AN INQUIRY INTO THE ORIGINS OF
FIRM DOMINANCE IN EU
COMPETITION LAW

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JORGE MARCOS RAMOS

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SUPERVISOR: PROF. DR. NICOLAS PETIT
CO-SUPERVISOR: PROF. DR. AXEL GAUTIER
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JORGE MARCOS RAMOS

Examination committee:
Prof. Dr. Nicolas PETIT, Université de Liège and University of South Australia (supervisor).
Prof. Dr. Axel GAUTIER, Université de Liège (co-supervisor).
Prof. Dr. Pierre LAROCHE, Université de Montréal.
Prof. Dr. Pablo IBÁÑEZ COLOMO, London School of Economics.
Jean-François BELLIS, Université Libre de Bruxelles.
Prof. Dr. Alexandre DE STREEL, Université de Namur.
Prof. Dr. Pieter VAN CLEYNENBREUGEL, Université de Liège.
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### TABLES OF LEGISLATION

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CONTENTS OF THIS THESIS

GENERAL INTRODUCTION

CHAPTER 1 – THE PROCESS PARADOX AND SEVEN CONVENTIONAL ORIGINS OF FIRM DOMINANCE

1. INTRODUCTION

2. COMPETITION IS A PROCESS

   2.1. The paradox of competition as a process in the case law

   2.1.1. Express considerations

   2.1.2. Competitive process through proxies

   2.2. Competition as a process in the economic literature

   2.3. The origins of dominance as part of the process of competition

3. WHY DO THE ORIGINS OF DOMINANCE MATTER?

   3.1. A metaphor

   3.2. Diagnoses

   3.3. Remedies

4. SEVEN CONVENTIONAL ORIGINS OF DOMINANCE

   4.1. Review of the literature

   4.1.1. Economic literature

   4.1.2. Strategic management literature

   4.1.3. Legal scholarship

   4.2. The seven conventional origins of dominance

5. LIMITS OF THE INQUIRY

   5.1. Merger control

   5.2. Categorical approach

CHAPTER 2 – STATUTORY DOMINANCE: THE STATE AT THE ORIGINS OF MARKET POWER

1. INTRODUCTION

2. A CONCEPTUAL NOTE

3. STATUTORY DOMINANCE: THE STATE AND THE MARKET

4. THE INDEPENDENT BUT UNDIFFERENTIATED APPLICATION OF ARTICLE 102 TFEU TO STATUTORY DOMINANT FIRMS
CHAPTER 3 – HISTORICAL OPERATORS: THE LEGACY OF THE STATE

1. INTRODUCTION ................................................................. 85
2. UNIFYING TERMINOLOGY .................................................. 87
3. THE POST DANMARK OBITER DICTUM – A REMINDER ................ 88
4. HISTORICAL OPERATORS BEFORE POST DANMARK I ................ 89
   4.1 Describing historical operators ........................................ 89
   4.2 The absence of competition for the market and State resources .......... 91
      4.2.1 The absence of competition for (and in) the market ................ 92
      4.2.2 State funding ........................................................ 94
4.3 Historical advantages and equality of opportunity ........................................... 95
  4.3.1 Equality of opportunity in Article 102 TFEU .................................................. 96
  4.3.2 Equality of opportunity and the process of competition .................................. 97
4.4 First Movers and Adjacent Markets .................................................................. 101
  4.4.1 What is the story? ............................................................................................. 101
  4.4.2 A unidirectional analysis .................................................................................. 103
  4.4.3 Standing up for recoupment .............................................................................. 105
4.5 Incentives to invest and innovate ........................................................................ 107
  4.5.1 Telefónica and beyond ..................................................................................... 107
  4.5.2 Ex ante incentives analysis for historical operators ......................................... 110
4.6 Competition between historical operators and effect on trade ............................ 114
5. HISTORICAL OPERATORS AFTER POST DANMARK I ......................................... 116
  5.1 Orange Polska ..................................................................................................... 116
  5.2 Slovak Telekom .................................................................................................. 118
6. THE TRANSIENT HISTORICAL POSITION AND INCENTIVES TO BEHAVE
   ANTICOMPETITIVELY ...................................................................................... 118
  6.1 Sustainability ....................................................................................................... 118
  6.2 Incentives to behave anticompetitively .................................................................. 120
7. CONCLUSION ......................................................................................................... 121

CHAPTER 4 – THE NATURAL MONOPOLIST

1. INTRODUCTION ..................................................................................................... 123
2. THE ECONOMIC THEORY OF NATURAL MONOPOLY ........................................ 124
   2.1. What a natural monopoly is not ......................................................................... 124
   2.2. Natural monopoly is found in nature ................................................................. 125
   2.3. Natural monopoly in contemporary IO terms ..................................................... 127
   2.4. Summation ....................................................................................................... 130
3. THE MARKET REALITY OF NATURAL MONOPOLIES .......................................... 131
   3.1. Natural monopolies and industrial history ......................................................... 131
       3.1.1. Telecommunications .................................................................................... 132
       3.1.2. Railroads ..................................................................................................... 137
       3.1.3. Summation .................................................................................................. 141
   3.2. Natural monopoly and the competitive process .................................................. 142
4. WHITHER NATURAL MONOPOLIST? A LEGAL ANALYSIS ................................ 144
   4.1. Natural monopolies in the case law ..................................................................... 144
       4.1.1. Natural monopolies ..................................................................................... 144
       4.1.2. Are “de facto monopolies” natural monopolies? ......................................... 147
       4.1.3. Efficiency and natural monopolies ............................................................... 150
   4.2. Natural monopolies and Article 102 TFEU enforcement ..................................... 151
       4.2.1. Natural monopoly defense ......................................................................... 151
4.2.2. The more-efficient firm framework ......................................................... 154

5. CONCLUSION ................................................................................................. 155

CHAPTER 5 – THE INVESTOR DOMINANT FIRM

1. INTRODUCTION ............................................................................................ 157

2. THE PLACE OF INVESTMENT EFFORTS IN ARTICLE 102 TFEU ...................... 158

   2.1. A general look into the place of investments in Article 102 TFEU case law .... 159

       2.1.1. United Brands and the forgotten paragraph ......................................... 159

       2.1.2. Commercial Solvents and the protection of a rival’s investments .......... 160

       2.1.3. Microsoft and the echoes of United Brands and Commercial Solvents . 161

       2.1.4. Intel, Moore’s “law” and endogenous change .................................... 163

       2.1.5. Google Shopping and investments as an entry barrier ...................... 165

   2.2. Doctrinal constructs and investment myopia ........................................... 166

       2.2.1. The existence and exercise dichotomy ................................................ 166

       2.2.2. The unwarranted asymmetry between intellectual and physical property in refusal to deal cases ................. 168

3. INVESTMENTS, MARKET UNCERTAINTY AND THE COMPETITIVE PROCESS 173

4. A PROCESS ORIENTED APPROACH TO ARTICLE 102 TFEU AND INVESTOR DOMINANT FIRMS ........................................................................................................... 178

   4.1. Depropertization and the competitive process ......................................... 178

   4.2. The misleading non-contestable share of the demand ............................. 185

       4.2.1. The “old” leveraging theory ............................................................ 186

       4.2.2. The “more-economic” leveraging theory ......................................... 187

       4.2.3. Incumbency advantages: a process perspective ............................. 191

       4.2.4. A simple process comparative and a pragmatic approach ............ 196

   4.3. Incumbency disadvantages: Google Shopping and beyond ........................ 199

5. CONCLUSION .................................................................................................. 204

CHAPTER 6 – THE INTANGIBLE DOMINANT FIRM

1. INTRODUCTION ............................................................................................ 205

2. WHY ARE SOME FIRMS MORE SUCCESSFUL THAN OTHERS? A STRATEGIC MANAGEMENT PERSPECTIVE .................................................................................. 206

   2.1. Intangible resources .................................................................................. 206

   2.2. The inimitability of intangible resources ................................................. 209

   2.3. Intangible dominance and the cumulative characteristic of the competitive process 213

       2.3.1. Path dependence and reputation ...................................................... 213

       2.3.2. Time compression and experience .................................................. 217

   2.4. Summation ............................................................................................... 219

3. INTANGIBLE RESOURCES AND UNILATERAL FIRM BEHAVIOR .................. 220

   3.1. Competitive asymmetries ......................................................................... 220

xvi
3.2. The expansion of intangible dominance and Google Shopping ........................................... 222
3.3. The limits of centralized knowledge: Michelin I and Intel .................................................. 225
  3.3.1. Michelin I ......................................................................................................................... 226
  3.3.2. Intel ............................................................................................................................... 227
4. CONCLUSION ....................................................................................................................... 229

CHAPTER 7 – THE LUCKY MONOPOLIST

1. INTRODUCTION .................................................................................................................... 231
2. THE PASSIVE ACQUISITION OF DOMINANCE ................................................................. 231
  2.1 Who is the Lucky Monopolist? ......................................................................................... 231
  2.2 The relevance of luck for dominance ............................................................................. 233
  2.3 Discovering the lucky monopolist .................................................................................. 237
3. THE LUCKY MONOPOLIST UNDER ANTITRUST SCRUTINY .......................................... 240
  3.1 A window for opportunistic behavior .............................................................................. 240
  3.2 Luck and Article 102 TFEU case law ................................................................................ 244
      3.2.1 Unforeseen events ....................................................................................................... 244
      3.2.2 Wrongly granted monopolies ..................................................................................... 246
      3.2.3 The luck defenses ....................................................................................................... 248
  3.3 Price gouging (regulation) .............................................................................................. 250
4. CONCLUSION ....................................................................................................................... 254

CHAPTER 8 – THE ANTICOMPETITIVE ROAD TO DOMINANCE

1. INTRODUCTION .................................................................................................................... 255
2. SECTION 2 SA AND ARTICLE 102 TFEU ON THE ROAD TO MONOPOLY .................. 257
  2.1 A threshold misjudgment .............................................................................................. 257
  2.2 The paradoxical irrelevance of market power in Article 102 TFEU ............................. 259
  2.3 Market power at the center of monopolization offenses in US antitrust laws ............. 261
3. THE ANTICOMPETITIVE ACQUISITION OF MONOPOLY POWER AND EXERCISE OF THAT POWER .................................................................................................................. 264
  3.1 The road to and exercise of significant market power .................................................... 265
  3.2 Deception in a standard setting process ........................................................................ 270
      3.2.1 In Re. Dell – Stiglerian and Bainian Market Power ..................................................... 271
      3.2.2 Rambus and the anticompetitive road to monopoly on both sides of the Atlantic .... 273
      3.2.3 Broadcom: outcomes or processes? .......................................................................... 282
  3.3 Anticompetitive behavior for dominance ...................................................................... 284
  3.4 Summation ....................................................................................................................... 286
4. FIXING THE ENFORCEMENT GAP IN ARTICLE 102 TFEU ................................................. 286
4.1. Differences between processes and outcomes ................................................................. 287
4.2. How to bridge the gap? ................................................................................................. 289
4.3. Causation and abuse ................................................................................................. 291
4.4. Causation and remedial action ................................................................................ 292
5. CONCLUSION ............................................................................................................... 294

GENERAL CONCLUSION .................................................................................................. 297

BIBLIOGRAPHY ................................................................................................................. 303
GENERAL INTRODUCTION

Modern competition law focuses on significant market power (SMP, dominance or monopoly) and conventionally discovers its existence through using proxies. The most prominent of these proxies is market shares, but others, like barriers to entry, have been incorporated into competition law analysis since the adoption of a “more economic approach”. What it is important, however, is that these proxies are fundamentally static, and at best provide a “snapshot” description of relevant antitrust markets. They leave little room for the consideration of dynamic or evolutionary processes. This is all the most remarkable given EU competition law is designed to protect the competitive process.¹

The description above is nothing new to those acquainted with EU competition law. Nevertheless, it serves to reveal a missing point: that positive law is barely concerned with the causes of SMP.² That is, competition law is not fundamentally concerned with the originating process that led the firm to acquire the position of dominance that it has today. Apparent causes of dominance such as luck,³ nature⁴ or the state,⁵ to name a few, have been virtually overlooked by the EU Courts (Court of Justice (CJEU) and General Court (GC)) and the EU enforcement authority (European Commission).

That the causes of dominance are outside competition policy’s zone of interest seems to be a priori a reason for unease. If competition policy is fundamentally concerned with anticompetitive behavior stemming from dominance, then it appears to be a necessary precondition to understand why a firm has a dominant position at all. This thesis proposes that to inquire into the causes of firm dominance is a crucial element in the analysis of anticompetitive effects. This is not just a fanciful inquiry but, as Ronald Coase put it, it “gives

² The terms cause, origin and source are used interchangeably.
³ Judge Learned Hand called into question the applicability of §2 of the Sherman Act to companies that would have “passively” acquired their dominant positions. See United States v. Aluminum Co. of America (“Alcoa”), 148 F.2d 416 (2d Cir. 1945), §430. See also WILLIAMSON, Oliver E. “Dominant Firms and the Monopoly Problem: Market Failure Considerations”. Harvard Law Review 85.8 (1972): 1512-1531; The Sherman Antitrust Act of 1890, (Sherman Act, 26 Stat 209, 15 U.S.C. §§1-7).