

**LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE  
INTERNATIONAL LEAGUE OF COMPETITION LAW  
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT**

**LIDC Annual Congress, Stockholm, 2015**

**QUESTION A: ABUSE OF A DOMINANT POSITION AND GLOBALIZATION**

**Is there any consistency between the recent approaches of the different jurisdictions to  
the notion of abuse?**

**Are there too many restrictions on legal rights and business opportunities?**

**INTERNATIONAL REPORT**

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## 1. Introduction\*

This International Report aims to summarise and synthesise the responses received from the national LIDC groups in twenty-one jurisdictions.<sup>1</sup> The national reports were prepared in response to a questionnaire prepared by the author of this International Report. The questionnaire sought to illicit views on abuse of a dominant position and globalization in relation to two broad questions: first, whether there is consistency between the approaches of different jurisdictions to the notion of abuse, and, second, whether there are too many restrictions on legal rights and business opportunities resulting from the prohibition of abuse of dominance. Given that not every jurisdiction which takes part in the LIDC and which has responded to the questionnaire adopts the terminology of abuse of a dominant position, the aim of the exercise is better expressed as the comparison of the different provisions and the different approaches to the issue of the anticompetitive exercise of unilateral market power. For ease of narrative, the concept of ‘abuse of a dominant position’ will be used to refer to such provisions even if they are not expressed in terms of abuse of a dominant position but in terms of monopolisation and similar concepts.

The prohibition of abuse of a dominant position is one of the core legal provisions in any modern competition law system. It makes up one of the three pillars of competition law alongside the prohibition of anticompetitive agreements (cartels, etc) and merger control. The prohibition of abuse of dominance is a controversial aspect of competition law since there is no apparent consensus across different prohibitions and different approaches of different jurisdictions such as the EU and the US. There are also no clear, general economic rules establishing when the exercise of unilateral market power is anticompetitive. The European Commission has, for example, been criticised for adopting a formalistic approach rather than an economic effects-based approach in the application of Article 102 TFEU.<sup>2</sup> This is to be

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\* The author would like to thank all the national reporters for their contributions. This report has been based entirely on the information collated from the national reports with no reference to external sources regarding jurisdiction-specific issues unless otherwise indicated by the references. The author is grateful to Magali Eben for research assistance in preparation of the report.

<sup>1</sup> The following national groups submitted reports on the topic: **Austria** (G Fussenegger, F Schuhmacher and R Tahedl); **Belgium** (PM Sabbadini); **Brazil** (M Pallerosi); **Bulgaria** (A Petrov); **France** (M Boudou, C Hubert, M Isola, T Marcerou, G Poulakos, M Vaz d'Ameida); **Germany** (M Hartmann-Rüppel); **Hong Kong** (K Fournier); **Hungary** (A Papp); **Italy** (A Camusso and C De Cesero); **Japan** (T Itoh); **Lithuania** (Y Goldammer); **Moldova** (A Svetlicinii); **Netherlands** (S Beeston and M Geilmann); **Norway** (JC Kongsli); **Poland** (A Stawicki and B Turno); **Spain** (M Cañadas Bouwen and J Suderow); **Sweden** (TO Bergqvist); **Switzerland** (D Cherpillod); **Ukraine** (N Ivanytska); **United Kingdom** (JDM Robinson); **United States** (DI Baker, K Mereand-Sinha and M Ferrari).

<sup>2</sup> For the criticisms, see eg 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 Jebsen and R Stevens ‘Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article

contrasted most significantly with the US approach where the antitrust laws are deemed to be ‘for the benefit of competition, not competitors’.<sup>3</sup> The Commission has recently sought to modernise its approach by, *inter alia*, adopting a Guidance document on its enforcement priorities in applying Article 102 TFEU to exclusionary conduct arguably to bring its approach more in line with modern economics.<sup>4</sup> Yet, commentators are also divided on the issue and particularly in the EU, some commentators have argued that a more economic approach is not appropriate and/or not justified.<sup>5</sup> One of the main aims of this International Report is therefore to establish whether there is consistency between the applications of the rules concerning abuse of dominance in different jurisdictions around the globe. A related aim is to determine whether the existing approaches are too restrictive of business rights and opportunities of the dominant undertakings since one of the major criticisms against the application of, for example, Article 102 TFEU by the European Commission has been that it seeks to ‘protect competitors, not competition’. A related criticism has been that efficiencies and other procompetitive effects of dominant undertakings’ practices are not duly taken into consideration by the European Commission, thereby potentially discouraging investment and innovation that would otherwise produce such efficiencies and other procompetitive effects.<sup>6</sup> In general, the European approach is contrasted with the US approach which is less restrictive of the business rights and opportunities of dominant undertakings due to the focus of the latter on the effects of a given conduct on competition and efficiency rather than on the competitors of the perpetrator.

From a study of the national reports that were submitted to the International Reporter, it is apparent that some jurisdictions have *per se* or formal approaches whereas some claim to adopt an effects-based approach to the prohibition of unilateral conduct. Similarly, some

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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) ECLR 243; J Kallaugher and B Sher ‘Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82’ (2004) 25 (5) ECLR 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 *EU Competition Law* (Oxford University Press, 4<sup>th</sup> ed, 2011) 281; R O’Donoghue and J Padilla *The Law and Economics of Article 102 TFEU* (Hart Publishing, 2<sup>nd</sup> ed, 2013) 67 et seq.

<sup>3</sup> *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.) cited in Baker et al, US, p. 7.

<sup>4</sup> See ‘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.

<sup>5</sup> See eg H Schweitzer ‘Recent developments in EU competition law (2006-2008): Single-firm dominance and the interpretation of Article 82’ (2009) (2) European Review of Contract Law 175, 184.

<sup>6</sup> See eg J Killick and A Komninos ‘Schizophrenia in the Commission’s Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis’ (2009) (February-I) Global Competition Policy; Y Katsoulacos ‘Some Critical Comments on the Commission’s Guidance Paper on Art. 82 EC’ (2009) (February-I) Global Competition Policy.

claim to pursue objectives such as consumer welfare whereas others also have objectives that could lead to the protection of competitors *as such*. Although broadly speaking, many jurisdictions have very similar provisions to the EU provision of Article 102 TFEU, much legislation also has small but important differences in the list of prohibited practices even when they are explicitly based on the example of Article 102 TFEU. Most notably, in the list of prohibited practices, several jurisdictions have separate clauses on refusal to deal and some have a separate clause explicitly prohibiting exclusion or predatory pricing in particular. A couple of jurisdictions (for example, Germany and France) have specific rules concerning the prohibition of abuse of economic dependency which does not require the existence of dominance and go over and beyond the prohibition found in Article 102 TFEU in terms of the strictness of the rule.

Interestingly, many jurisdictions provide definitions of ‘dominant position’ and some provide explanations of ‘abuse’ in their legislation unlike the EU or the US. In the same vein, many jurisdictions consider the effect of abuse on a contract to be nullity and voidness although this is not always explicitly regulated in the relevant provisions and is not regulated in Article 102 TFEU or in Sherman Act Section 2 on monopolization. Unlike the EU or US prohibition, some jurisdictions also do not require any effect on trade that would result from the abuse of dominance as part of the prohibition.

In terms of the question of whether there are too many restrictions on business rights and opportunities, it is not possible to discern a clear position from the national reports that there are too many restrictions on businesses. In fact, most jurisdictions seem to rather complain that there are too few cases concerning anticompetitive unilateral conduct and therefore there is too little guidance for businesses. Because they suggest that there are too few cases, there is no suggestion that there are too many restrictions but if anything, possibly that there is little control over dominant undertakings’ conduct. The one jurisdiction that expressly indicates a concern that over-enforcement of antimonopoly rules would deter innovation and investment in dynamic markets which are so important to the economy is the United States.<sup>7</sup> The US has far fewer restrictions on business rights and opportunities for dominant undertakings as a result of adopting a narrower approach to defining dominance, enforcement caution by agencies and a higher bar for private monopolization and abuse suits in comparison to many other jurisdictions around the globe.<sup>8</sup> This position adopted in the US leads to the main point

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<sup>7</sup> Baker et al US, p. 1.

<sup>8</sup> Baker et al, US, p. 2. Indeed, it is pointed out that it might be lack of competition intervention that might

of divergence concerning the prohibition of anticompetitive unilateral conduct across different jurisdictions. Such divergence has serious practical implications since both the undertakings and the enforcers of competition law operate in a global economy and the divergence risks creating a situation where the same undertaking's same conduct will be prohibited in one jurisdiction in the world and allowed (or even encouraged) in another jurisdiction.<sup>9</sup>

In the following, this report first provides a brief overview of the different prohibitions of abuse of a dominant position across the different jurisdictions studied in section 2. It then shifts the focus to the different aspects of conduct prohibited as an abuse of a dominant position in section 3. Section 4 considers the enforcement of the prohibition by competition authorities and courts, before section 5 concludes with some observations.

## **2. The Different Prohibitions of Abuse of a Dominant Position**

The oldest prohibition of anticompetitive unilateral conduct in the national reports submitted is the US Sherman Act of 1890. For most of the rest of the different jurisdictions studied, the majority of which are EU Member States, adoption of competition law seems to follow EU evolution and many – if not most - of them have adopted competition legislation when candidates for EU membership.<sup>10</sup> In contrast, in Germany, the first competition rule concerning unilateral conduct dates back to the Regulation against the Abuse of Economic Dominant Positions from 1923.<sup>11</sup> In Japan, the prohibition of private monopolisation modelled after the US Sherman Act existed since 1947.<sup>12</sup> In Brazil, the first prohibition of anticompetitive conduct can be found in a Decree from 1945.<sup>13</sup>

In almost all of jurisdictions covered by this report, the rules concerning competition are found in statutes that exclusively concern competition law, or if they are broader, they concern competition and fair trade/fair competition/consumer protection.<sup>14</sup> In contrast, in

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restrict the business opportunities of undertakings other than the dominant undertaking; see Baker et al, US, p. 3.

<sup>9</sup> Baker et al, US, p. 2.

<sup>10</sup> Beeston and Geilmann, Netherlands, p. 2; Camusso and De Cesero, Italy, p. 2; Sabbadini, Belgium, p. 4; Papp, Hungary, p. 4; Goldammer, Lithuania, p. 1; Stawicki and Turno, Poland, p. 1; Boudou et al, France, p. 3; Cañadas Bouwen and Suderow, Spain, p. 3; Robinson, UK, p. 6; Fussenegger et al, Austria, p. 3.

<sup>11</sup> Hartmann-Rüppel, Germany, p. 4.

<sup>12</sup> Itoh, Japan, p. 1.

<sup>13</sup> Pallerosi, Brazil, p. 4.

<sup>14</sup> These jurisdictions include Italy; Ukraine; Poland; Bulgaria; Japan; United Kingdom; Austria; Germany; Hungary; Switzerland; Lithuania; Spain; Brazil; Netherlands; Norway; Ukraine; Sweden; Moldova; Hong Kong (due to enter into force in December 2015).

two jurisdictions (France and Belgium), the competition rules are found in a more general statute, eg in a general commercial or economic code.

Interestingly, several statutes contain a definition and sometimes a presumption of dominance. For example, the German provisions set out a definition of dominance, as well as the criteria to be considered and the presumptions in analysing market power.<sup>15</sup> The provision also contains a presumption of dominance for undertakings holding a market share of at least 40%.<sup>16</sup> Similarly, the Austrian legislation provides a definition of dominance and a presumption of dominance at 30% market share alongside a reversal of burden of proof: the undertaking has to prove that it is not dominant if it has market share of 30% and above.<sup>17</sup> A legislative definition of dominance is also provided in Switzerland; Lithuania with a presumption of dominance at 40% market share; Belgium; Bulgaria; Netherlands; Ukraine with a presumption of dominance at 35% market share (although dominance at lower market share is stated to be possible in the Act) and a reversal of burden of proof similar to Austria; and, Moldova with a presumption of dominance at 50% market share.<sup>18</sup> An interesting case is that of Brazil where dominating a market in itself appears to be prohibited (except when such dominance results from a natural process caused by the greater efficiencies of the undertaking compared with its rivals) and where there is a presumption of dominance at 20% market share.<sup>19</sup> It should be noted that there is no definition of dominance in the Brazilian legislation. Another striking example is Japan where the prohibition of anticompetitive unilateral conduct (ie private monopolisation) does not require the existence of a dominant undertaking or an undertaking with substantial market power. What is required is instead the causing of a 'substantial restraint of competition in any particular field of trade' that is contrary to public interest.<sup>20</sup>

In the jurisdictions where a definition of dominance has been provided, it is striking that many of them have adopted the definition of dominance provided by the CJEU in its case law (most notably, in *Hoffmann-La Roche*) which included notions of economic strength that allows the undertaking to prevent effective competition and the possibility of acting

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<sup>15</sup> Hartmann-Rüppel, Germany, pp. 1-2.

<sup>16</sup> See Act against Restraints of Competition Section 18 (4) cited in Hartmann-Rüppel, Germany, p. 2.

<sup>17</sup> Fussenegger et al, Austria, pp. 9-10.

<sup>18</sup> Cherpillod, Switzerland, p. 2; Goldammer, Lithuania, pp. 2-3; Sabbadini, Belgium, p. 3; Petrov, Bulgaria, p. 2; Beeston and Geilmann, Netherlands, p. 2; Ivanytska, Ukraine, p. 4; Svetlicinii, Moldova, pp. 4-5.

<sup>19</sup> Pallerosi, Brazil, p. 1.

<sup>20</sup> Itoh, Japan, p. 1.

independently of competitors and consumers.<sup>21</sup> For example, the legislative definitions of dominance in the Republic of Moldova; Netherlands; Bulgaria; Belgium, and Switzerland have either adopted the definition of dominance from the CoJ case law in its entirety or have adopted significant elements of that definition. These market share thresholds and presumptions are to be contrasted with the case of the US where monopoly power is unlikely to be established at a market share lower than around 70%.<sup>22</sup> It is also noteworthy that many European jurisdictions have opted for a presumption of dominance at lower market share thresholds than that adopted in the CJEU case law which is that of 50%.<sup>23</sup> It is similarly striking that in one of the jurisdictions studied, namely Hong Kong, the Competition Ordinance due to come in effect in December 2015, adopts a lower substantive threshold (despite generally following the EU model) by replacing the concept of ‘dominance’ with that of ‘substantial degree of market power’ as more suited to the reality of the country’s business world.<sup>24</sup>

The foregoing clearly demonstrates that one of the points on which different jurisdictions diverge in their approach to abuse of dominance considers the issue of dominance. The same undertaking is likely to be presumed dominant in some jurisdictions with a burden to rebut that presumption, whereas it is not likely to be presumed dominant in some other jurisdictions, and be presumed dominant in yet some other jurisdictions with no duty to rebut the presumption. In a global context where the undertakings and their operations are global, it would be desirable to base presumptions of dominance on the same market share threshold or abandon the market share threshold altogether: modern economics as well as competition policy practice suggests that market shares only provide a first indication of ‘market power’.<sup>25</sup> Subsequently, what should be placed in the centre of the assessment is ‘market power’ (ie the ability to profitably raise price or reduce output) rather than ‘market shares’ as such.<sup>26</sup>

### **3. Conduct prohibited as abuse of a dominant position**

Most provisions prohibiting the abuse of a dominant position contain lists which are almost always indicative (except for the list of unfair trade practices in Japan which is

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<sup>21</sup> See Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [38].

<sup>22</sup> See eg *United States v Aluminium Co of America*, 148 F.2d 416, 424 (2d Cir 1945).

<sup>23</sup> See Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, [60].

<sup>24</sup> This wording is more akin to the Australian provision; Fournier, Hong Kong, pp. 16-17.

<sup>25</sup> See eg Commission Guidance [13].

<sup>26</sup> For the definition of market power, see eg Commission Guidance [11].

exhaustive).<sup>27</sup> The US provision of Sherman Act Section 2 contains no list of prohibited practices, which is suggested to reflect the intention of the drafters to create a common law system of enforcement (as opposed to a code-centred administrative system) that leaves generalist federal judges applying the undefined concept of ‘monopolisation’ with vast discretion in defining the legal wrongs.<sup>28</sup> Similarly, the prohibition of private monopolisation in Japan also does not contain a list although the Japanese Fair Trade Commission (JFTC) has issued guidelines that indicate typical prohibited practices.<sup>29</sup>

In most EU Member States the provisions have been modelled after the list of practices contained in Article 102 TFEU. This modelling takes the form of either almost identically copying the list in Article 102 TFEU or expanding on the list of Article 102 TFEU. Some lists include more examples, such as the explicit and separate prohibition of refusal to deal or below cost pricing.<sup>30</sup> Some jurisdictions that are not EU Member States but have agreements with the EU (neighbourhood policy, EEA or accession agreements) have also modelled their prohibitions after Article 102 TFEU.<sup>31</sup> The listing of practices appears to have particular significance in one jurisdiction, namely Switzerland, where if the practice in question is not found in the list of prohibited practices, it may not be subjected to administrative sanctions (ie fines) due to not fulfilling the requirements of predictability as envisaged by Article 7 of the European Convention on Human Rights.<sup>32</sup> The only EU Member State whose legislation does not contain a list is the statute of the Netherlands, although the Explanatory Memorandum does refer to the Article 102 TFEU list.<sup>33</sup> Some jurisdictions, such as the UK and France, also contain explicit legal exclusions from the prohibition of unilateral anticompetitive conduct.<sup>34</sup>

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<sup>27</sup> Svetlicinii, Moldova, p. 4; Beeston and Geilmann, Netherlands, p. 2; Camusso and De Cesero, Italy, p. 5; Sabbadini, Belgium, p. 4; Pallerosi, Brazil, p. 4; Papp, Hungary, p. 5; Fussenegger et al, Austria, p. 2; Goldammer, Lithuania, p. 2; Itoh, Japan, pp. 1 -2; Kongsli, Norway, p. 1; Ivanytska, Ukraine, p. 5; Stawicki and Turno, Poland, p. 1; Petrov, Bulgaria, p. 7; Bergqvist, Sweden, p. 1; Boudou et al, France, p. 3; Cañadas Bouwen and Suderow, Spain, p. 3; Switzerland, Cherpillod, p. 4; Robinson, UK, p. 7; Germany, p. 4; Hong Kong, pp. 2, 8, 15: the provisions state either ‘including, but not limited to’ or ‘in particular’. The Japanese Anti-Monopoly Act prohibits two types of conduct: i. private monopolisation; ii. unfair trade practices; Itoh, Japan, p. 1.

<sup>28</sup> Baker et al, p. 6.

<sup>29</sup> Itoh, Japan, p. 1.

<sup>30</sup> Provisions which add to the Article 102 TFEU list are found in Bulgaria; Spain; Austria; Poland; France; Hungary; Germany.

<sup>31</sup> These are Moldova; Ukraine; Switzerland; Norway.

<sup>32</sup> Cherpillod, Switzerland, p. 4.

<sup>33</sup> Beeston and Geilmann, Netherlands, p. 2.

<sup>34</sup> Robinson, UK, p. 9; Boudou et al, France, p. 10.

Several countries have legal rules found in other areas such as unfair competition law, etc that prohibit conduct similar to those prohibited by the competition rule on anticompetitive unilateral conduct. Provisions on unfair competition/trade practices are found in Belgium; Bulgaria; Japan; France (in the same legislation as that containing the prohibition of abuse of dominance);<sup>35</sup> and in Sweden; Spain; Ukraine; Poland; Switzerland; Austria; Germany; Hungary; Norway; US.<sup>36</sup> In the US, Section 5 of the Federal Trade Commission (FTC) Act prohibits ‘unfair or deceptive acts or practices in or affecting commerce’.<sup>37</sup> However, Section 5 of the FTC Act is different to most other unfair competition laws in other jurisdictions since it is used by the FTC to bring cases based on Sherman Act Section 2 antitrust principles (whereas Section 2 itself is used by the Department of Justice (DOJ) to bring cases).<sup>38</sup> In somewhat similar fashion, following a landmark decision of the Belgian Supreme Court, conduct complying with competition rules may not be prohibited under unfair competition rules in Belgium if the conduct is only allegedly impeding the functioning of the free market.<sup>39</sup> It is, however, noteworthy that this finding presumably does not prevent conduct that harms competitors but not competition to be found in breach of unfair competition rules similar to the case in most other jurisdictions containing such rules.

Other than unfair competition rules, several jurisdictions also contain provisions concerning abuse of relative market power or abuse economic dependency. These jurisdictions include Italy (limited to subcontracting in manufacturing), Hungary (limited to retail), France (in the same provision as that prohibiting abuse of dominance), Spain, Germany, Austria. In Japan, the abuse of ‘superior bargaining power’ is prohibited as an unfair trade practice.<sup>40</sup> For EU Member States, these provisions concerning economic dependency or relative market power, etc represent stricter rules than that contained in Article 102 TFEU in the sense of Regulation 1/2003 Article 3(2) since they apply the restrictions applicable to only dominant undertakings under Article 102 also to undertakings that are not dominant but in a superior

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<sup>35</sup> Sabbadini, Belgium, p. 5; Petrov, Bulgaria, p. 3; Itoh, Japan, p. 1; Boudou et al, France, pp. 3 et seq.

<sup>36</sup> Bergqvist, Sweden, p. 1; Cañadas Bouwen and Suderow, Spain, p. 3; Ivanytska, Ukraine, p. 6; Stawicki and Turno, Poland, p. 2; Cherpillod, Switzerland, p. 3; Fussenegger et al, Austria, p. 5; Hartmann-Rüppel, Germany, p. 6; Beeston and Geilmann, Netherlands, p. 2; Papp, Hungary, pp. 4-7; Kongsli, Norway, pp. 2-3; Baker et al, US, p. 11.

<sup>37</sup> 15 USC § 45.

<sup>38</sup> Baker et al, US, pp. 12-13.

<sup>39</sup> Sabbadini, Belgium, p. 5.

<sup>40</sup> Itoh, Japan, p. 2.

position to their contracting party.<sup>41</sup> Thus, even within the EU, the legal rules applicable to the similar behaviour of undertakings with some type of power in their markets differ across different Member States.

### 3.1 Definition of ‘Abuse’

Some national reports stipulate that their national legislation contains a definition of the concept of ‘abuse’. These include Lithuania, Ukraine, Bulgaria, Switzerland, and Hong Kong. These legislative definitions of ‘abuse’ are along the lines of any acts which restrict or may restrict competition, without due cause limit the possibilities of other undertakings to act in the market or violate the interests of consumers (Lithuania);<sup>42</sup> actions or omissions which has led or may lead to the exclusion, elimination or restriction of competition, or infringe on the interests of other undertakings or consumers, which would not be possible under significant competition on the market (Ukraine);<sup>43</sup> conduct that may prevent, restrict or distort competition and impair consumers’ interests (Bulgaria);<sup>44</sup> behaviour that hinders other undertakings from starting or continuing to compete, or disadvantages trading partners (Switzerland).<sup>45</sup> Similarly, in Hong Kong both the provisions found in the sectoral rules concerning Broadcasting and telecommunications and also the rules in the forthcoming, general Competition Ordinance are quite similar, defining abuse as conduct which has the purpose or effect of preventing, distorting or (substantially) restricting competition.<sup>46</sup> In Moldova, the legislation stipulates that abuse of a dominant position is prohibited ‘to the extent it may affect competition or damage the collective interests of the final consumers on the relevant market’.<sup>47</sup>

Similar to the legislation found in the majority of jurisdictions under study, most competition authorities do not provide a definition of ‘abuse’, but seem to set out principles to determine abuse in their decisional practice or guidelines. These principles include the objective character of the abusive conduct (ie intent is not necessary), the requirement of

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<sup>41</sup> Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1, p. 1, Article 3(2) stipulates that Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

<sup>42</sup> Goldammer, Lithuania, p. 3.

<sup>43</sup> Ivanytska, Ukraine, p. 3.

<sup>44</sup> Petrov, Bulgaria, p. 7.

<sup>45</sup> Cherpillod, Switzerland, p. 5.

<sup>46</sup> Fournier, Hong Kong, pp. 2, 8, 15.

<sup>47</sup> Svetlicinii, Moldova, p. 5.

adverse effects on competition and/or harm to consumers and the absence of objective justification<sup>48</sup>.

In some jurisdictions, the competition authority provides a definition of what makes conduct abusive on their website or in a decision. For example, according to the Dutch competition authority, '[a]buse occurs when an undertaking that holds a dominant position in the market causes damage to the competitive position of its competitors. The dominant undertaking excludes competitors from the market at the expense of consumers. Thereby the consumer has, for example, less choice'.<sup>49</sup> Similarly, the Austrian authority explains on its website that '[a]busive practices by dominant companies may lead to disadvantage for other companies and customers that would not naturally occur or be possible in a setting of effective competition'.<sup>50</sup> The German authority's website notes that '[a]busive practices are actions that a dominant company can only pursue on account of its market power and that hinder or discriminate against other companies or their customers in a way that would not be possible if effective competition existed'.<sup>51</sup> The German competition authority also defined abuse as exclusionary abuse in its *Soda-Club* decision and noted that '[a]n abuse ... exists in particular if a dominant undertaking as a supplier or a purchaser of a specific product or commercial service appreciably impairs the competitive opportunities of other undertakings without objectively justified reasons'.<sup>52</sup>

There is a notable difference in the reference or lack thereof to consumer harm in the authorities' explanations of what makes conduct abusive. Some authorities do not refer to consumer harm in their discussions of abusive conduct (eg Brazil; Norway)<sup>53</sup> whereas others refer to direct or indirect consumer harm (eg Hungary; UK; Netherlands)<sup>54</sup> This will be discussed further in Section 4.3 when discussing the objectives of the prohibition of abuse of a dominant position.

In terms of the definition of abuse provided in the case law, due to most jurisdictions under study representing EU/EEA/EU neighbourhood policy countries, most of their national case

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<sup>48</sup> See Petrov, Bulgaria, p. 7; Pallerosi, Brazil, p. 5; Robinson, UK, p. 12; Kongsli, Norway, p. 4.

<sup>49</sup> Beeston and Geilmann, Netherlands, p. 3.

<sup>50</sup> Fussenegger et al, Austria, p. 6.

<sup>51</sup> Hartmann-Rüppel, Germany, p. 7.

<sup>52</sup> Hartmann-Rüppel, Germany, p. 7.

<sup>53</sup> Pallerosi, Brazil, p. 5; Kongsli, Norway, pp. 3-4.

<sup>54</sup> Papp, Hungary, p. 8; Robinson, UK, p. 12; Beeston and Geilmann, Netherlands, p. 3.

law rely to a substantial extent on the EU jurisprudence. Some jurisdictions seem to rely on the basic concept of abuse as defined by the CJEU but also further develop this concept. For example, in Austrian case law, abuse has been defined as an undertaking which is economically superior in relation to other market participants influencing the market in a way which is likely to have negative effects on the market and competition or as conduct that is suspected to cause negative effects on the market and competition conditions.<sup>55</sup> Similarly, in Poland, Spain, and Norway, courts have expanded on the EU definition of abuse by adding different concepts such as disproportionality of conduct (Poland); abuse of rights and anti-social exercise of exceptional economic freedom (Spain); and competition on the merits and on better performance (Norway).<sup>56</sup> Several jurisdictions also seem to contain national judgments that repeat almost in identical terms the definition of abuse provided by the CJEU in cases such as *Hoffmann-La Roche*. According to this definition, abuse relates to any behaviour of a dominant undertaking which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.<sup>57</sup> Interestingly, despite being an EEA country, the Swiss case law contains a definition of abuse that is not related to the CJEU definition as that of all possible behaviours which have a damaging economic effect as well as those behaviours which hinder the economic freedom of the concerned undertakings.<sup>58</sup>

In countries outside of the EU, such as Japan, Brazil and the US, no specific definition of anticompetitive unilateral conduct is provided. Having said that, in the US, for example, it is accepted that the offence of monopoly under Sherman Act Section 2 has two elements: first, the possession of monopoly power in the relevant market; second, the wilful acquisition or maintenance of that power.<sup>59</sup> Thus, the case law does provide at least the constituent elements of the offence. Then again, for monopolization, one of the required elements is that the defendant has engaged in predatory or anticompetitive conduct,<sup>60</sup> which takes one back to the

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<sup>55</sup> Fussenegger et al, Austria, p. 6.

<sup>56</sup> Stawicki and Turno, Poland, p. 3; Cañadas Bouwen and Suderow, Spain, p. 4; Kongsli, Norway, p. 5.

<sup>57</sup> See *Hoffmann-La Roche* [91].

<sup>58</sup> Cherpillod, Switzerland, p. 9.

<sup>59</sup> *United States of Grinnell Corp*, 384 US 563, 570-1 (1966) cited in Baker et al, US, p. 7.

<sup>60</sup> Baker et al, US, p. 5.

question of what makes unilateral conduct ‘anticompetitive’.

### 3.2 Exploitative and Exclusionary Abuse

Exclusionary abuse relates to the conduct of a dominant undertaking that impacts primarily on the competitive position of its rivals, whereas exploitative abuse relates to practices that directly disadvantage the customers/consumers of a dominant undertaking.<sup>61</sup> Most provisions concerning abuse of dominance do not expressly distinguish between exclusionary and exploitative abuse, but cover both types of practices.<sup>62</sup> However, notably, Sherman Act Section 2 only applies to exclusionary conduct. This results from the assumption in the US that when government control over monopoly is needed, this must be a task for a sectoral regulator.<sup>63</sup> This distinguishes the US from most other jurisdictions in the world and is driven by history and culture, as well as the central role played by private plaintiffs in the US combined with the open-ended nature of the provision of Section 2.<sup>64</sup> Similar to the US and inspired by the Australian rules, no express distinction exists in Hong Kong either but the provision only applies to exclusionary conduct.<sup>65</sup> The distinction is controversial in Brazil since in the old legislation exploitative abuse by excessive pricing was prohibited, whereas in the current legislation no such prohibition exists.<sup>66</sup> This followed many years of enforcement by the Authority that refused to recognise that excessive pricing could be unlawful and that the prohibition could not be enforced as a result of lack of parameters for defining what is excessive pricing.<sup>67</sup> Although in a judgment from 2010, the Authority recognised by a narrow majority that the provision could be enforced, the old Act containing the prohibition has been revoked in 2012 and the new Act does not contain such a prohibition.<sup>68</sup> Thus, it remains to be seen how the law will be applied in practice under the

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<sup>61</sup> For the distinction, see P Akman *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Oxford Hart Publishing 2012) 6.

<sup>62</sup> See Svetlicinii, Moldova, p. 6; Camusso and De Cesero, Italy, p. 6; Sabbadini, Belgium, p. 6; Papp, Hungary, p. 10; Goldammer, Lithuania, p. 3; Ivanytska, Ukraine, p. 6; Stawicki and Turno, Poland, p. 4; Petrov, Bulgaria, p. 7; Bergqvist, Sweden, p. 2; Boudou et al, France, p. 7; Cañadas Bouwen and Suderow, Spain, p. 4; Robinson, UK, p. 15; Kongsli, Norway, p. 5; and Fussenegger et al, Austria, p. 7; Hartmann-Rüppel, Germany, p. 7. In the Netherlands, there is no express distinction in the provision, but the distinction exists in the explanatory memorandum to the Competition Act; Beeston and Geilmann, Netherlands, p. 3.

<sup>63</sup> Baker et al, US, p. 9.

<sup>64</sup> Baker et al, US, p. 9. To prove attempted monopolization, the plaintiff must demonstrate: i. that the defendant has engaged in predatory or anticompetitive conduct with ii. a specific intent to monopolize and iii. a dangerous probability of achieving monopoly power; *Spectrum Sports, Inc v McQuillan*, 506 US 447, 456 (1993) cited in Baker et al, US, p. 5. Conspiracy to monopolize requires proof of concerted action as in a cartel violation, and intent to achieve a monopoly; see *American Tobacco Co v United States*, 328 US 781 (1946) cited in Baker et al, US, p. 5.

<sup>65</sup> Fournier, Hong Kong, p. 14.

<sup>66</sup> Pallerosi, Brazil, p. 5.

<sup>67</sup> Pallerosi, Brazil, p. 5.

<sup>68</sup> Pallerosi, Brazil, p. 5. The new Act, however, does contain a prohibition of ‘arbitrarily increasing profits’;

new Act to exploitative practices.

In contrast to other jurisdictions, the Swiss provision does distinguish between exclusionary and exploitative abuse by its wording according to which behaviours which ‘hinder other undertakings from starting or continuing to compete’ (ie exclusionary) and those which ‘disadvantage trading partners’ (ie exploitative) are prohibited.<sup>69</sup> This distinction has been recognized since the redaction of the law and been consistently applied ever since, becoming inherent to the definition of abusive behaviour in Switzerland.<sup>70</sup> Similarly, other Acts in different jurisdictions (some of which have been based on Article 102 TFEU) have also included explicit prohibitions of exclusion. For example, foreclosure of rivals as a result of predation and the hindrance, without justification, of market entry are listed as examples of abusive practices in the Hungarian prohibition.<sup>71</sup> Similarly, creating entry or exit barriers for undertakings is listed as an abuse in Moldova,<sup>72</sup> whilst preventing the formation of conditions necessary for the emergence or development of competition is prohibited in Poland.<sup>73</sup> The Ukrainian legislation also makes explicit reference to the distinction between exclusionary and exploitative practices both in the general prohibition of abuse and also in the specific examples of abuse.<sup>74</sup> Similarly, in Japan, private monopolisation requires either ‘exclusion’ or ‘control’<sup>75</sup> corresponding to exclusionary abuse and exploitative abuse, respectively. The distinction is particularly important in practice in Japan: the base rate to calculate the administrative surcharge is lower for exclusionary abuse than for exploitative abuse.<sup>76</sup> This is in sharp contrast with the situation in Hungary where according to the Fine Setting Notice, exploitative abuse is to be treated more leniently than exclusionary abuse.<sup>77</sup> This is noted to contradict the Authority’s views on consumer welfare as the ultimate goal of competition law enforcement expressed elsewhere.<sup>78</sup>

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Pallerosi, Brazil, p. Brazil 6.

<sup>69</sup> Cherpillod, Switzerland, p. 5.

<sup>70</sup> Cherpillod, Switzerland, p. 5.

<sup>71</sup> Papp, Hungary, p. 2.

<sup>72</sup> Svetlicinii, Moldova, p. 2

<sup>73</sup> Stawicki and Turno, Poland, p. 1.

<sup>74</sup> See Ivanytska, Ukraine, pp. 3, 5-6.

<sup>75</sup> ‘Exclusion’ is understood to cover activity that has an artificial character which exceeds the normal competition measures in the sense that it could create, maintain and strengthen its own market power, and such activity has an effect to make it extremely difficult for a competitor to enter into (or continue competition in) the relevant market; whilst ‘control’ is understood to refer to restricting the counterparty in some way and to deprive it of the freedom to make its own decision; Itoh, Japan, p. 3.

<sup>76</sup> Itoh, Japan, p. 3.

<sup>77</sup> Papp, Hungary, pp. 9-10.

<sup>78</sup> Papp, Hungary, p. 9.

In the jurisdictions where it is accepted that the prohibition of anticompetitive unilateral conduct covers both exploitative and exclusionary abuse, even where such an explicit distinction does not exist in the legislation, it seems common for competition authorities to distinguish between these two types of abuse in explanatory documents or documents on enforcement priorities.<sup>79</sup> In its decisional practice, however, the competition authorities of quite a few countries do not seem to pay attention to an express distinction, although upon analysing the practice it would be possible to divide cases into categories (exploitative, exclusionary or mixed). For example, in Poland and Spain, the competition authorities (and courts) typically attempt to categorise conduct into a category.<sup>80</sup> In Norway, the competition authority recognised that conduct can be divided into the two categories in a decision,<sup>81</sup> similar to the Dutch and Belgian competition authorities which have also made a distinction between these two types of conduct in their decisions.<sup>82</sup> In Germany, the competition authority does not expressly differentiate in its decisions, but does explain the distinction between the two categories on its website.<sup>83</sup> Some competition authorities also seem to prioritise and/or mostly handle cases on exclusionary abuse such as those in Moldova, Sweden, Norway, and Poland.<sup>84</sup>

As for the case law of the national courts, in most jurisdictions, the courts do not seem to expressly distinguish between the two in all their cases.<sup>85</sup> In some of these countries, there have been cases which adopt and/or explain the distinction,<sup>86</sup> but this is not a common occurrence. Indeed, the Swiss report notes that the distinction is purely heuristic and legally irrelevant: what matters is that the abusive dimension – including the harm to competition – is determined on a case by case basis.<sup>87</sup>

When one considers the practice of the national competition authorities, it appears that

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<sup>79</sup> See eg Svetlicinii, Moldova, p. 6; Beeston and Geilmann, Netherlands, p. 3; Papp, Hungary p. 12; Petrov, Bulgaria, p. 7.

<sup>80</sup> Stawicki and Turno, Poland, p. 4; Cañadas Bouwen and Suderow, Spain, p. 5.

<sup>81</sup> Kongsli, Norway, p. 5.

<sup>82</sup> Beeston and Geilmann, Netherlands, p. 4; Sabbadini, Belgium, p. 7.

<sup>83</sup> Hartmann-Rüppel, Germany, p. 8.

<sup>84</sup> Svetlicinii, Moldova, p. 6; Bergqvist, Sweden, p. 2; Kongsli, Norway, p. 6; Stawicki and Turno, Poland p. 4.

<sup>85</sup> See Hartmann-Rüppel, Germany, p. 8; Bergqvist, Sweden, p. 6; Beeston and Geilmann, Netherlands, p. 5; Goldammer, Lithuania, p. 4. The practice appears to be different in Poland, Spain and Austria where the courts use the categorisation in their judgments; Stawicki and Turno, Poland, p. 4; Cañadas Bouwen and Suderow, Spain, p. 5; Fussenegger et al, Austria, p. 7.

<sup>86</sup> See eg Beeston and Geilmann, Netherlands, pp. 4-5; Sabbadini, Belgium, p. 7; Bergqvist, Sweden, p. 3; Boudou et al, France, p. 8; Fussenegger et al, Austria, pp. 7-8.

<sup>87</sup> Cherpillod, Switzerland, p. 6.

exclusionary abuse cases are the most common cases, although in the jurisdictions where exploitative abuse is also covered, there are certainly some cases concerning exploitation as well.<sup>88</sup> Thus, although exclusion makes up most of the authorities' and courts' decisional practice, the national authorities and courts do not categorically shy away from using the prohibition of unilateral conduct to sanction exploitative conduct either. In fact, for example, over a ten year period, there have been more exploitative abuse cases in Hungary than exclusionary abuse cases (despite the fact that it is vice versa by a small margin in a five year period).<sup>89</sup>

### **3.2 Price-Based and Non-Price-Based Abuse**

The National Reporters were asked to comment on whether there existed a distinction in their jurisdictions between price-based abuse and non-price-based abuse in the relevant legislation, decisional practice or case law. The reasoning behind the question was to ascertain, *inter alia*, the position of the European Commission's Guidance on enforcement priorities which makes this distinction between two categories of abusive conduct central to the Guidance document and adopts a general test for abuse for only one of the two categories of conduct (ie price-based). The Guidance's categorisation of conduct into these two types and adopting a particular, general test for price-based conduct without endorsing any similar test for non-price-based conduct was deemed to be worthy of investigation by the International Reporter to see whether this distinction might have been transposed into the Guidance from the decisional practice of the national competition authorities or courts. The responses received from the National Reporters suggest that such an influence did not arise from the decisional practice of national competition authorities or courts. The distinction made in the Guidance appears to influence (rather than be influenced by) the practice in different jurisdictions depending on the emphasis placed on Commission's soft-law in a particular jurisdiction.

In most jurisdictions studied, the legal provisions do not distinguish between price-based and non-price-based conduct as such, but are deemed to cover both on the basis of the examples listed in the prohibition.<sup>90</sup> Having said that, most competition authorities do not

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<sup>88</sup> See Camusso and De Cesero, Italy, p. 14; Sabbadini, Belgium, p. 10; Itoh, Japan, p. 5; Bergqvist, Sweden, pp. 2-3; Cañadas Bouwen and Suderow, Spain, p. 8; Kongsli, Norway, p. 8; Stawicki and Turno, Poland, p. 4; Boudou et al, France, p. 17; Cherpillod, Switzerland, p. 5; Fussenegger et al, Austria, p. 11; Robinson, UK, pp. 29-30.

<sup>89</sup> See Papp, Hungary, p. 11.

<sup>90</sup> Hartmann-Rüppel, Germany, p. 9; Camusso and De Cesero, Italy, p. 10; Sabbadini, Belgium, pp. 7 – 8; Pallerosi, Brazil, p. 6; Goldammer, Lithuania, p. 4; Itoh, Japan, p. 4; Kongsli, Norway, p. 6; Bergqvist, Sweden, p. 3; Cañadas Bouwen and Suderow, Spain, p. 5; Robinson, UK, p. 15; Svetlicinii, Moldova, p. 7; Beeston and Geilmann, Netherlands, pp. 5-6; Papp, Hungary, pp. 13-14; Fussenegger et al, Austria, p. 8;

expressly distinguish between the two types of conduct in their decisional practice<sup>91</sup> (but sometimes they do so in explanatory documents).<sup>92</sup> The Swiss report states that it may occur that distinctions are made, but it has no legal relevance as the same legal test will be applied.<sup>93</sup> In contrast, some other jurisdictions find the distinction useful in the analysis of conduct with the implication that different tests apply to these two types of conduct (eg the as-efficient-competitor test applies to price-based conduct).<sup>94</sup>

Similar to the competition authorities, most jurisdictions report that the courts do not make an express distinction between price-based and non-price based conduct, while some reports from EU Member States also note that in line with some recent judgments of the CJEU, the courts apply the as-efficient-competitor test to price-based conduct such as predatory pricing, margin squeeze, etc.<sup>95</sup> All in all, it appears that the distinction between price-based conduct and non-price-based conduct is not as common or as inherent as the distinction between exclusionary and exploitative conduct in the application of the prohibition of abuse of a dominant position.

## **4. Enforcement**

### **4.1 Decision-Making Practice**

There is a vast amount of difference in the number of decisions that different competition authorities around the world take on anticompetitive unilateral conduct. However, it must also be noted that there is also a vast amount of difference in the overall number of decisions taken by different competition authorities. In other words, some authorities are much more active than others, in general. In two of the countries studied, there are reportedly more decisions taken on unilateral conduct than anticompetitive agreements and this is so by a large margin. In Poland, in a period of five years, 360 decisions were taken on unilateral conduct, whilst 121 decisions were taken on anticompetitive agreements.<sup>96</sup> In the Republic of Moldova, over 50 decisions were taken on unilateral conduct in a period of 5 years as opposed to 20 decisions on anticompetitive agreements.<sup>97</sup> In some other jurisdictions, the

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Cherpillod, Switzerland, p. 6; Stawicki and Turno, Poland, p. 5.

<sup>91</sup> See text around n 79 and eg Boudou et al, France, pp. 8-9.

<sup>92</sup> As stated in the reports: Svetlicinii, Moldova, p. 7, Papp, Hungary, p. 14 and Petrov, Bulgaria, p. 9.

<sup>93</sup> Cherpillod, Switzerland, p. 6.

<sup>94</sup> Svetlicinii, Moldova, p. 7; Bergqvist, Sweden, p. 3; Pallerosi, Brazil, p. 6 (in the context of predatory pricing).

<sup>95</sup> See Hartmann-Rüppel, Germany, p. 9; Stawicki and Turno, Poland, p. 5; Bergqvist, Sweden, p. 3.

<sup>96</sup> Stawicki and Turno, Poland, p. 6.

<sup>97</sup> Svetlicinii, Moldova, pp. 10-12.

proportion of unilateral cases in the workload of the competition authority is still significant despite being lower than that of cases concerning anticompetitive agreements. For example, in Germany, Hungary and Sweden unilateral conduct cases make up around 35% of the case load, whereas in Ukraine and France unilateral conduct cases make up around 40% of the authority's case load.<sup>98</sup> In Italy, the percentage of unilateral conduct cases goes up to around %45 of the workload.<sup>99</sup> In other jurisdictions, unilateral conduct only makes up a small portion of the competition authority's decisional practice.<sup>100</sup> Finally, in two jurisdictions (UK and Norway), the number of decisions taken by the competition authority concerning both anticompetitive agreements and unilateral conduct is so low that it is not meaningful to examine the percentage of unilateral conduct decisions within the authority's workload.<sup>101</sup> As can be seen from this discussion, there is a great amount of divergence between different jurisdictions around the world regarding how active their competition authorities are in pursuing and/or finding infringements of competition law by unilateral conduct.

There also seems to be some divergence in terms of the case law of the courts on unilateral conduct but this divergence appears less stark than that between the practices of the competition authorities.<sup>102</sup> Other than Sweden where the courts have decided on more unilateral conduct cases than anticompetitive agreement cases in a 5 year period,<sup>103</sup> in most jurisdictions the courts deal with more cases concerning anticompetitive agreements<sup>104</sup> or deal with roughly the same number of agreement and unilateral conduct cases.<sup>105</sup>

## **4.2 Competent Courts and Authorities**

Only five out of twenty-one jurisdictions studied have specialist courts dealing with competition law infringements. These are Poland, Sweden, United Kingdom, Austria, and

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<sup>98</sup> See Hartmann-Rüppel, Germany, p. 10; Papp, Hungary, p. 16; Bergqvist, Sweden, p. 4.

<sup>99</sup> See Camusso and De Cesero, Italy, pp. 13-14.

<sup>100</sup> See Beeston and Geilmann, Netherlands, pp. 6-9; Pallerosi, Brazil, p. 8; Itoh, Japan, pp. 4-7; Cherpillod, Switzerland, p. 7; Baker et al, US, pp. 4-5.

<sup>101</sup> In the UK, nine decisions concerning unilateral conduct and three decisions concerning agreements were taken in a 5 year period; Robinson, UK, pp. 29. In Norway, the competition authority has only ever intervened twice concerning unilateral conduct and twice concerning anticompetitive agreements since the introduction of the legislation in 2004; Kongsli, Norway, p. 7.

<sup>102</sup> Note that these reports did not discuss this question or did not have sufficient information to rely on concerning case law: Moldova, Italy, Brazil, Ukraine, Poland, Bulgaria, Spain, Germany.

<sup>103</sup> Bergqvist, Sweden, p. 5.

<sup>104</sup> Beeston and Geilmann, Netherlands, pp. 9-10; Papp, Hungary, pp. 16-17; Itoh, Japan, p. 5; Fussenegger et al, Austria, pp. 10-11; Cherpillod, Switzerland, pp. 8-10; Boudou et al, France, pp. 10-16.

<sup>105</sup> Sabbadini, Belgium, p. 9; Goldammer, Lithuania, pp. 5-8; Kongsli, Norway, p. 7.

Hong Kong (under the forthcoming new legislation).<sup>106</sup> Some jurisdictions do not have specialist courts, but rely on special working groups, economic experts within the court or chambers with specific knowledge (Netherlands; Belgium; Lithuania; Switzerland; France; Germany).<sup>107</sup> In many countries, the courts are only competent in appeals/judicial review proceedings against the decisions of the competition authority.<sup>108</sup>

In a few countries, the competition authority has to obtain a court order to impose fines for breach of competition law (Sweden; Austria; (for personal sanctions) Lithuania).<sup>109</sup> The rest of the jurisdictions appear to be based on an administrative system where the competition authority can impose sanctions. This excludes the US where neither the FTC nor a federal court (acting in a case brought by the DOJ) has the authority to levy civil fines for monopoly infringements whilst the remainder of antitrust enforcement takes place before the US District Courts.<sup>110</sup>

Other than courts and competition authorities, some jurisdictions have sectoral regulators which can apply either the general competition rules directly or similar specific rules to their sector. In the majority of the jurisdictions studied, these regulators only act *ex ante*, so that there are no real concurrency powers (which would enable the regulators to apply the same rules in the same manner as the competition authorities).<sup>111</sup> The one jurisdiction where genuine concurrency exists is the UK.<sup>112</sup> For Lithuania it is noted that the sectoral regulators mostly act *ex ante*, but also partially *ex post*, and that a clear delimitation between powers is not always apparent.<sup>113</sup> In Bulgaria and France, the regulators also have the competence to launch investigations into possible abusive practices in their sectors.<sup>114</sup> In the US, although sectoral regulators have authority to enforce the rule prohibiting anticompetitive mergers, they have seldom used this power.<sup>115</sup> The US regulators do not have the authority to enforce

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<sup>106</sup> Stawicki and Turno, Poland, p. 7; Bergqvist, Sweden, p. 1; Robinson, UK, p. 5; Fussenegger et al, Austria, p. 12; Fournier, Hong Kong, p. 11.

<sup>107</sup> Beeston and Geilmann, Netherlands, p. 10; Sabbadini, Belgium, p. 9; Goldammer, Lithuania, p. 8; Cherpillod, Switzerland, p. 11; Hartmann-Rüppel, Germany, pp. 10-11.

<sup>108</sup> See eg Itoh, Japan, p. 7; Ivanytska, Ukraine, pp. 8-9; Stawicki and Turno, Poland, pp. 6-7.

<sup>109</sup> Bergqvist, Sweden, p. 1; Fussenegger et al, Austria, p. 12; Goldammer, Lithuania, p. 8.

<sup>110</sup> Baker et al, US, pp. 1; 14.

<sup>111</sup> Svetlicinii, Moldova, p. 13; Beeston and Geilmann, Netherlands, p. 11; Sabbadini, Belgium, p. 10; Ivanytska, Ukraine, p. 7; Stawicki and Turno, Poland, p. 7; Fussenegger et al, Austria, p. 12; Hartmann-Rüppel, Germany, p. 11.

<sup>112</sup> Robinson, UK, pp. 4-5.

<sup>113</sup> Goldammer, Lithuania, pp. 9-10.

<sup>114</sup> Petrov, Bulgaria, p. 14; Boudou et al, France, p. 18.

<sup>115</sup> Baker et al, US, p. 15.

the monopolization provisions of Sherman Act Section 2<sup>116</sup> with the implication that concurrency as in the case of the UK does not exist in the US either.

### **4.3 The Substantive Approach Followed by Competent Courts and Authorities**

The national reporters were asked if they were able to identify in the competent courts' and authorities' decisional practice a particular approach and/or standard of harm regarding the interpretation of 'abuse'. In most jurisdictions, there does not seem to be such a discernible approach other than the fact that some jurisdictions indicate a tendency to mostly follow the approach at EU level (Netherlands; Belgium; Hungary; Spain; France; UK; Austria).<sup>117</sup>

It appears that in some jurisdictions, the approach is more based on economic analysis and effects of conduct than in other jurisdictions. For example, it is noted that the Dutch competition authority and courts adopt a high standard of proof of harm, based on economic analysis.<sup>118</sup> Similarly, the Swedish competition authority and courts have recently begun adopting an economic and effects-based approach, focussing on the risk of consumer harm and possible efficiencies.<sup>119</sup> In the same vein, in Brazil, although it is difficult to identify a particular approach, harm is considered as the negative effects on competition which are not outweighed by gains in economic efficiency, which would also suggest an effects-based analysis.<sup>120</sup> For Switzerland, it is noted that the approach seems effects-based at first sight, but that the effects-based analysis is actually quite limited.<sup>121</sup>

Some jurisdictions operate on the basis of 'consumer harm' as the main criterion whereas others focus more on effects on competition. For instance, in Hungary, despite there being no specific approach, it is arguably indispensable that the conduct is likely to result in consumer harm.<sup>122</sup> In Italy, on the contrary, consumer harm will not be considered in the assessment of harm, only in assessing the existence of the violation as such.<sup>123</sup> In Japan, the

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<sup>116</sup> Baker et al, US, p. 15.

<sup>117</sup> Beeston and Geilmann, Netherlands, pp. 3, 5, 11; Sabbadini, Belgium, p. 10; Papp, Hungary, p. 19; Cañadas Bouwen and Suderow, Spain, p. 14; Boudou et al, France, p. 8, 21; Robinson, UK, p. 13; Fussenegger et al, Austria, p. 13. In the UK, the Competition Act 1998 section 60 obliges the national courts to apply the domestic competition rules (having regard to any relevant differences between the provisions concerned) in a manner which is consistent with the application of those rules by the CJEU even where the EU competition rule are not applicable (ie there is no effect on trade between Member States).

<sup>118</sup> Beeston and Geilmann, Netherlands, p. 12.

<sup>119</sup> Bergqvist, Sweden, pp. 4, 7.

<sup>120</sup> Pallerosi, Brazil, pp. 7-8.

<sup>121</sup> Cherpillod, Switzerland, p. 13.

<sup>122</sup> Papp, Hungary, p. 19.

<sup>123</sup> Camusso and De Cesero, Italy, p. 16.

focus is noted to be on ‘normal competition’.<sup>124</sup>

Similar to the question on approach, when asked whether there was a claimed objective of the prohibition of anticompetitive unilateral conduct adopted by the competition authority and/or the courts, the national reports struggled to identify precise objectives pursued by the relevant authorities. In general, EU/EEA countries state that they mostly follow the EU approach. Interestingly, they often refer to consumer welfare as a result or aim of the protection of competition despite the fact that the role of ‘consumer welfare’ is not quite clear cut in the approach of the EU Commission and certainly in the case law of the CJEU.<sup>125</sup> For example, in Belgium the objective is expressed in terms of ‘avoiding foreclosure of competitors and harming consumers’ as well as ensuring that a ‘favourable environment for sustainable investments is maintained’ and maintaining ‘competition on the merits in order to avoid causing harm to consumers’.<sup>126</sup> In the Netherlands, the aim of the authority is to protect the competitive process in order to prevent harm to consumers.<sup>127</sup> Indeed, benefit of consumers and/or consumer welfare is accepted as an/the objective in many, if not most, of the jurisdictions.<sup>128</sup> The one notable exception to this is Germany where the protection of the interests of consumers (or of competitors) is not deemed to be the main objective which is instead the ‘protection of competition as such’.<sup>129</sup> In contrast, in the US, since the 80s, government enforcers and courts have increasingly relied on the so-called Chicago School of economics that assumes that the goal of antitrust is to promote allocative efficiency in the society as a whole.<sup>130</sup> Finally, in two jurisdictions (Switzerland and Austria) maintaining open markets or terminating market disturbance is identified as the

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<sup>124</sup> Itoh, Japan, pp. 7-8.

<sup>125</sup> On the role of consumer welfare in EU case law and decisional practice on Article 102 TFEU, see eg P Akman “‘Consumer Welfare’ and Article 82EC: Practice and Rhetoric’ (2009) 32 (1) World Competition 71.

<sup>126</sup> Sabbadini, Belgium, p. 11.

<sup>127</sup> Beeston and Geilmann, Netherlands, p. 15.

<sup>128</sup> These include Papp, Hungary, p. 17 (‘protect competition in the interest of long-term consumer welfare’); Goldammer, Lithuania, p. 10 (‘ensure effective and free competition and thus consumer welfare’); Bergqvist, Sweden, p. 4 (‘promote effective competition in the private and the public sector to the benefit of consumers’); Stawicki and Turno, Poland, p. 7 (‘competition enforcement, i.e. protection of competition, is seen as a mechanism to ensure the efficiency of business processes and the optimal allocation of resources, on the one hand, and the means of safeguarding public interest of consumers, on the other’); Petrov, Bulgaria, p. 17 (‘to ensure that market players can operate within an environment which allows them to innovate and operate efficiently, based on the assumption that the ultimate beneficiary of normal competitive processes are consumers’); Pallerosi, Brazil, 8 (‘protection of consumers’ welfare’); Kongsli, Norway, p. 9 (special consideration of the interests of consumers).

<sup>129</sup> Hartmann-Rüppel, Germany, p. 12.

<sup>130</sup> Baker et al, US, p. 19.

objective of enforcement.<sup>131</sup>

As for enforcement guidelines or guidance concerning their approach to the prohibition of unilateral conduct, it does not seem common for the competition authorities to issue such documents. There are, however, some jurisdictions where documents explaining the authority's interpretation of and/or approach to the rule have been published.<sup>132</sup> Several jurisdictions contain no guidelines concerning the application of the prohibition of abuse of dominance.<sup>133</sup> In some jurisdictions, there are sector-specific guidelines issued by sectoral regulators.<sup>134</sup>

Similar to this divergence across jurisdictions concerning the existence of guidelines, the effect of the European Commission's Guidance on enforcement priorities in applying Article 102 TFEU to exclusionary conduct is also not consistent across jurisdictions. For example, in some jurisdictions, the competition authorities and/or courts refer to or rely on the Guidance.<sup>135</sup> In contrast, in some EU Member States, the impact of the Guidance has been limited or difficult to assess.<sup>136</sup> Finally, at least in one jurisdiction (Germany) the Guidance has been outright rejected as having no binding effect and for having focussed on consumer protection.<sup>137</sup>

#### **4.4. Criticism of the Decisional Practice of the Competition Authorities/Courts**

The national reports do not offer lengthy criticisms of the decisional practices of the competition authorities or courts in their respective jurisdictions. In some jurisdictions, this could be due to the fact that the amount of decisions is rather limited and thus, there is little that can be evaluated. In particular, in response to the question whether there are too many restrictions on legal rights and business opportunities, the overwhelming majority of the

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<sup>131</sup> Cherpillod, Switzerland, pp. 13-14; Fussenegger et al, Austria, p. 13.

<sup>132</sup> See eg Beeston and Geilmann, Netherlands, pp. 3, 11 (a brochure mostly relying on the Commission Guidance); Kongsli, Norway, p. 8 (a fact sheet); Svetlicinii, Moldova, pp. 16 (Regulation on determination of dominant position and assessment of abuse of dominant position); Hartmann-Rüppel, Germany, pp. 11-12 (one predatory pricing and one sectoral guideline).

<sup>133</sup> See eg Sabbadini, Belgium, p. 10; Goldammer, Lithuania, p. 10; Cañadas Bouwen and Suderow, Spain, p. 14; Cherpillod, Switzerland, p. 12; Fussenegger et al, Austria, p. 12; Boudou et al, France, p. 22; Papp, Hungary, p. 19.

<sup>134</sup> Robinson, UK, pp. 5 and 13; Fournier, Hong Kong, pp. 1, 7.

<sup>135</sup> Papp, Hungary, p. 20; Ivanytska, Ukraine, p. 1 (n. 2) (practitioner reliance on the Guidance); Kongsli, Norway, p. 9; Svetlicinii, Moldova, p. 16; Bergqvist, Sweden, p. 8 (more the authority rather than the courts); Beeston and Geilmann, Netherlands, p. 17.

<sup>136</sup> Camusso and De Cesero, Italy, p. 14; Goldammer, Lithuania, p. 10; Petrov, Bulgaria, p. 17.

<sup>137</sup> Hartmann-Rüppel, Germany, pp. 12-13.

jurisdictions studied do not report there to be too many restrictions on legal rights and business opportunities. The issue of not unduly restricting business rights and opportunities most clearly comes across as a factor in enforcement in the US. The US has far fewer antitrust-imposed restrictions on business opportunities of dominant firms due to its narrower approach to dominance, enforcement caution by agencies, and a high bar for private suits.<sup>138</sup> Thus, the restrictions on business opportunities are more aptly considered to be potential barriers to entry in local markets due to a *lack* of antitrust enforcement rather than because of antitrust enforcement.<sup>139</sup> Other than the US, the possibility of over-regulation is also discussed in Japan as a possible consequence of most cases being dealt with as ‘unfair trade practices’, which has a lower threshold than ‘private monopolisation’.<sup>140</sup> Similarly, the enforcement of the Hungarian rules has also been criticised for protecting competitors rather than competition.<sup>141</sup>

In contrast, in some jurisdictions, criticism is directed towards the competition authorities/courts for not being sufficiently active in the enforcement of the prohibition of anticompetitive unilateral conduct.<sup>142</sup> One jurisdiction (Netherlands) has been called the ‘paradise for abuse’ due to the extremely low number of decisions enforcing the prohibition.<sup>143</sup> In some jurisdictions, there is a demand for more guidance from the competition authority concerning the approach to the prohibition since stakeholders are not sufficiently certain regarding competition law liability.<sup>144</sup>

In Germany, the criticism focusses on the provision on the abuse of ‘relative market power’, which the OECD criticises as a way to protect SMEs.<sup>145</sup> Another point of criticism is by the competition authority itself and the Monopoly Commission, who are concerned that sectors providing services of general interest fall out of the scope of the competition provisions.<sup>146</sup> Criticism by businesses also exists concerning too narrow market definitions; the presumption of market dominance; and special provisions applicable to certain industries.<sup>147</sup>

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<sup>138</sup> Baker et al, US, p. 2.

<sup>139</sup> See Baker et al, US, p. 3.

<sup>140</sup> Itoh, Japan, p. 8.

<sup>141</sup> Papp, Hungary, p. 18.

<sup>142</sup> Bergqvist, Sweden, p. 5; Beeston and Geilmann, Netherlands, p. 18.

<sup>143</sup> Beeston and Geilmann, Netherlands, p. 18.

<sup>144</sup> Sabbadini, Belgium, p. 11; Boudou et al, France, p. 23.

<sup>145</sup> Hartmann-Rüppel, Germany, p. 13.

<sup>146</sup> Hartmann-Rüppel, Germany, p. 13.

<sup>147</sup> Hartmann-Rüppel, Germany, p. 13.

In some jurisdictions, the length of the proceedings is a point of criticism, as well as the lack of resources of the competition authority.<sup>148</sup> Lack of sufficient economic analysis is also an issue that raises concern in some jurisdictions.<sup>149</sup> ‘Market engineering’ through settlements/commitments on the part of the competition authority is also an area of dissatisfaction for one jurisdiction.<sup>150</sup>

## 5. Conclusions

The comparative study of the prohibition of anticompetitive unilateral conduct in twenty-one jurisdictions reveals that there are as many similarities as differences between the approaches of these different jurisdictions. Some of the similarities relate to the fact that many jurisdictions have statutes concerning either exclusively competition law or include provisions concerning fair competition/fair trade/consumer protection. Similarly, most provisions prohibiting abuse of dominance contain indicative lists of practices that are prohibited. There is only one jurisdiction with an exhaustive list, ie the unfair trade practices in the Japanese provision. There are also some prohibitions with no list of prohibited practices at all.

An important commonality across jurisdictions is that there are mostly no extensive and detailed definitions of ‘abuse’ in the legislation and no conclusive definitions of ‘abuse’ provided by the competition authorities. In terms of what type of conduct is covered by the prohibition, although a very small number of jurisdictions only prohibit exclusionary conduct, most of the jurisdictions have legislation that either expressly prohibits or is interpreted to prohibit both exploitative and exclusionary conduct. In fact, most provisions studied make no express distinction between exclusionary and exploitative abuse, but cover both. The competition authorities are more inclined to make an express distinction in explanatory documents than in decisional practice. Similar to the authorities, courts also seem to shy away from express categorisation. The one jurisdiction where the difference between exclusionary and exploitative conduct makes a significant difference for a given case is Japan since the categorisation directly affects the calculation of the administrative surcharge (which is higher for exploitative conduct). In practice, in the vast majority of jurisdictions, the

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<sup>148</sup> Sabbadini, Belgium, p. 11; Fussenegger et al, Austria, p. 14; Pallerosi, Brazil, p. 8.

<sup>149</sup> Kongsli, Norway, p. 10; Ivanytska, Ukraine, pp. 1-2 and 8-9.

<sup>150</sup> Cherpillod, Switzerland, p. 14.

majority of decisions and cases seem to concern exclusionary abuse although there are certainly exceptions to this. In the same vein, in the vast majority of jurisdictions studied, anticompetitive agreement cases take up more of the authorities'/courts' workload than unilateral conduct.

A significant point of divergence across different jurisdictions is their treatment of dominance. The approaches range from not requiring dominance at all to presumptions of dominance at substantially different market share thresholds. One obvious consequence of this is that the same undertaking with the same market share will be potentially subject to different approaches in different jurisdictions across the world, sometimes even within the EU. This divergent approach clearly adds to the costs of running a global business, but also raises the question of how modern the systems of competition law in these jurisdictions are given that economic principles suggest it is 'market power' and not 'market share' of a given undertaking that matters for the effects of conduct on competition.

Particularly interestingly for the EU, despite the fact that the European Commission's Guidance on Article 102 is based on a distinction between price-based and non-price-based conduct, such an express distinction does not seem to exist in the national practice of competition law in different EU Member States or elsewhere. Considering enforcement priorities and applicable tests of abuse, this suggests that this categorisation will possibly be transposed from EU level to the national level as the decisional practice develops and it seems almost certain that it has not been inspired by practice at the national level. However, the transposition of the distinction between price-based and non-price-based conduct into national practice depends to a degree on the approach of the national authorities and courts to the Commission Guidance itself. This approach is not consistent across different jurisdictions since some of them have been more open to adopting the concepts and methodology of the Guidance whilst some have been less so to the point of even rejecting the relevance of the Guidance in some cases.

Few of the jurisdictions studied have specialist competition courts, but some others do rely on experts, specific chambers or specialised judges in dealing with competition related cases. There is genuine concurrency in only one jurisdiction studied (UK) but in several other jurisdictions, regulators seem to play some role – albeit limited – in sanctioning abusive

behaviour in specific sectors.

When it comes to the substantive approach of the competition authorities/courts to the issue of ‘abuse’ and to the question of the objective of the prohibition of abuse of dominance, many mention consumer welfare or related consumer concerns as an/the objective of enforcement. However, this is certainly not universal and is outright rejected in at least one jurisdiction (Germany). Having said that, even for jurisdictions that use consumer welfare, etc as the guiding principle, one would need to examine in detail the decisional practice and policy-setting to establish what the actual role of such a principle is. Moreover, many jurisdictions refer to consumer welfare and avoiding consumer harm alongside other objectives such as effective access to market and protecting competition, etc. When several objectives are so adopted, it is inherently difficult to identify the role of any particular objective not least when so many of them, including consumer harm, are concepts that require interpretation and many of them can also conflict with one another in practice. What comes across quite clearly from the reports is that the EU Member States (or states with EU affiliations) tend to follow the approach at EU level even when applying their domestic law to cases that do not affect trade between Member States. Having said that, the immediate effect of the Commission’s Guidance seems to have been rather limited, perhaps due to a lack of endorsement on the part of the CJEU of the Guidance.

Going back to the question of whether there are too many restrictions on the rights and opportunities of businesses, although in some jurisdictions this is recognised to be an actual or potential problem, there are also at least as many jurisdictions which complain from the *lack* of enforcement of the rule prohibiting abuse of dominance rather than the enforcement of it. What remains to be the case, however, is that in many important aspects the rules on anticompetitive unilateral conduct diverge across jurisdictions with the implication that the same undertaking can easily be subject to significantly different approaches concerning a given practice. Bearing in mind that many of the large undertakings who may fall within the scope of the rule prohibiting abuse of a dominant position are global companies with global operations, reducing such divergence across different jurisdictions would reduce the cost of doing business, which might in turn allow for these cost savings to be used for the benefit of consumers in terms of investments, innovation, etc. The current position which displays divergence not only in the details but also in the fundamentals such as the aims and objectives

of the prohibition of abuse of a dominant position negatively impacts on business and legal certainty, and leaves much to be desired for a global, harmonised approach to unilateral conduct under competition law.