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Introduction

I INTRODUCTION TO THE UNILATERAL CONDUCT DEBATE

The frontiers of power are changing. By many measures, in many markets, the consumer appears to be king at last. Grocery shopping, preparing a home for a baby, purchasing an overseas holiday – all can be done online, switching between different platforms and ratings and suppliers and consumer reports until we find the right item at the best price. Improved technologies and efficiencies drive these prices down. We pay effortlessly on the spot. Delivery times can be measured in hours.

Young inventors have disrupted old business models and transformed the world with new ways to connect, pay and play, and 'tech giants' battle across a growing number of markets for our business and attention.[1] We google to find answers in seconds and share our lives minute to minute. We have amusement on demand with movies, music and news of our choosing wherever we might be. Satellite navigation can guide us to any destination, and cheap and pervasive rideshares can bring us home. These benefits reach around the world, as innovations in health, education, transport, communication and financial services are carried to new markets.

But the question of who is sovereign is more complicated than this. Concentration is growing in many markets, and not all prosper from the spreading commerce.[2] Citizens and politicians protest that the giants of retail are forcing down the

[1] John Deighton and Leora Kornfeld, *Amazon, Apple, Facebook, and Google: Organizational Development Case Study* (Harvard Business School, 2013); Jonathan Taplin, *Move Fast and Break Things: How Facebook, Google and Amazon Have Cornered Culture and What It Means for All of Us* (MacMillan, 2017) 144–5; Nicolas Petit, 'Technology Giants, the "Moligopoly" Hypothesis and Holistic Competition: A Primer' (Working Paper, 20 October 2016) 34–40, 46.

[2] 'America's Uncompetitive Markets Harm Its Economy', *The Economist* (online), 27 July 2017; Ian Harper et al, *Competition Policy Review: Final Report* (March 2015) ('*Harper Report*') 18, 283, 340; Andrew Leigh and Adam Triggs, 'Markets, Monopolies and

wages they pay to workers and the prices they pay to suppliers.[3] Banks that are too big to fail are still rescued by taxpayers who are not too small to pay. Strategic behaviour by drug companies keeps out rivals and places lifesaving medications beyond the reach of many consumers.[4]

The online platforms which deliver our lives of convenience also drive down the prices paid for journalism, literature, art and music.[5] These become the 'free' content which is used to grab the attention of consumers, whose personal data is harvested, aggregated and examined for patterns of value; for data, we are told, is the new oil.

Some argue that these vast wells of data should rightly be shared with competitors to drive rivalry and improve offerings to consumers. Others say this spread of personal data unfairly disadvantages consumers: the invisible hand of free trade in which we have placed our faith is being replaced by the 'digitized hand' of behavioural discrimination as suppliers benefit from intimate information about consumers, unbeknownst to them.[6] Our prices are 'personalized', our advertisements and news feeds 'customized', while the reach of the 'tech giants' spreads. Some go so far as to say these practices pose a threat to democratic values.[7]

It is in this context that competition policymakers around the world confront the question of how best to regulate the exercise of unilateral market power. This question is not new but has attracted increasing attention in recent decades, as national authorities and international competition law networks attempt to reach some consensus on the types of unilateral conduct that should be prohibited by competition laws,[8] while differences between the major jurisdictions and political approaches continue to spark controversy.[9]

Moguls: The Relationship between Inequality and Competition' (2016) 49 *The Australian Economic Review* 389, 391–8.

3 Elizabeth Warren, 'Reigniting Competition in the American Economy: Keynote Remarks' (New America's Open Markets Program Event, 29 June 2016); Commonwealth, *Parliamentary Debates*, Senate, 14 August 2017, 29–31 (Nicholas McKim).

4 Michael A Carrier, 'Sharing, Samples and Generics: An Antitrust Framework' (2017) 103 *Cornell Law Review* 1, 2–3.

5 Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710, 736; Taplin, *Move Fast and Break Things*, *supra* note 1, at 102–4.

6 See Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016) 203–17.

7 See, eg, Nell Abernathy, Mike Konczal and Kathryn Milani (eds), *Untamed: How to Check Corporate, Financial and Monopoly Power* (Roosevelt Institute, June 2016) 16–20; Taplin, *Move Fast and Break Things*, *supra* note 1, at 112–24, 257–62.

8 See Eleanor M Fox, 'Antitrust without Borders: From Roots to Codes to Networks' (E15 Expert Group on Competition Policy and the Trade System, Think Piece, November 2015) 4, regarding unsuccessful proposals for a world competition regime in the 1990s, followed by greater international cooperation via the 'grass-roots-up' International Competition Network and 'organically occurring soft convergence'.

9 See Daniel J Gifford and Robert T Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy* (University of Chicago Press, 2015); D Daniel Sokol, 'Troubled Waters between US and European Antitrust' (2017) 115 *Michigan Law Review* 955, 960–9.

Despite efforts to arrive at a consensus, economists and lawyers have struggled to produce a coherent and compelling theory about the kind of competition mischief a firm can cause while acting alone, as well as the types of unilateral conduct courts can reliably remedy. The debate about how to characterize unilateral conduct has often been sharpened by ideological and intellectual differences. After all, what is at stake is the ability of firms to exercise power at the expense of consumers and society as a whole or, conversely, the unnecessary restraint of firms acting efficiently for the benefit of society as a whole.

In recent years, Australia, in particular, has witnessed unprecedented controversy concerning its law against misuse of market power, largely as a result of growing dissatisfaction on the part of the competition regulator and small business groups over the operation of this 'ineffectual' law, famously labelled 'a hunting dog that won't leave the porch'.[10] In August 2017, following several years of intense debate and legislative review, the Australian Parliament amended section 46(1) of the *Competition and Consumer Act 2010* (Cth) (CCA) to incorporate an 'effects test' for misuse of market power: a corporation with substantial market power contravenes the amended provision if it engages in conduct which has the purpose, effect or likely effect of 'substantially lessening competition'. Two months later, the CCA was further amended by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) to permit a corporation to seek authorization from the Australian Competition and Consumer Commission (ACCC) for conduct which might otherwise infringe section 46(1) of the CCA (collectively, 'the 2017 Harper Amendments'). The New Zealand government is considering similar changes to its Commerce Act.[11]

The Australian reform has by no means put an end to the misuse of market power debate. On the one hand, the Prime Minister of Australia described this amendment as 'a vital economic reform',[12] and the former chairman of the ACCC, Allan Fels, applauded the government's decision as the adoption of 'an economically sound and sensible principle'.[13] By contrast, the Federal Opposition described the proposal to

[10] David Crowe, 'Consumer Law "A Dog That Growls but Rarely Bites"', *The Australian* (online), 31 October 2013 www.theaustralian.com.au/national-affairs/consumer-law-a-dog-that-growls-but-rarely-bites/news-story/a0e1ab9bbe0e3e1f18246dbeacd5bcc3, quoting federal Minister for Small Business, Bruce Billson.

[11] Office of the Minister of Commerce and Consumer Affairs, New Zealand, 'Outcomes of the Targeted Review of the Commerce Act 1986 and Other Measures to Promote Competition' (2017) www.mbie.govt.nz/publications-research/publications/business-law/cabinet-paper-outcomes-of-the-targeted-review-of-the-commerce-act-1986.pdf.

[12] Gareth Hutchens, 'Turnbull Government Sides with Small Business, Agrees to Implement Controversial "Effects Test"', *The Sydney Morning Herald* (online), 16 March 2016 www.smh.com.au/federal-politics/political-news/turnbull-government-sides-with-small-business-agrees-to-implement-controversial-effects-test-20160316-gnk6mx.html.

[13] Allan Fels, 'Effects Test: The Case For', *The Australian Financial Review* (Sydney), 17 March 2016, 39.

amend section 46(1) as a 'multi-billion dollar disaster waiting to happen',[14] while the Chief Executive of the Retail Council argued that the government's decision was 'simply bad policy and the consumer is the loser'.[15]

II OBJECTIVES, SCOPE AND METHODOLOGY

This book addresses the questions at the heart of this debate:

- What is the rationale for regulating single-firm conduct?
- How did the previous law against misuse of market power in Australia, based on the 'take advantage' test, address this problem, and what are the strengths and deficiencies of this and comparable tests proposed in the United States?
- How will the new law against misuse of market power in Australia, which incorporates an effects-based test, overcome these deficiencies, and do such tests in Australia and elsewhere have weaknesses of their own?
- Does a comparative analysis of unilateral anticompetitive conduct laws from other jurisdictions reveal an alternative standard, which overcomes the disadvantages of relying on either the 'take advantage' test or an effects-based test for unilateral anticompetitive conduct?

An 'effects-based test' is defined as a test for the characterization of unilateral anticompetitive conduct, which focuses on the effect, or likely effect, of the impugned conduct on competition in the relevant market. This is not a concept with a single meaning; rather it has been given different content by authorities in different places and eras, depending on their understanding of the meaning and value of competition, and their theory as to what kind of proof of impact is sufficient to warrant intervention.[16] However, all of these tests have in common a professed concern with the actual or probable effect of the conduct on the competitive process, as opposed to its effect on any individual competitor.[17] They also seek to determine the objective impact of the firm's conduct, as opposed to the subjective intent or purpose of the firm.

The question of the appropriateness of the respective tests is considered within the Australian context, taking into account the objective of the misuse of market power

[14] Gareth Hutchens, 'Labor Wants to Make It Easier for Small Business to Litigate Large Businesses', *The Sydney Morning Herald* (online), 15 March 2016. www.smh.com.au/small-business/labor-wants-to-make-it-easier-for-small-business-to-litigate-large-businesses-20160314-gnihx3.html. Numerous commentators claim that the new test is 'designed to protect competitors, particularly less efficient ones, from a competitive challenge': see Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2017, 3015 (Andrew Leigh), quoting former Treasurer Peter Costello.

[15] Hutchens, 'Turnbull', *supra* note 12.

[16] See Chapter 5 Sections III–VI.

[17] Ibid.

prohibition in Australia.[18] It therefore requires an analysis of how accurately the respective tests can identify unilateral conduct that is harmful to the competitive process and, just as importantly, how reliably the tests can be applied by courts and by firms seeking to determine in advance whether proposed conduct will contravene the provision.[19] There is no benefit in having a test that perfectly describes harmful unilateral conduct if it can only be accurately applied by a Nobel Prize winner.

The questions listed above are addressed, in part, by a comparative analysis of various legal tests adopted and proposed for the characterization of unilateral anticompetitive conduct in Australia, the United States (USA) and the European Union (EU), as explained later in this chapter.

III BACKGROUND TO THE UNILATERAL CONDUCT DEBATE

A *The International Context*

In recent decades, the main tension in the international unilateral conduct debate has been characterized as a clash between the 'economics-based' approach to unilateral anticompetitive conduct in the USA and the more 'formalistic' approach to such conduct in the EU.[20] This tension has sometimes been more than intellectual, with the US and EU antitrust authorities reaching contrary decisions concerning the same practices in major cases.[21] For example, after the US Federal Trade Commission declined to pursue claims that Google had leveraged its power in the Internet search engine market to systematically advantage its other business lines, the Commission of the European Communities ('European Commission') announced its decision that Google had abused its dominance by engaging in similar conduct, imposing a record €2.42 billion fine on the company,[22]

[18] See Chapter 3 Section IV.

[19] See Section V.

[20] See, eg, Philip Marsden, 'Exclusionary Abuses and the Justice of "Competition on the Merits"' in Ioannis Lianos and Ioannis Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International, 2010) 413–6. Cf Daniel A Crane, 'Formalism and Functionalism in the Antitrust Treatment of Loyalty Rebates: A Comparative Perspective' (2016) 81 *Antitrust Law Journal* 209, 210–12, arguing that while the EU Courts tend to rely on 'formal rules to prohibit', the US Courts tend to rely on 'formal rules to permit'.

[21] See Assistant Attorney General for Antitrust, US Department of Justice, R Hewitt Pate, *Statement on the EC's Decision in Its Microsoft Investigation* (24 March 2004); *British Airways plc v Commission of the European Communities* (T-219/99) [2003] ECR II-5917; *Virgin Atlantic Airways Ltd v British Airways plc* 69 F Supp 2d 571, 580 (SDNY 1999), affirmed, 257 F 3d 256 (2d Cir 2001).

[22] See Federal Trade Commission, 'Statement of the Federal Trade Commission Regarding Google's Search Practices: In the Matter of Google Inc, FTC File No. 111–0163' (Federal Trade Commission, 3 January 2013) 3–4; European Commission, 'Statement by Commissioner Vestager on Commission Decision to Fine Google €2.42 billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service' (27 June 2017) http://europa.eu/rapid/press-release_STATEMENT-17–1806_en.htm;

and attracting criticism from a number of scholars in the USA and the EU.[23] While comparisons have often been drawn between the approaches of these two jurisdictions, there have also been enduring debates over appropriate antitrust standards for unilateral conduct *within* each of these jurisdictions.

B *The United States*

In the USA, the general prohibition against unilateral anticompetitive conduct is found in the law against monopolization in section 2 of the Sherman Act,[24] which provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[25]

Trends in the application and enforcement of section 2 changed during the twentieth century. In the 1950s and 1960s, under the influence of the Harvard School of antitrust,[26] US antitrust authorities and courts tended to distrust the ability of unassisted market forces to correct market failures; to condemn dominant firm conduct without extensive investigation of its economic effects; and to protect small businesses, regarding the decentralization of economic power and the rivalry of numerous smaller firms as valuable in itself.[27] From the late 1970s, however, US antitrust courts and agencies began to adopt a much narrower approach to the

Florian Wagner-von Papp, 'Should Google's Secret Sauce Be Organic?' (2015) 16 *Melbourne Journal of International Law* 1, 15–6.

[23] See, eg, Alden Abbott, 'The European Commission, Google, and the Limits of Antitrust' (Truth on the Market Blog, 21 April 2015) https://truthonthemarket.com/2015/04/21/the-european-commission-google-and-the-limits-of-antitrust/; Pinar Akman, 'A Preliminary Assessment of the European Commission's Google Decision' (September 2017) *CPI Antitrust Chronicle*; Pinar Akman, 'The Theory of Abuse in *Google Search*: A Positive and Normative Assessment Under EU Competition Law' [2017] *Journal of Law, Technology and Policy* 301.

[24] 15 USC §§ 1–7 (1890) ('Sherman Act'). There are other US antitrust laws which address unilateral conduct in a more limited way, including Federal Trade Commission Act § 5, 15 USC § 45; Robinson-Patman Act, 15 USC § 13(a): see Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing, 2nd ed, 2011) 265–7.

[25] Sherman Act § 2.

[26] See Chapter 2 Section V.

[27] See Eleanor M Fox, 'The Modernization of Antitrust: A New Equilibrium' (1981) 66 *Cornell Law Review* 1140, 1141–2, 1152; Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, 2005) 1–2, 9, 41; Jonathon B Baker, 'Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement' (2010) 76 *Antitrust Law Journal* 605, 610.

enforcement of section 2, intentionally erring on the side of under-inclusiveness, in large part due to the 'chastening' influence of the Chicago School, which claimed that economic efficiency was the sole goal of antitrust and expressed great scepticism about the plausibility of previously accepted categories of monopolistic conduct.[28]

At the turn of the twenty-first century there began a period of intense debate about the appropriate standard to be applied in monopolization cases.[29] There was, at this stage, significant uncertainty about the state of the law concerning monopolization.[30] The Department of Justice very rarely brought cases under section 2 (a situation which continues to this day),[31] and the Supreme Court of the United States granted certiorari in monopolization cases even more rarely.[32] The renewed debate was fuelled in large part by two highly publicized cases which were exceptions to these trends, namely *United States v Microsoft Corp* ('*Microsoft*')[33] and *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* ('*Trinko*').[34]

In 1998, the US Department of Justice under the Clinton administration brought proceedings against Microsoft, alleging that the company had engaged in monopolization and thereby contravened section 2 of the Sherman Act.[35] The central allegations in the *Microsoft* case concerned various exclusionary practices adopted by Microsoft to protect its dominance in the market for computer operating systems, giving rise to an enormous volume of commentary on, and theorizing about, the proper characterization of unilateral conduct.[36]

[28] See Fox, 'The Modernization of Antitrust', *supra* note 27, 1143–6; Herbert Hovenkamp, 'The Harvard and Chicago Schools and the Dominant Firm' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press, 2008) 109–11. See Chapter 2 Section VI.

[29] See Steven C Salop and R Craig Romaine, 'Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft' (1999) 7 *George Mason Law Review* 617; Mark S Popofsky, 'Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules' (2006) 73 *Antitrust Law Journal* 435.

[30] See Salop and Romaine, 'Preserving Monopoly', *supra* note 29, at 649.

[31] See William E Kovacic, 'Politics and Partisanship in US Federal Antitrust Enforcement' (2014) 79 *Antitrust Law Journal* 687, 688; Maurice E Stucke and Allen P Grunes, *Big Data and Competition Policy* (Oxford University Press, 2016) 236, 300.

[32] See Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 *Stanford Law Review* 253, 271. See also Hovenkamp, *Antitrust Enterprise*, *supra* note 27, 6–7.

[33] 253 F 3d 34 (DC Cir, 2001).

[34] 540 US 398 (2004). See Popofsky, 'Defining Exclusionary Conduct', *supra* note 29, at 435.

[35] Baker, 'Preserving a Political Bargain', *supra* note 27, at 607. The case was finally, and controversially, settled in the first year of the Bush administration.

[36] See, eg, Salop and Romaine, 'Preserving Monopoly', *supra* note 29, at 617; J Bruce McDonald, 'Antitrust Division Update: *Trinko* and *Microsoft*' (Speech delivered at the Houston Bar Association, Antitrust and Trade Regulation Section, 8 April 2004); David McGowan, 'Between Logic and Experience: Error Costs and *United States v Microsoft Corp*' (2005) 20 *Berkeley Technology Law Journal* 1185; Andrew I Gavil and Harry First, *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century* (MIT Press, 2014); William H Page and John E Lopatka, *The Microsoft Case: Antitrust, High Technology, and Consumer Welfare* (University of Chicago Press, 2007).

In 2001, the DC Circuit in *Microsoft* outlined a 'rule of reason' analysis to be applied in section 2 cases.[37] This analysis focused on the competitive effects of the impugned conduct, requiring the plaintiff to prove that the conduct had an 'anticompetitive effect' but also taking into account 'procompetitive justifications' offered by the defendant and, where necessary, weighing the two against each other.[38] The judgment of the DC Circuit encouraged some commentators to advocate an effects-based test for monopolization claims under section 2.[39]

By contrast, in 2004, the Supreme Court in *Trinko* appeared to advocate a much narrower approach to section 2 cases.[40] *Trinko* concerned a claim that a telecommunications company, Verizon, had breached section 2 by refusing to provide new rivals with access to the local telephone loop on a par with Verizon's own access. Critically, the Court held that there would be no claim under section 2 when the right to access was regulated by a separate legislative regime, as in this case. However, the Court also warned more generally of the need to exercise restraint in imposing liability under section 2, having regard to the risk that an over-inclusive approach could deter dominant firms from undertaking socially beneficial investments and practices.[41] Some considered that the judgment of Scalia J supported the view that it should be necessary for plaintiffs to prove a 'profit sacrifice' on the part of the defendant in monopolization cases.[42]

These cases gave rise to lively debate concerning the appropriate standard for monopolization, in which commentators proposed a variety of tests for characterizing unilateral conduct as anticompetitive.[43] In Hovenkamp's words, the literature at this time was 'preoccupied to the point of obsession with the formulation of a single test for exclusionary conduct'.[44] Notwithstanding the depth of commentary in this area and growing calls for a more active antitrust policy to tackle the consequences of modern economic power, there is currently very little enforcement of the monopolization law by the Department of Justice,[45] and significant uncertainty about the basis on which unilateral anticompetitive conduct should be condemned

[37] See Chapter 5 Section III(A).
[38] Ibid.
[39] See, eg, Steven C Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard' (2006) 73 *Antitrust Law Journal* 311. See further Chapter 5 Section III(B).
[40] See Eleanor M Fox, 'Is There Life in *Aspen* After *Trinko*? The Silent Revolution of Section 2 of the Sherman Act' (2005) 73 *Antitrust Law Journal* 153, 155; Edward D Cavanagh, 'Detrebling Antitrust Damages in Monopolization Cases' (2009) 76 *Antitrust Law Journal* 97, 106.
[41] 540 US 398, 407–8, 414 (2004). See also Jonathan B Baker, 'Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right' (2015) 80 *Antitrust Law Journal* 1, 13.
[42] See Chapter 4 Section III(D),(E).
[43] See Chapters 4 Section III(E) and 5 Section III.
[44] See Herbert Hovenkamp, 'The Harvard and Chicago Schools and the Dominant Firm' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press, 2008) 114.
[45] Stucke and Grunes, *Big Data*, *supra* note 31, at 235–7.

under section 2. As Lambert commented, 'There is a problem with Section 2 of the Sherman Act: nobody knows what it means.'[46]

C *The European Union*

In recent decades, there has also been vigorous debate concerning unilateral conduct standards in the EU. Unilateral anticompetitive conduct is addressed by Article 102 of the TFEU,[47] which states that:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar 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 practices of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

From the late 1990s, the EU began a process of 'modernizing' its competition laws.[48] Central to this process was the acknowledgement that the assessment of competition complaints should depend on an analysis of the actual competitive effects of the impugned conduct and not on presumptions that certain forms of conduct were anticompetitive and therefore unlawful per se.[49]

The European Commission and the EU courts[50] had traditionally taken a relatively expansive approach to the enforcement of competition law, often condemning conduct based on its form without having regard to its likely economic

[46] Thomas A Lambert, 'Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach' (2014) 92 *North Carolina Law Review* 1175, 1177. See also Baker, 'Preserving a Political Bargain', *supra* note 27, at 606–7, 640, describing the publication of the report on single-firm conduct by the US Department of Justice under the Bush administration, which was withdrawn by the Department just months later under the Obama administration.

[47] *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) (TFEU).

[48] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Hart Publishing, 2nd ed, 2013) 47–8.

[49] Ibid 67–73. See also Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010) 1–3.

[50] Ie, the General Court (previously the Court of First Instance) and the European Court of Justice.

effects in a given case.[51] As part of the process of modernization, various aspects of the competition law, including merger analysis and vertical restraint guidelines, were reformed so as to focus on the economic effects of the relevant conduct.[52] A similar process was attempted in respect of unilateral conduct, but, in this area, the EU courts demonstrated a marked reluctance to move towards an effects-based analysis.[53]

The European Commission commissioned and received an expert economic report, which recommended an effects-based approach to unilateral anticompetitive conduct under Article 102.[54] This report, in turn, led to the publication of the 'DG Competition Staff Discussion Paper' in December 2005, produced by the Directorate General for Competition,[55] which adopted an effects-based, consumer welfare standard for exclusionary abuses.[56] The Discussion Paper stimulated lively debate, but, in the absence of any shift in the case law, the Commission could not issue guidelines that incorporated such an approach.[57]

Accordingly, in February 2009, the European Commission instead adopted a 'Guidance Paper', which set out its own 'enforcement priorities' in respect of exclusionary abuse of dominance claims ('*EC Guidance Paper*').[58] The *EC Guidance Paper* does not have the force of law, nor is it representative of the existing legal position in the EU; rather it outlines the manner in which the Commission will determine which claims of exclusionary abuse of dominance warrant investigation and prosecution.[59] The Commission's approach in the *EC*

[51] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (Oxford University Press, 3rd ed, 2014) 348 [4.85]–[4.88]; Gormsen, *A Principled Approach*, *supra* note 49, at 5. Cf Pablo Ibanez Colomo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) 53 *Common Market Law Review* 709.

[52] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 4th ed, 2011) 197–201, 650–1.

[53] Ibid 273, 275.

[54] Economic Advisory Group on Competition Policy, *An Economic Approach to Article 82* (July 2005) 3, advocating an 'economics-based approach' to abuse of dominance claims, which 'requires a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare'.

[55] The Directorate General for Competition is the division of the European Commission responsible for competition policy.

[56] Directorate General for Competition, European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (December 2005). See Jones and Sufrin, *EU Competition Law*, *supra* note 52, at 274.

[57] See Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 8th ed, 2015) 185–6; Faull and Nikpay, *EU Law of Competition*, *supra* note 51, at 351–2.

[58] *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* [2009] OJ C 45/2 ('*EC Guidance Paper*').

[59] See O'Donoghue and Padilla, *Law and Economics*, *supra* note 48, at 75–6. The *EC Guidance Paper* has nonetheless been criticized for creating uncertainty by putting forward different tests to those set out in the case law or expressing legal tests in a way that does not reflect judicial precedent: see, eg, Renato Nazzini, *The Foundations of European Union*