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Competition Law: Abuse of Market Position in the EU

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I. Introduction

Apple Pay in recent years has become somewhat of a mainstay in the lives of consumers. With just the tap of an Apple Watch or double-click of an iPhone consumers can make contactless payments with ease. As amazing as this technology is, the European Commission has taken issue with how Apple controls this technology. In particular, the Commission is concerned by Apple's near monopolistic hold of the technology behind Apple Pay on Apple products.

To address this concern, the Commission initiated an antitrust proceeding to investigate Apple's Apple Pay system. As part of the Commission's ongoing investigation into Apple Pay, a Press Release was given saying that the Commission finds problematic that Apple Pay "is the only mobile payment solution that may access the NFC (near field communication) "tap and go" technology embedded on iOS mobile devices for payments in stores with no access for competitors.[1] The Commission finds this to be problematic based on the importance of providing consumers with the benefit of "better choice, quality, innovation and competitive prices." As this ongoing matter currently stands, on May 2, 2022, the Commission put out another Press Release saying that a Statement of Objections has been sent to Apple regarding their anti-competitive practices with "tap and go" payment technology.[2]

This paper seeks to answer the question: "Does the Commission have a strong claim against Apple for Anti-Competitive behavior?" To answer this question, one must analyze the relevant law surrounding the matter. In this case, that law is Article 102 of the Treaty on the Functioning of the European Union (TFEU) which focuses on abuses of dominant positions by

[1] Commission Press Release, IP/20/1075 (June 16, 2020).
[2] Commission Press Release, IP/22/2764 (May 2, 2022).

actors within the internal market. In Section II, this paper will examine the text and history of Article 102 by following the origins of Article 102 and how the European Union has arrived at their interpretation of the Article today. In Section III, this paper will examine the requirements for the European Union to have jurisdiction over instances of abuse of a dominant position. This section provides information as to when the EU may step in to stop an abuse of a dominant position by a market actor, answering questions such as if there are minimum threshold requirements for abuse, a likelihood of abuse taking place, and if there's a need for intent by the market actor. Also in this section, this paper will explain what a "relevant market" is for purposes of Article 102. In Section IV, this paper will explore the meaning of "dominant position" as well as examine the special responsibility that comes with holding such a position. Finally, in Section V, this paper will closely analyze what the EU defines as abuse. More specifically, this paper will look at a subcategory of abuse commonly referred to as a "Duty to Deal" and explore its relationship with the ongoing matter surrounding Apple's exclusive use of NFC technology on iOS devices. Throughout this paper, we will be comparatively exploring US antitrust law and how the US would respond to these issues.

II. Text and History of Article 102 TFEU

Section II.A provides the text of Article 102 TFEU as well as provide some insight into its meaning and how the text would apply to the European Commission's ongoing investigation into Apple's exclusionary practices with NFC technology. Section II.B provides the history behind Article 102 TFEU from its inception leading up to today's interpretation of the text.

A. Text of Article 102 TFEU

Article 102 of the TFEU states that:

> "any abuse by one or more undertakings[3] of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States." Such abuses may consist of: "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[4]

Based on the language of the text, the words "such abuses may consist of" points to this being a non-exhaustive list with potential for other abuses to fall into the category of offenses that would be an abuse of a dominant position. However, from this list of abuses, category (b) "limiting production, markets or technical development to the prejudice of consumers" may be especially relevant in the Commission's ongoing investigation of Apple's sole control over NFC technology in iOS devices.

History of the Law Against Abuse of a Dominant Position

[3] *See generally* Niamh Dunne, Knowing When to See It: State Activities, Economic Activities, and the Concept of Undertaking, 16 COLUM. J. EUR. L. 427, 434–35 (2010) (More often than not, an undertaking is the economic activity of an entity.).

[4] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. C 326/47, at 89 hereinafter TFEU.

The history of US and EU competition law starts with the Sherman Act. In response to the dangers posed by "big business" and a fear of concentrated economic power with no ability for economic opportunity Congress created the Sherman Antitrust Act in 1890.[5] The Act reads that no person shall "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize."[6]

Unlike the U.S., distrust of big business was not a major issue to those living in Western Europe. European nations during the 1950's isolated their markets through the use of high trade tariffs and similar economic barriers. As a result, businesses in these countries were less than efficient and the idea of consolidating businesses across borders was encouraged. What is today known as Article 102 TFEU[7] was adopted in 1957 as a means to regulate the conduct of firms with economic power.[8] During this time, U.S. antitrust law was seen as preventing the creation of monopolies at the expense of consumers while EU competition law was seen as neutral towards the creation of monopolies and only concerned with controlling the actions of powerful market actors.[9]

To provide clarity and predictability in interpreting Article 82 (now 102 TFEU), the Commission issued the Guidance on the Commission's Enforcement Priorities in Applying Article 82 ECT (today 102 TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings.

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[5] Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME LAW. 981, 983 (1986).
[6] Commerce and Trade, 15 U.S.C. § 2.
[7] *See generally* Consolidated Version of the Treaty Establishing the European Community art 86, 1992, O.J. C 224/6 at 29 hereinafter 1992 EC Treaty (Originally, Article 102 of the Treaty on the Functioning of the European Union was Article 86 of the Treaty Establishing the European Community.); *see also* Consolidated Version of the Treaty Establishing the European Community art. 82, 2006 O.J. C 321 E/37 at 74 hereinafter EC Treaty (Article 86 of the Treaty Establishing the European Community later became Article 82 of the Treaty on the European Union.); *see also* TFEU, *supra* note 4, art. 102, 2012 O.J. C 326/47, at 89. (Finally, it became Article 102 of the Treaty on the Functioning of the European Union.).
[8] ROGER J. GOEBEL ET AL, CASES AND MATERIALS ON EUROPEAN UNION LAW 836 (4th ed. 2015).
[9] Fox, *supra* note 5, at 984.

This document set out the Commission's enforcement priorities in regard to abuses of dominant positions.[10]

The Treaty of Lisbon was entered into force in 2009[11] and brought some minor changes to Competition Law within the European Union such as changing Article 82 of the European Community Treaty to Article 102 of the Treaty on the Functioning of the European Union.[12] As the only difference is the change in numbering, both articles accomplish the exact same mission of prohibiting an abuse of a dominant position. While the changes to Competition Law in the EU were only minor there were some road bumps. In the formulation of the Treaty of Lisbon, debate was had involving French President Nicolas Sarkozy over the place of Competition Law as a core objective of the EU.[13] However, this ended with the Court of Justice saying that Competition Law is a "fundamental objective of the Community,"[14] based on the Court's interpretation of Article 3(1)(g) EC.[15]

After the repeal of Article 3(1)(g), not much has changed in terms of how Competition Law is treated in the European Union with the introduction of Protocol (No 27) on the Internal Market and Competition which preserved the status quo set out in Article 3, directing that "the internal market as set out in Article 3 of the Treaty on European Union includes a system

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[10] Commission Communication Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. C 45/7 hereinafter Commission Communication.
[11] Eeva Pavy, *The Treaty of Lisbon*, FACT SHEETS ON THE EUROPEAN UNION (Nov. 2022), https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon.
[12] Consolidated Version of the Treaty on European Union art. 102, 2012 O.J. C 326/13, at 89 hereinafter TEU post-Lisbon.
[13] Ioannis Lianos, *1 Competition Law of the European Community III*, *in* COMPETITION LAW OF THE EUROPEAN UNION, 2ND ED., (Despoina Mantzari, ed., Matthew Bender & Co., 2022). *See also* David Gow, *EU commissioner takes on Sarkozy over competition rules*, THE GUARDIAN (Jun. 25, 2007), https://www.theguardian.com/business/2007/jun/25/france.eu
[14] *Id.,* citing Showa Denko KK v. Commission, Case C-289/04, 2006 E.C.R. I-5895 ¶ 55.
[15] *See generally* EC Treaty, *supra* note 7, art. 3, 2006 O.J. C 321 E, at 44 hereinafter EC Treaty. (Article 3(1)(g) states that "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein a system ensuring that competition in the internal market is not distorted.)

ensuring that competition is not distorted."[16] This protocol is significant in that it is annexed to the TEU and TFEU and instructs that if competition is distorted in a way that Article 3 forbids "the Union shall, if necessary, take action under the provisions of the Treaties…"[17] In addition to the legal force Protocol (No 27) gives the EU, Article 3(b) TFEU gives the Union "exclusive competence" to establish "the competition rules necessary for the functioning of the internal market."[18]

Another important Article to consider in interpreting Article 102 TFEU is Article 9 TFEU which reads that "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."[19] In short, Article 9 of the TFEU would push both the Commission and Courts more towards public interest rather than pure competition. According to Article 9 TFEU, the goals of the EU should be directed towards protecting workers, promoting education, health, and furthering social goals in order to create a more fair society.

III. **EU Jurisdiction and the Relevant Market**

Section III.A provides for when the EU would have jurisdiction over a potential abuse of a dominant position. In addition to answering questions of territoriality, Section III.A also answers questions as to if there are minimum threshold requirements for abuse, if the abuse

[16] Lianos, *supra* note 13, citing TEU post-Lisbon, *supra* note 12, Protocol 27 on the Internal Market and Competition, 2012 O.J. C 326/1, at 309.
[17] TEU post-Lisbon, *supra* note 12, Protocol 27 on the Internal Market and Competition, 2012 O.J. C 326/1, at 309.
[18] TFEU, *supra* note 4, art. 3, 2012 O.J. C 326/47, at 51.
[19] Lianos, *supra* note 13, citing TFEU, *supra* note 4, art. 9, 2012 O.J. C 326/47, at 53.

needs to be likely or merely hypothetical, and if the abuse requires intent by the market actor. Section III.B provides insight into what the TFEU defines as the relevant market.

A. Jurisdiction

Article 102 TFEU states that abuse of a dominant position "shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."[20] This portion of the treaty's text defines EU jurisdiction. An abuse of a dominant position that affects only local trade would fall outside of the jurisdiction of the EU because it does not "affect trade between Member States."[21]

Another relevant question that must be asked is if there is a minimum threshold of abuse that would trigger Article 102 TFEU? In *Post Danmark II*, the ECJ said that "fixing an appreciability threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates."[22] In other words, there is no limit on abuse that would trigger Article 102. Any type of anticompetitive conduct can harm competition in the market. The degree of harm does not matter for purposes of Article 102.

One must also ask if the threat of abuse needs to be concrete and actual or merely likely? The European Court of Justice (ECJ) in *Post Danmark II* says that "only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of

[20] TFEU, *supra* note 4, art 102, 2012 O.J. C 326/47, at 89.
[21] *Id.*
[22] Post Danmark A/S v. Konkurrencerådet (Post Danmark II), Case C-23/14, 2013, ¶ 73, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0023&from=EN.

Article 102."[23] The ECJ provides further clarification in the case of *TeliaSonera* saying that an abusive practice "must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking."[24] In essence, according to the ECJ, anticompetitive effect must be likely. One does not need to prove that there were actual competitors harmed, but only that competitors could potentially be harmed.

Among the list of NFC competitors to Apple Pay, there are Microsoft, Google, Amazon, and PayPal. It can be easily argued that these large competitors could potentially be excluded from access to NFC technology on iOS devices, as is noted in *TeliaSonera,* and are "at least as efficient as the dominant undertaking."[25]

As for the question of intent, Advocate General Kokott in *Post Danmark II* says that a finding of intent is not necessary for a finding of an abuse of a dominant position but may still serve as a strong indication towards abuse. The Opinion states that although a finding of exclusionary intent will be "a strong additional indication" of abuse, "exclusionary intent or strategy is not… a mandatory precondition for a finding of infringement of Article 102, since abuse of a dominant position is an objective concept."[26] Arguing that one who "did not act with exclusionary intent does not therefore in any way protect the undertaking from a finding of abuse within the meaning of Article 102."[27]

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[23] *Id.* ¶ 67.
[24] Konkurrensverket v. TeliaSonera Sverige AB (TeliaSonera), Case C-52/09, 2011 E.C.R. I-527, ¶ 64..
[25] *Id.* ¶ 64.
[26] Opinion of Advocate General Kokott, Post Danmark A/S v. Konkurrencerådet, Case C-23/14, 2013, ¶ 39.
[27] *Id.* ¶ 39.

B. The Relevant Market

A firm's dominant position gives them economic power within a specific market. This power includes the ability to set terms on consumers, or to interfere with competition. Accordingly, "[M]arket definition… precedes any determination of dominance."[28] In other words, to define dominance within a market, one must first define the market that the dominant actor is in.

Previously, we've seen that Article 102 of the TFEU states "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."[29] Before getting to the question of dominance, the question that must first be answered is "What is the "internal market?" How has it been defined? To define what the relevant market is for the purpose of Competition Law, the Commission issued a Notice on the Definition of the Relevant Market. The notice states that "the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertaking involved, in terms both of products/services and of geographic location of suppliers." To put it plainly, the Commission is looking for two elements in defining relevant market: the geographic market and product market.[30]

> In the Commission's Notice, the definition of relevant geographic markets is as follows: "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be

[28] ELEANOR M. FOX & DAMIEN GERARD, EU COMPETITION LAW 162 (2017).
[29] TFEU, *supra* note 4, art. 102, 2012 O.J. C 326/47, at 89.
[30] Commission Notice, 1990 O.J. C 372/6 hereinafter Commission's Notice.

distinguished from neighboring areas because the conditions of competition are appreciably different in those areas."[31]

In other words, to be a relevant geographic market, the area in question has to be involved in dealing the products or services and must differ from surrounding regions in terms of competition while providing the same conditions for all traders. Examples of "homogenous conditions" include differences in pricing compared to other regions, imports, transport costs, trade barriers into the market, product characteristics, product regulation, market dynamics, and consumer characteristics.[32]

When compared to the Commission's ongoing investigation into Apple's potentially abusive practices involving NFC technology, the relevant geographic market would likely be the entirety of the EU as most likely all of it is "the area in which the undertakings concerned are involved in the supply and demand of products or services." The conditions of competition are likely homogenous as, at a minimum, mostly all major chain stores in member states use NFC "tap and go" technology to some degree as a customer payment option and consumers in the region have characteristically come to rely on "tap and go" technology compared to other regions that have yet to adopt it.

In the Commission's Notice, a relevant product market is defined as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[33] In other words, the relevant product market is comprised of products that are similarly comparable.

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[31] *Id.* at 6.
[32] Slide presentation by James Mancini in OECD Competition Division page, WWW.OECD.ORG, https://www.oecd.org/competition/geographic-market-definition.htm (last visited Nov. 30, 2022).
[33] Commission's Notice, *supra* note 30, at 6.

For example, two brands of milk are interchangeable. According to the Commission's Notice, it follows that they are part of the same product market.

The Court of Justice of the European Communities (CJEC)[34] provides some of their own insight on their interpretation of a relevant product market in the case of *United Brands* where the company, United Brands, was alleged to have abused a dominant position in the banana market. The company argued that the relevant product market consisted of various fruits, not just bananas on the shelves of grocery stores. The Commission argued for a narrower definition of product market and that there was a distinct demand for bananas. The CJEU ultimately ruled in favor of the Commission saying that the banana market is a distinct market from other fresh fruit markets because consumers specifically seek out bananas over other fruit.[35]

The importance of defining the relevant product market is shown in the case of *Continental Can* where the Commission fails to define the market for metal packing containers for food products.[36] In that case, the court reasoned that the market for packing containers for food products may not be different from the market for packing containers of other products and that the market for packing containers for food products may in fact be part of a larger general market.[37] In particular, the CJEC said "to be regarded as constituting a distinct market, the products in question must be individualized, not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose."[38] Put simply, a product must be specifically suited for a

[34] *See generally* Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 O.J. C 306/16 hereinafter Treaty of Lisbon (The Court of Justice was called the CJEC up until the adoption of the Treaty of Lisbon where it was renamed the Court of Justice of the European Union.).
[35] United Brands Co. v. Commission, Case C-27/76, 1978 E.C.R. 207 ¶ 33-34.
[36] Continental Can Co. Inc. v. Commission, Case C-6/72, 1973 E.C.R. 215 ¶ 38.
[37] *Id.* ¶ 34.
[38] *Id.* ¶ 33.

particular purpose. A product that is one size fits all is not sufficient in establishing a distinct market.

When compared to the Commission's ongoing investigation into Apple, NFC technology would most certainly be the relevant product market. It is a product and/or service that is "interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[39] In contrast with the Commission's argument in *Continental* Can, NFC technology is a distinct market. The technology itself makes it suitable as a tool for payments that are faster and easier than traditional payment methods.[40]

In defining the relevant product market, the U.S. has taken a different approach in the *du Pont* case, which concerned du Pont's monopoly on cellophane wrap. The Supreme Court sided with du Pont and held that there were substitutes available to define the relevant product market more broadly than just cellophane wrap saying that "despite cellophane's advantages, it has to meet competition from other materials in every one of its uses."[41] When comparing the U.S. approach to the EU approach, one observes that the US defines the relevant product market more broadly and focuses on the generalities of the product compared to the EU which takes a narrow approach that focuses on the particularities of the product in question.

Under US antitrust law, it is likely that a different conclusion would be reached regarding Apple Pay. For the relevant market analysis, the US would likely take a cue from the *du Pont* case and hold that there are substitutes available and the market can be more broadly defined than just "tap and go" technology. A US court would likely argue that consumers have the in-store alternatives of using credit cards, making purchases online, or a host of other alternatives to

[39] Commission's Notice, *supra* note 30, at 6.
[40] *Continental Can*, 1973 E.C.R. 215 ¶ 33.
[41] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 399 (1956).

choose from rather than NFC technology and that in actuality, NFC technology is just one option in a sea of payment methods. The differences between the U.S. and EU approach to defining a relevant product market shows how difficult it can be in defining a relevant product market. These differences have the potential of creating different outcomes based on the jurisdiction that a case is being litigated in.

IV. Dominant Position and Special Responsibility

Section IV.A explores what a dominant position is within the TFEU and compares what a typical market looks like as compared with a market dominated by a single firm. Section IV.B explains that although holding a dominant position is not in itself an abuse, a market actor with a dominant position holds a Special Responsibility to behave a certain way within the market. This section explores the concept of Special Responsibility in greater depths.

A. Dominant Position

The CJEC in *Hoffman-La Roche* defines a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[42] This means that the party in a dominant position can act in a way that they otherwise could not in the market if they were limited by the ceiling of competition.

The CJEC explains further that having a dominant actor in the market "does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly" but that a dominant market position allows a market actor to have a sizeable influence on the setting the

[42] Hoffmann-La Roche & Co. AG v. Commission, Case C-85/76, 1979 E.C.R. 461, ¶ 38.

conditions of competition and allows it to act without care of competition.[43] In determining the status on a market actor as holding a dominant position, the ability to impose price increases and act freely from competition may be a factor but is not an absolutely necessary factor in establishing the existence of a dominant position.[44]

To demonstrate what a normal market looks like compared to a market with a dominant actor, consider the following examples. Suppose that you are a buyer that wants to purchase a widget. There are twenty firms (firms A to Z) selling comparable widgets. If firm A raises their prices, you could simply go to firms B through Z and find a comparable widget at a lower price.

In a market that was dominated by a single firm, buyers are given a choice between firms A, B, and C to purchase their widgets. Firm A sells 95% of the widgets and may have the power to increase the price of the widgets regardless of the prices that firms B and C are offering buyers. Firm A here is dominant. When compared to the previous example, we find that the size of firm A's market share dictates the freedom that the firm is able to have irrespective of both consumers and competitors. This is the danger posed by a dominant position.[45] The Commission further clarifies this point in a Commission Communication providing that the ability of an undertaking to increase profits above the market level and still be profitable can be considered a dominant undertaking.[46]

It is important to note that the existence of a large market share is but one factor that when taken together with other factors in totality, one is able to derive the existence of a dominant position.[47] Other factors include "the relationship between the market shares of the

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[43] *Id.* ¶ 39.
[44] Telefónica and Telefónica de España v. Commission, Case T-336/07, 2012, ¶ 166, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007TJ0336&from=en.
[45] *See* LLOYD BONFIELD, EUROPEAN UNION BUSINESS LAW: REPRESENTING CLIENTS DOING BUSINESS IN THE EUROPEAN UNION 493 (2nd ed. 2022).
[46] Commission Communication, *supra* note 10, at 8.
[47] Hoffmann-La Roche, 1979 E.C.R. I-461, ¶ 39..

undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competitive strength of the undertaking in question to be assessed."[48] The first of these factors is relevant because "it enables the competitive strength of the undertaking in question to be assessed." The second and third of these factors are relevant because "they represent in themselves technical and commercial advantages." The fourth factor is relevant because "it is the consequence of the existence of obstacles preventing new competitors from having access to the market."[49]

When predicting the outcome of the Commission's investigation into Apple's potential anticompetitive conduct, Apple likely has a dominant position. As previously stated, the CJEC in *Hoffman-La Roche* says that a dominant market position "enables the undertaking which profits by it, if not to determine, at least have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of [competition] so long as such conduct does not operate to its detriment."[50] That is likely the case here. Apple's exclusive access to the NFC "tap and go" technology determines "the conditions under which that competition will develop." The company, by refusing to allow competitors to have access to its NFC technology, has set themselves up to hold a dominant position with consumers who own Apple devices. Because of this lock out of competitors, these consumers likely only have one choice in "tap and go" technology to choose from.

B. **Special Responsibility**

[48] *Id.* ¶ 48.
[49] *Id.* ¶ 48.
[50] *Id.* ¶ 39.

Being in a dominant position is not an abuse in itself. However, a company holding a dominant position in an undertaking has a special responsibility to take caution and not allow their conduct to distort genuine competition on the market.[51] This concept of special responsibility is usually tied to firms that hold a position of "superdominance."[52]

Having a special responsibility also means that companies cannot always do things that would otherwise be permissible if they were not in a dominant market position.[53] This is similar to the approach that the U.S. took with the monopolist company Standard Oil. For Standard Oil, the use of discount and rebate programs to negotiate with railroads to carry their oil would not have been objectionable if not for the company's exceedingly dominant position within the market. The Supreme Court, affirming the district court judgment to break up the company, held that industries are free to contract as they please. However, this right is not absolute as the goals of the Sherman Act aim to prevent an unwarranted degree of restraint on commerce.[54]

If predicting the outcome of the Commission's current investigation involving Apple's exclusionary conduct, this factor might not turn in the company's favor. By shutting out all other competitors from accessing NFC "tap and go" technology on Apple products, Apple may have gone against their special responsibility to take caution and not allow their conduct to distort potential genuine competition on the market. However, at least in the U.S., a question remains if Apple has such a large position and power within the market, comparable to Standard Oil, that a court may intervene in their practices.

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[51] Michelin v. Commission, Case C-322/81, 1983 E.C.R. 3461 ¶ 57.
[52] Erika Szyszczak, Controlling Dominance in European Markets, 33 FORDHAM INT'L L.J. 1738, 1756 (2010) ("Superdominant" positions are often seen in quasi-monopoly undertakings where the market actor in question holds a very high percentage of the market share.).
[53] Clearstream v. Commission, Case T-301/04, 2009 E.C.R. II-3155 ¶ 133.
[54] Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

V. Abuse

Within abuse are different categories or abuse. Section V.A takes its time in defining the two types of abuse within the meaning of Article 102 TFEU. These types of abuse are exploitative and exclusionary abuse. Section V.A.i digs even deeper into exclusionary abuse. In particular, the section explores the Duty to Deal that some market actors may find themselves in and the relevance of this duty to the Commission's ongoing investigation into Apple's exclusionary practices with NFC "touch and go" technology on iOS devices. Section V.B explores the types of counterbalances of abuse needed to be shown to the Commission in order to justify what would otherwise be abusive behavior.

A. Exploitative and Exclusionary Abuse

In the case, *Michelin I*, the CJEC summarizes the concept of abuse as follows:

> "Article 86 (now 102 TFEU) covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market."[55]

In other words, abuse under Article 86 is when a dominant actor, whose presence already weakens competition, performs acts different from what is normal in the competitive market and those acts have the effect of weakening competition below normal levels. However, as mentioned previously, these types of acts are not exclusive. As mentioned previously, having a Special Responsibility can also mean that acts that would ordinarily be acceptable are now unacceptable

[55] Michelin, 1983 E.C.R. 3461, ¶ 70.

based on the actor's dominant position. To understand what abusive practices are likely to affect the structure of a market and "hinder the maintenance or development of competition," Article 102 of the TFEU provides a list of potential abusive practices:

> "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[56]

Abuse of market position can be divided into two variations: Exploitative and exclusionary abuse. Exploitative abuse harms consumers directly through means such as excessive pricing, tying, or discriminatory pricing.[57]

Tying (102(d) TFEU) is seen when a dominant firm sells a product that a customer wants that is tied with a product that a customer may not want. Tying is a common practice meant to provide consumers with better products in a cost effective way. However, this can be an abuse of a dominant position as it forces consumers to purchase goods that they would otherwise not if it were not tied.[58] A similar and related practice to this is bundling which involves offering an assortment of products together at a discounted rate.[59]

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[56] TFEU, *supra* note 4, art. 102, 2012 O.J. C 326/47, at 89.
[57] *See* GOEBEL ET AL., *supra* note 8, at 842 (Discriminatory pricing includes two prongs: First, a high price that may be excessive and a low price that might be predatory.).
[58] BONFIELD, *supra* note 45, at 499 citing TFEU, *supra* note 4, art. 203, 2012 O.J. C 115/1 at 89 (Article 102(d) lists tying as one of the possible types of abuses of a dominant position).
[59] GOEBEL ET AL., *supra* note 8, at 882.

Excessive (102(a) TFEU) and discriminatory pricing (102(c) TFEU), as previously mentioned, is an exploitative abuse. Although often difficult to detect, a clear-cut example of this type of abuse is the case of *British Leyland PLC v. Commission*. There, British Leyland had the exclusive right to determine if imported British Leyland cars conformed to UK national standards, and to issue certificates of conformity. The company arbitrarily refused to grant certain certificates to applicants and set far higher fees for left-hand drive than right-hand drive cars. The ECJ found that the prices were fixed solely to make the re-importation of left-hand drive vehicles less attractive to consumers and that the fee was set at a price that was disproportionate to the economic value of the service that the company provided. This was an abuse of the monopoly that the company held.[60]

American antitrust law on the other hand is not concerned with excessive pricing. The Court of Appeals for the Second Circuit says that "unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive."[61] In other words, setting high prices is fine under American law. However, high prices cross a line when it creates an anticompetitive environment.

With regards to exclusionary conduct, the Commission states their goals and the meaning of "anticompetitive foreclosure" in paragraph 19 of their Commission Communication:

> "The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their rivals in an anticompetitive way and thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would

[60] British Leyland Public Limited Company v. Commission, Case C 226/84, 1986 E.C.R. 3263 ¶ 9, 29-30.
[61] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979).

> have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term "anticompetitive foreclosure" is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers."[62]

In other words, the goal of the Commission is to stop dominant actors from blocking off access to supplies or markets which ultimately will harm consumers through either higher prices, limiting choice in products or services, or limiting quality of the product or service. Under Article 82, The Commission will usually intervene "where, on the basis of cogent and convincing evidence, the alleged abusive conduct is likely to lead to anti-competitive foreclosure."[63]

Exclusionary abuse harms consumers indirectly through harm to competition by means such as raising barriers to enter the market or through practices that eliminate competitors altogether.[64] According to the Commission's Communication, exclusive dealing arrangements by a dominant firm and certain kinds of price dealings are among the list of exclusionary abuses.[65] Under EU law, this can be true regardless of the buyer's free consent.[66]

Anticompetitive foreclosure is not without defense, however. Even if the Commission does find that exclusionary conduct has occurred, the Commission will examine claims by the dominant undertaking that its conduct is justified by either showing that the conduct was

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[62] Commission Communication, *supra* note 10, at 9-10.
[63] *Id.* at 10.
[64] *Id.* at 10.
[65] *Id.* at 12.
[66] Hoffmann-La Roche, 1979 E.C.R. 461, ¶ 89.

objective necessary or that the conduct creates "substantial efficiencies" that outweigh harmful effects on consumers.[67]

Strengthening of a market position can itself be an abuse. In the case *Continental Can Company*, the CJEU said that an undertaking that strengthens a dominant position can be abuse if "the degree of dominance reached may be such as to substantially fetter competition."[68] In other words, once an undertaking becomes so great and takes up a significant portion of the market share, merely expanding that market position could be considered an abuse as it would harm competition to the detriment of consumers.

i. Refusal to Deal

Within exclusionary abuses is the subcategory of a "refusal to deal." The Commission said in the case of *Sealink* that a dominant undertaking that owns, controls, and uses an essential facility, and refuses to allow competitors access to the facility without an "objective justification" or will only grant access on less favorable terms, infringes Article 86. A dominant firm cannot use its market power to "protect and strengthen" its own position by refusing to grant access to a competitor or granting access on less favorable terms than it grants to its own service.[69] Within *Sealink,* an essential facility is defined as "a facility or infrastructure, without access to which competitors cannot provide services to their customers."[70]

For this reason, Apple may have a problem in the Commission's ongoing investigation of Apple's practices of limiting rivals' access to technology to Near Field Communication (NFC) technology. With Apple refusing to share access to the potential "essential facility" in NFC

[67] Commission Communication, *supra* note 10, at 15.
[68] Continental Can, 1973 E.C.R. 215, ¶ 26.
[69] Commission Decision No. 94/19/EC (Sealink), 1993 O.J. L 15/16.
[70] *Id.* ¶ 66.

technology on Apple devices, competitors have a hard time competing with Apple in storefronts.[71]

Although there is a duty to deal, the EU generally favors the freedom to contract and recognizes the harmful disincentives to investment and innovation if the duty to deal is taken too far.[72] In *Oscar Bronner*, the Court acknowledged a right to refuse to deal where a competitor has accesss to alternative routes to competition. In that case, Austrian publisher and newspaper distributor Mediaprint refused to distribute Bronner's small daily newspaper. Within Austria, Mediaprint held near monopoly power over the industry. The court said that the refusal would not be an abuse of a dominant position unless "it was likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, and also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme."[73] Because Bronner had other options available, Mediaprint had no duty to deal and distribute Bronner's newspaper.

This raises an interesting question with regards to Apple's near monopoly on contactless payment technology. If there is a substitute for other companies to use a contactless payment technology, in Android perhaps, would Apple have a right to refuse to deal? Apple could argue that competitors can use the NFC technology of other tech providers such as Samsung to allow customers to access their "tap and go" services. Under *Oscar Bronner*, this may be a successful

[71] Commission Press Release, IP/20/1075 (Jun. 16, 2020).
[72] Szyszczak, *supra* note 52, at 1759.
[73] Oscar Bronner GmbH v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH, Case C-7/97, 1976 E.C.R. I-7791 ¶ 27.

argument.[74] Under that case's line of reason, so long as there are alternative routes for competitors to take to get their products to consumers, Apple likely has no Duty to Deal.

Despite having some shared values, the "trust the markets" approach brings the U.S. to the same conclusion but through a different path. In *Verizon Communications, Inc. v. Trinko*, the Supreme Court of the United States stated:

> "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period - is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[75]

In short, monopolies can be seen as a force for good in the US. They spur economic growth and innovation. Monopolies only become an issue when their actions have an anticompetitive effect. This line of reasoning led the Supreme Court to conclude that in the U.S. companies generally have no duty to deal except in rare exceptions stating that the Court has been "very cautious in recognizing such exceptions (duties to deal), because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[76] If the Apple investigation were to take place under U.S. law, it is unlikely that Apple will be found to have a duty to deal. Although Apple would very likely be found to hold a dominant position when it comes to the exclusive use of Apple Pay on Apple devices, there will likely be no

[74] *Id.* ¶ 27.
[75] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
[76] *Id.* at 408.

finding of a Duty to Deal because of the U.S.' positive view of monopolies as "an important element of the free-market system" which attracts "business acumen" and "induces risk taking that produces innovation and economic growth."[77]

In the EU there is also a duty to deal in some instances where an essential facility is not involved. In *Commercial Solvents*, a manufacturer of raw materials stopped the sale of its materials to a local manufacturer of derivative products and announced that it was going to use the raw material to produce their own derivative products instead. The Court found that "an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition."[78] In other words, a dominant market actor embarking on a new undertaking has a responsibility to maintain competition and cannot stop selling to a competitor only because it would be advantageous for the actor's new business. This would run contrary to Article 102 TFEU and be an abuse of a dominant position.

B. No Exceptions for Abuse of a Dominant Position. However…

Under 102, no exemption may be granted for an abuse of a dominant position.[79] However, as the European Court of Justice stated in *Post Danmark II*, a dominant position may justify conduct that may be abusive if that conduct's effect can be counterbalanced and ultimately benefit consumers."[80]

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[77] *Id.* at 407.
[78] Istituto Chemioterapico Italiano Spa v. Commission, Joined Cases C-6 —7/73, 1974 E.C.R. 223.
[79] 2 HANS SMIT, PETER HERZOG, CHRISTIAN CAMPBELL & GUDRUN ZAGEL, SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 102.03 (2022), citing Ahmed Saeed v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Case 66/86, 1989 E.C.R. 803 ¶ 32.
[80] *Post Danmark*, C-209/10, ¶ 40-41.

If one argues efficiency to justify conduct that would otherwise be abuse, one must show that the efficiency gains from the conduct are likely to counteract any negative effects on competition or consumers, "that the gains have been or are likely to be brought as a result of the conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it doesn't eliminate effective competition, by removing all or most existing sources of actual or potential competition."[81]

When applied to Apple's potential anticompetitive conduct, Apple may have a somewhat difficult argument to make. By having more competitors that also use NFC "tap and go" technology on Apple devices, these companies may be able to negotiate with retailers that use the "tap and go" feature in their stores and bring about a result which leads to consumers paying lower prices in addition to the potential greater efficiency of competitor products. However, Apple may be able to argue that through the use of its exclusive access to NFC devices on Apple products, it may be able to offset the cost of their products through the profits made on their NFC devices which ultimately would benefit consumers.

Conclusion

Based on our understanding of Article 102 TFEU and the surrounding case law, it is unlikely that Apple will be found to have abused a dominant position. Although Apple refuses to share access to NFC technology on iOS devices there are still alternative routes available to competitors which means that Apple devices are not an essential facility.

The U.S. would likely reach the same conclusion but with different reasoning. Even if Apple were found to be a monopoly, that would not be a problem under U.S. law so long as it

[81] *Post Danmark*, C-209/10, ¶ 40-42.

does not unduly restrain commerce. Here, the US would likely see NFC technology as part of a larger payment market that involves cash, credit cards, and online payments in addition to NFC technology. For this reason, the U.S. would likely not find that Apple has unduly restrained competition.