'Dominant Position': A Term in Search of Meaning

ANNALIES AZZOPARDI·

Article 102 of the Treaty on the Functioning of the European Union applies only to dominant undertakings. However the definition of the term 'dominant position' originally established by the Court of Justice of the European Union poses some problems of interpretation. There have been many attempts at rationalising this definition, including attempts to equate it to the economic concept of 'substantial market power'. This article considers the definition of 'dominant position', and assesses the problems associated with the current legal definition. It reviews the attempts made to make sense of the legal definition and examines whether in reality 'dominance' amounts to 'substantial market power'.

I. Introduction

Article 102 of the Treaty on the Functioning of the European Union ("TFEU") prohibits the abuse of a dominant position; it is now well-established that a pre-condition of finding a breach of Article 102 TFEU is that the undertaking in question be in a dominant position. Understanding what constitutes a 'dominant position' is therefore the keystone to the application of Article 102 TFEU. However, the TFEU does not define the term 'dominant position', much less does it detail how it is to be assessed. It has fallen on the Court of Justice of the European Union ("the CJEU"), the General Court ("the GC")

· Annalies Azzopardi LL.B (*Melit*), LL.M (*Cantab*), LL.D (*Melit*) is a PhD candidate at the University of Birmingham, UK, as well as an associate at Mamo TCV Advocates in Valletta, Malta. She lectures in competition and consumer law at the University of Malta. Views expressed are strictly personal.

and the European Commission ("the Commission") to define the term 'dominant position'. However as will be demonstrated in this article, this definition poses some problems of interpretation, which are compounded by the fact that the notion of 'dominance' or 'dominant position' is unknown in economics, despite the fact that in matters of antitrust/competition, law and economics are inexorably linked. Economists speak in terms of 'substantial market power' rather than 'dominance', and, as will be shown, at present these terms do not correspond with each other.

The difficulty in interpreting the term 'dominant position' is not simply a theoretical conundrum, but also has practical implications. The GC has stipulated that undertakings which are in a dominant position must modify their conduct accordingly so as not to impair effective competition on the market.[1] However, if the definition of dominance is uncertain, undertakings cannot assess whether they are in a dominant position so as to align their conduct with the case-law under Article 102 TFEU, and not breach competition law in the first place. Similarly, legal advisors are unable to assist clients with much success. Legal advisors would likely err on the side of caution and warn undertakings against certain conduct on the market for fear that their clients be considered to be dominant, which advice might in turn hinder conduct which in reality is pro-competitive. Moreover, competition authorities cannot enforce Article 102 TFEU with any consistency if there is no clarity as to what constitutes a 'dominant position'.

The uncertainty as to what a dominant position really is falls foul of the general principle of legal certainty, which posits that rules of law should be 'clear, equal, and foreseeable' in order to 'enable those who are subject to them to order their behaviour in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation'.[2] The CJEU and the GC have established 'legal certainty' as a general principle of EU law, and have held that the 'principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them (…).'[3] The CJEU has even gone so far as to say that 'legal certainty must be observed all the more strictly in the case of rules liable

[1] See Cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises Inc v Commission of the European Communities* [2000] ECR II-1733, para 80.
[2] Paul Heinrich Neuhaus 'Legal certainty versus equity in the conflict of laws' (1963) 28 Law and Contemporary Problems 795, p 795.
[3] Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* [2007] ECR I- 05103, para 25.

to have financial consequences'.[4] Arguably this is the case with Article 102 TFEU, since should the undertaking in question be considered to have infringed Article 102 TFEU, the Commission is in a position to fine undertakings up to 10% of their turnover in the preceding business year.[5] However rather the interpretation of the competition rules being clearer, it seems the opposite is the case. In this instance, the problem with having an unclear definition is, ironically, clear enough: interested parties cannot know whether the law applies to them or not and it is left in the hands of the competition authorities to attempt to apply this definition in practice to undertakings under investigation. The starting point for coherent enforcement of Article 102 TFEU should be clarity and consistency in the terms used in the law.

In view of the above, this article examines the relevant literature on the notion of dominance in an attempt to extrapolate what the term 'dominant position' means, and to examine whether this definition could be improved upon in any way. The focus of this article is solely on the definition of 'dominant position' and not on its assessment. It starts by considering the legal definition of 'dominant position' as propounded by EU institutions, and highlights the problems associated with the current legal definition. It then traces attempts at rationalisation of this definition and, after briefly examining the notion of 'substantial market power' as understood in economics, attempts to assess whether in reality 'dominance' amounts to 'substantial market power'.

II. The legal definition of 'dominant position'

The CJEU first had to determine what the term 'dominant position', as used in Article 86 of the EEC Treaty,[6] meant in the late 1970s. The CJEU defined 'dominant position' in *United Brands*[7] as being a

> 'position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an

[4] *Ibid,* para 26 (emphasis added).
[5] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 23.
[6] Treaty establishing The European Economic Community and Related Instruments.
[7] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207.

> appreciable extent independently of its competitors, customers and ultimately of its consumers.'[8]

The CJEU therefore viewed 'dominant position' as a position of economic strength. The position of economic strength is in turn described as enabling the undertaking in question to prevent effective competition being maintained on the market through three methods:

i. By enabling the undertaking to behave to an appreciable extent independently of competitors;
ii. By enabling the undertaking to behave to an appreciable extent independently of its customers; and
iii. By enabling the undertaking to behave to an appreciable extent independently of consumers.

The CJEU built upon the definition laid down in *United Brands* in *Hoffmann-La Roche*,[9] which has now become the standard definition of dominance in EU competition law.[10] After repeating the basic definition in *United Brands*, the CoJ went on to state that:

> 'Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.'[11]

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[8] *Ibid*, para 65.
[9] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 464.
[10] See for instance Case T-340/03 *France Telecom SA v Commission of the European Communities* [year] ECR II-117, para 99. In Case 322/81 *NV Nederlandesche Banden-Industrie Michelin v Commission of the European Communities* [year] ECR 3466 the CJEU used slightly different wording, stating that Article 102 TFEU 'prohibits any abuse of a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competition and customers and ultimately of consumers' (para 30).
[11] Paras 38-39.

It would appear that the CJEU was initially inspired by the Commission's definition of dominance in the Commission decisions of *Continental Can*[12] which was reiterated in *Chiquita*.[13] In the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses ('Article 102 Discussion Paper'),[14] the Commission describes the definition as having three elements:[15]

> 'This definition of dominance consists of three elements, two of which are closely linked: (a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent.

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[12] [1972] OJ L7/25, para II.B.3: '(…) *des entreprises sont en position dominante lorsqu'elles ont une possibilité de comportements indépendants qui les met en mesure d'agir sans tenir notablement compte des concurrents , des acheteurs ou des fournisseurs; qu'il en est ainsi lorsque , en raison de leur part de marché, ou de leur part de marché en liaison notamment avec la disposition de connaissances techniques, de matières premières ou de capitaux, elles ont la possibilité de déterminer les prix ou de contrôler la production ou la distribution pour une partie significative des produits en cause; que cette possibilité ne doit pas nécessairement découler d'une domination absolue permettant aux entreprises qui la détiennent d'éliminer toute volonté de la part de leurs partenaires économiques, mais qu'il suffit qu'elle soit assez forte dans l'ensemble pour assurer à ces entreprises une indépendance globale de comportement, même s'il existe des différences d'intensité de leur influence sur les différents marches partiels*.'

[13] [1976] OJ L95/1, para II.A.2:
'Undertakings are in a dominant position when they have the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers. Such is the case where an undertaking's market share, either in itself or when combined with its knowhow, access to raw materials, capital or other major advantage such as trademark ownership, enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive all other market participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes, even if there are differences in the extent to which it dominates individual submarkets'

[14] European Commission 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' December 2005 < http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf > accessed 7 July 2015, paras 21-23.

[15] Although it would appear that there is no agreement between jurists as to whether this definition contains two elements or one – see Damien Gerardin, Paul Hofer, Frederic Louis, Nicolas Petit and Mike Walker 'The Concept of Dominance in EC Competition Law' (2005) Global Competition Law Centre Research Paper on the Modernisation of Article 82 EC < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144 > accessed 27 June 2015.

> The first element implies that dominance exists in relation to a market. It cannot exist in the abstract. It also implies that an undertaking either on its own or together with other undertakings must hold a leading position on that market compared to its rivals.
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> The second and third elements concern the link between the position of economic strength held by the undertaking concerned and the competitive process, i.e. the way in which the undertaking and other players act and inter-act on the market.'

Notwithstanding this attempt by the Commission to clarify the definition of 'dominance' however, problems with its proper interpretation remain.

III. The problem with the legal definition

There are two main problems with the definition devised in *United Brands* and *Hoffmann-La Roche*, which is still in force today. The first is that it is unclear[16] and nebulous; so much so that different analysts and authors interpret it in a different manner. Nazzini divides the various interpretations of 'dominant position' in two 'models', one being a structuralist model that regards dominance as coextensive with substantial and durable market power, which has been the preferred approach of the EU institutions;[17] and the other which is a behavioural or dynamic model that regards dominance as the ability to harm competition, which is Nazzini's preferred interpretation.[18]

Aside from the fact that there is no agreement as to what 'dominance' actually means, or what is implied in its definition, the current definition of dominance is somewhat arbitrary when one considers what is taken into account to assess dominance; in fact, the CJEU and the Commission have at times even considered the undertaking's (abusive) conduct to conclude that there is dominance, [19] notwithstanding the fact that the EU institutions have

[16] Monti is also of this opinion: 'the meaning of dominance in the decisions of the European Commission (…) and the Court's case law on Article 82 is far from clear' (Giorgio Monti 'The Concept of Dominance in Article 82' (2006) 2 European Competition Journal 31, p 31). Nazzini describes the definition as being 'not self-explanatory' (Renato Nazzini *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2012) p 328).
[17] Nazzini (n 16) p 328.
[18] *Ibid.*
[19] See Maher M Al-Dabbah 'Conduct, dominance and abuse in "market relationship": analysis of some conceptual issues under Article 82 EC' [2000] ECLR 45, p 46; Francis Fishwick 'The Definition of the Relevant Market in the Competition Policy of the European Economic Community' (1993) 63 (1) Revue d'economie industrielle, p 175.

continually emphasised that in order for there to be a breach of Article 102 TFEU, one must first find dominance, and then consider the conduct of the undertaking in question to determine whether there has been abuse of that dominance. Although conduct might be used to indicate that there is abuse of a dominant position on the market, the problem arises when the conduct itself is considered to assess whether there is dominance, rather than whether there is abuse. The legal definition of dominance in fact is particularly wide, which 'allows a range of behaviour to be captured as indicators of independence, such as foreclosing competitors, raising prices without concomitant increases in costs, reducing frequency or quality of service or reducing innovation.'[20]

A related issue that arises is that the definition of 'dominance' includes firms which have acquired strong market position through any manner, even if 'stemming from superior performance or quality, or due to structural absence of competition.'[21] As a result:

> 'dominance refers to market power (i.e. the ability to act independently of competitors, customers and consumers), whilst at the same time suggesting that dominance refers to superior performance evidenced by relatively high market shares and competitive advantages (even if the firm is subject to intense and structural competition)'.[22]

The emphasis in the jurisprudence on the definition of dominance is on independent conduct, or freedom from the constraint of competition, and the existence of a trading partner or competitor without whose consent other firms cannot remain in business,[23] without considering the efficiency of the undertaking in question. Strangely however, the efficiency of that undertaking may be considered as an indicator of dominance.

Secondly, the standard definition of 'dominance' is problematic since, as already noted, in economics the terms 'dominant position' or 'dominance' has no meaning. In fact, this definition is often referred to as the 'legal'

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[20] Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for Competition Lawyers* (OUP 2011), p 121.
[21] Frances Dethmers and Ninette Dodoo 'The abuse of Hoffmann-La Roche: the meaning of dominance under EC competition law' (2006) 27(10) ECLR 537, p 537.
[22] *Ibid.*
[23] Fishwick (n 19) p 175.

definition; dominance is considered a 'legal' concept.[24] This is obviously problematic for an area of law so tied with economics, particularly considering that the assessment of dominance requires an economic assessment.[25]

Walker and Pearce Azevedo argue that this 'legal' definition can never make sense in economic terms[26] since:

i. No successful firm can truly act independently of its customers and consumers to an appreciable extent, due to the discipline of the demand curve, whereby, if a firm raises its prices, it will sell fewer units, whether it is dominant or not.

   In economics, the 'demand curve' indicates that the lower the price of the product the more the consumer demand of that particular product, and therefore the more of the product that is sold. This holds whether an undertaking is dominant or not.

   On the other hand, the elasticity of the curve itself might vary, in other words the extent to which a change in price would impact the demand of a dominant undertaking's product could vary significantly from that of an undertaking that is not dominant. This means that it could be argued that a dominant undertaking would be able to raise prices to a greater extent that non-dominant undertakings. This however might have to be viewed on a case by case basis, as it might not be true of every dominant undertaking's products.

   Moreover, in practice and in particular circumstances, undertakings in a dominant position may be an unavoidable trading partner to such an extent that customers continue to buy product from them notwithstanding a high price. For instance in *United Brands*, the CJEU was impressed that UBC' customers continued to buy more

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[24] Damien Gerardin, Paul Hofer, Frederic Louis, Nicolas Petit and Mike Walker 'The Concept of Dominance in EC Competition Law' (2005) Global Competition Law Centre Research Paper on the Modernisation of Article 82 EC < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144 > accessed 27 June 2015; Niels, Jenkins and Kavanagh (n 22) p. 121.

[25] Gerardin *et al* in fact state that 'the assessment of dominance is ultimately very heavily influenced by economic considerations' (n 24).

[26] Mike Walker and Joao Pearce Azevedo 'Dominance: meaning and measurement' [2002] ECLR 363.

goods from it although it was the dearest vendor;[27] although it must also be noted that the definition of the relevant market in *United Brands* was heavily criticised as being too narrow,[28] and therefore the CJEU's perception of customer demand may have been skewed through its definition of the market.

ii. The dominant firm can only raise prices above the competitive level to the point at which the constraints imposed on it by its competitors on the demand curve are binding, and therefore it cannot truly act to an appreciable extent independently of its competitors.[29]

Walker and Pearce Azevedo explain that every undertaking is constrained by competitors since no undertaking can raise prices above the competitive price level without losing sales to its competitors so that the price rise is not profitable. They argue that this is also true of dominant undertakings not just non-dominant undertakings.

On the other hand, Walker and Pearce Azevedo admit that there is a sense in which dominant undertaking may act to an appreciable extent independently of competitors, and that is by raising prices above the competitive price level in the first place. However, they contend that it is still the case that at some point, even a dominant undertaking would have to reign in its price increases, or risk losing customers to its competitors. On the other hand, it would appear that in practice this is not always the case, if what was stated in *United Brands,* that in that case customers continued to buy from the undertaking in question although it was the dearest vendor, is true. This might imply that dominant undertakings do have significant leeway to increase prices. Of course, one might argue that UBC's price level at the time was at the highest level, and that had it increased its prices further, it

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[27] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207, para 128.

[28] See Alison Jones and Brenda Sufrin *EU Competition Law* (5th edn, OUP 2014), p 77-78, 306-309

[29] Walker and Pearce Azevedo (n 28), p 364. This is embraced by Gerardin *et al* (n 26) p 3. Niels, Jenkins and Kavanagh are largely of the same opinion – see (n 22) p 121. See also Emanuela Arezzo 'Is there a role for market definition and dominance in an effects-based approach?' in M-O Machenrodt, B Conde Gallego and S Enchelmaier (Eds) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Berlin, 2008).

would have lost customers to its competitors as posited by Walker and Pearce Azevedo.

Walker and Pearce Azevedo's argument is criticised by la Cour and Møllgaard who argue that the definition in *Hoffmann-La Roche* can be given an economically sensible interpretation. They propose that the CJEU's definition of a dominant position is that the rivals' price elasticity, the rivals' quantity elasticity and the own-price elasticity be close to zero, so that the dominant undertaking may change its price without a price response from its competitors or a quantity response from its competitors or from its customers and consumers.[30]

In the light of the above, it appears that the difficulty economists grapple with most in the legal definition is the notion of 'independence'. From the foregoing discussion of independence perhaps a tentative distinction can be drawn between 'practical' independence and 'theoretical' independence. It would appear highly unlikely that an undertaking can be considered to be 'independent' if one were to consider solely economic theory, since it appears doubtful whether, in view of well-established economic assumptions about markets, and about the demand and supply curves, any undertaking can act truly independently. On the other hand, it may be arguable that although in theory it is highly unlikely that an undertaking can actually act independently of its competitors, customers and consumers, this may be possible in practice on a day-to-day basis. For instance, one could say that an undertaking that has the capability to raise prices significantly, as well as to retaliate to a new entrant by drastically reducing its prices, is in a position to act independently of its competitors. In a way, la Cour and Møllgaard's theory envisages situations of 'practical' independence, since they opine that the definition in *Hoffmann-La Roche* refers to situations where competitors cannot easily respond to price changes by the dominant undertaking, whether through price or output. However, although la Cour and Møllgaard propose this theory as a true interpretation of the legal definition, it does not appear that the decisional practice of the CJEU and the GC has had this interpretation in mind when considering whether an undertaking is dominant or not. None of the

[30] Lisbeth F la Cour and H Peter Møllgaard 'Meaningful and Measureable Market Domination' [2002/05] LEFIC Working Paper <http://openarchive.cbs.dk/bitstream/handle/10398/6792/wplefic052002.pdf?sequence=1> accessed 27 June 2015.

judgments actually consider price elasticity or quantity elasticity but focus on other indicators of dominance, such as market shares and entry barriers.[31]

IV. Attempts at rationalisation of the definition

It should be evident by now that the legal definition has raised more questions than it answers. Monti rationalises the legal definition by interpreting it as 'commercial power'.[32] The idea of dominance as commercial power is inspired by the judgments in *Hoffmann-La Roche, United Brands* and the *GE/Honeywell*[33] merger decision. In *United Brands* for instance, the Court considered vertical integration as evidence of dominance because UBC had certain advantages which none of its competitors enjoyed, such as a number of plantations and a fleet of ships.[34] It also carried out research and development, and was able to hold competitors off although there was fierce competition on the market. The CJEU considered relevant the fact that UBC sold more bananas than anyone else, notwithstanding it was making losses.[35] Monti notes that this is evidence of efficiency not economic harm to consumer; the CEUJ therefore was focusing on UBC's commercial power and not on whether UBC was free to set prices and reduce output[36] (which is required by the notion of 'substantial market power'). The conception of 'dominance' as 'commercial power' is also espoused by Dethmers and Dodoo[37] (although they do not use the term 'commercial power'), and sustained by the study carried out by Fishwick, who found that the judgments of the CJEU stressed the importance of freedom from the constraint of competition, and the existence of a trading partner or competitor without whose consent other firms cannot remain in business.[38]

Monti notes that the case law on dominance departs from the idea of substantial market power since it considers commercial power and the ability to use it when confronted by competition.[39] In this conception of dominance, a firm is dominant:

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[31] See Jones and Sufrin (n 30), pp 335-361.
[32] Monti (n 15), pp 38-43.
[33] COMP/M.2220.
[34] Monti (n 15), p 39.
[35] *Ibid*, pp 39-40.
[36] *Ibid*, p 40.
[37] Frances Dethmers and Ninette Dodoo 'The abuse of Hoffmann-La Roche: the meaning of dominance under EC competition law' (2006) 27(10) ECLR 537, p 537.
[38] Fishwick (n 19) p 175.
[39] Monti (n 15), p 38.

> 'when its presence distorts the competitive process, which is characterised by the presence of several undertakings able to contest the market. The presence of a larger, commercially powerful entity harms the prospects of competition'.[40]

This idea of dominance, in line with the approach taken by the CJEU, the GC and the Commission when assessing whether a particular undertaking is dominant, boils dominance down to 'pre-eminence'.[41] However, commercial strength does not equate to market power – efficiencies are not necessarily indicators of (substantial) market power, particularly when consumers benefit. [42] The fact that an undertaking is successful does not mean that it is dominant. Viewing undertakings as dominant because they have commercial success undermines that success. This conception of dominance may classify undertakings as being in a dominant position simply because they have earned notoriety in their field. This would restrict the conduct of particular undertakings which are considered 'leaders' in a particular market, again potentially unnecessarily.

V. Other possible perceptions of 'dominance'

Asides from 'dominance as commercial power', which is the view of the EU institutions, Monti canvasses another three possible 'concepts of dominance' which in essence encapsulate the various interpretations that can be given to 'dominance': dominance as substantial market power (which will be considered in detail in Section VI below); dominance as the power to exclude rivals 'so as to gain the power to increase prices and reduce output; and dominance as purely a jurisdictional threshold to determine whether Article 102 TFEU applies or not.[43]

Dominance as 'the power to exclude rivals' implies that dominance is the power to harm rivals to gain substantial market power; it requires the dominant firm to act strategically on the market to gain substantial market power.[44] This concept would likely entail the finding of competitive harm, without the need to have a preliminary determination of dominance, as proposed by the Economic Advisory Group for Competition Policy

[40] *Ibid,* p 39.
[41] *Ibid,* p 42.
[42] *Ibid,* p 41.
[43] *Ibid*, pp 31-32.
[44] *Ibid*, p 43.

(EAGCP).[45] Nazzini's view of dominance is somewhat similar. He concludes that:

> 'Under Article 102, dominance is the ability to harm competition to the detriment of long-term social welfare. It is, therefore, a quintessentially behavioural concept.'[46]

Nazzini believes that substantial and durable market power is not relevant *per se*, and that therefore dominance does not mean substantial and durable market power 'as the Guidance on Article 102 appears to say'.[47] On the other hand, he opines that Article 102 TFEU:

> 'is a prohibition of unilateral conduct that restricts competition or takes advantage of a market structure in which competition is weakened to the detriment of long-term social welfare.
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> Substantial and durable market power is, therefore, an element of the assessment of a firm's ability to act in an anti-competitive way. The main implication of this finding is that dominance must be part and parcel of the assessment of abuse.'[48]

Taking this view however would entail either diverging from the text of Article 102 TFEU, or else require an amendment to the competition rules contained in the TFEU, since Article 102 TFEU is clear in requiring a dominant position for abuse to be censored. This option therefore has an inherent conceptual problem in that the text of Article 102 TFEU is clear that abuse and dominance are two separate notions. Moreover, it is difficult to see how Article 102 TFEU can only be applied to dominant undertakings if the idea of dominance is enmeshed with that of abuse.

Finally, Monti notes that one may consider dominance as a 'threshold' or jurisdictional criterion for the applicability of Article 102 TFEU. In this case, market shares would be used to define the threshold. Like the third option, this option appears to not be workable in practice. Although it would create legal certainty, it would also entail a heavy reliance on market shares, which

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[45] Economic Advisory Group for Competition Policy, *An economic approach to Article 82* (July 2005).
[46] Nazzini (n 15), p 357.
[47] *Ibid*. The term 'Guidance on Article 102' refers to the European Commission's 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7.
[48] *Ibid* pp 357-8.

is not advisable since market shares alone are not necessarily indicative of dominance.[49]

VI. Is 'dominance' really 'substantial market power' in disguise?

In view of the difficulty in making sense of the 'legal' definition of dominant position from an economic point of view, most economists equate 'dominance' with 'market power', more specifically with 'substantial market power',[50] which does have meaning from an economic point of view. Once again however, this view is not universal, and opinions vary from expert to expert. For instance, notwithstanding the fact that Monti views *United Brands* as evidence that 'dominance' means 'commercial power',[51] Whish and Bailey view the decision as associating dominance with market power.[52] Niels, Jenkins and Kavanagh opine that the legal definition of dominance does not accord with the underlying economics of market power, in particular because it does not 'capture the subtleties of market interactions'. [53] O'Donoghue and Padilla's view falls somewhere in between: they believe that the economic concept of dominance does not correspond fully with the legal definition propounded in *Hoffmann-La Roche* whilst remarking that in economics 'dominance' is 'broadly associated with the concept of market power'.[54] They note however that a firm which enjoys substantial market power need not necessarily be able to behave to an appreciable extent independently of its competitors, customers and consumers.[55] That leaves open the question: is dominance the same as substantial market power?

Market power is defined in economic literature as the ability to price above short-run marginal cost.[56] In practical terms however, it refers to the ability of an undertaking to raise price, through the restriction of output, above the level that would prevail under competitive conditions and thereby enjoy

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[49] See Jones and Sufrin (n 230), p 336.
[50] Simon Bishop and Mike Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (2nd edn, Sweet & Maxwell 2002), pp 227-229. See also Nicolas Petit and Norman Neyrinck 'Behavioural Economics and Abuse of Dominance: A proposed alternative reading of the Article 102 case-law', GCLC Working Paper 02/10, p 6.
[51] Monti (n 15).
[52] Richard Whish and David Bailey *Competition Law* (7th edn, OUP 2012), p 180.
[53] Niels, Jenkins and Kavanagh (n 22) p 121. See also Nazzini (n 15) pp 335-336.
[54] Robert O'Donoghue and Jorge Padilla *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013), p 141.
[55] *Ibid*, p 142.
[56] Bishop and Walker (n 51) p 52.

increased profits.[57] There are in essence two forms of substantial market power: power over price and the power to exclude.[58] Bishop and Walker indicate that the definition of market power contains three elements: first that 'the exercise of market power leads to lower output'; secondly that 'the increase in price must lead to an increase in profitability'; and finally that 'market power is exercised relative to the benchmark of the outcome under conditions of effective competition.'[59]

It is unlikely that at present dominance can be said to equate to substantial market power in its economic meaning. The drafters of the EEC Treaty chose to refer to a 'dominant position', rather than refer to 'substantial market power' when drafting the then Article 86. Simply from this linguistic choice therefore, it would appear that 'dominant position' does not equate to 'substantial market power', as the legislator's conscious textual decision cannot simply be discarded. Similarly, the failure by the CJEU, the GC and the Commission to adopt the definition of 'substantial market power' as a definition of 'dominant position', and their adoption of a specific definition, is indicative.

From a substantive, and more substantial, point of view, the definition of 'dominance' does not appear to encompass the elements which make up substantial market power. The ability to act independently does not necessarily entail the ability to lower output and increase price in order to enjoy increased profitability. It may be argued that the ability to act independently implies these requirements, since an undertaking in a dominant position may raise prices above the competitive level and therefore act independently of its competitors, and reduce output and thus act independently of its customers and consumers. However, the jurisprudence on dominance indicates that this was not the intention of the CJEU and the Commission when this definition was devised. Indeed in *United Brands* itself the CJEU dismissed the idea that profitability is indicative of dominance.[60]

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[57] *Ibid.* Others have described market power as 'the ability to charge prices significantly above competitive levels or restrict output significantly below competitive levels for a sustained period of time' (O'Donoghue and Padilla (n 455) p 142).

[58] Gerardin et al (n 26) p 4-5. Niels, Jenkins and Kavanagh (n 22) p 118, describe market power as 'the ability to raise prices above the competitive level or the ability to exclude or significantly harm competitors'

[59] Bishop and Walker (n 51), p 53.

[60] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207, para 126.

This idea was reiterated in *Michelin.*[61] The approach taken by the CJEU may appear surprising, but is understandable when one considers the type of abuses dealt with so far in competition cases, which have mostly been of an exclusionary nature. Certainly when particular conduct is being examined, for instance there is an allegation of predatory pricing,[62] profitability would not be indicative of dominance, as the dominant undertaking could be sustaining losses in the short term in order to eliminate competition and recuperate those losses in the long term. To some extent or other, the same could be true of most exclusionary abusive practices. This however cannot be said of most exploitative abuses, such as exploitative prices. Similarly an undertaking engaging in discriminatory conduct should not be sustaining losses by virtue of that abuse. Therefore, where the allegation appears to be of exploitative abuse, profitability should be an indicator of dominance.

The fact that dominance was originally not intended to equate to substantial market power is evidenced by the fact that in the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("the Article 102 Guidance Paper")[63] the Commission has attempted to marry the definition of dominance as found in the CJEU's case law and its own decisions with the notion of substantial market power. In the Article 102 Guidance Paper, after reiterating the legal definition, the Commission states that the ability to behave to an appreciable extent independently of its competitors, customers and consumers:

> 'is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are

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[61] Case 322/81 *Nederlandasche banden-Industrie Michelin v Commission* [1983] ECR 3461, para 59: "it must be observed that temporary unprofitability or even losses are not inconsistent with the existence of a dominant position".

[62] Predatory pricing occurs when an undertaking prices so low that competitors are driven from the market. In Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, predatory pricing was held to occur when a dominant undertaking prices below average variable costs, or else prices above average variable costs but below average total costs and has an intention to eliminate its competitors.

[63] European Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7.

> largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. (…)
>
> The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant. (…) the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers.'[64]

This statement is the first official recognition by an EU institution that the notion of profitably increasing prices above the competitive level for a significant period of time indicates dominance, and therefore that substantial market power equates to dominance. However, this statement is still problematic conceptually. The Commission is bound to use the CJEU's definition of dominance, since this constitutes law. Therefore, the Commission uses the legal definition as a starting point of an attempt towards a more economic and effects-based approach towards dominance. However, as has been shown above, forging an economic approach within the legal definition is not as straightforward as the Commission seems to imply.

This notwithstanding, there have been some attempts by the Commission to introduce the idea of 'substantial market power' in its decisions which date after the advent of the Article 102 Guidance Paper. In *Intel* for instance, it states that:

> 'The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82 of the Treaty. (…) for dominance to exist, the undertaking concerned must have substantial market power.' [65]

Similarly in *Telekomunikacja Polska* the Commission, citing *Hoffmann-La Roche,* notes that 'for dominance to exist, the undertaking concerned must

[64] *Ibid*, paras 10 and 11.
[65] COMP/C-3 /37.990 – Intel, para 837, 839 (emphasis added).

have substantial market power so as to have an appreciable influence on the conditions under which competition will develop.'[66] However, this idea has not yet trickled upwards to the GC and the CJEU.[67] Moreover, in other recent cases the Commission itself has simply relied on the traditional notion of dominance.[68] It is evident therefore that the idea that 'dominance' equates to 'substantial market power' is not yet part and parcel of EU competition law. Indeed it appears to not have yet been fully embraced by the entity which proposed the idea in the first place. At present therefore, there is only minimal theoretical acceptance towards the use of the notion of substantial market power in EU competition law, notwithstanding generally widespread support for the use of this criterion by the EU institutions.

This caution is perhaps warranted, since the notion of substantial market power is not without its problems. The criticism of 'substantial market power' centres around two issues.

First of all, identifying the 'competitive price level' is near impossible.[69] Bishop and Walker indicate that in view of the fact that the direct identification of the competitive price level is not usually possible, market power has to be inferred indirectly from the characteristics of the industry and the nature of competition within the market.[70] This means that adopting substantial market power as the definition of dominance would in practice re-create part of the original problem with the legal definition, in that an element of the notion of substantial market power is still uncertain. However, unlike with the legal definition, the notion of competitive price level (as opposed to its assessment in practice) is well-established. Therefore, at least conceptually, the idea of substantial market power is still clearer than the legal definition of dominance.

Secondly, it is not necessarily the case that there is a link between price-cost margins and the intensity of competition on a particular market; an undertaking may earn large profits simply because of its superior efficiency when compared to its rivals, rather than because of its market power.[71] As

[66] COMP/39.525 – Telekomunikacja Polska, para 641.
[67] See Case T-286/09 *Intel Corp. v European Commission* nyr 12 June 2014.
[68] Case AT.39985 -Motorola - Enforcement of GPRS standard essential patent.
[69] Walker and Pearce Azevedo (n 28) p 364-365 ; Pinar Akman 'The European Commission's Guidance on Article 102TFEU: From *Inferno* to *Paradiso*?' (2010) 73(4) Modern Law Review 605, p 612; Bishop and Walker (n 51), p 59-60.
[70] Bishop and Walker (n 51), p 61.
[71] Akman (n 71), p 612.

with the current perception of dominance as commercial power, this could also identify an undertaking as dominant irrespective of how it achieves that dominance.

This notwithstanding, utilising substantial market power as a definition would be preferable than using the current legal definition in view of the fact that there is consensus on the elements which make up substantial market power, and although some of the elements which make up the definition are difficult to quantify, they are clearly identified and comprehended. The same cannot be said for the legal definition.

Utilising 'substantial market power' as a stand-in for the current legal definition, that is dominance as commercial power, would likely mean that less undertakings will be found to be dominant. This would be the case largely because most of the indicators which are currently used to determine whether an undertaking is dominant,[72] such as an undertaking's portfolio power, [73] the undertaking's superior technology, [74] and its established distribution and sales networks,[75] which in reality indicate that an undertaking is efficient rather than dominant, would have no place in the test utilised to determine substantial market power. Because of the strict economic tests required, equating dominance to substantial market power could therefore potentially limit the number of undertakings that are considered 'dominant'. At the very least competition authorities would be required to adduce further evidence before concluding an undertaking is dominant. Indeed Monti opines that the undertakings in *United Brands* and *GE/Honeywell* would probably not have been found to be dominant if dominance were considered to be substantial market power.[76] Equating dominance to substantial market power therefore mean that Article 102 TFEU could potentially apply to fewer undertakings, and thus fewer undertakings would be restricted in their conduct by Article 102 TFEU, whilst at the same time, undertakings who are truly dominant because they are, through rigorous economic testing, proven to have substantial market power, would be constrained by the provisions of

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[72] See Jones and Sufrin (n 30), pp 345-346, 354-359.
[73] Case 85/76 *Hoffmann La-Roche & CO AG v Commission* [1979] ECR 461.
[74] Case 85/76 *Hoffmann La-Roche & CO AG v Commission* [1979] ECR 461, Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207, Case T-30/89 *Hilti AG v Commission* [1991] ECR II-439.
[75] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207
[76] Monti (n 15), p 33.

Article 102 TFEU. Therefore, the application of the 'substantial market power' test would proscribe truly anti-competitive conduct by truly dominant undertakings, whilst not checking the conduct of undertakings who may be considered 'dominant' but do not have 'substantial market power'. It is submitted that potentially, this could be pro-competitive, since the latter undertakings, which are currently restricted in what they can do, would be able to compete more fiercely on the market, therefore increasing the level of competition on the market, and thereby benefitting the market.

This discussion has focussed on what is sometimes referred to as 'single firm dominance', that is when one undertaking is found to be in a dominant position. However, Article 102 TFEU refers to abuse committed by 'one or more undertakings of a dominant position' (emphasis added), and not just to abuse committed by one undertaking in a dominant position, meaning that that Article 102 TFEU could be applied to 'two or more independent economic entities' which are 'united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis other operators on the same market'.[77] In other words, Article 102 TFEU does not just contemplate single-firm dominance, but also 'collective dominance'. Adopting 'substantial market power' as a definition for dominance would not impact negatively the notion of collective dominance as found in EU competition law. It would simply mean that after examining 'the economic links or factors which give rise to a connection between the undertakings concerned'[78] and whether the undertakings are 'sufficiently linked between themselves to adopt the same line of action on the market',[79] the assessment would continue by determining whether the undertakings which are so linked have substantial market power, rather than whether they have the ability to act independently of competitors, customers and consumers.

VII. Conclusions

In the light of the above, it is clear that dominance as defined by the CJEU, the GC and the Commission in practice is currently to be considered as a position of commercial power. From the decisional practice of the CJEU, the GC and the Commission, and taking into account the legal definition

[77] Cases T-68/89 et *Societa' Italiana Vetro SpA v Commission* [1992] ECR II-1403 para 358.
[78] Cases C-395/96P and C-396/96P *Compagnie Maritime Belge Transports v Commission* [2000] ECR I-1365, para 41.
[79] Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission of the European Communities* [2003] ECR II-3275, para 594-5.

propounded by the EU institutions as well as the factors which are considered in order to assess dominance, one may hazard to otherwise interpret the definition of the term 'dominant position' as referring to a position held by an undertaking on the market in which it operates which enables it to harm or damage that market in any manner whatsoever, irrespective of how or why it has obtained that position, and of whether it has the power to, in some manner, raise prices above competitive levels**.**

It is proposed that the idea of dominance be truly aligned with the concept of 'substantial market power', since this concept has economic rationale and has been properly analysed and defined and therefore would lead to more certainty for undertakings and enforcers alike. This idea is not particularly novel, and has already been proposed by other authors, for a variety of reasons.[80] As has been highlighted in Section VI, the shortcomings with the notion of substantial market power are considerably less than those of the legal definition, and therefore the adoption of substantial market power would constitute a step forward in the application of Article 102 TFEU.

[80] See for instance Gerardin et al (n 26), p 4.