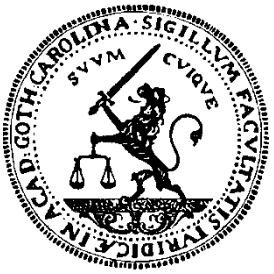

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Who Decides the Rules of the Market?

On the Application of Article 102 TFEU to Esports Tournaments

JURM02 Graduate thesis

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Table of contents

Summary

With intellectual property rights and ecosystems, publishers can decide who enters the market. This leads to competition law concerns when the publisher is in some cases also vertically integrated. Vertical integration is part of a publisher's business strategy, but at the same time it means that it competes in the same market as tournament organisers as well as in the market for publishers who grant licenses. It gives the publisher an advantageous position. In relation to competition law, the question thus arises as to how art. 102 TFEU is applied to the publisher's choices of business strategies consisting of which tournament organisers are granted a license.

The question is asked based on the application of competition law in a digital market and the structure of Esports as a digital ecosystem. The essay finds that Esports' characteristic features such as vertical integration and intellectual property rights can influence competition. The focus of the paper is to consider whether a refusal to license can occur, and, consequently, that the publisher can be obliged to grant a license.

There are several factors to consider. The starting point is an analysis of the competitive effect as well as economic factors. To begin with, however, it is important to look at the relevant market. Esports is largely fragmented, and it is therefore not certain that there is any dominance. Especially since a dominance in the market for publishers has not existed. In addition, the EU wants to promote a market in Esports and over-regulation could counteract this if it compromises with intellectual property rights.

Based on several aspects, there are factors that show that intellectual property rights and the right to decide over one's property weigh heavily and could not be considered proportionate to a requirement for a license.

Nevertheless, depending on business strategies and the decisions of the publisher there may still be conducts which can be challenged with competition law and specifically art. 102 TFEU. This is due to the vertical integration on the Esports market and the publisher's exclusive rights to the video game which should be taken into consideration.

Sammanfattning

Med immaterialrätter och ekosystem kan spelutgivare bestämma vilka som äntrar marknaden. Det medför konkurrensrättsliga frågeställningar när spelutgivaren i vissa fall dessutom är vertikalt integrerad. Vertikal integration är en del av en spelutgivares affärsstrategi, men samtidigt innebär det att den konkurrerar dels på samma marknad som organisatörer av turneringar, dels på marknaden för spelutgivare som beviljar licenser. Det ger spelutgivaren en fördelaktig position. I relation till konkurrensrätt uppstår därmed frågan om hur art. 102 FEUF appliceras på spelutgivarens affärsstrategiska val bestående av vilka turneringsorganisatörer som beviljas licens.

Frågan ställs med utgångspunkt i konkurrensrättens applicering på en digital marknad samt Esportens struktur som ett digitalt ekosystem. Uppsatsen finner att Esportens karaktäristiska drag såsom vertikal integration och immaterialrätter kan påverka konkurrensen. Fokus för uppsatsen ligger på att beakta huruvida det kan uppstå en licensvägran och spelutgivaren kan krävas på beviljandet av en licens.

Det finns flera faktorer att beakta. Utgångspunkt sker i en analys av den konkurrensrättsliga effekten samt ekonomiska faktorer. Till att börja med är det dock av vikt att se till den relevanta marknaden. Esporten är till stor del fragmenterad och det är därför inte med säkerhet som det kan konstateras att någon dominans föreligger. Särskilt eftersom en dominans i marknaden för spelutgivare inte har funnits. Därutöver vill EU främja en marknad inom Esporten och en överreglering skulle kunna motverka det om det kompromissar med immateriella rättigheter.

Baserat på flera aspekter finns det faktorer som visar på att immateriella rättigheter och rätten att bestämma över sin egendom väger starkt och skulle inte kunna anses stå i proportion till ett krav på licens.

Det kan dock även bero på de affärsmodeller samt strategiska beslut som spelutgivaren har tagit och i vilket syfte där beteenden som kan bli ifrågasatta baserat på konkurrensrätt och specifikt art. 102 FEUF. På grund av dess vertikala integration har spelutgivaren en exklusiv rätt till datorspelet och detta bör tas i beaktning.

Preface

Med den här uppsatsen går min tid på juristprogrammet nu mot sitt slut. Det är en tid som jag med glädje kommer se tillbaka på även om jag kanske stundvis tvivlade på det. Dagar fulla av studier och stress har blandats med att träffa nya vänner och uppleva nya platser. Det är på grund av alla runt omkring mig som dessa år har blivit några av de bästa och det har varit just under studierna som jag fått många av mina bästa minnen. Det har varit allt från plugg på Espresso House i Mölnlycke, Tryckeriet i Lund och såväl en källare under föreläsningssalar som stadshuset i Gent. Därför vill jag tacka alla som jag fått lära känna på dessa platser och de som stöttat mig redan sedan innan och fortsatt genom telefonsamtal. Varje samtal, sms och audio message har varit en betydande anledning till att juristprogrammet har känts som ett av de bästa valen jag gjort.

Jag vill dessutom tacka min familj som alltid funnits där för frågor, korrekturläsning och stöttning oavsett tid på dygnet. Jag vill rikta ett särskilt tack till mamma och pappa som hjälpt mig med flertalet flyttar över såväl länsgränser som landsgränser.

Jag vill också tacka min handledare Max Hjärtström som svarat på mina frågor även när jag varit osäker på vilka frågor jag hade själv.

Tack!

Knivsta, Februari 2024

Kristin Stolt

Abbreviations

AG	Advocate General
Art	Article
Arts	Articles
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
The Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Commission	European Commission
E.g.	Exempli gratia, for example
Esports	Electronic sports
EU	European Union
I.e.	Id est, that is
InfoSoc directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
IP	Intellectual Property
Market definition notice	European Commission, 'Commission Notice on the definition of the relevant market for the purposes of Union competition law,' C(2023)6789 final
P	Page
Pp	Pages
Para	Paragraph
Paras	Paragraphs
Pt	Point
Pts	Points
R&D	Research and development
Software directive	Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
TEU	The Treaty of the European Union
TFEU	The Treaty of the Functioning of the European Union
TPM	Technical Protection Measures
Treaties	The Treaty of the European Union & The Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

Electronic sports ("Esports")[1] competitions have been considerably developing since the late 1990s. In 2000 the Electronic Sports League was founded.[2]

At present, the digital market is an area which the European Union ("EU") seeks to develop in an attempt to follow the global digitalisation. The global digitalisation includes the Esports industry. Although the Esports industry is seemingly big within the internal market where many regularly play video games and big tournaments are held every year, merely 1.4 %[3] of the global revenue is from video games developed within the EU. One prerequisite for the development for the market is that there is an effective competition. However, as in many sections of the digital market there are special factors to consider when assessing the competition and potential exclusion of competitors. This is emphasised by the intellectual property rights ("IP rights") in principle steering the market.

The rise of the video game industry entails the development of a full ecosystem. Video games include advanced technologies which favours the growth of cultural and creative sectors as well.[4]

The Spanish presidency in the Council of the European Union brought forward the video games sector as an important sector for development.[5] In 2023 the global market for video games amounts revenue of ca €169.1 billion.[6] The revenue in Europe alone constitutes ca €30.9 billion.[7]

In contrast to traditional sports, Esports are heavily dependent on IP rights and the access to the video game is dependent on the owner of the IP right making license agreements essential to enter the market for Esports

[1] The abbreviation of 'electronic sports' has different forms, e.g. E-sports, eSports, but the abbreviation used in this paper will be 'Esports.'

[2] Scholz, T. M. & Nothelfer, N. 2022, *Research for CULT Committee – Esports, European Parliament, Policy Department for Structural and Cohesion Policies*, Brussels, p. 9.

[3] European Commission, 'European Media Industry Outlook,' SWD(2023) 150 final, p. 56.

[4] Council of the European Union, 'Council conclusions on enhancing the cultural and creative dimension of the European video games sector,' Brussels, 24 November 2023, p. 4.

[5] Council of the European Union, 'Council Resolution on the EU Work Plan for Culture 2023–2026,' OJ C 466, 7.12.2022, p. 6.

[6] $184 billion according to the exchange rate on 02-12-2023. Newzoo, *Global Games Market Report*, October 2023, https://newzoo.com/resources/trend-reports/newzoo-global-games-market-report-2023, p. 21.

[7] $33.6 billion according to the exchange rate on 02-12-2023. Newzoo, *Global Games Market Report*, October 2023, https://newzoo.com/resources/trend-reports/newzoo-global-games-market-report-2023, p. 21.

tournaments. Therefore, the question of how a potential refusal to license may be challenged.

This thesis will address the borders of intellectual property law and competition law. The areas have common objectives such as creating incentives for innovation and economic freedom. However, put in a context these may still create concerns when applied. In the area of Esports these areas are applied in addition to the interest of the commercial business as well as the competitive nature of the industry. In an industry where competition is everyday life, it is of interest to further analyse what happens when a potential competitive is excluded due to a refusal to license.

1.2 Purpose and research question

The purpose of the thesis is to study how EU competition law is applied on Esports leagues with a focus on the commercial aspects along with IP rights. Point of reference will be the license agreement concluded with tournament organisers which is intended to rule the conditions of organising an Esports tournament. Furthermore, the study will refer to characteristics which distinguish the industry and how this affects the application of art. 102 TFEU. Based on my findings I will discuss how competition law may be applied on Esports and what difficulties might arise.

- Can the publisher's refusal to license to an independent tournament organiser be challenged with art. 102 TFEU?

Answering this research question will be achieved by also answering the following sub-questions:

- What characteristics of Esports need to be considered for the application of art. 102 TFEU?
- What interests are important to consider for the application of art. 102 TFEU?

1.3 Method and materials

1.3.1 Method

To reach the aim of the thesis, legal dogmatic method and EU legal method will be applied. Legal dogmatic method will be applied to examine the current legal framework of the EU. Whereas no cases concerning Esports[8] have been

[8] The CJEU and the Commission have decided on cases concerning video games on several occasions which will be referred to in this paper. Esports, as will be further explained later, is a market built upon video games but are not the same.

before the Court of Justice of the European Union ("CJEU") there is a legal framework in the area of competition law. In order to assess how competition law, and more specifically art. 102 Treaty on the Functioning of the European Union ("TFEU"), may be applied to Esports it is of relevance to research the current law, *de lege lata*, to assess how it can be applied on future cases.

With the legal dogmatic method, the law is interpreted as it is meant to be applied in the specific context. Moreover, the legal dogmatic method allows the interpretation to stay formalistic. For this research it is necessary to establish the current law. Although it has not yet been applied to a case concerning Esports it allows us to see how it may be applied. This is not a question concerning *de lege ferenda* as it is current law which, however, has not yet been applied. The legal dogmatic method is traditionally not a method for examining a possible *de lege ferenda* which is also not the aim in the parts which concern the presentation and discussion of EU law. To ensure that there is a legal basis for the conclusion, the legal dogmatic method will be applied. Since there is no previous case law in the area, the method assists in establishing the applicable law which may be applied.[9]

Important for the research in this thesis is to not presume applications of law. Since the Esports industry is a fast growing industry, it may include many new challenges. Some of these questions may be answered by similar applications in previous cases.

The research questions will be examined through a literature review with a dogmatic method in the light of the EU legal method. It is necessary to use previous case law showcasing competition law's aims to assess how they may be applied on the Esports market. Competition law is a flexible legal instrument which is applied in different contexts where the same principles apply to create a dynamic approach.[10]

The dogmatic legal method will be applied in the light of the EU legal method will be applied. This is necessary as the research will focus on the EU where the legal system is quite different from many other systems being a supranational organisation with an autonomous legal order. However, it cannot be claimed that there is one distinct EU legal method. There are many aspects of EU law which may make it complicated to interpret. Whereas legal dogmatic method determines what relevant materials are chosen for the thesis and how they should be interpreted according to the hierarchy of norms, EU legal

[9] Kleineman, Jan, 'Rättsdogmatisk metod' in Maria Nääv & Mauro Zamboni (eds.) *Juridisk metodlära*. 2018, pp. 21-22.

[10] EVP Margrethe Vestager, 'A Principles Based approach to Competition Policy' Keynote at the Competition Law Tuesdays, 22 October 2022 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6393 accessed 2023-12-09.

method adds a way of determining how to apply the sources of law. Moreover, it needs to be acknowledged that the EU as a legal system is young. In comparison to national law, the doctrine discussing EU law is lacking a theoretical basis due to its youth.[11] There are different institutions within the EU adopting decisions and legislative acts. Whereas legislation adopted by the European Parliament is usually more technical, the CJEU is more often applying principles.[12] However, case law is often codified into legislative acts. Therefore, both have relevance for understanding EU law.[13]

Furthermore, it is necessary to understand the methods of interpretation in the CJEU. One generally applied method is the teleological interpretation. Although, the CJEU applies other methods of interpretation as well this is the most recognised method.[14] Teleological interpretation entails that the law is interpreted in accordance with its objective.[15] Aims and objectives of the EU competition law have been widely discussed. The rules concerning competition law alone have been argued whether they are an aim, objective or merely a tool to achieve an internal market.[16] Following the Treaty of Lisbon, both views have been acknowledged, but the Commission perceives it as a tool to ensure a resilient internal market which benefits consumers.[17]

It goes back to the case *Van Gend en Loos* where the CJEU asserted that the EU is a legal order. A legal order is a legal system and if this is self-referential, meaning that interpretations are based on sources found within the legal order it is part of, it is autonomous. When a conflict of laws arises, an application is made considering the hierarchy of norms within the autonomous legal order. Furthermore, foreign norms are merely considered as facts and do not have its own normative value in the legal order.[18] In EU law there is often a discussion on the autonomy of the EU in relation to the definition and interpretation of legal issues.[19]

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[11] Reichel, Jane, 'EU-rättslig metod' in Maria Nääv & Mauro Zamboni (eds.) *Juridisk metodlära*, 2018, pp. 109-110.

[12] Ibid, p. 116.

[13] Ibid, p. 120.

[14] Ibid, p. 122.

[15] Neergaard, Ulla and Nielsen, Ruth. 'Where Did the Spirit and Its Friends Go?' in Ulla Boegh Neergaard, Ruth Nielsen, Lynn M. Roseberry (eds.) *European Legal Method: Paradoxes and Revitalisation*., p. 99.

[16] The Brussels European Council - 21 and 22 June 2007 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:xy0001> accessed 2024-01-02.

[17] Communication from the Commission to the European Economic and Social Committee and the Committee of the Regions – 'A competition policy fit for new challenges,' COM(2021)713 final, p. 6.

[18] Barents, René, *The Autonomy of Community Law*, 2003, pp. 171-172.

[19] The CJEU has expressed the autonomy of the EU legal order in Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114, para. 4.

Furthermore, when the CJEU encounters a term which has no clear scope or meaning it is given an autonomous meaning.[20]

A consideration to be done when applying the European legal method is the importance that can be assigned to a source of law. EU law includes primary law, secondary law, and soft law. As in legal dogmatic method, the method is applied when analysing sources of laws, however, the question arises of what legal value the different sources have. This will be further discussed under "Materials", but the method of evaluating the sources of laws depends on the chosen method. Essential for both the legal dogmatic method and the EU legal method is to ensure that the value of the source of law is considered. Within the EU there are primary laws and secondary laws. It is important to acknowledge whether the applied source of law is either of the two. Furthermore, there are some sources of laws which are not primary law or secondary law. For example, soft law such as doctrines or guidelines. Soft law is generally not a source of law according to the EU. However, the CJEU has taken soft law into consideration as a source when deciding on a case[21] or to estimate whether the Commission's assessments have been correct.[22]

EU law has precedence over Member States' national acts.[23] Furthermore, since the EU has been established by the Member States partly transferring their sovereignty, they are bound by the decisions made by the CJEU.[24]

One central concern in the following paper is the definition of "Esports." The challenge of defining a word within in the EU is not new. With 27 Member States there will be both linguistic and legislative[25] differences. Thus, it'll need to be defined in its context and the commonly recognised definition.

1.3.2 Materials

In accordance with the legal dogmatic method, the materials will mainly consist of generally acknowledged law. The relevance of the sources of law will be assessed with the help of the EU legal method. Furthermore, in accordance with the EU legal method where the CJEU generally applies a teleological interpretation the thesis will examine the research question in the light of the

[20] Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel*, EU:C:2005:59, para. 29.

[21] Case C-301/04 P *Commission of the European Communities v SGL Carbon AG*, EU:C:2006:432, paras. 16-17.

[22] Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, para. 1328.

[23] Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (*Van Gend en Loos*), EU:C:1963:1, Section B.

[24] Case 6/64 *Flaminio Costa v E.N.E.L*, EU:C:1964:66, p. 593; art. 267 TFEU.

[25] Case 155/79 *AM & S Europe Limited v Commission of the European Communities*, EU:C:1982:157, para. 18.

method of interpretation. Case law from the CJEU will largely be considered as their judgements hold primacy.[26]

The material used is mainly EU primary and secondary law as well as soft law in the form of notices from the Commission and resolutions from the European Parliament. Whereas Esports has not been thoroughly regulated in EU law it is essential to explore future developments in soft law. This will give a picture of the status of sports and competition law. Literature will be used to get additional perspectives.

Both hard and soft law will be applied in order to come to a conclusion. However, it is essential to consider the different importance hard and soft law have. At the same time, it is necessary to apply both. Since the Treaties leave the authorities with a wide margin of appreciation, the Commission is able to adopt e.g. guidelines to explain how they apply competition law.[27] Notices and guidelines from the Commission may not be binding on national authorities, but they are encouraged to use them for a harmonised interpretation. Furthermore, these sources are used by the Commission in their decisions. When these are then upheld by the CJEU they constitute secondary law and consequently hard law.[28] This statement may, however, be challenged in *Van Gend en Loos*. To have direct effect, a rule has to be clear, unconditional, and constitute a negative obligation to the individual.[29] Furthermore, Advocate General ("AG") Kokott has stated in *British Airways*, that potential future rules can solely be applied to future cases. It is not until the rule has been implemented that it can be applicable.[30] Internal directive still work as guidance as it states a rule of conduct. They may not be deviated from within the internal structured unless reasons for doing so are stated.[31]

It is not unusual for conflicts of laws within the EU. The Union consists, after all, of 27 Member States where national laws apply as well. Furthermore, there are private entities which have developed business policies. On an EU level the different institutions have adopted regulations, directives, decisions, etc. These apply to different contexts, but these sometimes overlap. With different sources of laws within the EU it is necessary to determine a notion of

[26] Case 6/64 *Flaminio Costa v E.N.E.L*, EU:C:1964:66, p. 593.

[27] Ackermann, Thomas. "European Competition Law" in Karl Riesnenhuber (ed.) *European Legal Methodology*, Intersentia Ltd, Cambridge, 2021, pp. 533-534.

[28] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, p. 31.

[29] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1, p. 13.

[30] Case C-95/04 P *British Airways plc v Commission of the European Communities*, Opinion of Advocate General Kokott delivered on 23 February 2006, EU:C:2006:133, para. 28

[31] Case 148/73 *Raymond Louwage and Marie-Thérèse Louwage, née Moriame, v Commission of the European Communities*, EU:C:1974:7, para. 12.

hierarchy, and which sources should have precedence.[32] Art. 288 TFEU states the binding force of regulations, directives, decisions, and recommendations and opinions. It is said that a regulation is applied with binding force in its entirety. Furthermore, it is directly applicable. Whereas a directive is binding as well, it is up to the Member States to decide the method of application. A decision is also binding in its entirety except for when it is specifically addressed, then it is only binding on the specified parties. At last, recommendations and opinions are not binding. The binding force of these sources will be taken into consideration. Even though recommendations and opinions are not binding, these will still be applied as they may offer some guidance still.

Although resolutions of the Council of Europe are not binding, they act as an encouragement for the addressees to act upon them.[33] Moreover, they constitute a picture of how the political opinions might develop.[34] In this paper the resolution 'Esports and Video Games' will be used for that purpose.

In some circumstances guidelines from the Commission may be binding as their guidelines concern economic and social assessments where they enjoy a wide margin of discretion. Due to the principle of legitimate expectations, they may be binding. That is, as long as they do not breach the Treaties.[35] In the enforcement of the antitrust provisions, the Commission enjoys a certain margin of discretion as long as it aligns with the EU's policies.[36] Therefore, when analysing decisions from the Commissions this will be taken into account.

1.4 Delimitations

A characteristic attribute for Esports is IP rights which will be further discussed in relation to their impact on the market structure as well as the barriers to entry. The presentation will be limited to copyright and briefly patents and trademarks.

On the application of art. 102 TFEU to Esports tournaments, exclusionary abuses in general will be presented but it is merely refusal to license which will get a further presentation and discussion. That is, due to the focus on the

[32] Senden, Linda. 'Changes in the Relative Importance of Sources of Law – The Case of EU Soft Law' in Ulla Neergaard & Ruth Nielsen (eds.) *European Legal Method: in a Multi-Level EU Legal Order*. Denmark, Copenhagen: DJØF, 2012, p. 227.

[33] Art. 292 TFEU.

[34] Senden, Linda. 'Changes in the Relative Importance of Sources of Law – The Case of EU Soft Law' in Ulla Neergaard & Ruth Nielsen (eds.) *European Legal Method: in a Multi-Level EU Legal Order*. Denmark, Copenhagen: DJØF, 2012, p. 235.

[35] Case C-464/09 P *Holland Malt BV v European Commission*, EU:C:2010:733, paras. 46-47.

[36] Joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities*, EU:C:1983:158, para. 109.

license agreement the publisher's choice of granting it to the tournament organiser. There are more abuses which can potentially exist in the ecosystem, but that would require further research and make the topic too broad. Nevertheless, other potential abusive practices in the area of competition law would be interesting to see further research on in the future.

Esports is a complex industry and to go into detail on the variants of ecosystems would be to go beyond the purpose of this thesis. Therefore, the research as well as the explanation of the ecosystems will be focused on the parts which are deemed relevant for the thesis' purpose. That entails how the Esports ecosystems' characteristics generally distinguish themselves from others.

The topic of the Digital Markets Act may be of interest to discuss further in relation to Esports as well but would require a broader study if it were to be discussed alongside art. 102 TFEU. Therefore, this paper will not discuss it further.

Whereas the research within the EU has been limited, researchers and lawyers in other jurisdictions have done research in the area of Esports and competition law. Since Esports is a global industry, it is of relevance to take different jurisdictions into account to assess the application of competition law. However, that would make this thesis substantially longer and due to time limitations, the focus remains on the EU.

1.5 State of research

Currently, the research for sports law has gained attention due to several cases in the CJEU. In relation to Esports there are more discussions on the topic of digital markets. Big companies such as Microsoft and Google have been before the court where the digital markets have been analysed. However, since there has been no case on Esports within the EU so far it has gained very little attention when it comes to the topic of competition law. Nevertheless, as it will later be established, it constitutes an economic activity which is subject to competition law. Since not much research has been done on Esports and competition law within the EU the previous research that will be used as material mainly concerns the state of IP rights in relation to competition law and the digital markets.

1.6 Outline

To reach a conclusion to the purpose and research question of the paper, the different relevant factors will be presented. This will start with a presentation on competition law in a digital context. Due to the specificities of the digital market, it is significant to emphasise the characteristic factors which can

impact a market and is therefore relevant for an assessment of the competitiveness of the market. That includes the digital ecosystem and the relevance of IP rights. These are two main factors of the digital markets which have developed along with the digitalisation. In the chapter it will therefore be attempted to the core concerns as well as efficiencies they entail in relation to competition law.

In the next chapter the specificities of Esports are presented. As a part of the digital market there are several characteristics which need to be presented and highlighted. That includes the definition of Esports. Esports is not a globally defined term, and this paper will apply the meaning of the term which is commonly used by the EU. Furthermore, the structure of Esports tournaments will be described as the paper's further discussion will be based on its specificities. As a reflection to the previous chapter the ecosystems and the significance of IP rights will be analysed.

Based on the findings in previous chapters, Chapter 4 will present the application of art. 102 TFEU to Esports tournaments. Focus will lie on the publisher's exclusive rights to the video games and the tournament organisers' dependence on licenses. This will be evaluated in relation to the publisher's interests which entails incentives impacting the market. Some forms of abuse will be highlighted and further described and applied to Esports. This mainly concerns the refusal to license.

At last, there will be a discussion on Esports and the application of art. 102 TFEU. The discussion includes the different factors which will need to be taken into account. That entails for example exclusive rights weighed against the right to conduct a business.

2 EU competition law and the digital evolution

2.1 Article 102 TFEU: abuse of dominance

Art. 102 TFEU precludes abuse of dominance. Dominance is not *per se* prohibited, but along with a practice which can distort the market due to the undertaking's market power it can be determined as abuse of dominance.[37] Depending on the market and the undertaking's position a business strategy can become abusive. Dominant undertakings have a special responsibility not to distort the market. Dominance is estimated through market shares where other factors can determine the number of required shares. Abuse under the article is described as practices which are exclusionary of exploitative and has a causal link with the dominant position on the relevant market.[38]

Although the article has had the same wording since the Rome Treaty with primarily the number of the article changing, the application of it has changed due to a changing environment, including digitalisation. Even though the digital market differs from a physical market due to its global range and network effects the same rules apply and that includes competition law.[39] The practices which are deemed as exclusionary and exploitive are still prohibited. However, the digital market has entailed new forms of exclusionary and exploitative abuse.[40]

To adapt art. 102 TFEU to an evolving environment the Commission has provided guidance on the enforcement priorities which reflects both the aims and objectives of the Treaties as well as case law from the CJEU.[41] With this

[37] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para 57.

[38] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (*Continental Can*), EU:C:1973:22, para. 27.

[39] European Commission, 'Shaping Europe's digital future,' COM(2020) 67 final, p. 8

[40] See 'Amendments to the Communication from the Commission – 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 116, 31.3.2023.

[41] Communication from the Commission — 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009. On 27 March 2023 the Commission published amendments to the enforcement priorities in Amendments to the Communication from the Commission – 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.' Meanwhile the Commission launched a Call for Evidence for guidance on the application of art. 102 TFEU in order to reflect the CJEU's case law.

approach several cases have been brought before the CJEU where at times new forms of abuse have been defined.[42]

2.2 Objectives of EU competition law

The aims of competition law have been widely discussed. Writing about the aims and objective, or whether competition law is an objective itself,[43] would therefore require a paper on that topic alone. This paper, however, will instead give a general overview of the aims and objectives as well as how these have evolved over time. Because with the EU being an organisation consisting of 27 Member States with different political systems along with external influences, the political values within the EU change over time.[44]

Furthermore, it is not agreed whether competition constitutes an objective or merely a tool to ensure the objectives on the internal market. This was widely discussed before adopting the Lisbon Treaty. Eventually, the article was moved to Protocol 27, but it may be seen as merely a political decision. According to case law Protocol 27 and competition as an objective is still being referred to as an integral part of the system to ensure an internal market without distorted competition.[45]

Whereas consumer welfare is a common referred objective of competition law, the CJEU has held that it is not limited to that. Conducts can be deemed as anti-competitive where it may cause negative impacts to the structure of the market and to competition as such.[46]

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[42] See concerning e.g. self-preferencing in Case AT.39740 *Google Search (Shopping)* recital 344, confirmed by the General Court in Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission*, EU:T:2021:763, later upheld by the Court of Justice.

[43] The previous French president Nicolas Sarkozy was during his presidency a strong critic of the EU competition law and the previous wording of the treaties. After repeated discussions, the objective of the internal market to be protected from distorted competition was moved to Protocol 27. The remaining article in TEU is instead solely referring to the establishment of an internal market. See further 'The Brussels European Council - 21 and 22 June 2007' https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:xy0001 accessed 2024-01-02.

[44] Whish, Richard & Bailey, David. *Competition Law*. The United Kingdom, Oxford: Oxford University Press, (10th ed.) 2021, p. 18.

[45] *See* Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 20; Case C-496/09 *European Commission v Italian Republic*, EU:C:2011:740, para. 60; *Comp.* Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, EU:C:1973:22, paras. 24 and 25 where reference was made to art. 3(g) of the Maastricht Treaty where the previous wording was in force. See also art. 51 TEU which says that the Protocols and Annexes shall have an integral part in EU law.

[46] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (*GlaxoSmithKline*), EU:C:2009:610, paras. 62-63.

The core of the EU is to establish an internal market with economic growth and price stability. Competition law is intended to ensure that the internal market is protected from undertakings distorting the market.[47]

Values and aims of the EU may be found in the Treaty of the European Union (TEU). Specifically in arts. 2-3 TEU. In art. 2 TEU the EU's values are said to consist of e.g., the rule of law and democracy. In art. 3 TEU it is stated that the EU established an internal market where the aims consist of e.g., economic growth, and price stability. Furthermore, the EU aims to promote the scientific and technological development.[48]

The Commission has stood by the same aims for a long time, but they also recognise that competition law is applied in a context. Competition law needs to be applied with the legal, economic, political, and social context in mind. That is due to the nature of the EU as an organisation binding the wills of the Member States together.[49]

Additionally, it is not merely the Member States and their different political motivations that need to be considered, but also the technological development and the globalisation of markets both of which have a significant impact on the market and, thus, competition law.[50]

2.3 The economic approach of EU competition law

Competition law applies economic tools to establish consumer behaviour and market structure. Based on economics it can be argued what incentives are at hand and how the market structure will develop.[51] Economics' importance in competition law has expanded which can be demonstrated through the more effect-based approach by the Commission[52] as well as the CJEU.[53] Although, the economic reality needs to be considered, an effective enforcement of the antitrust provisions needs to remain.[54]

There are different states of aims for competition on a market. The most far-reaching being perfect competition. Perfect competition entails allocative and productive efficiency. Allocative efficiency demands an allocation of goods

[47] Art. 3(3) TEU. The rule's significance has been discussed before the adoption of the Lisbon Treaty. During debates it has been a question of whether competition law shall be perceived as an objective of the EU itself or whether it is merely a tool for fulfilling the objectives.

[48] Art. 3(3) TEU.

[49] European Commission, 'XXIInd Report on Competition Policy 1992,' p. 13.

[50] Ibid, p. 13.

[51] Van de Gronden, Johan W. & Rusu, Catalin S., Competition Law *in the EU: Principles, Substance, Enforcement*, 2021, p. 87.

[52] European Commission, 'Commission Notice on the definition of the relevant market for the purposes of Union competition law,' C(2023) 6789 final, pt. 8.

[53] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 77.

[54] OECD, 'Policy Roundtables: Competition Policy and Intellectual Property Right,' 1997, p. 222.

and services where nobody is worse off. The prices mirror the exact price consumers are ready to pay, and this equals the marginal cost. Productive efficiency demands that the cost of production is at its lowest for the society's wealth.[55] The competition is perfect in the way that the actors on the market, i.e. the sellers and buyers are aware of the price changes. Market actors can freely come and go on the market.[56] The level of competition which the EU has aimed for is affirmed in case law as effective competition. Effective competition entails that there is competition to a degree where the attainment to goods and services and the structure of the relevant market are ensured.[57]

Although economic efficiency influences the EU competition law, the EU is also valuing the growth of small and medium-sized companies and see these as an important part of the competition on the market.[58] This interest is, however, merely a factor in the assessment of the market impact. Economic considerations need to be taken. That entails that less efficient competitors are not intended to be protected. Generally, competition law is intended to protect consumers and not competitors.[59]

As aforementioned, allocative efficiency is essentially the aim to increase competition on the internal market. That entails opening barriers between the Member States as well as other potential barriers on the market. The enforcement of both arts. 101 and 102 TFEU are intended to reduce these barriers.[60] Moreover, the provisions aim to protect the competitive process and market structure.[61]

2.4 Transparency and legal certainty

Transparency and legal certainty are two of the key factors of the rule of law. As has previously been stated, there has been a major transformation of competition law despite few modifications in the articles in the TFEU. Instead of modifications in the TFEU these were made through case law from the CJEU as well as the European Commission's ("Commission" decisions and

[55] Whish, Richard & Bailey, David. *Competition Law*. The United Kingdom, Oxford: Oxford University Press, (10th ed.) 2021, pp. 6-7.

[56] Jones, Alison, Sufrin, Brenda & Dunne, Niamh, *EU Competition Law: Text, Cases and Material*, 2023, p. 11.

[57] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (*GlaxoSmithKline*), EU:C:2009:610, para. 109.

[58] See e.g. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Think Small First" A "Small Business Act" for Europe, COM(2008) 394 final, p. 2.

[59] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, paras. 20-21.

[60] 'Guidelines on the Application of Article 81(3) of the Treaty,' 2004, OJ C101/08, para.13.

[61] 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009, paras. 5-7.

guidelines.[62] In AG Kokott's opinion in *Post Danmark A/S v Konkurrencerådet* she asserted the importance of the CJEU not being influenced by ephemeral trends and instead ground its judgements on legal foundations.[63] Despite the necessity of transparency and legal certainty to uphold the rule of law, the CJEU has on several occasions needed to apply the law in a way which has been questioned whether it has a legal basis.[64]

To ensure a developing competitive market it is important to maintain the rule of law, including principles like legitimate expectations and transparency. Art. 2 TEU declares the EU's responsibility to ensure the rule of law.[65]

In Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty the EU refers to harmonisation and its effects to legal certainty. Meaning that an agreement which is outside the scope of the antitrust provisions in the TFEU according to EU competition law should not be prohibited by the national competition authorities.[66] This effect is governed by the principle of harmonisation. Through legal integration the Member States are adopting a harmonised legal framework. That is, in areas where the EU has exclusive competence, alternately where the competence is shared with the Member States. When the competence is shared, the Member States may legislate as long as the EU has not already legislated the area.[67]

The EU has competence to decide and legislate in the legal area of competition law due to the principle of conferral.[68] Another general principle concerning the competence of the EU is subsidiarity which is also regulated in art. 5(3) TEU. According to the principle of subsidiarity the EU shall only act within areas which are not within its exclusive competence if it cannot be sufficiently achieved by the Member States. That is, the action shall be taken

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[62] See e.g. 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings,' OJ C 31, 5.2.2004; 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009.

[63] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, Opinion of Advocate General Kokott delivered on 21 May 2015, EU:C:2015:343, para. 4. In the opinion she uses the term "zeitgeist" to explain the tendency to be influenced by "current thinking […] or ephemeral trends."

[64] One example is the still recent case Google Shopping where the CJEU established a test for self-preference. The test was later established in the Digital Markets Act.

[65] Art. 2 TEU.

[66] Preamble 8 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003.

[67] Art. 2(1)-(2) TFEU.

[68] Art. 5(1) TEU.

as close to the concerned area as possible. Furthermore, if the desired effects can only be achieved if the EU implements the act, due to its scale or proportion, that is deemed to be in accordance with the principle of subsidiarity.[69]

Although, it may be in accordance with the principle of subsidiarity it also needs to be proportional. According to the principle the EU may not regulate further than what is necessary.[70]

Due to varying aims of competition law, it raises questions concerning the rule of law as well as legal certainty. However, the ambiguity may also be favourable due to the constant changes of its context. It allows competition law to remain flexible and therefore applicable to future changes.[71]

2.5 Digital ecosystems

In general, digital markets are often characterised by their tendency of *consumer lock-in* and *winner-takes-most dynamics*. These characteristics influence the structure of the market where ecosystems are common.[72] That includes how the undertakings gain market chares, and consumers' as well as competitors' behaviour and freedom on the market.

Ecosystems exist on the physical market as well, where different products and services are tied together. On a digital market it differs due to several factors which are relevant for the application of competition law. To begin with, the digital market is often multi-sided meaning that the digital product also acts as a platform. This entails that it contains a market for content creators, consumers, and advertisers on the same platform. Furthermore, when a platform attracts many consumers and commercial actors it results in large amounts of data which are valuable and difficult to replicate for a smaller competitor.[73] These collections of data ultimately let some undertakings grow bigger and develop and produce other products and services which are built upon the first product or service. These ecosystems tend to aim for locking the consumers into the ecosystem (*consumer lock-in*).

Ecosystems are usually defined in two ways. Firstly, multi-actor ecosystems which consist of several independent actors. These actors work together to create a higher value than they could have done alone. Secondly, multi-product ecosystems are ecosystems where there are products and services with

[69] Art. 5(3) TEU.

[70] Art. 5(4) TEU.

[71] Brook, Or, 'In Search of a European Economic Imaginary of Competition: Fifty Years of the Commission's Annual Reports,' 1(4) European Law Open. 2022, pp. 823-824.

[72] Van de Gronden, Johan W. & Rusu, Catalin S., *Competition Law in the EU: Principles, Substance, Enforcement*, 2021, p. 181.

[73] OECD, 'Handbook on Competition Policy in the Digital Age,' 2022, pp. 14-15.

economic links.[74] On digital markets the undertakings are often vertically integrated, tying several products together. Ecosystems often create network effects which entails that the end-users tend to choose the products or services of one actor because of reasons which are not necessarily due to the quality of what they have to offer. Instead, user expectations have a higher significance. Network effects may ultimately lead to a market tipping, meaning the market becomes concentrated where only a few actors remain as competitors.[75] However, it is not necessarily solely a risk for distortion of competition, but it may also incur efficiencies on the market. Vertical integration can for example result in lower transaction costs and more efficient products for the consumer.[76]

2.6 Intellectual property law and competition law

The areas of intellectual property law and competition law may seem contradictory at times due to IP rights giving an author the exclusive right to monetise their work which can exclude competitors' access to the work. However, both legal areas are important for the internal market and to ensure that the competition on the market is not distorted.[77] The legal frameworks are established to ensure that there is an effective competition and to encourage innovation. IP rights are intended to prevent competition based on imitation which could ultimately distort the market. If competitors to the developer copy the work, it is not certain that the most efficient will stay on the market. Since the developer has already invested in the development of the goods or services, the dynamic cost, competitors may 'free-ride' on the finished service or goods by copying it. They will only bear the static cost, the production cost, which puts the original developer at a disadvantage unless the work is covered by a protection.[78] An effective protection is therefore aiming to protect the market from imitations. To become an effective competitor the undertaking needs to develop an alternate work which can compete with the first work.[79]

[74] Ibid, p. 2.

[75] Ibid, p. 3; European Commission, 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009, pt. 20.

[76] O'Donoghue, Robert & Padilla, Jorge. *The Law and Economics of Article 102*. The United Kingdom, Oxford: Hart Publishing Ltd, (2nd ed.), 2013, p. 161.

[77] European Commission, 'Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements,' para. 7. OECD, 'Licensing of IP rights and competition law – Summaries of contributions,' 23 July 2019, p. 9.

[78] Landes, William M., & Posner, Richard A., *The Economic Structure of Intellectual Property Law*, 2003, p. 107.

[79] Ibid, p. 209; Firth, Alison, *The Essential Facilities Principle and Other Issues of Competition*, 2021, p 52.

Furthermore, if the owner of the IP right cannot enjoy an effective protection it can result in a decrease in incentives to develop. Consequently, less innovations enter the market, and thus, a decrease in competition on the market.[80]

Sometimes, competition law may still be applied when the IP rights are not only used to protect the work but also to disproportionately take advantage of it by distorting the competition.[81] This is where competition law interferes and consequently has become cases before the CJEU.[82]

Copyrights are internationally regulated in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). The Berne Convention is signed by 181 states which results in an almost global coherence in the protection of literary and artistic works.[83] The Berne Convention entails a minimum protection where the signatories may decide to protect additional works and give them a wider protection than what is protected according to the Convention. The protection is independent, meaning the protection shall be applied automatically. No prior registration is needed for the protection in accordance with the Berne Convention to apply.[84] Moreover, the respect for the property rights for IP are granted a protection through the Charter of Fundamental Rights of the EU ("the Charter").[85] Despite global regulations as well as EU legislations the area of IP rights is fragmented within the EU as the national laws differ. However, in order to harmonise the internal market with the aim of increasing the functions of the market, the EU has adopted legislative measures.[86] In accordance with the fundamental principles of the Treaties, The EU may only interfere in accordance with the principles of proportionality and subsidiarity.[87] Meaning that the EU can only interfere in the national laws as long as it is proportionate to achieve the aim and as long as it cannot sufficiently be done on a national level.[88] The EU protects copyright through e.g. the Directive 2001/29/EC of the European Parliament and of the

[80] Comp. European Commission, 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009, para. 75.

[81] Joined cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* (*Commercial Solvents*), EU:C:1974:18, para. 25.

[82] See e.g. Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*., EU:C:2004:257, para. 52; *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, para. 1336.

[83] WIPO – Administered Treaties <https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=15> accessed 2023-11-12.

[84] Art. 5(2) Berne Convention.

[85] Art. 17 Charter of Fundamental Rights of the European Union.

[86] See e.g. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, recital 47.

[87] Art. 5(1) TEU.

[88] Art. 5(3) TEU.

Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ("InfoSoc directive"). With the InfoSoc directive the EU attempts to harmonise the protection of copyrighted works by taking the increasing digitalisation into account.[89] Reflecting the Berne convention as well as broadening the scope of protected objects, the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ("Software directive") is protecting the expression of ideas and principles of the author.[90] Whereas the Software directive aims to harmonise the protection of software, there are different legislation concerning e.g. who can be granted the rights in the Member States.[91]

IP rights contain the economic rights of IP. Those include the right of e.g. reproduction, distribution, and adaption of the work. To maintain the incentive for innovation it is important that the work remains effectively protected according to law.[92] Therefore, the CJEU has asserted that it is only when the IP right constitutes an essential facility that the owner of the IP right might need to be obligated to conclude a contract concerning the access to the right.[93]

In an attempt to counterbalance the potential competitive harm of the exclusive right to distribution the CJEU has established the exhaustion doctrine. The exhaustion doctrine entails that other parties than the owner of the right may distribute the protected work without the permission of the owner of the IP right, i.e. parallel trade. The condition for the exhaustion of rights is for the owner of the right to sell the protected goods into another state. Other parties are then allowed to distribute the goods in that state. Since the EU is based on the idea of a single internal market, the right is exhausted for the entire internal market when it has been sold across borders the first time. The rule is stated in both the Software directive as well as the InfoSoc directive.[94] The InfoSoc directive states that services, highlighting online services, are excluded from the exhaustion rule.[95] With the increasing online market this is awakening a discussion of when a right can be exhausted on the digital

[89] See e.g. recital 15 & art. 12 InfoSoc directive.
[90] Art. 1 Software directive.
[91] See e.g. art. 2(1) Software directive.
[92] Case 238/87 *AB Volvo v Erik Veng (UK) Ltd*., EU:C:1988:477, para. 8.
[93] Madison, Michael J., *Reconstructing the Software License*, 2003, p. 280.
[94] Art. 4(2) Software directive; art. 4(2) InfoSoc directive.
[95] Recital 29 InfoSoc directive.

market. This question is also essential for video games where the games rarely are sold on CD or DVD.[96]

The exhaustion of copyright for digital copies was discussed in *UsedSoft v Oracle* where the question was whether the transfer of a copy of a computer programme along with the user license constituted a 'sale.' The CJEU emphasised the importance of an autonomous definition of the term to allow a uniform application of EU law.[97] 'Sale' presumes the transfer of right of ownership of a copy in exchange for payment.[98] In the case the CJEU paid close attention to certain factors. Firstly, downloading a computer program along with concluding a user license agreement, secondly in return of a fee, thirdly the right to use that computer program for an unlimited time.[99] Given these circumstances, the CJEU concluded that the transfer constituted a sale and affirmed that the term needs to be given a broad interpretation. If the undertaking could circumvent the rules concerning the sale of a copyrighted work by calling a contract a 'license' it would undermine the provision.[100] This implies that cases where there is a subscription, thus, no unlimited time, does not constitute a sale. Subscription with limitations may let the publisher maintain the control of a video game.

The incentive for trademarks differs a bit from the other IP rights. Trademarks are meant to lower the search costs for the customer by telling the quality of the product. Furthermore, companies have an incentive to increase the quality of goods and services in order to increase positive perceptions of their company. The CJEU has asserted that trademarks are significant for a competitive market. The CJEU refers to it as an essential element in the EU's system to prevent the distortion of competition.[101] Competition law is based on the idea of competition on the merits, i.e. efficiency based competition. Thus, an undertaking is not abusing its dominance merely through being more efficient based on e.g. quality. However, when an undertaking is found to be dominant it has a higher responsibility to ensure that its behaviour does not negatively influence undistorted competition on the market.[102] Through the use of a trademark the company has an incentive to maintain the quality and therefore its reputation and if it does not, customers are able to distinguish the company from others that are more efficient.[103] The trademark is protected to ensure

[96] Case C-128/11 *UsedSoft GmbH v Oracle International Corp*., EU:C:2012:407, paras. 39-40.
[97] Ibid, para. 40.
[98] Ibid, para. 42.
[99] Ibid, para. 45.
[100] Ibid, para. 49.
[101] C-10/89 *SA CNL-SUCAL NV v HAG GF AG* (*HAG*), EU:C:1990:359, para. 13.
[102] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para. 57.
[103] C-10/89 *SA CNL-SUCAL NV v HAG GF AG* (*HAG*), EU:C:1990:359, para. 13.

that competitors are not free-riding and consequently also increasing the search costs of the customers since they cannot distinguish them.[104]

[104] Ibid, para. 14.

3 Esports in its digital context

3.1 Defining Esports

A general definition of Esports includes a human element, a digital element, and a competitive element.[105] However, there is no globally recognised definition of the term 'Esports.' Moreover, whereas there are national definitions, these are sometimes not coherent with all legal areas. To begin with, there have been wide discussions of whether Esports should be defined as a sport in different areas of law. The difficulty of defining Esports is due to its vastly heterogenous nature. Whereas some games fulfil the requirement for the physical element of sports some do not. In the research paper *Esports – Background Analysis* by Tobias M. Scholz and Nepomuk Nothelfer, requested by the European Parliament's Committee on Culture and Education, they attempt to define it in different contexts.[106] Based on their research Esports can be defined as digital tournaments taking place in video games. The shape of the video game is not specified merely through the term Esports, but consists of video games played on mobiles, consoles as well as PCs. The genre can vary from sports, shooting, or strategy games among many others. These are then divided into different subgenres.[107] Moreover, the term 'video game' has been defined in case law and constitutes a complex work built on a software with graphic and sound elements that has a unique creative value.[108]

Ultimately, it is necessary to understand the complexity of Esports and not reduce it to a number of homogenous video games. Similar to sports there are different video games requiring different strategies and skills. Moreover, Esports includes, as previously mentioned, a competitive element. Thus, the video game is used to compete in e.g. a tournament.[109] Despite the similarities to traditional sports it is not possible to simply equate them. The European Parliament issued a resolution on Esports in 2022 to highlight the areas of Esports which constitute challenges. On the topic of the definition of Esports in relation to traditional sports it is stated that they are to be perceived as different sectors. That is due to the digital environment of Esports and,

[105] European Parliament, resolution of 10 November 2022 on esports and video games, pt. P.

[106] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 11.

[107] Ibid, pp. 14-15.

[108] Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*., EU:C:2014:25, para. 23.

[109] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 16.

moreover, that the games often belong to private entities which can control the video games because of IP rights.[110]

Due the term 'Esports' it is expected to incur comparisons to traditional sports. Moreover, Esports is being shaped into a similar form as traditional sports with tournaments and even becoming parts of the Olympics. Guidance can be drawn from the CJEU case C-90/16 *The English Bridge Union*. The case concerned the definition of a sport in relation to VAT and a bridge club. The question was whether bridge could be defined as a sport and therefore be exempted from VAT. The CJEU asserted the importance of a number of factors, including a physical element.[111] Important to take into account is that *The English Bridge* case was a case concerning tax. EU law is applied in a context. Therefore, terms may be applied differently depending on the case at hand and a narrow application in another context may not be justified.[112] Later, *Skatterådet* in Denmark has decided in a similar case, but this time concerning Esports. Skatterådet decided that Esports constituted a sport in accordance with the assessment in *The English Bridge* case.[113]

Beyond the legal definition of Esports, the application of existing laws in relation to Esports have not yet been before the CJEU.[114] It would be too extreme, however, to say it is entirely unregulated. Existing laws concerning advertising and protection of minors are applied to Esports as well. Nevertheless, concerns regarding a coherent strategy for Esports is still lacking. Unlike traditional sports where the main regulations are local, this would be unfitting for Esports which is substantially international. A national regulation would therefore not be sufficient. [115] Furthermore, the digital market stands before a developing legal framework from the EU[116] and whereas Esports has not yet been regulated at an EU level it has been addressed in the European Parliament's resolution *Esports and video games*. One of the things addressed, is the definition of the term. Distinctive for Esports are the ecosystems which consist of different games and devices. Moreover, the European Parliament

[110] European Parliament, resolution of 10 November 2022 on esports and video games, pt. 28.

[111] Case C-90/16 *The English Bridge Union Limited v Commissioners for Her Majesty's Revenue & Customs*, EU:C:2017:814, para. 22.

[112] Case C-234/98 *G. C. Allen and Others v Amalgamated Construction Co. Ltd*, EU:C:1999:594, paras. 19-20.

[113] Skatterådet, 'Momsfritagelse - sport - E-sport,' SKM2020.309.SR, 26 May, 2020.

[114] There have been decisions from the Commission relating to publishers and video games distributors, *inter alia* Case M.7866 – *ACTIVISION BLIZZARD / KING*, C(2016) 955 & Cases AT.40413 – *Focus Home*, AT.40414 – *Koch Media*, AT.40420 - *ZeniMax*, AT.40422 – *Bandai Namco* and AT.40424 – *Capcom*, C(2021) 75 final, but cases concerning specifically Esports has been lacking.

[115] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 50.

[116] Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030.

acknowledges that the ecosystems are greatly impacted by the large amount of IP rights in the industry. IP rights are owned by private entities and may be licensed to other actors.[117] Furthermore, harmonisation is one of the corner stones in the EU's internal strategy and allows transparency and legal certainty. Therefore, the European Parliament has also highlighted this in their resolution 'Esports and video games.' It is important for the Commission to provide material to enable a coherent method for the national authorities "to deliver evidence-based assessments and recommendations."[118] Whereas there are regulations governing esports, there is currently not a coherent strategy of their application. The applicable rules concern e.g. advertising and the protection of minors. Compared to traditional sports, Esports is more international than local making it necessary to have a coherent approach on the international market.[119]

3.2 The structure of Esports

Although the publisher owns the IP rights of the video game and a license is required by a third party in order to use it, Esports tournaments are not always fully controlled by the publisher. Esports ecosystems are often divided into three different categories depending on the amount of control. The first is "highly controlled" ecosystems where the publisher is also the actor who controls the ecosystem. It is not possible to organise competitions as a third party. Second, there is the 'controlled' ecosystem which the publisher organises the competition and sets the rules, but differing from the previous ecosystem, there is an opening for third parties, independent tournament organisers, to arrange competitions. Third, is the "laissez-faire" ecosystem where third parties are mainly organising the competitions and the publisher is seemingly absent.[120]

The video games sector consists of both well-established publishers as well as new but rising publishers.[121] In these complex ecosystems, publishers can be vertically integrated where they organise the Esports leagues of the video games that they own the IP rights of. Alternately, they can choose to conclude license agreements with independent tournament organisers.[122] The publishers generate revenue based on their IP rights which they can commercialise. One way is through the Esports leagues. The revenue from Esports leagues is

[117] European Parliament resolution of 10 November 2022 on esports and video games, p. 4.

[118] Ibid, p. 7.

[119] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 50.

[120] Ibid, p. 25.

[121] Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final, para. 27.

[122] ISFE Esports, *The Guide to Esports*, https://www.videogameseurope.eu/vge-esports/esports-a-complete-guide-by-the-video-games-industry/ p. 26.

mainly generated from sponsorships, advertising, media rights, ticketing, and merchandise.[123] The independent tournament organisers follow the terms and conditions in an agreement set up by the publisher. Additionally, the tournament organisers need to obtain licenses or authorisations in order to broadcast the tournament. A substantial part from the tournament organisers' revenues is generated from broadcasting the tournament.[124] Since the opportunity to organise a tournament is based in the conclusion of a license which the publisher is part of, the publisher may also decide to not conclude a license agreement. Consequently, the independent tournament organiser may not set up a tournament based on that publisher's video game.

The Esports teams participating in the tournaments are companies or associations which have employed players. Players within one team may specialise in different games. Therefore, the company's brand is visible in different leagues. The companies do not merely consist of players, but also of coaches, dieticians, etc., as the teams grow more professional. A difference between traditional sports and Esports is that tournaments sometimes allow for amateurs to play alongside professional Esports players. Whereas professional players play for the chance to win the prize money, amateur players still have an incentive to play in the tournament merely for entertainment. Moreover, the number of varsity teams are increasing.[125] Another substantial difference from traditional sports is that not solely commercial broadcasters are streaming tournaments for a video game. It is common even for amateur players to stream the games which they are playing.[126]

Since the publisher holds the IP right for the video game, they may also decide on the strategy of the ecosystem. This includes the structure of the tournament and what rules apply.[127] Because of the IP rights of the publisher the business strategies they can apply are able to substantially impact the relevant market. That includes who gets access to the IP rights and essentially determines who enters the market.

The Esports ecosystem has characteristics relevant to take into account when determining the relevant market for the application of the antitrust provisions. The ecosystem consists of a number of parties with different roles and rules

[123] European Commission, Directorate-General for Communications Networks, 'Content and Technology, Understanding the value of a European video games society – Final report,' 2023, https://data.europa.eu/doi/10.2759/332575 p. 48.

[124] ISFE Esports, *The Guide to Esports*, https://www.videogameseurope.eu/vge-esports/esports-a-complete-guide-by-the-video-games-industry/ pp. 26-27.

[125] Ibid, p. 27.

[126] European Commission, Directorate-General for Communications Networks, *Content and Technology, Understanding the value of a European video games society – Final report*, 2023, https://data.europa.eu/doi/10.2759/332575 p.

[127] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 24.

governing them. Simplified, the ecosystem consists of the developers, the publishers, tournament organisers, teams, professional and amateur players, and fans. The developer is the company which has developed the game and therefore holds the IP right. Often, the developer is part of the undertaking being the publisher or it is developing the game on the request of the publisher. Although, the developer develops the game, it is usually the publisher that holds the IP right based on the contract between the publisher and developer or because it is sold to the publisher. It is the publisher that organises the availability of the game through distributors and platforms. Consequently, they also have a substantial impact on how the competitions are structured.[128]

Sometimes the developer of the game is a subsidiary of the publisher, and the publisher receives the ownership of the IP right in return for assistance for the development of the game. The publisher can also be in the form of a platform. Companies developing the hardware device, i.e., the console, may act as a publisher as they have in-house developers as well. Moreover, they may also own a platform where they distribute the game.[129] Essentially, the publisher that owns the video game, and its IP rights, also own other connected IP rights such as trademarks and patents. These incur a significant protection of the video game, beside copyright. To obtain a license, actors need to acquire it from the publisher. Consequently, the publisher has an exclusive right to the video game and an influence on the related markets.[130]

3.3 The intellectual property rights of Esports leagues

The IP rights constitute an exclusive right to commercialise and distribute the protected work. Therefore, the publisher in the Esports industry holds an exceptionally favourable position. The game is covered by a variety of IP rights, for example copyright, patents, and trademarks. All of these which are of relevance in the Esports market.

The Software directive protects computer programs by copyright.[131] The object of protection includes the parts which allow reproduction of the work.[132] This includes the source code and the object code of the computer programme. Furthermore, it includes any preparatory work which allows for

[128] ISFE Esports, *The Guide to Esports*, https://www.videogameseurope.eu/vge-esports/esports-a-complete-guide-by-the-video-games-industry/ pp. 24-26.

[129] Ibid, p. 26.

[130] European Commission, Directorate-General for Communications Networks, *Content and Technology, Understanding the value of a European video games society – Final report*, 2023, <https://data.europa.eu/doi/10.2759/332575> p. 73.

[131] Art. 1(1) Software directive.

[132] Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (*BSA*), EU:C:2010:816, para. 35.

reproduction at a later stage.[133] Nevertheless, a video game is deemed to be more complex than its source code which justifies extended protection. Although, the Software directive constitutes a *lex specialis* it is confirmed by case law that video games are protected by the InfoSoc directive as well. In *Nintendo v. PC Box*, the CJEU said that due to video games' complexity the visual and audio aspects of the programme would be protected by the InfoSoc directive.[134] A computer programme's graphical user interface is protected as so far as it is the author's own intellectual creation by the InfoSoc directive. The Software directive does not cover the graphical user interface as it does not enable reproduction.[135]

Video games require devices to be played. The Commission has divided video games played on PC, consoles, and mobile.[136] These may be protected by patents, but for video games they also entail a protection for the copyrighted video game. There are devices which are required in order to play certain games. That is due to a Technical Protection Measure ("TPM"). A TPM is integrated in the device which does not allow access to copyrighted works unless the device is authorised by the rightholder.[137] It is only when it is deemed proportionate that other actors may circumvent the protection. Such devices may be permitted when the commercially significant purpose is not to circumvent the device's TPM.[138] However, a product with the purpose to circumvent the TPM is not allowed. Therefore, an infringement of an IP right can occur even when the use of the copyrighted work has not yet happened but is enabled.[139]

Finally, not only the game but the company itself is linked to a trademark. Through marketing and producing a certain quality of goods a company can build its reputation and thereby the reputation of its trademark. The trademark constitutes a sign for the quality which the customer can expect.[140] One of the purposes of a trademark is, namely, the decrease of the search costs for consumers. The trademark gives out information about the product and its

[133] Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Minister-stvo kultury* (*BSA*), EU:C:2010:816, para. 37.

[134] Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*., EU:C:2014:25, para. 23.

[135] Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (*BSA*), EU:C:2010:816, paras. 41 and 46.

[136] Case M.7866 – *ACTIVISION BLIZZARD / KING*, C(2016) 955 final, para. 26

[137] Art. 6(3) InfoSoc directive.

[138] Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*., EU:C:2014:25, para. 30.

[139] Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*., EU:C:2014:25, para. 37.

[140] WIPO, 'World Intellectual Property Report 2013: Brand - Reputation and Image in the Global Marketplace,' 2013, p. 84.

quality. For the recognition off the trademark as a good quality brand it is essential that the company maintains producing good quality products.[141]

3.4 The digital environment of Esports

3.4.1 Vertical integration

Video game publishers are often vertically integrated due to efficiency gains. In this way the publisher creates ecosystems where services and products connect to each other. How they integrate and to what extent is for the publisher to choose. Thus, the Esports market consists of heterogenous ecosystems where each publisher may decide the structure of its own ecosystem.[142]

Publishers can decide on business strategies where they have high control over the ecosystem of a video game or apply the laissez-faire model. It is in the latter that independent parties organise the tournaments of the video game. This can be through a license or, more common for smaller Esports titles, by toleration. That is, the tournament organiser does not formally conclude a license agreement with the publisher, but still need to comply with the conditions in the publisher's typical license agreement.[143] Irrespective of the chosen option, the publisher remains in control of who has the legal right to commercialise and monetise the video game due to owning the IP rights.

Vertical integration lets the publisher control its IP right as well as monetise it on additional markets. The publisher has invested in the video game at the research and development ("R&D") stage, and integration on the Esports market is done to generate revenue. Furthermore, it incentivises further development and updates of the game. There is a stronger maintained relation to the video game.[144] The efficiency gains may benefit the end-users, but at the same time, the publisher constitutes a competitor to the independent tournament organisers, acting as both a distributor and competitor. This can impact the competition on the Esports tournament market.[145]

3.4.2 Barriers to entry

Characteristics and the structure of markets have been presented to explain the factors which the Commission as well as the CJEU considers when

[141] Landes, William M., & Posner, Richard, A., *The Economic Structure of Intellectual Property Law*, 2003, pp. 167-168.

[142] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 11.

[143] Ibid, p. 25.

[144] Miroff, Max, *Tiebreaker: An Antitrust Analysis of Esports*, Columbia Journal of Law and Social Problems, 2019, p. 213.

[145] Comp. Case T-340/03 *France Télécom SA v Commission of the European Communities*, EU:T:2007:22, para. 116 where the undertaking had access to technical advantages and real-time information.

assessing a market and ultimately determine whether there is a risk of falling within the scope of art. 102 TFEU. The structure of markets can depend on the existing or potential barriers to entry. Barriers can prevent some or all competitors from entering the market or expanding.

When assessing the relevant market, it is not merely the current market situation which is of relevance. If it is likely that competitors will enter the market, the market can still be competitive despite a low current number of competitors. Moreover, assessments of barriers to entry takes the barriers to expansion into account as well. Barriers to entry include the risks and costs of a failure a potential competitor needs to bear and whether there is a chance of sufficient profits.[146] The existence of barriers impacts the opportunities to compete on the market, and, as a result, consumers' freedom of choice. Central factors for determining the barriers to entry on a digital market are the switching costs and network effects. Switching costs are potential costs of switching supplier. That can include building new brand recognition and invest in advertising.[147] There have been occasions where it has been demonstrated that players tend to easily switch video game genres[148] indicating low entry barriers.

Barriers to entry are considered in competition law when assessing the market. Especially when applying art. 102 TFEU to estimate the market power of an undertaking.[149] Typical for digital markets are the network effects. Meaning, that goods and services on the digital market can gather a high number of users and it is essentially dependent on it.[150] For instance, multiplayer games need more players in order to be sufficiently interesting for the player to keep playing. Due to potentially strong network effects on the digital market the Esports market can be more fragile since there can be a tipping point. Meaning, the majority of the users are choosing the same goods or services leading to the undertaking gaining most of the market shares. On some digital markets the network effects have a big impact whereas on some digital markets the trends vary fast leaving less significance to tipping points. An

[146] Communication from the Commission — 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009, pts. 16-17.

[147] European Commission, 'Commission Notice on the definition of the relevant market for the purposes of Union competition law,' C(2023) 6789 final, pt. 25.

[148] Scholz, Tobias M. & Nothelfer, Nepomuk, *Research for CULT Committee – Esports*, 2022, p. 20.

[149] Communication from the Commission — 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009, pts. 16-17.

[150] OECD, 'The Evolving Concept of Market Power in the Digital Economy – Note by the European Union,' DAF/COMP/WD(2022)30, p. 3.

undertaking can gain large numbers of market shares to lose them soon again.[151] It is important to draw a distinction between different markets on the digital market. Merely because digital markets bear the risks of network effects and consumer lock-in it is not sufficient to establish that without assessing other characteristics of the market as well.

3.5 Developments in the EU

As a part of the digital evolution, the EU has started evaluating Esports and its impact on the internal market. That includes the European Parliament writing the resolution 'Esports and video games.' The resolution calls for the Commission further investigating the market for Esports.[152] The importance of the video games sector as a part of the cultural and creative industries has also been emphasised by the Spanish presidency of the Council of the European Union. Furthermore, it is necessary that the market for the video games sector remains competitive as well as ensuring IP rights to maintain the competitiveness and innovation on the market.[153]

In an attempt to more efficiently challenge undertakings on digital markets the Commission issued their renewed guidance on enforcement priorities in 2023. The guidance is based on case law from the CJEU. Along with the guidance, the Commission called for evidence in order to revise their notice on market definition. The previous market definition notice was from 1997 which meant that digitalisation was not accommodated. Instead, much of the guidance was based on the CJEU's case law. On 8 February 2024 the Commission issued their revised market definition notice, including digital markets. The revisions from the Commission as well as more cases concerning digital markets before the CJEU shows the EU taking notice of the relevance of digital markets and its substantial role in the EU.[154] Whereas the Esports market specifically has not been before the CJEU yet, cases concerning the digital markets can give some good guidance in the application of the antitrust provisions to Esports.

[151] OECD, 'The Evolving Concept of Market Power in the Digital Economy – Note by the European Union,' DAF/COMP/WD(2022)30, p. 4.

[152] European Parliament, resolution of 10 November 2022 *on esports and video games*, pt 11.

[153] The Council of the European Union, 'Council conclusions on enhancing the cultural and creative dimension of the European video games sector,' Brussels, 24 November 2023, pp. 2-3.

[154] European Commission, 'Commission adopts revised Market Definition Notice for competition cases,' Press release, 8 February 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6001

4 The application of art. 102 to Esports

4.1 Introduction to article 102 TFEU

The prohibition covers abusive practices by an undertaking that is dominant on the relevant market. The assessment of dominance is important in regard to the application art. 102 TFEU. There are practices conducted by a non-dominant undertaking that are allowed, but the same practice by a dominant undertaking can be deemed as abusive. To avoid the risk of a false positive[155] it is fundamental that the relevant market is properly defined.[156]

The definition of dominance on the relevant market has been defined in early case law. In *United Brands* it is defined as an undertaking which holds a position of economic strength which enables the undertaking to prevent the maintenance of effective competition on the relevant market. As a result, the undertaking holds the power to act independently of its competitors and customers on the relevant market.[157] It does not necessarily constitute a monopoly or even a quasi-monopoly but the independence on the market lets it influence the competition.[158]

Art. 102 TFEU precludes abuse of dominance. Dominance is not prohibited *per se*, but the undertaking has a special responsibility not to distort the competition on the market due to its behaviour.[159] An undertaking attaining dominance due to efficiency in its production of goods and services should not be prohibited from doing so. There is a risk of constraining innovation if achieving market power becomes prohibited. An undertaking can gain market power through innovation as well as R&D and this is therefore not something that shall be prohibited *prima facie*. Competition law's objective is rather to encourage and enable an internal market for innovation and development.[160] It is when the dominance has a causal link to an abuse distorting the competition that it is prohibited.[161]

[155] That is, there is a risk that defining a market too narrow and therefore finding an undertaking dominant will result in incorrectly finding a conduct to fall within the scope of art. 102 TFEU.

[156] Jones, Alison, Sufrin, Brenda & Dunne, Niamh, *EU Competition Law: Text, Cases and Material*, 2023, p. 306.

[157] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (*United Brands*), EU:C:1978:22, para. 65.

[158] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 39.

[159] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para 57.

[160] Van de Gronden, Johan W. & Rusu, Catalin S., *Competition Law in the EU: Principles, Substance, Enforcement*, 2021, p. 165.

[161] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (*Continental Can*), EU:C:1973:22, para. 27.

The ownership of an IP right does not constitute an abuse in breach of art. 102 TFEU. For an abuse subject to art. 102 TFEU to occur, the undertaking needs to hold a dominant position, abuse that dominant position as well as affect the trade between member states. Therefore, it is not sufficient to solely refer to the existence and exercise of the IP right to fulfil these requirements. Neither does taking certain advantage of the exclusive right by demanding a higher price for the protected product. Nonetheless, this factor may be considered when determining if abuse of dominance occurs.[162]

Due to the boundaries not appearing the same as on physical markets, it has been argued that other factors should be considered regarding abuse. Instead, more focus should lie on the theories of harm as well as the anti-competitive effects.[163]

4.2 Undertakings

An undertaking is, according to case law, an entity which engages in economic activity. This is regardless of the entity's legal status or the way it is financed.[164] Economic activity entails an activity which includes an economic interest. The EU has interpreted this broadly and even include services which are unpaid but are normally done with economic renumeration.[165] Furthermore, self-employed persons can be deemed as undertakings.[166]

Evidently, there are several actors within the ecosystem of Esports that can be defined as undertakings due to the broad definition by the CJEU. Because even when there is no renumeration it can be defined as an economic activity if it is an activity which is normally renumerated. Even though the undertaking is not generating revenue it is competing with those who do.[167] Thus, it can be determined whether the different actors within Esports can be defined as taking part in an economic activity and consequently being defined as an undertaking. First, there are the publishers that are distributing the video game

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[162] Case 24-67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, EU:C:1968:11, p. 72.

[163] Cremer, Jacques, de Montjoye, Yves-Alexandre, & Schweitzer, Heike. *Competition policy for the digital era*. Luxembourg: Publications Office of the European Union. 2019. ISBN 978-92-76-01946-6, pp. 2-3.

[164] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, para. 21.

C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, EU:C:2000:428, para. 74.

[165] Case C-222/04 *Cassa di Risparmio di Firenze and Others*, EU:C:2006:8, paras. 122-123; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, EU:C:2008:376, para. 28.

[166] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411, para. 37.

[167] Case C-222/04 *Cassa di Risparmio di Firenze and Others*, EU:C:2006:8, paras. 122-123; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, EU:C:2008:376, para. 28.

and, in some cases, building the structure of its ecosystem. These may be regarded as undertakings due to their economic interests in the video games and Esports leagues where they generate renumeration. Secondly, the tournament organisers and teams may also be regarded as undertakings due to similar reasons. The tournament organiser profit from streams and tickets.[168]

4.3 Dominance

4.3.1 Product market

Defining the Esports market is rather complex as it constitutes an aftermarket to video games which in itself is not a clear market. In case law video games have been divided into markets depending on the platform, but there have been arguments of whether different genres should be divided into different markets, and this becomes a question for the market definition of Esports as well. Whereas discussions of the market definition of Esports have occurred, no clear definition has yet been made.

The purpose of this section is not to determine the market power of a specific undertaking but to highlight the most relevant challenges on the area of Esports.

According to the European Parliament Esports can be considered part of the video games sector as well as the culture and media sectors. These considerations are of relevance when determining the relevant market.[169] Furthermore, the European Parliament emphasises the difference between Esports and traditional sports, mainly due to Esports' strong connection to IP rights and the digital aspect of it.[170]

The definition of the product market is based on the interchangeability and sustainability of the concerned product, including the characteristics, price and the end-use. Additionally, the market structure as well as supply and demand are considered.[171]

Defining a product market can be done through a so-called *small but significant and non-transitory increase in price* ("SSNIP") test, meaning that the

[168] ISFE Esports, *The Guide to Esports*, https://www.videogameseurope.eu/vge-esports/esports-a-complete-guide-by-the-video-games-industry/ p. 43.

[169] European Parliament resolution of 10 November 2022 on esports and video games (2022/2027(INI)), pt. P.

[170] Ibid, pt. R and pt. 28.

[171] Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority*, EU:C:2020:52, para. 129; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36; European Commission, *Commission Notice on the definition of the relevant market for the purposes of Union competition law*, C(2023) 6789 final, p. 7.

products or services are in the same market if end-users deem them substitutable when there is a small but significant increase in price. Since the digital market is mainly built on zero-pricing strategies where the prices of goods and services matter less if they even have a price. Instead, the market is defined with a test assessing the product or service market by whether the end-user would switch in case there is a *small but significant non-transitory decrease of quality of the goods or services* ("SSNDQ").[172] Through the SSNDQ test it may be possible to estimate which Esports tournaments belong to the same market. An application of the SSNDQ test would entail that the assessment would be based on whether end-users, e.g. the players, on the market would switch to another Esports tournament if the previous decrease in quality. The SSNIP test has, however, been applied in relation to video games.[173] Since tournaments may require an entrance fee as well, a SSNIP test would technically be possible, but the Commission has expressed that it may not be appropriate for the application of art. 102 TFEU. The price may already be affected because of the market structure.[174]

Furthermore, determining the market is as aforementioned relatively complex. The video game industry is dynamic and a dividing different video game genres into different markets would not truthfully reflect the market.[175] Instead the Commission has previously held that video game markets can be divided into different markets depending on the platform. These consist of PC games, console games, and mobile games.[176] Within the market for a platform, particularly consoles, the player is usually loyal to the hardware of a certain manufacturer, but can be impacted by network effects, that is, what hardware e.g. friends choose.[177]

The ecosystems may include obstacles which create barriers to entry, meaning that new competitors cannot compete on the same market or aftermarket. The undertaking controlling the ecosystem will control the market. Furthermore, the competitors may experience switching costs putting them in a disadvantageous position. Nevertheless, digital markets, such as the Esports market, have also been seen to create lower barriers to entry.[178]

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[172] Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, paras. 115-116; Van de Gronden, Johan W. & Rusu, Catalin S., *Competition Law in the EU: Principles, Substance, Enforcement*, 2021, pp. 176-177.

[173] Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final, para. 63.

[174] European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, C(2023) 6789 final, pt. 30; Case AT.39523 – *SLOVAK TELEKOM*, C(2014) 7465 final, para. 158.

[175] Case M.7866 – *ACTIVISION BLIZZARD / KING*, C(2016) 955 final, para. 16.

[176] Ibid, para. 26.

[177] Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final, para. 53.

[178] Scholz, T. M. & Nothelfer, N. 2022, Research for CULT Committee – Esports, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, p. 27.

Another relevant aspect of the definition of the Esports market is its position as an aftermarket. When there is a primary product that the market is based upon has high network effects and switching costs, it impacts the secondary market. An example is where there is a social network which is heavily impacted by network effects, end-users are less likely to switch as it entails losing contacts. Moreover, when the primary market is built upon a device the loyalty to that undertaking can be higher as the switching costs are higher.[179] Network effects on the primary market is demonstrated in the video game market. Depending on whether there is a strong community in the video game it gains more consumers.[180]

An aftermarket can include products of different extent of substitutability. For some primary products there is an aftermarket where the different brands' products are competing. In Esports, the tournaments are mostly consisting of one video game. Therefore, it is essential that the specific video game from the primary market is purchased in order to play in the tournament. The primary market and the aftermarket are different markets, but the aftermarket is associated with the specific brand of the primary market.[181]

Due to the connection between the different factors of what defines Esports, different product markets may be determined. This is mainly considering its characteristics as a product in an ecosystem and as an aftermarket. Since Esports consists of video games of different genres this constitutes a part of the complexity.

4.3.2 Geographical market

In regard to the geographical market, the Commission has stated that the publishing of video games should constitute the scope of the EEA if not worldwide.[182] Digital markets are common to be determined to include the worldwide market due to internet coverage.[183] Similar can be said for the publisher as a publisher of video games which reach a global or almost global market. However, in regard to tournaments the market can be more geographically restricted. Whereas some tournaments take place online, there are tournaments taking place in physical places. Moreover, the tournaments taking place online can also be geographically restricted due to geo-blocking and requirements of nationality in local tournaments. Thus, a publisher who is defined as

[179] OECD, *The Evolving Concept of Market Power in the Digital Economy – Note by the European Union*, DAF/COMP/WD(2022)30, p. 10.

[180] Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final, para. 63.

[181] See European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, C(2023) 6789 final, pts. 99-100; Comp. Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission*, EU:T:2010:517, paras. 112-121.

[182] Case M.7866 – *ACTIVISION BLIZZARD / KING*, C(2016) 955 final, para. 31; Case M.10001 - *MICROSOFT / ZENIMAX*, C(2021) 1607 final, para. 22.

[183] Case M.10001 - *MICROSOFT / ZENIMAX*, C(2021) 1607 final, para. 25.

not dominant on the EU market or even the global market may be defined as dominant on the market for tournaments. It is therefore important to distinguish between the two markets and define also the geographical scope of the market in the specific case.[184]

4.3.3 Relevant market

The defined product market and geographical market creates the relevant market. Based on the relevant market the market shares may be determined. Moreover, the market shares can suggest whether the undertaking is dominant on the relevant market.

An undertaking deemed as dominant on a market is not necessarily a monopoly or a quasi-monopoly. A dominant position means that the undertaking may either be able to determine or nonetheless influence the competitive environment in the relevant market.[185] Dominance on the relevant market is determined by the amount of market shares an undertaking has on the product or service market along with the geographical market. Different factors are taken into account to assess the market shares.[186] The conclusion of a dominant position may be drawn from several factors which are not separately determinative, but collectively may prove a dominant position.[187] What these factors include is determined on a case-by-case basis.[188]

Moreover, determining that there is a substantial market share does not entail that the undertaking may be defined as a dominant undertaking later. Due to the structure of the relevant market this can change. The structure of the market may vary especially in concerns of production, supply, and demand.[189] Moreover, when estimating the market power, it is necessary to not only consider the existing market shares but also who has access to specific assets, the degree of substitutability, and barriers to entry.[190] Market actors can create barriers to entry in order to prevent competitors from entering the market and consequently increase the independence of price setting. Barriers to entry is

[184] Scholz, T. M. & Nothelfer, N. 2022, *Research for CULT Committee – Esports, European Parliament, Policy Department for Structural and Cohesion Policies*, Brussels, p. 40.

[185] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 39.

[186] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para. 57 and Case T-83/91 *Tetra Pak International SA v Commission of the European* Communities, EU:T:1994:246, para. 114.

[187] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 39

[188] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para. 57; Case T-83/91 *Tetra Pak International SA v Commission of the European Communities*, EU:T:1994:246, para. 114.

[189] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 40.

[190] Commission Notice on the definition of the relevant market for the purposes of Union competition law, C(2023) 6789 final, p. 41.

described by the Commission as constituting for example legal, economic, or technological advantages.[191]

Digital markets are often described as "winner-takes-it-all" markets where the undertaking which gets the most users of their goods or services "wins." This is due to the common barriers to entry, network effects and tying on the digital markets. Whereas Esports constitutes a digital market it has been shown that the barriers to entry are relatively low. Simultaneously, certain switching costs have been identified in the Esports market as well. That is specifically when the video game is exclusive to a device which players tend to stay loyal to.[192] That is, that a sufficient number of players are playing the game.

Dynamic elements are important to take into account on a digital market where the environment is often described as a competition *for* the market instead of *in* the market.[193]

When it concerns a console video game, IP rights and the business strategies in relation to them play an important role. Namely, exclusive games[194] can make players choose a certain console. When the console is chosen, the player is usually loyal to that brand. This increases the market power of the undertaking.[195] Currently, there are three developers of consoles with exclusive console video games, i.e. Microsoft, Nintendo, and Sony.[196]

In digital markets market shares may not be the most fitting strategy to assess market power. The markets are highly dynamic compared to traditional markets which are mostly static. New innovations can almost immediately disrupt a market actor's market power.[197] Taking characteristics of emerging markets into account has been acknowledged in case law.[198]

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[191] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pt. 17.

[192] Case M.10001 - *MICROSOFT / ZENIMAX*, C(2021) 1607 final, para 105.

[193] See Bishop, Simon and Walker, Mike. *The Economics of EC Competition Law*, 2010, for dynamic considerations in an economic perspective of EU competition law.

[194] Video games which can only be played on a certain console. Because of a TPM in the game there needs to be a compatible device in order to play it.

[195] Case M.10001 - *MICROSOFT / ZENIMAX*, C(2021) 1607 final, para 105.

[196] Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final, para. 315.

[197] Van de Gronden, Johan W. & Rusu, Catalin S. *Competition Law in the EU: Principles, Substance, Enforcement*, 2021, p. 181.

[198] Case T-340/03 *France Télécom SA v Commission of the European Communities*, EU:T:2007:22, para. 251.

The video games sector has in previous case law been considered as fragmented where some bigger undertakings have for a longer period of time been established on the market, inter alia Microsoft, Sony Interactive Entertainment, and Nintendo, as well as a big number of new undertakings entering the market.[199]

Even some of the bigger publishers have been determined to have less than 30 % of the market shares on the relevant market for video games.[200] An undertaking with market shares below 40% is usually only considered as dominant in exceptional circumstances and that is where the competitors have significantly lower amount.[201] Regarding the question of Esports, the market for video games is also of interest in order to determine the publisher's position on that market which might influence the previous. Furthermore, an estimate of the video games market may constitute a guidance for the Esports market due to its close association and the position as a primary market. However, the market definition for tournaments needs to be distinguished. The Esports tournament market needs to be determined on different factors as well. That includes the switching costs. If a tournament organiser is not able to obtain a license for the video game, switching costs will occur. Switching costs include both static costs of obtaining licenses for other games as well as lost profit from no longer being able to act in the product market. Characteristically for the digital market, tournaments are both a part of an ecosystem and creating its own ecosystem. Tournament organiser does not merely build an organisation for competition, but also broadcasting and advertising.[202]

A market with high switching costs is easier to exploit customers on and exclude competitors from, making it sensitive and practices are of higher risk to be defined as abusive.[203]

4.4 Abuse in Esports tournaments

4.4.1 Introduction to abusive practices

To assess whether an undertaking is abusing its dominance in breach of art. 102 TFEU, the Commission has established a guideline for the application of art. 102 TFEU which is intended to reflect the CJEU's case law. According

[199] Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final, para. 27.

[200] Ibid, para. 269.

[201] Case T-219/99 *British Airways plc v Commission of the European Communities*, EU:T:2003:343, paras. 211 & 224.

[202] Miroff, Max, *Tiebreaker: An Antitrust Analysis of Esports*, Columbia Journal of Law and Social Problems, 2019, pp. 195-196.

[203] 'Guidance on the Commission's enforcement priorities in ap-plying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,' OJ C 45, 24.2.2009, pt. 17.

to the guideline, the Commission can do an as-efficient-competitor test. This entails that abuse may be determined to in cases where 'as efficient competitors' are hindered by the dominant undertaking's practices to enter or effectively compete on the market. However, the CJEU has also said that the test is optional and an assessment leading to a negative result does not necessarily mean that abuse does not occur.[204]

The Commission has moved from a formalistic application of art. 102 TFEU to a dynamic approach. Meaning that whereas the Commission assessed certain criteria the assessment today is rather effect based.[205] The development is seen through the adoption of the Commission's guidance which reflects the CJEU's case law.[206] Although, the Commission's guidelines do not have the status of hard law, but merely soft law, the CJEU has affirmed the more effects-based approach.[207]

The threshold for determining whether the undertaking's conduct constitutes an abuse of dominance refers to the effect and whether the behaviour "potentially" or is "likely" to cause an anticompetitive effect on the market where there are no economic justifications.[208] The CJEU has used a varied terminology for determining the threshold. Moreover, it has been held by e.g. AG Kokott has held that this is merely semantic and the CJEU is using the terms interchangeably. Moreover, in an attempt to clarify, AG Kokott refers to "tends to restrict competition" as the established threshold by the CJEU.[209] Actual effects do not need to be proven but it is sufficient to demonstrate an

[204] Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33, para. 62; reflected in European Commission, 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings:' Annex, pt. 3; Therefore, it is necessary to go further in the assessment as the relevance of the test is not ensured.

[205] European Commission, Directorate-General for Competition, McCallum, L., Bernaerts, I., Kadar, M. et al., *A dynamic and workable effects-based approach to abuse of dominance*, Publications Office of the European Union, 2023, p. 1. See Case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603 para. 254; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 77.

[206] In 2023 the Commission made a Call for Evidence in order to update the guidelines.

[207] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 77; See European Commission, Directorate-General for Competition, McCallum, L., Bernaerts, I., Kadar, M. et al., *A dynamic and workable effects-based approach to abuse of dominance*, Publications Office of the European Union, 2023, p. 2.

[208] European Commission, 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.'

[209] Case C-95/04 P *British Airways plc v Commission of the European Communities*, Opinion of Advocate General Kokott delivered on 23 February 2006, EU:C:2006:133, para. 76. See also Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para. 73.

effect of the conduct which can lead to the distortion of competition.[210] Nonetheless, the effect needs to be proven to not be purely hypothetical.[211]

4.4.2 Exclusionary practices

The application of art. 102 TFEU is substantially effect-based where the effect of the challenged behaviour that is analysed. Thus, there needs to be an actual or potential exclusionary effect on the relevant market. The condition for the application of the provision is that there is an effect, but no requirement for that to be by the dominant undertaking the desired effect. Therefore, it is not required for the competitors to ultimately be excluded from the market.[212] Furthermore, the abusive behaviour only falls outside of the scope of art. 102 TFEU if there is no effect at all.[213] When determining whether the practice is abusive all factors need to be considered.[214] That includes all circumstances of the behaviour, in particular potential rules, or criteria that the undertaking has applied to control the market.[215] Due to each publisher deciding on the structure of the competitions and the games the structure of the ecosystems may vary as well.[216]

Abuse includes exclusionary behaviour on the relevant market. Simplified, the behaviour is excluding actors on the market. Art. 102 TFEU prohibits different kinds of abuses of dominance. Exclusionary conduct is one of them. That is, when an undertaking abuses its dominance in order to exclude actual or potential competitors by preventing them from accessing the market. The undertaking does this by influencing different parameters of competition, e.g. innovation, production or quality of goods or services.[217] *Inter alia* cases involving essential facilities are discriminating against competitors to build its own vertically integrated business and tying and bundling is ultimately to demand a higher price for a product, that is price discrimination.[218] The provision is prohibiting exclusionary behaviour, but the aspect of discrimination is

[210] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 64.

[211] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 65; Case C-377/20 *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, EU:C:2022:379, para. 98.

[212] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 65.

[213] Case C-280/08 P *Deutsche Telekom AG v European Commission*, EU:C:2010:603, para. 254.

[214] Ibid, para. 175.

[215] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para. 73.

[216] Scholz, T. M. & Nothelfer, N. 2022, *Research for CULT Committee – Esports, European Parliament, Policy Department for Structural and Cohesion Policies*, Brussels, p. 11.

[217] Case T-604/18 *Google LLC and Alphabet, Inc. v European Commission*, EU:T:2022:541, para. 281.

[218] O'Donoghue, Robert & Padilla, Jorge. *The Law and Economics of Article 102*. The United Kingdom, Oxford: Hart Publishing Ltd, (2nd ed.), 2013, p. 777.

relevant and is included as one of the prohibited conducts on the internal market.[219]

Exclusionary practices can be a result of the exploitation of an IP right. However, this is prohibited merely under exceptional circumstances[220] and needs to be counterbalanced to the right to doing business[221] as well as the right to property[222] in accordance with the Charter. In some circumstances it can result in an obligation to license which will be discussed later.

Regarding tournaments, the publisher has the exclusive right to license its video game and therefore also the limits to it. Thus, the concern does not lie in merely obtaining a license for the tournament for the game. It includes how the intellectual property, i.e. the video game, and how it may be used. For example, broadcasting rights are often limited.[223]

Where a publisher is vertically integrated business strategies are risking an anticompetitive effect. In the recent amendment of the guidelines on the enforcement priorities of art. 102 TFEU the Commission has stated that a prioritised concern is where the behaviour negatively influences the relevant market to its own advantage. Where the benchmark previously was that the conduct sought to exclude or marginalise competitors the guidelines which are a codification of case law affirms that merely weakening the competition on the market can constitute an exclusionary practice.[224]

Esports consists of several ecosystems intertwined including those of the publisher and the tournament organiser. Additionally, the publisher has in some cases decided to vertically integrate as its business strategy. Usually, that incurs a strategy where the publisher can collect revenue on the market for Esports tournaments. Since the publisher is active on two markets in the ecosystem there is a risk of the publisher using its potential dominance in the upstream market as an advantage in the downstream market.[225]

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[219] Art. 102(c) TFEU. Observe that the list in the article is not exhaustive.

[220] Case 238/87 *AB Volvo v Erik Veng (UK) Ltd*., EU:C:1988:477, para. 9.

[221] Art. 16 the Charter.

[222] Art. 17 the Charter.

[223] See e.g. Riot Games, *OCE Tournaments*, https://developer.riotgames.com/policies/oce-tournaments, accessed 8 December 2023; Blizzard Entertainment, *Blizzard Community Competition License*, https://www.blizzard.com/en-gb/legal/ad996a79-1b76-47af-a586-833c8af93a3d/blizzard-community-competition-license, accessed 8 December 2023.

[224] European Commission, *Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings: Annex*, pt. 1.

[225] See e.g. Joined cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* (*Commercial Solvents*), EU:C:1974:18, para. 46; Ghidini, Gustavo & Arezzo, Emanuela. 'On the Intersection of IPRs and Competition Law With Regard to Information Technology Markets' in C.D

An allegedly dominant publisher can use its dominance on the upstream market to impact the downstream market. The ownership of the IP rights of the video game already gives the publisher an advantage.[226] Furthermore, the ecosystem includes broadcasting which requires a license.[227] Since the publisher can decide on whether an independent tournament organiser obtains a license for broadcasting, it can put the competitor at a disadvantage by refusing such a license.

As the owner of the IP rights of the video game, the publisher holds a special position. The IP rights entail an exclusive right to distribution and other ways to monetise the IP.[228] Furthermore, it includes a regulatory power of the video game. The publisher can decide who enters the market and on what conditions. Principally, deciding on the access to the IP right is not an infringement of art. 102 TFEU. An undertaking which has such a power may, however, have certain principles to consider.[229]

4.4.3 Refusal to license

On the digital market where parties often are vertically integrated is the abusive practice refusal to supply a common concern. Included in the abusive practice refusal to supply is the refusal to license.[230] In cases where the IP right plays an integral part of the market the doctrine is of relevance. The interface between IP rights and competition law becomes prominent and the question of which needs to be compromised arises. Nonetheless, it is important to keep in mind that whereas private law rules the internal roles, e.g. the interpretation of a contract, competition solely rules on the external rules.[231] Therefore, competition law cannot determine what the contract will include, but merely whether it infringes the antitrust provisions.

The obligation to give access to licenses in exceptional circumstances has been considered in several cases even when the essential facilities doctrine was not explicitly affirmed.[232] It concerns cases where the dominant

Ehlermann and I. Atanasiu, (eds.). *European Competition Law Annual 2005: The Relationship Between Competition Law and Intellectual Property Law*. The United Kingdom, Oxford: Hart Publ., Oxford. 2006. p. 4.

[226] European Commission, Directorate-General for Communications Networks, Content and Technology, Ecorys, *Understanding the value of a European Video Games Society*, Luxembourg: Publications Office of the European Union, 2023, p. 48.

[227] Art. 7(1)(a) InfoSoc.

[228] See e.g. art. 4 InfoSoc.

[229] See e.g. Case 238/87 *AB Volvo v Erik Veng (UK) Ltd*., EU:C:1988:477, para. 8.

[230] See *Microsoft* and *Google* where both cases concern obligations to give access to facilities.

[231] Cseres, Katalin, 'Competition and Contract Law,' in *Towards a European Civil Code*, Hartkamp, Arthur, et al. (eds.), 2010, p. 205.

[232] Joined cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* (*Commercial Solvents*), EU:C:1974:18, para. 46; Case 27/76 *United Brands Company and United Brands*

undertaking owns a facility which can be used to exclude competitors. That happened in *Commercial Solvents* where the dominant undertaking stopped supplying to the aftermarket due to plans of vertical integration.[233] Furthermore, similar principles can be applied to neighbouring markets where the supplier is not competing and the IP right is used to exclude undertakings from an aftermarket.[234] Depending on the market, the conditions for obligating an undertaking to give access to the facility differ as the interference with the exclusive right needs to be proportionate to the objective.[235] When there is a refusal to supply, the position on the relevant market needs to be considered as well as the position on a neighbouring market. Taking advantage of a dominant position on the primary market as a supplier the refusal to supply can constitute an abuse of dominant position within the scope of art. 102 TFEU.[236]

Primarily, an undertaking cannot be held liable for distortion of competition solely based on the refusal to conclude a contract. It is the undertaking's freedom of conducting business[237] and the fundamental principle that one is free to choose one's trading partners,[238] and it is not certain that it is anticompetitive. When an undertaking develops facilities for its business it has an incentive to produce facilities of a better quality than its competitors. If the competitor were to easily attain the facility the undertakings would not be as inclined to produce competing facilities. In cases concerning refusal to license it is therefore significant to strike a balance between dynamic and static efficiencies. That relates to economic theories of how the EU needs to interfere in order to ensure a competitive market. There are some facilities which are essential for enabling competition, but an incentive of producing these competing facilities needs to remain. This balance is supposed to encourage development and innovation which consumer can benefit from. If a fair balance

Continentaal BV v Commission of the European Communities (*United Brands*), EU:C:1978:22, paras. 182-183.

[233] Joined cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* (*Commercial Solvents*), EU:C:1974:18, para. 46.

[234] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill)*, EU:C:1995:98, paras. 53-56.

[235] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill)*, EU:C:1995:98, para. 93.

[236] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill)*, EU:C:1995:98, para. 54.

[237] Art. 16 the Charter.

[238] Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, para. 319.

is not achieved there is a risk of harming competition in the long term by obliging a license.[239]

Although, the undertaking has a freedom of conducting business it cannot be done by restricting the freedom to provide services on the internal market.[240]

To be a refusal to license which constitutes an abusive conduct, there needs to be a market where there is a potential or hypothetical is sufficient, neighbouring market where the facility is indispensable.[241]

In AG Jacobs' opinion in C-7/97 *Oscar Bronner GmbH* he refers to the generally recognised principle of choosing one's trading partners as well as the right to freely dispose one's property and asserts that compromising these rights requires careful justification.[242] Furthermore, this aligns with the economic approach. Competition law should solely interfere when there is a genuine competition problem on the market. Otherwise, the market and its competitive process should not be disturbed. The purpose of competition law is not to grant access to a market where an efficient competitor would succeed in entering.[243]

4.4.3.1 Excluding tournament organisers

Ultimately, IP rights grant an exclusive right to the owner of the protected work to control the access. On a physical market the owner may deny the sale of a copy. Furthermore, the access is only granted when there is an available copy of for example a photography or book. The digital market has altered how the owner of an IP rights can control the access.[244] The license agreements concluded with the tournament organiser include limitations of the rights conferred. For example, all derivative material such as broadcasts

[239] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264, para. 57; Case C-165/19 P *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239 para. 47.

[240] Comp. Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, EU:C:1974:140, para. 18.

[241] C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG., EU:C:2004:257*, para. 44; T-201/04 *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, para. 107.

[242] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264, para. 56.

[243] OECD, *Policy Roundtables: Competition Policy and Intellectual Property Right*, 1997, p. 222.

[244] Madison, Michael J., *Reconstructing the Software License*, 35 Loyola University Chicago Law Journal, 2003, p. 280.

normally belong to the publisher and the permitted revenue from a tournament.[245] This enables the publisher to maintain the access control.

The publisher is able to terminate the agreement on the basis of contract law.[246] By terminating the contract, the tournament organiser who is dependent on the video game for its profits is prevented from generating any further revenue from the video game. Consequently, questions of a potential abuse of dominance by foreclosing competition arises. A condition for applying art. 102 TFEU is that the abuse has a causal link to the undertaking's dominant position.[247] Therefore, a potential exclusion of a competitor needs to be caused by the dominant position of the publisher.

Alternately, referring to *United Brands* the dominant undertaking might abuse its dominant position by "stop supplying to a long standing customer who abide by regular commercial practice, if the orders placed by the customer are in no way out of the ordinary." The CJEU asserted that it would be inconsistent with the EU's objective, currently Protocol 27, of maintaining a competitive market.[248] In comparison, AG Jacobs has affirmed the, in many Member States constitutional, freedom of contract and having the right to decide in concerns of one's properties.[249] For a non-competitor it is of higher relevance to assess normal business practices in relation to the challenged behaviour.[250] After *United Brands*, the Charter has been established in EU law. The Charter includes the right to conduct a business[251] and the right to decide over one's property.[252]

A publisher's power and independence on the market based on copyright can significantly impact the ecosystem. Whereas organisers of tournaments in traditional sports cannot be prevented from doing so due to a license, the Esports industry requires a tournament organiser to first obtain a license. Furthermore, other actors in the ecosystem are dependent on it as well to maintain its participation. This may result in substantial economic consequences for the

[245] See e.g. Riot Games, *OCE Tournaments*, https://developer.riotgames.com/policies/oce-tournaments, accessed 8 December 2023; Blizzard Entertainment, *Blizzard Community Competition License*, https://www.blizzard.com/en-gb/legal/ad996a79-1b76-47af-a586-833c8af93a3d/blizzard-community-competition-license, accessed 8 December 2023.

[246] Contract law includes the legal framework for the internal rules of the contract whereas competition law is mainly applied for the external rules.

[247] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (*Continental Can*), EU:C:1973:22, para. 27.

[248] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (*United Brands*), EU:C:1978:22, paras. 182-183.

[249] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264, para 56.

[250] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 91.

[251] Art. 16 the Charter.

[252] Art. 17 the Charter.

player. Activision Blizzard, publisher of the video game Hearthstone, has previously banned the player Ng Wai Chung in Hong Kong. Ng Wai Chung was banned from playing the video game Hearthstone for one year and had to forfeit his previously earned prize money of $10.000. The sanction was the aftermath from showing support for the current protest in Hong Kong against China.[253] Since Activision Blizzard was the publisher with the IP rights covering the video game, they were able to completely ban Ng Wai Chung from playing. This can be compared with traditional sports where a player can still play e.g. ice-hockey even after they have been prohibited from participating in a tournament.[254]

A comparison can be done with the *United Brands* case where there was a question of whether halting the deliveries to a long-standing customer was abuse of dominance. The reason was that the customer was receiving deliveries from a competing producer as well. The CJEU asserted that United Brands was infringing art. 102 TFEU by refusing deliveries to a long-standing customer that had not done something outside of the ordinary business practices. The CJEU decided in that case that it constituted an abuse of dominance.[255] The same argument found success in the *Joined cases C-468/06 to C-478/06 Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* where the CJEU confirmed that refusing deliveries to customers acting outside the ordinary could constitute an abuse under art. 102 TFEU. Moreover, the refusal to deliver the products needed to be a proportionate measure to the achieve the objectives and protect the undertaking's legitimate interests.[256]

4.4.4 Market considerations

The obligation to license to another undertaking is as previously stated, a significant interference with the exclusive IP right. Therefore, to determine it as proportionate, necessary, and genuinely reach the objective, it is strongly

[253] Victor, Danel; 'Blizzard Sets Off Backlash for Penalizing Hearthstone Gamer in Hong Kong,' The New York Times, published 9 October 2019, updated 1 November 2019, <https://www.nytimes.com/2019/10/09/world/asia/blizzard-hearthstone-hong-kong.html> (accessed 26 October 2023); This raises the question of the balance of freedom of conducting a business (art. 16 EU Charter) and the freedom of expression (art. 11 EU Charter). This is increasingly relevant on the digital market with big platforms. It is, however, not a question which will be discussed in this thesis as the focus lies on the undertakings' competitive freedom.

[254] Miroff, Max, *Tiebreaker: An Antitrust Analysis of Esports*, Columbia Journal of Law and Social Problems, 2019, pp. 179-180.

[255] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (*United Brands*), EU:C:1978:22,

[256] Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, EU:C:2008:504, para. 70.

dependent on the market and its state.[257] For instance, an already weakened market may incur a higher interference of competition remedies. A weakened market is signified by the abilities to compete on the market. On markets where there is an undertaking with so much influence on the market that undertakings have difficulties in competing despite being more efficient the competition is weakened.[258] Furthermore, if the market is impacted by high entry barriers and strong network effects there are likely fewer competitors competing on the market.[259]

The application of competition law to Esports the special characteristics for the digital market need to be taken into account. Furthermore, Esports constituting tournaments based on video games has its own characteristics which need to be considered for determining whether an undertaking is dominant and whether the market is weakened enough for an obligation to license is considered proportionate. Esports as an aftermarket to the primary market of video games is relevant to take into account in the assessment.[260]

It is evident that market shares are not the only factor for determining whether an undertaking is dominant. There are other factors such as regulatory rights, including IP rights which can impact the market and let the undertaking gain market power.[261]

Regardless of market power, an undertaking may protect its own commercial interests as long as the objective in fact is to protect said interests and that the means to do so are appropriate and proportionate. The economic power the undertakings have does constitute a factor of what is deemed as appropriate in that regard. The objective cannot be to strengthen its own dominant position.[262] Moreover, whereas a dominant undertaking should be allowed to protect and maintain its dominant position, the effect cannot be to strengthen the dominant position, irrespective of fault. Meaning, that irrespective of what the objective is, the undertaking may only protect and maintain the dominance it already has as an increase in market might constitute abuse of dominance.[263]

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[257] Gölstam, Carl Martin, *Licensavtalet och konkurrensrätten*, 2007, p. 152.

[258] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 91.

[259] Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission*, EU:T:2021:763, para. 226.

[260] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 91.

[261] Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:T:2010:266, para. 244.

[262] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (*United Brands*), EU:C:1978:22, paras. 189-190 & Case T-65/89 *BPB Industries and British Gypsum v Commission*, EU:T:1993:31, para. 69.

[263] 2006/857/EC: Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/A.37.507/F3 — *AstraZeneca*), para. 326; Case T-128/98 *Aéroports de Paris v Commission of the European Communities*, EU:T:2000:290, para. 170; Case 6-72 *Europemballage Corporation and*

Although, market shares cannot determine a dominant position alone, it is strong evidence for the existence of dominance. Aside from market shares there are first-mover advantages and regulatory rights such as IP rights which impact the market power.[264] The mere existence of an IP right is not sufficient to determine the existence of a dominant position, but on market where the exclusivity of the right constitute a major advantage it is a factor to consider.[265]

If an undertaking's purpose of a certain practice is to gain market power, this may be deemed as abuse of dominance. Exclusionary behaviour may constitute even when the purpose is to maintain market power if this is in order to eliminate potential competitors. That does not preclude the abuse of dominance. The market shares are, as previously mentioned, merely a factor to assess dominance, even though they are strong evidence and determines market dominance except for in exceptional circumstances.[266]

In markets where innovation bears a high significance these may increase the market shares for an undertaking. The innovative environment constitutes a factor for assessing the market, but it does not preclude them from becoming a factor for the assessment of market shares.[267] A comparison can be made to the Esports market. Unless an undertaking has the IP right to a video game it is less likely they can be competitive on the market.[268]

The prohibited exclusionary behaviours in art. 102 TFEU are not an exhaustive enumeration. The article is applied with a dynamic approach and sees to the exclusionary behaviour demonstrated on the market which may impact consumer welfare. Furthermore, it is not only behaviour having a direct impact on the consumers which is prohibited, but also indirectly where the effective competition market structure might be impacted by the undertaking's behaviour. *Inter alia*, behaviour where the remaining undertakings on the relevant market are dependent on the dominant undertaking.[269]

Continental Can Company Inc. v Commission of the European Communities (*Continental Can*), EU:C:1973:22, paras. 27 & 29.

[264] Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:T:2010:266, para. 244.

[265] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* (Magill), EU:C:1995:98, paras. 46-47.

[266] Comp. Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:T:2010:266, para. 242, upheld by the Court of Justice in Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:C:2012:770, paras. 174-182.

[267] Ibid, paras. 174-182.

[268] European Commission, *European Media Industry Outlook*, SWD(2023) 150 final, p. 5.

[269] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (*Continental Can*), EU:C:1973:22, para. 26.

In previous case law the defendant has used the incentive to innovate as an objective justification to not conclude license agreements.[270]

4.5 Objective justifications

In conclusion, possible anticompetitive conducts mainly concern the refusal to supply and specifically the refusal to license. This concerns both towards players and tournament organisers. These are undertakings within Esports that are active on different markets. The refusal to license to players and tournament organisers are based on different business strategies. Based on the aforementioned freedom of conducting a business, applying business strategies are allowed. When these turn to become anticompetitive they are infringing art. 102 TFEU. Challenged practices do not need to have the aim to be anticompetitive. As it is an objective concept the CJEU has found that it is solely the effect on competition that is considered.[271] Therefore, conducts where, for instance, a tournament organiser is refused a license due to business related reasons, the conduct can still be deemed to be anticompetitive. Nevertheless, the conduct may be justified if it can be demonstrated that the behaviour is counterbalanced by efficiencies benefiting the consumer welfare or other objectives of the EU. Furthermore, these need to be proportionate and necessary for achieving the objective.[272]

Although Esports may result in obstacles on the internal market due to ecosystems it also has a value for the market. It may result in economic growth through increased technological as well as cultural development. Furthermore, the Esports tournaments may increase promotion of the EU's cultures and values[273] which reflects the EU's objective in art. 3(5) TEU.[274]

Video games, the basis of Esports, is becoming a major global industry resulting in revenues of €169.1 billion globally[275] where the revenue in Europe alone constitutes ca €30.9 billion.[276] Therefore, it is becoming an important part of the internal market since it also results in jobs, and it has been

[270] Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, para. 111.

[271] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36, para. 91 ; Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, EU:T:2003:250, para. 237; Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission*, EU:T:2021:763, para. 264.

[272] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 42.

[273] European Parliament, resolution of 10 November 2022 *on esports and video games*, pt. E.

[274] Art. 3(5) TEU.

[275] $184 billion according to the exchange rate on 2 December 2023; Newzoo, *Global Games Market Report*, October 2023, https://newzoo.com/resources/trend-reports/newzoo-global-games-market-report-2023, p. 21.

[276] 33.6 billion according to the exchange rate on 2 December 2023; Newzoo, *Global Games Market Report*, October 2023, https://newzoo.com/resources/trend-reports/newzoo-global-games-market-report-2023, p. 21.

recognized that the players develop valuable skills for the creative and technological markets.[277]

Competition law is seeing an increasing economic approach in general, for instance when it comes to justifications and an important objective is to prevent distortion of markets and increase consumer welfare. Furthermore, the Esports market is a market which EU wishes to evolve within the internal market.[278] Whereas the refusal to license may be perceived as anticompetitive due to the consequential barriers to enter the market it can still be justified. Arguments which have been brought before the court in previous cases concerning refusal to deal essentially concern the freedom of concerning business and the incentives it relates to. The objective of IP rights is to create an incentive to develop and innovate. The protection needs to be effective in order to ensure a consistent incentive.[279] The aforementioned opinion to the *Bronner* case also refers to the right to property. An obligation to conclude an agreement is a substantial interference with the right to property. [280]

Competition law, which is a, as previously mentioned, dynamic area of law these openings for justifications are necessary. Something which can be described as an abuse might be due to its circumstances justified. This has been established in case law.[281] Since art. 102 TFEU is prohibiting behaviour of dominant undertakings which sought to weaken the competition on the relevant market, it needs to be determined whether the challenged behaviour is deliberately conducted to exclude competitors from the market.[282]

[277] See European Parliament, resolution of 10 November 2022 on esports and video games, pts. W & T.

[278] See European Parliament, resolution of 10 November 2022 on esports and video games, pt. 29.

[279] Case 238/87 *AB Volvo v Erik Veng (UK) Ltd*., EU:C:1988:477, para. 8.

[280] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264, para. 57.

[281] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, paras. 26 & 30.

[282] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities*, EU:C:1991:286, para. 72.

5 Publisher vs Tournament organisers

5.1 Introduction

The legal dogmatic method in the light of the EU legal method will be the basis of the following discussion. Thus, as the previous chapters have presented the relevant sources these will be analysed to determine current law and how it may be applied to Esports. At final, the discussion will aim to answer the research question of whether the publisher's refusal to license to an independent tournament organiser may be challenged by art. 102 TFEU.

5.2 Market considerations

To start with, it is necessary to consider the market structure. An interference with exclusive rights needs to be proportionate and according to case law that is when the actor is dominant on the market and can create anti-competitive effects with the IP rights. Hence, it is necessary to establish whether a publisher and the tournament organiser are active on markets where such an interference may be considered proportionate.

Essentially, the market structure is what characterises the Esports market. With a similar structure of traditional sports, but including important IP rights, the publishers are at the top of the structure. Ultimately deciding on who is entering the Esports market. The chosen business strategy therefore has a big influence on the market.

There are strong network effects within Esports, but players can still easily switch from one video game to another. Dominance can therefore be significantly temporary. Moreover, low entry barriers increase the required amount of market shares to be considered dominant. These are factors that the Commission has taken into account in the past when assessing the market for video games. When assessing the market for Esports tournaments, it is of relevance to consider the video games market as it is part of the ecosystem and Esports is an aftermarket. Whereas the Commission has held that the market for video games is competitive due to for example players easily switching between games, there are factors which counteracts that argument. Low switching costs may be common on the markets for mobile and PC games, but as the Commission has also held, there are only three significant console developers that are also active on the market for video games. That entails that the influence the hardware, software and as a result the Esports market. Due to the potentially significant influence they can have on the market and as one of the few combined publisher and console developer, those undertakings can be determined as dominant on the Esports market. Furthermore, the Commission found that there was a tendency of brand loyalty to console games. Meaning that players who chose a certain console tended to stay with that brand which entails higher barriers to entry.

Regarding the market considerations, the market definition can be deemed as uncertain. The Commission has so far applied broad market definitions, but factors like brand loyalty to hardware can constitute a reason to consider a narrower definition.

5.3 The risks of a refusal to license

The refusal to license bears a high risk to negatively impact the market due to exclusive IP rights and its connected ecosystem. In an ecosystem where the publisher has vertically integrated there are certain practices which due to their effect can fall within the scope of art. 102 TFEU as an abuse of dominance.

There have been a number of cases concerning the refusal to deal, supply, license before the CJEU. All based on similar factors. The main factor is the amount of influence the dominant undertaking has on the market and the barriers to entry for potential competitors. Often, the CJEU has required a high market power from the undertaking concerned. Since the measure needs to be proportionate and necessary to achieve the objective factors like high market power is considered. If the market is fragmented and there are several competitors on the market obligations to license as a measure is not justified.

5.4 Balancing of interests

The mere exclusive rights are inherent of the IP and cannot be deemed as an abuse of dominance *per se*. That would be contradictory to the purpose of the IP rights which is to increase incentives to innovate and develop which ultimately increases competitiveness. Furthermore, the video game is not only protected by intellectual property law, but also the Charter. According to the Charter the undertaking is free to conduct its business, including choosing trading partners, and the freedom to control its property. To interfere with the rights granted by the Charter the remedies need to be proportionate, necessary, and effective to achieve the aim.

Where the publisher refuses to conclude a license to a tournament organiser, it prevents the tournament organiser from entering the market. Thus, there is a potentially anticompetitive effect. That is, as long as the tournament organiser was an effective competitor on the market. Competition law has an objective to ensure a competitive market benefitting the consumer welfare, not the protection of competitors. If the tournament organiser was not efficient, competition on the merit applies and it will leave the market. However, whereas consumer welfare is an often referenced objective, the CJEU has stated that is not merely that, but the structure of the market it aims to protect. By protecting the structure of the market, it enhances the chances of a competitive market.

There are several examples in case law where the access control, and more specifically, the exclusive rights to IP result in abuse of dominance. It is, however, not given that the refusal to license can be abusive. It is a right according to the Charter to decide on the business partners and that includes who can obtain a license. Even though the conclusion of a license agreement can result in an increase in competition short-term there might be negative long-term effects. The exclusive rights have the aim of increasing the incentive for R&D and innovation. By compromising the exclusive rights, the market may become less incentivised to develop and ultimately leaving the consumer with fewer and less efficient alternatives on the market. Furthermore, the rule of law including transparency and legal certainty need to be considered. The undertakings active on the market need to be able to assess the market. If competition law interferes it creates an uncertainty which has a negative impact on the market. Thus, even though it results in competitive effects short term, it can create negative effects long-term.

Even though the player will most likely be significantly impacted, it is important to keep in mind that competition law does not protect competitors. Instead, it is the consumer welfare and the structure of the market that are considered. Nonetheless, if a competitor is prevented from entering the market there are risks of negatively impacting the consumer welfare due to fewer choices which entails a risk of the publisher using its competitive advantage by exploiting end-users.

At last, if an abusive practice is found, there may still be justifications. A publisher can refer to economic efficiencies benefitting the consumers or other objectives of the EU. This includes justifications as higher quality in the tournaments.

5.5 Art. 102 TFEU and the refusal to license

The difficulty in defining the market constitutes a complication when determining whether the publisher's decision to refuse to license can be prohibited by art. 102 TFEU. The refusal to license can result in an obligation to license ruled by the CJEU. That is, however, a significant interference with the exclusive rights which also constitutes a part of the Charter. Therefore, it needs to be proportionate in relation to the anticompetitive effects the refusal has. On a market where the undertaking is dominant and can be determined to have a significant influence it is more likely that the CJEU finds it proportionate. In previous case law the obligation to license has occurred when the exclusive right has been indispensable to enter the market. Therefore, it is necessary to determine whether there are other suppliers that can supply the same product without demanding too high costs for the undertaking.

In the market for Esports, it is unlikely that the license for organising an Esports tournament can be deemed as indispensable. Regardless of how the market is defined, the switching costs are likely to remain too low to consider any

of the publishers dominant with a product which is indispensable. Even though there are few publishers that also develop consoles it can still not be indispensable as there are other suppliers. Therefore, the obligation to license is unlikely to be demanded.

There are conducts related to the refusal to license which can, however, constitute abuse of dominance despite the product to being indispensable. That is in regard to suppliers that stop the supply to the customer on an aftermarket. In *Commercial Solvents* the stop of supply was determined to be abuse of dominance under art. 102 TFEU. Furthermore, in *United Brands* the CJEU stated that it could be considered as abuse of dominance when the undertaking stopped dealing when the customer had not acted outside of the ordinary. These are cases where the CJEU has determined that the conduct is abuse of dominance due to the anticompetitive effects and the undertaking has had it as an objective to foreclose competition. Forcing a tournament organiser to switch to another publisher results in switching costs which due to large investments will exclude it from the market. Therefore, this conduct might fall under art. 102 TFEU.

With previous case law as a basis, publishers' decision not to license to a tournament organiser may be defined as abuse of dominance under art. 102 TFEU. That is provided that there has been a previous business relationship which has ended which has given anticompetitive effects.

5.6 Concluding remarks

There are many business strategies that a publisher can choose regarding Esports. This paper has mainly concerned where the publisher has decided whether or not to vertically integrate into the market for tournaments. Due to the IP rights of the publisher, it enjoys competitive advantages and can decide who enters the market for Esports tournaments. Ultimately, it has a seemingly regulatory power within the market as it can decide on who to conclude a license agreement with and what it shall include.

Even though the current state of the EU's legal framework indicates that publishers refusing to license will not constitute an abuse of dominance it cannot be a certain conclusion for the future. Evidently, EU law is influenced by politics and, hence, it depends on what direction it will continue. At the present stage, it has been demonstrated by the EU that digital markets will be further regulated. Thus, in the future, as the focus finally reaches the Esports industry further regulation may be initiated.

There are several interests concerned which need to be considered for an application of art. 102 TFEU. The most significant on the side of the EU is to maintain a competitive internal market in order to encourage innovation which results in consumer welfare. The publishers have a commercial interest where they partly use their IP rights to develop their strategies. At times, this

might constitute an abuse of dominance. Moreover, the IP rights includes an exclusive right so an undertaking refusing to conclude a license concerning the IP right is not necessarily an abuse of dominance.

There is an interest in regulating Esports but at the same time it is important to consider the market as it is structured. It is a global market which the EU also wants to see develop. However, competition law cannot be disregarded either. The basic principles of the EU and competition law are intended to ensure an effective competition on the internal market. The objective of EU competition law is to enhance economic growth and create incentives for innovation. The Esports market is an important environment for innovation, but currently there are big tech companies in the market which may create barriers to entry for small and medium-sized enterprises.

In conclusion, it might be difficult to challenge the publisher's refusal to license to a tournament organiser since it is unlikely that the license will be deemed as indispensable. Moreover, an obligation to license would incur a serious interference with the right to property and the freedom to conduct a business according to the Charter. Where the publisher eliminates a license there might be foreclosing effects which can be challenged with art. 102 TFEU. The future approach needs to be carefully considered as an effective protection of IP rights should be maintained to achieve a market with innovation where the Esports market can evolve. At the same time, the possible anticompetitive conducts need to be considered as well as it is a market on the rise which may need to be monitored more closely.

5.7 Further research

Finally, as a last remark, this paper has aimed at explaining the many different concerns in the Esports ecosystem with the focus lying on the relationship between the publishers and tournament organisers. Whereas there are concerns arising from the access control of the publisher that then has a substantial influence on the market for the game, there are also concerns in other areas of Esports. Although, the EU has increased its focus on the industry as a part of the global digitalisation it is still a largely unregulated area. As the tournaments increase the impact on the market and players no longer playing merely for recreation, but professionally, there is increasing relevance. Furthermore, especially the area of competition law is of interest. This includes different market players, *inter alia* players, advertisers, and teams. The intention of the Esports market is to maintain a competition in the game, and further research in the area would be interest to see from an EU perspective.

Bibliography

Literature

Ackermann, Thomas. "European Competition Law" in Karl Riesnenhuber (ed.) *European Legal Methodology*, Intersentia Ltd, Cambridge, 2021

Barents, René, *The Autonomy of Community Law*, The Netherlands, The Hague: Kluwer Law International, 2003, ISBN: 9789041122513

Bishop, Simon and Walker, Mike. The Economics of EC Competition Law. The United Kingdom, London: Sweet & Maxwell, 2010, ISBN: 9780421927308

Brook, Or. "In Search of a European Economic Imaginary of Competition: Fifty Years of the Commission's Annual Reports," 1(4) European Law Open, 2022, https://doi.org/10.1017/elo.2023.4

Cremer, Jacques, de Montjoye, Yves-Alexandre, & Schweitzer, Heike. *Competition policy for the digital era*. Luxembourg: Publications Office of the European Union. 2019. ISBN 9789276019466

Cseres, Katalin, 'Competition and Contract Law,' in Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud Hondius, C Mak, Edgar Du Perron (eds.) *Towards a European Civil Code*. (4th ed.) The Netherlands, The Hague: Kluwer Law International. 2010. ISBN: 9041133577

Firth, Alison. 'The Essential Facilities Principle and Other Issues of Competition,' in Irini A. Stamatoudi & Paul Torremans (eds.) *EU Copyright Law*. The United Kingdom, Cheltenham: Edward Elgar Publishing Limited. 2021. ISBN: 9781781952429

Ghidini, Gustavo & Arezzo, Emanuela. 'On the Intersection of IPRs and Competition Law With Regard to Information Technology Markets' in C.D Ehlermann and I. Atanasiu, (eds.). *European Competition Law Annual 2005: The Relationship Between Competition Law and Intellectual Property Law*. The United Kingdom, Oxford: Hart Publ., Oxford. 2006

Gölstam, Carl Martin. 'Licensavtalet och konkurrensrätten.' *Juridisk Tidskrift*, 2007

Jones, Alison, Sufrin, Brenda & Dunne, Niamh, *EU Competition Law: Text, Cases and Material*, (8th ed.) The United Kingdom, Oxford: Oxford University Press. 2023. ISBN: 9780192855015

Kleineman, Jan, ’Rättsdogmatisk metod’ in Maria Nääv & Mauro Zamboni (eds.) *Juridisk metodlära*. Sweden, Lund: Studentlitteratur. 2018. ISBN: 9789144116761

Landes, William M., & Posner, Richard A., *The Economic Structure of Intellectual Property Law*. The United States of America, Cambridge: The Belknap Press of Harvard University Press. 2003. ISBN: 9780674012042

Madison, Michael J., *Reconstructing the Software License*, 35 Loyola University Chicago Law Journal, 2003, https://scholarship.law.pitt.edu/fac_articles/209

Miroff, Max, Tiebreaker. *An Antitrust Analysis of Esports*, 52(2) Columbia Journal of Law and Social Problems, 2019, https://ssrn.com/abstract=3493869

Neergaard, Ulla and Nielsen, Ruth. ‘Where Did the Spirit and Its Friends Go?’ in Ulla Boegh Neergaard, Ruth Nielsen, Lynn M. Roseberry (eds.) *European Legal Method: Paradoxes and Revitalisation*. Denmark, Copenhagen: DJØF. 2011. ISBN: 9788757423778

O’Donoghue, Robert & Padilla, Jorge. *The Law and Economics of Article 102*. The United Kingdom, Oxford: Hart Publishing Ltd, (2nd ed.) 2013. ISBN: 9781849461399

Reichel, Jane, ’EU-rättslig metod’ in Maria Nääv & Mauro Zamboni (eds.) *Juridisk metodlära*. Sweden, Lund: Studentlitteratur. 2018. ISBN: 9789144116761

Senden, Linda. ‘Changes in the Relative Importance of Sources of Law – The Case of EU Soft Law’ in Ulla Neergaard & Ruth Nielsen (eds.) *European Legal Method: in a Multi-Level EU Legal Order*. (1st ed.) Denmark, Copenhagen: DJØF. 2012. ISBN: 9788757428681

Van de Gronden, Johan W. & Rusu, Catalin S., *Competition Law in the EU: Principles, Substance, Enforcement*. The United Kingdom, Cheltenham: Edward Elgar Publishing Ltd. 2021. ISBN: 9781788974745

Whish, Richard & Bailey, David. *Competition Law*. (10th ed.) The United Kingdom, Oxford: Oxford University Press. 2021. ISBN: 9780198836322

Websites

Blizzard Entertainment, *Blizzard Community Competition License*, https://www.blizzard.com/en-gb/legal/ad996a79-1b76-47af-a586-833c8af93a3d/blizzard-community-competition-license, accessed 8 December 2023

ISFE Esports, *The Guide to Esports*, https://www.videogameseurope.eu/vge-esports/esports-a-complete-guide-by-the-video-games-industry/ accessed 20 November 2023

Newzoo, *Global Games Market Report*, October 2023, https://newzoo.com/resources/trend-reports/newzoo-global-games-market-report-2023 accessed 1 December 2023

Riot Games, *OCE Tournaments*, https://developer.riotgames.com/policies/oce-tournaments, accessed 8 December 2023

Victor, Danel; 'Blizzard Sets Off Backlash for Penalizing Hearthstone Gamer in Hong Kong,' *The New York Times,* published 9 October 2019, updated 1 November 2019, https://www.nytimes.com/2019/10/09/world/asia/blizzard-hearthstone-hong-kong.html accessed 26 October 2023, accessed 2 December 2023

Other

European Commission, 'Commission adopts revised Market Definition Notice for competition cases,' Press release, 8 February 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6001

European Commission, Directorate-General for Competition, McCallum, L., Bernaerts, I., Kadar, M. et al., *A dynamic and workable effects-based approach to abuse of dominance*, Publications Office of the European Union, 2023OECD, 'Digital competition policy: Are ecosystems different? - Note by Amelia Fletcher: Hearing on Competition Economics of Digital Ecosystems,' 3 December 2020

European Commission, Directorate-General for Communications Networks, Content and Technology, Ecorys, KEA, *Understanding the value of a European video games society – Final report*. Luxembourg: Publications Office of the European Union. 2023, https://data.europa.eu/doi/10.2759/332575

European Parliament, Scholz, Tobias M. & Nothelfer, Nepomuk. *Research for CULT Committee – Esports*, Brussels: Policy Department for Structural and Cohesion Policies, 2022

OECD, 'The Evolving Concept of Market Power in the Digital Economy – Note by the European Union,' DAF/COMP/WD(2022)30

OECD, 'Handbook on Competition Policy in the Digital Age,' 2022

OECD, 'Licensing of IP rights and competition law – Summaries of contributions,' 23 July 2019

OECD, ‘Policy Roundtables: Competition Policy and Intellectual Property Right,’ 1997

WIPO – *Administered Treaties* https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=15 accessed 12 November 2023

WIPO, ‘World Intellectual Property Report 2013: Brand - Reputation and Image in the Global Marketplace,’ 2013

Legislation

Denmark

Skatterådet, ’Momsfritagelse - sport - E-sport,’ SKM2020.309.SR, 26 May, 2020

European Union

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012

Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012

Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016

International conventions

Berne Convention for the Protection of Literary and Artistic Works

Soft law

Council of the European Union

The Council of the European Union. ‘The Brussels European Council - 21 and 22 June 2007,’ https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:xy0001 accessed 2 January 2024

Council of the European Union. ‘Council Resolution on the EU Work Plan for Culture 2023–2026.’ OJ C 466, 7.12.2022

Council of the European Union. ‘Council conclusions on enhancing the cultural and creative dimension of the European video games sector,’ Brussels, 24 November 2023

European Commission

European Commission. ‘White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty,’ COM/99/0101 final, OJ C 132, 12.5.1999

European Commission. ‘XXIInd Report on Competition Policy 1992,’ Luxembourg: Publications Office of the European Union, 1993

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004

Communication from the Commission — Notice — Guidelines on the Application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “Think Small First” A “Small Business Act” for Europe, COM(2008) 394 final

European Commission, ‘Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements,’ OJ C 89, 28.3.2014

European Commission, *Shaping Europe's digital future*, COM(2020) 67 final

Communication from the Commission to the European Economic and Social Committee and the Committee of the Regions - *A competition policy fit for new challenges*, COM(2021)713 final

EVP Margrethe Vestager, ‘A Principles Based approach to Competition Policy’ Keynote at the Competition Law Tuesdays, 22 October 2022 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6393 accessed 2023-12-09

European Commission, ‘Amendments to the Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 116, 31.3.2023

European Commission, ‘European Media Industry Outlook,’ SWD(2023) 150 final

European Commission, ‘Commission Notice on the definition of the relevant market for the purposes of Union competition law,’ C(2023) 6789 final

European Parliament

Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030, OJ L 323, 19.12.2022

European Parliament resolution of 10 November 2022 on esports and video games, (2022/2027(INI)), OJ C 161, 5.5.2023

Case law

European Commission

2006/857/EC: Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/A.37.507/F3 — *AstraZeneca*), OJ L 332, 30.11.2006

Case M.7866 – *ACTIVISION BLIZZARD / KING*, C(2016) 955 final

Case M.10001 - *MICROSOFT / ZENIMAX*, C(2021) 1607 final

Case M.10646 – *MICROSOFT / ACTIVISION BLIZZARD*, C(2023) 3199 final

Case AT.39523 – *SLOVAK TELEKOM*, C(2014) 7465 final

Case AT.39740 *Google Search (Shopping)*

Cases AT.40413 – *Focus Home*, AT.40414 – *Koch Media*, AT.40420 - *ZeniMax*, AT.40422 – *Bandai Namco* and AT.40424 – *Capcom*, C(2021) 75 final

Advocate General

Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschrift-enverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264

Case C-95/04 P *British Airways plc v Commission of the European Communities*, Opinion of Advocate General Kokott delivered on 23 February 2006, EU:C:2006:133

Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, Opinion of Advocate General Kokott delivered on 21 May 2015, EU:C:2015:343

The General Court

Case T-65/89 *BPB Industries and British Gypsum v Commission*, EU:T:1993:31

Case T-83/91 *Tetra Pak International SA v Commission of the European Communities*, EU:T:1994:246

Case T-128/98 *Aéroports de Paris v Commission of the European Communities*, EU:T:2000:290

Case T-219/99 *British Airways plc v Commission of the European Communities*, EU:T:2003:343

Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, EU:T:2003:250

Case T-340/03 *France Télécom SA v Commission of the European Communities*, EU:T:2007:22

Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289

Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:T:2010:266

Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission*, EU:T:2010:517

Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission*, EU:T:2021:763

Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541

The Court of Justice

Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (Van Gend en Loos)*, EU:C:1963:1

Case 6/64 *Flaminio Costa v E.N.E.L*, EU:C:1964:66

Case 24-67 *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, EU:C:1968:11

Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114

Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities (Continental Can)*, EU:C:1973:22

Joined cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities (Commercial Solvents)*, EU:C:1974:18

Case 148/73 *Raymond Louwage and Marie-Thérèse Louwage, née Moriame, v Commission of the European Communities*, EU:C:1974:7

Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, EU:C:1974:140

Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities (United Brands)*, EU:C:1978:22

Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36

Case 155/79 *AM & S Europe Limited v Commission of the European Communities*, EU:C:1982:157

Joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities*, EU:C:1983:158

Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313

Case C-62/86 *AKZO Chemie BV v Commission of the European Communities*, EU:C:1991:286

Case 238/87 *AB Volvo v Erik Veng (UK) Ltd*., EU:C:1988:477

Case C-10/89 *SA CNL-SUCAL NV v HAG GF AG (HAG)*, EU:C:1990:359

Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161

Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Inde-pendent Television Publications Ltd (ITP) v Commission of the European Communities (Magill)*, EU:C:1995:98

C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, EU:C:2000:428

Case C-234/98 *G. C. Allen and Others v Amalgamated Construction Co. Ltd*., EU:C:1999:594

Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*., EU:C:2004:257

Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel*, EU:C:2005:59

Case C-222/04 *Cassa di Risparmio di Firenze and Others*, EU:C:2006:8

Case C-301/04 P *Commission of the European Communities v SGL Carbon AG*, EU:C:2006:432

Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities (GlaxoSmithKline)*, EU:C:2009:610

Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, EU:C:2008:376

Case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603

Case C-403/08 *Football Association Premier League and Others v QC Leisure and Others*, EU:C:2011:631

Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83

Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172

Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury (BSA)*, EU:C:2010:816

Case C-464/09 *P Holland Malt BV v European Commission*, EU:C:2010:733,

Case C-496/09 *European Commission v Italian Republic*, EU:C:2011:740

Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission*, EU:C:2012:770

Case C-128/11 *UsedSoft GmbH v Oracle International Corp*., EU:C:2012:407

Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*., EU:C:2014:25

Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411

Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651

Case C-90/16 *The English Bridge Union Limited v Commissioners for Her Majesty's Revenue & Customs*, EU:C:2017:814

Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority*, EU:C:2020:52

Case C-165/19 P *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239

Case C-377/20 *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, EU:C:2022:379

Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33