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Freedom to Conduct Business and Abusive Refusal
to Deal: Do dominant undertakings enjoy limited
contractual freedom?

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ABBREVIATIONS

AG	Advocate General
CISG	United Nations Convention on Contracts for the International Sale of Goods
CFREU	Charter of Fundamental Rights of the EU
Commission	European Commission
EU	European Union
ECJ	Court of Justice of the European Union
GC	General Court
Ibid.	Ibidem
p.	page
par.	paragraph
PECL	Principles of European Contract Law
TFEU	Treaty on the Functioning of the European Union

Abstract

Is there under EU law any general duty to deal for dominant undertakings stemming from the case law on abuse of dominance? My paper moves from this simple question in order to ascertain whether enforcement of art. 102 TFEU may lead EU institutions to forbid a refusal by dominant undertakings to provide a product or service or to license intellectual property rights. The main finding in this regard is that, although at odds with the general principle of freedom of contract and free competition, the ECJ may oblige a dominant undertaking to provide a product/service or grant a license under certain circumstances, when refusal to deal is an unjustified means to distort competition. Such limit is justified by the special responsibility imposed by EU case law on dominant undertakings to compete on the merits and not to employ any abnormal method of competition which is not based on market performance. In particular, the elements that the ECJ took into account for a finding of abuse of dominance in cases involving refusal to deal are mainly three: refusal is likely to eliminate competition; refusal concerns a product or service which is strictly necessary to allow another undertaking to carry on another business and there are no grounds for justification of refusal. When refusal concerns supply, the case law also took into account whether the refused undertaking was a long-standing customer or not and whether the request for supply is out of the ordinary compared to previous requests.¹ Dominant undertakings may though refuse to deal when this is a legitimate and proportionate means to pursue their commercial interests, as in principle anyone is entitled to choose who he wants to make business with and how to dispose of his assets.² Although the case law established well-defined requirements for a duty to deal being imposed on dominant undertakings, it is nonetheless necessary to take into account also the peculiarity of the case at stake for a finding of abuse of dominance.

¹ Case C-27/76, *United Brands vs Commission* [1978] ECR 207, [1978] 1 CMLR 429, par.182

² Par. 75 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now art. 102 TFEU) to abusive exclusionary conduct by dominant undertakings [2009] OJ C 045/7

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1. INTRODUCTION

This work is mainly concerned with understanding whether it is possible to conciliate freedom to conduct business and more specifically freedom of contract, which constitute two of the most important freedoms recognized both by EU Member States' legal systems and by the Charter of Fundamental Rights of the EU, with the limitations developed by the Court of Justice of the EU on the basis of the case law on the abuse of dominance. In particular, the research arises from a simple question: may a dominant undertaking, in spite of the general principle of freedom of contract, be forced by the EU institutions to enter into an agreement with another undertaking? The goal is to stress the inevitable friction between the law on abuse of dominance conceived by the ECJ in the refusal to deal by dominant undertakings and the freedom guaranteed to any individual or groups of individuals³ to freely decide who they want to make business or enter into agreements with. The main issue here is therefore to ascertain whether the prohibition of unjustified refusal to deal by a dominant undertaking, established by the case law of the ECJ in light of the prohibition under art. 102 TFEU, may be seen as a limit to their freedom of contract. In other words, the question here is whether the case law on abuse of dominance has implicitly restricted the ability of those undertakings who hold a strong position on the market to freely decide their business strategy and freely choose their commercial partners, by imposing upon them an obligation to enter into agreements. And if, as it will be argued, the answer is positive, then the matter shifts to investigating whether a duty to deal applies to dominant undertaking as a general rule or, on the contrary, as an exceptional remedy to be employed as a last resort. The research, therefore, aims more generally at ascertaining whether in light of the case law of the ECJ it is possible to clarify, once and for all, the border line between the freedom to conduct business guaranteed under art. 16 CFREU and the abuse of dominance prohibition enshrined in art. 102 TFEU. In order to do so the paper shall inevitably try to shed some light on the abuse of dominance perpetrated through refusal to deal, with particular focus on the various cases of abusive refusal examined by the case law. A correct understanding of the scope of such provision is crucial to avoid erroneous application of competition law prohibitions to what is conversely lawful, as art. 102 TFEU does not apply to firms which are not dominant on the market. Tackling such matters shall allow also some general

³ I.e. legal persons

considerations on the tension between the need for regulatory intervention guaranteeing the proper functioning of the market and the principle of free competition. It shall be argued that the task upon the ECJ is a very difficult one, namely to strike a fair balance between fundamental principles such as freedom of contract and private autonomy and those limitations necessary to avoid behaviors capable of harming the market to the detriment of consumers.⁴

1.1. Field of research

In order to reach the goal this paper aims at, two are the main provisions I will examine in detail in the following chapters, namely as already mentioned art. 16 CFREU and art. 102 TFEU, together with the relevant case law of the ECJ that contributed to shape the scope of such provisions. As far as the former is concerned, I shall try to stress what the Charter wants to protect in concrete terms with freedom to conduct business and which are the limits of such freedom, together with the legal status of the rights enshrined in it. In particular, the analysis shall focus on contractual freedom since the prohibition of refusal to deal developed by the ECJ under art. 102 TFEU seems particularly problematic in light of the former. This shall allow me also to ascertain which rights are enshrined under such freedom and to stress the particular friction between abusive refusal to deal and some of such rights, namely freedom from contract (also known as negative freedom of contract) and freedom to choose the counterparty. The research on freedom of contract shall not be limited to EU law but it shall take into account also of those international instruments of so called soft law⁵ like the United Nations Convention on Contracts for

⁴ The goal of protection of consumers is central in the Commission's policy and this is made very clear in many provisions of the Commission's enforcement priorities in applying Art. 102 TFEU to abusive exclusionary conduct by dominant undertakings (2009/C 45/02). For example in par. 5 it is said that: "(...) the Commission will focus on those types of conduct that are most harmful to consumers. (...) The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition. See also par. 6: "(...) the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This is in line with the case law of the ECJ, which was consistent in saying that "art. 82 EC (now art. 102 TFEU) prohibits a dominant undertaking from (...) strengthening its dominant position by using methods other than those that are part of competition on the merits" Case C-209/10 Post Danmark v. Konkurrencerådet, par. 24; similarly see also Case C-62/86 Akzo v. Commission par. 70; Case C-202/07 P France Telecom SA v. Commission, par 106; Case C-280/08 P Deutsche Telekom AG v. Commission, par. 177; Case C-95/04 P British Airways v. Commission, par. 68.

⁵ Soft law has been defined as: "A blanket term for all sorts of rules, which are not enforced on behalf of the state, but are seen, for example, as goals to be achieved." in Jan Smits, "A European Private Law as a

the International Sale of Goods (CISG), the Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts. This shall allow to ascertain whether freedom of contract shares the same privileged position as recognized by the Charter not just in the EU but also internationally. Finally, the attention shall shift towards EU Member States in order to discover how this freedom is conceived within national legal systems and how it is enforced by national courts.

As far as the abuse of dominance is concerned I shall focus, as already mentioned, on those cases of abuse arising from an unjustified refusal to deal: this line of cases is based on the creative work of the case law, as there is no provision imposing dominant undertakings to enter into agreements. Abuse of dominance is not indeed limited to those cases listed in art. 102 TFEU and therefore the prohibition enshrined in it may be extended to other behaviors and activities.⁶ In particular, the aim is to clarify when a refusal to deal comes into existence and, secondly, what forms such refusal may acquire. As made clear by authoritative authors: *“There is a wide array of commercial conduct that can be classified as refusal to deal. The following is a non-exhaustive list of types of refusal that might be caught by Art. 102: refusal to supply key input products and services; refusal to provide essential proprietary information; refusal to license IP rights; and refusal to grant access to an essential facility or network, or only doing so on uneconomic terms”*.⁷ The examination of this line of cases shall be combined with an understanding of the reason why such conduct raise competitive concerns and also of the source of such special limitations, such as refusal to deal, imposed on dominant undertakings.

1.2. Background and limitations

There are mainly two kinds of abuse of dominance, namely those abuses arising from exploitative conducts and those arising from exclusionary conduct.⁸ Abusive refusal to deal is a case that may fall under both categories of abuse: it shall constitute an exclusionary conduct when refusal is aimed at restricting competition by not allowing a competitor to enter the market or by obliging it to exit the market; it shall constitute an

Mixed Legal System- Towards a Ius Commune through the Free Movement of Legal Rules”, Maastricht Journal of European and Comparative Law 5, 1998, p. 330.

⁶ J. Faull & A. Nikpay, *The EU Law of Competition* (3rd edition), Oxford Competition Law, 2014, p. 330.

⁷ *Ibid.* p. 464

⁸ See Commission’s Guidance on art. 102 TFEU enforcement priorities, par. 7.

exploitative conduct when refusal is aimed at imposing on the counterparty unfair terms.⁹ The Commission, as stated in its Guidance on art. 102 TFEU enforcement priorities, is mainly concerned with abusive exclusionary conduct by dominant undertakings: this is a category of abuse that covers a large spectrum of conducts such as exclusive dealing,¹⁰ tying and bundling,¹¹ predatory pricing¹² and margin squeeze.¹³ Although these types of conduct are very different from each other they have in common the potential effect of excluding competitors to the detriment of an efficient competitive process. This paper is exclusively concerned with refusal to deal and therefore other kinds of abusive conduct, even though falling within the scope of art. 102 TFEU, are outside the scope of this work. Before going into the details, in the following chapters, in the case law on the abuse of dominance through refusal to deal, it is necessary to briefly address here those elements which are indispensable for the application of art. 102 TFEU prohibition. In particular the application of art. 102 TFEU depends on several elements such as the concept of undertaking, the effect on commerce between EU Member States and the position of dominance.¹⁴ As far as the concept of undertaking is concerned, art. 102 TFEU makes reference to the abuse of a dominant position “*by one or more undertakings*”. This is indeed a very important concept as it is used not only in art. 102, concerning unilateral conducts by dominant undertakings, but also in art. 101 TFEU which aims at prohibiting agreements between undertakings having the object or effect the restriction of competition. In the Treaties there is no provision giving a definition of such a concept and therefore it was on the case law the task of shedding some light. It is enough to say here that in defining such concept the ECJ mainly focused on the fact that an economic activity was performed rather than on the legal status of the entity engaged in the activity.¹⁵ Accordingly, the case law has deemed as undertakings both private and public companies, governmental entities, international organizations and commercial enterprises.¹⁶ Exceptions have been introduced in particular cases concerning entities carrying out activities that, although of an economic nature, are expression of state’s

⁹ R. Whish and D. Bailey, *Competition Law*, 8 ed., Oxford Competition Law, p. 213.

¹⁰ Par 32 of Commission Guidance on art. 102 TFEU enforcement priorities

¹¹ *Ibid.* par. 47

¹² *Ibid.* par. 63

¹³ *Ibid.* par. 75

¹⁴ Also known in economic terminology as substantial market power.

¹⁵ Case C-41/90 *Höfner and Elser v Macrotron GmbH*, par. 21

¹⁶ Alison Jones and Brenda Sufrin, *Eu Competition Law: Text, Cases and Materials*, 6th edition, pag. 117. As far as the case law is concerned, see for instance Case C-205/03 P, *Fenin v. Commission* (on governmental entities) and Case C-258/78, *Nungesser KG v. Commission* (on quasi-governmental bodies).

prerogatives.¹⁷ The case law on the matter is complex but it is not relevant for this research to go deep into such issue. As far as the effect of the abuse on trade between Member States is concerned, the Commission has clarified such concept in the Guidelines on the effect on trade concept contained in Articles 101 and 102 TFEU, which is in line with the case law of the ECJ.¹⁸ In particular, it is not relevant that the abuse has a negative impact on trade but it is sufficient that it may potentially have an impact. As far as the concept of dominance is concerned, since this is a key element for the application of art. 102 and for the understanding of its abuse, I shall deal with it in detail in the third chapter. For the moment, I may briefly point out here that the Commission refers to it in terms of substantial market power over a period of time: this is an expression used to indicate both economic strength and the power to act independently on the market. In particular, in the above mentioned Guidance, dominance is described as: *“a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. (...) the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains.”*¹⁹ Of particular importance is also par. 11 of the Guidance where the Commission explains what substantial market power means, by making clear that such power entails the ability of the dominant firm to influence the competitive process to its own advantage. Assessing whether an undertaking is dominant is not an easy task but it is at the same time very important because the prohibition of art. 102 TFEU may not be enforced without a finding of dominance. On the basis of what the ECJ established in its case law,²⁰ before moving to consider whether art. 102 TFEU is applicable or not it is necessary to define the relevant market in order to have a clear view about competitive constraints between undertakings.²¹ The assessment of the relevant market for the product

¹⁷ For instance Case C-364/92 *Sat Fluggesellschaft*, par. 30; Case C-309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*, par. 57; Case C-343/95 *Diego Calí & Figli*, par. 22.

¹⁸ See for instance Joined Cases 56/64, *Consten and Grundig* and joined cases 6/73, p. 429 and 7/73, *Commercial Solvents*, p. 223.

¹⁹ Par. 10 of the Commission Guidelines on art. 102 TFEU enforcement priorities to exclusionary conducts. This is in line with the ECJ judgements in Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, par. 65 and Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, par. 38/39. The Guidelines are also consistent with the concept of dominance in par. 6 of the ICN Unilateral Conduct Workbook- Chapter 3: Assessment of dominance.

²⁰ See for instance Case 6/72, *Continental Can Company Inc. v. Commission*, par. 32

²¹ As made clear by the Commission in par. 2 of its Notice on the Definition of the Relevant Market for the Purposes of EU Competition Law. See also Case T-321/05 *Astra Zeneca AB v. Commission*, par. 30..

and of the geographical market, although relevant, are complex activities that for the sake of brevity shall not be dealt with in this thesis.

1.3. Structure and methodology

The present work is divided in 4 chapters. After underlying, in the following section, those that are the inevitable frictions between contract law and competition law, I shall deal in the second chapter with the legal status and the scope of contractual freedom and private autonomy. The research shall start from an EU perspective by examining the only provision encompassing such freedom in the Charter of Fundamental Rights of the EU, namely art. 16. This shall be followed in the following sections by an analysis of the scope of such freedom also outside the EU, by taking into account the most relevant conventions on contracts and the legislations of EU Member States. The third chapter shall deal with abuse of dominance through refusal to deal in order to clarify when refusal to deal may constitute a means to abuse dominance and which kind of behaviors may fall within the scope of a refusal to deal. This chapter shall also allow some considerations on the goal of art. 102 TFEU by taking briefly into account the consequences of an abuse of dominance from an economic and competitive perspective. In the fourth chapter I shall go more deeply into the case law on the different cases of refusal to deal in order to find the main criteria EU institutions established to solve all the issues encountered. In particular, I shall focus on those cases of refusal that are more recurring in commercial practice, such as refusal to provide a service or a good and to license intellectual property rights. The analysis shall take into account both relevant cases addressed by the ECJ and the Commission and also relevant legal documents such as the Guidance on the Commission's enforcement priorities applying art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. In the final section I shall proceed, finally, to draw some conclusions on the proportionality and justifiable nature of the obligation to deal on dominant undertakings developed by the case law, to make clear whether this a necessary limit to a fundamental freedom required by the need for social justice and protection of consumers.

1.4. Competition law and contract law: two conflicting branches of law?

Before moving to deal with the matters outlined in the previous paragraphs, it is worth making some preliminary remarks in this paragraph that may be helpful to have a better understanding of what is at stake in this paper. It is indeed worth noting that the present paper is ultimately concerned with what seems to be an inevitable tension between those rights and freedoms which characterize contract law, among which stands out freedom of contract, and those limits characterizing competition law, justified by the need to protect the proper functioning of the market. Contract law indeed plays a key role because it may be used by market operators as a tool to regulate their commercial relations, therefore as a tool for setting up the rules of the game. In this sense freedom of contract, although is generally understood as a leading principle of contract law, may constitute a tool to circumvent those limitations provided for by competition law aiming to protect competition and consequently consumers. Scholarship is divided between those who, ever since the 19th century, believe that freedom of contract is itself a means to guarantee the proper functioning of the market without the need for an intervention by the state²² and those who instead believe that it is essential to establish rules in order to guarantee that stronger subjects do not exploit their bargaining power to the detriment of weaker ones.²³ In the last century classical contract theory turned out to be inadequate in the face of evident inequalities in bargaining power normally existing between market operators: in light of this, regulatory intervention has been considered desirable in order to guarantee self-determination of weaker contractual parties and protection against the imposition on the latter of unfair conditions. Therefore we observe a shift towards an understanding of limitations to freedom of contract not, as happened in the past, as unlawful restrictions trespassing into private autonomy²⁴ but, on the contrary, as something essential to maximize contractual freedom itself.²⁵ As Martijn Hesselink makes clear: *“Today, it is quite broadly accepted that contract law is best understood as being based on two*

²² Adam Smith, *Wealth of Nations*, Hayes Barton Press, 2001, p. 106. In the same way see also Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the US. and England*, 8 U. PA. J. LAB. & EMP. L., 883, 888, where the author makes clear that : “Since a contract is the result of free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole”.

²³ Grant Gilmore, *The Death of Contract* 3, 1974, p. 104.

²⁴ Carolyn Edwards, ‘Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues’ (2008) 77 *UMKC Law Review* 647, p.655.

²⁵ Stefan Grundmann, ‘The Future of Contract Law’ (2011) 7 *European Review of Contract Law* 490, 505

*fundamental - and conflicting - ideas, i.e. autonomy and solidarity. The idea of autonomy is politically linked to liberalism ('the right') and its typical dogmas in contract law are the 'freedom of contract' and the 'binding force of contract'. The idea of solidarity, on the other hand, is politically linked to socialism ('the left') and its main dogmas in contract law are the 'duty of good faith' and the 'need for specific mandatory rules for the protection of weaker parties.'*²⁶

To make things clearer, let's think of an example. We may think of companies like Intel, which holds a market share around 85% in the market of electronic processors. Processors are an essential component of all main electronic devices commonly used nowadays, such as computer and smartphones, and therefore all main manufacturers of such devices are interested into making business with Intel. Furthermore, the processors market is characterized by barriers to entry represented by high investments necessary to start the business in this sector. On the basis of these considerations it seems clear that Intel has a bargaining power much stronger than its commercial partners, that the former might use it to its own advantage in order to impose unfair contractual terms. For this purpose it is necessary that the law intervenes, so that those stronger undertakings do not take advantage of their strength to the detriment of consumers. In this regard competition law could serve as a means to avoid that freedom of contract might be used by some as a tool to strengthen their position on the market: this indeed would jeopardize both competition on the merits and, in turn, those who are the addressees of those goods or services offered on the market (i.e. end consumers). So, to some extent, competition law prohibitions may be seen as an essential limit which guarantees that undertakings compete on the merits, namely on the basis of the quality of the product or service provided. As it was pointed out by many scholars the objective of competition law is not that of protecting weaker competitors in order to allow them to compete with the stronger ones, but rather to protect the competitive process so that the market may prosper and achieve allocative and productive efficiency.²⁷ Although the theory of invisible hand conceived by Adam Smith claims that the market is capable of working in a proper way on its own, it is nowadays accepted that a few rules are to be set up in order to make sure that market operators compete equally and to tackle those gaps that market competition is not able to solve by itself. There are indeed cases of so called market failure, i.e. cases where the competitive

²⁶ Martijn Hesselink, *The Horizontal Effect of Social Rights in European Contract Law*, Social Science Research Network, 2002, p. 11

²⁷ G. Niels, H. Jenkins and J. Kavanagh, *Economics for Competition Lawyers*, 2nd edition, Oxford Competition Law, 2016, p. 16.

process on its own proves to be unsuccessful. For example, under an efficiency perspective, a properly functioning market may not guarantee on its own that welfare is equally distributed. Allocative efficiency and welfare distribution are two separate things: even though resources are optimally allocated,²⁸ i.e. is not possible to reorganize resources without making someone worse off, this does not mean that the competitive process is capable of equally distributing welfare.²⁹ If the above is true, namely that freedom of contract may be used as a tool to distort competition and circumvent those prohibitions set up for consumer's protection, then we may conclude by saying that contract law and competition law are two branches of law potentially conflicting with each other. Generally speaking, contractual freedom may be seen as expression of a principle of private autonomy which, as we shall see in the following chapter, is sometimes protected under constitutional provisions in EU Member States' legal systems; on the contrary, competition law may be seen as some sort of "necessary evil" directed to avoid that an immoderate exercise of contractual freedom may be in contrast with other principles or freedoms equally relevant, such as protection of consumers or the need for social justice.

²⁸ So called Pareto efficiency

²⁹ G. Niels, H. Jenkins and J. Kavanagh,, op. cited supra (footnote 27), pag. 17

CHAPTER 2

2. FREEDOM OF CONTRACT AND ITS REACH: AN EU AND INTERNATIONAL ANALYSIS

This chapter aims at giving a panoramic view on freedom to conduct a business so that the reader may understand how such freedom is conceived, not only from an EU perspective but also in the legal systems of EU Member States and in those international legal instruments that contribute to regulate international commerce. This shall allow me to underline, on the one hand, the content of such freedom and, on the other hand, its legal status. As far as the content is concerned, although encompassing different rights, the chapter shall mainly focus on one of them, namely the principle of freedom of contract. As far as the legal status is concerned, the chapter shall allow to understand the limits which have been developed by the case law and have a strong impact on its scope.

2.1. Freedom of contract: content and possible ways of restricting it.

Before going to analyze in the following sections the freedom of contract's legal status, it is necessary to deal with the characteristics and rights falling within the scope of such freedom. Secondly, it is helpful to see how freedom of contract and more generally any freedom may be restricted. As far as the content is concerned, freedom of contract is generally understood as expression of a principle of private autonomy, namely the principle that any private individual may freely enter into agreements with other individuals in order to pursue its interests and needs, within the limits set up by law. It is therefore a fundamental freedom conceived to protect individual liberty. In particular freedom of contract encompasses a broad spectrum of rights, which vary from freedom to enter into contracts, to choose counterparties,³⁰ to choose type and content of the

³⁰ Joined Cases C-90/90 and C-91/90 *Jean Neu and others v. Secrétaire d'Etat à l'Agriculture et à la Viticulture* ECR I-03617, para 13: "In that respect, it must be stated that the freedom to pursue a trade or profession, which, according to the consistent case-law of the Court (...) forms part of the general principles of Community law, includes, as a specific expression of that freedom, the freedom to choose whom to do business with". In the same way see also *Case 44/79 Hauer v Land Rheinland-Pfalz* ECR 3727, par. 31/32 and *Case 265/87 Schraeder v Hauptzollamt Gronau* [1989] ECR 2237, par. 15.

contract³¹ and freedom to modify the contract after it has been stipulated.³² The freedom guaranteed to any individual to decide whether he wants to stipulate or not a contract may be seen as one of the outmost expressions of contractual freedom, in the sense that no one might be deemed to be really free if there is an obligation to enter into agreements. Furthermore it is worth noting here that freedom to enter into a contract has a double face, i.e. is composed of a positive and a negative side: from a positive perspective, one is entitled to decide that he wants to stipulate a contract, whereas from a negative perspective he is also entitled to refuse the proposal to enter into agreements.³³ According to J. Basedow this also allows the parties to decide “*whether they, in fact, wish to provide their goods or services to another party, as opposed to using them exclusively for their own purposes – ‘freedom of supply’ – or whether, as users of a good or service, they wish to satisfy the need through a market purchase or through self-production – ‘freedom of demand’*”.³⁴

As far as limitations are concerned, doctrine has always tried to understand how freedom works in practice and how it may be restricted. Scholars are mainly divided in two different camps: on the one hand, those who focus on interferences to free exercise of a right and, on the other hand, those who focus on those forms of indirect pressure which do not amount to real interference but allow nonetheless some sort of control over another’s choices. In particular, Isaiah Berlin was one of the first to understand freedom as non-interference, claiming that people are really free as long as they have the chance to choose freely. He makes clear that: “*I am normally said to be free to the degree to which no man or body of men interferes with my activity. (...) If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. (...) Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.*”³⁵ Contrary to this

³¹ Case C-437/04 *Commission v Belgium* ECR I-2513, para 51

³² Case C-240/97 *Spain V. Commission* (1999) ECR I-6571, par. 99. For a general analysis of contractual freedom see J. Basedow, *Freedom of Contract in the European Union*, in *European Review of Private Law*, Vol. 6, 2008, Kluwer Law International, p. 906.

³³ AG Kokott’s Opinion in Case C-441/07 P *European Commission v Alrosa Company Ltd.* ECR I-05949, par. 227: “*(...) contractual freedom implies not only the freedom to conclude contracts (positive contractual freedom), but also the freedom not to conclude contracts (negative contractual freedom).*” See also the already mentioned case T-24/90, *Automec Srl v. Commission*.

³⁴ J. Basedow, op. cited supra, (footnote 32), p. 905.

³⁵ Isaiah Berlin and Henry Hardy, “Two Concepts of Liberty”, in *Liberty: Incorporating Four Essays on Liberty*, Oxford University Press, 2002, p. 169.

understanding is Phillip Pettit, who claims that freedom should not be conceived exclusively as non-interference because there are other ways to restrict freedom which do not necessarily require direct interference but share nonetheless the same effect.³⁶ Furthermore, Pettit does not share the opinion according to which every interference with one's freedom of choice amounts to a restriction of his freedom. He understands freedom as "*absence of domination by another*",³⁷ rather than as non-interference. As he makes clear in his work: "*There are three aspects to any relationship of domination. Putting the aspects starkly, and without yet adding glosses, someone has dominating power over another, someone dominates or subjugates another, to the extent that*

1. *they have the capacity to interfere*
2. *on an arbitrary basis*
3. *in certain choices that the other is in a position to make.*

(...) What is it to interfere, then, in the manner postulated in the first condition? Interference cannot take the form of a bribe or a reward; when I interfere I make things worse for you, not better. And the worsening that interference involves always has to be more or less intentional in character: it cannot occur by accident, for example, as when I fall in your path or happen to compete with you for scarce goods; it must be at least the sort of action in the doing of which we can sensibly allege negligence. (...) But interference, as I understand it, still encompasses a wide range of possible behaviours. It includes coercion of the body, as in restraint or obstruction; coercion of the will, as in punishment or the threat of punishment; and, to add a category that was not salient in earlier centuries, manipulation."³⁸ According to him also simple omissions may amount to an indirect form of interference, in the absence of a valid justification.

In order to better grasp the difference between the two different understandings of freedom we may make use of an example: let's imagine that a State wants to limit freedom of national undertakings to act in a certain way on the market, for consumers' sake. The State has two options for reaching its goal: it may directly ban a certain activity or it may subject such activity to certain requirements which constitute a strong deterrent, such as the payment of a very high rate of taxes. It is evident that, although in different ways, the state reaches its goal in both cases as companies are pushed not to carry out the specific activity the state wants to discourage. The main difference lies in the fact that in freedom

³⁶ E. Gill Pedro, Freedom to Conduct Business in EU Law, in *European Journal of Legal Studies*, Vol. 9 No. 2, 2017, p. 118

³⁷ Philip Pettit, *Republicanism – A Theory of Freedom and Government*, Oxford University Press, 1999, p. 51. Non-domination is also referred to as arbitrary sway by the author.

³⁸ *Ibid.* p. 52/53.

as non-dominance the undertakings' freedom is not directly restricted, as they still have the chance to carry out that specific activity, but it is indirectly controlled and influenced, as the state makes it difficult to perform that activity. Pettit claims that indirect control is different from direct interference because it does not allow dominance of some over others. In light of this he understands freedom as non-dominance. The mechanism that according to him allows indirect control without dominance is letting everyone contribute in deciding the "rules of the game". In other words, if I agree that my freedom should be restricted in some way this means that I am willing to give up some of my freedom: if this is true then I may not claim anymore that my freedom is being restricted.³⁹

These theories about freedom may come in handy also when dealing with abusive refusal to deal by dominant undertakings. Although refusal to deal in abuse of dominance will be dealt with in the following chapter, it seems nonetheless useful here to make some brief considerations. In particular it may be pointed out that the understanding of freedom as non-dominance may pave the way for a better grasp of this type of cases. Indeed, in case of an abusive refusal to deal, in line with what Pettit says, the dominant undertaking may exercise an influence over the other undertaking also without necessarily restricting directly his freedom to choose. Furthermore, dominant undertakings hold all of those three elements mentioned by Pettit, i.e. they are able to interfere arbitrarily in the choices of their competitors, both directly and indirectly. Indeed dominant undertakings are able both to act with a certain level of independence from competitors and consumers and to influence their competitors' activity.⁴⁰ Another point that may be raised here is that, in such cases of refusal to deal, one of the parties' freedom necessarily needs to be sacrificed for the sake of the other. For instance, if X is a dominant undertaking which abusively refuses to license its IP rights to Y so that the latter may not enter the market and compete with the former, I might consider such refusal as an interference in the choice of Y to enter the market. The dominant undertaking is using refusal to deal as a means to limit the other undertaking's freedom to enter the market and compete with the former. At the same time though if we claim that X is abusing its dominance by means of refusal to license and we oblige it to grant a license, we are interfering with its (contractual) freedom. Of course in such cases the restriction must fall on the dominant undertaking's freedom, in light of the fact that the refusal amounts to an abuse of dominance and

³⁹ Pettit, *Three Conceptions of Democratic Control*, 2008, p. 46

⁴⁰ M. Vatiere, *Power in the Market: on the Dominant Position*, I-COM Istituto per la Competitività, CLEIS (Centre for Law and Economics of Institutions Siena), 2006, p. 3 available at http://www.academia.edu/3038173/Power_in_the_Market_on_the_Dominant_Position

therefore it is a means for harming the competitive process. This brings us back to the question raised in the previous chapter, i.e. does this mean that dominant undertaking enjoy a narrower freedom of contract compared to that of the other undertakings? This is not the time to jump immediately to conclusion and therefore I shall address such question later.

One last question remains here: how is freedom to conduct a business conceived in the Charter and in the case law? Is such freedom seen as non-interference or as non-dominance? I will deal with this in the following section.

2.2. Freedom of contract and EU law: the Charter of Fundamental Rights of the EU.

If we take into consideration the Charter of Fundamental Rights of the EU, I agree with those scholars who claim that the wording of the Charter itself and the Explanations to the Charter seem to understand freedom to conduct business as non-dominance, rather than non-interference.⁴¹ Both in the Charter and in the Explanations indeed freedom to conduct business is conceived as a limited right, in the sense that one is free to conduct a business as long as EU law or national law do not establish limits to such right. Art. 16 of the Charter is worded as follows: “*The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.*” It follows that considering whether under EU law freedom to conduct business is restricted the ECJ is not obliged to protect such freedom but on the contrary is required to set it aside and apply any limitations.⁴² In the opposite case, where freedom to conduct business is not restricted under EU or national law, judges are called to protect it and to remove any unlawful measure which may hinder it.⁴³ But the elements in support of freedom to conduct business as non-dominance are not limited to the wording of art. 16 of the Charter: there are indeed other provisions which seem to support such understanding, such as art 52 of the Charter and art 16 of the Explanation to the Charter. The case law seems to be coherent with this approach as well. Art 16 of the Explanations relating to the Charter, besides a

⁴¹ E.g. E. Gill Pedro, op. cited supra, (footnote 34), p. 118;

⁴² Ibid., pag. 119.

⁴³ In Case C-240/97 Spain V. Commission (1999) ECR I-6571, par. 99, the ECJ stressed that freedom of contract: “cannot, therefore, be limited in the absence of Community rules imposing specific restrictions in that regard.”

reference to the exercise of the right according to the limits under EU and national law, makes reference to the limits provided for by Art. 52 (1) CFREU as well. The latter states that: *“Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objective of general interest recognized by the Union or the need to protect the rights and freedoms of others.”*⁴⁴ It is quite clear that the wording of such provisions are not much reconcilable with an understanding of freedom to conduct business as non-interference, as the law itself saves some room for the EU and Member States to interfere with the exercise of this right. As far as the content is concerned, in order to understand the genesis of such right to conduct business I may use the words of AG Cruz Villalón, in his already mentioned Opinion in case *Mark Alemo-Herron*, which give us an idea of the evolution this right went through over the years. In particular, the AG makes clear that: *“The freedom to conduct a business has a long history in European Union law. Originally seen as a corollary to the fundamental right to property, it started to have a separate existence in the 1980s, ultimately achieving the status of a general principle of European Union law. Today, explanations of the Charter point out that this article is based on the case-law of the Court of Justice recognising not only the freedom to pursue an economic or commercial activity, but also contractual freedom and the principle of free competition. However, despite the fact that the freedom to conduct a business derives from these three sources, to date the case-law has not, in fact, provided a full and useful definition of this freedom. The judgments in which the Court has had occasion to rule in this area have gone no further than either referring to the right to property or simply citing the provisions of Article 16 of the Charter. (...)In effect, the freedom to conduct a business, as stated in that article, acts to protect economic initiative and economic activity, obviously within limits but nevertheless ensuring that there are certain minimum conditions for economic activity in the internal market. Thus, the freedom to conduct a business acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law”*.⁴⁵ This allows some brief considerations, namely that the right to conduct a business is conceived as including three different components, is a limited right that may only be proportionately restricted and is directed to protect economic initiative.

⁴⁴ Art. 52 CFREU

⁴⁵ Opinion of A.G. Cruz-Villalón in Case C-426/11 *Mark Alemo-Herron v. Parkwood Leisure*, para. 48/50

What it is necessary to stress here is that between those three aspects enshrined in freedom to conduct business, the case law has often recognized the central role of contractual freedom both for legal and physical persons. The idea of contractual freedom as an essential and general principle of EU law is recurrent in the case law and among scholars.⁴⁶ This is the reason why this paper is mainly concerned with freedom of contract rather than freedom to start and run an economic activity or the principle of free competition. The focus on contractual freedom is also explained in light of the fact that the case law on prohibition of abusive refusal to deal may be seen as one of the most obvious forms of restriction of freedom of contract. Indeed if the ECJ or the Commission forces a dominant undertaking not to refuse to provide a service is clearly hurting that undertaking's (negative) freedom of contract. If we go back to the case law on freedom to conduct a business, another aspect seems clear: in light of the fact that this is not an absolute right and therefore it may be proportionally restricted, the ECJ has often employed such freedom to strike a fair balance between this and other fundamental rights. This was already clear in those early cases, prior to the entry into force of the Charter, where the ECJ had to adjudicate on freedom to conduct business for the first time, as in *Nold*.⁴⁷ The case was concerned with an EU measure establishing restrictions on coal direct supply to companies which did not possess certain requirements: the company (Nold) challenged the measure by claiming it was contrary to freedom to conduct its business because as a consequence of such measure it could not get supplies anymore as direct wholesaler. The activity of direct wholesaler was indeed limited to those undertakings possessing requirements provided for by law, which Nold did not possess. The ECJ stated that the right to conduct a business or a profession is not absolute and must be assessed "*in light of the social function of the property and activities protected thereunder.*"⁴⁸ Another point made very clear by the case law is that restriction to freedom to conduct business must be proportionate: but in some cases the Court went further by saying that when the Commission has other tools to bring infringements to EU law to an end, recourse to an obligation to deal must remain an exception to be employed as extrema

⁴⁶ As far as scholars as concerned see for instance E. Gill Pedro, op. cited (footnote 36), p. 118; J. Basedow, op. cited, (footnote 32); X. Groussot, G.T. Pétursson and J Pierce, 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights,' 2014, Lund University Legal Research Paper 01/2014, p. 6. As far as the case law is concerned, see Opinion of AG Kokott in Case C-441/07, *European Commission v. Alrosa Company Ltd.* para 225; General Court in T-24/90, *Automec Srl v. Commission*.

⁴⁷ Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission*, ECLI:EU:C:1974:51, 491.

⁴⁸ *Ibid.* par 14

ratio (last resort).⁴⁹ This gives us an idea of freedom of contract as a general rule that may be sacrificed only when no other means are available. In *Automec II* for instance the Court was called to decide whether the Commission's refusal to enjoin BMW to supply Automec with cars and spare parts was legitimate. Automec claimed that BMW's distribution scheme was contrary to art. 85 EC Treaty⁵⁰ and therefore asked the Commission to order BMW to sell its cars and spare parts to Automec and allow the latter to use the BMW trademark. The ECJ upheld the Commission's resolution by stating that the latter was not competent to grant the measures requested by Automec: interestingly it also made clear that the Commission may not terminate an infringement to EU law by requiring an undertaking to enter into contractual relations when there are other means to bring such infringement to an end.

Another relevant issue concerning art. 16 of the Charter is its applicability to so called horizontal situations, i.e. whether freedom to conduct business may be relied upon against other private individuals. I agree with those scholars who claim that freedom to conduct business is a "*weak right with a strong potential*"⁵¹: although such right is subject to those limits provided for by EU and national law, the strong potential stands in the possibility to rely upon it in horizontal situations. Arguments supporting the horizontal application of art. 16 CFREU may be found both in the second part of the already mentioned art. 52 (1) of the charter, which undoubtedly restricts the scope of limitations to such freedom,⁵² and in the case law. An important case on this matter is *Scarlet Extended*,⁵³ where art. 16 TFEU has been applied to deny a national measure in a dispute between two private companies. In particular, the case was concerned with an injunction sought by SABAM to impose on Scarlet Extended, an internet service provider, the use of a filter that would not allow its customers to unlawfully download works protected by copyrights owned by SABAM. Scarlet Extended was indeed accused of allowing its customers to download and share copyright protected works through a peer to peer software. When the case was referred by the national court to the ECJ, the latter had to ascertain whether the injunction would be compatible with the Directive on electronic commerce, which guarantees the right of network's users to data protection and to freedom of expression. Interestingly the Court ruled that such an injunction would not be compatible with the Directive because

⁴⁹ Case T-24/90, *Automec srl v. Commission*, par. 51.

⁵⁰ Current art 101 TFEU

⁵¹ X. Groussot, G.T. Pétursson and J Pierce, op. cited (footnote 46), p.6.

⁵² A twofold restriction, namely proportionality and objectives of general interest or protection of other rights and freedoms.

⁵³ Case C-70/10, *Scarlet Extended v. Sabam*, ECLI:EU:C:2011:771

the imposition on an Internet Service provider to introduce a filtering system would be contrary to their freedom to conduct business. The Court was called to balance, on the one hand, freedom to conduct business and, on the other hand, protection of intellectual property rights.⁵⁴ The imposition of an obligation to install a filtering system, in the view of the Court, would not have allowed to strike a fair balance between these conflicting needs because it would be too complicated, expensive and contrary to internet users' right to privacy.

2.3. Freedom of contract and international soft law: PECL, UNIDROIT principles and the CISG

So far we have seen the conception of freedom to conduct business in EU law, with particular focus on freedom of contract. It is now a good idea to extend the analysis beyond EU borders and see what is the understanding of contractual freedom in that set of non-mandatory rules that are nonetheless used to discipline some aspects in international commercial relationships. For example, those international instruments of soft law such as the Principles of European Contract Law (PECL) or the Principles of International Commercial Contracts of UNIDROIT, i.e. those principles developed by groups of academics with the aim of establishing common rules and principles in the field of contract law. The objective was that of harmonizing national laws on contracts in light of the key role that this set of rules plays in the trade sector. For instance PECL may be applied by judges and arbitrators to interpret unclear national laws or other EU legal acts, such as Directives, or in those cases where the parties have not clearly defined the law applicable to the contract.⁵⁵ Another relevant instrument is the Convention on International Sale of Goods (CISG)⁵⁶ directed to harmonize the rules governing those contracts which are commonly used in commerce. As regards to the PECL, such

⁵⁴ As AG Cruz Villalon made clear in his opinion in Case C-426/11, *Alemo-Herron and others v. Parkwood Leisure Ltd*, par. 52: “*freedom to conduct a business is a fundamental right that is very much open to being used as a counterweight. The fact that it is not an absolute right means that it is often used in contrast to other fundamental rights, as demonstrated by the case-law of the Court of Justice, which to date has used the freedom to conduct a business as a counterweight to other fundamental rights, such as the right to the protection of privacy, health, and intellectual property rights.*” Similarly see also AG Kokot Opinion in Case C-441/07 P, *Commission v. Alrosa Ltd*, par. 225.

⁵⁵ Irini Liakopoulou, *Le Politiche Comunitarie dell'Europa Allargata*, libreria universitaria edizioni, 2011, p. 238.

⁵⁶ Also known as the Vienna Convention

principles were developed by a specific commission financed by the EU and in charge of creating a uniform European civil law.⁵⁷ The commission's work prolonged for many years: a first part of such principles was published in 1995, whereas a second and third part were released respectively in 1999 and 2002. As regards to UNIDROIT Principles, they were developed by the United Nations Commission on International Trade Law (UNCITRAL) in order to harmonize international contract law: they have the same goal of the CISG and are considered as a development of the latter. It is not uncommon to find in the UNIDROIT Principles provisions which are very similar to those contained in the CISG.⁵⁸ Also PECL have been drafted by taking into account not exclusively EU member states' national law but also the CISG itself.⁵⁹ This is the reason why, although being legal instruments of a different nature, they are dealt with in the same paragraph. For instance PECL and the UNIDROIT Principles are both soft law but have a different scope: the former apply only to disputes concerning contract law in general and involving EU Member States whereas the latter apply to any disputes concerning international trade contracts.⁶⁰ The CISG is indeed an international Convention which regulates contracts regarding the sale of goods concluded between citizens of different countries and was ratified by almost all EU Member States and by many other countries not members of the EU. In particular the CISG is applicable every time contracting parties have not expressly excluded the application of the Convention in the contract. Once that the scope and legal status of such legal instruments have been briefly clarified, I may now focus on the role of contractual freedom within such acts. In line with the Charter, contractual freedom has been recognized in such international acts as a fundamental freedom as well. This means that freedom of contract and the principle of parties' autonomy acquire a universal connotation and affirm themselves as principles not limited to EU law but governing international law as well. It is important to note though that, similarly to the CFREU, also in these international instruments contractual freedom is not conceived as absolute and therefore limitations are recognized here as well. For instance art. 1:102 (1) PECL⁶¹

⁵⁷ For instance such will was expressed in Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ 1989 C 158 and Resolution of 6 May 1994 Concerning the codification of private law and the Commission on European contract law, OJ 1994 C 205.

⁵⁸ I. Buga, Taking the International Approach to the CISG: The Gap-Filling Role of The UNIDROIT Principles and the Principles of European Contract Law, R.R.D.C. 6/2009, p. 112.

⁵⁹ M.J. Bonell, The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?, in Uniform Law Review, 1996, p.229.

⁶⁰ I. Buga, op. cited (footnote 57), p. 113; see also M. J. Bonell and R. Peleggi, UNIDROIT Principles of International Commercial Contract and Principles of European Contract Law: A Synoptical Table, Uniform Law Review 9, 2004, p. 321.

⁶¹ *"Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by this Principles.*

subjects freedom of the parties to choose the content of contract to the requirements of good faith and fair dealing. No such limit is instead found in art. 6 of the CISG,⁶² although someone can claim such limit may be derived by art. 7 (1) which, similarly to art. 1:102 PECL, subjects the parties' rights to the same requirement of good faith.⁶³ Another limit set out by art. 1:102 PECL arises from the fact that contractual freedom is not subject exclusively to the requirements of good faith and fair dealing but also to those mandatory rules such as articles 4:118 PECL, 6:105 and so on.⁶⁴ As far as the CISG is concerned, art. 6 mentions among mandatory rules art. 12, but there are scholars claiming that other rules not expressly mentioned may be included as well, such as articles 4 and 7(2) CISG. The argument seems convincing because the former provision⁶⁵ concerns those matters governed by the Convention and therefore a derogation would render the Convention itself applicable to matters falling out of its scope;⁶⁶ as far as art. 7 CISG is concerned it seems convincing the objection that the parties are allowed by art. 6 to freely choose which provisions of the Convention they want to derogate and therefore they may choose interpretative criteria different from those mentioned by art. 7 (2).⁶⁷ Consequently, it seems correct that such provisions are not to be considered mandatory rules and therefore art. 4 and 7 are not to be seen as limits to contractual freedom. Another limit to be taken into account is that arising from art. 1:103 PECL: the first part of the provision allows parties to replace national mandatory rules with PECL every time this is allowed by the applicable law. The second part of the provision on the contrary imposes the application of mandatory rules of national, supranational and international law which are directly applicable by virtue of private international law. A similar provision is present in the

⁶² Such provision states that: *"The parties may exclude the application of this Convention or, subject to art. 12, derogate from or vary the effect of any of its provisions."*

⁶³ U. G. Schroeter, Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law, *The Vindobona Journal of International Commercial Law and Arbitration*, Vol. 6, 2002, p. 260. In particular art. 7 (1) CISG states that: *"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."*

⁶⁴ Such provisions concern respectively remedies against fraud, threats, excessive benefits, unfair terms and other similar issues (art. 4:118) and those terms unilaterally determined by a party which are unreasonable (art 6:105). *Ibid*, p. 261.

⁶⁵ Art. 4 CISG states that: *"This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: a) the validity of the contract or of any of its provisions or of any usage; b) the effect which the contract may have on property in the goods sold."*

⁶⁶ F. Ferrari, "Artikel 6", in *Kommentar zum Einheitlichen UN-Kaufrecht*, No. 22, 3rd ed, 2000.

⁶⁷ M. J. Bonell, "Article 7", in *Commentary on International Sales Law*, no. 1.2, 1987. In particular art. 7 (2) CISG states that: *"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

UNIDROIT Principles as well (art. 1.1 precisely).⁶⁸ A similar distinction is instead absent in the CISG, because this is an instrument of hard law adopted to establish uniform rules and therefore every time a matter is covered by the Convention the latter shall apply.

I can conclude this paragraph by saying that the understanding of contractual freedom in international law is coherent with what was pointed out in the previous paragraph about the CFREU, namely this is a fundamental freedom which plays a key role in the field of contract law but it is nonetheless conceived as a limited right.

2.4. Freedom of contract in the EU national legal systems

The perspective seems to remain unchanged also when considering the understanding of contractual freedom in EU Member States' national legal systems. Most part of EU national legal systems welcome freedom of contract as a leading principle of contract law and in some cases the case law has derived such form of freedom from constitutional provisions. A clear example of this are Germany and France, where there are no provisions in the civil code expressly envisaging freedom of contract: nonetheless the case law recognized the constitutional value of such freedom by connecting it to the more generic freedom of action, understood as expression of an individual's freedom to create and modify legal relationships which is indirectly protected by art. 2 of the German Constitution⁶⁹ and art. 16 Declaration of the Rights of Man and of the Citizen.⁷⁰ Other

⁶⁸ In particular, see Comment 3 on Limitation of party autonomy by mandatory rules, art. 1.1. Unidroit Principles 2016. Particularly relevant is also Comment 2 on "Economic sectors where there is no competition", where is stressed that: "There are of course a number of possible exceptions to the principle laid down in this Article. As concerns the freedom to conclude contracts with any other person, there are economic sectors which States may decide in the public interest to exclude from open competition. In such cases the goods or services in question can only be requested from the one available supplier, which will usually be a public body, and which may or may not be under a duty to conclude a contract with whoever makes a request, within the limits of the availability of the goods or services."

⁶⁹ Grundgesetz. In particular, the first part of the provision states that: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

⁷⁰ Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution." (Every society where rights are not guaranteed and the separation of powers is not determined, does not have a Constitution). On this matter see e.g. Roger Errera, 'The Right of Property and Freedom of Enterprise in French Constitutional Law', Institute of Law and Public Policy, 2009, p.22

provisions employed in France to recognize freedom of contract are art. 6⁷¹ and art. 1123⁷² of Code Civil. In Spain and Italy, instead, contractual freedom is expressly protected by specific provisions in the civil code such as respectively art. 1255⁷³ and art. 1332.⁷⁴ In both cases freedom of contract is subject to specific limits, such as those expressly provided for by law and those resulting from moral and public order. Furthermore in Italy freedom of contract has been linked to freedom of economic initiative protected under art. 41 of the Constitution.⁷⁵ Other EU Member States, although they do not have provisions which expressly recognize freedom of contract, have granted such freedom a key role through the work of jurisprudence. For instance, in Switzerland the Federal Court has established that: *“private law rests upon the principle of private autonomy. In the law of obligations, this principle materializes into the principle of freedom of contract. This freedom presents different aspects (such as freedom to contract, freedom in the choice of contractual partner, freedom of object, form and to terminate contractual relations).”*⁷⁶ In The Netherlands as well there is no express recognition of freedom of contract but rather a provision which make reference to one facet of freedom of contract, namely freedom to define the content of the contract.⁷⁷ Nonetheless such freedom is still accepted as a general principle in the field of contract law. Similarly to what we have seen when analyzing freedom of contract under EU law, also within national legal systems freedom of contract is subject to a various set of limits, arising both from mandatory rules of private law and from general clauses. Mandatory rules generally limit contractual freedom both by not allowing some persons to stipulate a contract (for instance minors,

⁷¹ Which provides that: *“On ne peut déroger, par des conventions particulières, aux lois qui intéressent l’ordre public et les bonnes mœurs.”* (Those laws concerning public order and morals may not be derogated from by private agreements)

⁷² Which provides that: *“Toute personne peut contracter si elle n’en est pas déclarée incapable par la loi.”* (Every person may enter into contracts unless he is declared incapable by law)

⁷³ Art. 1255 of the Spanish code civil states that: *“Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público.”* (Contracting parties may agree upon pacts, clauses and conditions they consider to be convenient, as long as they are not in contrast with the law, the moral and public order.).

⁷⁴ Art. 1332 of Italian code civil states that: *“Le parti possono liberamente determinare il contenuto del contratto, nei limiti imposti dalla Costituzione.”* (The parties may freely determine the content of the contract, within the limits provided for by Constitution).

⁷⁵ Art. 41 of the Italian Constitution states that: *“L’iniziativa economica privata è libera. Non può svolgersi in contrasto con l’utilità sociale o in modo da recare danno alla sicurezza, libertà ed alla dignità umana.”* (Economic activity of private individuals is free. It must be exercised according to social utility and without endangering security, liberty and human dignity).

⁷⁶ *“Le droit privé repose sur le principe de l’autonomie privée. En droit des obligations, ce principe se concrétise dans celui de la liberté contractuelle. Cette liberté présente diverses facettes (liberté de contracter, liberté dans le choix de son partenaire contractuel, liberté de l’objet, de la forme et de mettre un terme aux relations contractuelles..)”* Case La poste c. Acusa, ATF 129/2003 III p.35. See P. Engel ‘L’évolution récente de la partie générale du droit des obligations’, in P. Engel, C. Chappuis, S. Marchand, A. Morin *L’évolution récente du droit des obligations*, Publication CEDIDAC 61, 2004, p.8.

⁷⁷ Article 6:284 BW.

mentally ill and so on) or by forcing some others to enter into a contract (for instance monopolists). A clear example of the former kind of provisions is the already mentioned in art. 1123 of the French civil code⁷⁸ or art. 423 of Italian civil code.⁷⁹ General clauses play a key role in the field of contract law as well, since thanks to their flexibility they allow the application of general principles also in those cases not covered by specific provisions of law.⁸⁰ Such clauses are generally understood as open norms or empty containers and they are often used to balance the principle of contractual freedom with other conflicting important principles, such as the protection of minors or mentally ill people.

⁷⁸ Already cited (footnote 72)

⁷⁹ On contracts concluded by unfit to plead subjects, which may be declared void.

⁸⁰ Ibid, p. 33.

CHAPTER 3

3. ABUSE OF DOMINANCE THROUGH REFUSAL TO DEAL

In this chapter I shall try to clarify when a refusal to deal by a dominant undertaking may amount to an abuse of dominance prohibited by art. 102 TFEU, as envisaged by the ECJ in the case law. To this end, I shall preliminarily analyze refusal to deal, in order to give an understanding of what kind of behaviors fall within the scope of this concept, as the case law adopted a broad definition of refusal. Secondly, I shall deal with the matters of dominance and its abuse, in order to understand what is exactly that art.102 TFEU wants to forbid and what is the objective of such provision. This shall allow some brief considerations on the potential foreclosing effect of the abuse and the consequences for the market, which in turn affect competitors and consumers as well.

3.1. Understanding refusal to deal: scope and main reasons of concern

First of all it is important to see what does it mean refusal to deal, since this is a broad expression applied to different cases. As AG Jacobs makes it clear in his Opinion delivered in case *Syfait and Others*, there are some cases where a dominant undertaking may be obliged to supply its products or services or to license its intellectual properties to third parties.⁸¹ Therefore with the expression refusal to deal we generally refer to one of such cases where the dominant undertaking unlawfully refuse to supply or license another firm.⁸² In this regard, it is also important to understand what kinds of form refusal may take as the case law on refusal to deal considered not only the explicit and direct refusal by a dominant undertaking to enter into a contract, but included other less obvious behaviors: one example is those cases where the dominant undertakings delay on purpose the supply or camouflage the refusal behind the imposition of unfair contractual terms

⁸¹ Par. 66 of AG Jacobs opinion in Case C 53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) V. GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609

⁸² Some refer to the same phenomenon using the expression essential facility, as pointed out by C.I. Nagy, *Refusal to Deal and the Doctrine of Essential Facilities in US and EC Competition Law: a Comparative Perspective and a Proposal for a Workable Analytical Framework*, 2007, *European Law Review*, Vol. 32, no. 5, p. 664, available at: <https://srn.com/abstract=1737710>

which any commercial partner would not be willing to accept.⁸³ Including such cases of “hidden” refusal comes as no surprise as otherwise dominant undertaking might escape a duty to deal simply by making the deal unacceptable. Another case that falls under the scope of refusal to deal is that of a dominant undertaking quitting the supply of a product or service that has been supplied before: this means that the fact that refusal comes at a later stage, i.e. after a contractual partnership has already been introduced, is not relevant.⁸⁴ Another point made clear is that refusal to deal may amount to an abuse regardless of whether the dominant undertaking refuses to deal with any other firms or with some firms only: the ECJ prohibited both so called discriminatory and non-discriminatory refusal to deal.⁸⁵ Finally, according to the case law, it is also irrelevant the fact that refusal to deal is addressed to a competitor on the market of supply or to a customer on a downstream market, although the two cases should be tackled using different approaches, for the reasons that we shall see in the next chapter.⁸⁶

The Commission Guidance paper makes express reference to refusal to supply, making clear that in presence of such a refusal competitive concerns may raise in different cases: first of all, those cases where the dominant undertaking is a competitor to the refused undertaking on a downstream market, i.e. when the product or service requested to the former is necessary to the latter in order to carry out another business.⁸⁷ Another case is when a refusal to supply is a means of inducing the buyer to undertake certain actions or a punishment for actions already undertaken. As far as the refused input is concerned the Commission maintains that it is sufficient that there is a potential market, regardless of whether the product or service was already available on the market or not.⁸⁸ As far as the effect of refusal is concerned, three are the main conditions outlined in the Guidance that raise concerns: firstly, the refused input is indispensable for the undertaking in order to compete on the downstream market; secondly refusal shall most likely eliminate competition on the downstream market and, thirdly, refusal shall most likely damage

⁸³ So called constructive refusal. See par. 79 of Guidance on art. 102 TFEU Commission enforcement priorities. See also Commission decision of 25 July 2001, *Deutsche Post – Interception of cross-border mail*, (2001) O.J. L 331/40, par. 141 and Commission Decision 1999/243/EC Trans-Atlantic Conference Agreement (TAC), Case COMP/35.134 (OJ L 95, 9.4.1999, p. 1), par. 553.

⁸⁴ Joined Cases 6/73 and 7/73, *Commercial Solvents*, (1974) E.C.R. 223 and Case 311/84, *Télémarketing*, (1985) E.C.R. 3261.

⁸⁵ Liyang Hou, *Refusal to Deal within EU Competition Law*, 2010, p.1. available at: <http://ssrn.com/abstract=1623784>

⁸⁶ Christophe Humpe and Cyril Ritter, *Refusal to Deal – Global Competition Law Centre, Research Paper on the modernization of Art. 82 EC*, Draft version 6 July 2005, p. 5.

⁸⁷ Par. 76 of the Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty (now art. 102 TFEU) to abusive exclusionary conduct by dominant undertakings [2009] OJ C 045/7

⁸⁸ *Ibid.*, Par. 78

consumers.⁸⁹ As for the indispensability of the input, such requirement is conceived in terms of substitutability, in the sense that there is no other input that could be used in order to neutralize the effects arising from the refusal to deal. Consequently, substitutability is missing when the input refused may be obtained through other undertakings. As for the effect of the elimination of competition the Commission maintains that when the indispensability test on the input is successful the negative effect on competitors is in general presumed and connected to the market share that the dominant undertaking holds on the downstream market.⁹⁰ As for the damages to consumers, the Commission shall consider such requirement met any time the supply by the dominant undertaking would have carried less negative effects than those arising from refusal to deal. Although the Commission Guidance paper is not binding, we shall see in the following chapter that the ECJ has constantly followed such criteria when dealing with refusal to deal.

The reason why there are stringent requirements for a refusal to deal to be abusive is that a duty to deal is always seen as an exception to the general principle that “*any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property.*”⁹¹ This is so also in light of the fact that this could be counterproductive in practice: indeed whether any firm could get access to an input through competition law enforcement, this would constitute a disincentive to invest in those inputs as firms would see the benefits of such investments unfairly restricted.⁹² As Humpe and Ritter put it, “*Mandating an obligation to supply invariably undermines the firm’s ability to appropriate some of the rewards of its investment, thus harming the incentive to invest. (...) Moreover, imposing compulsory access too lightly may reduce the incentive of third parties to invest in their own inputs (and thereby create competition at the input level); instead, they would seek access to existing inputs through antitrust enforcement.*”⁹³

⁸⁹ Ibid., par. 81. As we shall see in the next chapter such conditions are constantly employed by the ECJ in its case law.

⁹⁰ Ibid. par. 85.

⁹¹ Ibid., par. 75. See also AG Jacob Opinion in Case C-7/97 ECR I-7791, *Oscar Bronner GmbH & Co, KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, par. 56

⁹² Ariel Katz, Paul-Erik Veel, *Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition and Innovation Policies*, 79 *Antitrust L.J.* 139, 2013.

⁹³ Christophe Humpe and Cyril Ritter, *Refusal to Deal – Global Competition Law Centre, Research Paper on the modernization of Art. 82 EC*, Draft version 6 July 2005, p. 4. This is in line with the view of the Commission, which in its Guidance on art. 102 TFEU enforcement priorities makes it clear, at par. 75, that: “*The existence of such an obligation (to supply) — even for a fair remuneration — may undermine undertakings’ incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that*

But the problem of the so called free rider is not the only critique. A duty to deal on dominant undertakings seems also to be at odds with the general assumption that effective competition entails market operators being rivals and competing on the merits. But if we want firms competing against each other, then, we may not pretend that the most efficient ones (i.e. dominant firms) have to collaborate with those who are less successful, so that the latter may remain in the market and compete with the former. If undertakings are meant to compete on the basis of their performance, then each undertaking should rely exclusively on its own resources and should not be allowed to rely on cooperation by most powerful ones.⁹⁴ In this sense a duty to deal may seem not very compatible with competition based exclusively on the merits.

Although, on the basis of the above, it may seem easy in theory to understand when a refusal to deal may be used to place other firms under a competitive disadvantage, we shall see in the following chapter that this is not always true when it comes to put this into practice. Moreover, as we shall see in the following chapters, there might be cases where refusal to deal may have beneficial effects and consequently it may be beneficial for consumers' welfare rather than harmful.

3.2. The concept of dominance under art. 102 TFEU

We already saw in the first chapter which are the essential elements in order for art. 102 to be applied and also what means being dominant. In particular this last concept is central because in order to understand what constitutes an abuse of dominance it is primarily necessary to have clear in mind what entails being dominant. It was briefly pointed out in the first chapter that the Commission in its Guidance on art. 102 enforcement priorities conceive dominance as substantial market power, i.e. as a position of power in the market that allow the dominant undertaking to enjoy independence from those constraints arising

they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers". Similarly, see also C.I. Nagy, Refusal to Deal and the Doctrine of Essential Facilities in US and EC Competition Law: a Comparative Perspective and a Proposal for a Workable Analytical Framework, 2007, European Law Review, Vol. 32, no. 5, p. 666.

⁹⁴ Dennis W. Carlton, A General Analysis of Exclusionary Conduct and Refusal to Deal- Why Aspen and Kodak Are Misguided, National Bureau of Economic Research, Working paper 8105, available at: <http://www.nber.org/papers/w8105>

from competitors and customers.⁹⁵ Such understanding of dominance is in line with settled case law, where the ECJ made also clear that: “*Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment*”.⁹⁶ It is in fact clear that whether for example I can raise the price of my products without fearing to lose part of my customers, this may be seen as an indicator that I enjoy a privileged position which grants me some degree of autonomy.⁹⁷ In order to understand why independence of one firm from its customers and competitors (including potential ones, i.e. those that may enter the market) is important in this context, it is necessary to make some considerations about the functioning of oligopolistic markets. In an oligopolistic market all the firms active in the market are usually interdependent on each other. This means that to any action of any firm in such market corresponds a reaction by the other market operators and by customers: to put it in other words, the scenario is similar to a chess game with the difference that here the game is not limited to two players but to any player present in the market. Market power itself though is not a reason of concern, as we also have it in collusive oligopolies, where market power is joint: competitive concerns may arise, on the contrary, when a high level of market power is held by one or few jointed firms.⁹⁸ For instance, in the cola beverages market where there are many firms competing with each other, some of them may be able to charge higher prices due to the fact that customers are fond to that brand and appreciate its quality more than other types of colas and they are therefore prone to pay a higher price. But this does not raise concerns because although prices for a certain brand of cola are higher, those firm shall invest a fair part of that income in advertising and other means of differentiation until the profit goes down to a normal rate. When this does not happen and profits remain high, new companies shall enter the market attracted by the

⁹⁵ In economic analysis substantial market power is defined as: “*the ability of a firm to raise prices above the competitive level without attracting new entrants and losing sales to competitors so rapidly that the price increase is unprofitable and must be rescinded.*” See Alison Jones and Brenda Sufrin, op. cited (footnote 29), pag. 285. As pointed out in par. 1.2 of the first chapter, the Commission Guidance on art.102 enforcement priorities does not limit such concept just to the capability to increase prices above the competitive level over a period of time but makes reference to any means of influencing competition to the advantage of the dominant undertaking.

⁹⁶ Case 85/76, *Hoffman-La roche & Co. v. Commission*, [1979] ECR 461, par. 4

⁹⁷ Lang John Temple, *Monopolisation and the Definition of “Abuse” of a Dominant Position Under Article 86 EEC Treaty*, 1989, 16, C.M.L. Rev., p. 351

⁹⁸ G. Niels, H. Jenkins and J. Kavanagh, op cited (footnote 28), p. 96.

profitability of the business and once again profits shall decrease until they reach regular levels.⁹⁹ This is so because demand elasticity shall affect prices for that product: generally therefore when prices reach a certain level market power decrease until the firm is not able to set prices any higher because this would lead to customers' loss and therefore profits shall lower too. To put it in other words, in competitive markets market power is usually a limited resource, in the sense that firms may take advantage of it to some extent but, sooner or later, a moment shall arrive when such power shall suddenly decrease.¹⁰⁰ For instance, if I continuously try to expand my firm's market share in order to monopolize the market, my market power shall be subject to a proportionate reduction due to the fact that monopolization requires huge investments and shall consequently disperse part of my resources and profits. Problems instead arise when there are not many firms competing in the market and one of them enjoys a high level of independence that allows to achieve substantial market power. When the other competitors are not able to exert any influence over such market power it is a sign that economic strength of a firm is considerably high and consequently there are higher chances that the competitive process is being hampered to the detriment of consumers. As already briefly pointed out in the first chapter, the case law of the ECJ has often made use of the expression "to an appreciable (or large) extent" when dealing with the ability of a firm accused of being dominant to behave independently.¹⁰¹ Such capability of acting to an appreciable extent independently has been compared by some to the concept of monopoly power used by antitrust law in the USA¹⁰² and criticized by many commentators. The main critique is that it was not clear what the ECJ means by capability to act to an appreciable extent independently. Furthermore some argued that, besides monopolists in certain types of markets, firms are always influenced by their consumers and are not therefore capable to act independently of them. Lastly, some commentators wondered whether the capability to act independently and to harm the competitive process, by setting prices above the competitive level over a period of time, are two independent requirements or not.¹⁰³ There

⁹⁹ D. Geradin, A. Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics*, 2012, Oxford Competition Law, p. 65.

¹⁰⁰ *Ibid.* p. 67

¹⁰¹ E.g. cases 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, [1979] ECR 461, par. 38 and Case 27/76 *United Brands v Commission* [1978] ECR 207, par. 65.

¹⁰² For instance in AG Fennelly's Opinion delivered in case C-395/96 P *Compagnie Maritime Belge and Dafra-Lines v Commission* [2000] ECR I-1365, the position of the dominant undertaking is conceived as almost leading to a monopoly.

¹⁰³ T. Eilmansberger, 'Dominance—The Lost Child? How the Effects-based Rules Could and Should Change Dominance Analysis', *European Law Journal Special Issue* 15, 2006, p.16.

is a case where the General Court seemed to bind together these two elements.¹⁰⁴ However, although the case law seems to be more concerned about the ability to hinder competition, the two capabilities may be seen as interconnected to each other in the sense that a dominant undertaking is able to hinder competition as long as it enjoys market power.

3.3. The abuse of dominance

The Commission's Guidance on art. 102 TFEU enforcement priorities makes clear that: "*The Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.*"¹⁰⁵ Furthermore, the Commission makes it clear that when it comes to exclusionary conduct, what really matters is the anti-competitive foreclosing effect on competitors realized through any means, which harms consumer welfare.¹⁰⁶ This means that whenever competitors are restricted from entering the market by a dominant undertaking through the use of anti-competitive behavior this shall amount to an abuse, regardless of the type of anti-competitive means undertaken. The focus here is on the fact that the anti-competitive foreclosing effect is very likely to harm consumers and should therefore not be allowed. So if we read this in conjunction with the concept of dominance already examined above, it seems clear that the danger here is that the dominant firm may take advantage of its substantial market power in order to harm the competitive process to the detriment of consumers. This is in line with the case law, where the ECJ described the concept of abuse as: "*An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that*

¹⁰⁴ Namely Case T-321/05, *AstraZeneca v Commission* [2010] ECR II-2805, para. 267.

¹⁰⁵ Par. 23 of the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now art. 102 TFEU) to abusive exclusionary conduct by dominant undertakings [2009] OJ C 045/7

¹⁰⁶ See par. 19 of the Commission's Guidance on art. 102 TFEU enforcement priorities.

*competition.*¹⁰⁷ The idea is that competition should be based exclusively on the merits and therefore any other means to circumvent such principle should be forbidden: this is so because competition on the merits is the normal way a competitive market works and therefore the aim is to avoid recourse to abnormal methods of competition that may be harmful to consumers. For instance, if I want to succeed in a competitive market without cheating, the only way to do so is to be more efficient than my competitors, by for example offering better quality products or cheaper services. But if I was allowed to achieve the same goal without necessarily investing money and resources on being one of the most efficient market operators, someone could argue, why would I bother to do so? Basically what is important in order to guarantee the proper functioning of the market is that every one follows the rules and does not make use of unfair means to beat its competitors. If recourse to other tools different from competition based on market operators' performance is not allowed then the only feasible way to beat competitors is being more efficient: if I am being more efficient than my competitors, this means that I am providing a better service or product and this, even if it could lead some of my competitors to abandon the market, is surely not detrimental to consumers.¹⁰⁸ The ECJ as well stressed the importance that the dominant undertaking does not alter the level of competition by impeding potential competitors to enter the market or force actual competitors to exit. It is also crucial to note that the focus in the case law is mainly on the effect of the alleged anti-competitive behavior on the level of competition, but no importance plays the fact that dominance has been used in practice in order to harm competition.¹⁰⁹ As for the effect of restricting competition, the ECJ made clear that once it has been ascertained that such an effect has been caused it is irrelevant any claim by the dominant undertaking that the goal pursued was different and therefore that it didn't want to harm competition.¹¹⁰ In *Michelin II* the General Court went further and bound together the objective of harming competition with the actual effect, in the sense that whenever it is proved that the dominant firm aimed at restricting competition then the

¹⁰⁷ Case 85/76, *Hoffman-La Roche & Co. v. Commission*, [1979] ECR 461, par. 91. This understanding of abuse of dominance was cited in many other judgements such as Case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission*, par. 70; Case C-62/86, *AKZO v Commission* [1991] ECR I-3359, par. 69; Case C-95/04 P, *British Airways v Commission*, par. 66; C-209/10, *Post Danmark I* EU:C:2012:172, par. 24 and Case C-202/07 P, *France Télécom v Commission*, par. 104

¹⁰⁸ This point was made clear for instance in *Case C-209/10, Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, par. 21. See also Pinar Akman, *The concept of abuse in EU competition law*, Hart Publishing, 2012, p. 135.

¹⁰⁹ Case 6/72, *Continental Can* [1973] ECR 215, par. 26.

¹¹⁰ Case T-301/04, *Clearstream Banking v Commission* [2009] ECR II-3155, par. 142 and 144. See also Case T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389, para. 70.

actual effect may be presumed and therefore must not be necessarily proved.¹¹¹ This led some commentators to describe such cases as “per se” abusive conducts or by object abuses, using the same expression which describes conduct at odds with art. 101 TFEU. However, the latter expression seems more accurate in light of the fact that conduct presumed to be abusive may still be justified. For instance in *Post Denmark v. Konkurrencerådet*, the ECJ held that the abusive behavior may be justified whether the dominant undertaking is successful in proving “*that its conduct is objectively necessary or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.*”¹¹² Both the criteria of objective necessity and efficiency of the conduct are also present in the Commission’s Guidelines on art. 102 TFEU enforcement priorities, but remain quite vague especially when it comes to the former.¹¹³ At the same time though, chances of having a conduct justified in a case concerning abuse of dominance are much lower than cases involving art. 101 TFEU, as there is no such provision as art. 101 (3) under art.102 TFEU. Another possible ground of justification was developed by the ECJ in *United Brands*, where the Court stressed that art. 102 does not impede the dominant undertaking to protect its commercial interests, as long as this is not a means to abuse its dominance.¹¹⁴

¹¹¹ Par. 241, Case T-203/01, *Manufacture Française des Pneumatiques Michelin v Commission* [2003] ECR II-4071.

¹¹² Case C-209/10 *Post Denmark v. Konkurrencerådet* ECLI:EU:C:2012:172, par. 42. See also Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, par. 86 and Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527

¹¹³ Para 29 generally states that: “*the question whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking.*” As for the criterion of necessity par. 30 states that: “*The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competition on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.*” Such paragraph also sets out several conditions that must be fulfilled in order for the conduct to be justified on grounds of efficiencies.

¹¹⁴ Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission* [1978] ECR 207, 1 CMLR 429, par. 189. I shall deal more in detail with this case in the following chapter

CHAPTER 4

4. EU CASE-LAW ON REFUSAL TO DEAL

In this chapter I shall focus on the different cases of refusal to deal the case law has often been called to settle. This shall allow me to underline the special features of each kind of refusal that may raise competitive concerns and possible differences in the approach of the EU institutions, especially when refusal occurs between competitors.¹¹⁵

4.1. Refusal to supply a product or provide a service

One of the most common cases of refusal to deal is refusal to supply a product or provide a service, which commonly occurs in the commercial practice in a supplier/wholesaler business relationship. The analysis of case-law involving refusal to supply shall be divided in three groups:¹¹⁶ in the first two groups I shall deal with cases where refusal occurs between competitors and non-competitors; in the third and fourth group the focus shall fall on the service or product refused rather than on the parties. In particular, in the third group I shall analyze those cases where the product/service requested was originally available on the market but suddenly the dominant undertaking decided to disrupt the supply. In the fourth group I shall instead focus on those cases where the product/service requested has never existed before on the market and therefore was not available to any firm. Basically, in such cases, the dominant undertaking producing the product/service has never externalized it. As far as the first two groups of cases are concerned, it was pointed out in the previous chapter that cases where competitors are involved should be dealt with differently from those involving non-competitors. The main reason which suggest a different treatment is that there are different implications in such type of cases. For instance it seems easier for dominant undertakings to put at a competitive disadvantage firms who are direct rivals in the same market, therefore direct competitors, compared to firms not competing on the market of supply.¹¹⁷ When the dominant seller

¹¹⁵ B. Simon and W. Mike: *The Economics of EC Competition law*, Sweet and Maxwell Limited, 1999, p. 118.

¹¹⁶ Such classification is also suggested by Liyang Hou, *Refusal to Deal within EU Competition Law*, 2010, p. 6 available at: <http://ssrn.com/abstract=1623784>

¹¹⁷ Hans H. Lidgard, Application of Art. 82 EC to Abusive Exclusionary Conduct- Refusal to Supply or to License, in *Europarättslig Tidskrift*, p.702, available at <http://ssrn.com/abstract=1529269>

and the buyer do not compete with each other, the former would normally have an interest to supply the latter, as this shall increase the volume of sales without necessarily losing market power. At the same time though, it is still possible that there are legitimate reasons that might lead the dominant seller to refuse to supply a non-competitor client, for instance when the buyer is a distributor who does not meet specific quality standards. However, risks of abuse are always behind the corner even in such cases, for instance when a dominant wholesaler is willing to sacrifice sales in order to achieve a competitive advantage. Let us now move on to see whether such considerations had some impact on the approach of the ECJ and the EU Commission or not.

4.1.1. Refusal to provide a product/service to non-competitors

Leading cases involving refusal to supply non-competitors¹¹⁸ are for example *United Brands*¹¹⁹ and *GSK AEVE*:¹²⁰ in particular such cases are concerned with refusal to keep supplying long-standing (non-competitors) customers.¹²¹ *United Brands* was a dominant banana wholesaler who decided to stop the supply of bananas to a long-standing Danish customer (retailer) as a punishment for the commercial activities that the latter had with other firms competing with the former. *Glaxomithkline AEVE* was instead a pharmaceutical company supplying medicines protected by exclusive rights to the main wholesalers in Greece, who suddenly decided to limit such supply due to a shortage allegedly caused by parallel trade towards other Member States.¹²² In both cases the court focused on the request for supply and on possible justification of refusal on grounds of commercial interests' protection. As for the former, it made clear that supply to long-standing non-competing customers may be legitimately stopped or reduced only when the order is "out of the ordinary"¹²³. As for justification, although in theory refusal may be justified by virtue of commercial interests' protection, the court stressed that in the cases at stake refusal was not proportionate to the risks deriving from the request for

¹¹⁸ Also referred to as vertical relations along the supply chain.

¹¹⁹ Case C-27/76, *United Brands vs Commission* [1978] ECR 207, [1978] 1 CMLR 429

¹²⁰ Joined Cases C-468-478/06, *Sot. Lelos kai Sia EE and others vs. GSK AEVE*, 16 September 2008, ECR [2008] I-7139.

¹²¹ B. Sher, *The Last of the Steam- Powered Trains: Modernising Article 82*, 25, 2004, E.C.L.R., p. 243

¹²² Par. 11, *Joined Cases C-468-478/06*, cited supra.

¹²³ Case *United Brands vs Commission*, par. 183

supply.¹²⁴ In fact, in both the mentioned cases refusal was deemed to be aimed at strengthening the position of the dominant wholesaler and therefore amounted to an abuse of dominance. In *GSK AEVE* the court also tried to shed some light on the concept of orders out of the ordinary by reference to “*quantities which are out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in that Member State.*”¹²⁵ In both cases the abuse was consequence of the fact that refusal or reduction of supply had caused serious harm to the customers. It is important to notice that the circumstance that in *United Brands* the refused customer could have been supplied by other firms competing with UBC was irrelevant in the view of the Court. This is a clear sign that refusal may be abusive even in the case where “*an interruption of supply would seriously disrupt competition between the undertaking and the customer on a downstream market or between the undertaking and its actual or potential competitors on the market of supply.*”¹²⁶ It is also important to notice that when it comes to non-competing customers the ECJ made also a distinction between long-standing and occasional customer, allowing more flexibility in cases involving the latter. If we take into account the BP case¹²⁷ for instance, it would come as a surprise the decision to consider legitimate the reduction of oil supply by a dominant undertaking (BP) to one of its customers only (ABG) due to a shortage, while keeping supply regular to others: the different treatment was indeed justified on appeal by the court in light of the fact that ABG was not a long-standing client, like the others that saw their level of supply maintained at a steady level. Deficiency in the availability of oil was enough to justify the decision to reduce supply to occasional clients only, in order to have enough oil to regularly supply firms bound to the dominant undertaking by long business relationships.¹²⁸ Surprisingly therefore, although ABG had put BP in a position of competitive disadvantage based on the discriminatory treatment compared to its competitors, the court maintained that this was justified by the need to keep the supply of long-standing competitors steady and therefore the refusal was not abusive.

¹²⁴ On justification based on commercial interests see also A. Albers-Llorens, *Refusal to Deal and Objective Justification in EC Competition Law in the Cambridge Law Journal*, Vol. 65, no. 1, 2006, Cambridge University Press.

¹²⁵ par. 76, Joined Cases C-468-478/06, *Sot. Lelos kai Sia EE and others vs. GSK AEVE*, 16 September 2008, ECR [2008] I-7139

¹²⁶ Par. 66 of AG Jacobs opinion in Case C 53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) V. GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609.

¹²⁷ Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, 29 June 1978, ECR 1513.

¹²⁸ *Ibid* par. 32 and 33.

From the above I can conclude by saying that in such kind of relationship between non competitors there are mainly three elements worth to take into account for a finding of abuse involving refusal to supply: firstly, refusal causes damages to the customer whose supply has been refused¹²⁹ and, in turn, to competition in general; secondly refusal may be justified by the goal to pursue commercial interests, as long as this is proportionate to the risks that would derive if the dominant undertaking would agree to supply the customer; thirdly refusal is usually lawful when it comes to requests out of the ordinary, i.e. when the order is disproportionate in relation to the quantity normally sold. Due to its potential effect of eliminating trading parties and to harm competition, refusal to supply in such cases shall be deemed as a means of strengthening dominance on the market.

4.1.2. Refusal to provide a product/service to competitors

Although it was pointed out above that there are legitimate reasons suggesting a different treatment of such cases,¹³⁰ the case law adopted an approach similar to cases involving refusal to supply between non-competing firms. For example, *British Midland*¹³¹ was a new airline competing with a dominant Irish company (Aer Lingus) in the market for flights from London to Dublin: the issue arising in the case concerned the refusal of the latter to provide the former with an interlinking service, namely the possibility to sell services provided by other partners. Aer Lingus had already concluded agreements with other competitors for the provision of such kind of service and British Midland was the only competitor excluded. Aer Lingus tried to justify refusal on grounds of possible market shares loss but the court held nonetheless that such discrimination would have placed British Midland at a competitive disadvantage, causing it damages. The court deemed irrelevant that British Midland gained market share despite refusal because in the opinion of the court the firm could have gained greater benefits if the service was provided. Refusal to provide interlinking was deemed abusive as the court held it was aimed at reducing competition and therefore amounted to an abuse of dominance.

¹²⁹ This does not necessarily require the elimination of all competition but the potential effect of elimination of a trading partner.

¹³⁰ Such view is shared also by R. Subiotto and R. O' Donoghue, "Defining the Scope of the Duty of Dominant Firms to Deal with Existing customers under Article 82 EC" [2003], E.C.L.R., issue 12, Sweet & Maxwell Limited (and Contributors), p. 685

¹³¹ 92/213/EEC: Commission Decision of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (IV/33.544, *British Midland v. Aer Lingus*), OJ L 096/34.

Surprisingly, therefore, the fact that the service was requested by a competitor did not have much weight in the view of the Commission, which suggests an equal treatment with cases involving non-competitors. Another similar case involving refusal to provide a service is *London European/Sabena*.¹³² The case concerned refusal by Sabena to allow its competitor London European to access a computerized system owned by the former which simplified reservation of flights and consultation of fares of airline companies listed in that system. London European operated flights from Luton to Amsterdam whereas Sabena was a dominant undertaking operating flights from London to Amsterdam. The two companies were not directly competing in the same market, as they were providing flights covering different routes: however Luton was quite close to London.¹³³ The two companies were therefore potential competitors but flights operated by London European were much cheaper than those operated by Sabena. In order to reduce competitive constraints deriving from London European, Sabena proposed to grant the former access to the system only under a commitment to raise fares and to give the ground handling contract for London European aircrafts to Sabena.¹³⁴ The system owned by Sabena was not the only system available as there were other companies providing similar systems. Moreover, Sabena was providing access to its system to other airline companies. The Commission deemed refusal by Sabena to be abusive, as the conditions established to grant London European access to the system could not be justified.

I may conclude by saying that there is no relevant difference in the approach that EU institutions take when dealing with refusal to supply among competitors compared to that regarding the same matter among non-competitors. Also when competitors are involved, refusal by the dominant undertaking to supply/provide a product/service may have the same effect of placing them under a competitive disadvantage, causing them harm.¹³⁵ The coherent approach in relation to these two different type of relationships is also confirmed by the fact that in both cases examined in this section reference is made to *United Brands*. The same findings underlined at the end of the previous section are therefore valid also when it comes to competitors.

¹³² 88/589/EEC: Commission Decision of 4 November 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/32.318, London European - Sabena), OJ L 317/47.

¹³³ The distance between the two airports was approximately 50 kilometer.

¹³⁴ *Ibid*, par. 2.

¹³⁵ Liyang Hou, *op. cited* (footnote 116), p. 6

4.1.3. Refusal to provide a product/service available on the market

As mentioned earlier in this group of cases the focus switch from the subjects to the object of refusal, in order to see whether the fact that a product or service that was regularly supplied in the past is suddenly reserved to the dominant undertaking production, has some relevance in the case law or not. It must be noted here that this type of cases is slightly different from the previous ones because here we have no discrimination that may put some firm at a competitive disadvantage with its competitors, as the service or product is not provided or supplied to anyone but rather used by the dominant undertaking exclusively. Leading cases in this line of case law are *Commercial Solvents*¹³⁶ and *Telemarketing*.¹³⁷ *Commercial Solvents* (CS) was a quasi-monopolist manufacturer of raw materials (aminobutanol and nitropropane), bought by other undertakings to manufacture finished products such as ethambutol, an anti-tuberculosis drug. When CS decided to stop the supply of these raw materials to any company in order to manufacture the finished product itself, the case was brought before the ECJ by one of its biggest customers (Zoja) claiming an abuse of dominance. The court made clear that: “ *an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its customers) act in such a way as to eliminate their competition (...). (...) It follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position.*”¹³⁸ CS tried to rely on the fact that Zoja had cancelled a big order of aminobutanol in order to justify the refusal but the argument was rejected and therefore, without a valid justification, the refusal amounted to an abuse of dominance. The peculiarity of such case lies in the fact that the product requested was a raw material but most importantly also that refusal to supply Zoja would have amounted to the elimination of all competition. The approach employed in *Commercial Solvents* was reiterated and

¹³⁶ Joined Cases C-6-7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities*, [1974] ECR 223

¹³⁷Case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, [1985] ECR 3261.

¹³⁸ par. 25 of joined Cases C-6-7/73, cited supra (footnote 135)

developed in *Telemarketing*. In particular, in this later case the court introduced the indispensability test and made clear that the product/service refused and the activity the refused firm wants to engage in must be on two different markets.¹³⁹ The case is concerned with a dispute between, on the one hand, Compagnie luxembourgeoise and its subsidiary Information Publicite and, on the other hand, Centre Belge. Compagnie luxembourgeoise was a monopolist engaged in tv advertising and running the RTL tv station; Information Publicite was a subsidiary of Compagnie luxembourgeoise and RTL's exclusive advertising agent, whereas Centre Belge was a broadcasting company which held exclusive rights to engage in telemarketing activities on RTL tv station in Belgium.¹⁴⁰ In its telemarketing activities Centre Belge used to display its own telephone number: but when the agreement between Compagnie luxembourgeoise and Centre Belge expired the former refused to provide advertising services unless the latter would accept to use in its tv commercials Information Publicite's telephone number.¹⁴¹ Centre Belge was therefore seeking an injunction against such refusal. The problem here was mainly to ascertain whether the fact that Compagnie luxembourgeoise reserved tv advertising for its subsidiary may amount to an abuse of dominance. In particular the problem was to clarify whether telemarketing and broadcasting were two separate activities in different markets and whether such activities were interconnected, in the sense that the former is indispensable for carrying out the latter. The answer was positive and therefore the condition imposed on Centre Belge to use Information Publicite's telephone number amounted to an abuse. Once again the court took into account that refusal would have eliminated all competition from Centre Belge, as the dominant undertaking had a legal monopoly on tv advertising. The court made also clear that refusal could have been justified "*by technical or commercial requirements*"¹⁴² concerning the service, but this was not proved in the case.

In conclusion, when it comes to refusal to supply a product or provide a service available on the market to third parties, the approach seems to be stricter compared to the other two lines of cases analyzed above. In case of refusal to supply/provide a product/service to third parties, in fact, the case-law established stringent requirements for a finding of abuse that may be summed up as follows: the undertaking refusing the supply is dominant in the market for the primary product and there is an indispensability relationship between

¹³⁹ Liyang Hou, *op. cited supra* (footnote 116), p. 11.

¹⁴⁰ Par. 2, Case 311/84, *cited supra* (footnote 136)

¹⁴¹ *Ibid.*, par. 5.

¹⁴² *Ibid.*, par. 26.

the former and the ancillary product.¹⁴³ Also the possibility for the refusal to be justified seems to be more difficult when it comes to refusal to third parties as the court subject justification to technical and commercial requirements, which is a vague concept concerning the service/product refused not clearly defined.

4.1.4. Refusal to provide a product/service not available on the market.

In this section the analysis shifts towards products or services for which there is no market because the product/service refused has always been used exclusively by the dominant undertaking which produces it.¹⁴⁴ A duty to deal in such cases would have the effect to externalize the product or service, creating a new market.¹⁴⁵ One of the main cases concerned with such issue is for example *Bronner*,¹⁴⁶ an undertaking engaged in the newspaper market which sought access to a home-delivery scheme operated by Mediaprint, a firm dominant in the same market in the same country. The home-delivery service operated by Mediaprint consisted in the daily delivery of its newspaper to subscribers. The service was reserved to Mediaprint's newspaper only and to another newspaper produced by a company which entrusted the former also with printing and distribution.¹⁴⁷ Except these two undertakings, the home-delivery service had never been available to other firms. When Mediaprint refused to provide the service to Bronner, the latter filed a complaint and the case was referred to the ECJ for a preliminary ruling. Bronner claimed that access to the scheme was indispensable because there were no other valid option having the same advantages of the home-delivery service: in particular Bronner maintained in fact that delivery by post would take longer and that the establishment of its own home-delivery scheme would not be profitable as a consequence of the small number of subscribers. Mediaprint tried to justify the fact that the home-delivery service was provided to another company by claiming that in such case the

¹⁴³ Liyang Hou, op. cited (footnote 116) p. 9

¹⁴⁴ Ibid., p. 13.

¹⁴⁵ C. Ritter, "Refusal to Deal and "Essential Facilities": Does Intellectual Property Require Special Deference Compared to Tangible Property?, *World Competition: Law and Economics Review*, Vol. 28, n. 3, 2005 available at <http://ssrn.com/abstract=726683>

¹⁴⁶ Case C-7/97 *Oscar Bronner GmbH & Co, KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* (1998) ECR I-7791.

¹⁴⁷ Ibid, par. 9.

service included other activities and was not therefore comparable to the service requested by Bronner, which was more limited. The court came to the conclusion that the refusal did not amount to an abuse of dominance because the service requested by the refused undertaking did not pass the indispensability test. The court held that Bronner had other options to distribute its newspaper and the fact that such other services were less convenient could not have a weight in the assessment of the indispensability of the home-delivery scheme. Bronner could have established its own home-delivery scheme or could have distributed its newspaper through stores or by post. Similarly to the group of cases examined above, the court in Bronner focused on the issue whether home-delivery service was in a separate market compared to the market for newspapers and whether Mediaprint was dominant in that market. The criteria established in Bronner to ascertain whether refusal to supply is abusive may be broken down as follows: the product or service refused must be in a separate market than the product/service the refused undertaking wants to provide¹⁴⁸; the requested firm is dominant in the market for the requested product; the refused service/product is indispensable in order to allow the requesting firm to provide another service/product and, lastly, refusal may have the effect of eliminating all competition from the refused firm. If we compare such requirements with those established under the previous line of cases we may notice they are very similar. It is interesting to note here that in the judgement both the parties tried to rely on to the so called essential facility doctrine established in *Magill*,¹⁴⁹ that shall be dealt with in the following section where I shall examine refusal to license.

Another relevant case is *Info-Lab Ricoh*,¹⁵⁰ concerning refusal by a dominant undertaking manufacturing photocopiers (Ricoh) to supply empty cartridges to a firm manufacturing toner (Info-Lab). Ricoh tried to justify refusal on the basis of the argument that otherwise the other firm could compete with the former on the market concerning the sale of filled cartridges but this was not possible in practice as Ricoh held IP rights on those cartridges and Info-lab did not ask for a license. Once again the Commission had to assess whether there was a separate market for filled and empty cartridges and whether Ricoh was

¹⁴⁸ This also entails that the two services are totally independent and may be therefore provided separately from each other.

¹⁴⁹ Joined Cases C-241/91 and C-242/91 P RTE and ITP v. Commission ECR I-743. See also Commission decision of 21 December 2003, *Sea Containers v. Stena Sealink O.J. L 15/8, para. 66*, where such doctrine is described as follow: “An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i.e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met.”

¹⁵⁰Case No IV/E 2/36.431, Info-Lab/Ricoh

dominant in the market for filled cartridges. The Commission maintained that there was no demand for empty cartridges and therefore no market for such products was conceivable. Also the assessment of dominance had a negative result, notwithstanding the IP rights Ricoh owned on the cartridges. Refusal therefore was deemed legitimate although the Commission did not assess whether the absence of a market for empty cartridges could be a consequence of refusal to supply by Ricoh.

I may conclude by saying that the stricter approach of EU institutions in this line of cases compared to the cases examined in the previous section may be seen in light of the fact that it seems more difficult to reconcile with the principle of free competition a duty to provide a product/service that has never been provided at all. In fact, while the fact that the product or service was originally provided by the dominant undertaking and subsequently disrupted may raise legitimate expectations in other firms, the same does not hold true when the product or service has always been reserved by the producer for its own use.

4.2. Refusal to license IP rights

This section is concerned with the case-law on refusal to license IP rights and it is mainly aimed at underlying whether there is or there should be an equal treatment between tangible products and intangible property rights. Some commentators in fact suggest more stringent requirements for a finding of an abuse of dominance in cases involving refusal to license IP rights, in light of the fact that one of the objectives of IP law is indeed to protect the owner against unfair competition and therefore such rights should constitute a legitimate justification for a refusal.¹⁵¹ Other arguments usually raised concern the fact that IP rights require greater investments and innovation compared to tangible products and are subject to limited protection over time and therefore an obligation to license would be unsound.¹⁵² These arguments seems to be welcomed by the case law, also, a

¹⁵¹ C. Humpe and C. Ritter, op. cited (footnote 99), p. 10

¹⁵² Such ideas are also reflected in A.G. Jacobs opinion in Case C-7/97 *Oscar Bronner GmbH & Co, KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* (1998) ECR I-7791, par. 62 where it is made clear that: “*In assessing such conflicting interests particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to license intellectual property rights. Where such exclusive rights are granted for a limited period, that in itself involves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity. It is therefore with good reason that the refusal to license does not of itself, in the absence of other factors, constitute an abuse.*”

duty to license is not limited to the requirements established for tangible property, such as indispensability and the elimination of competition, but there is something else that must be proved. In particular the foreclosure effect of refusal seems to be broader in the sense that refusal to license must not only exclude competition but also impede the development of new products.¹⁵³ At the same time there are though arguments suggesting a more coherent approach between the two types of assets: for instance some have argued that it is in the very essence of property rights the objective to exclude others from the enjoyment of the property, regardless of whether it is tangible or intangible. Therefore, there would be no reason justifying a different treatment. Secondly, some have argued that a different treatment could carry at the same time side effects in the sense that dominant undertakings could take advantage of such a stronger protection of IP rights by combining in their tangible products components covered by IP rights.¹⁵⁴

One of the leading cases on refusal to license is the already mentioned *Magill* case.¹⁵⁵ The case was concerned with a refusal to license copyrights for the publication of weekly TV guides in North Ireland, covering programs broadcasted by all the main TV stations. In fact all the main TV station from North Ireland used to publish TV guides, which included their own programs only, but no comprehensive TV guide was available at the time. There were newspapers and other third parties allowed to publish daily TV guides but no firm was allowed to publish program listings for the entire week. Magill tried to obtain a license to publish weekly listings of TV programs, without success. Before arriving to the ECJ, the case was first examined by the Commission and the General Court. As usual the first problem was to define the market where the refusing undertaking could be found to be dominant. Contrary to what the TV stations involved in the proceeding claimed, the Court held that weekly comprehensive TV guides were part of a separate market from that of general TV programs information: this was so because the same market was also present in other countries and most of all because weekly TV guides allowed the public to have a broader knowledge of TV programs.¹⁵⁶ The Court also came to the conclusion that the TV stations were monopolists in such market (weekly TV guides), in light of the protection guaranteed by copyrights. In the assessment of an alleged abuse of dominance the Court made use of the same criteria established under

¹⁵³ Ibid. p

¹⁵⁴ J. MacKie-Mason “Antitrust Immunity for Refusals to Deal in (Intellectual) Property Is a Slippery Slope”, *The Antitrust Source*, July 2002, p.5.

¹⁵⁵ See Footnote 120

¹⁵⁶ B. Doherty, Just What are Essential Facilities?, 2001, C.M.L. Rev. (Common Market Law Review), Kluwer Law International p. 395.

Bronner but also added a further requirement, namely that refusal to license would have the effect of “preventing the emergence on the market of a new product, namely a general television magazine likely to compete with their own magazines”¹⁵⁷ However, the Court in *Magill* left unresolved the question whether such further requirement was meant to be additional to the indispensability test or rather an alternative to it.¹⁵⁸ The problem was then resolved later in *Ladbroke*¹⁵⁹ where the GC made clear that: “The refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers.”¹⁶⁰ The use of the term “either” seems to suggest that the court conceived such condition not in addition to the indispensability test but rather in alternative to it. However, such claim was not expressly tackled until in cases such as *IMS Health*¹⁶¹ and *Microsoft*¹⁶² that assisted to a change in this regard. It is in particular in *Microsoft* where the court expressly considered the prevention of a new product as a further condition to the indispensability, the elimination of competition and the absence of justification for a finding of an abuse of dominance. But *Microsoft* was also very important because the court changed its approach on the prevented new product, reversing its view taken in all the main earlier cases where it held that the prevented product had to be a new product.¹⁶³ Surprisingly, in *Microsoft* it was held that it is enough for the refusal to license to avoid technical improvements, without even clearly defining such expression. Finally, *Microsoft* also innovated on the requirement of elimination of competition from the requesting undertaking as it focused exclusively on actual competitors, keeping out of the assessment potential competition.¹⁶⁴

5. Conclusion.

¹⁵⁷ Par. 29 of Joined Cases C-241/91 and C-242/91 P *RTE and ITP v. Commission* [1995] ECR I-743

¹⁵⁸ Liyang Hou, op. cited (footnote 116), p. 22.

¹⁵⁹ Case T-504/93, *Tiercé Ladbroke SA v Commission of the European Communities*, [1997] ECR II-923.

¹⁶⁰ *Ibid.* par. 131, case T-504/93

¹⁶¹ Case C-418/01 *IMS Health GmbH & Co. OHG and NDC Health GmbH & Co. KG* [2004] ECR I-5039

¹⁶² Case T-201/04 *Microsoft v. Commission* [2004] ECR II-4463

¹⁶³ Liyang Hou, op. cited supra (footnote 116), p. 29.

¹⁶⁴ M. Lamping, *Refusal to License as an Abuse of Market Dominance- from Commercial Solvents to Microsoft*, 6, 2015, published in R.M. Hilty & K.C. Liu, *Compulsory Licensing: Practical Experiences and Ways Forward*. Berlin /Heidelberg, Springer, available at: <http://ssrn.com/abstract=2561361>

On the basis of the findings deriving from the analysis of the ECJ and Commission's case law, it is possible to draw some conclusions and answer those questions asked in the first chapter. It is indeed quite evident from what has been outlined above, that freedom of contract is a basic and general principle both under EU law and national legal systems that enjoys particular importance and, as such, restrictions of such freedom must be limited to those cases where no other means to tackle an abuse of dominance are available. There are evident traces of such view not only in the AG opinions¹⁶⁵ and the case law in general,¹⁶⁶ but also in legal documents such as the Guidance paper on enforcement priorities.¹⁶⁷ As a clear sign of this, for example, the GC in *Automec* held that whenever there are other remedies to end an infringement of EU law, recourse to a "duty to enter into an agreement" remedy must be avoided, as this would constitute a disproportionate and unjustified restriction to a fundamental principle. Another clear sign of this approach are all the stringent requirements that the case law has developed for a finding of abuse to justify a duty to deal. Depending on the case at stake, in fact, a duty to deal may be imposed only after refusal has passed demanding tests such as the indispensability test, the elimination of competition and harm to consumers test. Furthermore, in some cases, there might be still room for justification of refusal to deal on grounds of commercial strategy. Therefore, the answer to the question incorporated into the title of this work is positive, but with a qualification. Dominant undertakings enjoy more limited contractual freedom only in well-defined and circumscribed cases, where the effect of the abuse may not be tackled otherwise. In this sense, restriction of contractual freedom of dominant undertakings must always be considered as a last resort rather than an ordinary weapon in the hand of competitors or EU institutions. In other words, recourse to a duty to deal represents the exception to the general principle that any undertaking is free to decide

¹⁶⁵ AG Jacobs in his Opinion in Case C-7/97 ECR I-7791, *Oscar Bronner GmbH & Co, KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, par. 56: "(...) the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification." See also Opinion of AG Kokott in Case C-441/07 P *European Commission v Alrosa Company Ltd*. ECR I-05949, para 225: "Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is also inseparably linked to the freedom to conduct a business. In a Community which must observe the principle of an open market economy with free competition contractual freedom must be guaranteed"

¹⁶⁶ Case C-240/97 *Spain V. Commission* (1999) ECR I-6571, par. 99.

¹⁶⁷ Par. 75 of the Guidance paper on Commission's enforcement priorities recognize that: "(...) generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration." See also par. 62 of the Communication to the European Parliament and the Council on European Contract Law OJ 1994 C 205., where it is made clear that: "(...) In this context (common frame of reference) contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons."

whether to enter or not into an agreement and to choose how to dispose of its products or services. The reason why, under exceptional circumstances, dominant undertakings may find their contractual freedom restricted could seem at first sight unjustified. In a market where free competition is guaranteed, someone could argue, firms should be treated equally and have equal rights. But such reasoning would be flawed on the grounds that we lose sight of the circumstance that some firms may be in a competitive advantage compared to others and therefore, although this might be the consequence of better performance, it could seem nonetheless justified the imposition of a special responsibility upon them, entailing special duties. It is indeed the same principle that applies also to sport competitions: the coach of the team always expects sometime more from an exceptionally gifted player. Similarly, the ECJ made clear in its case law that dominance entails “*a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.*”¹⁶⁸ Whether undertakings are not equal, then, the imposition of special limitations on some firms just on the basis of their dominance is based on principle. This is also coherent with the argument that competition law does not protect competitors but rather consumers:¹⁶⁹ in other words, the imposition of special duties upon dominant undertakings is not a mean to favor non-dominant undertakings but a remedy to make sure that stronger firms do not take advantage of their privileged position to the detriment of consumers. This in turn is justified by the need for social justice, i.e. the need to avoid that everyone’s welfare is sacrificed in light of the economic profit of few. It is evident that commercial interests of dominant undertakings pursued through abnormal methods of competition may not prevail over the need for protection of the weaker ones. As far as the circumstances under which a refusal to deal may be found to be abusive, there is no universal formula that may be used in any case as the case law adopted a fact-based approach, i.e. always took into account the peculiarities of the case at stake. As we have seen in the previous chapter, requirements are different depending on many factors that may play an important role on the finding of abuse.¹⁷⁰ Generally speaking, a sign of a potentially abusive refusal to deal is that refusal concerns a product or service which is necessary to compete with the refusing dominant undertaking: in such a case indeed the foreclosing effect is quite evident and it may be therefore difficult for the dominant undertaking to justify refusal. Such a refusal is indeed

¹⁶⁸ Case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, par. 57. See also Case T-321/05 *Astra Zeneca AB and AstraZeneca plc v. Commission* [2010] ECR II-2805, par. 355.

¹⁶⁹ R. Whish and D. Bailey, *op. cited* (footnote 7), p. 205

¹⁷⁰ I.e. when refusal to supply concerns both competitors and non-competitors.

likely to harm competition. However, as we have seen, indispensability itself, in some cases, did not prove to be decisive as the court also took into account whether the refused undertaking could have replicated the service or product in question. The suggestion is therefore to employ the requirements outlined in the previous sections with an eye on the specific circumstances of the case at stake, as we have seen requirements themselves may be different depending on the parties or the object of the dispute and considering the features of the market at stake. In particular, as far as refusal to supply is concerned, we have seen that when it comes to horizontal and vertical business relationships an abuse of dominance is mainly found when refusal is capable of harming the refused undertaking and eliminating competition, in the absence of valid grounds for justification. As it was pointed out my main criticism here is that perhaps it would be appropriate to tackle such cases using different requirements as the two kinds of situation are not completely comparable with each other. In fact, although dealing with a non-competitor may not bear direct and significant consequences for the dominant undertaking in term of duty, this might not be the case when it comes to direct competitors. Indeed, I believe in such cases dealing with competitors may have the consequence of depriving the dominant undertaking on which the duty has been imposed of a competitive advantage earned through better performance on the market. In this regard, it is my opinion that competition on the merits is hardly compatible with a duty to deal with competitors, although limited to some stringent requirements.

As far as refusal to supply a product available on the market, we have seen that in such cases usually the dominant undertaking tries to disrupt the supply of a product/service that was previously supplied, to access a so called neighbouring (or downstream) market. Here the case law developed further requirements such as the indispensability of the product/service whose supply is disrupted in order to access a downstream market and the position of dominance of the refusing firm on the upstream market. Such requirements, together with the elimination of competition on the part of the refusing undertaking, makes a finding of abusive refusal to deal more difficult. In my opinion the approach the case law took to tackle such line of cases is convincing: indeed when a product or service is provided by the dominant undertaking and subsequently disrupted for no objective reason, legitimate expectations of the refused firm are frustrated without justification. Furthermore, in presence of a link between the primary input and the derivative input it is quite obvious that refusal, absent a valid justification, aims at foreclosing access to the derivative market.

As far as refusal to supply a product/service never provided to any firm and therefore not available to anyone on the market, also here the stringent approach requiring the same requirements of indispensability, harm to the refused undertaking and not justifiable nature of the refusal seems convincing. In particular, I believe it is convenient to have a stricter approach on the indispensability test in such cases, as the Court made clear in *Bronner*. It is indeed understandable the need to circumscribe a prohibition of refusal to deal to those cases where interdependence between the refused product/service and the product/service to be performed by the refused firm is particularly strong: in fact in this line of cases there is no discrimination between firms and no breach of legitimate expectations to obtain a supply. Since the dominant undertaking produces the product/service for its own use it would be quite arbitrary to oblige it to externalize it, as any firm is in principle free to dispose freely of its property¹⁷¹ and this holds true especially when the product/service was not meant from the beginning for the market. Furthermore, as already seen, a duty to deal in such cases would constitute a strong deterrent for dominant firms to produce their own inputs, if other firms were allowed to free ride through competition law enforcement.

Lastly, as far as refusal to license is concerned, there is some criticism that should be addressed in order to meet the need for legal certainty, when dealing with such cases. In particular, it would be appropriate to clarify whether the indispensability of the license is required in addition to the requirement of prevention of a new market for a new product, as established in *Microsoft*, or rather in substitution to the latter, as it seemed to be suggested in earlier cases such as *Ladbroke*. A clarification concerning the requirement of prevention of a new market also seems desirable, in order to understand whether this means that the license is necessary to produce a totally new product or whether this also includes simple improvements on the refused product, as suggested in *Microsoft*. Finally, it would also be desirable, in my opinion, to make clear whether the elimination of competition on the part of the refusing undertaking requires to take into account also potential competitors or exclusively actual competitors, as maintained in *Microsoft*.

I would like to finish this work with a fundamental yet unresolved question, provoking further thoughts on the subject under review. Is prohibition of refusal to deal really desirable even in the presence of those stringent requirements developed by the case law? Is there any chance that competition law enforcement, although aiming at improving competition on the market and consumer welfare, may end up having nonetheless the

¹⁷¹ par. 75 of the Guidance paper on Commission enforcement priorities.

opposite effect? As some economists pointed out in fact, there might be cases where a refusal to deal may have beneficial effects on the market and on competition in general. In particular it has been shown that, from an economic perspective, the cases where refusal to deal is likely to harm competition are, contrary to what is generally believed by the law, rare.¹⁷² In particular, the main criticism is that, firstly, where there are no relevant scale effects it is unlikely that refusal to deal will harm competitors and, secondly, that it is often difficult to distinguish cases where such refusal harms competitors from cases where this has also actual consequences on competition.¹⁷³ If what economists maintain is true and there are risks to involuntarily harm competition by prohibiting a dominant firm to refuse to deal, then my final point here is: should we have a duty to deal at all? These broader questions could provide useful ground for future research.

¹⁷² Dennis W. Carlton, A General Analysis of Exclusionary Conduct and Refusal to Deal- Why Aspen and Kodak Are Misguided, National Bureau of Economic Research, Working paper 8105, p. 30, available at: <http://www.nber.org/papers/w8105>

¹⁷³ Ibid. pag. 21

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