet, it is a generally accepted distinction, although some abuses can be both.[34]

[30] This study refers to the consolidated version of the EC Treaty.

[31] The provisions in the EC Treaty will be referred to hereinafter by simple number alone rather than by providing the full reference. The complete reference will be included when referring to articles for the first time, or when referring to provisions from other treaties.

[32] Case 6/72 *Europemballage Corporation and Continental Can Co. Inc. v. Commission* [1973] ECR 215, para. 26; Case C-333/94P *Tetra Pak International SA v. Commission* (*Tetra Pak II*) [1996] ECR I-5951, para. 37.

[33] Exploitative abuse is where dominant undertakings take excessive advantages of their market power and obtain a benefit by placing an unfair burden upon their customers or consumers without any effect on the competitive process or the structure of the market in which dominant firms operate: see D. Goyder, *EC Competition Law* (Oxford University Press, 3rd edn, 1998) 369. Exclusionary abuse is where dominant undertakings deny rivals access to the market or expansion in the market.

[34] J. Temple Lang, 'The Requirements for a Commission Notice on the Concept of Abuse under Article 82 EC' CEPS Special Report (2008) 1. Available at: www.ceps.eu.

The meaning of the concepts of dominance and abuse emerge from the case law and practice of the Commission and the Community Courts, as Article 82 is a framework provision and the central terms 'dominance' and 'abuse' are inherently vague. Neither the concept of abuse nor that of dominance is defined in the EC Treaty. The Commission has not sought to publish general secondary legislation or substantive guidance,[35] although it did publish enforcement priorities in December 2008. The *travaux préparatoires* to the Treaty were deliberately never published, although they can be accessed in the Florence archives. In any event, the Community Courts rarely focus on the intent of the drafters of the EC Treaty.

The concept of abuse is not explicitly defined in the EC Treaty. Such a definition could have had a limiting effect on its interpretation, because every decision or judgment would have to fit within the definition. Instead, the interpretation of Article 82 has been developed through case law, which has allowed the concept of abuse to develop to fit the contours of a particular decision and new learning to be integrated into the case law in an ever-changing economy. This allows the analysis of the provision to be updated, as interpretations that seemed adequate years ago may no longer be suitable. However, the lack of substantive guidance as to what does and does not constitute an abuse has led to an *ad hoc* process, swayed by the specific facts that come before the authorities or the courts. It is hard to see a single unifying theory underpinning the interpretation of Article 82.[36] The law of Article 82 is the result of the cases brought before the Community Courts. This has led to some legal uncertainty resulting from the way in which the provision is being applied in practice and the way in which the legal framework is written. This uncertainty, especially with regard to the 'speciality responsibility' of dominant undertakings,[37] may result in dominant firms

[35] However, the Commission has published guidance in specific sectors such as postal services and telecommunications. Some insight into the identification of market power can be gained by analogy from OJ [2002] C165/6 *Commission Guidelines on Market Analysis and Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services*, para. 70; EC Directive 2002/21 on a *Common Regulatory Framework for Electronic Communication Service* (the Framework Directive) Article 14(2), where significant market power is equated with dominance under Article 82; 'Commission Issues Market Power Assessment Guidelines for Electronic Communications', press release of 9 July 2002, IP/02/1016.

[36] Dabbah points out that the ECJ has created a jurisprudence under Article 82 which makes it difficult to understand the real aim of Article 82: see M. M. Dabbah, 'Conduct, Dominance and Abuse in "Market Relationship": Analysis of Some Conceptual Issues under Article 82 EC' 21(1) *European Competition Law Review* (2000) 45.

[37] Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v. Commission* (*Michelin I*) [1983] ECR 3461, para. 57.