



Exploitative Abuse in Article 82EC: Back to Basics?

by

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Abstract: For the last few years, the EC Commission has been reviewing its application of Article 82EC which prohibits the abuse of a dominant position on the Common Market. The review has resulted in a Communication from the EC Commission which for the first time sets out its enforcement priorities under Article 82EC. The review had been limited to the so-called 'exclusionary' abuses and excluded 'exploitative' abuses; the enforcement priorities of the EC Commission set out in the Guidance (2008) are also limited to 'exclusionary' abuses. This is, however, odd since the EC Commission expresses the objective of Article 82EC as enhancing *consumer* welfare: exploitative abuses can *directly* harm consumers unlike exclusionary abuses which can only *indirectly* harm consumers as the result of exclusion of competitors. This paper questions whether and under which circumstances exploitation can and/or should be found 'abusive'. It argues that 'exploitative' abuse can and should be used as the test of anticompetitive *effects* on the market under an *effects-based* approach and thus conduct should only be found abusive if it is 'exploitative'. Similarly, mere exploitation does not demonstrate harm to competition and without the latter, exploitation on its own should not be found abusive.

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1. Introduction

For the last few years, the EC Commission had been reviewing its application of Article 82EC which prohibits the abuse of a dominant position on the Common Market. Modernisation in this area has long been called for since the application of Article 82EC by the EC Commission and Courts has been criticised for not being based on sound economic analysis and economic effects, protecting competitors instead of competition and being inefficient for failing to deliver from a 'welfare' perspective.¹ During the EC Commission's review, a move towards a more economic approach to Article 82EC that would scrutinise conduct on the basis of its *effects* on the market appeared to be supported.² The review very recently resulted in a Communication from the EC Commission which for the first time sets out its enforcement priorities in applying Article 82EC.³ The enforcement priorities of the EC Commission as set out in the Guidance (2008) are limited to 'exclusionary' abuses. 'Exploitative' abuses had similarly been left out of the scope of the Discussion Paper (2005) which was the first document in which DG Competition had elaborated on its overall current and future application of Article 82EC.⁴ Hence, the review was limited to the so-called 'exclusionary' abuses and excluded 'exploitative' abuses all along. This is, however, peculiar: 'exclusionary' abuses refer to those practices of a dominant undertaking which seek to harm the competitive position of its competitors or to exclude them from the market, whereas 'exploitative' abuses can be defined as attempts by

¹ For various criticisms see amongst others EM Fox 'Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness' (1986) 61 *Notre Dame Law Review* 981, 1004; P Jebson and R Stevens 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union' (1996) 64 *Antitrust Law Journal* 443; B Sher 'The Last of Steam-Powered Trains: Modernising Article 82' (2004) 25 (5) *European Competition Law Review* 243; J Kallaugh and B Sher 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82' (2004) 25 (5) *European Competition Law Review* 263; D Waelbroeck 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 (1) *Journal of Competition Law and Economics* 149; A Jones and B Sufrin *EC Competition Law* (3rd ed Oxford University Press Oxford 2008) 321

² EC Commission 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf> [55]; N Kroes 'Exclusionary Abuses of Dominance – the European Commission's Enforcement Priorities' Fordham University Symposium New York, 25 September 2008, 3

³ 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (draft text) (Brussels, 3 December 2008) available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>

⁴ See Discussion Paper (2005) (n 2) [3]

a dominant undertaking to use the opportunities provided by its market strength in order to harm customers *directly*.⁵ Given that according to the EC Commission the ultimate objective of Article 82EC is enhancing ‘consumer welfare’,⁶ one would have expected its review to *a fortiori* include an assessment of ‘exploitative’ abuses since these can immediately and directly harm consumers. Yet, the issue of ‘exploitative’ abuse has been swept under the carpet. Thus, this paper questions what the role of ‘exploitative’ abuse should be in a finding of ‘abuse’ under Article 82EC and the enforcement of the provision.

Admittedly, the categories of ‘abuse’ are not mutually exclusive and the story of Article 82EC has predominantly been one of action against ‘exclusionary’ abuses.⁷ Interestingly, the reason for limiting the scope of the review to ‘exclusionary’ abuses has been expressed by Commissioner Kroes as that ‘it is wise in [their] enforcement policy to give priority to so-called exclusionary abuses, since exclusion is often at the basis of later exploitation of customers.’⁸ As one commentator has noted, this is rather paradoxical: if exclusionary abuses are bad because they ultimately exploit consumers, why should the policy emphasis not be directly on exploitative abuses?⁹ Indeed, the main objection to an undertaking with market power is its ability to ‘exploit’ its position in a way which would not be possible for an undertaking on a competitive market.¹⁰ Furthermore, the paradox is aggravated by the fact that it is questionable and has been questioned whether the provision of Article 82EC itself prohibits ‘exclusionary’ abuses at all, although there is no question that it prohibits ‘exploitative’ abuses. The latter is clearly demonstrated by

⁵ CE Mosso and S Ryan ‘Article 82 – Abuse of a Dominant Position’ in J Faull and A Nikpay (eds.) *The EC Law of Competition* (Oxford University Press Oxford 1999) 146; DG Goyder *EC Competition Law* (4th ed. Oxford University Press Oxford 2003) 283

⁶ See Discussion Paper (2005) (n 2) [4], [54], [88]. Although neither the Discussion Paper (2005) nor the Guidance (2008) provides a definition, ‘consumer welfare’ can be defined as ‘consumer surplus’ which is the aggregate measure of the surplus of all consumers. The surplus of a given consumer is the difference between her valuation of a good and the price she actually pays for it; see M Motta *Competition Policy: Theory and Practice* (Cambridge University Press Cambridge 2004) 18

⁷ Jones and Sufrin (n 1) 320

⁸ N Kroes ‘Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82’ in B Hawk (ed.) *International Antitrust Law and Policy: Fordham Corporate Law Institute Annual Proceedings 2005* (New York Juris Publishing 2006) 384

⁹ B Lyons ‘The Paradox of the Exclusion of Exploitative Abuse’ in *The Pros and Cons of High Prices* (Swedish Competition Authority 2007) 65

¹⁰ Jones and Sufrin (n 1) 316

examples in Article 82EC, in conformity with the legislative history of the provision and the text of Article 82EC in some original languages of the EC Treaty.¹¹

Moreover, the Discussion Paper (2005) had defined 'exclusionary' conduct as behaviour by dominant undertakings which is likely to have a foreclosure effect on the market *and* which ultimately harms consumers.¹² The implication of this was that the prevailing categorisation of abuse as 'exclusionary' and 'exploitative' might no longer have been sustainable since 'exclusionary' conduct would have, as a result of this understanding, required 'exploitation' as well which could have been seen as a move towards a single type of abuse, namely 'exploitative'.¹³ However, the Guidance (2008) seems to rather blur this issue since by explicitly leaving 'exploitative abuse' outside its scope, it first recognises and confirms the prevailing categorisation and separation of the two types of abusive conduct. Second, it expresses the EC Commission's enforcement aim in a rather different way to the definition of 'exclusionary' conduct in the Discussion Paper (2005). According to the Guidance (2008), the aim of the EC Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing rivals in an anticompetitive way and thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.¹⁴ Without defining either 'exclusionary' or 'exploitative' conduct, the Guidance (2008) then explicitly states that conduct which is directly exploitative of consumers (for example, charging excessively high prices) is also liable to infringe Article 82EC and the

¹¹ In the early days of EC competition law, it had been argued that Article 82EC merely prohibited 'exploitative' abuse and did not go as far as to prohibit 'exclusionary' abuse; see Jones and Sufrin (n 1) 316-321 in general. Joliet had specifically argued that Article 82EC covered merely 'exploitative' conduct; R Joliet *Monopolization and Abuse of Dominant Position* (Martinus Nijhoff La Haye 1970) 250. Indeed, the German and French versions of the Treaty only prohibit 'exploitative abuse'. For the legislative history supporting Joliet's view see P Akman 'Searching for the Long-Lost Soul of Article 82EC' (forthcoming) (2009) 29 (2) Oxford Journal of Legal Studies, an earlier version of which can be found at <http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-5.pdf>

¹² Discussion Paper (2005) (n 2) [1]

¹³ See EM Fox 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 20 Antitrust Law Journal 371 questioning whether there is ultimately only one type of abuse, that is exploitative. See also P Akman 'Article 82 Reformed? The EC Discussion Paper on Exclusionary Abuses' [2006] (December) Journal of Business Law 816, 821-822

¹⁴ Guidance (2008) (n 3) [19]

EC Commission may decide to intervene in relation to such conduct.¹⁵ Thus, although harm to ‘consumer welfare’ is included in the setting of enforcement priorities regarding ‘exclusionary’ conduct, the EC Commission does not seem to think that there is only one type of abuse. It rather acknowledges the separation of ‘exploitation’ from ‘exclusion’, leaving the former without any guidance regarding its substantive assessment and/or enforcement. Yet, elaborating on ‘exploitative’ abuse is crucial for the application of Article 82EC if the objective is to be ‘consumer welfare’ and a discussion of whether and under which circumstances exploitation can and/or should be found ‘abusive’ is necessary. This has not been done sufficiently in the decisional practice or the literature so far due to the emphasis on ‘exclusionary’ abuses.

Hence, this paper first elaborates on the definition of ‘exploitation’ in Section 2 and points out the uncertainty in both the definition and the desirability of the scrutiny of exploitation. Section 3 then investigates the place of ‘exploitative abuse’ in the prohibition of and the decisional practice on Article 82EC. It finds that although there is no doubt that exploitative abuse is covered by Article 82EC, there are very few cases which provide limited insights into the role of exploitative abuse. Consequently, Section 4 investigates whether and how ‘exploitative abuse’ can be meaningfully utilised under Article 82EC. It argues that pure exploitation should not be found abusive under Article 82EC since exploitation on its own does not demonstrate harm to competition and mostly constitutes more of a contract law problem than a competition law problem. Similarly, pure exclusion on its own without exploitation also should not be found abusive under Article 82EC to avoid protecting competitors rather than competition; exploitative abuse can and should be used as the test of anticompetitive *effects* on the market and conduct should only be found abusive if it is ‘exploitative’. Thus, neither exploitative nor exclusionary abuse making sense on its own, this implies that there is ultimately one type of abuse. Finally, Section 5 concludes.

¹⁵ Guidance (2008) (n 3) [7]

2. Defining 'Exploitation'

Going back to basics, the verb 'to exploit' has two very different meanings in the dictionary: it means either to 'make full use of and derive benefit from (a resource)' or to 'make use of (a situation) in a way considered unfair or underhand'.¹⁶ This definition of 'to exploit' lends itself precisely to the ultimate question of what is meant by 'exploitative abuse' under Article 82EC: if according to standard economic theory, every rational actor seeks to maximise its welfare and in the case of undertakings this would mean maximising profits, how is the line to be drawn between the case when an undertaking is 'making full use of and deriving benefit from (a resource)', i.e. its business and the case when it 'makes use of (a situation) in a way considered unfair or underhand', i.e. abuses its position? In other words, it is ambiguous what is meant by 'exploitation' in the context of Article 82EC since it is not straightforward when the conduct of the undertaking 'exploits' its customers rather than making full use of its resources. It is also unclear what the relevant parameters of 'exploitation' are. Questions such as whether exploitation relates to price or quality or choice or to all of these and if so, *when* such price, quality and/or choice become(s) 'exploitative' remain unanswered. Answering these questions requires the consideration of a counterfactual and that counterfactual is not obvious either; it is unclear to which alternative state of competition the position of the customers should be compared to decide that they are being 'exploited' by the dominant undertaking. One benchmark can be 'perfect competition', but there is wide agreement that 'perfect competition' is not a realistic or always desirable state since, for example, it would require pricing at marginal cost which could distort incentives to invest and innovate.¹⁷

¹⁶ See 'exploit verb' *The Oxford Dictionary of English* (revised edition) (ed.) Catherine Soanes and Angus Stevenson. Oxford University Press, 2005. *Oxford Reference Online*. Oxford University Press. 16 October 2008 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t140.e26279>

¹⁷ In 'perfect competition', the market price of a product would be equal to the marginal cost of producing the product, delivering both productive and allocative efficiency; S Bishop and M Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (2nd ed Sweet&Maxwell London 2002) 17, 20. 'Productive efficiency' occurs when a given set of products is being produced at the lowest possible cost (given current technology, input prices and so on) and 'allocative efficiency' relates to the difference between the cost of producing the marginal product and the valuation of that product by consumers, *ibid.* 20. However, 'perfect competition' is unrealistic due to the assumptions underlying the paradigm: there are many buyers and sellers of the product, the quantity of products bought by any

This points out another paradox: although it is not clear what exactly 'exploitation' means or refers to, 'exploitation of consumers is the textbook abuse by a monopolist or dominant firm'.¹⁸ So much so that, '[a]ll economics students learn this in their first year of study, and it is a major justification for competition policy.'¹⁹ The dominant undertaking can raise its prices to enhance profits because consumers cannot easily switch to another undertaking and they lose out by paying more and buying less, leading to a misallocation of resources.²⁰ Thus, exploitation in this sense can be interpreted as the 'earning of monopoly profits at the expense of the customer.'²¹ However, any undertaking that earns any profits may be deemed to earn it 'at the expense of the customer'. Moreover, competition policy should be wary of prohibiting the earning of monopoly profits since the essence of pro-competitive behaviour is also to increase market power to increase profits by exploiting this market power; if there were no possibility to ever exploit one's market power, there would not be any incentives to compete either.²² Hence, yet another paradox for Article 82EC: not only is it unclear when conduct becomes 'exploitative', there may be reasons not to tackle such conduct, even though the prevention of exploitation may be the ultimate aim of the prohibition. This will be returned to in Section 4.

A working definition of 'exploitative abuse' under Article 82EC can be taken as any conduct that *directly* causes harm to the customers of the dominant undertaking. The *direct* harm to customers is the main characteristic of 'exploitative abuse' and the rest of this paper will interpret exploitation based on this premise.²³ Although this does not provide an unambiguous definition, it

buyer or sold by any seller is so small relative to the total quantity traded that changes in these quantities leave market prices unchanged, the product is homogeneous, all buyers and sellers have perfect information and there is both free entry and exit out of the market; *ibid.* 17

¹⁸ Lyons (n 9) 66

¹⁹ Lyons (n 9) 66

²⁰ Lyons (n 9) 66; R Whish *Competition Law* (6th ed. Oxford University Press Oxford 2009) 199

²¹ Whish (n 20) 200

²² LH Röller 'Exploitative Abuses' in CD Ehlermann and M Marquis (eds) *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (forthcoming 2008) available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Roeller.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Roeller.pdf) 2

²³ O'Donoghue and Padilla express 'exploitation' as the dominant undertaking taking advantage of its market power to extract rents from consumers that would not have been possible for a non-dominant undertaking or to take advantage of consumers in some other way; R O'Donoghue and AJ Padilla *The Law and Economics of Article 82 EC* (Hart Publishing Oxford 2006) 174. Although this can explain harm from pricing behaviour, it does not cover non-pricing conduct which may still harm customers without the extraction of extra rents

is questionable whether any unambiguous definition can be provided. The next section investigates the place of 'exploitative abuse' in Article 82EC and the decisional practice on it thus far seeking to find whether 'exploitation' can be concretised any better.

3. Place of 'Exploitative Abuse' in the Prohibition of and the Decisional Practice on Article 82EC

It is not questionable and has never been questioned whether Article 82EC covers 'exploitative' abuse. The evidence supporting this is comprehensive. First, the drafters of Article 82EC seem to have intended to prohibit merely 'exploitative' abuses by dominant undertakings and not 'exclusionary' abuses.²⁴ Their main concern appears to have been not the effects on competitors of the dominant undertakings, but the effects on their customers. Second, there is nothing in the text of Article 82EC that suggests that it covers 'exclusionary' abuses. A reading of Article 82EC clearly shows that the prohibition is about imposing prices, trading conditions, discriminatory and tying clauses which can only occur in relations with 'customers'.²⁵ Although it has been argued in the literature that the prohibition in subparagraph (b), namely that of 'limiting production, markets or technical development' shows that Article 82EC prohibits 'exclusionary' abuses,²⁶ since this conduct is only abusive when it is 'to the prejudice of consumers', the concern is again with harm to customers, rather than harm to competitors. Hence, such conduct is only abusive if it can 'exploit' customers of the dominant undertaking. Third,

²⁴ See Akman (n 11)

²⁵ Article 82EC reads '[a]ny 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 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 parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

²⁶ O'Donoghue and Padilla (n 23) 197

the texts of Article 82EC in French and German also support this view as they literally state that the provision prohibits 'abusive exploitation'.²⁷

Indeed, in the early years of implementation there was a dispute about whether Article 82EC applied to only exploitative abuses or covered exclusionary abuses as well. For example, Joliet (later a judge of the ECJ) had opined that it merely covered exploitative abuses; under the abuse theory applicable to Article 82EC, the test of legality is not the interference with other firms' freedom to compete and the use of 'exclusionary' conduct to achieve and hold power, but *rather whether there is monopolistic exploitation of the market*.²⁸ Joliet reached this conclusion by studying the examples listed in Article 82EC and finding that the main preoccupation of the Treaty was not the maintenance of a competitive system.²⁹ According to him, large size was considered as an economic necessity, the basic assumption underlying Article 82EC being that monopolistic structure does not inevitably lead to monopolistic performance. The reason why monopoly power as such was not condemned was because the Treaty assumed that this power would not be systematically utilised.³⁰

Although Joliet does not specifically refer to the intent of the drafters of Article 82EC, as mentioned above, this also appears to be in conformity with his viewpoint. Hence, it was the ECJ judgment in *Continental Can* holding that Article 82EC applies to not only exploitative practices, but also to exclusionary practices which determined that Article 82EC is applicable to exclusionary conduct as well.³¹ As such *Continental Can* appears to have been indeed 'the apotheosis of the teleological method'.³² Thus, the ECJ in *Continental Can* significantly changed the ambit and life of the provision by 'making law', rather

²⁷ In the French and German texts, Article 82EC prohibits '... d'exploiter de façon abusive ...' and '... missbräuchliche Ausnutzung ...' respectively

²⁸ Joliet (n 11) 250

²⁹ Joliet (n 11) 131

³⁰ Joliet (n 11) 252

³¹ Case 6/72 *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] ECR 215 [26]: '... [a]s may further be seen from letters (c) and (d) of Article 8(2), the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 [(1)(g)] of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behaviour depends on the dominant one.'

³² DJ Gerber 'The Transformation of European Community Competition Law?' (1994) 35 *Harvard International Law Journal* 97, 116

than ‘applying the law’.³³ As a result, the story of Article 82 has been predominantly one of action against exclusionary abuses.³⁴ However, by its interpretation in *Continental Can* the ECJ not only overrode the drafters’ intent that achieving a dominant position is compatible with the EC Treaty, it also led to the misinterpretation of ‘exploitative’ abuse. The place of exploitative abuse in the decisional practice on Article 82EC has been limited, but as will be seen in the rest of this section, where exploitation has been found abusive, there is often no other showing of harm to competition. Without this separate showing of harm to competition, some of the condemned practices appear to be more contract law problems than competition law problems. So much so that, for example, if these were to be the subject of private enforcement in the US, it is unlikely that ‘antitrust injury’ could be proved.³⁵ The rest of this section elaborates on this case-law seeking for the principles governing exploitatively abusive conduct.

3.1 Article 82(a)EC

According to Article 82(a)EC, it is an abuse for a dominant undertaking to directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions. Hence, this subparagraph prohibits ‘unfair pricing’ and ‘unfair trading conditions’. As such, the ‘unfairness’ of conduct can be thought to demonstrate the ‘exploitative’ nature of it.

3.1.1 Unfair Pricing

Although the provision prohibits ‘unfair’ prices and the meaning of ‘unfair’ is unclear, in EC case-law this has usually been understood to cover ‘excessive’ and ‘predatory’ prices. ‘Predatory’ prices, i.e. prices below a measure of cost, are not exploitative in themselves since low prices to customers do not ‘exploit’ them and a failed attempt at predation would actually benefit them.

³³ Cf. Case 6/60 *Jean-E Humblet v Belgium* [1960] ECR 559, 575 where the ECJ held that it does not act arbitrarily but judicially; it has to see that its interpretation reflects the intention of the parties to the Treaties and the *ratio legis* of the text. It is questionable whether this was followed in *Continental Can*

³⁴ Jones and Sufrin (n 1) 320

³⁵ In the US, for private plaintiffs to recover damages from breaches of competition law, ‘[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.’; *Brunswick Corp v Pueblo Bowl-O-Mat, Inc* 429 US 477, 489 (1977). Hence, without proving anticompetitive *effects*, harm to competition (which may then give rise to a claim for damages) will not be proven

Exploitation can follow exclusion of other undertakings due to 'predatory pricing' of the dominant undertaking, but that would require the *post-predation* price to become 'unfair' and exploit the customers. In contrast, 'excessive' prices can be thought to directly exploit the customers of a dominant undertaking within the meaning of 'exploitation' in this paper as they would be paying prices higher than they would under, for example, perfect competition.³⁶

The case-law on unfair 'excessive' prices is sparse and this is indeed welcome given the problems with scrutinising the levels of price as will be explained below. The current EC approach towards 'unfair pricing' is based on several different tests.³⁷ The practice of the EC Commission and Courts evidence a range of benchmarks against which prices have been compared in order to demonstrate 'unfairness'. These benchmarks include the costs of the dominant undertaking, prices charged by the dominant undertaking on other markets, the prices of competitors' products on the same market and the prices of competitors' similar products on other markets.³⁸ These comparators have been utilised either on their own or in conjunction with one another depending on the information available in the case at hand.

The concept of 'unfair' prices has been used in the EC jurisprudence since the early days. In *Parke Davis*, for example, the ECJ held that even though the sale price of a patent protected product may be regarded as a factor to be taken into account in determining the possible existence of an abuse, a higher price for the patented product as compared with the unpatented product does not necessarily constitute an abuse.³⁹ The ECJ repeated this in *Sirena v Eda* by stating that although the price level may not in itself necessarily suffice to disclose the abuse of a dominant position, if unjustified by any objective

³⁶ On 'perfect competition' see n 17

³⁷ For a study on all cases, see M Motta and A de Streel 'Excessive Pricing and Price Squeeze under EU Law' in CD Ehlermann and I Atanasiu (eds.) *What Is an Abuse of Dominant Position?* (Hart Publishing Oxford 2006)

³⁸ See Motta and de Streel (n 37) 95 *et seq.* See also *Scandlines Sverige AB v Port of Helsingborg* Commission Decision (Case COMP/A.36.568/D3) 23.07.2004 (unreported) [170] *et seq.* This paper uses the term 'product' to cover 'services' as well unless otherwise stated

³⁹ Case 24/67 *Parke Davis and Co v Probel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 71, 72.

criteria and if particularly high, it may be a determining factor.⁴⁰ In *Volvo* and *Renault* the ECJ confirmed that charging ‘unfair prices’ for spare parts by a car manufacturer that refused to license its intellectual property rights might constitute abuse.⁴¹ In *General Motors*, the ECJ used the expression ‘excessive price’ for the first time and decided that ‘the imposition of a price which is excessive in relation to the economic value of the service provided’ could be abusive under Article 82(a)EC.⁴²

The leading case on the matter is *United Brands*, in which the ECJ set out the conditions for a price to be ‘unfair’, although in that case the Court held that the EC Commission had not proved the existence of ‘unfair’ prices.⁴³ According to the ECJ in *United Brands*, ‘charging a price that is excessive because it has no reasonable relation to the economic value of the product’ would be an abuse of a dominant position.⁴⁴ This excess could be determined objectively by looking at the amount of the profit margin.⁴⁵ A twofold test was proposed as follows: first, it should be determined whether the difference between the costs actually incurred and the price actually charged is excessive.⁴⁶ Second, if the answer to the first question is in the affirmative, it should be assessed whether a price has been imposed which is either ‘unfair’ in itself or when compared to competing products.⁴⁷ In other words, the excessiveness of the profit margin does not in itself prove that the price is ‘unfair’. However, it is ambiguous what exactly would prove that the price is indeed ‘unfair’. In another decision, the EC Commission held that ‘[a]n infringement of Article 82(2)(a) of the EC Treaty exists where the price charged for a service is clearly disproportionate to the cost of supplying it’.⁴⁸

⁴⁰ Case 40/70 *Sirena Srl v Eda Srl and Others* [1971] ECR 69, [17]

⁴¹ Case 238/87 *AB Volvo Veng v Erik Veng (UK) Ltd* [1988] ECR 6211 and Case 53/87 *CICCRA v Renault* [1988] ECR 6039

⁴² Case 26/75 *General Motors Continental NV v EC Commission* [1975] ECR 1367, [12], [20]. In this case such abuse was not found contrary to the EC Commission’s decision

⁴³ Case 27/76 *United Brands Company and United Brands Continental BV v EC Commission* [1978] ECR 207, [267]. For a recent EC Commission Decision applying the test in *United Brands* see *Scandlines* (n 38)

⁴⁴ *United Brands* (n 43) [250]

⁴⁵ *United Brands* (n 43) [251]

⁴⁶ For the argument that the test is single-staged see Motta and de Streel (n 37) 96. However, the wording used by the Court is very clear in that it requires a two-staged examination. The EC Commission adopts this latter view as well in *Scandlines* (n 38) [149]

⁴⁷ *United Brands* (n 43) [252]

⁴⁸ DSD Commission Decision (Case COMP D3/34493) 2001/463/EC [2001] OJ L166/1 [111]

Hence, this approach seems to be mainly based on the comparison of the cost and price of the product.⁴⁹ For example, it seems that this approach was used in *British Leyland* where the fees charged by the car manufacturer British Leyland for national type approval certificates were found 'unfair' and thus abusive by the EC Commission and the ECJ as they were 'clearly disproportionate to the economic value of the service'.⁵⁰

Of the other methods of determining the unfairness of price, comparison of the allegedly abusive price with that of the dominant undertaking's comparable products on the same market is the approach adopted by the EC Commission in cases of 'margin squeeze' and was, for example, applied in *Deutsche Telekom*.⁵¹ As another approach, comparison with *other* undertakings' prices may be done for the same market where abuse allegedly takes place or for a different market where similar products are offered by other undertakings. However, prices of competitors on the same market could not be an appropriate benchmark most of the time since if the market is dominated and thus competition is already impaired, then the prices of other undertakings on that market would not necessarily show what the price would be under more competitive conditions.⁵² Similarly, comparison with other undertakings' prices

⁴⁹ Except for *Scandlines* (n 38), the EC Commission and the Courts demonstrate a problematic understanding of 'economic value', as they seem to equate it with 'cost'. See e.g. See Case 226/84 *British Leyland plc v EC Commission* [1987] 1 CMLR 185, [28]-[30] where the ECJ explicitly looks at the factors determining the 'cost' of the service to find that the price is disproportionate to the 'economic value'. In *General Motors* (n 42) the ECJ states that abuse may be found in the 'imposition of a price which is excessive in relation to the economic value of the service' and then decides that since General Motors brought its rates into line with the 'real economic cost' of the operation after the complaints, there is no abuse; [12], [22]. In *Deutsche Post AG – Interception of cross-border mail* Commission Decision (Case COMP/C-1/36.915) 2001/892/EC [2001] OJ L331/40 [162] the prices were found to be '25% above the estimated average cost and the estimated economic value for that service' and hence, abusive. In this decision 'average cost' is used interchangeably with 'economic value' at [162], [163]-[164], [166]. Although it is not clear from the judgment, this must also be why the ECJ in *United Brands* (n 43) compared the cost and the price of the product to see whether the price was excessive in relation to its 'economic value'; *ibid.* [250]-[251]. However, in a recent preliminary ruling the ECJ decided that the royalties paid to a collection society for the use of copyright protected musical works must be analysed with respect to the 'value of that use in the trade' and hence may be adopting the more appropriate understanding in *Scandlines*; see Case C-52/07 *Kanal 5 Ltd and TV4 AB v STIM* [2008] ECR 0, [36]

⁵⁰ *British Leyland* (n 49) [30]. The Court bases its judgment on the fact that the costs of issuing conformity certificates for right-hand drive and left-hand drive vehicles were not so different to justify the different higher fee for left-hand drive vehicles as compared to the fee for right-hand drive vehicles

⁵¹ In *Deutsche Telekom* the margin between the wholesale price charged to competitors for access to the fixed network and the retail prices charged to end-users for access over local networks was not sufficient enough to allow competitors to compete with Deutsche Telekom to provide end-user access over local networks and Deutsche Telekom was fined €12, 6 million for charging 'unfair' prices; *Deutsche Telekom AG* Commission Decision (Case COMP/C-1/37.451, 37.578, 37.579) 2003/707/EC [2003] OJ L263/9 [4], [199], [212]

⁵² This was confirmed in *Deutsche Post AG – Interception of Cross-Border Mail* in which case the EC Commission expressed that in a market open to competition, the normal test to be applied for 'fairness'

on other markets, as done in *SACEM*,⁵³ risks comparing non-equivalent products and the authority would have to estimate how much of the price difference is due to different market characteristics. Moreover, it implicitly assumes that the price in the low-price market is a benchmark for the competitive price in the market where the alleged abuse took place.⁵⁴ Further, if the comparative competing product is produced at a non-trivial quantity, then the higher price of the dominant undertaking's product may not signify abuse since the demand of buyers deeming that price excessive should possibly be satisfied by the other undertaking(s).

Hence, all these methods present various problems, both in terms of definition and assessment; none of these renders a coherent and objective test of finding price to be 'unfair' and 'exploitative'. Indeed, the prohibition of excessive pricing is controversial and problematic for many reasons: scrutiny of the level of price set in a market economy implies the regulation of prices by authorities rather than the market. Moreover, in the case of Article 82EC the test on which such scrutiny will be based is ambiguous and thus can lead to perverse outcomes in terms of both the operation of the market and the incentives of the undertakings in the market.⁵⁵ One reason for this is that any policy seeking to detect and prohibit excessive prices in practice is likely to yield incorrect predictions and all these errors are costly.⁵⁶ The cost of a Type I error (false positive) in excessive pricing cases is given by a reduction in the investment and innovation incentives of not just the undertakings that operate

of a price would be to compare the price of the dominant undertaking with the prices charged by its competitors. Yet, since *Deutsche Post AG* had a wide-ranging monopoly, such a comparison was not possible; *Deutsche Post AG – Interception of cross-border mail* (n 49) [159], [162]

⁵³ The ECJ in that preliminary ruling case held that *SACEM* could be found to have charged unfair royalties as a result of a comparison between the royalties charged by *SACEM* in France and other copyright-management societies in other Member States if such a comparison could be made on a 'consistent basis', Case 110/88 *François Lucazeau and others v Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM)* [1989] ECR 2811, [25]. The dominant firm is given the right to prove objective dissimilarities between the Member States to justify such a difference, *ibid*. However, this would require such a firm to be able to prove conditions of markets on which it is not active. Moreover, this would perversely encourage dominance since it would mean that being dominant on many markets is better than being dominant on one since in that way, the firm can eliminate the possibility of comparison with different markets. See also Case 30/87 *Bodson v Pompes Funèbres des Régions Libérées* [1988] ECR 2479 and Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521

⁵⁴ O'Donoghue and Padilla (n 23) 618

⁵⁵ Offering a new test of 'unfair pricing' under Article 82EC, see P Akman and L Garrod 'Incorporating Behavioural Economics into a New Test of Unfair Pricing in EC Competition Law' (mimeo)

⁵⁶ DS Evans and AJ Padilla 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1 (1) *Journal of Competition Law and Economics* 97, 99

in the sectors where intervention takes place, but throughout the entire economy since evidence of false positives would reduce the expected rate of return on successful innovations.⁵⁷ It has been argued that firms need to mark up their variable costs in order to cover their fixed costs, fund new investments and innovate (that is, the cost of a Type I error is typically large) and that the ability of undertakings to sustain above-competitive prices is most often constrained by the possibility of entry (that is, the cost of a Type II error – false negative - is small).⁵⁸

Moreover, in reality, virtually no market qualifies as perfectly competitive and pricing at perfectly competitive levels would yield overall losses in the short term and under-investment in the long term.⁵⁹ In any case, identifying the competitive price level is almost always impossible.⁶⁰ Further, the fact that an undertaking is earning a large profit may be attributable to its superior efficiency over its rivals, rather than to its market power.⁶¹ In such a case, too low a profit may reduce *ex ante* investment and harm consumers in the long run.⁶² Hence, especially in dynamic industries, prices need to be set significantly above cost to fund initial capital outlays and compensate for associated risk.⁶³ Therefore, the general presumption should be that market forces will over time reduce the market power of a dominant undertaking and oblige it to decrease price to prevent switching. That is, exploitative prices are deemed to be self-correcting because they will attract new entrants.⁶⁴

⁵⁷ Evans and Padilla (n 56) 114

⁵⁸ Evans and Padilla (n 56) 118

⁵⁹ O'Donoghue and Padilla (n 23) 605, 608

⁶⁰ Bishop and Walker (n 17) 43; Jones and Sufrin (n 1) 586

⁶¹ Whish (n 20) 709

⁶² O'Donoghue and Padilla (n 23) 605; Röller (n 22) 3

⁶³ O'Donoghue and Padilla (n 23) 608. See similarly FM Fisher 'Monopolization versus Abuse of Dominant Position: An Economist's View' in B Hawk (ed.) *International Antitrust Law & Policy: Fordham Corporate Law 2003* (Juris Publishing Inc New York 2004) 160; RJ van den Bergh and PD Camesasca *European Competition Law and Economics A Comparative Perspective* (Intersentia-Hart Antwerpen-Groningen-Oxford 2001) 259; Jones and Sufrin (n 1) 588

⁶⁴ Motta and de Streeck (n 37) 108. This explanation goes back to the 'Chicago School' of antitrust according to which monopoly is self-destructive; monopoly prices will eventually attract entry, FH Easterbrook 'The Limits of Antitrust' (1984) 63 (1) *Texas Law Review* 1, 2. Scrutiny of excessive pricing has been rejected by US courts. See for example Justice Scalia opining that the charging of 'monopoly' prices is not only 'not unlawful', but also 'an important element of the free-market system' in *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP* 540 US 398, 407, 124 S Ct 872 (2004)

Recently in the European literature, commentators have remarked that the prohibition of ‘excessive pricing’ can be operationalised under certain special circumstances.⁶⁵ What they all argue in common is that there should be significant barriers to entry and the ability to exploit should be the result of ‘exclusion’. Hence, scrutiny of exploitatively excessive prices is suggested to make sense only when it is not or has not been possible to tackle exclusion directly and exploitation results from exclusion. This implies that exploitation on its own is not sufficient to demonstrate ‘harm to competition’.⁶⁶ This in turn suggests that for there to be an abuse, there should be both exclusion *and* exploitation. This will be returned to in Section 4.

3.1.2 Unfair Trading Conditions

An early example of the ECJ referring to ‘unfair trading conditions’ is found in *BRT v SABAM* where it was held that an abuse could consist in the fact that a dominant undertaking entrusted with the exploitation of copyrights imposes on its members obligations which are not absolutely necessary for the attainment of its object and thus encroach ‘unfairly’ upon a member’s freedom to exercise his copyright.⁶⁷ According to the ECJ, for this appraisal, account had to be taken of all the relevant interests to ensure a balancing between the requirement of maximum freedom for members to dispose of their works and the effective management of their rights by the undertaking.⁶⁸ As such, ‘fairness’ concerned balancing the rights and obligations of contract parties. Thus, a condition going beyond what was *absolutely necessary* for the achievement of one party’s objectives was an ‘unfair’ limitation of the freedom of the other party. In *GEMA*, basing its judgment on this decision of the ECJ, the EC Commission stated that the decisive factor in copyright collection cases was whether the collecting society’s statutes exceeded the limits

⁶⁵ See Motta and de Streel (37), Röller (n 22), Lyons (n 9), Akman and Garrod (n 55)

⁶⁶ Interestingly, in all EC cases where ‘unfair pricing’ is an issue, there is an additional practice other than ‘unfair pricing’ which is scrutinised as well. It is usually discrimination [*United Brands* (n 43); *Deutsche Post AG – Interception of cross-border mail* (n 39)], but in some cases different practices - especially those impeding market integration - such as curbing of parallel trade *General Motors* (n 27), refusal to supply [*United Brands* (n 43); *Deutsche Post AG – Interception of cross-border mail* (n 49)], creating barriers to reimportations [*British Leyland* (n 49)] or to free movement of goods [*Renault* (n 41); Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmarkte GmbH & Co KG* [1971] ECR 487]

⁶⁷ Case 127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313, [15]

⁶⁸ *SABAM* (n 67) [8]

absolutely necessary for effective protection (the 'indispensability test') and whether they limited the individual copyright holder's freedom to dispose of her work no more than need be (the 'equity test').⁶⁹ Thus, expressed as 'indispensability', the *absolute necessity* of a contract term was again seen as part of the test of 'fairness' of the dominant undertaking's behaviour. In these cases the issue was clearly the 'exploitation' of the trading parties of a dominant undertaking and not the exclusion of competitors. However, what type of potential harm to competition makes these competition law issues is not necessarily obvious.

In *Télémarketing*, the imposition of conditions on competitors not imposed on one's self for the same operations was deemed an 'unfair' trading condition.⁷⁰ Hence, access to an indispensable input was denied to competitors that were *downstream* customers of the dominant undertaking and was abusive. Another ECJ decision found the charging of higher royalties to undertakings in one Member State than those charged in another to be an 'unfair' trading condition.⁷¹ Hence, discrimination between customers was deemed to be 'unfair'. In *DSD*, the EC Commission held that an 'unfair' commercial term exists where a dominant undertaking fails to comply with the principle of *proportionality*.⁷² Since the EC Commission was referring to the ECJ judgment in *United Brands* where the Court had held that a possible counter-attack by a dominant undertaking had to be 'proportionate' to the threat taking into account the economic strength of the undertakings confronting each other,⁷³ 'fairness' appears to have been understood as that to the customers of the dominant undertaking in the sense that the interests of the contracting parties be balanced. Moreover, in *United Brands*, the ECJ had decided that a dominant undertaking could not stop supplying a long-standing customer who abides by regular commercial practice if the orders placed by that customer

⁶⁹ *GEMA Statutes* Commission Decision (Case IV/29.971) 82/204/EEC [1982] OJ L94/12 [36]

⁷⁰ Case 311/84 *Centre Belge d'Etudes de Marche-Telemarketing (CBEM) v SA Compagnie Luxembourgeoise de Telediffusion (CLT) and Information Publicite Benelux (IPB)* [1985] ECR 3261, [24]

⁷¹ Case 395/87 *Ministere public v Jean-Louis Tournier* [1989] ECR 2521, [46]

⁷² *DSD* (n 48) [112]

⁷³ *United Brands* (n 43) [190]

are in no way extraordinary.⁷⁴ Hence, *arbitrariness* was also found to be the reason of the ‘unfairness’.

In *Alsatel v SA Novasam*, the unilateral fixing of the prices of supplements to the contract due to modifications and the automatic renewal of contract for 15 years (under certain circumstances) were found to be ‘unfair’ trading conditions.⁷⁵ It appears that the *oppressiveness* and *one-sidedness* of the contract were the cause of ‘unfairness’. In *Michelin II* a discount system applied by a dominant undertaking and which left it a considerable margin of discretion as to whether the dealer may obtain the discount was considered ‘unfair’ and abusive.⁷⁶ It thus implies that ‘fairness’ requires *transparency, objectivity, certainty and limited discretion*.

In *Tetra Pak II* contract clauses going beyond the recognised right of a dominant undertaking to protect its commercial interests were deemed ‘unfair’.⁷⁷ In that case, such clauses included those giving the absolute right of control over the configuration of equipment prohibiting the buyer from making any modifications, those giving Tetra Pak the exclusive right to maintain and repair the equipment, the exclusive right to supply spare parts, requirements to obtain Tetra Pak’s permission for the transfer of ownership or use of equipment, imposition of long lease terms of three years to nine years and penalty clauses for breach of these terms. In another decision, AAMS which was part of the Italian financial administration that engaged in the exclusive production and also the import, export and wholesale distribution of manufactured tobaccos was found to have abused its dominant position by unfair clauses in its distribution contracts.⁷⁸ The distribution contracts of AAMS included clauses that set a time-limit for the introduction of new cigarette brands, limited the maximum quantities of cigarettes allowed on the

⁷⁴ *United Brands* (n 43) [182]

⁷⁵ Case 247/86 *Alsatel v SA Novasam* [1988] ECR 5987, [10]. The case was a preliminary ruling concerning an obligation to deal exclusively with the installer of telephone systems as regards any modification of the installation

⁷⁶ Case T-203/01 *Manufacture Francaise des Pneumatiques Michelin v EC Commission* [2003] ECR II-4071, [141]

⁷⁷ Case T-83/91 *Tetra Pak International SA v EC Commission* [1994] ECR II-755, [140]

⁷⁸ Case T-139/98 *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v EC Commission* [2001] ECR II-3413 upholding EC Commission decision *Amministrazione Autonoma dei Monopoli di Stato (AAMS)* [1998] OJ L252/47

market, limited the monthly quantity of cigarettes sold on the market, restricted the conditions under which monthly limits could be increased, and imposed unnecessary obligations regarding packaging and inspections.⁷⁹ In both these cases, the stringent restrictions on the customers' freedom of action appear to have been the reason of 'exploitation'.

It has been argued in the literature that a workable definition of 'unfair contract terms' under Article 82(a) is not easy, but essentially asks whether the clause is one that would be imposed and accepted in competitive conditions, and whether the gains in efficiency, if they are shared or passed on, are sufficient to outweigh the onerous effect for the other parties bound by the clause.⁸⁰ Thus, the clause should (i) have a legitimate objective other than exploitation, (ii) be effective in achieving the legitimate goal, (iii) be necessary in that there are no alternative equally effective means for achieving the same goal with a less restrictive/exploitative effect, and (iv) be proportionate in the sense that the legitimate objective pursued should not be outweighed by its exploitative effect on the trading party in question.⁸¹

Regardless of how one defines 'unfair trading conditions', one common characteristic of such behaviour coming out of the case-law is the dominant undertaking's imposition of conditions on its customers that directly harm them, usually by an onerous restriction of their freedom of action. The underlying assumption seems to be that such clauses would be impossible to impose *but for* the dominance of the undertaking. The question is, although the 'unfairness' of any contract term may be objectionable, why and when this should be a competition law issue, rather than, for example, a contract law issue. This question will be returned to in Section 4 which seeks to investigate how the prohibition of exploitation in Article 82EC should be interpreted for it to be used meaningfully for competition law and policy purposes.

⁷⁹ For the argument that most of the terms in *Tetra Pak II* and *AAMS* were onerous in the extreme and many of them were objectionable not only because they exploited consumers, but also because they had the effect of denying competitors sufficient customers to reach economies of scale and scope in order to more effectively challenge Tetra Pak's near- and AAMs' actual-monopoly, see O'Donoghue and Padilla (n 23) 652

⁸⁰ O'Donoghue and Padilla (n 23) 640

⁸¹ O'Donoghue and Padilla (n 23) 654-655

3.2 Article 82(b)EC

Article 82(b)EC prohibits limiting production, markets or technical development to the prejudice of consumers. This provision has usually been understood as prohibiting 'exclusion' since limiting production by foreclosing or handicapping competitors broadly covers any type of exclusionary conduct.⁸² Nevertheless, the provision can be and has been applied to 'exploitation' as well. For example, in some cases it has been applied to prohibit 'inefficiency' and sanctioned dominant undertakings operating inefficiently and unable to meet demand, particularly public undertakings with statutory monopolies. One of these was the case of *Port of Genoa* in which the ECJ held that abuse can be found where an undertaking with the exclusive right to organise dock work at a port refuses to use modern technology leading to an increase in costs and prolongation of the time required for its performance.⁸³ In this reference for a preliminary ruling, there was no issue of exclusion; a customer of the dock work company had demanded compensation before the national court for the damage it had suffered due to the dock work company's delay in carrying out the work.

Similarly in another preliminary ruling, the ECJ held that a state employment agency with the monopoly of employment procurement regarding business executives abuses its position when it is clearly not in a position to satisfy demand for its services.⁸⁴ Again the issue was not exclusion, but rather the inefficiency of the dominant undertaking to the prejudice of its customers. In the same manner, in *British Telecommunications* the EC Commission held that the maintenance of obsolete systems through measures taken by a dominant undertaking is an abuse as it limits technical development to the prejudice of consumers.⁸⁵ Finally, in *P & I Clubs* the EC Commission expressly stated that there would be an abuse under Article 82(b)EC by way of 'exploitation' where an association providing marine insurance agreed to offer only a single level of cover that left a very substantial share of the

⁸² O'Donoghue and Padilla (n 23) 197

⁸³ Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889, [19]

⁸⁴ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, [31]

⁸⁵ *British Telecommunications* Commission Decision (IV/29/877) 82/861/EEC [1982] OJ L360/36 [34]

demand unsatisfied.⁸⁶ However, since it was not for the EC Commission to decide on the level of cover to be offered, it stated that it might only intervene if there is clear and uncontroversial evidence that a very substantial share of the demand is being deprived of a service that it manifestly needs.⁸⁷

In these cases, the 'prejudice to customers' is the result of a limitation of production, markets or technical development by the dominant undertaking which would not be possible *but for* the dominance of the undertaking. It is the lack of competition to punish the dominant undertaking for the 'quiet monopoly life' it is leading and thus productive inefficiency that the law seeks to sanction.⁸⁸ Hence, exploitation is the consequence of the inefficiency of the dominant undertaking.

3.3 Article 82(c)EC⁸⁹

Although the literature is mainly based on the premise that Article 82(c)EC prohibits discrimination between the downstream customers of the undertaking (understood as other undertakings) thereby distorting competition between them, Article 82(c)EC can apply to discrimination between final consumers and thus exploitation as well.⁹⁰ This is quite clear from various decisions under Article 82(c)EC and is in line with the underlying principle of Article 82EC being a prohibition of 'exploitation'.

The predominant view on the literature is based on a literal reading of Article 82(c)EC that prohibits applying dissimilar conditions to equivalent transactions

⁸⁶ *P&I Clubs, IGA and P&I Clubs, Pooling Agreement* Commission Decision (IV/D-1/30.373 and IV/D-1/37.143) 1999/329/EC [1999] OJ L125/12 [128]

⁸⁷ *P&I Clubs* (n 86) [128]

⁸⁸ As put by Hicks, '[t]he best of all monopoly profits is a quiet life' which expresses the inefficiency that would result from the monopolist not being pressured to reduce its costs and maximise its productive efficiency; JR Hicks 'Annual Survey of Economic Theory: The Theory of Monopoly' (1935) 3 (1) *Econometrica* 1, 9

⁸⁹ This sub-section mainly draws on P Akman 'To abuse, or not to abuse: discrimination between consumers' (2007) 32 *European Law Review* 492

⁹⁰ Akman (n 89) and for the predominant view in the literature see e.g. SM Lage and R Allendesalazar 'Community Policy on Discriminatory Pricing: A Practitioner's Perspective' in CD Ehlermann and I Atanasiu (eds.) *What Is an Abuse of Dominant Position?* (Hart Publishing Oxford 2006) 341; D Geradin and N Petit 'Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?' (2006) 2 (3) *Journal of Competition Law and Economics* 479, 487; M Waelbroeck 'Price Discrimination and Rebate Policies under EU Competition Law' in B Hawk (ed.) *International Antitrust Law & Policy: Fordham Corporate Law 1995* (Juris Publishing New York 1996) 160; Jones and Sufrin (n 1) 443, 594

with other trading parties, thereby placing them at a 'competitive disadvantage'. Underlying this view is the assumption that the customers should be competing to be placed at a 'competitive disadvantage'. However, the EC Commission and Courts have almost read the 'competitive disadvantage' requirement out of the provision.⁹¹ Moreover, it has been argued that this part of subparagraph (c) is easily dealt with since the use of 'thereby' suggests that it is presumed that a competitive disadvantage flows from the application of 'dissimilar conditions'.⁹² Second, it is not clear what is meant by 'competitive disadvantage' and it can be comprehended broadly enough to cover 'exploitation' when some customers are paying higher prices than others due to discrimination. For example, the Discussion Paper (2005) conceptualises discrimination between customers by making those customers with a higher willingness to pay and less switching possibilities pay a higher price than others as 'direct exploitation'.⁹³ Moreover, if it is accepted that 'consumer welfare' is the standard that Article 82EC serves, then it should follow that a dominant undertaking's direct discrimination between consumers is scrutinised since this would have more immediate and direct effects on consumers than that between the firm's downstream customers. Furthermore, since the list of practices in Article 82EC is not exhaustive, even if not covered by Article 82(c)EC, discrimination between consumers can still fall under scope of the provision.⁹⁴

Some of the most obvious expressions of 'exploitation' by discrimination can be found in the EC Commission's *1998 Football World Cup* decision. That dispute had arisen out of the French organiser CFO's requirement that the general public provide an address in France in order to be able to purchase entry tickets. The effect of CFO's behaviour was described as 'to discriminate against residents outside France, which indirect[ly] amounted to discrimination against those consumers on grounds of nationality, contrary to fundamental Community principles'.⁹⁵ Moreover, the EC Commission stated that

⁹¹ The stance seems to slightly change in Case C-95/04 P *British Airways plc v EC Commission* [2007] ECR I-2331, [144]

⁹² M Furse *Competition Law of the EC and UK* (6th ed. Oxford University Press Oxford 2008) 346

⁹³ Discussion Paper (2005) (n 2) [141]

⁹⁴ For the non-exhaustive nature of the list see *Continental Can* (n 31) [26]

⁹⁵ *1998 Football World Cup* Commission Decision (Case IV/36/888) 2001/12/EC [2000] OJ L5/55 [102]

... [w]hile the application of Article 82 often requires an assessment of the effect of an undertaking's behaviour on the structure of competition in a given market, its application in the absence of such an effect cannot be excluded. Consumers' interests are protected by Article 82, such protection being achieved either by prohibiting conduct by dominant undertakings which impairs free and undistorted competition or which is direct[ly] prejudicial to consumers. Accordingly, and as has been expressly recognised by the Court of Justice, Article 82 can properly be applied ... to situations in which a dominant undertaking's behaviour direct[ly] prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition.⁹⁶

Thus, this decision obviously found exploitation by discriminating between different groups of consumers, even without an effect on competition, to be an abuse of dominant position under Article 82EC.⁹⁷

Another example is the *Deutsche Post AG – Interception of Cross-border Mail* decision of the EC Commission. In that case, DPAG was found to treat differently incoming cross-border letter mail which it considered to be 'genuine' international mail on the one hand, and incoming cross-border letter mail which it considered to be virtual A-B-A remail⁹⁸ on the basis of the inclusion of a reference to an entity residing in Germany on the other. The Commission held that DPAG was behaving in a discriminatory manner by charging different prices for equivalent transactions and the different tariffs charged could not be justified on a basis of economic factors.⁹⁹ Similar to its holding in *1998 Football World Cup*, the EC Commission stated that Article 82EC might be applied even in the absence of a direct effect on competition between undertakings on any given market where a dominant undertaking's behaviour causes damage directly to consumers. The EC Commission expressed that due to the behaviour of DPAG, the senders of the disputed mailings (consumers of postal services) were affected negatively by having to

⁹⁶ *1998 Football World Cup* (n 95) [100]

⁹⁷ Nonetheless, as this decision has not been appealed, and the ECJ judgment to which the EC Commission refers actually held that subparagraph (c) was an example of Article 82EC *not* being limited to behaviour directly harming consumers [*Continental Can* (n 31) [26]], it is not possible to know whether it would have been upheld by the Courts

⁹⁸ 'Genuine' international mail was considered to be letter mail without any references to entities residing in Germany. In A-B-A remail, letters come from State A but are posted in State B for delivery in State A, Cases C-147/97 and C-148/97 *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH* [2000] ECR I-825, [12]

⁹⁹ *Deutsche Post AG – Interception of cross-border mail* (n 49) [127]

pay prices which were higher than those charged to other senders and by having their mailings delayed significantly.¹⁰⁰

The EC Commission elaborated on this issue and the concept of ‘competitive disadvantage’ in *BdKEP – Restrictions on Mail Preparation*.¹⁰¹ It held that Article 82(c)EC covered three types of discrimination, the first two being exclusionary and the last one exploitative. Accordingly, the customer of the dominant undertaking may be placed at a competitive disadvantage either vis-à-vis the dominant undertaking itself; or in relation to other customers of the dominant undertaking; or the customer suffers commercially in such a way that her ability to compete on whichever market is impaired. The first and third possibilities do not require a competitive relationship between the two comparator groups.¹⁰² Moreover, as regards the exploitative type of abuse covered by Article 82(c)EC, the EC Commission remarked that

numerous precedents demonstrate that both the Commission and the Courts apply a broad interpretation of this provision, condemning dominant undertakings for exploitative discrimination between customers who are not competing on the same market.¹⁰³

Thus, once it is accepted that there is no need for a competitive relationship between the undertaking’s customers for discrimination to be abusive, it would follow that discrimination between consumers can constitute an ‘exploitative’ abuse under Article 82EC without demonstrating a competitive disadvantage.¹⁰⁴

¹⁰⁰ *Deutsche Post AG – Interception of cross-border mail* (n 49) [133]. The German addressees were also consumers who were affected in a negative manner especially due to the delays, *ibid*. Deutsche Post was fined €1000 and the decision was not appealed, thus the Courts were not faced with the issue.

¹⁰¹ *BdKEP – Restrictions on Mail Preparation* Commission Decision (Case COMP/38.745) 20.10.2004 (unreported) [93]

¹⁰² *BdKEP – Restrictions on Mail Preparation* (n 101) [93]

¹⁰³ *BdKEP – Restrictions on Mail Preparation* (n 101) [95]

¹⁰⁴ See similarly Gerard arguing that discrimination among final consumers who do not compete with each other may also give rise to an issue of exploitation; D Gerard ‘Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities’ in *Global Competition Law Centre Research Papers on Article 82 EC – July 2005* available at

<http://www.coleurop.be/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf> 122 n 68. Nonetheless, he further notes that the EC Commission should make clear that price discrimination might constitute an abuse under Article 82(c)EC only to the extent that it results in a distortion of competition among the dominant undertaking’s trading parties, *ibid*. 107

Nevertheless, this causes both economical and legal concern since it broadens the scope of a prohibition that is deemed to deserve limited enforcement, if at all.¹⁰⁵ This is because according to economics, discrimination is a practice with ambiguous effects on total and consumer welfare; it can either reduce or increase consumer welfare.¹⁰⁶ The economic studies – generally concentrated on ‘price discrimination’ – find that the welfare effects depend mainly on whether discrimination causes output to increase or decrease.¹⁰⁷ For example, in industries with fixed and common costs, such as airlines, hotels and cinemas, discrimination can be beneficial as it can lower the price to all users of the service due to the costs being spread over more customers.¹⁰⁸ Similarly, discrimination can expand output so that customer segments that would otherwise be excluded are served and this would increase welfare. Thus, prohibiting price discrimination on the grounds of ‘unfairness’ to those consumers who have to pay higher prices may end up making those very consumers worse off.¹⁰⁹ However, as put by Motta, ‘[e]conomic theory shows that price discrimination unambiguously reduces welfare only when it does not raise total output, whereas the sign of welfare change is ambiguous in all other cases’.¹¹⁰ Accordingly, depending on the informational and strategic context, the various forms of price discrimination may have very different impacts on consumer welfare, as well

¹⁰⁵ See e.g. O’Donoghue and Padilla (n 23) 602 arguing for a limited enforcement. See also DP O’Brien and G Shaffer ‘The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman’ (1994) 10 *Journal of Law, Economics & Organization* 296, 298 arguing that the US Robinson-Patman Act prohibiting discrimination reduces welfare

¹⁰⁶ See e.g. M Armstrong and J Vickers ‘Price Discrimination, Competition and Regulation’ (1993) 41 *Journal of Industrial Economics* 335, 336; Gerard (n 22) 105; A Perrot ‘Towards an Effects-based Approach of Price Discrimination’ in *The Pros and Cons of Price Discrimination* Swedish Competition Authority 2005, 168

¹⁰⁷ See R Schmalensee ‘Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination’ (1981) 71 *American Economic Review* 242; Report by the EAGCP ‘An Economic Approach to Article 82’ (July, 2005) available at

http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf 31 and HR Varian ‘Price Discrimination and Social Welfare’ (1985) 75 *American Economic Review* 870, 871. In economics, ‘price discrimination’ is defined as the ability to set prices so that the difference between average prices and average costs varies between different sales of either the same good or closely related goods; J Church and R Ware *Industrial Organization* (Irwin McGraw-Hill Singapore 2000) 160

¹⁰⁸ P Muysert ‘Price Discrimination – An Unreliable Indicator of Market Power’ (2004) 25 (6) *European Competition Law Review* 350, 353; WJ Kolasky ‘What Is Competition? A Comparison of U.S. and European Perspectives’ [2004] (Spring-Summer) *The Antitrust Bulletin* 29, 34

¹⁰⁹ EAGCP Report (n 107) 32

¹¹⁰ Motta (n 6) 496

as on producer welfare.¹¹¹ Hence, the welfare effects of price discrimination require a case-by-case analysis.¹¹²

All in all, the lesson from economics is that discrimination should not be found abusive merely because some consumers are deemed to be 'exploited' by paying higher prices than others as this may lead to perverse welfare outcomes. For example, if price discrimination increases output by sales to consumers who would have been left out of the market under uniform pricing and the authority cannot prove a (likely) decrease in welfare, then this should be considered 'legitimate' or 'normal' competition. The same would be true for discrimination aimed at covering fixed and common costs of the undertaking by expanding output. Regarding the possibly necessary trade-off between consumer groups, if discrimination results in *some* consumers being 'exploited' and these are consumers worthy of more protection than those benefiting from discrimination, that protection should be provided by other means, such as *ex ante* regulation or consumer law. Hence, regarding discrimination, exploitation on its own does not provide sufficient grounds to find conduct abusive if the standard is based on welfare since an outright prohibition can lead to perverse welfare effects.

3.4 Article 82(d)EC

Article 82(d)EC prevents dominant undertakings from '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', a practice also known as 'tying'. Tying occurs when a supplier supplies a product on condition that the customer obtains something else from it as well and can be of economic or contractual nature.¹¹³ Although the practice may result in exclusion of competitors from the market and has mainly received attention for this reason

¹¹¹ Perrot (n 106) 168

¹¹² Geradin and Petit (n 90) 483; Lage and Allendesalazar (n 90) 17

¹¹³ Jones and Sufrin (n 7) 514. When the supplier is willing to supply each product separately but the customer gets an advantageous deal if they are bought together, the practice is called 'mixed bundling'. When the components of the package are only supplied together, the practice is called 'pure bundling'. A form of pure bundling is 'technological tying' where the supplier physically integrates the products in some way, so that neither is available without the other, *ibid.* 515

in EC competition law, it can also be exploitative.¹¹⁴ Indeed, even when it is an exclusionary abuse, all practices of tying can be thought to exploit the customer by reducing choice since they ultimately restrict the options of a customer and limit the customer's freedom of action.

Indeed, in *Microsoft*, whilst finding the tying of the Windows Operating System with Windows Media Player by Microsoft abusive, the CFI identified the condition in Article 82(d)EC that the conclusion of contracts be made subject to acceptance of supplementary obligations that have no connection with the subject of such contracts as 'coercion'.¹¹⁵ Hence, the inability of consumers and original equipment manufacturers to acquire the Windows Operating System without simultaneously acquiring Windows Media Player was deemed as 'coercion' by the CFI.¹¹⁶ This is all the more interesting since the 'coerced' product was supplied without charge to consumers and consumers were free not to use Windows Media Player as they were not prevented from using substitute products.¹¹⁷

The lack of customer choice due to tying can arise not only from the refusal of the dominant undertaking to supply the tying product without the tied one, but also from the unavailability of products separately and from pressure exerted on the customer through the promise of favourable treatment to customers who purchase both products.¹¹⁸ In *Hilti*, for example, the EC Commission found that Hilti which was a dominant undertaking in the supply of patented nail guns and made the sale of patented cartridge strips conditional upon purchasing a corresponding complement of nails abused its position.¹¹⁹ Its conduct included reducing discounts and using other discriminatory policies on cartridge-only orders and such policies left 'the consumer with no choice over the source of his nails and as such abusively exploit[ed] him'.¹²⁰

¹¹⁴ For tying and bundling as an exclusionary leveraging abuse see J Langer *Tying and Bundling as a Leveraging Concern under EC Competition Law* (Kluwer Law International The Netherlands 2007).

¹¹⁵ Case T-201/04 *Microsoft Corp v EC Commission* [2007] 5 CMLR 11, [961] *et seq.*

¹¹⁶ *Microsoft* (n 115) [961]-[962]

¹¹⁷ *Microsoft* (n 115) [969]-[970]

¹¹⁸ Jones and Sufrin (n 1) 517-518

¹¹⁹ *Eurofix-Bauco v Hilti* Commission Decision (IV/30.787 and 31.488) 88/138/EEC OJ [1988] L65/19 [74]-[75]

¹²⁰ *Hilti* (n 119) [75]

In *Tetra Pak II* the EC Commission held that an abusive behaviour of Tetra Pak was to tie the supply of its non-aseptic packaging machines to the supply of cartons that the machines filled.¹²¹ Moreover, customers were also tied to obtain all maintenance and repair services and spare parts from Tetra Pak. Some commentators interpret both *Hilti* and *Tetra Pak II* as being driven by concerns about the structure of the market, rather than the extraction of monopoly profits or the protection of consumers.¹²² Hence, they argue that the concern was with the ability of smaller firms to compete which represents a policy not so much about efficiency and free competition as the protection of small firms and competitors.¹²³ Regardless of whether or not this has been the case in these decisions, what stands out is that exploiting by coercing a customer to accept a certain contract term can be abusive if it is the result of dominance. Moreover, what the criticism in literature that the decisions protected competitors implies is that when there is no showing of exploitation of consumers and the prohibition is used against exclusion, this can result in protecting competitors, rather than competition. This leads to the question of how exploitative abuse can be utilised to operationalise the prohibition of Article 82EC and is dealt with in the next section.

4. Whether and How ‘Exploitative Abuse’ can be Utilised under Article 82EC: How to Make Sense out of the Prohibition of ‘Exploitative Abuse’

Examples from case-law in the previous section demonstrate that there is no exact definition or test of ‘exploitation’ under Article 82EC although the prohibition without doubt prohibits exploitative abuse. In the literature, it has been argued that there are formidable difficulties in telling whether, for example, the price a dominant undertaking charges is really exploitative¹²⁴ and enforcement action against exploitative conduct should be seen as a last

¹²¹ *Elopak Italia/Tetra Pak* Commission Decision (IV/31043) 92/163/EEC OJ [1992] L72/1 [117]

¹²² Jones and Sufrin (n 1) 521

¹²³ Jones and Sufrin (n 1) 521

¹²⁴ Whish (n 20) 709

resort.¹²⁵ Further, some commentators have remarked that even limited use of exploitative abuse is questionable due to institutional design and mismatch.¹²⁶ In contrast, this section argues that ‘exploitative’ abuse can and should be meaningfully utilised under Article 82EC with an *effects-based* approach which is the aspired approach of the EC Commission: ‘exploitation’ should be used as the test of anticompetitive *effects* on the market and thus the conduct of a dominant undertaking should only be deemed abusive if it is ‘exploitative’. However, the term of ‘anticompetitive’ must not be lost sight of; that is, there should first be a conduct *against* competition. Exploitation should be the *result* of this conduct harming competition. This can be harm to competition at the level of the production chain that the dominant undertaking is active on or harm to competition at the downstream level consisting of the customers of the dominant undertaking. This interpretation may be considered as implying that there is ultimately one type of abuse, namely ‘exploitative’.¹²⁷ If conduct is not ultimately exploitative, it should not be seen as an abuse.

This interpretation has three advantages over the suggestion to exclude ‘exploitation’ from scrutiny altogether: first, it recognises and remains loyal to the true nature of Article 82EC in that the provision itself is all about the prohibition of ‘exploitation’. Second, it ensures that only those exclusionary practices of a dominant undertaking which harm consumers and not merely competitors are prohibited. Third, it ensures that Article 82EC remains as a prohibition of competition law, rather than work as a contract law or consumer protection law rule. Hence, it ensures that there is harm to competition – using the US private enforcement terminology, ‘antitrust injury’ – in Article 82EC exploitative abuse cases.¹²⁸

¹²⁵ E Paulis ‘Article 82 EC and Exploitative Conduct’ in CD Ehlermann and M Marquis (eds) *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (forthcoming 2008) available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COM Ped-Paulis.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COM Ped-Paulis.pdf) 3

¹²⁶ W Blumenthal ‘Discussant Comments on Exploitative Abuses under Article 82 EC’ in CD Ehlermann and M Marquis (eds.) *European Competition Annual 2007: A Reformed Approach to Article 82 EC* (forthcoming 2008) available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Blumenthal.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Blumenthal.pdf) 4

¹²⁷ See Fox (n 13) and Akman (n 13)

¹²⁸ For antitrust injury see n 35

This suggestion is based on the premise that the goals usually attributed to competition policy such as consumer welfare, producer welfare and welfare of competitors are all welfarist objectives in that each is a function only of economic agents' utility levels, not of the process by which those utilities are obtained or of other aspects of the outcome.¹²⁹ However, whether competition law allows particular conduct depends not just on the consequences of that conduct, but also on characteristics of the conduct itself.¹³⁰ A crucial element of competition law is that it examines not only consequences (the change in consumer or total welfare), but also the process (the nature of the acts) that generates the consequences.¹³¹ Specifically, competition law and policy prohibit firms from harming consumers and/or efficiency *through anticompetitive actions*.¹³² Thus, both consequences and process count; it is incomplete and potentially misleading to say that competition law and policy protect consumer welfare, total welfare or rivals' profits since conduct can violate competition law only if it harms 'competition'.¹³³ As the concept of harming competition is often hard to interpret and too naïve an interpretation would prohibit many beneficial agreements, the law has evolved towards prohibiting only acts that *both* (a) hurt competition in an ordinary (and sometimes vague) sense *and* (b) hurt efficiency and/or consumer surplus.¹³⁴

As also held by the EC Courts, although Article 82EC contains no reference to the anticompetitive object or anticompetitive effect of the practice referred to, in the light of the context of Article 82EC, conduct will be regarded as abusive only if it restricts competition.¹³⁵ Hence, competition law, including Article 82EC should always be about *competition* and should not lose sight of the aim of protecting competition whatever the ultimate aim is. In other words, even if the ultimate objective is to enhance the welfare of society or consumers,

¹²⁹ J Farrell and ML Katz 'The Economics of Welfare Standards in Antitrust' (2006) 2 (2) Competition Policy International 3, 5

¹³⁰ Farrell and Katz (n 129) 5

¹³¹ Farrell and Katz (n 129) 6. See similarly D Zimmer 'On Fairness and Welfare: The Objectives of Competition Policy (Comment)' in CD Ehlermann and M Marquis (eds.) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (forthcoming 2008) available at [http://www.iue.it/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Zimmer.pdf](http://www.iue.it/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Zimmer.pdf) 2

¹³² Farrell and Katz (n 129) 6

¹³³ Farrell and Katz (n 129) 8

¹³⁴ Farrell and Katz (n 129) 8. The authors thus suggest that the debate over 'the standard' of competition law and policy is the debate over the standard applied in the second prong, *ibid.*

¹³⁵ *Michelin II* (n 76) [237]; *Microsoft* (n 115) [867]

competition law should play a role in this by protecting ‘competition’, be it horizontal or vertical competition and albeit potential competition. This is because competition law is not the only tool one has in law and policy that can be used to achieve the various desired goals of the society. The expertise of competition law and policy belongs to the area of *anticompetitive* behaviour. If consumer welfare is accepted as the objective of competition law, then the detriment to consumers that competition law seeks to avoid should be understood as harm following an *anticompetitive* act. This detriment to consumers can be determined by the existence or lack of ‘exploitation’.

On the other hand, this interpretation implies that just like mere harm to competition not being enough, mere consumer/customer harm is also not sufficient for conduct to be abusive if it is not tied to some conduct distorting competition.¹³⁶ This also goes for contract clauses which may be exploitative but do not necessarily lead to harm to competition; such clauses can be dealt with under contract law. As such, Article 82EC should be interpreted as prohibiting ‘exploitation’ of customers resulting from an *anticompetitive* act. As mentioned in Section 3, exploitation can be meaningfully objected to only when it would not occur *but for* the dominance of the undertaking. Specifically when the objective is ‘consumer welfare’, this becomes more important. Competition law is not consumer law; consumer law could attack all types of behaviour merely because they are against consumers’ interests as the purpose of consumer law is the protection of ‘consumers’. Competition law cannot and should not go as far to attack all types of conduct that may be detrimental to consumers unless the conduct is *anticompetitive* and harmful to competition. For example, as demonstrated in Section 3, unfair contract terms may have no necessary connection with harm to competition, even if, in a broad sense, they both concern aspects of consumer welfare.¹³⁷ The objectives of competition law are much narrower than the wider consumer

¹³⁶ Cf. Haracaoglou arguing that although untested, it appears that the ambit of Article 82EC is sufficiently wide to allow for an interpretation that would cover the situation where access to a product is restricted despite consumer demand and there is no apparent harm to competition; I Haracoglou ‘Competition Policy Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law’ (2007) 3 (2) The Competition Law Review 175, 204

¹³⁷ O’Donoghue and Padilla (n 23) 647

protection law goals.¹³⁸ Competition law should attack practices that distort competition *and* thus are detrimental to consumer or total welfare (or any other ultimate goal) as determined by policy.

This is a consequence of the nature of Article 82EC as well: although Article 82EC prohibits ‘exploitation’, it is a competition law provision and ultimately exploitation is not the disease, but the symptom of there being another conduct that may be harming competition. Thus, if the exploitative practices of a dominant undertaking, for example, excessive prices, are not attracting entry to the market, then the cause of this should be attacked, rather than the consequence. This is because if a dominant undertaking can exploit its customers for a significant period of time, there must be something wrong with the *market*.¹³⁹

Apart from the possible lack of harm to competition in cases of mere ‘exploitation’, there is also a problem of remedy. A policy directed at purely exploitative conduct would almost inevitably require the scrutiny of the terms, in particular the price term of the contracts of a dominant undertaking. Tackling prices directly is unattractive since there is the abovementioned problem of identifying what is an ‘excessive price’ and also the problem of the apt remedy.¹⁴⁰ Understandably, competition authorities do not like acting as price regulators; ‘price regulation is the antithesis of the free market’ and is better restricted to *ex ante* regulation in the case of natural or legal monopolies.¹⁴¹ The scrutiny of mere ‘exploitation’ by competition authorities may require them to act as regulators for which they are unlikely to be the appropriate bodies. Hence, there is both the problem of a potential lack of harm to competition in pure exploitation cases and also the problem of finding an appropriate remedy. Therefore, to avoid both problems, the scrutiny of exploitation and exclusion should go hand in hand.

¹³⁸ O’Donoghue and Padilla (n 23) 647-648

¹³⁹ Jones and Sufrin (n 1) 320

¹⁴⁰ Jones and Sufrin (n 1) 320-321

¹⁴¹ Jones and Sufrin (n 1) 321, 586

A tendency towards such an approach could be found in the Discussion Paper (2005), but the position has been rather blurred by the Guidance (2008) of the EC Commission. The Discussion Paper (2005) defined exclusionary abuses as: 'behaviours by dominant firms which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers.'¹⁴² From the definition of 'foreclosure', it was understood that 'harm to consumers' was a further addition to foreclosure to find conduct exclusionary. Hence, 'exclusionary' conduct would, as a result, appear to have required 'exploitation' (of consumers) as well.¹⁴³ This has not been elaborated on in the Guidance (2008) which excludes 'exploitative' abuse from its scope and does not provide a definition of 'exclusionary' conduct in a manner similar to the Discussion Paper (2005). Indeed, the Guidance (2008) does not provide a definition of 'exclusionary' or 'exploitative' conduct at all. However, it states that the aim of the EC Commission's enforcement in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their rivals in an anticompetitive way and thus having an adverse impact on consumer welfare.¹⁴⁴ Hence, it recognises the necessity of an adverse impact on consumer welfare for exclusion to be found abusive. What is unfortunate is by separating 'exclusionary' from 'exploitative' abuse, the EC Commission clearly rejects the existence of a single type of abuse, but leaves the latter without any guidance regarding its assessment and/or enforcement although it states that there may be instances where there will be intervention.¹⁴⁵ Consequently, it still cannot be unambiguously said that the EC Commission requires 'exploitation' for there to be 'exclusion'.

Some commentators have also recently argued that exploitative abuses can be intervened in under certain circumstances. For example, Röller has suggested that this use be limited to 'gap cases' and 'mistakes'.¹⁴⁶

¹⁴² Discussion Paper (2005) (n 2) [1]

¹⁴³ Akman (n 13) 821-822

¹⁴⁴ Guidance (2008) (n 3) [19]

¹⁴⁵ Guidance (2008) (n 3) [7]

¹⁴⁶ Röller (n 22) 4 *et seq.*

Accordingly, ‘gap cases’ refer to the enforcement ‘gap’ resulting from the fact that Article 82EC applies only to firms that are already dominant and anticompetitive conduct that *leads* to a dominant position is not caught as an exclusionary abuse.¹⁴⁷ On the other hand, ‘mistakes’ occur when, for some reason, a competition authority may not have effectively prosecuted an exclusionary abuse.¹⁴⁸ Hence, in gap cases and cases of mistake, action can be taken under Article 82EC against exploitation if there are also significant entry barriers, the market is unlikely to self-correct, there are no structural remedies available and there is no regulator (or regulatory failure).¹⁴⁹ Similarly, Lyons has argued that when there are structural barriers or barriers resulting from a history of unnoticed, unprosecuted or ineffectively prosecuted exclusionary practices, exploitative conduct may be sanctioned.¹⁵⁰ However, in contrast to Röller, Lyons argues that it is not feasible to focus entirely on how a dominant position was attained since this is likely to be lost in the ‘mists of history’.¹⁵¹ Thus, the finding of abuse and the choice of remedy should be kept separate and wherever possible, the remedy should be in the form of encouraging expansion or entry to use the market to undermine the dominant undertaking’s incentive to exploit.¹⁵² In any case, both these suggestions emphasise the ability of the undertaking to exploit mainly resulting from exclusion and deserving scrutiny for this reason with a remedy primarily attacking the cause of exclusion.

Finally, it is worth elaborating on how exploitative effects should be deemed to exist. This is important since currently in EC competition law, an exclusionary abuse can be found in the mere *likelihood* of adverse effects and actual effects are not necessary.¹⁵³ However, ‘exploitation’ must be observable; for abusive exploitation to occur, the dominant undertaking has to *use* its power to exploit. Finding abuse in the mere *likelihood* of exploitation would not be consistent with Article 82EC; the fact that a dominant position itself is not

¹⁴⁷ Röller (n 22) 4

¹⁴⁸ Röller (n 22) 5

¹⁴⁹ Röller (n 22) 6

¹⁵⁰ Lyons (n 9) 83

¹⁵¹ Lyons (n 9) 83

¹⁵² Lyons (n 9) 83-84

¹⁵³ See e.g. Opinion of Advocate General Kokott on 23 February 2006 in Case C-95/04 *British Airways plc v EC Commission* [2007] ECR I-2331, [71]

prohibited demonstrates that it is not the likelihood of exploitation that is abusive since that likelihood always exists as long as there is a dominant position. Conduct becomes abusive only when the dominant undertaking actually uses its power to 'exploit'. The presumption underlying Article 82EC as proven by the lack of prohibition of dominance itself is that dominant undertakings may not always use their power to exploit.¹⁵⁴ Hence, the *use* of that power should be observable and thus demonstrable in terms of its *actual effects* since otherwise abuse would not have been proven.

5. Conclusion

Although 'exploitative abuse' is unquestionably prohibited by Article 82EC, there has been scarce case-law and academic interest on the matter and the life of Article 82EC has been mainly one of 'exclusionary abuse'. Yet, neither the scrutiny of 'exclusionary abuse' nor 'exploitative abuse' seems to make sense on its own. The former can undesirably lead to the 'protection of competitors' of a dominant undertaking for its own sake if not backed by exploitative effects on customers. Similarly, the latter can undesirably lead to the tackling of conduct which does not harm competition and thus does not fall within the ambit of competition law. Deeming 'exploitation' as the part of the test under Article 82EC which demonstrates the *effects* on the market would eliminate both problems. Since the EC Commission is seeking to adopt an *effects-based* approach with a consumer welfare standard, such a use of 'exploitative abuse' can serve this purpose.

'Exploitative abuse' is likely to attract more attention in the future enforcement of Article 82EC although it has been left out of the EC Commission's review of its application of Article 82EC. This is mainly because with a possible rise of private enforcement of EC competition rules, customers of dominant undertakings will have to base their claims on 'exploitative' abuse and thus the number of cases of 'exploitative' abuse is likely to increase. This will force the

¹⁵⁴ Joliet (n 11) 131

courts to deal with practices that they are not used to handling under the national equivalents of Article 82EC and they are likely to struggle in drawing the boundaries between consumer law, contract law and competition law. What can be a guiding principle in such cases is that pure exploitation is not and should not be deemed as a competition problem. The fact that Article 82EC is a competition provision implies that there must also be harm to competition. Hence, if the objective of Article 82EC is enhancing 'consumer welfare', then harm to competition resulting in harm to consumers should be the test of abuse.