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**A COMPARATIVE ANALYSIS OF EU AND US APPROACHES
TO ABUSE OF MARKET DOMINANCE – REVIEWING EU
ANTITRUST INVESTIGATIONS AGAINST FOREIGN
UNDERTAKINGS**

Bachelor's thesis

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ABSTRACT

The research centralises on the concept of abuse of dominance, aiming to determine the differences between the EU and US systems of antitrust regulation, and further reviewing European Commission's antitrust investigations against foreign undertakings. The research also addresses the cases against Intel and Google due to their currentness and relativity to the topic.

The research is based on a literature review in the field of competition law. The research data is gathered from different legal publications, judicial decisions and other relevant legal sources. The research strives to answer whether the EU measures on abuse of dominant position have a possible effect of punishing foreign corporations for being successful in the territory of EU. The author's hypothesis is that the EU measures on abuse of dominance are stricter regarding market-power and could have potential restricting effects for foreign corporations.

Even though the two systems are distinct models for antitrust regulation, the major goals of the systems are reasonably similar. The main differences are connected to requirements for abusive conduct, including dissimilar regulatory application of laws related to abuses in general. The EU competition provisions can be considered to be easier in application, while the US case-law has introduced many additional requirements to the section 2 of the Sherman Act that must be satisfied in order to find an offence of monopolization. The author concludes that EU cannot directly be regarded as attacking US corporations with its competition law enforcement – the EU measures are easier to satisfy, and due to the dominance of US companies in the European markets, they inherently become more vulnerable for antitrust investigations. The antitrust investigations often also originate from direct-competitor complaints, not from the European Commission's initiative.

Keywords: abuse of dominance, monopolization, antitrust investigations

LIST OF ABBREVIATIONS

EC: European Commission

ECJ: European Court of Justice

EEA: European Economic Area

FTC: Federal Trade Commission

TFEU: Treaty on the Functioning of the European Union

INTRODUCTION

In the recent years, the European Commission (EC) has ruled on several antitrust cases involving abuse of dominant position conducted by US technology corporations operating in the European Economic Area (EEA). In September 2009, the EC held that Intel Corporation had abused its dominant position in EU by concluding unlawful rebate arrangements with various computer manufacturers.¹ The EC imposed a fine amounting to over 1 billion euros for the alleged infringement, together with an injunction to end the violating practises infringing the EU competition law.² Another record-breaking fine, amounting to 2.42 billion euros, was imposed in June 2017 when the EC found that Google had abused its dominant position by favouring its own shopping services in its search engine.³ The both companies have contested the fines and facing appeal-proceedings.

The research topic was chosen to acquire understanding of the EU antitrust investigations and to comprehend the underlying reasons behind the actions taken by the EC against US corporations. The aim of the research is to determine whether the EU measures on abuse of dominant position are stricter than the comparable measures in US, and to examine whether these measures could be regarded as having potential restricting effects for US corporations, even so far that EU could be regarded as punishing foreign corporations for being successful and having significant market-power in the EEA.

The research provides answers to several questions to fulfil the aim of the research. The research questions are the following: **(1) What are the main differences between EU and US approaches to abuse of dominance? (2) Do the EU measures on abuse of dominant position have an effect of restricting foreign corporations for being successful? (3) Are the investigative actions**

¹ European Commission Press Release, Brussels, 13.5.2009, *Antitrust: Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practises*, IP/09/745, 37990 Intel. Accessible: http://europa.eu/rapid/press-release_IP-09-745_en.htm?locale=en, 26.4.2018.

² *Ibid.*

³ European Commission Press Release, Brussels, 27.7.2017, *Antitrust: Commission fines Google €2,42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, IP/17/1784, 39740 Google Search. Accessible: http://europa.eu/rapid/press-release_IP-17-1784_en.htm, 26.4.2018.

taken by the EC against US technology corporations necessary to protect the consumers in the EU, or do they merely restrict the success of the foreign dominant corporations in the EEA? The author's hypothesis is that the US antitrust policy is more allowing in terms of dominant market position when comparing the two approaches, thus the EU measures on abuse of dominance could be regarded as having restrictive effects for foreign undertakings, including the US-based technology corporations.

The research is a comparative analysis between EU and US regulatory systems on abuse of dominance, based on a literature review in the field of competition law. The research data is gathered from different primary and secondary sources of law, including legal publications, statutes, laws and judicial decisions, and from other legal and supporting sources relevant to the research topic. The list of the references is displayed at the end of the research.

The research comprises in total of four chapters. The first chapter provides an overview of the regulatory aspects of the EU's approach to abuse of dominant position and defines what constitutes an abusive conduct. The second chapter follows the methodology of the previous chapter and provides an overview of the US approach to monopolization, equivalent concept to abuse of dominance in the US antitrust system. The purpose of the first and second chapter is to provide specific features of the two systems in order to derive conclusions regarding the differences of the systems. The third chapter is dedicated to the differences of the EU and US measures to abuse of dominance. The fourth chapter analyses EU antitrust investigations, including the Intel and Google cases, and examines the possible restrictive effects of the EU competition enforcement. The fourth chapter also addresses the calculation of antitrust fines in the EU and US.

1. ABUSE OF DOMINANT POSITION – EU APPROACH

The main EU antitrust provision regulating abuse of dominant position is Article 102 of the Treaty on the Functioning of the European Union (TFEU). In essence, Article 102 prohibits any abuse of dominant position which could affect the trade in the internal market. Article 102 also provides a non-exhaustive list of prohibited abusive conducts.⁴ The list is non-exhaustive, meaning that other conducts apart from the listed ones can also be regarded as being abusive, even if not described in Article 102.⁵

The specific requirements for abuse of dominant position can be derived from Article 102⁶. Firstly, Article 102 provides that an actual possession of dominant position is necessary in order to find an abuse of dominant position, meaning that abuse of dominant position is not possible without demonstrated market dominance. The wording of Article 102 also specifies that an undertaking must be established in EU in order to be subject to EU competition law rules. In addition, there must be abusive conduct, from the list of Article 102 or in other form. It is also required that the abusive conduct has an effect on the trade in EU. The effect on trade means that the abusive conduct must have some kind of impact or alteration in the market, so that the abuse creates certain advantages and disadvantages in the competition setting.⁷ If a specific conduct does not affect the trade in EU, that conduct cannot be considered an abuse of dominant position within the meaning of Article 102.

⁴ Jones, A., Sufrin, P. (2015). *EU Competition Law: Text, Cases and Materials*. 6th ed. Oxford University Press, p 259.

⁵ Akman, P. (2012). *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*. Oxford and Portland: Hart Publishing, p 1, 2.

⁶ Jones, Sufrin (2015), *supra nota* 4, p 259.

⁷ Whish, R., Bailey, D. (2012). *Competition Law*. 7th ed. Oxford: Oxford University Press, p 178.

1.1. Existence of dominant position

The requirement of abusive conduct is necessary in order to find an abuse of dominant position, because it ascertains that a mere existence of dominant position is not unlawful under Article 102.⁸ This means that dominance in itself is lawful as long as it is not used to abuse or alter the competition. The concept of dominant position can be further divided into two sub-categories: single and collective dominance.⁹ A single dominance means that only one company is dominant on a specific market, while the other companies on the same market cannot be dominant.¹⁰ A collective dominance on the other hand means that there is more than one dominant company on the market.¹¹

The European Commission's Guidance on Enforcement Priorities in Applying Article 82 EC (now 102 TFEU) sets out a criteria which must be analysed in order to determine whether an undertaking is dominant on a specific market.¹² Paragraph 11 of the Guidance provides that in order for an undertaking to be dominant an undertaking must be able, at least in theory, to increase or maintain prices at a specific level without being harmed by that.¹³ Paragraph 12 of the Guidance provides that market position, existence of competitors in the market, and consumer approach to products or services must also be analysed in order to determine possible dominant position.¹⁴ It is also necessary for the EC to establish dominant position by defining the relevant market for the company, including geographical market as well as the products in question.¹⁵

In today's commercial world it is highly unlikely that any private undertaking would hold 100% of a market all by itself. That is why much lower percentages can indicate dominance. The Guidance on Enforcement Priorities states that even though a low market share is a good indicator to determine absence of dominance, there are still no specific minimum market share which would

⁸ *Ibid.*, p 192.

⁹ *Ibid.*, p 179.

¹⁰ *Ibid.*, p 179.

¹¹ *Ibid.*, p 179.

¹² 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, p 7-20, referenced in Whish (Whish, Bailey (2012), *supra nota* 7, p 179).

¹³ 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, p 7-20, para. 11.

¹⁴ *Ibid.*, para. 12.

¹⁵ European Commission. *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*. Accessible: ec.europa.eu/competition/antitrust/procedures_102_en.html, 25.4.2018.

indicate that dominance cannot be applicable.¹⁶ Nevertheless, paragraph 14 of the Guidance suggests that market dominance is improbable when the market share is anything below 40%.

1.1.1. The special responsibility of dominant undertakings

The European Court of Justice (ECJ) has concluded in its case-law concerning abuse of dominance position, that dominant undertakings have special responsibility in the market, meaning that dominant undertakings must make sure that their conduct does not affect negatively the trade in the single market of EU.¹⁷ This means that a dominant undertaking cannot engage in any conduct which could distort the trade in EU, even though it could be lawful without the possible effects. In other words, the special responsibility of dominant undertakings means that a conduct can be regarded as lawful if done by a non-dominant company, when at the same time the same conduct can be regarded as unlawful if done by a dominant company. The concept of special responsibility of dominant undertakings is unique in the EU competition law.

1.2. Abuse of dominant position in connection with pricing

1.2.1. Excessive pricing

Article 102(a) prohibits excessive pricing, which means that an undertaking cannot impose excessive prices because it would most likely result to unfair treatment between companies in the market. The exact wording of Article 102, applicable to excessive pricing, is the following: “(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”. The determination on whether unfair purchase or selling prices are existent is often tested by comparing similar products in the product market.¹⁸ This means that prices must be in some line with other similar products. The existence of excessive pricing as an abuse of dominant position is further confirmed in the EU case-law.¹⁹

Excessive pricing is essentially involved with unfairness of prices, which evidently is problematic because it is difficult to determine unfairness, since company’s pricing can be just part of normal

¹⁶ *Ibid.*, para. 14.

¹⁷ Court decision, 9.11.1983, NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, C-322/81, EU:C:1983:313, point 57.

¹⁸ Akman (2012), *supra nota* 5, p 195.

¹⁹ Whish, Bailey (2012), *supra nota* 7, p 721.

economic behaviour to earn profits, and have nothing to do with exploitative practises.²⁰ Even though the unfairness of prices is difficult to determine, excessive pricing can still be considered to be abusive if it fulfils the criteria in Article 102.

Exclusionary excessive pricing has a close connection with refusal to supply, because excessive prices can prevent the access of competitors or other undertakings to essential facilities.²¹ The reason why this kind of conduct is considered exclusionary is that competitors can be excluded from the market due to this conduct. The EC has outlined the issue of refusal to supply in the context of exclusionary excessive pricing in its Notice on the application of the competition rules to access agreements in the telecommunications sector.²² Paragraph 97 of the Notice provides that excessive pricing in connection with access to essential facilities may be considered an abusive conduct.²³

1.2.2. Predatory pricing

Predatory pricing is an abusive conduct where a dominant undertaking engages in sales of products or services at loss in a way that competitors or other companies cannot compete with the prices.²⁴ Predatory pricing can be done when an undertaking has dominant capacity to squeeze prices very low, and not be affected in its own commercial progress. Even the fact that a possible competitor knows and is aware that a certain actor in the market is engaging in predatory pricing may restrict the desire of that potential competitor to enter the market.²⁵ This means that even a known reputation of engaging in predatory pricing may constitute a barrier to enter the product market, which is enough to be considered an abuse of dominant position.²⁶

General test to examine whether a certain price is predatory is the Areeda/Turner test.²⁷ The Areeda/Turner test is basically a cost/price analysis, where a price is considered predatory when it is below dominant firm's average variable cost, meaning that the price of the product is lower

²⁰ *Ibid.*, p 718, 719.

²¹ *Ibid.*, p 724.

²² Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector – Framework, Relevant Markets and Principles, OJ C 265, 22.8.1998, p. 2-28, referenced in Whish (Whish, Bailey (2012), *supra nota* 7, p 724).

²³ Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector – Framework, Relevant Markets and Principles, OJ C 265, 22.8.1998, point 97.

²⁴ Whish, Bailey (2012), *supra nota* 7, p 739.

²⁵ *Ibid.*, p 740.

²⁶ *Ibid.*, p 740.

²⁷ *Ibid.*, p 742.

than the cost of the production of that product.²⁸ Still, the ECJ has stated that when a price is above average variable cost and below average total cost, the prices may be still regarded as predatory, even though the calculation method does not directly follow the Areeda/Turner test.²⁹ The purpose of the ECJ's calculation approach is that the Areeda/Turner test is very strict regarding a specific price, and the EC and the ECJ want to also include information on intentions of a specific price when assessing possible predatory conduct in the case.³⁰ The EC's view is that when a price is under allowable acquisition cost it is usually a definite way to know that a company is engaging in predatory pricing.³¹

1.2.3. Discriminatory pricing

The abuse of discriminatory pricing is clearly addressed in Article 102(c). The exact wording of Article 102(c) dealing with discriminatory pricing is the following: “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at competitive disadvantage”. In general, discriminatory pricing means that a dominant undertaking applies differing prices to different natural or legal persons in comparable circumstances. This kind of conduct is considered unfair and not neutral in the competition setting and is therefore forbidden under the EU competition law, as described in Article 102(c). The key aspect, when examining the conduct of discriminatory pricing, is to determine whether the transactions in the comparable situations are equivalent.³² The determination of comparability of transactions is necessary because different prices may often be justifiable in the normally functioning commercial world. Therefore, the determination of the factor of equivalence and comparability of the situations is of particular importance when assessing discriminatory pricing.

1.2.4. Tying and bundling

Tying means that a primary product is “tied” to a secondary product in a way that in order to buy the primary product it is also required to buy the secondary product. Tying and bundling can be considered to be abusive within the meaning of Article 102, if the action satisfies the conditions of Article 102(d). The exact wording of the Article 102(d) is the following: “(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations

²⁸ *Ibid.*, p 740-742.

²⁹ *Ibid.*, p 740-742.

³⁰ *Ibid.*, p 740, 741.

³¹ *Ibid.*, p 746.

³² *Ibid.*, p 761.

which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” This provision means that when tying is done in a way that the secondary product has no connection with the primary product, the action of tying constitutes an abuse of dominant position.

Tying might exist in different forms, such as commercial tying, refusal to supply and bundling.³³ Bundling means that two products are tied together to constitute one sale in a manner that the two products are sold for one price.³⁴ Bundling does not at all times constitute an abuse of dominant position. The selling price is the key factor in determining whether the activity of bundling two products together is abuse of dominant position.³⁵ If the selling price is not in any way unusual for the bundled products in question, the bundling most likely will not amount to abusive conduct.

1.2.5. Rebates

In most cases rebates are considered as loyalty rebates.³⁶ Loyalty rebates can mean for instance that discounts and bonuses are available to only those customers who are considered to be loyal to the undertaking. Rebates can also take form of conditional rebates, meaning that the rebate, being discount, bonus or relevant, is conditional on purchasing products from the undertaking.³⁷ Rebates can also have the same impact on the market as exclusionary pricing.³⁸ This might happen when discounts, bonuses or other forms of rebates exclude other companies unfairly from the market. It is still notable to emphasize that majority of rebates do not constitute an abuse of dominant position within the meaning of Article 102, which means that most of rebates are part of the normal economic behaviour. As a matter of fact, rebates are often regarded as being pro-competitive even though nearly all rebates can have both pro-competitive and anti-competitive effects on trade.³⁹

The EC examines conditional rebates by using the Guidance on Enforcement Priorities.⁴⁰ In order to determine whether conditional rebates can be considered abusive within the meaning of Article

³³ *Ibid.*, p 689.

³⁴ *Ibid.*, p 689.

³⁵ *Ibid.*, p 689.

³⁶ *Ibid.*, p 729.

³⁷ *Ibid.*, p 735.

³⁸ *Ibid.*, p 728.

³⁹ Waelbroeck, D. (2005). Michelin II: A Per Se Rule Against Rebates by Dominant Companies. – *Journal of Competition Law & Economics*, Vol. 1, No. 1, 171.

⁴⁰ 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, p 7-20, referenced in Whish (Whish, Bailey (2012), *supra nota* 7, p 735).

102, the EC examines prices and rebates of the company, evaluates an effective price, and determines whether the prices and rebates offered by the company are below fair prices and can have effects of hindering the product market.⁴¹ The ECJ has regarded that loyalty rebates are in many situations illegal because they are not part of the normally functioning competition structure.⁴² In *Hoffman-La Roche v Commission*, the ECJ concluded that rebates can be considered abusive if they are improving loyalty in a manner that it could result to create anti-competitive effects for other companies in the market, in other words to alter the competition in EU.⁴³ In *Michelin II*, the Court of First Instance of the European Communities concluded that a rebate system must be economically justified in order to be lawful.⁴⁴

1.3. Abuse of dominant position in connection with operations of companies

1.3.1. Refusal to supply

Refusal to supply can infringe Article 102 if it is done strictly for anti-competitive purposes by a dominant company, for example if a dominant company wants certain company intending to buy products from the dominant company to exit the market. In order for refusal to supply to be considered abusive in accordance with Article 102, all of the requirements in Article 102 must be satisfied. In a situation where a dominant company wants another company out of the market by refusing to supply products to that company, the requirements of Article 102 would be considered satisfied. The exit of a company from the market would modify the competition structure in the particular market, leading to an effect on trade.

Still, many situations concerning refusal to supply are not infringing Article 102, for example when there is an existent objective justification for the refusal.⁴⁵ Objective justification means that the conduct is in fact abusive, but the benefits in terms of efficiency outweigh the competition

⁴¹ Whish, Bailey (2012), *supra nota* 7, p 735.

⁴² Zenger, H. (2012). Loyalty Rebates and the Competitive Process. – *Journal of Competition Law & Economics*, Vol. 8, No. 4, 718.

⁴³ Court decision, 13.2.1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, EU:C:1979:36, referenced in Waelbroeck (Waelbroeck (2005), *supra nota* 39, p 149).

⁴⁴ Court decision, 30.9.2003, *Michelin v Commission of the European Communities*, T-203/01, EU:T:2003:250, point 59, 98.

⁴⁵ Whish, Bailey (2012), *supra nota* 7, p 707.

concerns.⁴⁶ This is an interesting factor, since usually Article 102 does not allow this kind of exceptions based on examination of pro-competitiveness.

1.3.2. Exclusive dealing obligations

When considering exclusive dealing obligations in terms of abuse of dominant position, abusive conduct can occur if the agreement between dominant undertaking and other company promotes the position of dominant company in an unfair manner, for example when a dominant company concludes a contract with a sub-contractor to supply products only for that company, or other way around, if the dominant company is the sub-contractor in the case.⁴⁷ This kind of dealings can restrict operations of the company contracting with the dominant company, in a way that the company doing business with the dominant company cannot use its total competitive value. The major effect and purpose of this kind of dealing is that the dominant company achieves something from the market which companies without competitive advantage are not able to achieve. Some types of exclusive dealing agreements are still allowed, for example if there are investments made by a company dealing with a dominant company, which for example limits the possibilities to supply products or material to other companies but the dominant company.⁴⁸

1.3.3. Refusal to license

Patents and other intellectual property rights are valuable assets of companies and can create evident dominance in the markets due to the exclusive protection conferred by intellectual property laws. Intellectual property rights cannot infringe provisions of EU competition law as stated in Article 345 TFEU.⁴⁹ The wording of Article 345 is the following: “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”. Still, the notable question is whether an intellectual property owner can exploit its exclusive rights in a way that it creates imbalance in the market, for example by licensing its invention to some of its competitors and refusing to license it to others. This issue was dealt in 1968 in *Parke, Davis & Co v Probel*, where the ECJ concluded that mere intellectual property rights are not grounds for an abuse of dominant position, but unfair use of the exclusive rights can in fact constitute an abuse of

⁴⁶ *Ibid.*, p 211, 212.

⁴⁷ *Ibid.*, p 682, 683.

⁴⁸ *Ibid.*, p 687.

⁴⁹ *Ibid.*, p 794.

dominant position if it can impact the trade.⁵⁰ The ECJ's ruling means that unfair refusal to license intellectual property can be considered an abuse of dominant position.

1.3.3.1. The concept of compulsory licensing

Refusal to license may lead to compulsory licensing, which means that an EU antitrust institution orders intellectual property owner to license certain invention to the competitors if that invention is used by that owner in a manner that can restrict innovation in the field.⁵¹ This is mainly done to ensure that inventions are exploited in their whole potential to achieve maximum consumer welfare.⁵² The purpose of compulsory licensing is that when a certain invention is meaningful for the whole society and consumers, it can be exploited by other companies even if the intellectual property owner refuses to license it. This means that the intellectual property is just too significant innovation to be in the hands of the property holder. The requirements for compulsory licensing are still very strict and only relied on in exceptional circumstances when the intellectual property owner is refusing to license its innovation or refuses to license it to certain actors in the market. In case that compulsory licensing occurs, the intellectual property owner is still entitled to a fair compensation of the compulsory licence even though the license would not be agreed by the owner.

⁵⁰ Court decision, 29.2.1968, Parke, Davis & Co. v Probel, Reese, Beintema-Interpharm and Centrafarm, C-24/67, EU:C:1968:11.

⁵¹ Maggiolino, M. (2011). *Intellectual Property and Antitrust: A Comparative Analysis of US and EU Law*. Cheltenham, Northampton and Massachusetts: Edward Elgar Publishing, p 177.

⁵² *Ibid.*, p 177.

2. MONOPOLIZATION – US APPROACH

The US antitrust system is universally considered as one of the oldest antitrust systems in the world. The first antitrust statute adopted in US is called the Sherman Antitrust Act (Sherman Act), which was adopted as early as in 1890.⁵³ The Clayton Antitrust Act and the Federal Trade Commission Act, establishing the Federal Trade Commission (FTC), entered into force in 1914.⁵⁴ These three statutes form the basic foundations of the US antitrust law. The principles of US antitrust law have also been strongly developed by the US case-law, since the courts have the final say whether an alleged infringement is breaching the US antitrust law.⁵⁵ The Sherman Act is the main legal instrument in US concerned with monopolization. The Robinson-Patman Act, an amendment to the Clayton Act, is mainly concerned with discriminatory pricing.⁵⁶

The US approach to monopolization is ultimately focused on the market power and dominance of companies.⁵⁷ The main section concerning monopolization in the Sherman Act is the section 2 of the statute. The section 2 of the Sherman Act (§2 Monopolizing trade a felony; penalty) defines monopolization in the following manner: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign national, shall be deemed guilty of felony...” The section 2 has not been revised or altered thus the wording has been exactly the same since 1966 when the monopolization provision was included in the Sherman Act.⁵⁸

The section 2 provides a broad definition explaining that an act of monopolization constitutes a criminal offense. It can be interpreted that when a company engages, or plans to engage, in an act which could monopolize the trade, the act will be considered illegal. The section 2 also prohibits

⁵³ Jones, Sufrin (2015), *supra nota* 4, p 29.

⁵⁴ Federal Trade Commission. *Guide to Antitrust Laws: Antitrust Laws*. Accessible: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>, 21.1.2018.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Ross, S. (1993). *Principles of Antitrust Law*. Westbury, New York: The Foundation Press, Inc, p 1.

⁵⁸ Calkins, S. (2007). *Competition Law in the United States of America. – Competition Law Today: Concepts, Issues, and the Law in Practice*, (Ed.) Dhall, V. Oxford: Oxford University Press, 419.

attempts to monopolize. The attempt might not require the actual conduct of monopolization. Still, an actual monopoly position is always required in order to be accused of monopolization.

2.1.1. Monopoly position

In *Standard Oil Co. of New Jersey v United States (1911)*, the US Supreme Court concluded that monopoly position in itself cannot be regarded as monopolization in the manner of the section 2 of the Sherman Act, meaning that possession of a monopoly position is not illegal.⁵⁹ It is in fact evident that a company has to have some kind of monopoly power in order to conduct in monopolization.⁶⁰ There are different factors to indicate monopoly power, which are at mostly considered to be high level of profits, monopolistic conduct and amount of market shares.⁶¹ Monopoly position and market power was also examined in *Dimmitt Agri Industries, Inc. v CPC International Inc. (1982)*, where it was stated that in order to satisfy the condition of monopoly power, possession and maintenance of that power must be established.⁶² Paragraph 65 of the case concludes that there has not been any case where a company would have been offended with monopolization charges under a market share of 50%, consequently it can be derived that under US case-law monopoly position is highly unlikely under market share of 50% in the relevant market.⁶³

2.1.2. Rule of reason and per se antitrust violations

Rule of reason is a unique principle of US antitrust law. It means that a form of conduct executed by a monopolist company must be examined and weighted in the light of all its possible pro-competitive benefits and anti-competitive effects.⁶⁴ This rule is distantly similar to the rule of EU competition law under Article 101(3) TFEU, which is used to determine whether a restrictive or anti-competitive agreement can be exempted from the prohibition by assessing its pro-competitive effects and balancing them with anti-competitive effects. Still, the rule of reason is different because it is concerned with monopolization, not anti-competitive agreements. It is also established that the rule of reason can also apply to certain ancillary restrains – it can for example

⁵⁹ United States Supreme Court, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), referenced in Ross (1993), *supra nota 57*, p 22-23).

⁶⁰ Ross (1993), *supra nota 57*, p 36.

⁶¹ *Ibid.*, p 36-39.

⁶² United States Court of Appeals, *Dimmitt Agri Industries v. CPC International Inc.*, 679 F.2d 516 (1982).

⁶³ *Ibid.*

⁶⁴ Diény, E. (2006). The CFI Reaffirms the Absence of a Rule of Reason in EC Competition Law. *International Business Law Journal*, No. 5, 681-682.

allow certain anti-competitive conduct by a dominant company if it is done strictly for purposes of commercial necessity, such as non-competition clauses between companies.⁶⁵ Hence, rule of reason means that certain monopolizing conduct can be considered lawful if it benefits the whole community.

The US law also distinguishes infringements between antitrust violations that are *per se* infringing the Sherman Act with certain acts that might not at all times constitute a violation.⁶⁶ This approach is strongly connected with the concept of reasonableness, because some acts might be restricting but not in an unreasonable manner.⁶⁷ The point of distinguishing antitrust violations between *per se* antitrust violations and other infringements, is that *per se* antitrust violations do not need court examination in order to prove the unlawfulness because the infringement is unlawful just by its existence.⁶⁸ The most generic examples of *per se* antitrust violations are price fixing and market division.⁶⁹

There is an evident connection between *per se* antitrust violations and doctrine of rule of reason in US antitrust law, because these two are the classifications of possible types of antitrust violations. While the rule of reason requires examination of economic benefits and anti-competitive effects, the *per se* rule establishes that certain acts are illegal, no matter if they are pro -or anti-competitive.⁷⁰ The rule of reason has been criticised in many instances since an entirely objective economic analysis has been regarded to be too complex task for the judicial system.⁷¹

⁶⁵ *Ibid.*, p 681, 682.

⁶⁶ Federal Trade Commission, *supra nota* 54.

⁶⁷ *Ibid.*

⁶⁸ Dabbah, M. (2010). *International and Comparative Competition Law*. Cambridge: Cambridge University Press, p 241.

⁶⁹ Federal Trade Commission, *supra nota* 54.

⁷⁰ Neales, P. (2000). Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason. – *Ohio State Law Journal*, Vol. 61, No. 1, 365.

⁷¹ *Ibid.*, p 372.

2.2. Monopolization in connection with pricing

2.2.1. Predatory pricing

Predatory pricing can be violating the section 2 of the Sherman Act if it is done in an anticompetitive or excluding way.⁷² The Areeda/Turner test in the Sherman Act determines that a price is predatory when it is below the average variable cost of the dominant firm.⁷³ Predatory pricing has also two main requirements – company engaging in predatory pricing must possess a monopoly position, and the abusive conduct must be profitable at the point when competitors are excluded from the market.⁷⁴ The requirement for future profits is important because during the predatory pricing act, the dominant company suffers losses due to the products or services being sold by loss. The requirement for future profits is called requirement of recoupment which is a distinctive feature of the US approach to predatory pricing. The requirement of recoupment means that a dominant company must be able to recoup any losses suffered during the predatory pricing.⁷⁵ If a company cannot recoup its losses in the future, the company cannot be blamed for predatory pricing.

2.2.2. Discriminatory pricing

Discriminatory pricing, regulated in the Robinson-Patman Act, is an unlawful monopolizing act unless it can be justified by reasons related to necessary costs or other commercial necessities to achieve the equivalent level of prices of competitors.⁷⁶ In order to prove a discriminatory pricing offence, a conduct must have an effect on the market, specifically on the customers.⁷⁷ This basically means that companies cannot have different prices for customers if they cannot objectively justify them with business necessities.⁷⁸ Another defence to the discriminatory pricing, apart from the economic justification, is price discounts made in good faith to meet the prices of a competitor.⁷⁹ Also, if a customer or a company benefits from the monopolist company's discriminatory prices, that natural or legal person may also be regarded as violating the Robinson-

⁷² Areeda, P., Turner, D. (1975). Predatory Pricing and Related Practises under Section 2 of the Sherman Act. – *The Harvard Law Review*, Vol. 88, No. 4, 697.

⁷³ Whish, Bailey (2012), *supra nota* 7, p 740.

⁷⁴ Areeda, Turner (1975), *supra nota* 70, p 698.

⁷⁵ Whish, Bailey (2012), *supra nota* 7, p 745.

⁷⁶ Federal Trade Commission. *Guide to Antitrust Laws: Price Discrimination: Robinson-Patman Act Violations*. Accessible: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>, 21.1.2018.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Federal Trade Commission, *supra nota* 76.

Patman Act.⁸⁰ The Robinson-Patman Act has been widely criticised by companies and legal scholars by its alleged anti-competitiveness and complex wording.⁸¹

2.2.3. Tying and bundling

The US antitrust law regards that tying is a monopolization violation when it fulfils the requirements specified in case-law.⁸² In order to find a monopolization violation of tying, it is required that two products, which are not connected to each other and cannot be bought separately, are sold together in a way that alters the competition.⁸³ A “tying product” must also have certain economic power, which means that the product must be somehow unique in the market leading the consumer to buy the secondary product as well, even if that consumer would not buy the secondary product in a normal competition setting.⁸⁴

Bundling, in the US antitrust law, is usually concerned with discounts, when in EU-context it is more closely connected to tying.⁸⁵ In US, bundling has been and continues to be a controversial topic, but generally it is not considered unlawful.⁸⁶ Still, the conduct of bundling can be anti-competitive when a company in monopoly position offers low bundled prices to which the competitors cannot respond to.⁸⁷ The US courts have approached the issue of bundling in different ways, but the most used way to assess monopolization offence of bundling is to conduct a below cost test, which examines whether the costs of producing the items against the competitive product prices are higher than the competitive product’s price.⁸⁸ If the dominant company’s product is proven to be cheaper than the production costs and also cheaper than the competitive product prices, it can be an evidence of exclusionary conduct of bundling.⁸⁹

⁸⁰ Federal Trade Commission, *supra nota* 54.

⁸¹ Calkins (2007), *supra nota* 58, p 423.

⁸² *Ibid.*, p 415.

⁸³ *Ibid.*, p 415.

⁸⁴ *Ibid.*, p 415.

⁸⁵ Duncan, R., Coleman, C., Daniel, H., Haleen, P. (2009). Litigating Single-Firm Conduct Under the Sherman Act and the EU Treaty: Divergence Without End, or Change We Can Believe In. – *Global Competition Litigation Review*, Vol. 2, No. 3, 164.

⁸⁶ *Ibid.*, p 162.

⁸⁷ *Ibid.*, p 162.

⁸⁸ *Ibid.*, p 164.

⁸⁹ *Ibid.*, p 164.

2.2.4. Rebates

In US, loyalty rebates are usually considered to be pro-competitive and part of normal commercial, unless they are connected with predatory pricing activities.⁹⁰ The evident connection between rebates and predatory prices has been addressed in the US case-law, where the US courts have examined and found similarities, including that the requirement of recoupment and requirement of below-cost pricing are both necessary and must be established when assessing the legality of rebate schemes, similarly as in cases dealing with predatory pricing.⁹¹ This means that in order for a rebate scheme to be unlawful, it has to be proven that the selling prices are lower than the production costs, meaning that the products are sold at loss, and that the losses occurred during the selling at loss are possible to recoup in the future, after the monopolizing rebate scheme.

2.3. Other monopolization offences

2.3.1. Exclusive dealing obligations

It is concluded in the US case-law that exclusive dealing obligations, initiated by companies in monopoly positions, can be considered to be monopolizing because they can cause anti-competitive effects for competitors.⁹² Nevertheless, exclusive dealing obligations have not been regarded as violating as for example tying, since exclusive dealing obligations usually can also produce pro-competitive effects on the market.⁹³ Requirements for assessing whether anti-competitive effects are apparent for competitors are determined in the US case-law.⁹⁴ Firstly, it is required to examine whether there is an existence of monopoly position, and secondly, to assess whether the exclusive dealing obligations in the contracts can create substantial foreclosure to the market.⁹⁵ The requirement of substantial foreclosure is significant, since there is a safe-harbour for contracts including exclusive dealing obligations, but it can only occur if a dominant company can prove that the foreclosure is not substantial, meaning that it does not amount to over 30% of the market, and does not create any competitive advantage for the companies in question.⁹⁶

⁹⁰ Zenger (2012), *supra nota* 42, p 719.

⁹¹ Duncan, Coleman, Daniel, Haleen (2009), *supra nota* 85, p 168.

⁹² *Ibid.*, p 151.

⁹³ Calkins (2007), *supra nota* 58, p 416.

⁹⁴ Duncan, Coleman, Daniel, Haleen (2009), *supra nota* 85, p 151.

⁹⁵ *Ibid.*, p 151.

⁹⁶ *Ibid.*, p 152.

2.3.2. Refusal to deal

Refusal to deal can lead to an offence of monopolization if a dominant company refuses to deal with a certain company because it is dealing with competitors of that dominant company.⁹⁷ This basically means that a dominant company cannot refuse to deal with certain company, even if that company was dealing with dominant company's rival. This type of situation is addressed in *Lorain Journal Co. v United States*⁹⁸, in which a newspaper Lorain Journal, at that time dominant company in the advertisement sector in Lorain, United States, refused to advertise companies in the newspaper, who also advertised on a local radio station.⁹⁹ The newspaper was held to violate the section 2 of the Sherman Act because it had attempted to monopolize the market and keep its monopoly position by engaging in refusal to deal with certain companies which also wanted to advertise in the platforms of the Lorain Journal's competitor.¹⁰⁰

An offence of refusal to deal also requires an established motive on behalf of the dominant company. This requirement means that the motive of a dominant company must be monopolization, which essentially means that the exact refusal to deal is done for the purposes of monopolization.¹⁰¹ This requirement is important, because refusals to deal are mostly lawful and normal part of business behaviour. Refusal to deal is unlawful monopolizing conduct only in circumstances where a dominant company knowingly and purposely refuses to deal with a company, with a motive of monopolization and maintaining monopoly position in the market.

⁹⁷ Ross (1993), *supra nota* 57, p 76.

⁹⁸ United States Supreme Court, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), referenced in Ross (Ross, (1993), *supra nota* 57, p 77).

⁹⁹ United States Supreme Court, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

¹⁰⁰ *Ibid.*

¹⁰¹ Ross (1993), *supra nota* 57, p 76.

3. MAIN DIFFERENCES IN APPROACHES TOWARDS ABUSE OF MARKET DOMINANCE

Firstly, it is important to address that the US antitrust law has influenced competition policies globally, including in Europe, because the US antitrust law came into existence much earlier.¹⁰² Still, the both systems of EU and US are often regarded as two model systems for competition policies around the world.¹⁰³ Even though these systems are two distinct models for antitrust regulation, the major viewpoints are fairly similar. In fact, most of the competition policies around the world share similar elements and approaches of competition law.¹⁰⁴ Essentially, the establishment of abuse of dominance requires monopoly position in the market as well as abusive conduct according to the requirements laid down in the applicable laws and regulations.

When turning to the differences, it is rational to start with the objectives towards the topic. When comparing the competition law objectives between the EU and US antitrust systems, it is seemingly clear that the US antitrust law is more focused on economic aspects and economic justifications in assessment of offences relating to monopolization.¹⁰⁵ The EU system does not usually examine economic benefits in terms of abuse of dominant position but concentrates more on the anti-competitive effects of the conducts. In EU, economic and pro-competitive justifications are examined in antitrust cases dealing with anti-competitive dealings, such as cartels, but not in cases regarding abuse of dominant position. The US antitrust system seems to protect the markets as a whole, including both companies and consumers, while the EU system values highly the protection of consumers, possibly sometimes at the stake of companies operating in the EU markets.

The main provisions dealing with abuse of dominance in EU and US have differing elements when considering the wording. The section 2 of the Sherman Act is broader and does not give specific

¹⁰² Jones, Sufrin (2015), *supra nota* 4, p 29.

¹⁰³ Marcos, F. (2017). The Prohibition of Single-Firm Market Abuses: US Monopolisation Versus EU Abuse of Dominance. – *International Company and Commercial Law Review*, Vol. 28, No. 9, 338.

¹⁰⁴ Dabbah (2010), *supra nota* 68, p 13.

¹⁰⁵ Marcos (2017), *supra nota* 103, p 339.

examples of monopolizing conduct. It is also much simpler provision in wording. Article 102 TFEU on the other hand is more specific in terms of wording and also addresses specific examples of abuses, even though the list is not exhaustive and leaves room also for different and other kinds of abusive conducts apart from the list. The section 2 criminalizes the acts of monopolization, including attempts to monopolize even if an actual monopolizing behaviour has not happened. This is seemingly a different approach, since Article 102 does not prohibit mere attempts of abuse of dominant position, even though for example a reputation of predatory pricing may fulfil the conditions of an abuse of dominant position in EU, if that reputation creates barriers to enter the market in question. In this example, an actual conduct of predatory pricing must still be established in order to satisfy the conditions laid down in Article 102.

The both jurisdictions require establishment of dominant position. The difference towards the determination of dominant position is essentially connected to the required market shares. The EC has concluded in its assessment that dominance in a market is unlikely when company's market share is below 40%. The US courts on the other hand have maintained that a monopoly position will be improbably with possession amounting to under 50% of the market shares. Even though the percentages are different, mostly because in EU an undertaking can regarded in some circumstances to be dominant with market share lower than half of the total market, the approach towards the issue is very similar. The administrative bodies in EU and US have both concluded that even though the dominant position with those particular market shares is not probable, it still cannot be determined with absolute certainty.

The both antitrust systems have also unique features, which do not exist in other jurisdictions. A unique concept of EU competition law is the concept of special responsibility of dominant undertakings, which means that companies doing business in EU must make sure that their operations do not negatively affect the trade in EU. This means in the context of abuse of dominance, that the companies with significant market power must refrain from all activities which are available to them due to their position in the market and which could possibly lead to alteration in the competition structure. The special responsibility of dominant undertakings does evidently create more burden for dominant companies due to the requirement of being careful about any possible impacts of business behaviour. The special responsibility of undertakings also

means that a conduct which could be considered lawful by a non-dominant undertaking, could be regarded as unlawful conduct when performed by a dominant undertaking.¹⁰⁶

A special feature in US antitrust law is the application of the doctrine of rule of reason in antitrust regulation. Rule of reason allows US courts to determine economic benefits of an alleged offence of monopolization in order to define its lawfulness. In general terms, the rule of reason means that certain monopolizing conduct can be considered lawful if it benefits the community and market as a whole. The doctrine of rule of reason has been strictly rejected in the EU case-law, even though the rejecting approach has in some instances been criticised, since the doctrine has been regarded to be present in some applications of non-competition clauses in EU.¹⁰⁷

When turning to the specific criteria and requirements for abusive conducts in the application of antitrust provisions in EU and US, one differing area is the regulation of loyalty rebates.¹⁰⁸ In EU, loyalty rebates are in most cases considered as being artificial and not part of the normal competition structure, while in US loyalty rebates are mostly considered lawful and part of the normal business behaviour.¹⁰⁹ The US antitrust law also requires establishment of below-cost pricing, meaning that the bonus or discount makes the company to operate loss at the time of the rebate scheme, and possibility of recoupment in the future, meaning that the occurred loss can be recouped when the customers become loyal to the dominant company, in order to find an offence of monopolization in connection with rebate schemes. The requirement of recoupment is not existent in EU law. EU approach toward the issue of rebate schemes is that loyalty rebates are always abusive when they improve loyalty in an unfair manner and can have an effect of altering the market and competition structures.

Another clear difference in specific conducts is excessive pricing, which is not considered as monopolizing conduct in US. In EU competition law, excessive pricing is clearly prohibited in Article 102(a), which prohibits unfair prices and selling conditions in the markets, including excessive prices. Also, the approaches to intellectual property rights in connection with abuse of dominant position are different. EU may require compulsory licensing in circumstances where non-licensing could alter the market setting. In US, there is no equivalent concept to compulsory

¹⁰⁶ Alvin Sng, Yi. (2016). Tying Conduct Under Article 102 TFEU: Can Intervention Against Google Be Justified. – *European Competition Law Review*, Vol. 37, No. 10, 406.

¹⁰⁷ Dieny (2006), *supra nota* 64, p 683.

¹⁰⁸ Zenger (2012), *supra nota* 42, p 717.

¹⁰⁹ *Ibid.*, p 717.

licensing, mostly due to the strong tradition upon private ownership and property rights. The approaches to discriminatory pricing are also slightly different, since in US, a company can justify its discriminatory prices by economic benefits, while in EU discriminatory prices are prohibited *per se*.

When turning to the regulation of predatory pricing, the US law requires recoupment and follows directly the Areeda/Turner test to examine whether the prices in question are in fact predatory. The EU approach to predatory pricing is slightly different, since apart from the fact that requirement of recoupment is not existent, the Areeda/Turner test is not completely followed in the course of the determination of predatory prices. According to the ECJ's calculation method of predatory prices, the examination can also include assessment of possible intent of the predatory action, which can make the conduct possibly acceptable. The ECJ came up with its own calculation approach due to the fact that the Areeda/Turner test is very strict regarding specific prices. The ECJ wanted to also include information about intentions of the prices when assessing the possible predatory conduct. The EC's view to the predatory pricing is that allowable acquisition cost is a definite indicator to know that a company has predatory prices.¹¹⁰

The approaches towards exclusive dealing obligations have also different features. In US, an exclusive dealing obligation offence requires substantial foreclosure of over 30% in the market so that it creates certain competitive advantage for the dominant company in question. In EU, the approach is different because there are no established certain percentages to calculate alteration in the market. It is enough in EU that the exclusive dealing obligation promotes dominant company in an unfair manner, in comparison to its competitors, in order to find an abuse of dominant position, including alteration of the market structure. The US approach to exclusive dealing obligations is also a good example of the requirements which US law has introduced to the monopolization offences. The additional requirements to the specific abusive conducts need to be fulfilled in order to find a monopolization offence. Often the criteria and requirements created by the US courts to the section 2 of the Sherman Act relate to establishment of certain and proved competitive advantage resulting from the alleged monopolizing conduct.

¹¹⁰ Whish, Bailey (2012), *supra nota* 7, p 746.

4. RESTRICTING SUCCESS OR PROTECTING COMPETITION? REVIEW ON EU ANTITRUST INVESTIGATIONS

4.1. Intel and abuse of dominant position in EU

The Intel case is one of the most famous recent antitrust cases in EU concerning abuse of dominant position, more specifically rebates. Intel Corporation is a manufacturer of computer chips, and the abusive conduct in the case concerned alleged anti-competitive practises and rebate schemes with several computer manufacturers using the Intel chips (Acer, Dell, HP, Lenovo and NEC).¹¹¹ The antitrust violation was that Intel allegedly gave rebates to the computer manufacturers to use the Intel chips, and further also made payments to Media Saturn Holding, a major retailer of computers, to only sell these particular computers using the Intel chips.¹¹²

The formal investigation against Intel Corporation began already in 2004, after a direct competitor of Intel, Advanced Micro Devices (AMD), had complained about Intel's anti-competitive practises to the EC.¹¹³ In 2006, the AMD further complained to the German National Competition Authority that Intel was contributing in exclusive dealing obligations with the above-mentioned computer manufacturers.¹¹⁴ Finally, after years of investigations and gathering evidence and after concluding that Intel had in fact dominant position in the relevant market, the EC came into conclusion that Intel had abused its dominant position in the market.¹¹⁵ The fine of abuse of dominant position amounted to in total of 1 060 000 000 euros together with an order to cease all the found illegal practises.¹¹⁶ The EC justified the massive sanctions by the exclusionary conduct resulting from the conditional rebates and payments which led to harmful effects to consumers

¹¹¹ European Commission Press Release, *supra nota* 1.

¹¹² *Ibid.*

¹¹³ Commission Decision, 13.5.2009, relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, COMP/C-3/37.990 – Intel, C-277/13, para. 5-7.

¹¹⁴ *Ibid.*, para. 13.

¹¹⁵ European Commission Press Release, *supra nota* 1.

¹¹⁶ *Ibid.*

and effect on the trade.¹¹⁷ Intel appealed the decision to the General Court, and argued that the rebates were not exclusionary.¹¹⁸ The General Court rejected the arguments and appeal was not successful.¹¹⁹ Intel further appealed the General Court's decision to the ECJ, and the ECJ ruled that the General Court did not examine all of the arguments of Intel, and the case must be referred back to the General Court.¹²⁰ The case is now waiting for the next round of examinations by the General Court.

4.2. Google's search engine and unfair competition practises in EU

The Google Search investigation started in the same manner as the Intel investigation, when multiple companies and competitors complained to the EC about Google's anti-competitive practises relating to its search engine.¹²¹ In 2010, the EC started the antitrust investigations against Google, and the preliminary assessment by the EC concluded that Google may engage in anti-competitive practises by favouring its own services in its search engine.¹²² Google did not agree with the assessment nor with the complaints, but still offered to adopt certain commitments to address the issues discovered in the preliminary assessment.¹²³ The complainants were still not happy and lodged a second round of complaints resulting to EC's statement of objections, which again concluded that Google was abusing its dominant position within the meaning of Article 102.¹²⁴ Google contested the proceedings taken by the EC, arguing that the evidence was not correctly assessed and that Google did not have sufficient rights of defence.¹²⁵ These alleged misconducts in the course of the proceedings were found inexistent.¹²⁶

The judgment given by the EC was clear – Google abused its dominant position by favouring its own services in its search engine.¹²⁷ The abusive conduct related to a Google search engine service

¹¹⁷ *Ibid.*

¹¹⁸ Court decision, 12.6.2014, Intel Corporation Inc. v European Commission, T-286/09, EU:T:2014:547, point 97.

¹¹⁹ *Ibid.*, point 1638.

¹²⁰ Court decision, 6.9.2017, Intel Corporation Inc. v European Commission, C-413/14 P, EU:C:2017:632, point 144, 148-150.

¹²¹ Commission Decision, 27.6.2017, relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, AT.39740 – Google Search (Shopping), para. 38-42.

¹²² *Ibid.*, para. 43, 63.

¹²³ *Ibid.*, para. 71.

¹²⁴ *Ibid.*, para. 72-76.

¹²⁵ *Ibid.*, para. 106-107.

¹²⁶ *Ibid.*, para. 108-139.

¹²⁷ European Commission Press Release, *supra nota* 3.

called Google Shopping, which gave consumers a possibility to compare different kinds of products.¹²⁸ Google was found guilty of favouring its own products in the service by altering the search results illegally and, by this conduct, getting a pro-competitive position in comparison to other companies and competitors using the service.¹²⁹ As a consequence of the abusive conduct, the EC ordered Google to stop the illegal practises and sanctioned Google with a substantial fine amounting to 2.42 billion euros.¹³⁰ The fine is the biggest sanction in the history of EU's antitrust cases and Google has also appealed the judgment to the General Court.

There were also proceedings in the US against Google with identical facts and circumstances, which lead to a conclusion that Google could not be investigated judicially.¹³¹ The FTC's view was that the underlying intention of the Google's algorithm altering the shopping service was not to infringe the antitrust provisions nor to restrict the competition, but to offer informative results in the search engine, even though the FTC found that certain search results were in fact harmful for the competition and other companies using the service.¹³² Even though the investigation did not lead to judicial proceedings, FTC still ordered Google to adopt some changes to its practises.¹³³

The different approaches between EU and US systems can be seen very clearly in the Google investigations. In the FTC-investigation, Google relied on the First Amendment, protecting freedom of speech and expression, to protect the search engine results, when in EU such defence is not possible.¹³⁴ Elisabeth Fox analyses in her article *Monopoly and Abuse of Dominance*, that US conditions for abuse of dominance regarding monopoly power and abusive conduct are harder to satisfy, concluding that the investigation against Google was easier to initiate in EU.¹³⁵ It is still important to keep in mind that even if the case was easier to initiate in EU, it does not mean that there was no abusive conduct. In other words, even though the EU rules are stricter in this sense, it cannot be concluded that Google did not do anything wrong.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Federal Trade Commission. (2013). Press Release: Google Agrees to Change Its Business Practises to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tables, and in Online Search. Accessible: <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>, 1.11.2017, referenced in Fox (Fox, E. (2014). Monopolization and Abuse of Dominance: Why Europe Is Different. *The Antitrust Bulletin*, Vol. 59, No. 1, 142-143).

¹³² Foer, A., Vaheesan, S. (2013). Google: The Unique Case of Monopolistic Search Engine. – *Journal of European Competition Law & Practice*, Vol. 4, No. 3, 199.

¹³³ Jazrawi, W., Laporte-Bisquit, C. (2015). Google's Abuse of Dominance. – *Global Competition Litigation Review*, Vol. 8, No. 3, 51-53.

¹³⁴ *Ibid.*, p 51-53.

¹³⁵ Fox, E. (2014). Monopolization and Abuse of Dominance: Why Europe Is Different. – *The Antitrust Bulletin*, Vol. 59, No. 1, 142-143.

4.2.1. EU fines for antitrust infringements

In addition to remedies, the EC can impose fines on companies who have infringed the EU competition law provisions.¹³⁶ The fines for infringement of competition law can amount up to 10% of a yearly turnover.¹³⁷ The Council Regulation 1/2003 also provides that fines can be imposed for different kinds of failings to comply with the EC's requests in the course of the investigations, including for example failure to supply information or additional answers.¹³⁸ These types of failings can amount to fines up to 1% of the yearly turnover.¹³⁹

The amount of a fine is calculated in accordance with the goods or services connected with the case, and the EC must also take into account the overall circumstances of the infringement.¹⁴⁰ Article 23(3) of the Council Regulation 1/2003 determines that gravity and duration of the infringement must be thoroughly analysed and observed when calculating the total amount of a fine.¹⁴¹

Fines for antitrust infringements in US can amount up to 100 million US dollars for corporations and 1 million US dollars for private individuals.¹⁴² The differences are significant between the policies regarding calculation of fines in US and EU. When companies are investigated and found engaging in unlawful anti-competitive practises in US, they can be fined up to 100 million dollars, while the EU fines in similar cases can climb to massively more extensive numbers, as seen for example in the Intel and Google cases.

4.3. EU measures on abuse of dominance – necessary or restricting?

As addressed above, the EU conditions regarding abuse of dominance can be argued to be easier to satisfy, because the US case-law has established many additional criteria and requirements to the section 2 of the Sherman Act which must be satisfied in order to find an offence of

¹³⁶ Whish, Bailey (2012), *supra nota* 7, p 275.

¹³⁷ Jones, Sufrin (2015), *supra nota* 4, p 261.

¹³⁸ 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, p 1-25, Art. 23(1).

¹³⁹ *Ibid.*

¹⁴⁰ Guidelines on the method of setting fines imposed pursuant to Article 23(3)(2) of Council Regulation 1/2003, OJ C 210, 1.9.2006, p. 2-5, referenced in Whish (Whish, Bailey (2012), *supra nota* 7, p 277).

¹⁴¹ Council Regulation, *supra nota* 138, Art. 23(3).

¹⁴² Federal Trade Commission, *supra nota* 54.

monopolization. Also, the broadness and non-exhaustiveness of Article 102 makes it clear that an abuse of dominant position can be somewhat any anti-competitive conduct performed by a dominant undertaking operating in EU.¹⁴³ The broad interpretation of abusive conduct together with the special responsibility of dominant undertakings under EU law can lead to situations where it may be difficult for dominant undertakings to determine whether their conduct is lawful or not.

The easier application of EU antitrust provisions can make it difficult for dominant companies to do business in EU because their conduct can be more easily regarded as anti-competitive. In addition, the corporate environments in US and EU are seemingly different. In EU, the maintenance of fairly operating markets can be regarded to be stricter for dominant undertakings due to the requirement of special responsibility and more easily satisfiable conditions for abusive conduct. Even though many US companies are globally dominant and therefore possibly vulnerable for EU antitrust investigations, it is notable that the rules are still same for every company, whether from EU or US, and therefore ultimately a matter of compliance. That is why the author regards that the EU competition enforcement cannot be directly seen as punishing US dominant companies, even though they might be the ones strongly affected by the legal requirements and framework of the EU competition law.

The objectives of competition laws are also important to address. The EU competition law objectives rely strongly on the consumer welfare, and when comparing the EU and US systems, it can be analysed that the US antitrust policy aims more for total welfare of the economy, in contrast to the EU's approach which is more directed towards mere well-being of consumers.¹⁴⁴ The total welfare of the economy does not opt-out the welfare of the companies or monopolist companies, and that slight difference in the competition law objectives is perhaps one reason why the requirement of special responsibility does not exist in the US antitrust law, particularly because US does not want to burden the dominant companies operating in its territory.

When regarding the investigative powers between EU and US, it is also clear that the competence of EC is much wider than the competence of the competition authorities in the US. The EC has direct enforcement powers in antitrust investigations, when US competition authorities have often only investigative powers.¹⁴⁵ The direct enforcement of the EC allows it to make decisions and

¹⁴³ Alvin Sng (2016), *supra nota* 106, p 406.

¹⁴⁴ Alvin Sng (2016), *supra nota* 106, p 406, 407.

¹⁴⁵ Jones, Sufirin (2015), *supra nota* 4, p 30.

impose remedies for violations of competition law.¹⁴⁶ The EC can initiate investigations independently if it believes that an undertaking has infringed EU competition law provisions.¹⁴⁷ EC can also initiate investigations on account of a complaint¹⁴⁸, usual source of complaints being often competitors, which is also the manner how the antitrust investigation against Google got started in EU, when around twenty competitors, including Microsoft, lodged complaints to the EC about Google's unfair practises.¹⁴⁹ The investigation against Intel Corporation also got started by competitor complaints. The author views that the competitor complaints are problematic and can have major effects on the competition setting when competitors want to make each other's operations harder, even though in most cases the competitors are most aware of the business practises and in that way can know more about infringing practises than the official bodies. Still, it can be derived from the competitor complaints that the EC does not directly intend to attack US companies. The antitrust investigations are often initiated by complaints of their US-based rivals.

Even though there are clear differences in the antitrust enforcement in EU and US, the competition authorities of both jurisdictions have been cooperating officially in competition matters since the EU/US Cooperation Agreement in 1991, which is still in force today.¹⁵⁰ The EU/US Cooperation Agreement sets out rules and procedures on exchange of information, and cooperation in anti-competitive activities and enforcement activities in antitrust dealings and consultation matters.¹⁵¹ Still, the Cooperation Agreement by itself is not a sign that US would not regard that EU competition laws are not attacking US corporations. In fact, US has in many platforms accused EC of attacking US corporations with its strict and wide-reaching competition laws.¹⁵² Still, the laws are the same for everybody, even for EU and US companies. That is why it is important that the dominant US companies get well educated on the EU competition laws so that they can operate lawfully and avoid the possible consequences of antitrust infringements.¹⁵³

¹⁴⁶ Craig, P., de Búrca, G. (2015). *EU Law: Text, Cases and Materials*. 5th ed. Oxford University Press, p 1007.

¹⁴⁷ Jones, Sufrin (2015), *supra nota* 4, p 260.

¹⁴⁸ Craig, Búrca (2015), *supra nota* 146, p 1007.

¹⁴⁹ Jones, Sufrin (2015), *supra nota* 4, p 261.

¹⁵⁰ Whish, Bailey (2012), *supra nota* 7, p 509.

¹⁵¹ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, OJ L 95, 27.4.1995, p 47-52.

¹⁵² Dabbah (2010), *supra nota* 68, p 60.

¹⁵³ Potter, A., Constantine, S. (2009). The Europe: Where Monopolists Fear to Treat – EU's Abuse of Dominance Rules and their Impact on Commercial Policy Setting by U.S. Companies. – *Antitrust*, Vol. 24, No. 1, 84.

CONCLUSION

The research examines EC's antitrust investigations by comparing the antitrust systems of EU and US, in order to further analyse whether the EU measures can be regarded as restricting the functioning of US companies. The hypothesis of the research is that the EU measures are stricter and that they can result to punishing effects for foreign corporations with significant market power in the EEA. The differences between EU and US systems of antitrust regulation are mainly connected to different requirements for abusive conduct, including dissimilar regulatory application of laws related to abuses in general. The US antitrust provisions are seemingly very simple, but the case-law lays down many complex requirements that must be satisfied in order to find an offence of monopolization.

The sanction policies also differ significantly. In US, the maximum fine for antitrust infringement can amount up to 100 million dollars for legal persons, when in EU the similar fine can climb up to multiple times higher number, since the fine can be anything up to 10% of the yearly turnover of the undertaking. The author regards that the drastic difference in calculation of the fines is problematic because it makes the same abusive conduct so differently treated in EU and US. It also can make EC seem like it is trying to make the most of the abuses conducted in the EU markets. There are also significant differences in the enforcement mechanisms. While the EC has direct enforcement in EU competition law, including investigative and administrative powers, a separate legal action is usually required in US, in addition to the investigations carried out by the FTC. The author regards that the EC's competence as an investigator and a judge is contravening with neutrality and separation of powers in governance. The author also regards that the fine policy in EU can be considered to be leaning towards profitability.

The author agrees that the objective of EU's antitrust investigations is to protect consumers and competition in EU and not to attack foreign corporations. The key conclusion in the research is that the EU competition provisions are easier to satisfy, while concentrating solely on the concept of abuse of dominance. Even though the legal language in the section 2 of the Sherman Act is fairly general and broad, the US case-law has established various additional requirements to be

fulfilled, which makes it harder to initiate investigative and judicial proceedings. The difference in application of antitrust provisions can also be seen in real life – the Google Search case was also investigated in the US but did not lead to judicial proceedings due to the inability to satisfy the requirements of monopolization offence. The differences between EU and US application of antitrust provisions might arise from the fact that US is a common law country with strong private litigation altering antitrust laws to the preferred directions, while EU is more concerned with the exact provisions, making the enforcement in application easier in this sense.

The author regards that EU cannot be regarded as strictly punishing US corporations with its competition enforcement. EU seems to be stricter on dominant undertakings to ensure consumer welfare, and the conditions are easier to satisfy possibly due to the differences in the emphasis of the competition objectives. This can emerge from the fact that the US antitrust policy seems to be driven more in a market-orientated way by protecting also corporations, not only consumers. EU seems to protect consumers even if it could lead to potential harm on the companies and economy. In conclusion, the author regards that the two systems are driven by different underlying objectives which might appear in a way that EU is punishing US corporations. Hence the author's hypothesis that the US antitrust policy is more allowing in terms of dominant market position is not completely fulfilled. The more correct approach to the issue is that the monopolization offence is harder to initiate in US than in EU. The author's opinion is that the direct-competitor complaints are usually problematic when analysing the protection of consumers, because the main objective of this kind of investigations is usually to harm the other competitor on the market, not to protect consumers. Still, the fact that the majority of the EU antitrust investigations against US corporations originate from competitor complaints is one factor to determine that EU is not attacking US corporations or restricting their operations in an unfair manner. It is also important to note that the rules are same for all companies, regardless of the origin of the company.

The author suggests internationalised, extra-territorial and unified framework to be created in the field of competition regulation. The author regards that it is necessary to strive towards similar global rules concerning fair business practises in terms of monopoly position in international trade, despite of the place of the business operations. This is because companies operating globally need to unreasonably adjust to significantly different rules in different parts of the world. The author concludes that there are potential further research possibilities in the area of this research, for example examining the potentiality of the international framework of competition regulation.

LIST OF REFERENCES

Scientific books

1. Akman, P. (2012). *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*. Oxford and Portland: Hart Publishing.
2. Craig, P., de Búrca, G. (2015). *EU Law: Text, Cases and Materials*. 5th ed. Oxford: Oxford University Press.
3. Dabbah, M. (2010). *International and Comparative Competition Law*. Cambridge: Cambridge University Press.
4. Jones, A., Sufrin, P. (2015). *EU Competition Law: Text, Cases and Materials*. 6th ed. Oxford: Oxford University Press.
5. Maggiolino, M. (2011). *Intellectual Property and Antitrust: A Comparative Analysis of US and EU Law*. Cheltenham, Northampton and Massachusetts: Edward Elgar Publishing.
6. Ross, S. (1993). *Principles of Antitrust Law*. Westbury, New York: The Foundation Press, Inc.
7. Whish, R., Bailey, D. (2012). *Competition Law*. 7th ed. Oxford: Oxford University Press.

Scientific articles

8. Alvin Sng, Yi. (2016). Tying Conduct Under Article 102 TFEU: Can Intervention Against Google Be Justified. – *European Competition Law Review*, Vol. 37, No. 10, 406-412.
9. Areeda, P., Turner, D. (1975). Predatory Pricing and Related Practises under Section 2 of the Sherman Act. – *The Harvard Law Review*, Vol. 88, No. 4, 697-733.
10. Calkins, S. (2007). Competition Law in the United States of America. – *Competition Law Today: Concepts, Issues, and the Law in Practice*, (Ed.) Dhall, V. Oxford: Oxford University Press, 401-428.
11. Dieny, E. (2006). The CFI Reaffirms the Absence of a Rule of Reason in EC Competition Law. – *International Business Law Journal*, No. 5, 681-690.
12. Duncan, R., Coleman, C., Daniel, H., Haleen, P. (2009). Litigating Single-Firm Conduct Under the Sherman Act and the EU Treaty: Divergence Without End, or Change We Can Believe In. – *Global Competition Litigation Review*, Vol. 2, No. 3, 148-172.

13. Foer, A., Vaheesan, S. (2013). Google: The Unique Case of Monopolistic Search Engine. – *Journal of European Competition Law & Practice*, Vol. 4, No. 3, 199-200.
14. Fox, E. (2014). Monopolization and Abuse of Dominance: Why Europe Is Different. – *The Antitrust Bulletin*, Vol. 59, No. 1, 129-152.
15. Jazrawi, W., Laporte-Bisquit, C. (2015). Google's Abuse of Dominance. – *Global Competition Litigation Review*, Vol. 8, No. 3, 51-53.
16. Marcos, F. (2017). The Prohibition of Single-Firm Market Abuses: US Monopolisation Versus EU Abuse of Dominance. – *International Company and Commercial Law Review*, Vol. 28, No. 9, 338-345.
17. Neales, P. (2000). Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason. – *Ohio State Law Journal*, Vol. 61, No. 1, 347-398.
18. Potter, A., Constantine, S. (2009). The Europe: Where Monopolists Fear to Treat – EU's Abuse of Dominance Rules and their Impact on Commercial Policy Setting by U.S. Companies. – *Antitrust*, Vol. 24, No. 1, 78-84.
19. Waelbroeck, D. (2005). Michelin II: A Per Se Rule Against Rebates by Dominant Companies. – *Journal of Competition Law & Economics*, Vol. 1, No. 1, 149-171.
20. Zenger, H. (2012). Loyalty Rebates and the Competitive Process. – *Journal of Competition Law & Economics*, Vol. 8, No. 4, 717-768.

European Union legislation

21. 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, p 1-25.

Court decisions

22. Court decision, 29.2.1968, Parke, Davis & Co. v Probel, Reese, Beintema-Interpharm and Centrafarm, C-24/67, EU:C:1968:11.
23. Court decision, 13.2.1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities, C-85/76, EU:C:1979:36.
24. Court decision, 9.11.1983, NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, C-322/81, EU:C:1983:313.
25. Court decision, 30.9.2003, Michelin v Commission of the European Communities, T-203/01, EU:T:2003:250.
26. Court decision, 12.6.2014, Intel Corporation Inc. v European Commission, T-286/09, EU:T:2014:547.
27. Court decision, 6.9.2017, Intel Corporation Inc. v European Commission, C-413/14 P, EU:C:2017:632.

Commission decisions

28. Commission Decision, 13.5.2009, relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, COMP/C-3/37.990 – Intel, C-277/13.
29. Commission Decision, 27.6.2017, relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, AT.39740 – Google Search (Shopping).

Foreign country legislation

30. Sherman Act, 26 Stat. 209, 15 U.S.C (1890).

Foreign country court decisions

31. United States Court of Appeals, *Dimmitt Agri Industries v. CPC International Inc.*, 679 F.2d 516 (1982).
32. United States Supreme Court, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).
33. United States Supreme Court, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

International agreements

34. Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, OJ L 95, 27.4.1995, p 47-52.

Other sources

35. European Commission Press Release, Brussels, 27.7.2017, *Antitrust: Commission fines Google €2,42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, IP/17/1784, 39740 Google Search. Accessible: http://europa.eu/rapid/press-release_IP-17-1784_en.htm, 26.4.2018.
36. European Commission Press Release, Brussels, 13.5.2009, *Antitrust: Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practises*, IP/09/745, 37990 Intel. Accessible: http://europa.eu/rapid/press-release_IP-09-745_en.htm?locale=en, 26.4.2018.
37. Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector – Framework, Relevant Markets and Principles, OJ C 265, 22.8.1998

38. 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, p 7-20.
39. European Commission. *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*. Accessible: ec.europa.eu/competition/antitrust/procedures_102_en.html, 25.4.2018.
40. Federal Trade Commission. *Guide to Antitrust Laws*. Accessible: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>, 21.1.2018.
41. Federal Trade Commission. (2013). Press Release: *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search*. Accessible: <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>, 1.11.2017.