EU enforcement policy on abuse of dominance: Some statistics and facts

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1. Introduction

The European Commission (Commission) is widely seen as one of the toughest enforcers with respect to abuse of dominance cases. The Commission has a track record of going after allegedly dominant companies for years—even if other authorities (most notably the US authorities) do not; and for imposing massive fines on allegedly dominant companies that have committed an abuse.[1]

In this article an overview is provided of the Commission's enforcement policy since 2000 based on the available statistics. First, we will identify the sectors and types of companies that were subjected to abuse of dominance investigations. In doing so, we will analyse the types of abuses that have been raised and whether at face value there has been an increase in the use of a more effects or economics based analysis following the adoption of the Guidance Paper on exclusionary abuse in 2009.[2] Secondly, we will look at the way in which these procedures are initiated and the odds of the Commission abandoning the case (or finding no infringement) after the investigation has formally started or after a Statement of Objections (SO) has been issued. Thirdly, we will address the average duration as well as the various steps taken during the process. Lastly, we will briefly summarise the relevant court judgments, which show that so far no abuse of dominance case has been annulled on appeal.

2. Which sectors and companies are most frequently targeted?

Overview of cases since 2000

In the analysis below an overview is provided of all companies that have been found to commit an abuse of a dominant position since 2000. In doing so, we will analyse the following elements:

- The sector in which the dominant company is active.
- The market position of the dominant company.
- The nationality of the dominant company.
- The size of the dominant company.[3]

We will address these elements in turn.

Relevant sectors

Most targeted sectors

The graph below provides a breakdown of the sectors in which the allegedly dominant company was active.

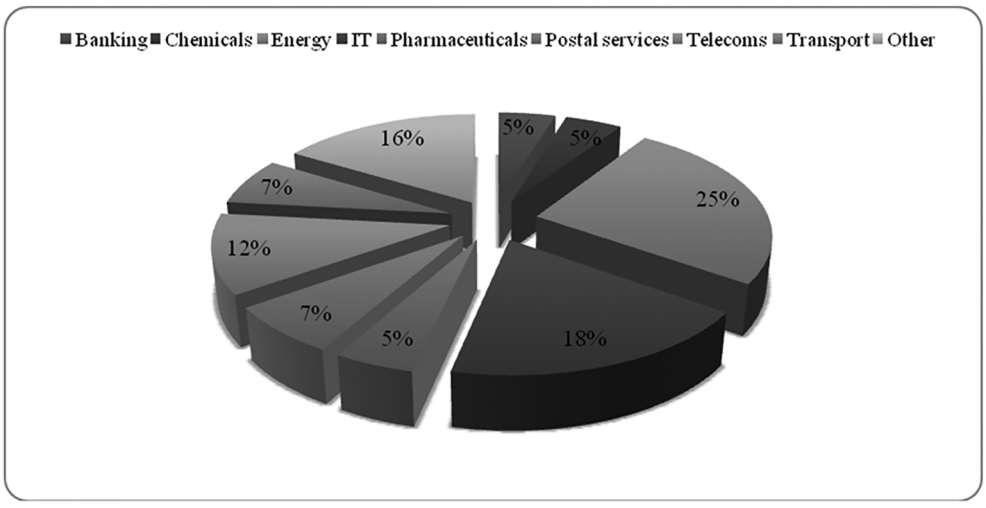

Figure 1: Breakdown of cases by sector

* The views expressed in this article are those of the authors and do not purport to be the views of Clifford Chance LLP.

[1] For example, in case COMP/C-3/37.990 — *Intel*, the Commission imposed a fine of €1.06 billion on Intel for granting fidelity rebates, which was the largest fine ever; in case COMP/37792 — *Microsoft*, the Commission imposed a fine of €497 million for the refusal to supply interoperability information and the implementation of tying practices. The next big case will likely be Google where fines can easily reach similar if not higher levels than in these record-breaking cases.

[2] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Communication) [2009] OJ C45/1.

[3] As measured by the global turnover and market capitalisation at the time of the infringement decision.

This breakdown shows—in order of importance—that the sectors of most interest are:

- Energy
- IT
- Telecoms

Following the liberalisation of the energy, telecoms and postal sectors in the early 2000s (end 1990s) there were several infringement decisions in these sectors in addition to those cases that were either informally resolved or formally settled through commitment decisions (see further below). Although there are still two pending investigations in the energy sector (i.e. Gazprom and BEH gas), the number of cases in these sectors has decreased, which is not surprising given the Commission's historic enforcement activity and subsequent market developments in these sectors.

Focus on the IT sector

In recent years, the Commission seems to have focused its enforcement activities on the IT sector, i.e. five out of a total of 10 pending investigations concern the IT sector with the Google investigation arguably being the most high-profile case in recent years.[4] This is in line with the public statements made by Commissioner Vestager and her predecessors on the importance of enforcement activity in the "digital economy".[5] While there are perhaps compelling reasons to tackle the IT sector (e.g. companies with very high shares in several markets, network economies, impact on EU market integration),[6] the activity also seems to have been spurred by many complaints from IT companies including—for the avoidance of doubt—large US IT companies.

Indeed, allegedly dominant IT companies have developed a habit of accusing each other of all sorts of abusive behaviour, thereby actually supporting the policy and theories applied by the Commission in more general ways than they may have wished. It is therefore questionable whether these companies have acted in their best strategic interest at least in the medium to long term, as they have managed to put the whole IT sector in the EU enforcement spotlight for years to come.

Nonetheless, as will be further explained below, it is to some extent understandable that the Commission is targeting these large IT companies because under the Commission's flawed approach towards dominance, these companies tick all the relevant boxes, e.g. very successful dominant shares, etc.

Consumer goods

What is also apparent from the overview is that the relevant sectors mainly concerned consumer goods[7]: since 2000 there only appear to be two cases out of a total of 43 cases—in which the Commission issued a decision—that related to intermediate goods or inputs as opposed to consumer goods.

This approach makes sense as abusive behaviour directly impacts consumers in these sectors and consumers are ill-placed to defend themselves against abusive behaviour (although it is noteworthy that practically all known complaints seem to come from competitors in these cases and not from end consumers or their representative organisations[8]: see further below). However, the Commission should perhaps be more watchful of possible abusive behaviour in markets for intermediate goods such as raw materials where the impact may be less direct but may be more widespread and ultimately have a much greater impact on welfare than any change in, e.g. Intel's rebates or Google's online search behaviour would ever have.[9]

Market position

The below graph includes the market shares that the allegedly dominant companies reportedly had at the time of the abuse.

[4] These are the investigations into alleged abusive behaviour of Google (targeted in two separate investigations for alleged abuse related to online search and Android), Qualcomm (two separate investigations into respectively predatory pricing and bundling) and Amazon (MFN provisions in e-book distribution agreements).
[5] See, e.g. "Setting priorities in antitrust", speech by M. Vestager, GCLC, Brussels, 1 February 2016.
[6] See in this respect also the Commission's e-commerce sector inquiry, which will likely trigger further investigations in the IT sector. See *http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html* [Accessed 6 February 2017].
[7] Defined as goods that are purchased by consumers although the immediate customers may be third parties such as retailers.
[8] However, in Case COMP/C-3/39.740 — *Google Online Search*, the European Consumer Organisation (BEUC) formally filed a complaint against Google (*http://www.beuc.eu/publications/beuc-pr-2014-010_eu_google_investigation-beuc_complaint.pdf* [Accessed 6 February 2017]).
[9] Using a hypothetical example of a monopolist supplier of salt would affect the entire global food industry and while the resulting impact on pricing (as represented by the proportion of total cost that salt represents) may seem minor, the aggregated welfare loss would be huge.

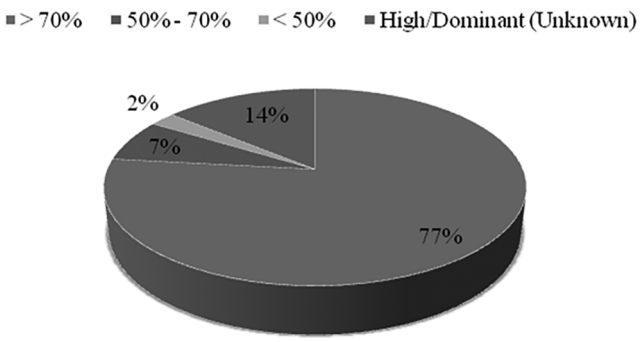

Figure 2: Overview of market shares

As can be seen from this graph, the Commission's enforcement policy is clearly focused on companies with so-called super dominant shares in excess of 70%. These companies are generally recognised as dominant, at least in layman's terms, and are often referred to as such in the media. Only in a minority of cases did the Commission find dominance below 70%, e.g. *Michelin*[10] (51%) and *ENI*[11] (50%–60%).

This focus is perfectly understandable, as it would be a waste of scarce resources to investigate companies that do not even have (super) dominant shares.[12] However, as the European courts have confirmed in several landmark judgments,[13] the existence of very high market shares is in itself not sufficient to prove dominance. It is regrettable that both the Commission and perhaps practitioners do not try to do more to establish a concept of dominance that is less dependent on a finding of a dominant market share, which may simply reflect a company's superior business model including efficiencies rather than substantial market power (see further below).

Size of the dominant companies

Most allegedly dominant companies had global turnover in excess of €5 billion and the Commission has investigated (or is still doing so) some of the largest companies in the world as measured by market capitalisation, e.g. Coca Cola, Amazon, Google, Microsoft. There are some smaller companies with turnover of less than €1 billion but these companies account for only a small proportion of the total number of cases, e.g. Compagnie Maritime Belge, Clearstream, Prokent-Tomra, Rambus, and Slovak Telekom.

Generally the allegedly dominant companies are multinationals active in most if not all EU countries although there are also some companies (mainly in the energy and telecoms sectors) that were only or predominantly active in one single EU country.

In short, the Commission tends to go after very large multinational companies. The Commission may argue in its defence that any alleged abuse by such companies has the greatest impact (which is not necessarily true) and that national authorities are better placed to deal with smaller dominant companies. However the truth is that these household names also attract much more media attention and are more exciting to deal with. There are likely to be many smaller companies with lesser profiles in more obscure markets that may have super dominant shares but where the enforcement risk is much lower simply because these are not on the radar of the Commission. Moreover, unlike for instance the IT sector, there are sectors where there is no snowball effect of complaints and investigations.

Nationality of the dominant companies

Wide variety of nationalities

The graph below confirms that the Commission has investigated many different nationalities of companies (to the extent that a multinational can be qualified as having one single nationality).[14]

[10] Case COMP/E-2/36.041/PO — *Michelin*.
[11] Case COMP/39.315 — *ENI*.
[12] However, it should be noted that, as under EU merger control, the Commission has a tendency to define markets very narrowly or to come up with novel market definitions.
[13] *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) EU:C:1979:36; [1979] 3 C.M.L.R. 211.
[14] The nationality of the addressees of the Commission's decisions was determined according to the location of the corporate headquarters.

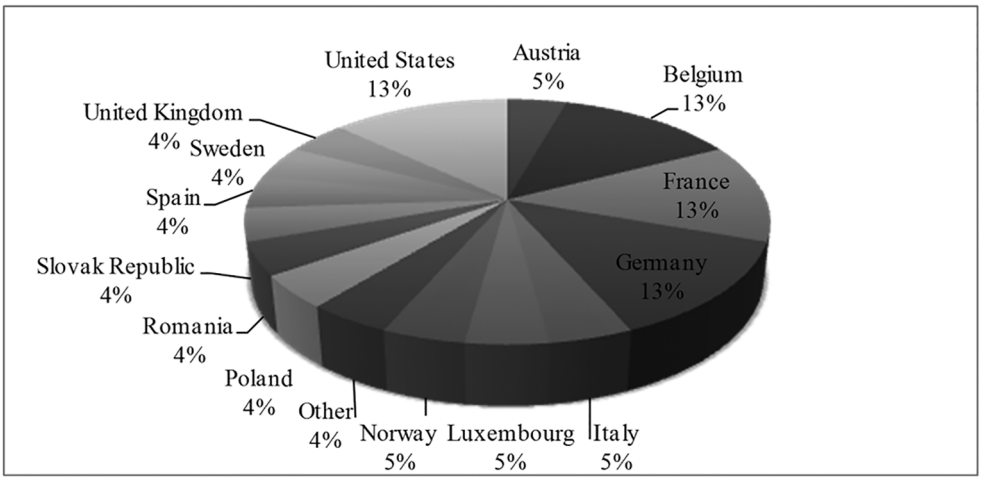

Figure 3: Nationality of dominant companies

This wide range of nationalities also reflects the Commission's focus on the energy, telecoms and postal sectors where incumbent monopolists were targeted in several different EU countries.

No bias towards US companies

A controversial issue is whether the Commission disproportionately targets US companies in its abuse of dominance investigations. This allegation is sometimes made and has resurfaced recently due to the Commission's state aid investigations into tax arrangements of US companies.[15] As can be seen though from the breakdown above, there is no such bias towards US companies, especially given the relative size of the US corporate sector. However, arguably the most high profile cases have been (and still are) those concerning US companies, e.g. Intel, Microsoft, Google. Yet, this says more about the number of large US companies with household names than the Commission's enforcement policy.

In recent years, however, there has been a shift towards US companies due to the Commission's focus on the IT sector (nearly 50 per cent of pending investigations relate to US IT companies). Excluding these cases, there no longer appears to be any imbalance. The fact is that there are far more successful US companies in the IT sector. If there was be an EU equivalent of Amazon, Google, Microsoft, etc. there would probably be no US bias. Indeed, in some ways, this bias demonstrates the failure of the EU to provide the necessary support and cross-border platform for domestic IT companies to grow and ultimately challenge their US counterweights. With a few exceptions there are no domestic IT companies that would ever gain the same global traction as these US giants. As such, initiating one antitrust investigation after another into the likes of Google is unlikely to fundamentally change the competitive landscape, as the alleged abusive behaviour is by no means the cause of the perceived lack of competition both in the EU and internationally. This is not to say that antitrust intervention is not warranted, it simply means that the EU may wish to set different priorities and become less defensive and more offensive in terms of creating the right conditions for IT innovation in the EU.

3. What type of abuse is most frequently raised?

Established abuse versus novel abuse

While the concept of abuse includes all behaviour of dominant firms that is not considered competitive on the merits, the Commission has traditionally focused on a number of abuses that have been previously defined in its case law and that are also referred to in the Guidance Paper on exclusionary abuse.[16] However, as the case law shows, there is always scope for novel abuses so there is no exhaustive list. Even so, a finding of a well-established abuse is more likely than that of a novel unprecedented abuse and is more likely to attract a higher fine.[17] Indeed, as can be seen from Fig.4 below, in the overwhelming majority of cases, the Commission has found established abuses such as refusal to supply or exclusionary pricing although the proportion of unprecedented abuses seems to be increasing.

Different labels and terminology

Dominant companies are often accused of engaging in different types of abusive behaviour so when determining the relevant abuse in each case there is inevitably some double counting of cases. In addition, different qualifications may be used interchangeably to denote the

[15] For example, case SA.38944 — Luxembourg Alleged Aid to Amazon by way of a tax ruling; case SA.3837 — the Netherlands Alleged Aid to Starbucks; case SA.38973 — Ireland Alleged Aid to Apple; and case SA.38945 — Luxembourg Alleged Aid to McDonald's.

[16] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Communication) [2009] OJ C45/1.

[17] The Commission did not impose a fine or only imposed a symbolic fine for a novel abuse in Case COMP/C-1/39.915 — *Deutsche Post AG*; Case IV/36.888 — *1998 Football Word Cup*; Case COMP/37.685 — *GVG/FS*; Case COMP/38.096 — *Clearstream (Clearing and Settlement)*; and Case COMP/D3/34493 — *DSD*.

same type of behaviour: for example, a company that bundles two products may be accused of both bundling and refusal to supply (and possibly exclusionary rebates if it also offers these bundles at a conditional discount). In analysing the cases we have used the qualification, which seems most relevant and which refers to the main effect, e.g. predatory pricing may result in price discrimination but this is not the main effect.

Exploitative abuse

There have only been three cases (out of a total of 43)[18] in which the Commission identified an exploitative abuse (i.e. excessive pricing, price discrimination and/or unfair commercial terms and conditions). Following the adoption of the Guidance Paper on exclusionary abuse in 2009, there were indications that the Commission would adopt a similar paper on exploitative abuse. However, since then nothing has happened and there is no indication that this guidance paper will be issued any time soon. Although exploitative abuse cases are clearly far less prevalent than exclusionary abuse cases, nothing prevents the Commission from pursuing such cases: there is no legal precedent that would preclude the Commission from acting against an exploitative abuse. In addition, in some EU jurisdictions there seems to be a much higher level of enforcement activity against exploitative abuses than at the EU-level.[19]

Classification of exclusionary abuses

Broadly speaking the following categories of exclusionary abuse can be distinguished (see also the Commission's Guidance Paper on exclusionary abuse that applies a similar classification):

- *Refusal to supply:* this comprises all types of refusal to supply such as refusal to supply inputs, access to infrastructure, licences, proprietary information, interoperability information, etc. A refusal to supply is not limited to an outright refusal to supply; it also refers to any tactics related to price, delivery, quality, etc. that are deployed to frustrate competition. As such, we have also included margin squeeze as a type of refusal to supply. Moreover, we did not make a distinction between those cases where the refusal to supply was analysed under the essential facility doctrine and those cases where it was sufficient for a finding of abuse for the dominant firm to refuse a certain input irrespective of whether access to this input would be considered essential; or where the refusal to supply was qualified as a different abuse e.g., tying or favouring an undertaking's own products.
- *Exclusionary pricing:* exclusionary pricing entails all pricing abuses that are supposedly aimed at excluding competitors from the market including predatory pricing and conditional rebates.
- *Tying and bundling:* comprising all forms of tying or bundling including contractual tying, technical tying and mixed bundling. In case of tying, there is also a refusal to supply, i.e. if a dominant company only sells two products as part of a bundle, it refuses to sell the individual components of the bundle on an individual basis.
- *Exclusivity agreements:* many of these are straightforward exclusivity arrangements whereby a company agrees to only purchase or sell the products of the dominant company. These practices can be assessed under both art.101 TFEU (restrictive agreements or practices) and art.102 TFEU. Many of these cases were settled through commitments, e.g. *Coca Cola*, exclusivity cases in the energy sector.
- *Abuse of IP and the regulatory system:* this is quite a broad category and includes inter alia providing misleading information to regulators (e.g. *Astra Zeneca*), pay-for-delay cases in the pharmaceutical sector, misuse of standard essential patents, etc. What these abuses have in common is that these are typically considered so-called naked abuses, which are deemed anti-competitive by their very nature, as there is no objective justification.
- *Miscellaneous:* all other abuses.

[18] Case COMP/D3/34493 — *DSD*; Case COMP/C-1/36.915 — *British Post/Deutsche Post AG*; and Case COMP/39.592 — *Standard & Poor's*.

[19] For instance, in the UK there have been several investigations into excessive and unfair pricing (most recently in the pharmaceutical sector, i.e. Phenytoin sodium capsules, Hydrocortisone tablets (ongoing), Pharmaceutical sector (ongoing)) but also in other sectors, e.g. payment surcharges in the passenger transport sector. In Gemany, there have been several excessive pricing investigations in recent years, e.g. case B8-34/13 — *Stadtwerke Leipzig* (2015), Case B8-40/10 — *BWB Berlin* (2012), Case B8-159/11 — *Stadtwerke Mainz Netze GmbH* (2012). The same applies to Spain where the authorities pursue infringements of art.102 TFEU due to excessive pricing and/or price discrimination on a regular basis, e.g. Expte. S/0500/13 AGEDI/AIE RADIO (2015), Expte. S/0460/13 SGAE — Conciertos (2014), Expte. S/0248/10 Mensajes cortos (2012), Expte. S/0297/10 AGEDI/AIE (2012), and Expte. S/0157/09 Entidad Gestión Derechos Productores Audiovisuales, EGEDA (2012). Finally, in France there have also been regular investigations into exploitative abuses in the past decade e.g., Case 15-D-13 – Décision relative à une demande de mesures conservatoires de la société Gibmedia (ongoing), Case 11-D-20 – Décision relative à des prati ues mises en oeuvre par Carrefour dans le secteur de la distribution alimentaire (2011), and Case 10-D-06 – Décision relative à des prati ues mises en oeuvre par la Société des Téléphéri ues de la Grande Motte (STGM) (2010).

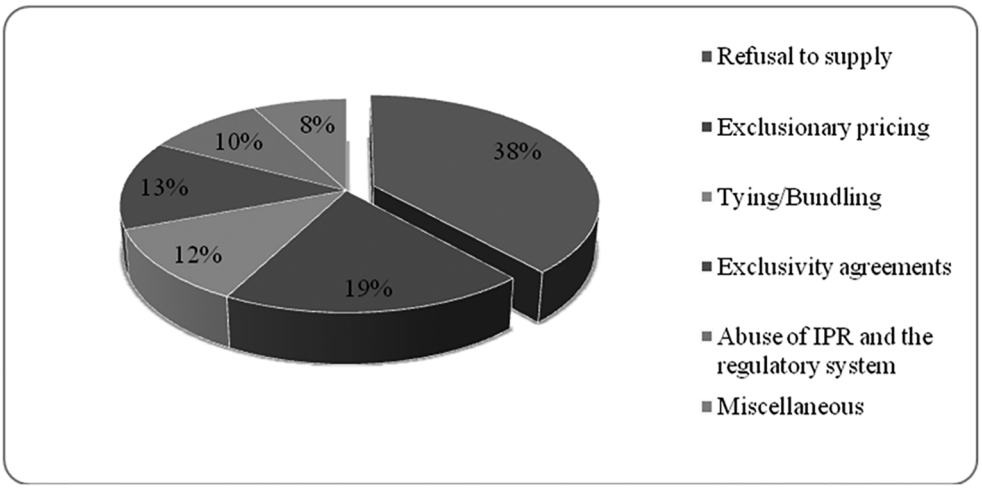

Figure 4: Types of exclusionary abuses in commitment and prohibition decisions

Refusal to supply is most prevalent

As can be seen from the overview above, refusal to supply is the most commonly found abuse followed by exclusionary pricing:

- One likely reason why refusal to supply is the most common abuse is that it covers a broad range of anti-competitive practices, from outright or constructive refusal to supply to margin squeeze.
- The prevalence of exclusionary pricing cases is also not surprising given that virtually all companies (whether dominant or not) engage in conditional discounting. This makes this abuse also rather controversial, as some of the other abuses arguably cannot exist in the absence of genuine dominance, e.g. if there are sufficient competitive alternatives, it is not possible to refuse an essential input.
- As noted, both exclusivity agreements and bundling can be found anti-competitive under art.101 TFEU although we are not aware of cases where these were found to be problematic in the absence of dominance.[20]

In recent years there seems to have been a trend towards more novel abuses for which there is no precedent and which are not explicitly identified in the Guidance Paper on exclusionary abuse. In particular, the Commission has become more critical of companies that allegedly abuse their IP rights or game the regulatory system.

Commitment decisions are often applied to exclusivity arrangements

Commitment decisions are often applied to exclusivity arrangements, as can be seen from the graph below.

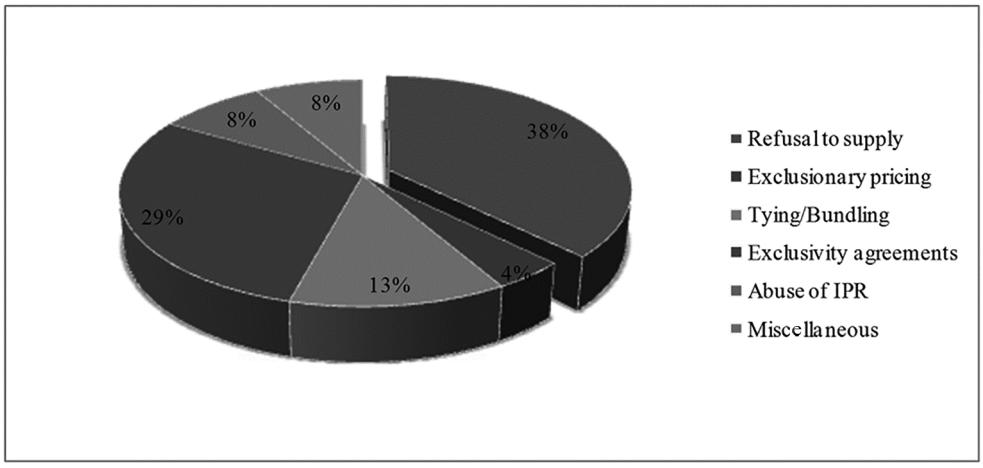

Figure 5: Breakdown of commitment decisions by type of exclusionary abuse

[20] Indeed, the market share threshold in the block exemption on vertical agreements is 30% and therefore not substantially lower than the threshold of 40–50% for the presumption of dominance. Going forward, the Commission's policy would arguably benefit from greater consistency if the threshold in the block exemption would be increased to 40%.

One of the most well known exclusivity cases is the *Coca Cola* case where the Commission entered into a commitment decision whereby Coca Cola agreed to refrain from: (i) concluding exclusivity agreements save in specific circumstances; (ii) granting growth and target rebates; and (iii) engaging in certain bundling practices.

The Commission's seemingly more lenient approach towards exclusivity arrangements seems at odds with its heavy-handed approach towards rebates where substantial fines are the general rule and where, except for *Coca Cola*, so far no commitment decision has been issued. Instead, the Commission generally imposes very substantial fines on dominant firms that engaged in abusive rebates. In simple terms, a dominant company may agree with a customer that it only buys its products under an exclusivity agreement (as expressly allowed under the block exemption on vertical agreements) but it cannot apply rebates that try to induce the customer to buy as much as possible from the dominant company. Indeed, the assessment of exclusivity arrangements has always been more effects based than that of rebates.[21] As such, it is much less likely that an exclusivity arrangement would be considered abusive even if entered into by a super dominant company. One possible reason for the different treatment of exclusivity agreements versus conditional rebates is that the Commission views the former as being capable of resulting in outweighing efficiencies whereas the purpose of the latter is seen as mainly, if not only, anti-competitive.

4. What reasoning is typically applied to find an abuse of dominance?

No noticeable increase in the use of an effects-based analysis

The Guidance Paper on exclusionary abuse[22] provides a more effects based analysis. However, since the adoption of the guidance paper, there does not appear to have been a noticeable increase in the use of such an analysis in abuse of dominance cases, which affected the Commission's conclusions. Of course, it could be argued that even under a more formalistic approach there is an effects-based analysis as certain behaviour is assumed to be anti-competitive based on past experience and economic theory. Indeed, it is difficult to identify what type of analysis could be viewed as (more) effects based, as there are varying degrees of analysis that could be considered effects based:

- **Possible anti-competitive effects:**

  the behaviour is generally capable of resulting in anti-competitive effects *i.e.,* there is no need to demonstrate concrete anti-competitive effects.

- **Potential anti-competitive effects:**

  the behaviour may result in anti-competitive effects in the near future. This test is similar to that applied to vertical or conglomerate mergers under EU merger control.

- **Actual anti-competitive effects:**

  the behaviour already (likely) resulted in anti-competitive effects.

Under each of these effects-based approaches, there can be different interpretations of anti-competitive effects: for example, is it sufficient if the behaviour results in a negative impact on competitors which may in turn reduce competition? Or should there be evidence of a decrease in consumer welfare? In addition, irrespective of the adopted approach, a finding of an abuse depends mainly on the type of evidence that is needed to prove these anti-competitive effects.

While it is not possible to know what the outcome would have been in the absence of the guidance paper, i.e. the counter-factual, at face value, in most if not all cases it seems that the Commission could have reached the same conclusion under a more formalistic approach. Arguably, the adoption of a more effects-based approach may be more about semantics or presentation than substance. As such, it is questionable whether there has been any impact and whether it effects how the Commission argues its case if ultimately the conclusions remain the same.

Typical elements for a finding of dominance and abuse

The decisions on abuse of dominance follow a remarkably consistent pattern with respect to both the analysis of dominance and abuse. This makes the Commission's decisional practice quite predictable. However, in a way, such legal certainty makes it difficult if not impossible for defendants to change the findings of the Commission whether in first instance or on appeal before the European Courts and it makes it remarkably easy for complainants to persuade the Commission to act in an abuse of dominance procedure if there is evidence of dominance and an established abuse.

[21] See in this respect the Commission's Guidelines on Vertical Restraints as well as the judgment of the Court of Justice of the EU in *Delimitis v Henninger Bräu AG* (C-234/89) EU:C:1991:91; [1992] 5 C.M.L.R. 210. In addition, there have been several cases under art.102 TFEU including Case 39.116 – Coca Cola, and Case IV/34.073, IV/34.395 and IV/35.436 – Van den Bergh Foods Ltd (upheld on appeal in *Van den Bergh Foods Ltd v Commission of the European Communities* (T-65/98) [2003] E.C.R. II-4653; [2004] 4 C.M.L.R. 1 and in *Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities* (C-552/03 P) [2006] E.C.R. I-9091; [2006] 5 C.M.L.R. 27).

[22] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Communication) [2009] OJ C45/1.

Dominance

The allegedly dominant firm's market share forms the starting point for the analysis followed typically by a list of competitive advantages that further strengthen (or explain) a finding that a firm is dominant. This position of dominance is not challenged by rivals that have much lower shares and that do not enjoy the same competitive advantages. This reasoning is to some extent circular:

- a dominant company has a high share due to its competitive advantages or vice versa it has competitive advantages due to its high share;
- competitors are much smaller and do not enjoy the same competitive advantages as the dominant company or vice versa they do not have the same competitive advantages and therefore do not have the same level of shares.

The Commission typically refers to several competitive advantages as contributing factors to a finding of dominance even though these advantages cannot necessarily be seen as unique, e.g. economies of scale and scope, brand recognition and reputation, R&D and marketing spend, high profitability, etc. Some of these factors are arguably more indicative of competition than dominance whereas others are inherent to a high market share and therefore do not add much to a finding of market power, e.g. scale economies increase with a greater market position and so does a company's track-record.

Based on such reasoning it is difficult to distinguish genuinely dominant companies that have substantial market power from successful companies that are subject to effective competition.

Another problem with the above approach towards market shares and competitive advantages is that logically speaking this reasoning only works if the competitive advantages are truly unique or unmatchable (and therefore akin to an essential facility) or else rivals should be able to compete, as they are able to replicate these competitive advantages. Even if rivals are able to do so, this does not mean that they will reach the same level of success and therefore market shares as the allegedly dominant firm. What matters though is whether rivals can credibly challenge the dominant company and force the dominant company to behave competitively with respect to pricing, quality and innovation. Indeed, a true monopolist has little incentive to invest to make its products more attractive. As such, the existence of, for example, significant R&D expenditure is more likely to be evidence of competition than dominance.

In its analysis of the competitive constraints posed by rivals the Commission attaches relatively little value to the ability of these rivals to raise output in response to a price increase (i.e. expansion barriers). Instead the Commission often argues that even though these rivals may have the ability to raise output, they are unlikely to do so because of the competitive disadvantages they face and the abusive behaviour of the dominant company in question. This lack of emphasis on the existence of expansion barriers is somewhat inconsistent with the case law of the European Courts where the ability of rivals to increase output is considered a major element in the analysis of dominance.[23] For instance, the ability of rivals to meet demand is a decisive factor in the Commission's analysis of conditional rebates (at least as prescribed in the Guidance Paper on exclusionary abuse,[24] which is not necessarily endorsed by the European Courts).

In short, proving dominance typically does not amount to much more than a finding of very high shares (mostly in excess of 70 per cent) in combination with a number of competitive advantages (which do not need to be unique) and a dismissal of countervailing factors (in particular low entry barriers and buyer power),[25] as is illustrated by the following quotes from the *Intel* decision,[26] which confirm how straightforward a dominance finding is (in this respect, it is worth noting that the analysis of dominance was extremely short compared with the overall assessment):

> *Step 1 High market share: Market shares between 70% and 80% have, according to the case law, been held to be in themselves a clear indication of the existence of a dominant position. This insight is subject to further verification in any given case by reference to contextual factors such as barriers to entry and expansion and buyer power* (at [852]). As such, super-dominant shares prove dominance absent exceptional circumstances.
>
> *Step 2 High expansion barriers/competitive advantages:* "Intel owned the world's fifth-most valuable brand behind Coca Cola, Microsoft, IBM and GE. Its brand value was estimated at USD 32 billion. Given that investment in branding constitutes sunk costs, Intel's brand equity therefore creates significant barriers to expansion and entry in the x86 CPU market." ([873])
> "[…] Intel's financial data are indicative of the fact that the company has substantial market power that cannot be explained by the need to cover fixed costs alone. In fact, Intel's operating margins are comparable to those of Microsoft, which enjoys a near-monopoly in its market and has been found to be dominant in a previous Commission Decision. The financial data hence confirm that there are significant barriers to expansion and entry in the x86 CPU market."[27] ([880])
>
> *Step 3 No countervailing factors (a) high entry barriers/(b) no buyer power):* (a) "A potential entrant will be faced with significant intellectual property barriers and will have to engage in substantial initial research and development and production investment to be able to

[23] See, for example, *Hoffmann-La Roche* [1979] 3 C.M.L.R. 211.
[24] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Communication) [2009] OJ C45/2, para.39.
[25] Such factors are only found under exceptional circumstances and are therefore rarely if ever accepted, e.g. absent monopsony power there is unlikely to be any buyer power and given the alleged dominant firm's large share it is inevitably an unavoidable trading partner under the Commission's reasoning.
[26] Case COMP/C-3/37.990 – Intel.
[27] Intel's gross margin was 59% and the Commission explains in detail why gross margins need to be relatively high in large fixed costs industries such as the production of micro-processors. Indeed, AMD —the much smaller non-dominant firm —enjoyed a similar gross margin as Intel. The Commission therefore relied on Intel's much higher operating margin (gross margin minus fixed costs, i.e. R&D, marketing and administrative overhead), which is a less relevant measure and is higher than that of AMD due to Intel's much larger revenue base.

start up production of x86 CPUs. Once this investment has been made, it will be necessary to achieve a high capacity utilisation to maximise average cost reductions and hence compete most efficiently with the producers already in the market (essentially, AMD and Intel).” ([866])
“A second important group of barriers to expansion and entry arises from product differentiation. The barriers to entry arise from the fact that the necessary investment in marketing involves sunk costs.” ([867])
(b) “Because Intel is an unavoidable business partner for OEMs, they have no means to neutralise Intel’s market power by diversifying their supply sources […].” ([905])

Step 4: Low pricing or heavy discounting does not undermine a finding of dominance: “The fact that prices in a market may be falling is not in itself inconsistent with the existence of a dominant position.” ([907])
“[…] fidelity rebates, when prices are falling, indicate the existence of dominant position, rather than negate it. This is because such rebates show that the dominant company is able or free to adopt a price policy to forestall competitive pressure.” ([910])

The approach towards dominance seems inconsistent with the concept of dominance as established in other areas of competition law (i.e. art.101 TFEU and merger control),[28] the case law of the courts and the Guidance Paper on exclusionary abuse. Indeed, there should arguably be more scope for defendants to undermine a finding of dominance than for abuse and it is therefore perhaps surprising that most cases revolve around the issue of abuse and not so much dominance.

Abuse

As regards abuse, as noted above, most cases concerned exclusionary abuses, in particular refusal to supply and exclusionary pricing. When analysing abuse, the Commission tends to refer to precedent, which established that the behaviour in question is likely to yield anti-competitive effects irrespective of the case-specific circumstances. As such, there is no need to analyse the actual or potential effects at all or in any detail, as the behaviour is assumed to be anti-competitive. In describing the abuse, the Commission typically relies on the phrase that the behaviour is capable of being anti-competitive without the need to show concrete effects; for example (emphasis added):

- Motorola:

  “(308) Article 102 TFEU prohibits behaviour that *tends to restrict competition or is capable of having that effect*, regardless of its success.”

  “(311) Motorola’s choice to continue the injunction proceedings following Apple’s Second Orange Book Offer and to enforce the injunction on the basis of the Cudak GPRS SEP against Apple in Germany *was capable of having the following anti-competitive effects:* […].”

- Slovak Telekom:

  “(1046) […] It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position *tends to restrict competition, that is to say that the conduct is capable of having, or likely to have, such an effect*. In other words, under the case law, it is enough to show ‘potential effects’ of the dominant undertaking’s behaviour. To establish whether a practice is abusive, that practice must have an anticompetitive effect in the market, but *the effect does not necessarily have to be concrete*, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors from the market who are at least as efficient as the dominant undertaking. […]”

- OPCOM/Transelectrica:

  “(173) Commission’s practice in relation to abuses of dominance that exclude market players from the market is, in line with the case-law cited above, to show that the behaviour *tends to distort competition* on the relevant market, on an upstream or a downstream market, or that the behaviour is *capable of having that effect. It is not necessary* for the Commission *to demonstrate the actual effects* of the behaviour in question […].”

The advantage of this more formalistic approach towards abuse is that it gives a certain degree of legal certainty compared with a more effects based approach: arguably, companies know better what behaviour is abusive and it

[28] For instance, there are many cases under merger control where mergers have been cleared despite the merging parties having dominant shares pre or post-merger. Indeed, as a company with a dominant share it is arguably easier from an EU competition law perspective to purchase a company in an adjacent market than to engage in *e.g.,* bundling or discounting. This is because there is a presumption of efficiencies with respect to vertical or conglomerate integration, which does not exist for unilateral conduct.

is more difficult for the Commission to challenge behaviour that has not been previously qualified as abusive.[29]

The problem though is that it is not at all self-evident that certain established abuses such as conditional discounting are *inherently* anti-competitive. Indeed, the Commission's approach only seems to be defensible where the behaviour in question constitutes a naked abuse: behaviour that cannot possibly result in any positive effects or efficiencies regardless of the case specific circumstances.[30] As the continuing debate on loyalty rebates shows,[31] it is not at all clear that loyalty rebates would fall within this category if only because the ubiquitous nature of such rebates amongst both dominant and non-dominant firms strongly suggests that these must result in certain advantages or efficiencies even if not immediately quantifiable.

And even if there is a naked abuse it is questionable whether there is always a justification for intervention (e.g. there may be no impact on competition) or whether the Commission is best placed to do so (e.g. changes in laws or even criminal sanctions may be more appropriate to combat fraudulent behaviour, misuse of patents, etc.).[32]

Apart from such naked abuse, there are abuses that can be broadly classified as a refusal to supply whereby a dominant firm possesses a certain input that is necessary for competitors to compete effectively. This input can be a raw material, IP, a platform, the ranking of search results, etc. and in our view such refusal can only be qualified as an abuse if it can be shown that these inputs are objectively essential to compete, i.e. essential facility. The problem though with finding an abuse of this category is that a remedy is rarely straightforward, as the Commission would need to figure out how to grant access to third parties and under which conditions without unduly undermining the viability or attractiveness of the essential facility.

However, for purposes of this overview it suffices to say that the Commission typically applies a relatively transparent "checklist" approach with respect to a finding of an abuse and that its analysis of the actual effects of the alleged abuse tends to be non-existent or limited and is in any event unlikely to be decisive to the outcome of a case, as the relevant test is whether the behaviour in question is generally capable of distorting competition without there being a need to demonstrate concrete anti-competitive effects.

5. What triggers an investigation and what is the likelihood of the Commission abandoning its investigation?

Complaints versus ex officio investigations

Many investigations start with a complaint but no records are kept by the Commission so it is not possible to provide reliable statistics. Nonetheless, based on publicly available information it seems that most cases in particular outside the energy and telecoms sectors were initiated by complaints from third parties, e.g. Google, Microsoft, Intel, Rio Tinto Alcan, Deutsche Bahn, and Motorola.

While the Commission is entitled to reject a complaint before opening formal proceedings,[33,34] the Commission may understandably be reluctant to do so. As it is relatively easy to prove an abuse, once a company is found to be dominant (almost a given in case of super-dominant shares), it is very difficult for the Commission to come up with arguments to dismiss a complaint especially if up against complainants with deep pockets that are willing and able to go to court.[35] For this reason it would be useful for the Commission to issue "no infringement" decisions (see also further below). Of course the downside of doing so is that it also provides ammunition to defendants who currently have no precedent to rely on to dismiss accusations of a finding of dominance or an abuse.

The Commission may also start an investigation on its own initiative (so-called "ex officio" investigations). This may be the case where the Commission has already done the groundwork through a sector inquiry. Hence, a sector

[29] This does not prevent the Commission from doing so from time to time, (e.g. margin squeeze) although such novel abuses are rare and generally attract no or (much) lower fines. See, for example, case COMP/C-1/39.915 — *Deutsche Post AG*; case IV/36.888 — *1998 Football Word Cup*; case COMP/37.685 — *GVG/FS*; case COMP/38.096 — *Clearstream (Clearing and Settlement)*; and case COMP/D3/34493 — *DSD*. Under a formalistic approach, it could be argued that the Commission does not have the discretion to come up with new abuses as it deems fit without first undertaking a proper analysis of the concrete effects, and that in any event the Commission should always seek to use the established abuses as a benchmark.

[30] Indeed, the Guidance Paper on exclusionary abuse refers to such abusive behaviour in para.22: "There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred." As such, the effects-based doctrine can be bypassed where the behaviour is deemed to result in no efficiencies.

[31] Contrast Wouter P.J. Wils, "The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance" (2014) 37 *World Competition* 405 with Luc Peeperkorn, "Conditional pricing : Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates" (2015) 1 *Concurrences* 43.

[32] Arguably it is not possible for the same behaviour to be considered both an abuse and a criminal offence under national legislation, as this would breach the ne bis in idem rule. Also for this reason, the Commission may wish to exercise caution when pursuing such abuses, as it may deprive other more competent regulators in the EU from imposing more appropriate measures.

[33] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/1, para.45; *International Express Carriers Conference (IECC) v Commission of the European Communities* (C-449/98 P) EU:C:2001:275; [2001] 5 C.M.L.R. 7 at [37].

[34] See, for example, case AT.39097 — *Watch Repair*; in this case, the European Confederation of Watch and Clock Repairer's Association lodged a complaint alleging that luxury watch manufacturers had engaged in anti-competitive conduct by refusing to supply spare parts to repairers that did not belong to their selective system for repair and maintenance. On 10 July 2008, the Commission rejected the complaint for lack of community interest. However, on 15 December 2010 (in *Confederation Europeenne des Associations d'Horlogers-Reparateurs CEAHR v European Commission* (T-427/08) EU:T:2010:517; [2011] 4 C.M.L.R. 14), the General Court annulled the Commission's rejection decision due to errors of assessment and lack of motivation. Subsequently, the Commission opened formal antitrust proceedings on 1 August 2011. However, in the end, the Commission again decided to reject the complaint because of insufficient grounds to conduct a further investigation. See also case COMP/39892 — *Numericable*—Luxembourg, in which the Commission rejected a complaint regarding alleged violations of art.102 TFEU in relation to the wired telecommunications, Internet connection and cable television markets in Luxembourg on the basis of a lack of sufficient EU interest.

[35] Unfortunately there are no official statistics published by the Commission on the complaints that were dismissed before the Commission opened formal proceedings.

inquiry significantly increases the probability of follow-on investigations into either anti-competitive agreements or abuse of dominance[36]:

- **Pharmaceutical sector (January 2008):**

  Case AT.3961 — *Servier*;

- **Financial services: Retail banking (June 2005):**

  Case COMP/39.592 — *Standard & Poor's*;

- **Local Loop: Broadband Internet access (July 2000):**

  Case COMP/C-1/37.451, 37.578, 37.579 — *Deutsche Telekom AG*; case COMP/38.233 — *Wanadoo Interactive*; case COMP/38.784 — *Wanadoo España v Telefónica*; case COMP/39.525 — *Telekomunikacja Polska*; case AT.39523 — *Slovak Telekom*.

The Commission's pending e-commerce sector inquiry is likely to trigger further abuse of dominance cases in this broad sector.[37]

Formal investigation

The Commission first determines whether there are sufficient grounds to initiate a formal investigation. In doing so, it may request information from the allegedly dominant firm as well as third parties. This investigation prior to formal proceedings can easily take a year or more. For example, in the ongoing investigation regarding Google Android,[38] the Commission announced on 15 April 2015 that it had initiated formal antitrust proceedings against Google as concerns its alleged anti-competitive business practices related to Android. However, prior to opening this formal investigation, the Commission had already received two complaints (the first one in March 2013) and had already carried out an initial investigation on its own initiative, which lasted more than two years. The record-breaking case is *Coca-Cola*[39] where the investigation period prior to the opening of formal proceedings lasted approximately eight years.

A formal investigation is officially announced and in the announcement the Commission provides very little detail and the alleged abuse is often described in general terms, as is illustrated in case COMP/C-3/39.740 — *Google Online Search* (emphasis added):

> "On 30 November 2010, the Commission decided to initiate antitrust proceedings in cases COMP/C-3/39.740, COMP/C-3/39.775 & COMP/C-3/39.768 within the meaning of Article 11(6) of Council Regulation No 1/2003 and Article 2(1) of Commission Regulation No 773/2004.
>
> The proceedings were opened with a view to adopting a decision in application of Chapter III of Council Regulation No 1/2003 *and concern the unfavourable treatment by Google Inc. (Google) of competing vertical search service providers in Google's unpaid and sponsored search results* coupled with an alleged preferential placement of Google's own services. The Commission will also investigate the alleged imposition of exclusivity obligations by Google on its advertising and distribution partners and suspected restrictions on advertisers as to the portability of campaign data to competing online advertising platforms. These practices may constitute an infringement of Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement.
>
> The initiation of proceedings does not imply that the Commission has proof of any infringements. It only signifies that the Commission is dealing with the case as a matter of priority" (emphasis added).

Nonetheless, the opening of formal proceedings and the accompanying press release typically signal a strong suspicion of an abuse that may be difficult to rebut for the defendant also given the time that the Commission already spent investigating before making the announcement. For instance, in the above press release, the Commission refers to the unfavourable treatment by Google of competing vertical search sites rather than the allegedly unfavourable treatment. Also note that we are not aware of any press releases where the Commission mentioned the facts that may counteract a finding of an abuse, e.g. the Commission will investigate further whether the allegedly unfavourable treatment by Google results in anti-competitive foreclosure and/or whether there is an objective justification.

Abandoned abuse of dominance investigations

Considering the above, the Commission is understandably reluctant to drop a case after it has publicly announced that the case may raise concerns at face value based on a (lengthy) informal investigation. As such, there have only been seven cases (out of a total of 50 abuse of dominance

[36] Please note that these sector investigations may also have triggered investigations at the national level in the EU.
[37] On 6 May 2015 the Commission launched a sector inquiry into e-commerce in the EU (for press release, see *http://europa.eu/rapid/press-release_IP-15-4921_en.htm* [Accessed 6 February 2017]). The aim of this sector inquiry is to identify possible restrictions or distortions of competition in e-commerce markets both in relation to the online sales of consumer goods as well as the online distribution of digital content. In the meanwhile, the Commission has published its initial findings of the sector inquiry in relation to geo-blocking and a Preliminary Report that provides an overview of the main competition-relevant market trends identified in the e-commerce sector inquiry and points to possible competition concerns. In addition, a public consultation has been held for interested stakeholders to express their views. The Final Report is scheduled for the first half of 2017.
[38] Case 40099 — *Google Android*.
[39] Case 39116 — *Coca-Cola*.

cases in the last 16 years) that were abandoned following the opening of a formal investigation. These cases are listed in the table below.

Table 1: Overview of abuse of dominance investigations that were abandoned after formal investigation initiated

Case Name	SO issued?	Date investigation ended	Alleged abusive behaviour
Velux	No	10.2008	Anti-competitive foreclosure of competitors (in the roof windows market) through conditional rebates and other individualised benefits for distributors, as well as predation ("fighting brands")
Texas Instruments/Qualcomm	No	24.11.2009	Non-FRAND licensing terms and conditions (standards in mobile telephony)
Long term electricity contracts in Belgium	No	03.02.2011	Foreclosure of the Belgian and French electricity markets through long term exclusive purchase obligations in supply contracts with industrial consumers
Boehringer	No	06.07.2011	Misuse of patent system in order to exclude competition in the area of COPD drugs
EPH and Others	Yes	24.06.2013	Abuse of dominance in relation to the supply of electricity
Deutsche Bahn III	No	18.12.2013	Anti-competitive pricing system for traction current in Germany
The Mathworks	No	02.09.2014	Refusal to provide competitors with software licenses and/or interoperability information in relation to certain product families

It should be noted that no decisions were taken in these cases and that it is not always clear why the case was abandoned based on public sources. In only two cases the Commission explained why it had abandoned the investigation:

- **Texas Instruments/Qualcomm:**

  "All complainants have now withdrawn or indicated their intention to withdraw their complaints, and the Commission has therefore to decide where best to focus its resources and priorities. In view of this, the Commission does not consider it appropriate to invest further resources in this case."[40]

- **Boehringer:**

  "The European Commission has closed an antitrust investigation into allegations by Spanish pharmaceutical company Almirall that the German pharmaceutical company Boehringer Ingelheim had filed for unmeritous patents regarding new treatments of chronic obstructive pulmonary disease (COPD). The Commission investigation concerned the alleged misuse of the patent system in order to exclude potential competition in the area of COPD, in breach of EU antitrust rules. As Boehringer agreed to remove the alleged blocking positions, this lifts the obstacles to the launch of Almirall's products and the Commission no longer needs to pursue the case. […]."[41]

These press releases confirm that it is not necessarily the case that there was an insufficient basis for a finding of an abuse. Instead, the investigation may be dropped because the allegedly dominant firm voluntarily changed its behaviour and/or reached an agreement with the complainants.

As noted, it is unfortunate that the Commission does not issue decisions in which no infringement was found, as these would provide useful insights and a much needed counterweight against the infringement decisions.[42] This has become even more relevant since the publication of the Commission's Guidance Paper on exclusionary abuse where the Commission promotes a more effects-based analysis of exclusionary abuse. Although the Commission has the power to issue "no infringement" decisions under art.10 of Regulation 1/2003, it has never done so. One reason for not doing so may be that the Commission does not want to create the expectation that it would adopt no infringement decisions whenever companies seek the Commission's guidance thereby effectively re-establishing a notification system.[43] Moreover, where there is a complaint, the Commission may publish a fairly detailed rejection decision, which, despite being administrative in nature, often contains a legal analysis that comes close to explaining why there was no finding of an infringement.[44] Finally, even where there is no

[40] Case COMP/39247 — *Texas Instruments/Qualcomm*; Press release, *http://europa.eu/rapid/press-release_MEMO-09-516_en.htm?locale=en* [Accessed 6 February 2017].
[41] Case COMP/39246 — *Boehringer*; Press release, *http://europa.eu/rapid/press-release_IP-11-842_en.htm?locale=en* [Accessed 6 February 2017].
[42] There are national authorities, in particular the Dutch Competition Authority (ACM), that do issue decisions in which no abuse is found. See, for example, the ACM's decisions in *AstraZeneca*, *Gas Terra BV*, *TNT/Post NL*, *Stichting Aysis Zorggroep*, *UPC & Casema*, and *Studieplan (Waldeck)*.
[43] This would be a step back to the enforcement regime prior to 1 May 2004, whereby undertakings were required to notify their intended conduct to the Commission, which had a monopoly for issuing individual exemptions.
[44] See, for example, the Commission's rejection decision in Case AT.39097 — *Watch Repair* (2008) and in Case AT.39864 – *BASF (formerly AGRIA e.a./BASF e.a.)* (2015).

complaint, Commission officials sometimes publish articles that set out why the Commission closed a particular case.[45]

The above statistics imply that the likelihood of an infringement is very high and almost a certainty following a formal investigation or after a statement of objections has been issued. While it is difficult to tell from the infringement or commitment decisions whether the allegedly dominant firms had any chance of convincing the Commission that there were no concerns, the decisions seem to suggest that the Commission hardly ever concedes any substantive aspect of its investigation. Likewise, the Commission is unlikely to narrow the scope of its allegations.

The chances on appeal are even slimmer with almost no Commission decision on abuse of dominance being overturned in the last 15 years. There have only been judgments where the courts rejected part of the Commission's grounds mainly in relation to the level of fines (see further below).

It could be argued that the Commission is very good at pursuing the right cases, as it has an almost unblemished track record. However, the statistics may also underline the need for a more objective appraisal by the Commission and a more interventionist approach by the European courts: it is in a way too good to be true. The bottom line for defendants and their advisers is that even with the best defence the odds are very much against the defendant after a formal investigation has been initiated. However, this does not mean that it is not worth putting up a strong defence if only because, even with a very low probability of success, the unlikely gains of winning a case (even partially, i.e. reduction of a fine) may still outweigh the costs of such defence.

6. Process and duration

Uncertainty regarding allegations

Unlike merger control, there are no fixed deadlines in the Commission's formal investigation under art.102 TFEU.[46] Before a formal investigation is initiated, the defendant is often in a limbo as to what the allegations are (even in the most general terms) and it is not uncommon for the Commission to first do an exploratory investigation without the defendant knowing about it. Indeed, all cases, irrespective of their origin, are subject to an initial assessment phase, during which the Commission examines whether the case merits further investigation and, if so, provisionally defines its focus, in particular with regard to the parties, the markets and the conduct being investigated.[47] Although undertakings subject to the investigation may inquire with the Commission about the investigation's procedural status, including the period preceding the opening of proceedings,[48] they will only be able to do so after the first investigative measure is addressed to them. Thus, it is only after having received a request for information or being subject to an inspection that the undertaking involved is informed of the fact that it is subject to a preliminary investigation and about the subject matter and purpose of such investigation.

After the Commission initiates a formal investigation, there is usually a State of Play meeting at which the Commission explains what preliminary concerns it has and which issues it needs to investigate further.[49] Yet, at this stage in the investigation, the Commission is rarely able to provide much insight into its thinking and any feedback therefore tends to be quite high level and often it is unclear what exact behaviour is under scrutiny unless the alleged abusive behaviour is easy to identify, e.g. patent settlement.

Moreover, during the course of the investigation the Commission may change, broaden or narrow the scope of its investigation.[50] Indeed, it is not unusual to only obtain an understanding of the allegations at the last State of Play meeting prior to the issuance of the SO (this last State of Play usually takes place shortly before the SO is issued —this may only be a couple of weeks).[51] This also means that it may be difficult for companies to adjust their behaviour or to consider the pros and cons of their options in particular a commitment versus a potential infringement decision. As is explained further below, although according to the Commission's Best Practice Notice (para.71), the defendant should obtain a copy of any formal complaint at an early stage of the investigation (at the latest shortly after the opening of formal proceedings), in practice, the defendant is unlikely to receive all relevant information pertaining to the complaint and therefore may not learn much about the exact allegations.

Statement of objections and hearing

Often the SO follows towards the end of the review process (see further below) and is adopted one–two years before the prohibition decision is issued (based on our

[45] See, for example, S. Albaek and A. Claici, "The Velux case — an in-depth look at rebates and more" (2009) 2 *Competition Policy Newsletter* (commentary), on the abandonment of Case COMP/39.451 — *Velux*.

[46] Article 2 of Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/1. The Commission may decide to initiate proceedings with a view to adopting an infringement or commitment decision at any point in time, but no later than the date on which it issues a preliminary assessment in case of commitments, an SO or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a market test notice is published, whichever is the earlier.

[47] Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/6, para.12.

[48] Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, para.15; if the undertaking considers that it has not been properly informed by the Directorate General for Competition of the investigation's procedural status, it may refer the matter to the hearing officer for resolution, after having raised the matter with the Directorate General for Competition.

[49] Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, para.63(1).

[50] Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, para.23.

[51] Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, para.63(2); at a sufficiently advanced stage in the investigation, the State of Play meeting "gives the parties subject to the proceedings an opportunity to understand the Commission's preliminary views on the status of the case following its investigation and on the competition concerns identified."

calculations the average period is 17.8 months, so approx. one year and six months).[52] No SO is issued where the defendants agree to a commitment beforehand. If the SO has already been sent to the parties, commitments may still be accepted in appropriate cases.[53] The Commission may issue several SOs pertaining to the same or different behaviour committed by the dominant company, e.g. two SOs in *Intel*, three SOs in *Microsoft*, two SOs in *Wanadoo Interactive*, and two SOs in *Google Search* (and potentially more in the future).[54]

As under any other EU antitrust procedure, the defendants obtain access to file and can request an oral hearing. An oral hearing is optional and some defendants choose not to have a hearing in particular where there are many complainants who may end up dominating the hearing, e.g. there were no hearings in the *Google online search* and *Android* cases. More generally, given the above-described approach towards both dominance and abuse, there is not much left to argue by the time an SO is issued and the Commission's position is likely to be fixed.

The role of complainants/third parties

Although complainants play an important role in initiating investigations, it is unclear what influence they have on the outcome of the case. Once a formal investigation is set in motion, it is very likely if not certain what the outcome will be since the analysis of dominance and abuse often leaves little scope for argumentation. As such, the influence of complainants is most significant in the phase prior to opening of the formal proceedings. Following formal proceedings, there is often not much that complainants need to do apart from providing support and input to the Commission's case where needed. Their importance returns when discussing a possible settlement or remedy where complainants are asked for their views.

From the Commission's perspective, there should arguably be more scrutiny of the merits of any complaint considering the commercial interests and business conflicts that may explain the complaint. Indeed, it is the Commission that acts in the interest of end-consumers and not companies who (should) only care about their own welfare, i.e. profitability. In this respect, it is difficult to see how the Commission can accept inconsistent argumentation and evidence from the same companies in different procedures. Of course any company chooses its strategy on a case-by-case basis but making fundamentally different arguments depending on the case in question should affect the credibility of the arguments.

When submitting complaints, third parties do not need to comply with particularly strict procedural requirements. For example, the form or template for a complaint is not very detailed, the complainant can add whatever it deems necessary to substantiate a complaint, complaints can be submitted at any stage during the investigation, etc. It is ultimately the Commission that decides whether a certain submission is, or is part of, a formal complaint and if so whether it should be shared with the defendant(s) before access to file. As such, there is no guarantee that the defendant actually receives all relevant information pertaining to a complaint.

Indeed, third parties often influence the Commission through more informal contacts that are not necessarily included in the case file. The involvement of third parties on an informal basis led to some discussion in the *Microsoft* case.[55] In its supplemental response to the Commission's SO concerning Microsoft's failure to provide interoperability information, Microsoft complained about the undisclosed correspondence between the Commission (including the trustee) and Microsoft's long-time adversaries (i.e. third parties). According to Microsoft, the Commission had violated its fundamental rights of defence, in particular its right of access to the file, by "encouraging and facilitating these communications to occur in the dark, and without any record of the content of the communications apparently being kept."[56] This prevented Microsoft from knowing whether the content of the communications was distorted or accurate. However, these objections fell on deaf ears and Microsoft's pleas were rejected.

More recently though, this issue resurfaced in the AG's opinion in the *Intel* case where Advocate General Wahl held that a meeting between the Commission and third parties to collect information on the subject of an ongoing investigation is an "interview" for purposes of art.19 of Regulation 1/2003. As a result, the Commission must record (the substance of) the meeting and put in the case file a non-confidential note summarising the substance of what was discussed and the content of any information provided. A note merely summarising the names of the participants and a brief summary of the subjects discussed does not suffice, as it does not spell out the substance of the interview. In that regard, the Advocate General held that

> "it cannot be overemphasised that the information contained in the file about an interview must be sufficient to ensure that the rights of defence of the undertakings accused of infringing EU competition rules are respected."[57]

[52] This only includes infringement decisions and not commitment cases in which an SO was initially issued for which the average duration between the SO and the commitment decision is even longer, i.e. 25.5 months (more than two years).
[53] Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, para.123; see, for example, Case COMP/38.381 — *De Beers*, Case COMP/37.966 — *Distrigaz*, Case COMP/38.636 — *Rambus*, Case COMP/39.530 — *Microsoft*, Case COMP/39.386 — *EDF*, Case COMP/39.315 — *ENI*, Case COMP/39.592 — *Standard & Poor's*, Case COMP/39.230 — *Rio Tinto Alcan*, Case AT.39939 — *Samsung* and Case COMP/39.767 — *Bulgarian Energy Holding*.
[54] It has now been around two years since the Commission issued an SO in the *Google Search* case, which is already well above the average. The issuance of a supplemental SO may have provided the Commission with an excuse to delay the decision further.
[55] Case COMP/C-3/37.792 — *Microsoft*.
[56] Supplemental response of Microsoft Corporation to the SO by the European Commission dated 21 December 2005 (2 March 2006), para.2.
[57] AG Wahl, *Intel Corp v Commission* (C-413/14 P) EU:C:2016:788 at [249].

Therefore, the Commission cannot escape the application of Regulation 1/2003 on the basis that the meeting is "informal" rather than "formal", as "no such distinction exists in the legislative framework laid down by Regulation No 1/2003."[58]

Perhaps this time, the Court will rightly intervene against a practice that has been in place for too long and that is clearly incompatible with the notion of due process under abuse of dominance proceedings. It is important for both its credibility and impartiality that the Commission does not give the impression that it is siding with the complainants and effectively acting in unison with the complainants. It happens all too often that relevant Commission officials get very close to the complainants, e.g. having off the record conversations at paid-for dinners or lunches. Complainants remain third parties and should be treated as such. It should not be too difficult to establish a simple rule of basic ethics whereby relevant officials cannot have any contacts with complainants (or defendants) in relation to an on-going investigation unless it is official and on the record.

This also means that complainants should act as parties who provide useful facts rather than views or legal opinions and these facts should be carefully scrutinised by the Commission. Moreover, the allegedly dominant firm has a right to know what allegations are made by third parties so it can respond accordingly and clarify the relevant facts where needed. It is procedurally unacceptable that the allegedly dominant firm is only entitled to obtain a copy of the full complaint during access to file and that the complainant can have access to the Commission during a long period of time without being confronted with the rebuttal of the allegedly dominant firm. Indeed, given the sensitivity of these proceedings and the need for the Commission to remain unbiased it seems odd for the Commission to have all sorts of contacts including meetings with the complainants without having formulated any concerns to the allegedly dominant firm. This is particularly important for off-the-record meetings between the hierarchy of the Commission and the parties where there is inevitably a risk of a party (most likely the allegedly dominant firm) feeling excluded. It also makes sense from an efficiency point of view to have more transparency and to have a more direct interaction between the defendant and the complainants which may reveal the relevant facts in a more expedient manner than through numerous requests for information. In addition, commercial disputes often form the basis for complaints; and instead of endless litigation, it may be possible to find common ground more easily by having such direct interaction (it also allows the Commission to probe whether there is ultimately a remedy or solution to any hypothetical concerns raised by complainants).

As regards third party rights, the relevant notices or regulations do not explain in great detail what rights third parties have, which is problematic considering the role that third parties play in abuse of dominance cases.[59] From practice though it is clear that third parties have considerable rights in terms of access to file (e.g. they often but not always obtain a copy of the non-confidential version of the SO). Yet third parties do not have the same rights and guarantees concerning access to file as the parties under investigation.[60] An undertaking which submits a complaint to the Commission enjoys the strongest third party rights, as it is entitled to receive a non-confidential copy of the SO when the Commission decides that the complaint can be upheld. At that time, the complainant will also be invited to comment in writing on the SO within a certain time-limit.[61] The Commission may also afford the complainant the opportunity to express its view at the oral hearing of the investigated parties (although the complainant has no right to do so).[62] Only if a complainant has been informed of the Commission's intention to reject its complaint, will it have the right to request access to the documents on which the Commission has based its provisional assessment.[63]

Lengthy process

The procedures for abuse of dominance cases tend to be very lengthy: the average duration is 61 months (± 5 years).[64] In the table below, we have included cases with a longer duration than the average.

[58] *Intel Corp* EU:C:2016:788 at [230].
[59] Paragraph 67 of the Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU provides that the Commission may exceptionally decide to invite, among others, third parties to a so-called "triangular" meeting. A triangular meeting will only be organised if the Director-General for Competition believes it to be in the interest of the investigation to hear the views on, or to verify the accuracy of, factual issues of all the parties in a single meeting. Third parties do not, however, have a right to demand such a meeting.
[60] See *Matra-Hachette SA v Commission of the European Communities* (T-17/93) [1994] E.C.R. II-595 at [34]. The Court ruled that the rights of third parties were limited to the right to participate in the administrative procedure.
[61] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/1, para.64.
[62] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/1, para.65.
[63] For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings. See Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, art.8(1)*juncto*Commission Notice on rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, arts 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C 325/1, paras 30–32.
[64] Figure corresponding to period June 2004 – December 2015.

Table 2: Duration of abuse of dominance cases[65]

Case Name	Duration of investigation (months)	Date of decision	Type of decision
Scandlines Sverige and Sund-busserne v. Port of Helsingborg	84 (7 yrs)	23.07.2004	Decision rejecting complaint
Generics/Astra Zeneca	73 (6 yrs)	15.06.2005	Infringement decision
Coca-Cola	108 (9 yrs)	22.06.2005	Commitments decision
Intel	103 (8.5 yrs)	13.05.2009	Infringement decision
Rambus	84 (7 yrs)	09.12.2009	Commitments decision
EDF wholesale spot electricity market	72 (6 yrs)	17.07.2014	Decision rejecting complaint
Slovak Telecom	76 (6 yrs)	15.10.2014	Infringement decision

Of the pending investigations, the Google online search case is the longest, entering its sixth year at the end of November 2016. Based on the statistics, a decision is expected within the next year or so although it seems likely that this case will be further delayed through the issuance of supplemental SOs (as already happened when the Commission recently issued a supplemental SO in Case AT.39740 — *Google Search*).

One possible reason why these cases take so long is that, save exceptional cases, many of these cases were highly contentious if not downright controversial. Moreover, given the extremely high level of fines, the Commission also feels the urge to uncover as many facts as possible, resulting in very lengthy decisions that at least give the impression that the investigation has been utterly thorough. Indeed, while no hard evidence exists, it is believed that several competition commissioners preferred to delay cases so these could be dealt with by their successors.

Legal uncertainty and negative exposure

There is clearly a downside for any allegedly dominant firm to be subjected to such a lengthy review process in terms of, e.g. cost, distraction and negative media exposure. Another more pressing issue is whether to change or terminate the alleged abusive behaviour pending the investigation, which is especially difficult if there are various allegations (which may change over time). This is an important decision, as the number of years of participation in the infringement will be taken into account in calculating the fine. Thus, if an undertaking decides to dispute the Commission's allegations and to continue its behaviour during the Commission's investigation, the infringement period will be considered to have run up to the date of the infringement decision.[66]

The Commission's position (and that of the Courts) has always been that any company should know what an abuse is and therefore decide for itself whether to terminate any potentially abusive behaviour irrespective of the Commission's preliminary views. However, such a position is not tenable, if only because the reason why the Commission is unable to take a decision in a timely fashion is also because it does not yet know what exactly the abuse is, even if it has the relevant facts at its disposal. Moreover, it is even more difficult for companies to properly assess whether they have committed an abuse under a more effects-based approach where the companies may not even have access to the relevant data to assess whether there was an abuse. In addition, even if the company knew how to change its behaviour, it may be reluctant to do so pending the review, as this may be seen as an acknowledgment of guilt.

Undertakings rarely complain to the Commission or in appeal about the disproportionate length of some of these investigations and if they do, they do not succeed on this point,[67] even though it may be argued that these procedures are not concluded within a reasonable timeframe as prescribed by the right to a fair trial set out in art.6 of the European Convention on Human Rights[68] and arts 41 and 47 of the Charter of Fundamental Rights of the EU.[69] At the very least the Courts could consider a reduction of the fine in long cases (of more than six years) at least for the period of the investigation. Perhaps

[65] The duration of the investigations was treated as running from the date of the first procedural action that is referred to in the Commission's decision, e.g. receipt of a leniency submission, receipt of a complaint, conduct of a dawn raid, sending of a questionnaire, etc. Thus, in calculating the duration, the formal initiation of proceedings was ignored as this has no meaningful relationship with the actual duration of an investigation.

[66] See in that regard Case COMP/C-3/37.792 — *Microsoft*.

[67] *Compagnie Maritime Belge SA v Commissio of the European Communities* (T-276/04) EU:T:2008:237; [2009] 4 C.M.L.R. 21 at [39]–[48]; *Imperial Chemical Industries Ltd v European Commission* (T-66/01) EU:T:2010:255; [2011] 4 C.M.L.R. 3 at [91]–[118]; *Solvay SA v European Commission* (T-57/01) EU:T:2009:519; [2011] 4 C.M.L.R. 1 at [110]–[142]. In all of the aforementioned appeals, the General Court rejected the plea that the duration of the administrative procedure exceeded a reasonable time, since a failure to act within a reasonable time in competition matters can only justify the annulment of a decision if the infringement of the reasonable time principle affects the ability of the undertakings concerned to defend themselves effectively. If not, failure to comply with the principle that action must be taken within a reasonable time cannot affect the validity of the administrative procedure; see also *Intel Corp v European Commission* (T-286/09) EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [1639] and [1644]. Here, the applicant claimed that the duration of the administrative procedure, which lasted nine years, warranted a reduction in the fine, as art.6 ECHR and art.41 of the Charter of Fundamental Rights require cases to be dealt with expeditiously. However, the plea was declared inadmissible under art.48(2) of the General Court's Rules of Procedure because it was not put forward in the application.

[68] Article 6 ECHR provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law." (emphasis added)

[69] Article 41(1) of the Charter provides that "Every person has the right to have his or her affairs handled impartially, fairly and *within a reasonable time* by the institutions and the bodies of the Union."; Article 47 of the Charter provides that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law […]" (emphasis added).

some companies quietly hope that the case may simply disappear if it is constantly delayed but this does not explain the lack of such argumentation on appeal. From the Commission's perspective there is a risk in waiting too long before taking a decision: while the assessment is backward looking, it is more difficult to defend an abuse of dominance finding if the infringement has ceased to exist due to changes in market behaviour or conditions. Also any remedy that is envisaged may change over time, as the underlying circumstances may change especially in the IT sector where products constantly change due to rapid innovation.

7. Court appeals fail

The Commission appears to have a stellar record, as almost none of its decisions finding an abuse of dominance have been overruled by the European Courts in over 15 years. Indeed, 11 out of the 15 concluded appeals before the General Court failed on all grounds. Hence, the applicants were only successful—albeit only to a very limited extent—in a mere 25 per cent of appeals, i.e. four cases. Moreover, in only one appeal the General Court annulled the fine in its entirety. In the other three successful appeals, the General Court only reduced the amount of the fine. The success rate before the Court of Justice of the EU (CJEU) is even worse, as 86 per cent of the concluded appeals were dismissed in their entirety. This means that only one appeal was successful before the CJEU.

Table 3: Overview of appeals before the General Court and the CJEU[70]

Case Name	Appeal (date)	Result	Elements of Commission Decision rejected by the General Court
AAMS	T-139/98 (22/11/2001)	No change in fine	The General Court dismissed the appeal in its entirety.
TACA	T-191/98 (30/09/2003)	*Annulment of fine*	Fines annulled by the General Court on substantive and procedural grounds: • the Commission infringed the parties' rights of defence by basing its findings on documentary evidence upon which the parties were afforded no opportunity to comment; • the Commission wrongfully found that the parties agreed on the mutual disclosure of the availability and content of individual service contracts; • the Commission did not prove to the requisite legal standard the abusive alteration of the competitive structure of the market; and • the TACA parties could, notwithstanding the case law to the effect that agreements entered into by dominant undertakings are liable to constitute an abuse, legitimately have been unaware that their practices on service contracts were likely to be regarded as such (novelty/legitimate expectations).
Virgin — British Airways	T-219/99 (17/12/2003)	No change in fine	The General Court dismissed the appeal in its entirety.
	C-95/04 P (15/03/2007)	No change in fine	The CJEU dismissed the appeal in its entirety.
Soda ash — Solvay	T-57/01 (17/12/2009)	*Reduction of fine*	The General Court reduced the fine from €20 million to €19 million as the Commission was wrong to find that an aggravating circumstance (repeated infringement) existed.
	C-109/10 P (25/10/2011)	*Annulment of fine*	The CJEU set aside the General Court's judgment because it erred in law in holding that the Commission had not infringed the rights of the defence by failing to hear Solvay before the adoption of the contested decision. Moreover, the CJEU annulled the Commission's decision for infringement of the rights of defence.
Soda ash — ICI	T-66/01 (25/06/2010)	*Reduction of fine*	The General Court reduced the fine from €10 million to €8 million as the Commission wrongly assessed the duration of the infringement and as the Commission was wrong to find that an aggravating circumstance (repeated infringement) existed.
Michelin	T-203/01 (30/09/2003)	No change in fine	The General Court dismissed the appeal in its entirety.
Deutsche Telekom AG	T-271/03 (10/04/2008)	No change in fine	The General Court dismissed the appeal in its entirety.

[70] This overview only sets out the appeals for which a judgment was handed down by the General and/or the CJEU, and therefore does not include: (i) cases in which no appeal was lodged; (ii) appeals that were removed from the register; or (iii) appeals that are pending before the General Court or the CJEU. As regards the latter, an appeal against the Commission's decision (and the General Court's judgment) in *Intel* is pending before the CJEU (C-413/14 P). Furthermore, before the General Court appeals are pending against the Commission's decision in *Servier* (T-677/14) and *Slovak Telekom* (T-851/14).

Case Name	Appeal (date)	Result	Elements of Commission Decision rejected by the General Court
	C-280/08 P (14/10/2010)	No change in fine	The CJEU dismissed the appeal in its entirety.
Wanadoo Interactive	T-340/03 (30/01/2007)	No change in fine	The General Court dismissed the appeal in its entirety.
	C-202/07 P (02/04/2009)	No change in fine	The CJEU dismissed the appeal in its entirety.
Microsoft	T-201/04 (17/09/2007)	No change in fine	The General Court partially annulled the Commission's decision insofar as it ordered Microsoft to appoint an independent monitoring trustee empowered to access, independently of the Commission, Microsoft's assistance, information, documents, premises and employees and also source code of its relevant products and also to bear all the costs of the appointment of the monitoring trustee, including his remuneration. However, the General Court did not reduce the amount of the fine.
Compagnie Maritime Belge	T-276/04 (01/07/2008)	No change in fine	The General Court dismissed the appeal in its entirety.
Clearstream	T-301/04 (09/09/2009)	No change in fine	The General Court dismissed the appeal in its entirety.
Astra Zeneca	T-321/05 (01/07/2010)	*Reduction of fine*	The General Court reduced the starting amount by €5 million as the Commission failed to establish to the requisite legal standard that the de-registrations of the marketing authorisations at issue were capable of preventing or restricting parallel imports in Denmark and Norway.
	C-457/10 P (06/12/2012)	No change in fine	The CJEU dismissed the appeal and the cross-appeal in their entirety.
Prokent-Tomra	T-155/06 (09/09/2010)	No change in fine	The General Court dismissed the appeal in its entirety.
	C-549/10 P (19/04/2012)	No change in fine	The CJEU dismissed the appeal in its entirety.
Wanadoo España v Telefónica	T-336/07 (29/03/2012)	No change in fine	The General Court dismissed the appeal in its entirety.
	C-295/12 P (10/07/2014)	No change in fine	The CJEU dismissed the appeal in its entirety.
Intel	T-286/09 (12/06/2014)	No change in fine	The General Court dismissed the appeal in its entirety.

Conclusion

The Commission's art.102 TFEU enforcement policy is very much targeted at large multinational companies with super dominant shares in excess of 70 per cent. In recent years the Commission's focus has shifted towards IT companies in large part due to the existence of many complainants. The Commission relies predominantly on well-established exclusionary abuses in particular refusal to supply and conditional rebates, even though there seems to have been an increase in novel abuses especially in the area of intellectual property. Its assessment of both dominance and abuse is remarkably predictable and remains formalistic despite the Commission's adoption of the Guidance Paper and a more effects based approach. In particular, for a finding of dominance it suffices that the undertaking in question has a super dominant share in combination with certain competitive advantages (which may be inherent to its large market position) whereas for a finding of exclusionary abuse it is not even necessary for the Commission to demonstrate concrete anti-competitive effects. In addition, the relevant procedure suffers from a number of flaws that require consideration: first, the review process is typically initiated and dominated by complainants; secondly, it is questionable whether there is due process given the inability of defendants to address the allegations in a timely fashion as well as the Commission's habit of having off the record communications with complainants; and thirdly, the review process often takes far too long. Despite these failings, the Commission's track record under art.102 TFEU is unblemished, with only a few investigations having been abandoned and no decision having been overturned by the European Courts on the basis of either substantive or procedural grounds. However, this may change in the short term depending on whether the CJEU will follow AG Wahl's opinion in the *Intel* case.