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APPLICABILITY OF THE RULE AGAINST AN ABUSE OF DOMINANT POSITION IN PORTS: The EU Competition Law Perspective

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CHAPTER ONE: INTRODUCTION

1.1 OBJECTIVES OF THE THESIS AND BACKGROUND OF THE STUDY

1.1.1 Introduction

Ports facilitate a waterborne transport which is the backbone of international trade, and thereby the global economy. There are thousands of ports on Europe's coastline and inland waterways. These ports, which handle 90 % of Europe's international trade in volume, constitute an imperative points of modal transfer without which international trade and the free movements of persons and goods within the European Union (EU) would be severely jeopardized.[1]

Considering this high significance of ports in facilitating the international trade of EU and the free movement of persons and goods within the Union, this study focuses on determining the extent of application of the EU competition rules for the sector of port operators. Under this general purpose, this thesis will analyze the rule prohibiting abuse of dominant position in port operators; in particular, examining the core points of this rule such as 'undertakings', 'relevant market', 'dominance' and 'abuse'; and finally, determining how and to what extent the rule against an abuse of dominant position could be applicable to port operators.

The application of competition law especially, the rule against an abuse of dominant position, to ports and port service providers is quite important. As discussed below it is well established practice that competition law rues are unarguably applicable to ports. However, due to the below-mentioned peculiar natures of the port sector the application of these rules could not be

[1] Competition concerns in ports and port services, Submission by the European Union, Working Party No. 2 on Competition and Regulation, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP/WP2/WD (2011) 40, P.2.

smooth. The questions of how and to what extent could these rules be applicable necessitates some scrutiny and clarification. This need to solve the difficulty of application is the motive behind this study.

It is obvious that like any other sector of the economy, the benefits of competition are also expected to be enjoyed in the maritime transport sector. Maritime transport is a vital factor in the international trade and the global economy as a considerable volume of goods are transported through this modal. As an important element of the maritime transport sector, ports play a magnificent role in the economy. Port operators may acquire a dominant position in the relevant markets concerned. The acquisition of a dominant position may not be a concern in itself.[2] However, this dominant position may contain an inherent element of potential capacity of abusive behavior which may compromise effective competition in the port industry.

In addition, the prevalent close connection between ports and downstream market operators make ports highly susceptible to abusive conducts. This close connection partly emanates from the contractual nature of the maritime industry, where port users are locked to some ports through long standing contracts. Whatsoever the background might be, the lack of competition or the prevalence of any kind of anti-competitive behavior caused by the acquisition of dominance in the ports market would inevitably damage the global economy as a whole and consumers' welfare, ultimately.[3] Therefore, the existence of effective competition in general and the non-existence of abuse by dominant port operators in particular must be ascertained.

Having this in mind, competition law devoted a significant concern to address this issue of an abuse by dominant undertakings. Article 102 of TEFU[4] dealt with this issue exhaustively.[5] Recently, this issue of abuse by undertakings in a dominant position has also become a concern to be addressed in the national laws of the individual Member States of the EU.

[2] Richard Whish & David Bailey, Competition Law, Seventh ed., Oxford University Press, New York, 2012, P. 192.
[3] Competition in ports and port service, OECD Competition law & policy round table, Directorate for Financial and Enterprise Affairs: Competition Committee, DAF/Comp (2011) 14, P.26.
[4] The Treaty on the Functioning of the European Union, OJ [2010] C 83/88-89.
[5] In the US legal system this matter has been regulated in §1 & 2 of the Sherman Antitrust Act (1890).

Despite its obvious importance to the economy, the application of competition rules to port operators has always been complicated. Various factors have contributed to this difficulty of application. Among others, the peculiar nature of ports as largely financed by governments placed their status of "undertakings" in question.[6] Their nature of indispensability to the downstream market operators coupled with the large economics of scale associated with them make ports an essential facility, difficult either to neglect or to duplicate. These characteristics of ports are incentives making them potential areas of abuse and impediment for effective competition.

Considering the ports indispensability for downstream market of shipping service providers, the difficulty of their duplication, and the importance of the waterborne transport for the global economy, the impairment of competition in this area has a huge bearing in the welfare of consumers.[7] Therefore, it seems vital to establish and clarify how and to what extent the rule against abuse of dominant position could be applicable to port operators.

1.1.2 Special Characteristics of the Port Industry

Ports are defined as transportation nodes that form transfer points for passengers and freight from one vehicle to another;[8] or more specifically, a seaport may generally be regarded as acting as a gateway through which goods and passengers are transferred between ships and the shore.[9] Ports are infrastructures generally characterized by limited capacity of serving customers and costly nature of duplication.

[6] OECD (2011); Ports are usually constructed by public funds.
[7] Ibid.
[8] Angelos Pantouvakis, Port-Service Quality Dimensions and Passenger Profiles: An Explorary Examination and Analysis, Maritime Economics & Logistics, Palgrave Macmillan Ltd, 2006, P. 404.
[9] Gross R., Economic policies and seaports: 1. The Economic Foundation of Seaports, Maritime policy and management, Vol.17, No. 3, 1990, P.207-219.

Ports as infrastructure assets can be owned, organized and managed in various ways. Factors affecting the ownership structure of ports include the type of customers the port serves, the scale it has, and the other characteristics of individual ports. Due to variation in these factors there is no single ownership structure of the port industry. However, as manifested historically, the most common ownership structure of ports has been public ownership combined with vertical integration of the port owner and port operator.[10] Even though there are numerous commercial ports and terminals where no port authority exists, i.e., ports in which facilities are all privately owned,[11] the most dominant model comprises a port authority, mostly the same as port owner, who owns port infrastructures such as berths, quays, terminal buildings, storage areas, cargo handling areas, and so on.

Port infrastructures could be used to provide variety of services such as cargo and passenger handling, security, pilotage, towage and salvage, line handling, maintenance and repair, bunkering, tank cleaning, containers' sale, rental and repair, diving services, oil spill response, pest-control, etc.[12] At this point it is also due to note that the internal organization of ports is very complex and it usually involves large number of bodies participating in the provision of port services. Mostly, unlike typical services markets, say banking, the provision of port services is fragmented.[13]

The type of ports, like their ownership structure, varies considerably. The categorization of ports into different types may largely depend on the type of services they may offer, their location, and the type of vessel and cargo they can handle. Based on these differences ports can be classified as seaports and inland ports, transshipment hubs and hinterland ports, freight ports and passenger ports, container traffic ports and bulk freight traffic ports, and so on.[14]

[10] OECD (2011), P. 25.
[11] Competition concerns in ports and port services, Submission by the United States, Working Party No. 2 on Competition and Regulation, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP/WP2/WD (2011) 34, P.2-3.
[12] Rotterdam Port Structure. Available at: http://www.rotterdameportinfo.com
[13] Pantouvakis (2006), P. 405.
[14] OECD (2011), P. 24.

Whatever their type or ownership structure might be, ports are indispensable components of international trade. This vital position in the international trade coupled with their nature as a limited capacity infrastructure enabled ports to be a significant market actor that is susceptible to possess market power. If there is such market power in their hands, as a principle there is a significant competition law concern relating to the potential abuse of that power. It is obvious that, depending on the applicable relevant market definition, some ports and particular service providers within ports may acquire a dominant position and therefrom an inherently related potential of abusive behavior.[15] It is at this point, therefore, the application of the rule against an abuse of dominant position, which is stated under Article 102 TFEU, would be sought.

1.1.3 Research Questions

Based on the above discussed background, this study will address a number of research questions. These research questions are: what are the competition law provisions applicable against an abuse of dominant position by port operators; is port an undertaking falling under the rule against an abuse of dominant position; what constitutes dominant position in the port sector; what is abuse in the context of port industry; what degree of dominance and what kind of abuse are the subject matters of the rule against an abuse of dominant position; and how and to what extent the rule against an abuse of dominant position can be suitably applied to the port sector.

1.2 SOURCES AND METHOD

Both primary and secondary sources of law have been used in this work. As this study focuses on the abuse of dominant position under the EU law, Article 102 of the Treaty on the Functioning of European Union (TFEU) has been the major provision to be analyzed. To some extent, Article 101 and Article 106 of TFEU have also been examined. For the purpose of

[15] Id, P. 26.

comparison the legal documents of the US have also been consulted, especially Section 1 and 2 of the Sherman Act.

During this effort of textual analysis great care has been taken to interpret and apply the rules according to their literal and contextual meaning, and broadly according to the general objectives of the TFEU and EU competition law. In this regard it should be recognized that despite the EU competition law has various objectives including market integration, political stability, and the protection of small and medium- sized enterprises, the most important goal of competition law in general is the maximization of consumer welfare.[16]

It is also well accepted principle that competition law primarily protects the process of competition, and not competitors. Even if perfect competition might be difficult to achieve, "workable competition" – a system where the objectives mentioned in the perfect competition have not been attained, but a state of affairs has been reached which comes close to the ideal- must be secured. In general, the goal of competition law is to ascertain the achievement of this state of affairs for the benefit of consumers.[17] If this level of effective competition cannot be ensured, the main goal of competition law, i.e. consumer welfare as manifested by low price, improved quality of goods and services, and innovation, cannot be achieved.[18]

Analysis of Article 102 TFEU is not sufficient to understand the scope and application of the rules prohibiting an abuse of dominant position. The concept of an abuse of dominant position has evolved through EU courts cases. Therefore, analyses of TFEU and EU courts cases have been the main sources of this study. In the EU jurisdiction there is no much case law on ports in relation to competition law. However, this paper has, to the extent possible, consulted the

[16] Sonya Margaret Willimsky, The Concept (s) of Competition, Rosa Greaves (edi), Competition Law, The International Library of Essays in Law and Legal Theory, 2nd edi, Ashgate Publishing, England, 2003, P. xiii.
[17] Id, P. 3-4.
[18] Roger J. Van den Bergh and Peter D. Camesasca, European Competition Law and Economics: A Comparative Perspective, second ed., Sweet and Maxwell, London, 2006, P. 16. The goal of competition law in the US as a promotion of consumer welfare is relatively a recent ideology as compared to the promotion of total welfare, .i.e. maximization of producer surplus and consumer surplus in all sectors of the economy.

available decisions of the Commission, even if most of these decisions are at the level of interim measures.[19]

1.3 SCOPE OF THE STUDY

The scope of this paper covers only the rule against an abuse of dominant position. Therefore, as mentioned in the above section, discussion in this thesis is mainly limited to the normative content of Article 102 TFEU, i.e., the rule against an abuse of dominant position, despite some other related competition law matters, such as anticompetitive cooperation of Article 101 have also been discussed to some extent. With regards to jurisdiction, the scope of the thesis is limited to the EU jurisdiction only. However, to some extent some laws and cases of the US legal system have also been assessed to serve the purpose of constructive comparison.

It is also very important to note that the scope of this work covers both ports, as a unified entity, and specific individual port service providers within these ports. The term 'port' used in the headings of various sections and the term port operator/s used in the entire text are meant to represent the concepts of both ports and port service providers. The scope of this study covers the separate concepts of an abuse of position by dominant ports and an abuse of position by dominant port service providers, whenever they appear as a separate entity.[20] However, as a matter of convenience the study has discussed these entities altogether, rather than allocating a separate chapter for each of them.

1.4 ORGANIZATION OF THE STUDY

This study contains four chapters. Chapter one, as an introduction, explains the fundamentals of the study. It discusses the objectives and background of the study, the research questions, the sources used and methodologies adopted in the study, and finally the scope of the study.

[19] 'Sources and Method' section of this thesis has been in general adopted from Alla Pozdnakova, Liner Shipping and EU Competition Law, International Competition Law Series, Wolters Kluwer, 2008, P. 7-9.

[20] In Rotterdam port, for instance, there are 50 pilotage operators, 20 towage and salvage operators, 14 tank cleaning service providers, 28 bunkering service providers, & so on. See http://www.rotterdameportinfo.com.

Chapter two generally elaborates the concept of dominant position of ports. This chapter examined ports as an undertakings, discussed the definition of the relevant market in this area, evaluate ports as a dominant undertaking, explains the concept of collective dominance, and finally it has discussed the criteria of dominance within the whole or the substantial part of the internal market.

Chapter three separately discusses the concept of abuse. In this chapter the notion of abuse has been generally assessed together with some of its major components such as the 'effect on trade criterion' in relation to port operators. The chapter has also discussed some of the major abusive conducts of the dominant port operators one by one, separately. Some major doctrines such as the doctrine of essential facilities and some major defences of dominant undertakings such as the defence of objective justification have also been explained in this chapter.

Finally, chapter four delivers the summary and conclusion of the study.

CHAPTER TWO: DOMINANT POSITION OF PORTS

2.1 INTRODUCTION

The most important provision of this study, i.e., Article 102 of TFEU, reads as follows:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states. Such abuse may, in particular, consist in:
>
> (a) Directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
>
> (b) Limiting production, markets or technical development to the prejudice of consumer;
>
> (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantages;
>
> (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[21]

As it is explicitly indicated on the provision, the conduct of port operators will only be caught by this article if several criteria are met. First, it will only apply to conducts by "undertakings". If an abuse is conducted by a dominant entity which could not be properly classified as undertaking, then such abusive practice will not be caught by the above provision. Therefore, the first point to address the issue of an abuse by a dominant entity, applying the above provision, is to determine whether this entity is an undertaking or not.

Second, undertakings must hold a dominant position within a relevant market. Having said that port operators are generally undertakings falling under the ambit of Article 102, the next point should be defining the relevant market in which these undertakings could be dominant so that their abusive conducts would be caught by Article 102.

[21] OJ [2010] C 83/89.

Third, we need to determine whether a port operator holds a dominant position within the relevant market. This dominant position could be held either by single port operator or by several port operators collectively.

Fourth, it is necessary to examine whether dominant position is held "within a substantial part of the internal market".

2.2 PORTS AS UNDERTAKINGS

The term "undertaking" is not defined by the Treaty (TFEU). The meaning of undertakings is clarified and developed through the decisions of the Commission and the EU Court.[22] The fundamental meaning of undertakings, as stated under the EU Court judgment of *Hofner and Elser v. Macrotron GmbH*, is that "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed".[23] This statement is quite important concerning ports, as they are mostly financed by the government, at least at the stage of construction.[24] This judgment underlined that its legal status as public infrastructure or the fact of being financed by the government doesn't exclude an entity (say port) from the concept and scope of undertakings.

Whether the entity has a profit motive or not also doesn't count.[25] Even if the port authority administering the port has neither a purpose of making profit nor an intention to be engaged in economic activities, it could still be considered as an undertaking as it was reflected in the decision of the Commission in the case of *the Distribution of Package Tours during the 1990 World Cup*, where FIFA was held as undertaking.[26] What matters is whether that port operator is engaged in economic activities or not. Therefore, the next question would be what the court does mean by economic activities?

[22] Whish (2012), P. 83.
[23] Case C- 41/90 [1991] ECR I-1979, [1993] 4 CMLR 306, para 21.
[24] OECD (2011), P. 26.
[25] Whish (2012), P. 86.
[26] OJ [1992] L 326/31, [1994] 5 CMLR 253.

In the case *Pavlov* it was held that "any activity consisting in offering goods or services on a given market is an economic activity".[27] It is well known that port operators are naturally engaged in the provision of services to shipping companies and other port users. Access to quays and berthing, the provision of pilotage or towage services are normally services to be offered by port operators in a given market. Therefore, even if port operators are under the control of public body, they can be considered as undertakings as they are engaged in economic activities.[28]

However, this general feature of service provision should not be always enough to classify ports as undertakings as this is not the only purpose and activity they are established for. In the judgment of *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*, the EU Court stated that "the competition rules on the Treaty (TFEU) doesn't apply to activity which, by its nature, its aim and the rules to which it is subject doesn't belong to the sphere of economic activity … or which is connected with the exercise of the powers of a public authority".[29] This is the point where the peculiar traits of ports need to be assessed. Ports are mostly administered by port authorities which are public entities entrusted with, among other things, the protection of the marine environment and safety and security at sea. As a port is a huge and complex entity there are a number of activities to be performed under it, some of which are purely connected to the exercise of a public authority while the others are economic in nature.[30] Therefore, a detail analysis is required to determine the status of ports as undertakings.

In this regard the first and the most important method of determining an entity as an undertaking or not is to adopt a functional approach.[31] One and the same legal entity may act as undertaking when it carries on one activity but not when it is carrying on another. A particular port may, therefore, be categorized as undertaking when it allows access to quays for ships and

[27] Cases C- 180/98 etc [2000] ECR I-6451, [2001] 4 CMLR 30, para 75.
[28] In *Ambulanz Glockner*, Case C-475/99 [2001] ECR I- 8089, [2002] 4 CMLR 726, an ambulance service supplier was categorized as undertaking.
[29] Case C-309/99 [2002] ECR I- 1577, [2002] 4 CMLR 913, para 57.
[30] In this regard, general reference is available in various International safety at sea and marine environment protection regulations.
[31] Whish (2012), P. 84.

provide pilotage service in exchange for port charge and may not be considered as undertaking when it is engaged in activities related to marine environment protection and safety at sea. This is clearly stated under the decision of the EU Court in the judgment of *Motoe*, when it said that "the classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity".[32] Therefore, the conclusive point should be that even if port operators could be generally categorized as undertakings providing a service in a given market, this classification may not be always true depending on their specific activities. Specific activities they are engaged in must be analyzed in a case by case basis to determine their actual status in that given situation.

Once a port entity is ascertained to be an undertaking based on the above assessment, sometimes the next problem would be the tendency of these port operators to be benefited from Article 106 by claiming that they are *public undertakings*. However, the fact of being a public undertaking or being conferred with monopolistic privileges doesn't exclude an entity from the application of Article 102.[33] Besides, these port operators may also invoke Article 106 (2) of the treaty as a shield to be protected from the reach of Article 102. However, the fact of being entrusted with the operation of general economic interest could not all the time prevent the application of Article 102 on the port operators.[34] Article 106 (2) reads that:

> Undertakings entrusted with the operation of services of general economic interest or having the character of revenue- producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, *in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.* The development of trade must not be affected to such an extent as would be contrary to the interests of the union. (author's emphasis)

Therefore, this means that these port authorities, which may provide services of general economic interest, are excluded only to the extent that the application of Article 102 would

[32] Case C- 49/07 [2008] ECR I- 4863, [2008] 5 CMLR 790.
[33] *Centre Belge d'Etudes de Marche Telemarketing v. CLT*, Case 311/84 [1985] ECR 3261, [1986] 2 CMLR 558.
[34] Valentine Korah, Cases and Materials on EC Competition Law, third edi., Hart publishing, Oregon, 2006. P.239. Article 106 (the then 86) has been discussed in detail in combination with the rules for free movement and competition.

'obstruct the performance, in law or in fact, of the particular tasks assigned to them'.[35] Otherwise, the interpretation in this regard is usually narrow as inferred from the decisions of the Commission and EU courts.[36]

2.3 RELEVANT MARKET DEFINITION IN RELATION TO PORTS

Market definition of port operators is a necessary prerequisite for competition authorities to determine the dominant position of port operators in that given market, as dominance or any position in general is a meaningless concept without the existence of a predefined market in which such alleged position could be held.

Up on the hearing of its first appeal on the application of Article 102, the EU Court held that when identifying a dominant position the delimitation of the relevant market was of a great importance.[37] As underlined by the court, to determine whether an undertaking has a market power it is necessary that the relevant market should be defined in advance. Since Article 102 is applicable only to the abusive conducts of undertakings dominant in a *particular relevant market,* the definition of this market is vital before evaluating the position of port operators as dominant or their conduct as abusive.

As it is stated on the *European Commission's Notice on the Definition of the Relevant Market for the Purpose of EU Competition Law*[38] "market definition is a tool to identify and define the boundaries of competition between firms. The objective of defining a market in both its product (good or service) and geographic dimension is to identify those actual competitors of the

[35] For example, in *Calì e Figli*, Case C- 343/95 [1997] ECR I- 1547, [1997] 5 CMLR 484, a private company engaged in anti-pollution surveillance was not treated as an undertaking while it discharges that specific activity.
[36] In *Port of Rødby* the claim of Danish government to protect its public company, DSB, based on this argument was rejected by the Commission.
[37] *Europemballage Corpn and Continental Can Co. Inc. v. Commission,* Case 6/72 [1973] ECR 215, [1973] CMLR 199, para 32.
[38] European Commission's Notice on the Definition of the Relevant Market for the Purpose of EU Competition Law, OJ [1997] C 372/5, para 2.

undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure."[39]

The key element of market definition is interchangeability or substitutability, which is a point what leads to competitive constraints.[40] The Commission's Notice states that the definition of relevant market should consider both demand side substitutability and supply side substitutability.[41] According to the Commission's Notice a relevant product market comprises all those products and/or services which are regarded as interchangeable by the consumer, by reason of the product's characteristics, their prices and their intended use.[42] On the other hand, relevant geographic market, as defined by the EU Court in *United Brands v. Commission*, is a clearly defined geographic area where a product is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking to be evaluated.[43]

For port operators their product is the service they are offering for shipping companies or any other vessel operators. The product market of port operators usually includes the provision of services like access to quays, pilotage, towage, cargo handling, bunkering and so on. Substitutability at this point is to what extent other services may substitute these services offered by port operators. As the major function of ports is facilitating waterborne transport, the behavior of port operators could largely be constrained by other modes of transport, like road, railway or air transport. Therefore, the issue is to what extent a customer of a particular port operator can switch to another kind of service .i.e. to other modes of transport, due to a price increase or some other factors happened in these ports.[44]

[39] This Notice adopts a test called 'hypothetical monopolist' or 'SSNIP test'.
[40] This was reflected in the judgment of the EU Court in *Continental can*. For further detail see also Albertina Albors-Llorens, EC Competition Law and Policy, Willan Publishing, Oregon, 2002, P. 77-88.
[41] Commission's Notice (1997), para 13. However, according to the Notice rather than supply side substitutability demand side substitutability is of the greatest interest for market definition.
[42] Id, para 7(2).
[43] *United brands v. Commission,* Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429, para 11.
[44] OECD (2011), P. 27. This is based on the demand side substitutability analysis only. Due to the very specific nature of assets employed in terms of functionality, supply side substitutability in context of ports is not a significant factor.

As a matter of fact it seems the substitutability between waterborne and other modes of transport (in effect the substitutability between port services and services provided in other modes of transport) is restricted due to various factors such as the lack of sufficiently available infrastructure, the characteristics of the goods being transported, geographic conditions, and weak price sensitivity of port users. Therefore, generally the degree of competitive constraints imposed by other modes of transport on port operators is very limited.[45]

The geographic market of port operators, on the other hand, is defined by the availability of constraints like other substitutable port operators. The degree of substitutability in between port operators at or around the location of the port determines the range of geographic market of port operators; and the issue here is to what extent a customer of a particular port operator can switch to another port operator. In this regard the decisive factors may include customers' level of price sensitivity, the availability of intra-port competition, and the port's ability to serve the same hinterland.[46]

In relation to port operators the market can also be defined from a third dimension, i.e. the customer dimension. The extent of port competition can differ across different groups of customers especially when port operators target higher prices at customers who are willing to pay more. The definition of market in this dimension is affected by factors like arbitrage opportunities between customers and the port's ability to identify customers with a high willingness to pay. As a matter of fact, port terminal services are not easily arbitraged, therefore defining a market by customers is usual.[47]

To conclude, after a cumulative assessment of the above mentioned weak substitutability and other factors, the practice of the European competition authorities and courts shows that

[45] OECD (2011), P. 28-29.
[46] Id, P. 30-31.
[47] Id, P. 33. "The customers Dimension",

markets in relation to port operators are usually defined very narrowly.[48] For example, in the case *Sea Containers v. Stena Sealink*,[49] the market was defined by the Commission as "the provision of port facilities for car and passenger ferry operations on the central corridor route between the UK and Ireland". In the same manner, when the Competition Commission of UK has dealt with a merger between *SvitzerWijsmuller A/S and Adsteam Marine Ltd*., it has defined the market narrowly as "the provision of harbor towage and terminal towage services in individual ports in the UK".[50]

2.4 DOMINANT POSITION OF PORTS

2.4.1 A Dominant Port

Unless an undertaking or two or more undertakings collectively have a dominant position, Article 102 would not be applicable. The term dominant position, as defined by the EU Court,[51] relates to a position of 'economic strength' enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it *'the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers'* (author's emphasis).[52]

For the purpose of Article 102 the term dominant is a binary term in which an undertaking could be a 'dominant one' so that it will be caught by Article 102 or 'non- dominant' so that it will escape the application of the provision. Therefore, in this regard comparative degrees of market

[48] Hans Jacob Bull and Helge Stemshaung (edi), EC Shipping Policy, The 17th Nordic Maritime Law Conference, Juridisk Forlag, Oslo, 1996, P. 208.
[49] OJ [1994] L15/8, [1995] 4 CMLR 84.
[50] *SvitzerWijsmuller A/S and Adsteam Marine Ltd*.; decision of the Competition Commission of the UK. Full judgment can be found at: http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/svitzerwijsmuller-as-adsteam-marine-limited.
[51] *United Brands*.
[52] This definition is, however, criticized for reflecting dominant position only from the selling side. See Whish (2012), P. 180.

power such as 'some' or 'appreciable' or 'significant' are not relevant. Port operators should be classified only either as 'dominant' or 'non-dominant'.[53]

The subsequent inevitable question is how this judgment of defining port operators sharply as a dominant or non-dominant could be reached. There are three major factors to be considered when competition authorities decide as to the dominance or otherwise of an undertaking in scrutiny. These are: (1) an existing competition; constraints imposed by an existing port operators; (2) the threat imposed by potential competition i.e. constraints posed by the credible threat of future expansion by actual competitor port operators or a threat of new entry by potential competitors; and (3) the role of buyer power; constraints imposed by the bargaining strength of the port operator's customers (say the countervailing buyer power of shipping companies).[54]

Most of the time a dominant position may be mistakenly understood as it could only be related to market share. Market share is not the sole factor in the assessment of dominance. Actually market share is the most relevant point in the evaluation of market dominance. However, the process of this evaluation requires the general consideration of other market conditions including, the dynamics of the market, the extent to which products are differentiated, and the trend or development of market shares over time.[55] As mentioned in *Hoffmann- La Roche v. Commission*[56], saving exceptional circumstances, the existence of very large share is the evidence of the existence of a dominant position. Usually the existence of market share above 50% indicates that the undertaking is a dominant one.[57] An undertaking with above 50% market share would, therefore, be presumed to be a dominant. If such undertaking contests this, it

[53] Whish (2012), P. 180.
[54] The Commission's Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings, OJ [2009] C 45/7, Para 12.
[55] Id, para 13.
[56] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211.
[57] *AKZO v. Commission*, Case C-62/86 [1991] ECR I- 3359, [1993] 5 CMLR 215.

would be up to the undertaking to prove the otherwise of it. It is not rare, however, to find a dominance of an undertaking even with less than 50% market share.[58]

Based on this understanding a port operator is more likely to be found to have a market power if it has a persistently high market share than if it does not. If this high market share is frequently changing or fluctuating, it may not indicate the market power in the way required to ascertain dominance. Therefore, it is necessary to look at the evolution of the market shares, where usually port operator's market share couldn't be fluctuating in a short term due to factors such as the economics of scale of the infrastructure and the contractual nature the maritime industry (because of which shipping companies are usually locked to one port). As a market share in context of ports is assessed by the volume of traffic handled if a port has a persistently *high market share* in the handling of large volume of traffic than others, it would be generally presumed to have a dominant position.[59]

Some competition authorities, however, have avoided this doubt *[of high]* by adopting safe heavens. For example, EU Merger Regulation[60] states that market share of less than 25% are presumed to be compatible with the EU single market and then are not a concern of dominant position. Therefore, for instance if a merger of different port operators is requested, it would not be denied by the authorities so long as the merger will not be resulted in more than 25% market share.[61]

Besides the constraints imposed by actual competitors the existence of dominant position can also be inferred from the constraints posed by potential competition. The assessment of potential competition determines the degree of pressure exerted by undertakings not yet operating in the market but with the capacity to enter it in a timely manner.[62] In the context of

[58] Dominance was found with a market share of less than 50% in *Virgin/British Airways* case and *United Brands* case. See Whish (2012), P. 183.
[59] OECD (2011), P. 36.
[60] Council Regulation (EC) No. 139/2004.
[61] A good example of this test is *Hutchiston/RCPM/ETC*, Case No. COMP/JV.55.
[62] Whish (2012), P. 184.

port operators there are three broad categories of barriers that determine the extent of threats imposed by potential competitors so as to constrain the behavior of an existing port operator. These barriers, generally known as entry barriers[63], include legal barriers, economic barriers, and geographic barriers. These barriers are factors that prevent or hinder new port operators from entering the market. The less these barriers exist, the more competition would be presumed since an existing port operators' behavior could be controlled by the threats of new entrants.[64]

Regulatory, legal and institutional barriers against the entry of port operators may range from a general prohibition- like no more port service provider entry in to a particular port- to prohibitions imposed based on the discretion of port authorities. These barriers against port operators are usually expressed in the license or lease conferring exclusive rights granted to an existing operators.[65]

Economic barriers include economics of scale. Ports require large fixed costs in relation to their infrastructure; therefore, the *minimum efficient scale* can be large. This would, finally, discourage new entrants since due to this large minimum efficient scale the market may not be able to hold more than one port operator. The favorable location of existing ports, customers' high cost of switching between port operators, and the fact that existing port operators may have benefited from previous public funding are some of the other economic barriers that may affect the interest of new entrant port operators.[66]

Finally, geographic barriers are significant for new entrant port operators, unlike many of other types of service providers. For ports to enter in to the market a land must be available and that land must not be in an inferior position, where there is no access to surface transport links. The

[63] Commission's Guidance (2009), para 16 and 17.
[64] OECD (2011), P. 41.
[65] Id, 39-40.
[66] Ibid. The minimum efficient scale is the scale of activities needed to produce at the lowest average cost.

requirement of approval procedure for the construction of new ports and irregularities linked to that are also the other factors putting new entrants in less advantageous position.[67]

Countervailing buyer power (CBP) may also exert an effective competitive constraint. If customers have sufficient bargaining strength- which may result from either the size of the customer or its commercial significance for the dominant undertaking- they can influence the dominant undertaking not to appreciably act in its own irrespective of their interests.[68] In the context of ports this means port operators cannot independently act to an appreciable extent when shipping companies and other port users have sufficient bargaining power.

The existence of CBP may depend on a number of factors including: the size of port users in comparison with ports, the extent of port users ability to switch to other port operators without excessive lose, the extent to which port users possess a credible threat of setting up their own supply arrangement, and the extent to which port users can impose costs on port operators simply by acting in a different manner.[69]

In this regard, outside options of port operators and port users are the major factors determining the strength of CBP. Outside options of port operators means that if a port has other readily available alternative port users, then the CBP of the present port user would be less or insignificant. Usually this outside option of port operators depends on various factors such as the possibility of port users to form a collective bargaining groups, the existence of investments made by these port operators to specific port users, the possibility of ports losing economics of scale due to loss of a port user, and the particular financial situation of that specific port operator. The outside option of port users, on the other hand, depends on factors like the port users' size and the substitutability of alternative port operators or other transport models to the current port operator.[70]

[67] Ibid.
[68] Commission's Guidance (2009), para 18.
[69] A detail discussion can be found in *Monopsony and Buyer Power, OECD Competition law & policy round table, Directorate for Financial and Enterprise Affairs: Competition Committee, DAF/Comp (2008) 38*.
[70] OECD (2011), P. 42-44.

To conclude, the status of being in a dominant position is a matter directly related to the ability of port operators to behave independently of their customers and competitors, which is an ability to be determined considering factors like existing competition, potential competition and CBP. Therefore, the determination of a specific port operator as a 'dominant' requires thorough and case by case analysis within the context of the relevant market, as defined in the previous section.

2.4.2 Collective Dominance of Ports

The other important point in relation to the dominance of port operators is the concept of collective dominance. Literally, Article 102 of TFEU prohibits an abuse of dominant position by *'one or more undertakings'*. This phrase is not about several port operators functioning within the same corporate group. In this regard, the doctrine of single economic entity is a relevant doctrine for huge, complex, and mostly vertically integrated entities such as ports. The treatment of a port operator and other port operators, or a port operator and shipping companies, as a single economic entity has a lot of significance especially, in the assessment of the existence and degree of dominance.[71]

According to this doctrine the most important preliminary assessment is to ascertain whether these entities form a single economic entity or not. In a situation where a port is a parent company and has other subsidiary port operators or shipping companies vertically integrated to it, the first question must be whether the 'so called' subsidiary port operator does have a real autonomy to decide on its commercial matter. If the answer is in affirmative then this [so called subsidiary] port operator and the concerned [so called parent] port operator cannot be considered as a single economic entity. By contrast, if the subsidiary port operator does not have a real autonomy to decide on its commercial policy then the parent port operator and the

[71] Whish (2012), P. 92 & ff. "*Single Economic Entity Doctrine*"

subsidiary port operator forms a single economic entity and they will be treated as a single undertaking in the eyes of competition law.[72]

Therefore, since the application of this 'single economic entity' doctrine to various port operators within the same corporate group will be resulted in the finding of only one undertaking, there is no need to insert this 'one or more undertakings' phrase in Article 102.

Rather, the EU case law suggests that '*one and more undertakings'* phrase of Article 102 is meant to address the issue of collective dominance of two or more legally and economically independent undertakings. The EU Court in *Compagnie Maritime Belge Transport v. Commission* stated that a dominant position may be held by two or more economic entities legally independent of each other provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. [73]

This judgment has also clarified that in order to establish collective dominance, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned especially; (1) it must be asked whether economic links exist which enable the undertakings to act independently of their competitors, (2) the fact that undertakings have entered in to agreements doesn't in itself mean that they are collectively dominant; but they might be if it caused them to appear as a collective entity, and (3) the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and in particular, on an assessment of the structure of the market in question.[74]

It was clear from these paragraphs that the existence of an agreement or a concerted practice is not a pre-requisite to a finding of collective dominance. Therefore, undertakings could be held

[72] *Viho v. Commission*, Case C- 73/95 P [1996] ECR I – 5457, [1997] 4 CMLR 419.
[73] Case C-396/96 P [2000] ECR I- 1365, [2000] 4 CMLR 1076. Para 36.
[74] Whish (2012), P. 578.

to be collectively dominant where the oligopolistic nature of the market is such that they may behave in a parallel manner, thereby appearing to the market as a collective entity. The essence of collective dominance is parallel behavior within an oligopoly, that is to say tacit collusion or tacit coordination (of Article 101 TFEU).[75]

The port industry is a capital intensive industry mostly designed to accommodate current and future demand, which ultimately characterizes it by excess capacity.[76] This excess capacity of ports is an incentive which may lead port operators to be engaged in some form of tacit coordination or parallel behavior where breaking this tacit coordination by one port operator will be resulted in a severe punishment emanated from the inherent nature of excess capacity of ports.[77] Therefore, finding a collective dominance in the port sector is not uncommon.

2.5 A DOMINANT PORT 'WITHIN THE WHOLE INTERNAL MARKET OR IN A SUBSTANTIAL PART OF IT'

Article 102 requires the dominance to be held in a whole or a substantial part of the EU. The above discussed finding of dominance or collective dominance within the predefined *relevant market* doesn't in itself trigger the application of Article 102 unless such dominance is held *in the whole or a substantial part of the internal market.*[78]

When port operators are dominant within the whole Europe, then there is no problem as they will be immediately caught by Article 102. However, most of the time they may not be dominant in the whole Europe; their dominance may not extend beyond some Member States or one Member State or even a part of it. This is the point where the term 'substantial part of the

[75] *Impala v. Commission*, Case C- 413/06 [2008] ECR I- 4951, [2008] 5 CMLR 1073. For further detail see also *Laurent Piau v. Commission*, Case T- 193/02 [2005] ECR II- 209, [2005] 5 CMLR 42.
[76] OECD (2011), P. 44.
[77] *Laurent. Piau.* One of the conditions for the finding of collective dominance requires the existence of "an incentive" not to depart from the common policy of the market. In our case the excess capacity of ports could be considered as a negative incentive.
[78] See Whish (2012), P. 140. "The de minimis doctrine"- by analogy dominances of minor importance are not caught by Article 102.

internal market' needs to be defined. It must be clear to everyone that the terms 'internal market' and 'relevant market' represent two completely different things.[79]

The concept of 'substantiality' is not only about a geographic width of the market compared to the whole EU. Dominance within a relatively small geographic market could be considered as within a substantial part of the EU. For instance, in *Suiker Unie* Belgian and southern Germany sugar producers (relatively small in terms of geographic coverage) have been separately considered to be a substantial part of the internal market. The EU Court considered the ratio of the volume of sugar produced by this market to the overall production of sugar of the EU to reach its decision.[80]

Normally, there is a well-established presumption that each Member State would make a substantial part of the EU internal market, especially in those areas where undertakings are conferred with statutory monopoly. In some situations, even a part of a Member State can be considered as a substantial part of the internal market.[81] Therefore, if a Member State has only one port, for instance, it is most likely that an abusive conduct practiced by that port [assuming that port has dominant position in the given predefined relevant market] in that Member State would fall under the scrutiny of Article 102.

However, the fact that Belgian and southern Germany sugar producers are considered as a substantial part of the internal market because of *their volume of production* or the fact that *every Member State is presumed* to be a substantial part of the internal market doesn't necessarily mean that substantiality is solely related to the game of percentage. There is no specific percentage placed by the EU Court or the Commission to determine the finding of substantiality above that percentage, as compared to the whole EU market. Even markets producing very small ratio of the whole EU can be considered as substantial.[82]

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[79] Id, P. 189-190. When the dominance in the relevant market doesn't extend to the whole or substantial part of the internal market, it will be caught by the national laws of Member States.
[80] *Suiker Unie v. Commission*, Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295.
[81] Ibid. See also Whish (2012), P. 190.
[82] The opinion of Advocate General Warner in *BP v. Commission.*

It is common that port operators could be caught by Article 102 even if they are serving insignificant area coverage, as compared to the whole EU internal market. For instance, in the case *Sealink/B & I- Holyhead*[83], the Port of Holyhead has been caught by Article 102 even if the port has been used only for short sea crossing from British to Ireland (insignificant percentage of area and traffic volume compared to the whole maritime transport in EU). Therefore, the finding of dominance in the whole internal market or in a substantial part of it needs an in-depth analysis- it is not simply about geographic market or geographic coverage or percentage of service provision. It is an overall assessment of all these factors.[84]

[83] *Sealink/B & I- Holyhead*- interim measures, [1992] 5 CMLR 255.
[84] Bull (1996), P. 207.

CHAPTER THREE: ABUSIVE CONDUCTS OF DOMINANCE IN RELATION TO PORTS

3.1 INTRODUCTION: ABUSE IN GENERAL

By contrast to Article 101, which deals only with the deliberate conduct of undertakings by agreements and concerted practices, Article 102 catches any kind of unilateral conducts of dominant undertakings. For the purpose of Article 102, the conduct of a dominant port operator may be regarded as abusive in the absence of any fault and irrespective of the intention of that undertaking.[85] This inherent nature of the rule coupled with the lack of precise definition for the term "abuse" either in the Treaty or in the practice of the EU Court and the Commission has left the determination of conducts as 'abusive or not' at a great extent in the discretion of competition authorities and courts.

In this regard, a great deal of responsibility is also expected from dominant port operators unlike those non-dominant undertakings. What is fair play for non-dominant port operators can be considered as abusive when practiced by those in a dominant position. As the EU Court stated, in *Michelin v. Commission,* an undertaking in a dominant position has a special responsibility not to allow its conducts to impair undistorted competition on the internal market.[86] Therefore, dominant port operators, simply by virtue of being in a dominant position, are expected to act with great caution and special care not to hamper effective competition.

At the same time competition authorities are also responsible for assessing the conducts of dominant undertakings carefully before deciding that they are abusive or not. Some unilateral conducts of dominant port operators can be confusing to determine their status as anticompetitive, procompetitive or neutral. The traditional practice of the Commission and EU

[85] *Europemballage Corpn and Continental Can Continental can*. "In the absence of any fault"- it was a statement forwarded as a response for Continental Can's claim that it has not exercised its dominant market power to cause the alleged abuses.
[86] Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.

courts as supported (at least not opposed) by Article 102[87], shows that there are some per se rules in the application of Article 102. The General Court, in various decisions including in the case *Michelin v. Commission*[88]*, ICI v. Commission*[89]*,* and *Solvay v. Commission*[90] has considered loyalty rebate, discounts, and exclusive dealing agreements per se illegal. However, some conducts, for example price cutting and refusal to supply could be anticompetitive or procompetitive depending on a particular situation they have been practiced. Therefore, the economic harm of the conduct and its adverse effect on the market must be analyzed to categorize it as an abusive capable of falling under Article 102.[91]

However, in the context of ports this analysis of adverse effect on the market could be more cumbersome than usual as there are two levels of competition in the port sector. These different levels of competition are inter-port competition, i.e. competition between two or more ports and intra-port competition, i.e. competition between several port service providers or terminals within a single port. There is no special list of abusive conducts to be caught either only in case of inter-port competition or only in case of intra-port competition. A single conduct by a dominant port operator can be found abusive in light of both inter-port and intra-port competition.[92]

If there is any major distinctive character of abuses in these two levels of competitions that is the effect the abuses could bring about. It must be analyzed and clarified whether the conduct is likely to impair undistorted competition between ports or is that likely to impair undistorted competition between port service providers and terminal operators within the same port. Mostly, conducts affecting either of these two markets cannot be distinctively identified unless they have targeted competitors rather than consumers, as any kind of abusive conduct, whether

[87] Article 102, unlike Article 101, does not expressly incorporated the "object or effect" requirement to make conducts abusive.
[88] Case T-203/01 [2003] ECR II- 4071, [2004] 4 CMLR 923.
[89] Case T- 66/01 [2010] ECR II- 000, [2011] 4 CMLR 162.
[90] Case T- 57/01 [2009] ECR II- 4621.
[91] Pinar Akman, The Concept of Abuse in EU Competition Law: Law and Economic Approaches, Hart Publishing, Oregon, 2012, P. 130. The notion of effect-based analysis is well discussed under the title "Are effects necessary for a finding of abuse?"
[92] Working party No. 2: EU submission, P. 2.

in inter-port or intra-port competition, will have a negative effect on the market to the detriment of consumers.[93]

Despite these difficulties of analyzing effects, especially in the port sector, the desirable 'effect based analysis' of conducts has been recently introduced by the Commission[94] when it analyzed the tying practice of *Microsoft* and pricing practice of *Telefonica* in light of their anticompetitive nature and adverse effect on the market. The General Court also has introduced this approach in its trial of *TeliaSonera v. Commission* and *Deutsche Telekom v. Commission* where the Court has required the adverse effect of the conducts on the competition to be demonstrated before it decide that margin squeezing is an abuse.[95]

It is apparent from the practice of European competition authorities that in this effect based analysis an abusive conduct of dominant port operators can be categorized as either exclusionary or exploitative, depending on the main purpose it is designed to serve and *the main effect it has brought about*. The analysis may address matters such as whether the main *effect* of the conduct was excluding competitors from the market or exploiting customers.[96]

Exclusionary abuse of dominant port operators has an effect of excluding competitors from the market, either by expelling those preexisting port operators or by preventing the entry of newcomers. The conducts of dominant port operators such as predatory pricing, refusal to supply, exclusive dealing agreements, tying, bundling, price discrimination, margin squeezing, and rebates are exclusionary abuses. These practices, while may not harm consumers [even may benefit] in the short term, will exclude competitors from the market in the long term.[97]

By contrast, exploitative abusive conducts such as excessive pricing, limiting production, and discriminating between customers are practices designed to directly or indirectly collect benefit

[93] Ibid.
[94] Commission's Guidance (2009), para 20.
[95] Whish (2012), P. 200.
[96] Whish (2012), P. 201.
[97] Id, P. 210.

at the expense of customers.[98] So long as the port operator is dominant or monopolist in the market it can make profits at the expense of downstream market shipping companies. It is also true that as there is no competition such port operator would no longer need to innovate or improve its efficiency to survive in the market.[99] Therefore, the effect of these conducts will also extend to affect the choice of customers.

However, this classification of abuses into exploitative and exclusionary doesn't mean that there is always a clear boundary between behaviors labeled as exploitative and exclusionary. A single conduct can be considered as both exclusionary and exploitative. For instance, a dominant port may have a subsidiary shipping company in the downstream shipping service provision market. If this port refuses access to another shipping company to its infrastructure, this can be found both exploitative and exclusionary. In the case where the port imposes unfair port charge on this competitor shipping company it is exploitative practice. At the same time if this unfair port charge has a purpose of excluding that shipping company from the downstream market, then it is also exclusionary.[100]

Generally speaking, as we have seen even after having such 'effect based' analysis it is not as such easy to determine the exact effect of the conducts on the market. Therefore, it is not uncommon that competition authorities may decide procompetitive unilateral conducts as abusive and anticompetitive conducts as fair practice or legal. Since this mistake cannot be avoided altogether, competition authorities used to opt to establish a policy priority in which they may give much concern either for false positives [false positive occurs when a competition authority mistakenly decide a procompetitive conduct as abusive] or for false positives [false negative occurs when a competition authority mistakenly decide an anticompetitive conduct as legal].[101] As stated earlier, this unavoidable confusion of competition authorities mainly

[98] However, in situations where there is no entry barriers these practices may in a long term attract competitors and enhance competition.
[99] Whish (2012), P. 202. The 'right to quite life' of dominant undertakings.
[100] Ibid.
[101] It is well-known behavior that EU tends to be more concerned about false negative while US is more concerned about false positives. Therefore, as it can be inferred from various cases such as *Verizon Communications* [540 US 398 (2004)] and *Pacific Bell* [555 US 438 (2009)] US is more of non-interventionist.

emanates from the crude nature of the term abuse. Article 102 does not contain an exhaustive list of conducts labeled as abusive. The provision explicitly marked only few conducts such as limiting production, discrimination, and charging excessive prices as abusive.[102]

In various judgments, however, the European competition authorities have also considered other practices, such as making misleading representation in relation to patent protection as abusive conduct.[103] The problem in these judgments is that the EU competition authorities did not provide broad theoretical statements which can be applied to other subsequent cases. They used to decide each and every case narrowly, based on its own peculiar facts and for itself.[104] As many experts of competition law agreed up on there is no a unifying theory for various aspects of anticompetitive conducts.[105]

If there is one judgment containing a foundational statement for the finding of abuse under Article 102, it must be the judgment of the EU Court in *Hoffman La Roche v. Commission*. The judgment stated that:

> "Abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[106]

The most important point of this judgment is that it has introduced the concept that 'methods different from those which condition normal competition are' abusive. However, the decision has some drawbacks. First, by using the term "hindering competition" as a mandatory criterion

[102] Whish (2012), P. 193.
[103] *AstraZeneca AB v. Commission*, Case T-321/05 [2010] ECR II- 000, [2010] 5 CMLR 1585.
[104] Whish P. 197.
[105] Among others, the influential speech of Philip Lowe, the former Director General of DG COMP, on Sep 11 of 2006 is mentionable.
[106] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211.

of being abusive, it has excluded those exploitative conducts of dominant port operators which, by nature, doesn't hinder competition but still are abusive as they harm port users and consumers.[107]

Secondly, the term "normal competition" is not unequivocal. What is 'normal' needs another definition. This problem has been actually alleviated when the EU Court started to use the term *'competition on the merits'*.[108] To explain this point the Commission also has provided examples of competition on the merit. According to the Commission offering better quality, lower prices, and a wider choice of new and improved goods and services are behaviors reflecting competition on the merit.[109]

It is well established in the EU case law and Commission's practice that to find an abuse there is no need for a causation to exist between the exercise of dominant position and the alleged abusive conduct. As stated in *Continental Can v. Commission* it is possible to abuse a dominant position without actually exercising or relying on the market power, that is to say dominant port operators could be held liable for abuse even if they did not actually present their market power as leverage to accomplish their abusive desire in that particular situation.[110]

The practice of the EU competition authorities has also established that for the finding of abuse there is no need for the dominance, the abuse, and the effects of the abuse all to be in the same market. A dominant port operator owning a downstream market shipping company may abuse its dominant position in that market of port operators to get a benefit on a separate market of shipping service provision.[111] This dominant port operator may also use its market power to abuse the separate market of shipping service provision in order to strengthen its dominant

[107] Whish (2012), P. 198.
[108] In recent cases such as *Deutsche Telkom* (Case C- 280/08 P [2010] ECR I- 000, [2010] 5 CMLR 1495) and *TeliaSonera* (Case C- 52/09 [2011] ECR I- 000, [2011] 4 CMLR 982) this term has been consistently used.
[109] Commission's Guidance (2009), para 5.
[110] *Continental Can.*
[111] *Commercial Solvents* (Case 6/73 etc [1973] ECR 223, [1974] 1 CMLR 309, *Telemarketing* (Case 311/84 [1985] ECR 3261, [1986] 2 CMLR 558)*, De poste- La Poste* (OJ [2002] L 61/32, [2002] 4 CMLR 1426)*, and Sealink/BI* (OJ [1992] 5 CMLR 255..

position in the market of port operators.[112] It is also possible that a dominant port operator may use its market power to abuse a separate market of shipping service provision to get a benefit from that latter market of shipping service operation.[113]

However, in these different markets of dominance, abuse, and benefit of abuse, unlike in the case of *Continental Can* where the dominance and the abuse were at the same market, there is a need for a causation to exist between the exercise of dominant position and the alleged abusive conduct.[114]

To conclude, an abusive behavior of dominant ports with all its above-discussed characteristics can be expressed in various manners. Some of these major forms of abuse in the port sector are discussed in the next sections.

3.2 REFUSAL TO SUPPLY

3.2.1 In General

In the context of port operators, refusal to supply is a refusal by a dominant port operator to supply an access or services to those who want to use its infrastructure and services. This refusal to supply includes both pure refusal and constructive refusal, in the sense that refusal to supply manifested through charging unreasonable prices, imposing unfair trading conditions or unduly delaying or degrading the supply of the service in question is called constructive refusal.[115]

Refusal to supply can be an abuse of a dominant position because it might create a limited competition in the downstream market and, therefore, it will inevitably lead to allocative inefficiency and higher prices in the downstream market. Refusal to supply may have two kinds

[112] *British Gypsum,* Case C-310/93 P [1995] ECR I- 865, [1997] 4 CMLR 238.
[113] *Tatra Pak v. Commission,* Case C-333/94 P [1996] ECR I- 5961, [1997] 4 CMLR 662.
[114] Ibid. Causation is not required only if all the dominance, abuse, and the benefit are in the same market.
[115] Commission's Guidance (2009), para 79.

of anticompetitive effect, i.e., vertical foreclosure of the market and horizontal foreclosure of the market. In the context of port operators the most common one is vertical foreclosure of the market where the refusal to supply an access to the port infrastructure and port services will be resulted in a harm to the downstream shipping service provision market.[116]

It is common practice in the port industry that port operators have a vertical integration with the downstream market of shipping companies. Some shipping lines own and operate their own terminals within ports. The fact that many port operators are also involved in shipping service provision makes the port sector highly susceptible to refusal to supply.[117] As the Commission's decisional practice demonstrates, in general a refusal to supply access to port infrastructure has been, most of the time, considered as an abusive conduct of dominant ports as ports are indispensable and difficult-to-duplicate essential facilities for downstream shipping service providers.[118] As explicitly stated in the *Port of Rødby* "an undertaking that owns or manages an essential port facility from which it provides a maritime transport service, may not…refuse to grant a ship owner wishing to operate on the same maritime route to that facility without infringing Article 102."[119]

Refusal to supply, however, is not per se abusive conduct. A number of situations need to be considered before the refusal of a dominant port operator to supply its infrastructure or services is categorized as an abusive conduct. To begin with, refusal to supply has a lot to do with the grand legal concept of "freedom of contract". Port operators have a right to choose with whom they want to trade. Setting an exception to this principle requires careful consideration of justifications. In addition, a duty to supply or share their infrastructure and property may undermine the incentives of dominant port operators to invest and innovate. It is also true that under the umbrella of objective justification ports have the right to reserve supply

[116] *Port of Elsinore*, [1996] 4 CMLR 728. The Commission mentioned that refusal to grant access to the ferry operator, Mercandia, to the Port of Elsinore would reinforce the dominant position of the other ferry operator, ScandLines, and thereby foreclose Marcandia.
[117] However, dominant ports may abuse their position even where they do not have a vertical integration or any substantial interest in the downstream market. See *Port of Roscoff*, [1995] CMLR 177.
[118] See *Sealink/B&I v. Holyhead, Sea Containers v. Stena Sealink, and Port of Rodby.*
[119] OJ [1994] L 55/52.

due to capacity shortages and their natural desire to avoid dealing with bad debtors and with those who use the supply for illegal ends.[120]

3.2.2 Competition Law v. Property Rights: The Essential Facilities Doctrine

As well discussed in the above section refusal to supply their own properties may sometimes constitute an abuse of dominant position against port operators. In this situation port operators used to come up with arguments of defence involving property rights.[121] On one hand, competition law as inferred from the decision of competition authorities requires some properties of dominant undertakings, in some exceptional situations, to be granted to competitors; and on the other hand, the Treaty and national laws of Member States guarantee the protection of property rights of undertakings.[122] Therefore, the problem would be how to reconcile this battle between *Competition Law v. Property rights Law*.

As successfully argued by the competition authorities in various occasions it is not an issue if their interference merely affect the property right of undertakings; it will be a concern when such interference has affected these property rights to the extent where the rules on property ownership in Member States have been prejudiced.[123] The Commission, in *Frankfurt Airport*,[124] has clarified this point stating that the constitutions of the Member States recognized that the exercise of property rights may be restricted in the public interest; and this public interest clause has indeed includes competition rules of the Treaty as the rules are meant to maintain effective competition within the whole EU. The commission, in this case, has established that as long as the application of competition law in this manner does not constitute an excessive or

[120] Whish (2012), P. 697. See also Commission's Guidance (2009), para 75.
[121] Id, P. 212.
[122] It is obvious that the right to property of undertakings is guaranteed under the national laws of all Member States. Further, Article 345 of the Treaty states that "the treaties shall in no way prejudice the rules in Member States governing the system of property ownership".
[123] The opinion of Advocate General Cosma in the case *Masterfoods Ltd v HB Ice cream* (Case C- 344/98 [2000] ECR I- 11369, [2001] 4 CMLR 449) is mentionable.
[124] OJ [1998] L 72/30, [1998] 4 CMLR 779.

intolerable interference in to property rights, there is no legal ground to oppose it.[125] Then, the question is what would the unifying concept be for these key issues of *'the goals of competition law as public interest*' in one hand and '*excessive and intolerable interference*' on the other hand?

The competition law system of EU has developed a doctrine called "essential facilities doctrine" based on which an interference to property rights could be considered as tolerable and warranted as long as the interventionist application of competition law, as narrowly tailored to serve the public interest, is mandatory. The essential facilities doctrine imposes on owner of essential facilities a duty to deal with competitors.[126]

As defined under *Sea Containers v. Stena Sealink*, essential facility is a facility or infrastructure without access to which competitors cannot provide services to their customers.[127] According to this doctrine dominant port operators could be, under some circumstances, forced to supply their infrastructures to competitors in exchange for reasonable remuneration. This doctrine, however, doesn't guarantee the grant of access to competitors *whenever they wish* to use the facilities of dominant port operators.

It is understandable that if competitors are always allowed to use the facilities of dominant undertakings, it would be destructive for the competition law itself, let alone the protection of property rights. If dominant undertakings are simply forced to share their facility, infrastructure, and innovation, it will discourage the investment and efficiency of these dominant undertakings and finally it will be resulted in detriment to consumer welfare. Therefore, such grant of access to these essential facilities under competition law has to be tailored narrowly and very carefully.[128]

[125] The Commission stated that the property right of the Frankfurt airport is not excessively and intolerably violated since its own right to provide the claimed (ground handling) services is not interfered.
[126] Sebastien J. Evrard, Essential Facilities in the European Union: Bronner and Beyond, Columbia Journal of European Law, Vol.10, 2004, P. 491.
[127] OJ [1994] L 15/8, [1995] 4 CMLR 84.
[128] Evrard (2004), P. 505. Pre-Bronner case law was more of applying the doctrine without assessing its side-effects for the competition.

As it can be inferred from the definition of essential facilities in *Sea Containers v. Stena Sealink* this doctrine is very significant for the very subject matter of this paper since ports are essential facilities to downstream market shipping service operators. The essential facilities doctrine was first developed in the United States in the case of *Terminal Railroad Combination* of 1912.[129] In the EU competition law system this doctrine is relatively new.[130]

Until 1998, .i.e., in the case of *Bronner,* the commission and the EU courts had previously been confronted with a number of cases involving similar situations, but they have never explicitly and directly addressed the matter using the term 'essential facilities doctrine' in a precise manner.[131] These an extremely interesting and constructive previous (pre-Bronner) cases addressed by the Commission and EU courts includes *Commercial Solvents,*[132] *Mexicar v. Renault,*[133] *United Brands,*[134] *Ladbroke,*[135] *BP,*[136] *Telemarketing,*[137] *RTT v. GB-Inno-BM,*[138] *Port of Rødby,*[139] *Sea Container v. Stenalink,*[140]*and Magill.*[141]

To summarize, the Commission and EU courts have accepted arguments and sanctioned the grant of access to essential facilities in some of these cases while rejected the arguments and

[129] *United States v. Terminal Railroad Association of St. Louise*, 224 U.S. 383 (1912).
[130] Evrard (2004), P. 491 & ff.
[131] Ibid.
[132] Case 1974 E.C.R 223. Refusal to supply the raw material for the production of ethambutol has been alleged as abusive.
[133]Case 53/87, [1988] ECR 6039, [1990] 4 CMLR 265. Refusal to supply a license to manufacture or import spare parts has been alleged as abusive.
[134] Case 27/76, [1978] ECR 207 [1978] 1 CMLR 429. Refusal to supply banana has been alleged as abusive.
[135] Case T- 504/93 [1997] ECR II- 923 [1997] 5 CMLR 309. Refusal to supply license to transmit pictures of horse race has been alleged as abusive.
[136] Case 77/77 [1978] ECR 1513 [1978] 3 CMLR 174. Refusal to supply oil (petroleum) has been alleged as abusive.
[137] Case 311/84 [1985] ECR 3261 [1986] 2 CMLR 558. Refusal to sale advertising time on TV has been alleged as abusive.
[138] Case C- 18/88 [1991 ECR I- 5941 [1994] 1 CMLR 117. Refusal to approve (preventing) market entry for non-approved telephones has been alleged as abusive.
[139] OJ [1994] L 55/52. Refusal to supply an access to the port infrastructure and refusal to supply approval to construct a new port has been alleged as abusive.
[140] OJ [1994] L 15/8, [1995] 4 CMLR 84. Refusal to supply an access to the port infrastructure has been alleged as abusive.
[141] Cases C- 241/91 P & C- 242/91 P, [1995] ECR I- 743, [1995] 4 CMLR 718. Refusal to supply an access to TV program listings has been alleged as abusive.

denied the application of the doctrine in the rest of them. In general, the contribution of these cases for the development of the essential facilities doctrine in the EU system is tremendous.

As an initial experience the Commission, for instance while ruling on *Sea containers,* has stated that "an undertaking that occupies a dominant position in the provision of an essential facility and that itself uses that facility, and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favorable than those which it gives to its own services infringes Article (102) if the other conditions of that Article are met."[142]

The *Bronner*[143] is very important in establishing and clarifying the boundaries of the essential facilities doctrine in the EU competition legal order. Considering the significant position of this case in the establishment of this doctrine, and the significance of this doctrine for the competition in the port sector, it is important to analyze this case in detail.

Mediaprint is a publisher of daily newspapers in Austria with a market share of 46.8% in terms of circulation and 42% in terms of revenue. Oscar Bronner, on the other hand, is a publisher of a competing daily newspaper with a market share of 3.6% in terms of circulation and 6% in terms of revenue. Mediaprint has its own nationwide early morning home-to-home newspaper delivery scheme. Bronner requested access to this scheme in return for reasonable remuneration. However, Mediaprint declined to grant access. Then, Bronner lodged a complaint in the national court, and the national court referred the matter to the EU Court.

The EU Court ruled that [if other requirements of Article 102 are met] there could be an abuse of dominant position if: (1) the refusal was likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; (2) that such refusal was incapable of being objectively justified; and (3) that the service in itself was indispensable to

[142] *Sea Container*. Further discussion is provided by *Irene Grassi (Advocate)*, Refusal to Supply and Abuse of Dominant Position in European Antitrust Law: An Analysis of the Case Law of the Court of Justice, Bologna. P. 416. Online available at: http://www.derra.eu/dateien/public/publikationen/publikation160.pdf

[143] *Bronner v. Mediaprint*, Case C- 7/97, [1998] ECR I- 7791.

carrying on that person's business, in as much as there is no actual or potential substitute in existence for the home delivery scheme. It actually appears that there is no difference between the first and the third requirements in the sense that if the facility is essential but refused, it will inevitably eliminate competition on the requesting side.[144]

The Court has finally decided that these conditions were not met since (i) other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, while potentially less advantageous for the distribution of certain newspapers, existed and were used by some publishers and (ii) there were no technical, legal or even economic obstacles capable of making impossible or unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home delivery scheme and use it to distribute its own daily newspapers. The Court further added that the fact that Bronner has a small share of circulation of newspapers in the market doesn't matter. The economic viability must be evaluated on the assumption that Bronner has comparably large enough newspapers with Mediaprint.[145]

The *Bronner* case was very crucial in defining the elements and the scope of application of the doctrine. It has established that the essential facilities doctrine could be invoked only when the facility is indispensable and showed that refusal to supply is not per se abusive.

In the context of ports the prevalence of vertical integration between upstream port operators and downstream shipping companies is an incentive for port operators to restrict access to their facilities only to their downstream market subsidiaries. This may requires an aggressive application of the doctrine. On the other hand, the unlimited application of the doctrine may hamper the consumer welfare. For example, a port operator may invent specialized sophisticated unloading equipment that creates efficiencies in unloading time. If this port operator is simply forced to share this innovation to others, its investment will be useless.[146]

[144] Evrard (2004), P. 507-508.
[145] Ibid.
[146] OECD (2011), P. 47.

Therefore, this Bronner style strict and carefully designed adoption of the essential facilities doctrine is quite important to achieve the goals of competition law in general since both a mistaken applicability or inapplicability of the doctrine has an adverse effect on the competition process, especially for ports which are apparently essential infrastructures for downstream market of shipping service provision.[147]

3.3 TYING AND BUNDLING

Tying and bundling by dominant port operators is expressly prohibited by Article 102 (2) (d) which reads that "…abuse may…consist in making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the nature of such contracts".[148] In addition, the EU Court, in *Tetra Pak v. Commission*, has stated that tying practices may also be caught by Article 102 where they do not fall within the precise terms of Article 102 (2) (d), that is to say, even if the products are connected by commercial usage.[149]

Tying, by definition, is a practice of a supplier of one product (good or service), the tying product, requiring a buyer also to buy a second product, the tied product. One form of, or closely related idea to, tying is bundling which is a practice whereby two products are sold as a single package at a single price. This practice of bundling may consist in two forms, i.e. pure bundling- where two products are sold only together (they are not available for individual purchase) – and mixed bundling- where two products can be purchased separately but with discount when purchased together.[150]

[147] Albertina Albors- Llorens, "Essential Facilities" Doctrine in EC Competition Law, The Cambridge Law Journal, Vol. 58, No 3, 1999, P. 492.
[148] One of the essential components of the provision is that the alleged tied product must be distinct from the tying product. See Commission's Guidance (2009), para 51.
[149] Case C- 333/94 P [1996] ECR I- 5951, [1997] 4 CMLR 662.
[150] Whish (2012), P. 689.

Markets like port service provision are usually exposed to the practices of tying and bundling as they provide a variety of services, and as they are, most of the time, ultimately operated by one port owner.[151] Tying and bundling may cause a horizontal foreclosure in the market of port operators in the sense that a dominant port operator supplying a tying service, say access to quays, may use its power in this market to accomplish a high sale of a tied service, say pilotage service of a competitive market, thereby it could expand its market power.[152]

Tying may also lead to less competition for customers interested only in buying the tied service but not the tying service. It may also leads to price increase for the tied service if the price of the tying service is regulated. Tying and bundling may also have the effect of introducing an entry barrier. Entry into the tying service market alone may be made more difficult if there are a limited number of alternative suppliers of the tied service.[153] In case of bundling as well it may establish an entry barrier by forcing new entrants to search for customers who do not require one component of the bundle, or the entrant must compete to provide the bundle as a whole.[154]

However, there is no per se abuse of tying and bundling as tying and bundling may also have positive cost efficiencies stemming from the economics of scope of joint supply and as it may also help shipping companies reduce costs of port search and transaction, in addition to its morale assurance of safety and quality to be earned from purchasing various services from the same supplier.[155]

[151] OECD (2011), P. 51.
[152] Whish (2012), P. 689.
[153] Commission's Guidance (2009), para 55- 58.
[154] OECD (2011), P. 51.
[155] OECD (2011), P. 51. See also Whish (2012), P. 690.

3.4 PRICING ABUSES IN THE PORT SECTOR

3.4.1 Excessive Pricing

Excessive pricing by dominant port operators is prohibited under Article 102 (2) (a) with clear terminology that "…abuse may, in particular, consists in directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions". In the *United Brands* case, the EU Court also stated that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is an abusive".[156] This statement presupposes addressing questions like whether the difference between the costs actually incurred and the price actually charged is excessive, and if the answer to this question is in the affirmative, to consider whether a price has been charged which is either unfair in itself or when compared to other competing services.[157] Therefore, exploiting port users by excessive pricing is an abuse.

Excessive pricing exploit port users and may leads to a net consumer welfare detriment due to the allocative inefficiency caused by the raised prices.[158] It is also true that excessive pricing could be exclusionary, especially when it is imposed by a dominant port operator while it was requested to grant access to its essential facility.[159]

However, excessive pricing could be pro-competitive as well, in the sense that it may attract competitors if there is no entry barrier. It is also true that for a monopolist to charge excessive pricing is a means of earning sufficient income which enables it to invest on risky innovative research and development programs.[160]

[156] However, the mere finding of positive difference between the price charged and the cost of supplying port services may not be sufficient to conclude that prices are excessive
[157] *United Brands*, para 252. See also *Scandlines Sverige AB v Port of Helsingborg*, (COMP/36.568).
[158] OECD (2011), P. 46.
[159] Whish (2012), P. 724.
[160] Id, P. 718.

3.4.2 Price Discrimination

As stated under Article 102 (2) (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage is prohibited as an abuse.[161] In the context of port sector price discrimination occurs when the same port service is sold at different prices to different customers despite identical costs or when the same port service is sold at the same price to different customers despite different costs.[162]

The price difference or similarity imposed by port operators in between these customers must be justified by their cost of supplying that particular service.[163] Differences between local taxes and duties, the terms and conditions of specific contracts entered in to between ports and shipping companies, and the length and frequency of services demanded could be the justifications of the price difference or similarity.

Any price discrimination not justified by factors of this kind may abusively exploit downstream shipping companies, especially in the case of captive hinterlands where shipping companies have nowhere else to turn their face. It may also damage the competitive process of the downstream shipping service provision market, as it may have exclusionary effect by placing some shipping companies at a disadvantage.[164]

However, there is no per se rule prohibiting price discrimination since charging a higher price from those shipping companies who have the ability to pay more and charging less from those who cannot afford higher prices may in some situations leads to allocative efficiency and thereby increases an output.[165]

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[161] One of the essential components of this abuse is the 'equivalence' of transactions which can be justified by the nature of the service supplied and the cost of supplying it. See also *United Brands*.
[162] Alison Jones & Brenda Sufrin, EC Competition Law, Text, Cases, and Materials, third edi., Oxford University Press, New York, 2008, P. 440.
[163] Ibid.
[164] Whish (2012), P. 759-760. See also above at P. 17, in relation to the arbitrage opportunities the lack of which may expose port users to price discrimination.
[165] Jones (2008), P. 441.

3.4.3 Predatory Pricing

Predatory pricing is an abuse whereby dominant port operators price their services so low that competitors cannot live with the price and are driven from the market; and once the competitors are excluded from the market the port operators are able to increase prices to monopoly levels and recoup losses.[166]

As the EU Court, in *Akzo v. Commission*, stated where prices were below AVC[167] predation had to be presumed (as just a prima facie abusive- it may still be rebutted[168]), since every sale of service would generate a loss for the port.[169] The court has, further, stated that even where prices are above AVC but below ATC[170] they can be regarded as abusive if they are part of a plan which aimed at eliminating competitors. Further, as the Commission and EU courts established, unlike in the US antitrust legal regime, the ability to recoup losses in the future by the dominant undertakings is not considered as an essential element of an abuse of predatory pricing.[171]

However this test may not work for the port sector. As ports are infrastructure assets their fixed cost is naturally very high while their variable cost in relation to providing services is significantly low. It takes a lot of capital investment to construct ports and install all necessary machineries and equipment. However, once the port is constructed and ready for service, the actual cost of providing port services for customer shipping companies could be significantly low, especially with regards to berthing and generally providing access to the port infrastructure. Therefore, in this situation if competition authorities are going to adopt those standards of pricing below AVC or ATC + Intention, predatory pricing may not ever be found abusive and ports may enjoy abusive conducts without legal constraint.[172]

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[166] Id, P. 443.
[167] "AVC" stands for average variable cost, as calculated by dividing the undertaking's all variable costs by the total of its actual output. This test depends on Areenda and Turner Test.
[168] *France Telecom v. Commission*, Case C- 202/07 [2009] ECR I- 2369, [2009] 4 CMLR 1149.
[169] *AKZO.*
[170] "ATC" stands for average total cost, as calculated by dividing the undertaking's both variable costs and fixed costs by the total of its output.
[171] *France Telecom.*
[172] Whish (2012), P. 747.

Due to this peculiar nature of some sectors such as ports, some commentators and the Commission, as stated under its *Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector*[173], have suggested that for some infrastructural industries like telecommunication and ports pricing below LRIC[174] (after combinational approach of cost analysis involving LRIC of the port and its 'stand alone cost') must be considered as predatory pricing.

3.4.4 Margin Squeezing

The EU Court, in *Konkurrensverket v. TeliaSonera Sverige*, stated that "a margin squeeze means that the dominant firm (say port) leaves an insufficient margin between its upstream (say port infrastructure access) and downstream (say shipping service provision) products; and that it is this difference that is the essence of the infringement."[175]

In a situation where a dominant port operator is vertically integrated with downstream shipping companies and provides shipping services in the downstream market of shipping services provision[176] a margin squeezing may occur when that dominant port operator supplies a key input, such as access to quays, to undertakings that compete with it in the downstream market. In this situation the dominant port operator of the upstream market may charge equal price of port access against its subsidiary shipping company and another competitor shipping company. However, the squeezed margin can be manipulated for the benefit of the financially strong and vertically integrated [port operator-shipping company] as the self-standing but as efficient competitor shipping company may not be able to finalize the rest of the cost of shipping service provision within that margin and sale its service at competitive price.[177]

[173] OJ [1998] C 265/2, [1998] 5 CMLR 821.
[174] "LRIC" stands for Long-run incremental cost that is the sum of the fixed and variable costs that an undertaking incurs when deciding to produce a particular product (to supply a particular service).
[175] Case C- 52/09 P [2011] ECR I- 000, [2011] 4 CMLR 982.
[176] A typical example of this situation can be found in *Sea Container.*
[177] Whish (2012), P. 755.

The abuse of margin squeezing is not about price discrimination or excessive pricing or predatory pricing, it is an independent abuse of dominant position.[178] The EU Court in *TeliaSonera Sverige* stated that a margin squeeze, in view of the exclusionary effect which may create for competitors who are at least *as efficient as the dominant undertaking*, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU".[179] (author's emphasis).

3.5 THE CRITERION OF 'EFFECT ON INTER-STATE TRADE' OF ABUSES

The above discussed abusive conducts, finally, need to have an effect on inter-state trade to trigger the application of Article 102. In addition, in order to fall under this provision the effect on the inter-state trade must be appreciable.[180] If the abusive conduct of a dominant port operator doesn't have [an appreciable] effect on the inter-state trade it can be caught by the competition law of the concerned Member States but not by Article 102.[181]

This conduct with 'effect on inter-state trade' has been well explained by the decision of the EU Court in *Commercial Solvents v. Commission*, where the court rendered that "this criterion will be satisfied when the conduct in issue brings an alteration in the structure of competition in the common market".[182] According to this judgment the main standard to assess the port's conduct for its effect on inter-state trade is to test whether it has resulted in structural changes of competition in the common market. The conduct may restrict the inter-state trade or may expand it, but in any way there must be a structural change. The essence of this criterion is not specifically about a trade increased or a trade reduced; the point is the inter-state trade must be influenced one way or another.[183]

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[178] Id, P. 756.
[179] *TeliaSonera*, para 31.
[180] *The Guidelines on the Effect on Trade Concept Contained in Article [101 and 102 TFEU],* OJ [2004] C 101/81. para, 50-53. The guideline sets positive and negative rebuttable presumptions of appreciably.
[181] De minimis doctrine applicable. Effects on inter-state trade of minor importance are not caught by Article 102.
[182] *Commercial Solvents*. Para 33.
[183] *The Guidelines on the Effect on Trade (2004),* para 34.

Based on the *Commission's guideline on the Effect on Trade*[184], the conduct of a dominant port operator must be evaluated with regards to its overall impact on trade between Member States. Each and every element of the conduct need not be assessed separately and found to have an effect on inter-state trade to be caught be Article 102. This effect on trade could be direct or indirect, potential or actual; there is no need to show an actual effect or subjective intent of the dominant port operators to influence trade between states. It is enough to show that the conduct of the port operator, considering objective factors of law and fact, is capable of having an effect on inter-state trade.[185]

Generally, the practices of EU courts and the Commission have shown that the effect on inter-state clause of Article 102 has been interpreted broadly.[186] In case of dominant port operators it is especially important to notice that their conducts are generally capable of having effect on inter-state trade, as waterborne transport is the major means of inter-state trade for EU.

3.6 THE DEFENCE OF OBJECTIVE JUSTIFICATION

Dominant port operators used to come up with the defence of objective justification against accusations of unilateral abusive conducts. Indeed, as it can be inferred from the decision of the EU competition authorities, an otherwise abusive conduct of dominant undertakings may not be caught by Article 102 if it is found to be corroborated by an objective justification.[187]

The Commission's Guidance on Article 102[188] states that an otherwise abusive behavior of a dominant undertaking could be considered acceptable under the terms of objective justification for two reasons: (1) *objective necessity* and (2) *efficiency*. These grounds are acceptable if and

[184] Id, para 17.
[185] Id, para 23-26.
[186] See *Soda- ash/Solvay*, OJ [1991] L 152/21 and Soda-ash/ICI, OJ [1991] L 152/1, where even undertakings located outside of EU have been caught by Article 102.
[187] Whish (2012), P. 211.
[188] It is important to notice that despite its tremendous importance as an interpretative aide, this guidance doesn't have a binding effect on the decision of EU courts.

only if the conduct in question is *indispensable* and *proportionate* to the goal allegedly pursued by the dominant undertaking. Therefore, based on this standard a dominant port operator can defend its conduct with the grounds of efficiency and objective necessity from being caught by Article 102.[189]

However, these defences are not open-ended. The Commission has further, with regards to *objective necessity*, stated that the question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. An exclusionary abusive conduct may be admitted as objectively necessary for health or safety reasons related to the nature of the product in question.[190] However, it is not the mandate of a dominant port operator to take steps in its own initiative to exclude such kinds of unsafe and unhealthy services. It is the task of public authorities.[191]

The Commission has also stated that four criteria must be cumulatively satisfied to enable an otherwise abusive conduct of a dominant port operator be defended by the grounds of *efficiency*. These elements are: first, the conduct in question must not eliminate all effective competition; second, the conduct in question must be indispensable for the realization of those efficiencies; third, the efficiencies need to have been realized, or likely to be realized, as a result of the conduct in question; and fourth, the efficiencies must outweigh any negative effects on competition and consumer welfare in the affected market.[192]

The EU Court also has, in the case *Sot. Le'los*, confirmed this position mentioning that the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked as long as such behavior doesn't have a purpose of strengthening the dominant position and to abuse it.[193] The elements of this

[189] Commission's Guidance (2009), para 28.
[190] Id, para 29.
[191] Id, para 29, sentence 4.
[192] Id, para 30.
[193] Cases C- 468/06 etc [2008] ECR I- 7139, [2008] 5 CMLR 1382.

judgment, along with the other inseparable criterion, .i.e., proportionality, have also been discussed in the case of *United Brands*.

In *United Brands* the EU Court stated that an abuse of refusal to supply could be justified as a commercial response to the competitor's attacks, but must be proportionate to thereat, taking in to account the economic strength of the undertakings confronting each other.[194]

The defence of objective justification has also been interestingly dealt in the case of BP, where due to the shortage of oil BP reduced its deliveries to its customers (ABG). In doing so BP gave preference to its long standing customers. In the case the Commission has considered BP's conduct as abusive stating that discriminating between habitual customers and occasional customers is an abuse of dominant position.[195] However, the EU Court has reversed this decision and rendered the conduct of BP as objectively justified. The court stated that BP can give more favorable treatment to its traditional customers than its occasional customers during oil shortage.[196]

The Commission and the EU Court have also well discussed the defence of objective justification in various other cases such as *Tetra pak II* and *Telemarketing*. It must be finally underlined that it is the burden of these dominant port operators to come up with all relevant evidences and to substantiate their defence of objective justifications.[197]

[194] *United Brands.*
[195] *BP*, para 21.
[196] However the General Court followed different approach and found abuse with regards to making distinctions between 'loyal customers' and 'customers who buy also from other suppliers'. See *BPB Industries and British Gypsum v. Commission,* Case T- 65/89, [1993] ECR II- 389.
[197] *Microsoft v. Commission*, Case T- 201/04 [2007] ECR II- 3601, [2007] 5 CMLR 846.

CHAPTER FOUR: SUMMARY AND CONCLUSION

4.1 SUMMARY AND CONCLUSION

The paper has demonstrated that ports have some peculiar characteristics that necessitate a careful and special consideration with regards to the application of competition law. Ports have a unique ownership structure as they are usually vertically integrated with downstream shipping companies. Their function covers unusually a wide range of activities, both public and economic activities. Ports are also unique for their possession of expensive infrastructural asset and their indispensability to downstream market of shipping service provision. Due to these and other peculiar traits of ports, there was some doubt as to how and to what extent Article 102 could be suitably applied to them.

In an effort to clarify this skepticism Chapter 2 of this paper has elaborated on Article 102 and examined its application to the market of ports and port service providers. The provision prohibits *any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it as incompatible with the internal market in so far as it may affect trade between member states*. It is generally agreed that port operators are undertakings within the meaning of Article 102.

As the application of Article 102 at a specific case is limited to a particular predefined market, the general manner of defining the product and geographic markets in the port sector has also been illustrated in this chapter. Due to lack of substitutability between port services (ultimately maritime transport) and other modes of transport and lack of substitutability in between various port operators, both product and geographic markets have been defined very narrowly in the port sector. Apart from this usual narrow market definition, there was no specific problem with regards to market definition which is capable of incapacitating the applicability of Article 102.

Port operators are also found to be in a potentially 'good position' to meet the other essential component of Article 102, i.e. dominance. As the paper has well demonstrated, due to various reasons port operators do not usually face substantial competitive constraints either from existing or potential competitors. The only considerable threat that may challenge their market power is the existence of large countervailing buyer power as manifested through strong and well organized downstream shipping companies. Generally, however, it is not uncommon to find a dominant position in the market of ports and port service providers, either in a form of individual dominance or in a form of collective dominance as involving two or more independent port operators.

It was also demonstrated that the finding of dominance within the whole or the substantial part of EU was not as such a cumbersome task. Due to the inherent nature ports and their significant role in the inter-state and international trade of EU, it is not usually difficult to find a dominant position held in a substantial part of EU.

Chapter 3 has shown the kinds of abuses in which dominant port operators could involve together with their anticompetitive nature leading to the distortion of effective competition in the market. It was sufficiently explained how the Commission and EU courts have established the meaning of abuse under Article 102.

Based on the meaning it was apparent that dominant port operators could commit various kinds of abuses, some distorting an inter-port competition while the others affect intra-port competition. Some of the abusive practices have been exclusionary that are capable of foreclosing competitors, while the others are exploitative which are intended to maximize profit at the expense of customers and consumers. As reflected under decisional practice of the Commission and EU courts, some of practices of dominant port operators could be considered per se abuses while the rest could be classified as abuses after an effect-based analysis of the conduct.

It was also clarified in this chapter that it is fairly easy to show the satisfaction of the effect on inter-state criterion of Article 102. It seems obvious that any practice that distorts effective competition in the port sector would most likely affect the inter-state trade of EU.

The major battle ground in the port sector, i.e. the conflict between competition law and property rights law in times of refusal to supply, has also been discussed in light of the essential facilities doctrine whereby it was revealed that property rights could be justifiably restricted when the application of competition law requires so. This especially works for the port sector as it is an indispensable infrastructure for the downstream market of shipping service providers.

The chapter has also revealed the kinds of specific abuses usually practiced by dominant port operators. Dominant port operators could be caught for an abuse of refusal to supply when they unjustifiably deny access to their infrastructure. They could also be liable for an abuse of excessive pricing when they charge unfairly high prices for their services. An abuse of price discrimination could be committed by dominant port operators when they charge unduly discriminatory prices against their customers.

Ports may also commit an abuse of predatory pricing when they sale their services below their cost of supply. An abuse of tying and bundling could be found against dominant port operators when they tie or bundle distinct port services. They may also involve in an abuse of margin squeezing when they unfairly narrowed the difference between the prices of their input service of the upstream market and output service of the downstream market. However, the chapter has finally confirmed that dominant port operators can always defend their conducts by adducing objective justification which includes the defence of objective necessity and efficiency.

The paper has generally shown that Article 102- the rule against abuse of dominant position- is sufficiently suitable to be applicable to the port and port service provision market. However, some form of unique approach towards the abusive conducts of dominant port operators might be necessary due to the peculiar nature of the port industry.

Unlike some other sectors which are entirely engaged in economic activities, the application of Article 102 to port operators may require competition authorities to have more careful study towards the activities of ports in order to separate those economic activities of undertakings from activities exercised under the power of public authority. In case of port operators, competition authorities might also need to be too cautious with regards to applying Article 102 in its full extent since the application could be restricted to the extent required by the port's operation of services of general economic interest as stated under Article 106.

It is also true that unlike some other dominant undertakings, dominant port operators might need to be very cautious of their practices as the finding of dominance is relatively easy due to the narrow definition of the market in this sector and as the finding of abuse is fairly easy due to the fact that the conducts of ports are usually very likely to affect the inter-state trade.

It is generally understandable that unlike in case of some other undertakings, in case of ports- which are indispensable infrastructures to the downstream market- an aggressive application of the essential facilities doctrine by competition authorities could be necessary. Competition authorities might also need to adopt separate standards of identifying abuses in case of ports as some pricing practices of dominant port operators such as predatory pricing cannot be detected by the application of the normal AVC or ATC tests. The prevalence of vertical integration between upstream port operators and downstream shipping companies may also require competition authorities to have a special and an in-depth look towards the finding of some abuses such as margin squeezing and price discrimination.

It is also understandable that the huge economic significance of ports to the EU trade and the consequential huge economic loss that may follow from applying Article 102 in a wrong manner may necessitates competition authorities to take an extraordinary caution with regards to identifying abuses and taking sides in times of (procompetitive/anticompetitive) doubt. In this regard the paper has demonstrated how the rule of reason or effect-based analysis is preferable to per se finding of abuse against the conduct of port operators.

In the author's view it is also recommendable that in a situation where the anti-competitiveness or pro-competitiveness of a conduct is ambiguous, it is preferable to follow the US style non-interventionist approach. In connection to this, the paper has underlined that the major goal of competition law should be protecting the competition process rather than protecting individual competitor port operators.

Generally, the paper has sufficiently shown that Article 102 could be overwhelmingly applied to the market of port and port service provision, in the sense that the full liberalization of the port and port service provision market could be effectively used to maximize the welfare of the consumers as the threat of a distorted market due to an abusive conducts of dominant port operators could be successfully alleviated by the application of Article 102 TFEU.

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