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Judicial Review & Unilateral Practice Research Program

Judicial review & burden of proof in unilateral practice cases: an overview of EU and national case law

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DOMINANCE (NOTION), BURDEN OF PROOF, ESSENTIAL FACILITY, EXCESSIVE PRICES, EXCLUSIVE DISTRIBUTION, PREDATORY PRICING, PRICES, REFUSAL TO DEAL, REBATES, MARGIN SQUEEZE, EXCLUSIVITY CLAUSE, PRICE DISCRIMINATION, FOREWORD, JUDICIAL REVIEW, UNFAIR COMPETITION, MARKET DEFINITION, EXCLUSIVE PURCHASING AGREEMENT, PRIVACY

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The timing of this latest work in the impressive series of Concurrences projects could hardly have been more apt. [***1***] 2020 was a bumper year, in both EU and national courts, for judgments involving judicial review of enforcement decisions in unilateral cases. At the same time, however, of the most significant unilateral cases pending before the General Court, three – *Intel* (on *renvoi*), *Google (shopping)* and *Google (Android)* are, at the time of writing, still in délibéré, with judgments expected later this year or next. Lawyers, economists and, above all, businesses at risk of being regarded as dominant, especially in the digital sector, will be looking to the judgments in these cases, each of which has its distinctive facts, to clarify the analytical framework for determining whether, and specifically why, unilateral conduct of a dominant undertaking crosses the – sometimes all too obscure – line into transgression.

It, therefore, seemed to the Editors that, while waiting for these three judgments (and then, in all probability, the results of any appeals), many practitioners might find it useful to look back over recent years to see how the judicial review of decisions of competition authorities, both Commission and national (NCAs), has evolved.

The present focus on judicial review of enforcement decisions has two explanations. First, private actions in respect of unilateral conduct are still, understandably, a relative rarity. There are however a number of significant exceptions, such as decisions on FRAND in the German and UK supreme courts. More important, for present purposes, is the fact that Commission and NCA decisions on the existence of dominance and findings of abuse are typically based on a much more complete evidential and analytical foundation than is available to the parties in private suits, and this is reflected in the – usually very lengthy – final decision. Judicial review of such decisions, therefore, tends to involve a close and detailed review of those specific elements of that reasoning that are selected for the challenge. The resulting judgments can therefore be particularly useful as establishing the principles and approaches to be applied, not only in the instant case but also in others.

By design, this foreword does not address all cases decided by courts in the EU relating to unilateral practices. In particular, it does not cover decisions made in the context of civil litigation by national courts or preliminary rulings by the Court of Justice of the European Union. Therefore, no doubt interesting judgments such as Post Denmark I and II are not covered. Instead, the aim is to provide an overview of judgments that were issued in the context of administrative infringement proceedings. In addition, since this survey only covers judgments that have been reported in Concurrences, it certainly does not exhaustively cover the case law of all courts in the EU of past years.

Before we look more closely at particular aspects of unilateral conduct, a number of more general observations can be made about the cases covered in the survey:

- 2020 was a bumper year for judgments in unilateral cases (20 cases), but also 2012, 2010 and 2018 saw several cases (13, 11 and 11 cases respectively). In contrast, 2016 was the year with the lowest number of cases (only 1 case), followed by 2017 and 2020 (with only 4 cases for each year).
- The unilateral conduct most frequently targeted by public enforcement, and thus subject to judicial review, is by far that relating to pricing: discriminatory pricing: 11 cases; excessive pricing: 10 cases; rebates: 10 cases. Refusals to supply come as a distant second (8 cases).
- The most frequently mentioned jurisdictions for unilateral cases are: EU (16 cases), Slovenia (13 cases), Italy (12 cases), UK (11 cases), Germany and France (8 cases each). The least mentioned jurisdictions for unilateral cases are: Bulgaria, Ireland, Portugal, Spain and Switzerland (2 cases each). Whether or not this variation in coverage reflects differences in enforcement (and consequent judicial review) at national level, it remains true that national enforcement today still produces, overall, the largest number of cases in Europe, and thus a body of case law that merits attention.
- Germany and Slovakia appear to be jurisdictions which have a good track record of annulments, while in Austria and Lithuania all decisions were upheld. The EU and the UK's courts appear to uphold most decisions they have to review. Views may vary as to how far this reflects the quality of the decisions attacked, or indeed national differences in the intensity of review. Most annulments occurred in cases pertaining to fines, essential facilities and rebates.
- Excessive pricing has been a recent topic, subject to intense judicial review in Austria, Italy and the UK. The outcome of several cases – annulment – suggests that some courts exercise rigorous review in this area.
- The overall trend among EU courts is that they confirm the finding of an infringement in 88% of the time. Moreover, of the six cases that appeared before the European Court of Justice ('ECJ') on appeal, only one of them was annulled. Thus, the ECJ appears to rarely deviate from the General Court's rulings.
- Several cases related to pharmaceutical companies, and the pharmaceutical sector provide useful guidance as to market definition and criteria for abuse in markets with distinctive characteristics. [*2*] Not surprisingly, the digital markets and their participants have also attracted much attention. [*3*]
- Finally, several cases involve abuses that are not clearly established in the TFEU or in the case law. This case law not only reminds us that the list in Article 102 TFEU is not exclusive, but also stresses that sufficient evidence and cogent analysis must be provided to substantiate these abuses. [*4*]

Excessive pricing

When it comes to abuse through excessive pricing, there appears to be a clear tension between, on the one hand, the right of companies to freely set their prices and, on the other hand, the desire of NCAs to regulate what they consider to be "excessive pricing". All selected decisions on excessive pricing originated at national level and no cases concerning excessive pricing appeared before the EU courts during the relevant period.

Overall, what emerges from the national court judgments is a picture of strict judicial review of the boundaries of excessive pricing as an infringement of competition law, emphasizing its exceptional nature. In the majority of the presented cases, the NCA's decisions were thus overturned. This no doubt reflects the courts' reluctance to see NCAs interfere with prices set in the market unless a strong case is made out.

- In *Flynn/Pfizer* (2018-2021) [*5*], the CMA found that Pfizer and Flynn had charged unfairly high prices for an anti-epilepsy drug. Pfizer transferred the marketing authorization for the drug to Flynn, who sold them to the NHS, but Pfizer continued manufacturing the drug. Following Flynn's de-branding of the drug, Pfizer increased its manufacturing price by between 780% and 1,600%, and Flynn raised the price for the supply to NHS by between 2,390% and 2,660% which was possible as only branded drugs are price regulated. The CMA found that Pfizer and Flynn abused their dominant position by charging excessive prices. The CAT quashed the CMA's decision finding that the CMA had misapplied the legal test for excessive pricing, not properly evaluated the evidence adduced by the companies by not taking sufficient account of the prices of comparable products, and not properly considered the economic value of phenytoin sodium capsules. The Court of Appeal mostly upheld the CAT's findings. After reassessing the case, the CMA has recently issued a revised Statement of Objections to Pfizer and Flynn.

- In *Swisscom/Comco* (2011) [*6*], the Swiss Supreme Court quashed the NCA's EUR 220 million decision against Swisscom for allegedly excessive mobile termination fees against its competitors because the NCA had failed to prove the "imposition" of excessive rates given that competitors had not filed complaints and the Swiss telecom provider was only empowered to step in *ex-post* at the request of a telecom provider. The Swiss courts held that it is not the Comco's task to introduce an *ex ante* price control.

- In *BTC Cable Ducts* (2011) [*7*], the Bulgarian Supreme Administrative Court confirmed the NCA's decision that the prices charged by BCT, the incumbent fixed-line operator, for sharing its underground ducts network were not excessive. It relied hereby exclusively on the decision of the regulatory body which pre-approved the terms at stake. However, the court pointed out that an abuse of dominance based on excessive pricing requires *"a steady trend towards deformation of the normal and effective functioning of the markets."*.

- In *Vilniaus energija* (2012), [*8*] the Lithuanian Supreme Administrative Court quashed the NCA's decision, which found that an operator of underground communication tunnels imposed unfair prices by charging some lessees a tenfold price than others for the same tunnel space. The Court held pointed out that prices may be regarded excessive if they are excessive compared to the economic value of the provided service and held that the NCA did not correctly evaluate the alleged unfairness of prices as the NCA's presented profitability analysis could not show that prices were unfair or excessive and that the NCA failed to determine what the actual economic costs were. Further, the Court held that Vilniaus energija was not free in setting its prices as they were regulated by the municipality.

- I n *Lufthansa* (2018) [*9*], the Austrian Supreme Court held, *inter alia,* that there were no indications that Lufthansa's 'distribution cost charge', a fee applying to tickets not booked via Lufthansa's own website, was

"*greatly or clearly excessive*".

- In *Sanicorse* (2019), [***10***] the French Court of Appeal overturned the NCA's fining decision, strictly applying the *United Brands* test, and holding that the NCA failed to demonstrate that the increase in Sanicorse's prices for collecting and treating infectious clinical waste, ranging from 77% to 380%, were unfair as the NCA did not assess if the price is excessive. Further, the Court pointed out that only in exceptional circumstances, if trading conditions imposed by a dominant undertaking appear to be "*objectively unfair*", the NCA can take action.

- In *ORF* (2020) [***11***], which concerned allegedly excessive rates of encryption services proposed by ORF, the national public broadcasting company, to a satellite TV platform operator, the Austrian Supreme Court emphasized that only prices that "*significantly exceed competitive prices*" [***12***] can amount to excessive pricing.

In contrast to the foregoing, the courts upheld the Italian NCA's decision in the *Aspen* (2020) case [***13***]. The Aspen Group ('Aspen') was the only company authorized to commercialize four off-patent anticancer drugs considered irreplaceable from a therapeutic viewpoint making Aspen a *de facto* monopolist. Aspen's prices charged to the Italian National Health System for the anticancer drugs increased between 300% and 1500%. The Italian Supreme Administrative Court rejected Aspen's appeal and found that the size of the price increases and the context in which they were applied sufficed to establish the unfairness of Aspen's prices and abuse of a dominant position, without strictly applying the two-limb legal test set forth in *United Brands*.

In sum, the national courts' judgments analyzed for the present article reflect the narrow boundaries for excessive pricing as a competition law infringement.

Discriminatory pricing

All of the selected cases originated at the national level. There were no judgments of the EU courts on appeal of decisions from the Commission regarding discriminatory pricing during the relevant period, reflecting the lack of enforcement of the Commission in this area. In all six national cases in the survey, the courts upheld the finding of an infringement by the NCA. In half the cases reviewed, the abuse was exclusionary, while in the other half it was exploitative.

Exclusionary conduct

In *Czech Railways Company* (2011) [***14***], the Regional Court of Brno upheld the NCA's decision against the Czech Railway Company, which held a dominant position on the market for the rail freight transport of large volume substrates, for applying discriminatory prices to customers. The NCA's investigation revealed that prices set for individual customers differed by more than 50% and that the Czech Railway Company exercised a long-term pricing policy based on preferential tariffs offered to selected customers in order to secure their loyalty, thereby, at least implicitly, foreclosing competitors.

In *ENVI-PAK* (2013) [***15***], the Slovakian Supreme Court confirmed the NCA's condemnation of ENVI-PAK's practice of setting the sub-license fee for the use of the 'Green Dot' trademark in a way that companies using the packaging waste collection, recovery, and recycling services of ENVI-PAK did not have to pay a license fee, while companies using the services of its competitors, which were interested only in the 'Green Dot' sub-license, had to pay a separate license fee, even for packages without the 'Green Dot'. ENVI-PAK thereby indirectly forced undertakings using the 'Green Dot' trademark to use also its packaging waste collection, recovery, and recycling

services and thus created barriers to growth and entry for competitors on this market.

In *Royal Mail/Whistl* (2019) [***16***], the CAT confirmed Ofcom's decision finding that Royal Mail applied a discriminatory pricing strategy in relation to bulk mail delivery services by issuing price differentials via a contract change notice to bulk mail operators including Royal Mail's competitor Whistl. Royal Mail's practice allegedly rendered Whistl's planned own final delivery service in competition with Royal Mail uneconomical.

Exploitative conduct

In *Orlen Lietuva* (2013) [***17***], the Lithuanian Supreme Court confirmed the Lithuanian NCA's finding that AB Orlen, a fuel supplier, abused its dominant position by applying a discriminatory pricing policy and obliging its customers to purchase fixed amounts of fuel thereby restricting the import of petrol and diesel into Lithuania.

In *Sports TV* (2015) [***18***], the Lisbon Court of Appeal upheld the NCA's decision finding that Sports TV, the monopolist provider of premium paid sports TV channels, entered into discriminatory distribution agreements with pay-TV providers. Sports TV set up a discriminatory pricing scheme according to which other operators paid for a fictitious number of channel subscribers, which was almost always higher than the real subscriber number and resulted in widely varying prices between operators. The court concluded on the discriminatory nature as ultimately different operators were paying different prices for the identical services.

In *Lufthansa* (2018) [***19***], the Austrian Supreme Court confirmed that Lufthansa's practice of charging different prices for flight tickets booked via a global distribution system depending on customer location/travel destination amounted to abuse. Furthermore, it did not find any objective justifications for price discrimination. Neither the fact that price differences had been the result of an error in the GDS' respective IT systems nor the fact that, in some cases, the Austrian customers were benefitting from the error caused by the GDS' systems, was considered a sufficient justification.

Predatory pricing

All four reported cases originated at the national level. In three out of the four cases [***20***], an infringement was found. In these three cases, a foreclosure effect on a competitor was at stake. The only one case where an infringement was not found is *Itak Džabest* [***21***], where the Supreme Court of Slovenia annulled the NCA's decision due to procedural errors.

Market definition

A correctly defined market is a prerequisite to finding dominance and an abuse thereof. The theory that the abuse defines the market no longer has a place under EU case law. Dominance must be based on a correct market definition, which these days means rooted in serious economic (including, where appropriate, AEC) analysis. This can make it a difficult area for judicial review, as judges are often not as well equipped as regulators to make complex economic assessments. Yet, the sample of cases covered in this survey shows that judges can – and do – exercise rigorous review of the regulators' findings.

In *Servier* (2018) [***22***], the GC concluded that the EC had wrongly defined the relevant product market because it had erroneously held that perindopril differed in terms of therapeutic use from alternative drugs in the same class, had underestimated the propensity of patients treated with perindopril to switch treatment, and had given

excessive importance to price in analyzing the competitive constraints, leading it to ignore significant competitive constraint from those other drugs. In the pharmaceutical sector, national and EU courts stress that the approach to market definition needs fully to reflect the unique characteristics of the sector. The analysis must rely not only on quantitative (price) factors but also on qualitative ones [*23*], taking into account considerations other than the price such as the therapeutic indications, a comparison of the drugs' efficacy, doctors' habits and promotional efforts. [*24*]

Similarly, in *Aspen* [*25*], the Italian Supreme Administrative Court highlighted that non-price competitive factors play a significant role in defining the market in the pharmaceutical sector. In that case, the court even found that once a drug is found to be irreplaceable from a therapeutic point of view, there is no need to verify whether there are 'comparable' products from a price viewpoint.

In *PGNiG* (2017) [*26*], the Polish Supreme Court referred the case back to the lower court after establishing that the appellate courts as well as the Polish NCA, had failed to establish a sufficiently precise market definition. The Polish Supreme Court stressed the fact that a sufficiently precise market definition is a prerequisite to find an abuse of dominance; an accurate economic analysis is necessary for properly understanding the functioning of the market. Although not falling under this category *per se* [*27*], the Polish Supreme Court in its *Emitel* (2015) [*28*] and *Marquard Media* (2013) [*29*] judgments also stressed the importance of the economic analysis when defining the market. In both cases, the court's conclusion that the Polish NCA's assessment of a relevant market was incorrect or insufficiently based on market studies appears to illustrate a willingness to engage in at least moderately intense judicial review.

Novel methods for defining the market are also not excluded. In the *Lufthansa* [*30*], the nature of two-sided platforms such as global distribution systems ('GDS') led the Austrian Supreme Court to judge that a departure from the SSNIP test did not amount to a reviewable error.

In the *Google publishing* case in France [*31*], the Paris Court of Appeal upheld the decision from the French NCA, which had imposed interim measures on Google, in particular on market definition. The judgment is however surprisingly short (just a few paragraphs long) for such a complex issue, possibly because the decision concerned interim measures and not the full merits of the case.

Margin squeeze

Margin squeeze cases reviewed in this survey offer an interesting contrast between EU cases and national cases. In all three national cases, the court quashed the decision of the NCA, while EU courts upheld the Commission decisions. This outcome, and the review of individual cases, suggest that national courts may be more demanding than EU courts as regards the likely effects of a margin squeeze. Overall, national courts adopt a similar approach, namely that the anticompetitive effects of margin squeeze must be clearly established. EU courts, instead, seem more prone to find an infringement of Article 102 TFEU because of an inherently abusive nature of margin squeezes. At EU level, the past decade has significantly shaped the EU's jurisprudence with respect to margin squeeze.

- In *Deutsche Telekom* (2010) [*32*], the ECJ rejected Deutsche Telekom's (DT) appeal against the GC's decision which upheld the Commission's infringement decision against DT. Importantly, in doing so, the ECJ held that the GC had correctly found that '*margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article [102 TFEU] in view of the exclusionary effect that it can create for competitors*' thereby for the first time recognizing the validity of a margin squeeze claim as a stand-alone abuse under Article 102 TFEU.

Furthermore, the ECJ found it appropriate that the GC and the EC relied on an equally efficient competitor test.

- The ECJ confirmed its view in *TeliaSonera* (2011). In this preliminary ruling, which arose in the context of an infringement proceeding of the Swedish NCA against TeliaSonera, the ECJ confirmed that a margin squeeze constitutes a standalone abuse distinct from refusal to supply and the application of the equally efficient competitors test. Furthermore, the ECJ noted that margin squeeze as abuse can be sanctioned in unregulated industries, that indispensability is no precondition, and that dominance need not be established on both the wholesale and retail market. Following this preliminary ruling, the Swedish national courts confirmed the abuse, however, the fine was greatly reduced by the appeal court [***33***].

- In *Telefónica and Telefónica de Espana* (2014) [***34***], the ECJ confirmed that margin squeeze constituted an autonomous form of abuse. Furthermore, in the three selected cases, the EU courts clarified that the existence of *ex ante* regulation does not preclude the application of competition law, nor does it preclude the EC's power to intervene ex post against abusive margin squeezes [***35***].

- In *Slovak Telekom* (2018), while accepting the Commission's position that a positive margin did not necessarily disprove a margin squeeze abuse, the GC noted that the Commission must demonstrate the exclusionary effects of the margin squeeze which it failed to do over a limited period and therefore it slightly reduced the fine [***36***]. Whereas at EU level, the courts gave the EC's findings their blessing, the opposite has occurred at national level.

- In *France Télécom* (2012) [***37***], the French Supreme Court upheld the appeal court's decision which annulled fines imposed on France Telecom and SFR for an alleged margin squeeze on the market for fixed-to-mobile telephony services. The French Supreme Court ruled that the French NCA failed to establish that the tariff structure at issue amounted to a margin squeeze having the anticompetitive object of restricting competition between fixed-line operators. According to the Supreme Court, the appeal court was right to conclude that France Télécom's tariff structure did not necessarily result from coordination between its fixed-line and mobile branches, but could have been determined solely by France Télécom Mobile in an attempt to pursue an objective other than limiting competition between fixed-line operators.

- In *Correos* (2015) [***38***], the Spanish High Court overturned the NCA' decision against the Spanish postal service incumbent Sociedad Estatal Correos y Telégrafos, S.A. ("Correos") for allegedly abusing its dominant position on the wholesale market for postal services and on the retail market for postal services involving key accounts in Spain. In its judgment, the Spanish High Court stressed that a NCA has to show at least probable anti-competitive effects with respect to the allegedly abusive conduct. The court ruled that it is not enough to rely on a service-by-service price comparison, even if this comparison renders negative margins. Instead, the NCA is required to evaluate (i) to what extent competitors are dependent on having access to an essential facility; and (ii) if competitors are able to propose offers that are profitable overall in spite of the alleged price squeeze.

- I n *Deutsche Post* (2016), however, Deutsche Post unsuccessfully appealed against the German NCA's decision finding that Deutsche Post had abused its dominant position on the German market for end-to-end delivery mail and for partial service of mail delivery by conducting *inter alia* margin squeeze practices. With regards the margin squeeze, the court referred to the EC court's case law and noted that margin squeeze is a standalone abuse and that Deutsche Post had not submitted economic evidence potentially justifying its pricing policy [***39***].

- In *Swisscom* (2019), the Federal Supreme Court confirmed that Swisscom had abused its dominant position in

the market for wholesale broadband connectivity services by applying a margin squeeze and examined for the first time a margin squeeze under Swiss law. The court noted the application of the as efficient competitor test and relatively briefly concluded on the restrictive effect on competition due to the indispensable input on the upstream market [***40***].

- In *Proximus* (2020), the Markets Court of the Brussels Court of Appeal partially annulled a decision from the Belgian NCA in which Proximus was found to have abused its dominant position. Following its 2019 decision, in which the court held that dawn raids carried out at Proximus' premises had not been authorized by a judge and the gathered evidence had to be removed from the NCA's case file, the court had to decide on Proximus' claim that the remaining evidence was not sufficient and the NCA's decision should be annulled. The court assessed if the evidence originated from the dawn raid and to what extent the dawn raid was indispensable to obtain the evidence as only in the absence of indispensability the evidence could remain in the investigation file. Resulting from this assessment, the Court held that the NCA's decision could not be upheld for a certain part of the infringement decision but did not annul the fine [***41***].

Refusal to supply/essential facilities

In recent years, several cases enriched the law on refusal to supply in the footsteps of famous cases such as *Bronner*, *McGill*, and *Microsoft*. One particularly interesting discussion has centered on the extent to which the strict *Bronner* criteria are applicable to all cases of refusal to supply. In this regard, a series of cases including the most recent *Slovak Telekom* case suggests, in line with paragraph 82 of the Commission Guidance on enforcement of Article 102 TFEU [***42***], that the *Bronner* criteria may not apply when the legislator has already decided that access to a facility should be granted. By contrast, EU and national cases appear aligned in finding that, where such obligation is not set in the law, a dominant company may not be forced to give access to its assets or facility unless such access is indispensable to compete in the market and lack of access threatens to eliminate all competition in the market.

In *Slovak Telekom/Deutsche Telekom* (2018) [***43***], the GC confirmed the EC's decision finding that Slovak Telekom, *inter alia*, set unfair terms and conditions in its offer for unbundled access to its local loop amounting to a refusal to supply. The GC clarified that it was unnecessary for the EC to demonstrate the indispensability of such access within the meaning of the *Bronner* case law because the relevant regulatory framework acknowledged the need for access to Slovak Telekom's local loop. In 2021 [***44***], the ECJ confirmed that the *Bronner* "indispensability" criterion need be satisfied only where the conduct concerns an outright refusal to supply in the absence of a regulatory obligation to give access.

In another recent judgment *Lietuvos gelezinkeliai* (2020) [***45***], the GC upheld the EC's decision to fine Lithuanian Railways ("LR") for dismantling a railway track which Orlen, a customer of LR's rail transport services, wanted to use to shift export business to the Latvian National Railway company as result of a dispute on rates with Lithuanian Railways. Like in it its Slovak Telekom judgment, the GC held that the essential facilities doctrine does not apply when there is a regulatory obligation for the dominant undertaking to provide access. The GC emphasized that in cases, in which a regulatory obligation to grant access exists, the necessary balancing of interests, which is normally carried out through the essential facilities doctrine, is deemed to have been carried out *ex ante* by the legislator. The GC also concluded on the non-applicability of the doctrine because the dominant undertaking's infrastructure was built on public funds (rather than private investments), thus endorsing the approach in paragraph 82 of the Commission Guidance on Article 102 TEU.

At national level, the German Supreme Court (BGH) had to decide in *Ferry Port Puttgarden II* (2012) [***46***] if and under what circumstances a regulatory classification can amount to 'operational or other reasons for impossibility', which was included in the German ARC as justification to refuse to supply. The case involved two shipping companies who sought access to a ferry port to set up an additional ferry service but were turned down by the port owner and sole provider of ferry services on the ground that sharing use would involve obtaining regulatory approvals which the owner considered impossible. The BGH held that such impossibility exists only where the action is not eligible for official approval or where official authorization will definitely not be obtained even after the third party and the dominant undertaking have taken all necessary economic and legal steps. Instead, the mere possibility that the necessary authorizations could potentially not be obtained was insufficient for denying access. The BGH also held that the burden of proof lies with the dominant owner and referred the case back to the lower court.

In *PT Comunicações* (2010) [***47***], the Portuguese Court of Appeal confirmed the appeal court's decision which annulled the decision that *PT Comunicações* allegedly refused to grant access to its underground conduit network. The court ruled that the denial of access to its conduits was justified, thus excluding abuse of dominant position. The court emphasized the possibility of replication of electronic communications infrastructures or the possible existence of alternatives to such infrastructures that may reasonably allow for the provision of certain communications by competitors without any undue foreclosure of the market. In doing so, the court implied a demanding burden of proof for the NCA in order to ascertain the actual impossibility of replication of certain key infrastructures or the actual absence of alternative infrastructures (that could render the infrastructures controlled by the incumbent operator as truly indispensable for competitor access to the electronic communications markets at stake).

In *Teatro della Provvidenza* (2012) [***48***], a case concerning access to a theatre facility in the district of Cilento, the Administrative Court of Lazio (first instance) quashed the NCA's decision finding no abuse of a dominant position, in particular, because the NCA had failed to state sufficient reasons and take into account the relevant statutory criteria for its adopted geographic market definition. The court applied the *Bronner* criteria and emphasized that an overly broad interpretation of what is considered "indispensable" might discourage investments and innovation by the dominant undertakings. However, on the facts of the case, on what appears to be a somewhat generous application of the *Bronner* criteria, the court found that the theatre was indeed indispensable for the applicant and that it was economically impossible for the latter to build a theatre of its own due to the lack of sufficient financial resources. Finally, the court found that there was no objective reason to refuse access other than the foreclosure of a competitor. The court referred the case back to the NCA to start a formal investigation.

In *Bayer* (2013) [***49***], the Italian Supreme Administrative Court upheld the decision of the NCA (which had been quashed at first instance) by confirming that the facility in question (in this case scientific studies on chemicals) was indispensable because the law not only made the studies necessary to obtain registration but also prohibited their duplication. In this context, Bayer's refusal to negotiate access to the studies was found abusive.

In *Telecom Italia* (2014) [***50***], the Regional Administrative Court of Lazio confirmed the NCA's finding that Telecom Italia, *inter alia*, refused to give wholesale network infrastructure access and broadband access to its competitors despite the regulatory obligation to do so. Telecom Italia had discriminated against requests coming from competing market operators while favoring those originating from its internal divisions, thereby hindering competitors' access to its infrastructure and making access activations significantly more difficult.

In *Energo Pro* (2017) [***51***], the Bulgarian Supreme Administrative Court held that the NCA had incorrectly found that EnergoPro, an electricity distribution company, abused its dominant position by imposing high prices for access to grid of low tension pillars. The NCA, it ruled, had not properly considered the market price of access to the electricity grid at stake, which was lower than the price offered by Energy Pro's competitors in Bulgaria. When it comes to the justification of the price levels, the court disagreed with the NCA and noted that EnergoPlus indeed had maintenance costs and thus the price was not economically unjustified.

Rebates

The judicial approach to characterizing rebates as abusive has clearly evolved from a *per se* analysis to a more economic approach.

In *Tomra* (2010 and 2012) [***52***], the EU courts appeared to hold that exclusivity and loyalty-based rebates were prohibited *per se*. With its *Intel* 2019 judgment [***53***], on appeal from the GC's 2014 judgment in the same case, however, the ECJ arguably introduced a new approach to rebates and exclusive agreements, based more on economics than form-based analysis. The ECJ considered that exclusive or quasi-exclusive arrangements by a dominant company may be deemed lawful if the dominant company can demonstrate that (i) such agreements are not capable of foreclosing competitors that are as efficient as itself or (ii) the foreclosure effect is outweighed by objective justifications. Thus if, in the course of the Commission's investigation, a company submits evidence that its rebate scheme was not capable of foreclosing competitors as efficient as itself (AECs), the Commission is under a duty to engage with the evidence and draw the necessary conclusions. Questions still remain open as to how far the test of foreclosure of AECs is applicable across all categories of abuse, what are the relevant, and irrelevant, characteristics of the AEC, and indeed as to precisely what "foreclosure" entails – is it total elimination of the possibility of competition, or is mere "significant impairment" sufficient, and if so what comprises "significant"? But since Intel, there appears at least to exist greater scope for defending rebate schemes, at least if they arguably show no potential to foreclose as efficient competitors.

At national level, in *TDF* (2020) [***54***], the French Supreme Court appeared to embrace a form of effects-based approach. While it did not find a *per se* abuse established merely because the rebate at issue was exclusive, it did not limit its requirements to the actual or likely effects on competition. Instead, it merely considered the potential effects of the practice. After establishing the existence of the latter, it did not proceed further on demonstrating the existence either of an exclusionary strategy or of more concrete effects. No doubt observers will be watching carefully to see whether the still developing GC case law in Intel and the two *Google* cases will influence the French courts next time this issue is before them.

Rebates conditional on exclusivity and other provisions regarding exclusivity were also condemned as abusive in the Danish Competition Appeal Tribunal's decision in *Teller*, having regard to the fact that there was no substantiated justification for their capability to foreclose [***55***].

Exclusivity

An interesting and unsettled question is whether unilateral cases involving exclusivity agreements should be subject to the same standard as rebates cases. At the heart of this question is the standard of proof weighing on the authority, and in particular whether the effect-based approach of *Intel* should apply to exclusivity cases.

In *Pro Plus* (2013) [***56***], which predates the ECJ *Intel* judgment, the Slovenian Supreme Court explicitly confirmed the correctness of the NCA's approach when determining the "existence of abuse" on the basis of a variety of

factors including the strong market position of the applicant, its role of an inevitable contract partner, individualized approach in negotiating the exclusive agreements, and conditions under which discounts had been granted. Referring to EU case law, the Supreme Court ruled that in cases involving exclusive agreements and loyalty rebates, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect, and that the fact that an exclusivity agreement was entered into based on the client's proposal was no defense.

I n *Orange Caraïbe* [***57***], the Paris Court of Appeal in 2013 appears to have applied a more economic-based approach, verifying and confirming that the exclusivity agreements at issue did lead to a foreclosure effect.

In its *CTS Eventim* judgement [***58***], the German BGH not only validated the FCO decision (which had already been upheld by the Higher Regional Court of Düsseldorf, but it also held, in an *obiter dictum*, that, in the case of an exclusivity agreement, it is not necessary to demonstrate the agreement's concrete ability to restrict competition, as well as its foreclosure effect on as-efficient competitors ('AEC'), to qualify as abusive. According to the court, the foreclosure effect of an exclusivity clause flows from the degree of exclusivity imposed by it (total or partial) and its duration and makes an AEC test unnecessary.

Misuse of regulatory procedures/abuse of rights

In several cases at EU level [***59***], the courts were ready to accept the finding of an infringement of Article 102 TFEU based on a new category of abuse (i.e. 'misuse of regulatory procedures').

Similarly, at the national level, in *Coop Estense / AGCM* (2014) [***60***], the Italian Administrative Court confirmed the NCA's decision to fine Coop Estense for having abused its dominant position in the markets for supermarkets and superstores by preventing a competitor from opening new sales points in the Province of Modena by intervening in the administrative procedures to obtain the necessary authorizations for opening new sales points, under national and local planning rules. In *SEA/AGCM* (2017) [***61***], the Administrative Court of the Region of Latium has partially upheld the NCA's finding, that SEA hindered a new competitor from entering the market for the management of airport facilities for the general aviation by abusing its contractual rights to terminate a concession agreement regarding the use of those facilities.

Regulated markets

The interplay between regulation and competition law has been the subject of numerous discussions, and indeed cases in the period under examination. The general state of case law appears as follows: competition regulators can still intervene in regulated sectors and a company meeting its regulatory obligations may still fall foul of competition rules; conversely, not meeting a regulatory obligation can lead to sanction under both the specific regulatory framework and competition law, without infringing the principle of *ne bis in idem* [***62***].

The relationship between regulation and competition law was dealt with in several cases at EU level. In these cases, EU courts clarified that the existence of ex ante regulation does not preclude the application of competition law and consequently does not exclude the EC's power to intervene ex post against abusive margin squeezes.

At the national level, the Latvian Supreme Court ruled that the existence of regulation does not preclude the power of the NCA to assess alleged abusive behavior by dominant undertakings. Neither does the fact that the practices were previously approved by the competent NRA [***63***].

By contrast to that case and EU case law, the Slovakian Supreme Court that the NCA lacks competence in the regulated sector whenever the law enables the NRA to act. It further specified that if the market behavior can be adjusted by the NRA, the competences of the NCA are excluded [***64***].

Data protection

The interplay between regulation and competition law also gave rise to an interesting saga in the German Facebook case. Indeed, on appeal against an FCO decision, the Higher Regional Court of Düsseldorf and the German Federal Supreme Court reached opposite conclusions.

The Higher Regional Court of Düsseldorf required a clear link between the dominant undertaking's market power and the alleged infringing conduct; the court stressed that an infringement of data protection cannot amount to an abuse merely because the undertaking at issue is dominant. Thus, the data collection by Facebook did not constitute an exploitative abuse of its dominant position. [***65***]

On the contrary, the German Federal Supreme Court found that Facebook abused its dominant position through the collection of data from its users, finding that the conduct likely impeded effective competition on the online advertisement market, as access to data is an essential parameter of competition in both the advertisement market and the social network market. The FCS found that the fact that competition would be impaired on the market for online-advertisement (but not the market for social networks) was not relevant as an abuse of a dominant position would not necessarily have to lead to impacts on the dominated market (the market for social media network), and consequences on a third market would therefore be relevant as well from a competition law point of view [***66***].

Unfair trading conditions

In *Google/ SPEM* [***67***], which concerned interim measures proceedings, the Paris Court of Appeal upheld the NCA decision that Google had potentially abused its dominant position by deciding to stop displaying short abstracts or 'snippets' of press articles unless press publishers and news agencies allowed it to display these snippets for free. The Court held that Google derived a direct and indirect economic interest from the display of snippets and acknowledged that publishers got value out of the display of snippets, but that value could potentially be insufficient compared to publishers' investments. The Court held the conduct was thus likely to constitute the imposing of unfair trading conditions on press publishers and news agencies, which caused serious, urgent, and immediate harm to the press sector (thus justifying the interim measures).

In *Drogas* [***68***], the Latvian Supreme Court held a number of practices and provisions related to contracts of a dominant purchaser with its suppliers to be unfair and unjustified: (i) return of goods (which allowed an undertaking to return goods in the case of 'poor sale results'), (ii) discounts (which were applied twice for the same turnover of goods or for non-existing marketing services), (iii) one-time payments for access to newly opened retail shops, and (iv) sanctions for breach of the supply contracts (suppliers had to pay fines which were higher than the actual sales profits or value of goods itself).

In *MÁV* (2010), the Hungarian Supreme Court held that, while requiring bank guarantees from new market entrants is reasonable and not abusive, an inefficient administrative system and exclusive long-term forwarding contracts could amount to an abuse. More recently, in Auchan (2020), it held that Auchan's request for a fee in order for suppliers' products to be available to customers at a discounted price was deemed to fall foul of the Trade Act.

In the UK, in *National Grid* [***69***], National Grid's use of long-term contracts with major energy suppliers and of financial penalties envisaged by these contracts (which applied if suppliers replaced more than the small number of gas meters allowed under the contract with National Grid) was deemed to have restricted competition on the market.

Concluding remarks

In summary, this survey vividly demonstrates the roles played by national courts alongside the EU courts in developing and applying the principles of dominance and abuse under EU law and equivalent national provisions. Even where there is a heterogeneity of approach, which may ultimately be subjected to the final *ipse dixit* of the ECJ, national court decisions will continue to make their contribution to the evolution and, we hope, refinement, of competition law. The Concurrences case law database will assist enormously in that task.

This Research Program provides a comprehensive case database on the notion of judicial review and burden of proof in unilateral practice cases of competition law with more than 700 case summaries drafted by academics and practitioners, from 20 December 1977 to 14 July 2021. The focus is on Europe but the database also includes commentary on cases in other jurisdictions such as Canada, China, India, Japan, Mexico, Russia, and the US. The database covers over 40 sectors, including telecommunications, pharmaceuticals, energy, transport, utilities, distribution/retail, information technology and online platforms. This Research Program benefited from the financial support of Amazon.

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[***2***] Paris Court of Appeal, *Jansson-Cilag / Johnson & Johnson, 18/01945 - N° Portalis 35L7-V-B7C-B44MU (2019)* - see ***Mélanie Thill-Tayara, Marion Provost, Sophie Mitouard***, *The Paris Court of Appeal upholds the decision of the Competition Authority to fine a pharma company for abuse of dominance (Jansson-Cilag / Johnson & Johnson), 11 July 2019, e-Competitions July 2019, Art. N° 96202*; *Servier and Others v. Commission, T-691/14 (2018)* - see ***Sophie Pele, Mélanie Thill-Tayara, Marion Provost, Simon Hetsch***, *The EU General Court annuls a decision of the Commission for wrongly qualifying agreements as "pay for delay" and improperly qualifying an abuse of dominance, thus reducing the fine imposed on a pharmaceutical company (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 88946* and ***James Aitken, Christopher Stothers, Gian Luca Zampa***, *The EU General Court rules that pay-for-delay patent settlements can be illegal agreements but annuls abuse of dominance finding (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 94166*; Italy, Italian Supreme Administrative Court, *Aspen, N. 01832/2020REG.PROV.COLL. N. 08447/2017 REG.RIC (2020)* - see ***Federico Marini Balestra, Lucia Antonazzi***, *The Italian Supreme Administrative Court rejects an appeal lodged by a multinational drug company against a previous decision ascertaining it as having abused its dominant position by imposing unfair prices for drugs (Aspen), 13 March 2020, e-Competitions March 2020, Art. N° 95455.*

[***3***] UK, UK Competition Appeal Tribunal, *Epic Games / Apple / Google (2021)* - see ***Lesley Hannah***, *The UK Competition Appeal Tribunal provides guidance for post-Brexit permission to*

serve out applications and confirms that damages occasioned by anti-competitive conduct will not be narrowly construed (Epic Games / Apple / Google), 22 February 2021, e-Competitions February 2021, Art. N° 99739; France, Paris Court of Appeal, *Google/ SPEM, n°20/08071 (2020)* - see ***Michaël Cousin,*** *The Paris Court of Appeal confirms the Competition Authority's decision ordering a search engine to negotiate with news agencies and press publishers (Google), 8 October 2020, e-Competitions October 2020, Art. N° 97555*; Germany, Higher Regional Court of Düsseldorf, *Facebook, Case VI-Kart 1/19 (V) (2019)* - see, e.g. ***Michael Holzhäuser, Nick Elverston****, The Higher Regional Court of Düsseldorf suspends the decision of the German Competition Authority which prevented data gathering practices from a social network company (Facebook), 26 August 2019, e-Competitions August 2019, Art. N° 91630*, ***Dina Jubrail, Maureen K. Ohlhausen, Matthew Levitt, Daniel Vasbeck****, The Higher Regional Court of Düsseldorf suspends an order of the German Competition Authority on an alleged abuse of dominance in the social networks (Facebook), 26 August 2019, e-Competitions August 2019, Art. N° 92044*, and ***Thomas Höppner, Phillipp Westerhoff****, The Dusseldorf Higher Regional Court quashes the Competition Authority findings that a social network abused its dominant position by improperly combining user data that it collected from various sources (Facebook), 26 August 2019, e-Competitions August 2019, Art. N° 96434*; Germany, German Federal Supreme Court, *Facebook, Case KVR 69/19 (2020)* - see ***Friedrich Andreas Konrad, Rieke Kaup, Romina Polley, Laura Melusine Baudenbacher****, The German Federal Court of Justice overturns the Dusseldorf Court of Appeals' interim decision and finds an online social media platform to have abused its power in collecting data from different sources (Facebook), 23 June 2020, e-Competitions June 2020, Art. N° 95537.*

[***4***] France, French Supreme Court, *France Télécom, 11-13067 (2012)* - see ***Tim Kasten****, The French Supreme Court confirms the annulment of fines for margin squeeze (France Télécom), 17 January 2012, e-Competitions January 2012, Art. N° 58832*; Spain, Spanish High Court, *Correos, n°2759/2015 (2015)* - see ***Juan Passás, Hugo Roldán****, The Spanish High Court issues landmark judgment on the need to establish foreclosure effects of a margin squeeze (Correos), 1 July 2015, e-Competitions July 2015, Art. N° 76171* and ***Pedro Callol, Jorge Manzarbeitia, Laura Moya, Manuel Canadas Bouwen****, The Spanish High Court annuls the decision of the Spanish Competition Authority fining the public postal operator for an abuse of dominant position consisting on margin squeeze due to lack of evidence (Correos), 1 July 2015, e-Competitions July 2015, Art. N° 95946*; Spain, Spanish Supreme Court, *Correos, n° 2808/2015 (2018)* - see ***Pedro Callol, Manuel Canadas Bouwen, Jorge Manzarbeitia, Laura Moya, Enrique Fayos****, The Spanish Supreme Court rejects the allegations of abuse of dominance by a postal incumbent for lack of evidence (Correos), 5 February 2018, e-Competitions February 2018, Art. N° 95255*; France, Paris Court of Appeal, *Sanicorse, n°18/23992 (2019)* - see *Mélanie Thill-Tayara, Marion Provost, The Paris Court of Appeal clarifies the relevant test for characterizing an excessive price in the market of waste disposal for hospitals and clinics in Corsica (Sanicorse), 14 November 2019, e-Competitions November 2019, Art. N° 93760*; Slovakia, Judgment of the Supreme Court of the Slovak Republic, *Case no. 2/ SŽh/1/2012 (2013)* - see ***Michal Palisin****, The Slovak Supreme Court upholds the Competition Authority's decision on the abuse of a dominant position in the national petrol and diesel oil wholesale markets (Slovnaft), 18 April 2013, e-Competitions April 2013, Art. N° 55668.*

[***5***] UK Court of Appeal, *Flynn / Pfizer, [2020] EWCA Civ 339 (2020)* - see ***UK Competition Authority,*** *The UK Competition Authority welcomes the UK Court of Appeal's judgment, calling it an important step forward in clarifying the legal test for excessive and unfair pricing (Pfizer / Flynn Pharma), 10 March 2020, e-Competitions Judicial review, Art. N° 97329* ; ***James Killick, Assimakis Komninos, Aqeel Kadri,*** *The UK Court of Appeal upholds the Competition Appeal Tribunal's quashing of the Competition Authority's decision against pharmaceutical undertakings who had abused their dominant position by pricing their epilepsy drug unfairly (Pfizer / Flynn Pharma), 10 March 2020, e-Competitions March 2020, Art. N° 94178* ; ***Ruth Allen, Kyriakos***

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[***6***] Swiss Supreme Court, *Swisscom / Comco, Reference 2C_343/2010 and 2C_344/2010 (2011)* - see ***Laure Corgier,*** *The Swiss Supreme Court upholds the annulment of the record fine on the historical telecom operator for excessive pricing in mobile termination fees (Swisscom / Comco), 11 April 2011, e-Competitions April 2011, Art. N° 36123.*

[***7***] Supreme Administrative Court of Bulgaria, *BTC Cable Ducts*, Judgment n° 2234, Case n° 15412/2010 (2011) - see ***Anton Dinev,*** *The Bulgarian Supreme Administrative Court upholds the Competition Authority's decision finding no infringement of Art. 102 TFEU in a case involving the concurrent application of competition rules and communications regulation (BTC Cable Ducts), 15 February 2011, e-Competitions February 2011, Art. N° 38336.*

[***8***] Lithuanian Supreme Administrative Court, *Vilniaus energija, Decision No. A858-1516/2012 (2012)* - see ***Marius Juonys,*** *The Lithuanian Supreme Administrative Court brings clearance on assessing excessive pricing under 102 Art. TFEU (Vilniaus energija), 13 August 2012, e-Competitions August 2012, Art. N° 57287* ; ***Raimundas Moisejevas,*** *The Lithuanian Supreme Administrative Court repeals decision of the Competition Authority, which recognized that energy operator abused its dominant position (Vilniaus energija), 13 August 2012, e-Competitions August 2012, Art. N° 56294.*

[***9***] Austrian Supreme Court, *Lufthansa, 16 Ok 1/18k 16 Ok 2/18g (2018)* - see ***Franz Stenitzer,*** *The Austrian Supreme Court confirms that charging different prices for tickets booked via a global distribution system depending on the location of the customer/travel is abusive (Lufthansa), 17 July 2018, e-Competitions July 2018, Art. N° 91350.*

[***10***] Paris Court of Appeal *Sanicorse n°18/23992 (2019)* - see ***Mélanie Thill-Tayara, Marion Provost,*** *The Paris Court of Appeal clarifies the relevant test for characterizing an excessive price in the market of waste disposal for hospitals and clinics in Corsica (Sanicorse), 14 November 2019, e-Competitions November 2019, Art. N° 93760.*

[***11***] Austrian Supreme Court, *ORF, Case 16 Ok 1/20p, 12 March 2020* - see ***Franz Stenitzer,*** *The Austrian Supreme Court confirms lower court's decision finding that the national public broadcasting company did not abuse its dominant position by increasing its fee for decryption service (ORF), 12 March 2020, e-Competitions March 2020, Art. N° 96189.*

[***12***] Austrian Supreme Court, *ORF, Case 16 Ok 1/20p (2020)* - see ***Franz Stenitzer,*** *The Austrian Supreme Court confirms lower court's decision finding that the national public broadcasting company did not abuse its dominant position by increasing its fee for decryption service (ORF), 12 March 2020, e-Competitions March 2020, Art. N° 96189.*

[***13***] Italian Supreme Administrative Court, *Aspen, N. 01832/2020REG.PROV.COLL. N. 08447/2017 REG.RIC (2020)* - see ***Federico Marini Balestra, Lucia Antonazzi,*** *The Italian Supreme Administrative Court rejects an appeal lodged by a multinational drug company against a previous decision ascertaining it as having abused its dominant position by imposing unfair prices for drugs (Aspen), 13 March 2020, e-Competitions March 2020, Art. N° 95455.*

[***14***] Regional Court in Brno, *Czech Railways Company*, Press Release, 12 May 2011 - see

European Competition Network Brief, *The Regional Court in Brno confirms fine imposed on the national railways' company for having abused its dominant position on rail freight transport of large-volume substrates market (Czech Railways Company), 12 May 2011, e-Competitions May 2011, Art. N° 37872.*

[***15***] Slovak Supreme Court, *ENVI-PAK*, 23 May 2013 - see ***European Competition Network Brief,*** *The Slovak Supreme Court upholds the Authority's decision on prohibition of abuse in 'green dot' licensing (ENVI-PAK), 23 May 2013, e-Competitions May 2013, Art. N° 53343.*

[***16***] UK Competition Appeal Tribunal, *Royal Mail / Whistl, n°1299/1/3/18, 12 November 2019* - see, e.g., ***Alexandra Luchian, David Little, Gregory Bonné, Nathan Wilkins,*** *The UK Competition Appeal Tribunal considers what constitutes an abusive conduct and the use of expert economic advice and clarifies what the "as-efficient competitor test" entails (Royal Mail / Whistl), 12 November 2019, e-Competitions November 2019, Art. N° 93223* ; ***Lauren Kourie, Peter Willis,*** *The UK Competition Appeal Tribunal upholds the OFCOM's decision for abuse of dominance and discriminatory pricing strategy in the mail delivery service market (Royal Mail / Whistl), 12 November 2019, e-Competitions November 2019, Art. N° 93750* ; ***Nigel Parr, Christopher Eberhardt,*** *The UK Competition Appeal Tribunal upholds a fine totaling £50 million to the national post office for abusing its dominant position by announcing price changes (Royal Mail / Whistl), 12 November 2019, e-Competitions November 2019, Art. N° 95618.*

[***17***] Lithuanian Supreme Court, *Orlen Lietuva, A502-801/2013 (2013)* - see ***European Competition Network Brief,*** *The Lithuanian Supreme Court upholds the Competition Authority's decision finding abuse of dominant position in the fuel sector (Orlen Lietuva), 21 January 2013, e-Competitions January 2013, Art. N° 51209.*

[***18***] See *Lisbon Court of Appeal, Sport TV, IP 04/2015, Press release, 11 March 2015 ;* ***Portuguese Competition Authority,*** *The Lisbon Court of Appeal upholds the decision of the Portuguese Competition Authority against sports channels for abuse of dominance in the market of conditional-access premium sports TV channels (Sport TV), 11 March 2015, e-Competitions March 2015, Art. N° 72195* ; ***Miguel Sousa Ferro,*** *The Lisbon Appeal Court confirms 2.7 million € fine for discriminatory pricing under Art. 102 national equivalent, and revolutionizes access to information for third parties (Sport TV), 11 March 2015, e-Competitions March 2015, Art. N° 72120.*

[***19***] Austrian Supreme Court, *Lufthansa 16 Ok 1/18k 16 Ok 2/18g (2018)* - see ***Franz Stenitzer,*** *The Austrian Supreme Court confirms that charging different prices for tickets booked via a global distribution system depending on the location of the customer/travel is abusive (Lufthansa), 17 July 2018, e-Competitions July 2018, Art. N° 91350.*

[***20***] UK Competition Appeals Tribunal, *2 Travel Group PLC v. Cardiff City Transport Services Limited, Case Number: 1178/5/7/11 (2012)* - see ***Dorothy Livingston,*** *The UK Competition Appeal Tribunal awards exemplary damages for breach of competition law (Cardiff Bus), 5 July 2012, e-Competitions July 2012, Art. N° 48639* ; ***Patrick Harrison,*** *The UK Competition Appeal Tribunal imposes exemplary damages in a predatory pricing case in the bus services market (2 Travel / Cardiff Bus), 5 July 2012, e-Competitions July 2012, Art. N° 48795* ; ***Stephen Dnes,*** *The UK Competition Appeal Tribunal awards exemplary damages against conduct calculated to make a profit exceeding the compensation payable (2 Travel Group / Cardiff City), 28 March 2013, e-Competitions Private enforcement, Art. N° 61494* ; UK Competition Appeals Tribunal), *Albion Water Limited v. Dŵr Cymru Cyfyngedig, Case No.: 1166/5/7/10 (2013)* ; ***Thomas Sharpe,*** *The UK Competition Appeal Tribunal awards the highest damages ever in a case involving an abuse of dominant position in the water sector (Albion Water), 28 March 2013, e-Competitions*

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[***21***] Supreme Court of Slovenia *Itak DŽabest, Judgment No. G 9/2012 (2013)* - see ***Andrej Fatur,*** *The Slovenian Supreme Court annuls the Competition Authority's infringement decision against telecom company for abuse of dominance in the market for the provision of mobile telecommunications services to end customers (Itak DŽabest), 26 November 2013, e-Competitions November 2013, Art. N° 63570.*

[***22***] EU General Court, *Servier and Others v. Commission* (T-691/14) - see ***Enzo Marasà,*** *The EU General Court holds that patent settlements may be deemed pay-for-delay agreements only if there are reverse payments, and the originator may not be held dominant if the market is not assessed rigorously (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 90103* ; ***Peter L'Ecluse,*** *The EU General Court offers a mixed review of patent settlement agreements in the pharmaceutical sector (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 88976.*

[***23***] EU General Court, *Servier and Others v. Commission* (T-691/14) - see ***Enzo Marasà,*** *The EU General Court holds that patent settlements may be deemed pay-for-delay agreements only if there are reverse payments, and the originator may not be held dominant if the market is not assessed rigorously (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 90103* ; ***Peter L'Ecluse,*** *The EU General Court offers a mixed review of patent settlement agreements in the pharmaceutical sector (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 88976* ; Italian Supreme Administrative Court, *Aspen*, N. 01832/2020REG.PROV.COLL. N. 08447/2017 REG.RIC - see ***Federico Marini Balestra, Lucia Antonazzi,*** *The Italian Supreme Administrative Court rejects an appeal lodged by a multinational drug company against a previous decision ascertaining it as having abused its dominant position by imposing unfair prices for drugs (Aspen), 13 March 2020, e-Competitions March 2020, Art. N° 95455.*

[***24***] EU General Court, *Servier and Others v. Commission* (T-691/14) - see ***Enzo Marasà,*** *The EU General Court holds that patent settlements may be deemed pay-for-delay agreements only if there are reverse payments, and the originator may not be held dominant if the market is not assessed rigorously (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 90103* ; ***Peter L'Ecluse,*** *The EU General Court offers a mixed review of patent settlement agreements in the pharmaceutical sector (Servier), 12 December 2018, e-Competitions December 2018, Art. N° 88976.*

[***25***] Italian Supreme Administrative Court, *Aspen*, N. 01832/2020REG.PROV.COLL. N. 08447/2017 REG.RIC - see ***Federico Marini Balestra, Lucia Antonazzi,*** *The Italian Supreme Administrative Court rejects an appeal lodged by a multinational drug company against a previous decision ascertaining it as having abused its dominant position by imposing unfair prices for drugs (Aspen), 13 March 2020, e-Competitions March 2020, Art. N° 95455.*

[***26***] Polish Supreme Court, *PGNiG*, III SK 61/15 - see ***Małgorzata Kozak, Maciej Janik,*** *The Polish Supreme Court finds that a decision of the Competition Authority and the judgment of the Court of Appeal failed to establish a sufficiently precise relevant market definition to enable the*

finding of an abuse of dominance in the natural gas sector (PGNiG), 10 January 2017, e-Competitions January 2017, Art. N° 87911.

[*27*] For the purposes of this article, in fact, the *Emitel* (Polish Supreme Court judgment of 5 November 2015, III SK 7/15 (Emitel)) and *Marquard Media* (Polish Supreme Court judgment of 12 April 2013, III SK 28/12 (Marquard Media) judgments by the Polish Supreme Court have been categorized under the topic of 'intensity of judicial review'.

[*28*] Polish Supreme Court judgment of 5 November 2015, III SK 7/15 (Emitel).

[*29*] Polish Supreme Court judgment of of 12 April 2013, III SK 28/12 (Marquard Media).

[*30*] Austrian Supreme Court, *Lufthansa*, 16 Ok 1/18k 16 Ok 2/18g - see ***Franz Stenitzer,*** *The Austrian Supreme Court confirms that charging different prices for tickets booked via a global distribution system depending on the location of the customer/travel is abusive (Lufthansa), 17 July 2018, e-Competitions July 2018, Art. N° 91350.*

[*31*] Paris Court of Appeal, *Google/ SPEM*, n°20/08071 (2020) - see ***Michaël Cousin,*** *The Paris Court of Appeal confirms the Competition Authority's decision ordering a search engine to negotiate with news agencies and press publishers (Google), 8 October 2020, e-Competitions October 2020, Art. N° 97555.*

[*32*] *Deutsche Telekom AG v. Commission, C-280/08 P (2010)* - see ***Paul Nihoul,*** *The EU Court of justice rules on predatory pricing in the form of price squeeze (Deutsche Telekom), 14 October 2010, e-Competitions October 2010, Art. N° 34050* ; ***Alexandre G. Verheyden, Serge Clerckx,*** *The EU Court of Justice upholds EU Commission's fine against telecommunications operator in margin squeeze case (Deutsche Telekom), 14 October 2010, e-Competitions October 2010, Art. N° 33659* ; ***James S. Venit, Horst Henschen,*** *The EU Court of Justice upholds the €12.6 million fine imposed by the EU Commission for abuse of dominant position in the German telephony fixed market (Deutsche Telekom), 14 October 2010, e-Competitions October 2010, Art. N° 45407.*

[*33*] European Court of Justice, 17 February 2011, C-52/09, *Telia Sonera Sverige* - see, e.g., ***Thomas Graf,*** *The EU Court of Justice holds a decision on margin squeezes in the telecommunications sector addressing the issue of indispensability (TeliaSonera), 17 February 2011, e-Competitions February 2011, Art. N° 35312* ; ***David Henry, Martina Maier, Philipp Werner,*** *The EU Court of Justice clarifies the scope of the law about pricing practices of vertically integrated companies in the telecommunications sector (TeliaSonera), 17 February 2011, e-Competitions February 2011, Art. N° 45027* ; ***Emanuela Matei,*** *The Swedish Court of Appeal endorses the EU Court of Justice's finding of abuse of dominance in margin squeeze case (TeliaSonera), 12 April 2013, e-Competitions April 2013, Art. N° 52237.*

[*34*] Case T-336/07, *Telefonica and Telefonica Espana v. Commission (2012)* - see ***Hendrik Auf'mkolk,*** *The EU General Court dismisses Spanish telecom incumbent's appeal against a Commission decision that imposed a €151 million fine on the company for a margin squeeze in the regulated national broadband market (Telefónica), 29 March 2012, e-Competitions Judicial review, Art. N° 45020* ; C-295/12 P Telefonica and Telefonica de Espana v Commission (2014) ; ***Maria Moustakali,*** *The EU Court of Justice reiterates that effective judicial protection is a general principle of law and finds no error in the examination of the evidence related to abuse of dominance in the telecom sector (Telefónica), 10 July 2014, e-Competitions July 2014, Art. N° 68050.*

[**35**] C-280/08 P *Deutsche Telekom AG v. Commission (2010)* ; Case T-336/07, *Telefonica and Telefonica Espana v. Commission (2012)*; C-295/12 P, *Telefonica and Telefonica de Espana v Commission (2014)* - see ***Hendrik Auf'mkolk,*** *The EU General Court dismisses Spanish telecom incumbent's appeal against a Commission decision that imposed a €151 million fine on the company for a margin squeeze in the regulated national broadband market (Telefónica), 29 March 2012, e-Competitions Judicial review, Art. N° 45020.*

[**36**] General Court, 13 December 2018, T-851/14, *Slovak Telekom v Commission* - see ***Tim Kasten,*** *The EU General Court slightly reduces the fine in a case of abuse of dominance in the telecom sector to account for the Commission's failure to establish exclusionary effects over a limited period (Slovak Telekom), 13 December 2018, e-Competitions December 2018, Art. N° 88965.*

[**37**] French Supreme Court, *France Télécom, 11-13067 (2012)* - see ***Tim Kasten,*** *The French Supreme Court confirms the annulment of fines for margin squeeze (France Télécom), 17 January 2012, e-Competitions January 2012, Art. N° 58832.*

[**38**] Spanish High Court, *Correos, n°2759/2015 (2015)* - see ***Pedro Callol, Jorge Manzarbeitia, Laura Moya, Manuel Canadas Bouwen,*** *The Spanish High Court annuls the decision of the Spanish Competition Authority fining the public postal operator for an abuse of dominant position consisting on margin squeeze due to lack of evidence (Correos), 1 July 2015, e-Competitions July 2015, Art. N° 95946* ; ***Juan Passás, Hugo Roldán,*** *The Spanish High Court issues landmark judgment on the need to establish foreclosure effects of a margin squeeze (Correos), 1 July 2015, e-Competitions July 2015, Art. N° 76171.*

[**39**] Higher Regional Court of Düsseldorf, 6 April 2016, VI-Kart 9/15 (V), *Deutsche Post* - see ***Tim Kasten,*** *The Higher Regional Court of Düsseldorf rejects an appeal lodged by the German incumbent postal services operator, against a decision of the Federal Cartel Office in an abuse of dominance case (Deutsche Post), 6 April 2016, e-Competitions April 2016, Art. N° 81487.*

[**40**] Swiss Federal Supreme Court, 9 December 2019, 2C_985/2015, *Swisscom* - see ***Marcel Meinhardt, Suzan Hacisalihzade,*** *The Swiss Federal Supreme Court confirms and defines margin squeeze as a particular form of abusive pricing strategy in the telecommunication market (Swisscom), 9 December 2019, e-Competitions December 2019, Art. N° 93450.*

[**41**] Cour d'appel Bruxelles, 7 October 2020, 2009/MR/3-8, *Proximus* - see ***Peter L'Ecluse, Valérie Lefever,*** *, The Brussels Court of Appeal partially annuls a decision imposing a record fine on a telecommunication company for margin squeeze (Proximus), 7 October 2020, e-Competitions October 2020, Art. N° 98028.*

[**42**] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), OJ C 45, 24.2.2009, p. 7–20 - see ***Lucas Peeperkorn, Katja Viertiö,*** *The EU Commission issues guidance on its enforcement priorities in applying EU rules on abuse of a dominant position to abusive exclusionary conduct by dominant undertakings, 24 February 2009, e-Competitions Rebates, Art. N° 35141* ; ***James Killick, Jacquelyn MacLennan, Mark D. Powell,*** *The EU Commission publishes its guidance paper on exclusionary abuses under Article 82 EC, 24 February 2009, e-Competitions February 2009, Art. N° 37060.*

[**43**] EU General Court, 13 December 2018, T-851/14, *Slovak Telekom v Commission* - see ***Tim Kasten,*** *The EU General Court slightly reduces the fine in a case of abuse of dominance in the telecom sector to account for the Commission's failure to establish exclusionary effects over a*

limited period (Slovak Telekom), 13 December 2018, e-Competitions Judicial review & Burden of proof in unilateral practices cases, Art. N° 88965.

[***44***] European Court of Justice, 25 March 2021, C-152/19 P, *Slovak Telekom / Deutsche Telekom v Commission* - see ***Nigel Parr, Donald Slater,*** *The EU Court of Justice provides guidance on the circumstances in which an infringement of competition law can be imputed to a parent company (Slovak Telekom) (Deutsche Telekom), 25 March 2021, e-Competitions March 2021, Art. N° 99984* ; ***Maria-Olga Papadopoulou,*** *The EU Court of Justice dismisses the appeals brought by two telecommunications companies and rules that the indispensability requirement does not apply to conduct that falls short of outright refusal to supply (Slovak Telekom) (Deutsche Telekom), 25 March 2021, e-Competitions March 2021, Art. N° 100833* ; ***Alain Ronzano,*** *Access to infrastructure: The Court of Justice of the European Union confines the standard of proof in the Bronner judgment requiring verification of the indispensability of access for competitors to the sole refusal of access (Slovak Telekom, Deutsche Telekom), 25 March 2021, Concurrences N° 3-2021, Art. N° 99865.*

[***45***] General Court, 18 November 2020, Case T-814/17, *Lietuvos gelezinkeliai v Commission* - see ***General Court of the European Union,*** *The EU General Court upholds the Commission's decision finding that the national railway company of Lithuania abused its dominant position on the national rail freight market (Lietuvos geleŽinkelai), 18 November 2020, e-Competitions November 2020, Art. N° 97970* ; ***Samuel Hall,*** *The EU General Court maintains Commission decision finding that a Lithuanian railway company abused its dominant position on the national rail freight sector (Lietuvos geleŽinkelai), 18 November 2020, e-Competitions November 2020, Art. N° 98217* ; ***Sandrine Mathieu, Thaiane Abreu,*** *The EU General Court confirms the Commission's decision finding that the Lithuanian railway incumbent abused its dominant position by dismantling a rail track (Lietuvos geleŽinkelai), 18 November 2020, e-Competitions Judicial review & Burden of proof in unilateral practices cases , Art. N° 99586.*

[***46***] Federal Court of Justice of Germany, 11 December 2012, KVR 7/12, *Ferry Port Puttgarden II* - see ***Frank Röhling, Christian Ritz,*** *The Federal Court of Justice of Germany clarifies that 'legal impossibility' can be used as a justification for denying potential competitor access to essential facilities and provides guidance on the respective burden of proof (Ferry Port Puttgarden II), 11 December 2012, e-Competitions December 2012, Art. N° 57263.*

[***47***] Lisbon Appeal Court (Relação), 22 December 2010, *PT Comunicações* - see ***Luís D. S. Morais,*** *The Lisbon Court of Appeals acquits Portuguese telecommunications incumbent (PT Comunicações), 22 December 2010, e-Competitions Judicial review & Burden of proof in unilateral practices cases, Art. N° 33892.*

[***48***] Italian Administrative Court of Lazio, 27 March 2012, N. 11308/2009, *Teatro della Provvidenza* - see ***Michele Giannino,*** *An Italian administrative court applies the doctrine of essential facilities to a theatre (Teatro della Provvidenza), 27 March 2012, e-Competitions March 2012, Art. N° 45579.*

[***49***] Italian Supreme Administrative Court, 29 January 2013, N. 00548/2013, Bayer - see ***Andrea Zulli, Elisabetta Grassi,*** *The Italian Supreme Administrative Court reinstates the Competition Authority's decision finning a pharmaceutical group for abuse of dominant position in the market for the production and commercialization of fosetyl-based fungicides against downy mildew in grapes (Bayer), 29 January 2013, e-Competitions Judicial review & Burden of proof in unilateral practices cases, Art. N° 52732* ; ***Peter L'Ecluse, Jerome Dickinson,*** *The Italian Council of State reinstates a € 5.1 million fine initially imposed on a pharmaceutical company by the Competition Authority for its alleged abuse of dominant position in the market for the production*

and commercialization of fosetyl-based fungicides (Bayer), 29 January 2013, e-Competitions January 2013, Art. N° 56792 ; ***Gabriele Accardo,*** *The Italian Council of State reinstates fine for abuse of dominant position in the market for the production and commercialization of fosetyl-based fungicides (Bayer), 29 January 2013, e-Competitions January 2013, Art. N° 58439.*

[***50***] Italian Administrative Court of Lazio, 8 May 2014, N. 04406/2012, *Telecom Italia*. See ***Tim Kasten,*** *The Lazio Administrative Court upholds a fine of €103.8 million for abuse of dominant position in the telecom sector (Telecom Italia), 8 May 2014, e-Competitions May 2014, Art. N° 66957.*

[***51***] Bulgarian Supreme Administrative Court, 20 January 2017, Decision Nº 798, *Energo Pro* - see ***Eleonora Mateina,*** *The Bulgarian Supreme Administrative Court quashes the Competition Authority's decision on an abuse of dominance in the energy sector, due to a different economic analysis (Energo Pro), 20 January 2017, e-Competitions Judicial review & Burden of proof in unilateral practices cases, Art. N° 84447.*

[***52***] EU General Court, 9 September 2010, Case T-155/06, *Tomra v Commission* - see ***Frederic Depoortere, Ingrid Vandenborre, Simon Baxter, James S. Venit,*** *The EU General Court confirms fine imposed by the Commission for abuse of dominant position in the market for reverse-vending machines (RVM) used to collect used beverage containers focusing on exclusive agreements and loyalty-based rebates (Tomra), 9 September 2010, e-Competitions September 2010, Art. N° 45409* ; ***Nicolas Petit,*** *The EU General Court upholds a Commission's decision concerning an abuse of dominance in the market for machines for the collection of used beverage containers addressing the issues of loyalty rebates and exclusivity agreements (Tomra), 9 September 2010, e-Competitions September 2010, Art. N° 36404* ; European Court of Justice, 29 March 2012, Case C-459/10 P, *Tomra v Commission* - see ***Alain Ronzano,*** *Fidelity rebates: The CJEU confirms its position concerning fidelity rebates (Tomra), 19 April 2012, Concurrences N° 3-2012, Art. N° 56127.*

[***53***] European Court of Justice, 6 September 2017, Case C-413/14 P, *Intel v Commission* - see ***Bill Batchelor, Keith Jones,*** *The EU Court of Justice revisits forty years of case law on when a dominant company's rebate scheme may be abusive (Intel), 6 September 2017, e-Competitions September 2017, Art. N° 84795* ***Simon Baxter, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre,*** *The EU Court of Justice quashes a judgment of the General Court that upheld a fine of €1.06 billion for an abuse of dominance due to implementing loyalty rebates based on exclusivity agreements (Intel), 6 September 2017, e-Competitions September 2017, Art. N° 84756* ; ***Jay Modrall, Ian Giles,*** *The EU Court of Justice refers a case back to the General Court for re-examination (Intel), 6 September 2017, e-Competitions September 2017, Art. N° 84767.*

[***54***] French Supreme Court, *TDF*, n°18-11.034.

[***55***] See ***Danish Competition Authority,*** *The Danish Competition Appeals Tribunal confirms that a company abuses its dominance by using conditional rebates and exclusivity provisions in the payment card sector (Teller), 18 September 2019, e-Competitions September 2019, Art. N° 91766.*

[***56***] Slovenian Supreme Court, *Pro Plus, case G 7/2009 (2013)* - see ***Andrej Fatur,*** *The Slovenian Supreme Court upholds the Competition Authority's prohibition decision finding an abuse of dominant position in the market for TV advertising (Pro Plus), 3 December 2013, e-Competitions December 2013, Art. N° 71303.*

[57] Paris Court of Appeal *Orange Caraïbe, n°2012/05160 (2013)* - see ***Sergio Sorinas,*** *The Paris Court of Appeal upholds the Competition Authority's decision holding that a parent company and its subsidiary are jointly liable for an abuse of dominance in the French overseas departments (Orange Caraïbe), 4 July 2013, e-Competitions July 2013, Art. N° 68786.*

[58] German Federal Court of Justice *CTS Eventim*, KVZ 44/19 (2020) - see ***Laura Lehoczky-Deckers,*** *The German Federal Court of Justice rejects an appeal against the prohibition of exclusivity clauses in online sales of event tickets (Eventim), 3 June 2020, e-Competitions June 2020, Art. N° 97144.*

[59] Case T-321/05, *AstraZeneca* - see ***Jonas Koponen, Bernd Meyring, Gerwin Van Gerven,*** *The EU General Court upholds "novel" approach to abuse of dominance in pivotal pharma appeal (AstraZeneca), 1 July 2010, e-Competitions July 2010, Art. N° 41073* ; ***Thomas Graf,*** *The EU General Court fines a company for abuse of a dominant position in the pharmaceutical sector addressing the issues of market definition and dominance analysis (AstraZeneca), 1 July 2010, e-Competitions July 2010, Art. N° 35645* ; on appeal Case C-457/10 P, *AstraZeneca v Commission* - see ***Kyriakos Fountoukakos, Kristien Geeurickx,*** *The EU Court of Justice dismisses pharmaceutical company's appeal against the Commission and EU General Courts' findings that it abused its dominant position by misusing patent systems and pharmaceutical marketing procedures to exclude generic competitors from the market and restrict parallel imports (AstraZeneca), 6 December 2012, e-Competitions December 2012, Art. N° 50286* ; ***Gabriele Accardo,*** *The EU Court of Justice upholds the abuse of patent systems and the procedures for marketing pharmaceutical products to prevent or delay the arrival of competing for generic medicinal products on the market for proton pump inhibitors (AstraZeneca), 6 December 2012, e-Competitions December 2012, Art. N° 62394* ; Case T-814/17, *Lietuvos gelezinkeliai* - see ***General Court of the European Union,*** *The EU General Court upholds the Commission's decision finding that the national railway company of Lithuania abused its dominant position on the national rail freight market (Lietuvos geležinkelai), 18 November 2020, e-Competitions November 2020, Art. N° 97970* ; ***Samuel Hall,*** *The EU General Court maintains Commission decision finding that a Lithuanian railway company abused its dominant position on the national rail freight sector (Lietuvos geležinkelai), 18 November 2020, e-Competitions November 2020, Art. N° 98217* ; ***Sandrine Mathieu, Thaiane Abreu,*** *The EU General Court confirms the Commission's decision finding that the Lithuanian railway incumbent abused its dominant position by dismantling a rail track (Lietuvos geležinkelai), 18 November 2020, e-Competitions Judicial review & Burden of proof in unilateral practices cases , Art. N° 99586.*

[60] Italian Supreme Administrative Court, 8 April 2014, No. 1673/2014, *Coop Estense / AGCM* - see ***Sara Lembo, Giulio Matarazzi,*** *The Italian Council of State confirms the Competition Authority's decision adopted in an abuse of dominance case in the mass retail sector (Coop Estense / AGCM), 8 April 2014, e-Competitions April 2014, Art. N° 68803.*

[61] Italian Administrative Court of Lazio, 23 January 2017, N. 07420/2015, *SEA/AGCM* - see ***Michele Giannino,*** *The Italian Administrative Court of Lazio partially upholds the fine imposed on the company managing the Milan airports for abusive practices in the general aviation sector (SEA / AGCM), 23 January 2017, e-Competitions January 2017, Art. N° 83570.*

[62] See AG Bobek's opinions of 2 September 2021 in Cases C-151/20 Nordzucker and C-117/20 Bpost for the latest discussion ; ***Valérie Lefever, Peter L'Ecluse,*** *The EU Court of Justice AG Bobek proposes to include protected legal interests within the threefold conditions for the ne bis in idem principle thereby allowing the Belgian Competition Authority to pursue a fine against a postal incumbent which had already been fined by its sectoral regulator (Bpost), 2 September 2021, e-Competitions September 2021 - II, Art. N° 102337.*

[**63**] Latvian Supreme Court, *Judgment in case No SKA-461/2016, Latvijas Gāze (2016).*

[**64**] Slovakian Supreme Court, *Judgment of the Supreme Court of the Slovak Republic, case no. 4SŽh1/2010 (2011).*

[**65**] Higher Regional Court of Düsseldorf) *Facebook, Case VI-Kart 1/19 (V) (2019)* - see ***Thomas Höppner, Phillipp Westerhoff,*** *The Dusseldorf Higher Regional Court quashes the Competition Authority findings that a social network abused its dominant position by improperly combining user data that it collected from various sources (Facebook), 26 August 2019, e-Competitions August 2019, Art. N° 96434* ; ***Dina Jubrail, Maureen K. Ohlhausen, Matthew Levitt, Daniel Vasbeck,*** *The Higher Regional Court of Düsseldorf suspends an order of the German Competition Authority on alleged abuse of dominance in the social networks (Facebook), 26 August 2019, e-Competitions August 2019, Art. N° 92044* ; ***Natascha Gerlach, Constanze Kauffmann, Tobias Pesch,*** *The Higher Regional Court of Düsseldorf grants a social network company the suspensive effect to an appeal in an interim decision (Facebook), 26 August 2019, e-Competitions August 2019, Art. N° 91686.*

[**66**] Germany, German Federal Supreme Court) *Facebook, Case KVR 69/19 (2020)* - see ***German Competition Authority,*** *The German Federal Court of Justice provisionally confirms allegation of a social media company abusing dominant position (Facebook), 23 June 2020, e-Competitions June 2020, Art. N° 95564* ; ***Friedrich Andreas Konrad, Rieke Kaup, Romina Polley, Laura Melusine Baudenbacher,*** *The German Federal Court of Justice overturns the Dusseldorf Court of Appeals' interim decision and finds an online social media platform to have abused its power in collecting data from different sources (Facebook), 23 June 2020, e-Competitions June 2020, Art. N° 95537* ; ***Jörg Witting, Marcio da Silva Lima,*** *The German Federal Court of Justice confirms abuse of dominance over data collection by an online platform without the user's explicit consent (Facebook), 23 June 2020, e-Competitions June 2020, Art. N° 95915.*

[**67**] Paris Court of Appeal, *Google/ SPEM*, n°20/08071 (2020) - see ***Michaël Cousin,*** *The Paris Court of Appeal confirms the Competition Authority's decision ordering a search engine to negotiate with news agencies and press publishers (Google), 8 October 2020, e-Competitions October 2020, Art. N° 97555.*

[**68**] Latvian Supreme Court, *Drogas*, 291/2015 (2015) - see ***Janis Sarans,*** *The Supreme Court of Latvia upholds the Competition Authority's decision on the establishment of abuse of dominance in retail trade in the market of beauty and household goods (Drogas), 15 June 2015, e-Competitions June 2015, Art. N° 76774.*

[**69**] Court of Appeal (E&W) *National Grid, Case n° C1/2009/1573 (2010)* - see ***Yasmin Arshed,*** *A UK Court of Appeal supports OFGEM's decision against national grid's metering case (National Grid), 23 February 2010, e-Competitions February 2010, Art. N° 30708* ; ***Simon Barnes,*** *The UK Court of Appeal upholds an abuse of dominance finding against incumbent gas provider but reduces the size of the fine imposed (National Grid), 23 February 2010, e-Competitions February 2010, Art. N° 31020* ; ***Marcus Pollard,*** *The UK Court of Appeal's reminds of how novel points in a case should impact on the penalty imposed (National Grid), 23 February 2010, e-Competitions February 2010, Art. N° 32901.*