WHEN MEMBER STATES CREATE ABUSE OF A DOMINANT POSITION
- a study of the combined articles 106(1) and 102 TFEU

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Abstract

This thesis investigates the possibilities of prohibiting abuse of a dominant position in relation to public undertakings and undertakings granted exclusive or special rights in accordance with the combination of articles 102 and 106(1) TFEU. Case law from the CJEU has been interpreted in terms of how the two provisions are functioning together given the problematic fact that article 102 TFEU targets undertakings and not Member States when applied on its own. The thesis shows that when regarding undertakings concerned by article 106(1) TFEU, Member States can be held responsible for their own independent conducts which have resulted in an abuse. The thesis further submits that the provisions combined has given the reference rule of article 106(1) TFEU a broader interpretation than its initial function, indicating that the requirement of an abusive conduct in article 102 TFEU can also include the creation of dominance if it effects a liberalised market. This further indicates that although Member States still can dictate the conditions on certain markets by maintaining or creating public monopolies or by granting exclusive or special rights through article 106(1) TFEU, such performance is rather limited when open markets are affected by such dominance. This result implicates for Member States that their possibilities to intervene on the internal market is decreasing to the benefit of free competition and interstate trade between on the internal market. It should however be mentioned that case law on the issue is rather scarce, and the generalizability of the findings are therefore limited.
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<th>Full Form</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<td>CJEU/Court</td>
<td>Court of Justice of the European Union</td>
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<td>Commission</td>
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<td>GC</td>
<td>General Court of the European Union</td>
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<td>TFEU</td>
<td>Treaty of the Functioning of the European Union</td>
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1. Introduction

1.1 Introduction to the Research Problem

With the Treaty of Rome in 1957, the first step to create a common market between states in Europe was taken.¹ A common market simplified trade between states through harmonised regulations and gave rise to a more intensified cooperation that eventually led to the creation of an internal market between the Member States of the EU. State interventions are such factors that may seriously distort cross-border competition as it was intended to work in the Treaty.² The Commission saw state interventions as hindering full market integration, and with the increasing number of liberalised markets, state interventions were addressed accordingly, resulting in a decreasing acceptance for Member States’ influence over market structures.³ Due to state interventions, some undertakings affiliated with monopoly positions prior to liberalization were able to keep their market advantages also after the market opening.⁴ This paper will focus on state monopolies, public and private undertakings granted exclusive or special rights through article 106(1) in the Treaty of the Functioning of the European Union (hereinafter referred to as TFEU). Through article 106(1) TFEU, Member States have been given opportunity to keep dictating market structures on certain markets. Given the political sensitiveness derived from Member States’ possibilities to intervene on a market, arrangements with exclusive rights and state monopolies are often politically heated.⁵ This thesis will address the possibility to prohibit Member States from creating or maintaining monopolies from operating on the internal market through the application of articles 106(1) and 102 TFEU (formerly articles 86(1) and 82 of the European Community Treaty (hereinafter referred to as EC)).

¹ The Treaty Establishing the European Economic Community (EEC), OJ 25.3.1957.
⁵ Buendia Sierra, J. L., Exclusive Rights and State Monopolies under EC law, (Oxford University Press, New York, 1999), p. 130. (For the purpose of this study, “State Intervention and Competition under EU Competition Law” (2015) by the same author would have been of great interest, unfortunately, the book was not published by the time this thesis was delivered).
One initial problem with the interpretation of these two articles in conjunction is that they target different actors; Article 106(1) TFEU addresses Member States and allows them to own public undertakings and to grant exclusive rights to undertakings and at the same time prohibits them from adopting measures contrary to the Treaty. Article 102 TFEU addresses undertakings and the article contains a prohibition to abuse a dominant position. The articles in conjunction can thus be addressed to Member States when publicly owned undertakings or undertakings granted special or exclusive rights are involved in market infringements through abuse of a dominant position, and in that sense a Member State may be in breach of its duties under EU competition law. An infringement to the combined articles can consequently occur where an abuse of a dominant position is established and derived from a state measure either as through the granting of an exclusive or special right, or otherwise by affecting an undertaking where the Member State has majority influence. Given that two different actors are involved in such abuse, the problem of how much liability to be conferred upon the Member State for the action of an undertaking, arises. The second problem with the functioning of the combined articles is the construction of an abuse. Since article 102 TFEU is directed at undertakings, the prohibition ought not to apply on pure state measures without the construction of an abuse. Therefore, an abusive conduct conferred upon the undertaking but with required level of connection to a state measure, must be identified. The third observed problem with the combined provisions is that public undertakings or undertakings granted special or exclusive rights might earn dominance strong enough to prevent or eliminate other competitors from a market due to the state measure in question. This effect is truly anticompetitive but the mere fact that a dominant position is created or maintained through a state measure is not in itself contrary to article 102 TFEU. It follows from a granting of an exclusive right that it may substantially affect the ability of other undertakings to exercise the economic activity in question under the same provisions.

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6 Article 106(1) TFEU
7 Article 102 TFEU and article 106(1) TFEU.
8 Case C-155/73, Guiseppe Sacchi, ECR [1974] 409, para 18, (This case will be more thoroughly presented in chapter 4).
9 Case C-260/89, ERT v DEP, ECR [1991] I-2925, para 31, (This case will be more thoroughly presented in chapter 3).
11 Case C-320/91, Criminal Proceedings against Paul Corbeau, ECR [1993] I-2533, para 11, (This case will be more thoroughly presented in chapter 4).
12 Case C-311/84 CBEM, ECR [1985] 3261, para 18.
13 Case C-311/84 CBEM, [supra note 12], para 17., and Case C-155/73, Guiseppe Sacchi,[supra note 8], para 14.
14 Case C-475/99, Firma Ambulanz Glückner, ECR [2001] I-8089, para 24, (This case will be more thoroughly presented in chapter 5).
Article 102 TFEU in fact requires that an undertaking holds a dominant position in order for the prohibition to be applicable.¹⁵ A state measure which effect contributes to an undertaking’s dominant position is therefore not precluded in itself through the application of article 102 and 106(1) TFEU.¹⁶ However, through case law it can be observed that dominance in itself by effect of a state measure actually can constitute an infringement to articles 102 and 106(1) TFEU, which was recently the case in the Commission v DEI-judgment.¹⁷ In the case, the CJEU annulled the previous judgment by the General Court (hereinafter referred to as GC), to rule in favour of the approach that dominance in itself can constitute abuse.¹⁸ These three problems described above indicate that the function of the combined provisions has been problematic to interpret by the CJEU over the years, which is why it is needed to be investigated further. Depending on the current interpretation of the two provisions combined, Member States are getting more or less space to influence market structures through article 106(1) TFEU.

### 1.2 The Aim of the Paper

The broader subject studied in this paper is the possibility for Member States to derogate from principles of competition, in order to select certain undertakings to be the only or the major operator on a market. By examining the extension of the current interpretation of the combined articles 102 and 106(1) TFEU, some clarity to the broader subject will hopefully be provided. In order to reach the aim of the paper, the following research questions are posed:

1. How should the combined articles 102 and 106(1) TFEU be interpreted to function in practice, in order to establish that a Member State has infringed these Treaty provisions?

2. Is it enough for a public undertaking (or an undertaking granted exclusive or special rights) to hold a dominant position on a market as a result of a state measure, in order to infringe EU Competition law?

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¹⁵ Article 102 TFEU
¹⁶ Case C-155/73, Guiseppe Sacchi, [supra note 8], para 14.
¹⁷ Case C-553/12 P, Commission v DEI, ECLI:EU:C:2014:2083, (this case will be more thoroughly presented in chapter 5).
¹⁸ Ibid., para 48.
1.3 Method and Material

To meet the objectives of the paper and to answer research questions posed above, a European Legal Method with a systematic coherence approach will be used when determining, systematizing and interpreting relevant material for the purpose of the study. The method of system coherence will be applied since the idea is to interpret how articles 106(1) and 102 TFEU are combined in order to constitute an infringement. This implies that problems relating to the varied characteristics of each article will be identified and analysed through case law. The current interpretation of the two provisions should then indicate how the Court has defined the functioning of the articles in conjunction. When conducting a study using a European Legal Method, it is important to mention that EU law is characterised by a different norm hierarchy than the Swedish legal system. Case law enjoys a prominent and dominant position in the EU norm hierarchy, which is why the dominating legal source used to determine the functioning of articles 106(1) and 102 TFEU will be case law derived from the CJEU. Primary law such as the Treaty provisions are due to their legitimacy from the Member States superior to case law, but are formulated in order for their application to be interpreted by the Court. It is given by article 19(1) in the Treaty of the European Union (TEU) that it is the responsibility of the CJEU to ensure that the essence of the law is observed when the Treaties are applied. The case law that assess the functioning of the combined provisions is not particularly extensive, and for that reason it will be possible within this thesis to provide with a comprehensive cover of the majority of case law from the CJEU. Due to the limited size of this thesis it has unfortunately not been possible to include all relevant case law, and some of the cases have not been presented as thoroughly as others. This selection has been made with respect to each case’s additional contribution to the result, and for that reason the cases included will manage to represent the entire existing case law on the subject. The cases will be assessed according to the three problems identified above, which will be discussed in more detail in the following section of this paper. Preparatory work from the legislator would in a legal research of Swedish law serve as an important legal source that could provide with the relevant aim behind the national law. This does not apply in the same way in EU-law. Although preparatory acts arguably have

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20 Ibid., p. 49.
21 Ibid., p. 113.
gained importance in the norm hierarchy of EU law lately,\textsuperscript{22} for the combined use of articles 106(1) and 102 TFEU no such acts have been found. In order to substantiate the judicial problems, statements and decisions by the European Commission (hereinafter referred to as Commission) will also be of interest. In this study the opinion of the Advocate General (hereinafter referred to as AG) has been included at times. The relevance of such opinions will be read in relation to the actual judgment by the CJEU. The opinions of the AGs are not considered as judgments in themselves, and should not be interpreted as such, they could however provide with more elaborated aspects of the CJEU’s interpretation of the Treaties.\textsuperscript{23} It has therefore been valuable for this particular study. Doctrine and articles will be used in order to provide with relevant aspects on the current interpretation of the law. It should be taken into consideration that doctrine within the field for competition law comes from political and economic contexts and the fact that there might be individual interests behind the written word should not be denied.

\textbf{1.4 Delimitations}

This paper addresses state interventions and their compatibility with the Treaty. The subject is narrowed down to comprise such interventions that can be prohibited with the combination of articles 106(1) and 102 TFEU. This thesis will leave out, although intertwined with the subject and interesting indeed, other aspects of state interventions such as state aid. Closely related to addressing Member States for an abuse of a dominant positon is how such infringement could be justified through the derogation rule in 106(2) TFEU. In some of the analysed cases this article is applied after an infringement has been established, it will therefore be briefly discussed as in relation to article 106(1) TFEU, but will not be thoroughly addressed within the analysis. This is unfortunate in the sense that the current interpretation of the applicability of article 106(2) TFEU would contribute to the discussion on the possibilities for Member States to influence market structures.

\textsuperscript{22} Hettne, J., [supra note 19], p. 114-115.
\textsuperscript{23} Ibid., p. 117.
1.5 The Disposition of the Paper

Following this introduction, chapter 2 is a rather descriptive chapter of the regulatory framework under which prohibition for state measures that lead to abuses of dominant positions can be imposed. The idea is to provide the reader with basic information of the two articles and to present the problems that appear when the articles are combined. In the following three chapters, case law where the combined articles are applied will be presented and analysed. The problems addressed within the three chapters are closely related and intertwined, but for pedagogical reasons they are divided into themes accordingly. Within these chapters, the cases are presented in chronological order, to facilitate for a better overlook of the development of case law. Chapter 3 will thus deal with case law which highlights how strong the connection between a state measure and an abuse must be in order for a Member State to infringe the Treaty. Chapter 4 covers case law that emphasises on the construction of an abusive conduct. This is to indicate on how concrete an abuse must be in order to be established as a Treaty infringement. This assessment is necessarily in terms of public undertakings and undertakings granted special or exclusive rights since state measure should not, in themselves, constitute an abuse to article 102 TFEU. The analysis in chapter 5 is an extension of the previous two chapters and will address case law that assess when dominance and inequality of opportunities between market players can constitute abuse of a dominant position. Since dominance is a requisite for article 102 TFEU to apply, this case law stretches the functioning of the combined provisions to a new level. The paper ends with a summarising part in chapter 6, combined with some more reflective conclusions on how Member States might be affected by the result.
2. The Regulative Framework

The following chapter will discuss the regulative framework of EU competition law in relation to state interventions through the creation and maintenance of public undertakings or undertakings granted exclusive or special rights. The Chapter is divided into two parts that cover each article respectively. It will introduce the functions of the provisions in articles 106(1) and 102 TFEU in order to understand the problems that are addressed with their combined application in the following chapters.

2.1 Article 106(1) TFEU

The first paragraph of the article 106 TFEU is aimed at the Members States and entails a prohibition to adopt or maintain measures contrary to the Treaty rules, it states that:

*Article 106(1) TFEU*

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

The article emphasises the particular importance of Treaty rules concerning competition and discrimination on grounds of nationality when it comes to such state measures. Hence, in order for state measures to be considered prohibited in accordance to the article, they need to be in contrast with another Treaty provision. Article 106(1) TFEU is therefore a reference rule, indicating that same Treaty rules should apply on all forms of undertakings in the Union. It consequently stems from the article that undertakings affected by it should be subject to normal market conditions in order for state measures affecting them to be compatible with the Treaty.24

In that sense, the paragraph contains both a prohibition (when read in conjunction with another

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24 Von Quitzow, C.M., [supra note 2], pp. 38-39.
Treaty rule) and a permission for Member States to grant exclusive or special rights to undertakings and to own undertakings.\textsuperscript{25}

\subsection{Public Undertaking}

Firstly it should be mentioned that the definition of \textit{undertaking} will be developed in the next section of this paper, as it is included in the requisites of article 102 TFEU.\textsuperscript{26} The concept of public undertaking is widely used throughout EU and its definition has been established in case law through the judgment in \textit{France, Italy and the UK v. Commission},\textsuperscript{27} and was derived from article 2 of the \textit{Transparency directive}.\textsuperscript{28} The definition held that undertakings that public authorities could be presumed to have a dominant influence over were considered to be public.\textsuperscript{29} This given, undertakings need not be subject of full public ownership in order to be considered public, but the limitation lies in the degree of influence over such undertaking. In \textit{Commission v DEI}, an undertaking where 51\% of its shares could be derived to the state was considered as a public undertaking by the CJEU, which can illustrate that influence relation.\textsuperscript{30}

\subsection{Exclusive and Special Rights}

A brief introduction to the concepts of exclusive and special rights is needed in order to understand judicial problems linked to their granting or maintenance. The notion of an exclusive right corresponds with the notion of a monopoly, exclusivity to access or handle a good or service. The scholar Buendia Sierra suggests that the concept ought to be more specified and offers a definition:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} Case C-155/73 \textit{Sacchi}, [supra note 8], para 14.
\item \textsuperscript{26} See section 2.2.1 “Undertaking”.
\item \textsuperscript{27} Joined Cases 188-190/80, \textit{France, Italy and the UK v. Commission}, ECR [1982] 2545.
\item \textsuperscript{29} Ibid., article 2.
\item \textsuperscript{30} Case C-553/12 P, \textit{Commission v DEI}, [supra note 17], para 3.
\end{itemize}
\end{footnotesize}
“An exclusive right can be defined as a measure taken by a Member State in the exercise of its functions as a public authority, by which exclusivity is granted through any legal instrument in favour of a single undertaking, public or private, such exclusivity being for the exercise of a given economic activity in a given territory for a given period of time.”

When it comes to the definition of special rights in accordance with article 106 (1) TFEU, the Commission has not provided a clear definition and case law has been silent on the issue. The Commission has at the same time indicated that special rights are similar to exclusive rights but that they are granted to more than one, and still to a limited number of undertakings in order to carry out a certain service. A special right should however not be confused with national regulations regarding access to certain market activities, where objective requisites on, for instance special knowledge, are required by the Member State. In SOA Nazionale Costruttori, certain institutions in Italy were entrusted to carry out certification services that could be obtained by consumers in the exchange of remuneration. The right to issue such certifications was given by the Member State to all undertakings that satisfied the conditions given for such services, and the entrusted undertakings were therefore not considered to be undertakings granted exclusive or special rights in the meaning of article 106 (1) TFEU. In Pavel Pavlov and Others (hereinafter referred to in text as Pavlov) the Court assessed whether a national law which established compulsory affiliation to a supplementary pension fund by that had granted an exclusive right in the meaning of article 106(1) TFEU. Although there were other competing pension funds on the national market, the Court confirmed that given the compulsory element of the supplementary pension scheme, the fund was granted exclusive rights by the state in the essence of article 106(1) TFEU. By that it stems that the presence of other competitors on a market does not in itself eliminate the possibility for a state measure to be an

31 Buendia Sierra, J.L.,[supra note 5], p. 6.
32 Buendia Sierra, J.L.,[supra note 5], pp. 64-65.
34 Case C-327/12, Soa Nazionale Costruttori, ECLI: EU: C: 2013: 827.
35 Ibid., paras 42-43.
36 Ibid.
37 Joined Cases C-180/98 to C-184/98, Pavel Pavlov and Others, ECR [2000] I-6451. (This case will be more thoroughly presented in chapter 4).
38 Ibid., para 116.
39 Ibid., paras 116, 119 and 122.
exclusive right. National regulations that eliminate the possibility for consumers to select the provider of a particular service can thus be an exclusive right granted to an undertaking.

2.1.3 Article 106(1) TFEU in relation to Article 106(2) TFEU

As given above, article 106(1) TFEU states the allowance of public undertakings and that exclusive and special rights may be granted to certain undertakings by Member States, while the Member States must refrain from measures that infringe the implications of the Treaty rules. However, the prohibitions of such Treaty infringements are limited by the application of article 106(2) TFEU. This provision provides with a derogation that applies on state measures that are infringing the Treaty, but are considered necessary in order for the undertaking concerned to deliver services of general interest that have been imposed on it by the Member State.\(^{40}\) This provision is indeed both important and interesting in terms of Member States’ possibilities to withdraw certain markets from competition, but its impact on this essay’s field of investigation is rather limited, which is why it will not be further explored here.

2.2 Article 102 TFEU

The article contains a prohibition for undertakings to abuse its dominant position, which serves its broader aim to maintain effective competition within the internal market.\(^{41}\) Contrary to article 106(1) TFEU, article 102 TFEU aims at actions taken by undertakings and not at Member States as such.\(^{42}\) Since undertakings are the intended targets of this article, difficulties regarding the liability of Member States arises when the article is applied in conjunction with 106(1).\(^{43}\) The article provides the following:

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\(^{40}\) Case C-155/73, Guiseppe Sacchi, [supra note 8], para 15.
\(^{42}\) Case C-320/91, Criminal Proceedings against Paul Corbeau, ECR [1993] I-2533, para 10.
\(^{43}\) Papaconstantinou, H.,[supra note 10], p. 186.
Article 102 TFEU

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 other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (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.

2.2.1 Undertaking

In order to apply article 102 TFEU the first step is to confirm that there is at least one undertaking concerned in the case. It stems from the judgment in Klaus Höfner and Fitz Elser v Macrotron GmbH (hereinafter referred to in text as Höfner)⁴⁴, that within EU competition law

“the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed [...].”⁴⁵

This given, a company need not have full commercial character and be privately owned in order to be considered an undertaking, it could also be public undertakings given that it is in partly involved in economic activity. This can be illustrated by the judgment in AG2R Prévoyance v Beaudout Père et Fils SARL (hereinafter referred to in text as AG2R),⁴⁶ which held that even though an undertaking was a non-profit-making legal person with a social aim, it was still considered to be involved in economic activity by managing health insurance reimbursements on a national market.⁴⁷ The concept of economic activity on the other hand, has been defined as every activity that offers a good or a service in exchange of a remuneration on a market.⁴⁸

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⁴⁴ Case C-41/90, Klaus Höfner and Fitz Elser v Macrotron GmbH, ECR [1991] I-1979., (this case will be more thoroughly presented in chapter 4).
⁴⁵ Ibid., para 21.
⁴⁶ Case C-437/09, AG2R Prévoyance v Beaudout Père et Fils SARL, ECR [2011] I-973, (This case will be more thoroughly presented in chapter 4).
⁴⁷ Ibid., paras 43 and 45.
⁴⁸ Ibid., para 42 with reference to Case C-218/00, Cisal, ECR [2002] I-691, para 23.
Exempted from the concept of economic activity are activities that can be attached with the principle of solidarity and that are to a certain level under supervision by the Member State which instituted it, this issue will not be developed further in this study given its irrelevance for the aim of the study.\(^49\) Since article 102 TFEU applies to all undertakings, no matter the ownership structure, the article can be applied to public undertakings without the need of article 106(1) TFEU. All undertakings can by their independent act abuse a dominant position, and article 106(1) is thus not \textit{lex specialis} holding that public undertakings can only infringe article 102 TFEU if applied in conjunction with article 106(1) TFEU.\(^50\)

\textbf{2.2.2 Dominant Position and the Relevant Market}

It is given by article 102 TFEU, that for its application on a conduct, the undertaking in question must have a dominant position on a distinguished market.\(^51\) When assessing whether an undertaking holds such position, it is necessary to define the relevant market in question.\(^52\) The assessment of the characteristics of the product or service offered for sale can define such market which has been addressed in the \textit{Connect Austria v Telekom-Control-Kommission – case}\(^53\) where the CJEU stated after referring to previous case law, necessary requisites in such assessment:

\begin{quote}
“[I]n order for a market to be held to be sufficiently homogeneous and distinct from others, the service must be able to be distinguished from other services by virtue of specific characteristics as a result of which it is scarcely interchangeable with those alternatives as far as the consumer is concerned and is affected only to an insignificant degree by competition from them”\(^54\)
\end{quote}

\(^{49}\) See to that effect Case C-218/00 Cisal,[Ibid., supra note 48], paras 38-44.
\(^{50}\) Papaconstantionou, H., [supra note 10], pp. 178-179.
\(^{51}\) Article 102 TFEU.
\(^{52}\) Case C-462/99, Connect Austria v Telekom-Control-Kommission, ECR [2003] I-5197, para 74, (this case will be more thoroughly presented in chapter 5).
\(^{53}\) Ibid.,
\(^{54}\) Ibid., para 75.
Thus, by defining the relevant market, the frame within which the dominance can exist is set.\textsuperscript{55} To further conceptualize how dominance can be constructed, market shares can indicate on dominant position.\textsuperscript{56} In that regard, market shares of 50\% can serve as indications on dominance over a market.\textsuperscript{57} The market share of an undertaking is only one indication on dominance, other aspects, such as how remaining market shares are divided among competitors, technical advantages in comparison with competitors and the barriers to entry could also be taken into consideration when assessing dominance.\textsuperscript{58} In general when regarding undertakings granted exclusive rights, and undertakings otherwise enjoying the position of a monopolists, dominance and a dominant position on the market is often predicted with their mere existence.\textsuperscript{59} It should however not be considered as given by the legal form or the benefits granted to an undertaking, what level of dominance it might hold. The assessment of the relevant market and dominance is still relevant in relation to public undertakings and undertakings granted special or exclusive rights. To that regard, In the Centro Europa 7 Srl-case,\textsuperscript{60} a dispute regarding a national regulation’s compatibility with articles 106(1) and 102 TFEU had appeared due to the allocation of radio frequencies.\textsuperscript{61} The CJEU concluded in its judgment that since it had not received any information on the relevant market, or indications on the market shares that were divided among the competitors, that question was inadmissible.\textsuperscript{62} By that it follows that he granting of an exclusive right is not enough for the undertaking to hold a dominant position, due to the difficulties that sometimes appear when assessing the relevant market. In Pavlov, the supplementary pension fund was considered to hold a dominant position in a substantial part of the internal market although it normally competed on a market characterized as competitive, this since a national law left no other legal option for certain work forces than to affiliate with that fund.\textsuperscript{63} This shows that certain state measures that grant exclusivity can construct a market within a market so narrow that the undertaking conferred with such right automatically holds a dominant position within that market, although it may not have any dominant position on the larger market which it usually competes at.

\textsuperscript{55} Case C-462/99, Connect Austria v Telekom-Control-Kommission, [supra note 52], para 77.\textsuperscript{56} Case C-85/76, Hoffmann-La Roche & Co. v Commission, ECR [1979] 461, para 41.\textsuperscript{57} Case C-62/86, AKZO Chemie BV v Commission, ECR [1991] 1-3359, para 60.\textsuperscript{58} Case C-85/76, Hoffmann-La Roche & Co. AG v Commission, [supra note 56], para 48.\textsuperscript{59} Case C-41/90, Klaus Höfner and Fitz Elser v Macrotron GmbH, [supra note 44], para 28, Case C-260/89, ERT v DEP, [supra note 9], para 31., Case C-179/90, Merci v Siderurgica, [1991] ECR I-5889, paras 14-15.\textsuperscript{60} Case C-380/05, Centro Europa 7 Srl, ECR [2008] I-349.\textsuperscript{61} Ibid., para 59., and Advocate General’s Opinion in Case C-380/05, Centro Europa 7 Srl., para 27.\textsuperscript{62} Case C-380/05, Centro Europa 7 Srl, [supra note 60], para 61-62.\textsuperscript{63} Joined Cases C-180/98, Pavel Pavlov and Others [supra note 37], paras 125-126.
2.2.3 Effect on Trade

As given by the formulation of article 102 TFEU, the abusive behaviour needs to have an effect on trade between Member States in order to constitute an infringement.\(^{64}\) There is no requirement of an actual cross-border element to this provision, but a Member State’s territory alone can comprise an essential part of the internal market.\(^{65}\) This given, it can be derived that the prohibition in article 102 is infringed when an abusive behaviour might affect the internal market, which means that it is sufficient enough if confirmed that the behaviour may have such effect on the market.\(^{66}\) In the Höfner-case it was stated that also when article 102 and 106(1) are read in conjunction, there must be a possible effect on the trade between Member States in order for the infringement to exist, and it was stated that such effect was especially potential if the service could be extended to citizens of other Member States or territories.\(^{67}\) Although it is not necessary for effects to be observable and actual, the criterion is not satisfied by claims on effects on trade that are based on pure speculations and hypothesis.\(^{68}\) A possible effect on trade between Member States is not precluded by the fact that an undertaking alleged with an abusive conduct only is established in one Member State without any aims to extend its business to other Member States.\(^{69}\)

2.2.4 The Abusive Conduct

Abuse of dominant position can be directed at customers as an exploitative abuse which has the result of harming consumers.\(^{70}\) An abusive conduct can also be directed at competitors, as an exclusionary abuse, by throwing out competitors from the market or hindering new firms from entering.\(^{71}\) Varied activities by undertakings can be considered abusive, such as predatory

\(^{64}\) Article 102 TFEU.


\(^{66}\) Ibid., para 104.

\(^{67}\) Case C-41/90, Klaus Höfner and Fitz Elser v Macrotron GmbH, [supra note 44], paras 32-33.

\(^{68}\) Case C-475/99, Firma Ambulanz Glöckner [supra note 14], para 48, (this case will be more thoroughly presented in chapter 5), with reference to Joined Cases C-215/96 - C-216/96, Bagnasco and Others [1999] ECR I-135, para 60.


\(^{71}\) Ibid., p. 1036.
pricing\textsuperscript{72} and discriminatory rebate schemes.\textsuperscript{73} The list of abuses provided by the Treaty provision is not exhaustive, which means that other abusive conducts than the ones mentioned can be identified by the Court.\textsuperscript{74} When it comes to public undertakings and undertakings granted special or exclusive rights in accordance with article 106(1) TFEU, an alleged abuse must derive from a state measure, if the Member State should at all be held responsible for the infringement of 102 TFEU.\textsuperscript{75} This implies that the Court ought to differ between abuses that are conducted by the influence of Member States through state measures, and abuses that are conducted as a result of an undertaking’s independent choice. This is the core problem of the functioning of the combination of articles 102 and 106(1) TFEU, which will be addressed in the three following analytical chapters of the thesis. The next chapter will address how strong the influence of a Member State must be in order to create an abuse. The second analytical chapter assesses how an abusive conduct ought to be constructed in order for the Member State to have infringed the Treaty. The last analytical chapter combines these two aspects in order to analyse cases where Member States’ mere creation of dominance is discussed in terms of being an abuse of a dominant position.

\textsuperscript{72} See to that effect Case C-62/86, AKZO Chemie BV v Commission, [supra note 57], para 83, and Case C-333/94, Tetra Pak International SA v Commission, ECR [1996] I-5951, para 41-42.

\textsuperscript{73} See to that effect Case C-95/04 P, British Airways v Commission, ECR [2007] I-2331, para 143.

\textsuperscript{74} Case C-6/72, Continental Can v Commission, [supra note 41], para 26.

\textsuperscript{75} Papaconstantinou, H. [supra note 10], p. 178.
3. The Link between the Abuse and the State Measure

Contrary to when article 102 TFEU is applied on its own on undertakings, when applied together with article 106(1) TFEU it addresses the activities of public authorities of Member States. One critical point in the application of the two articles in combination is to treat possible abuses of dominant positions by public undertakings or undertakings granted exclusive or special rights, as the result of a state measure. Since it is the Member State that will be held responsible for the abuse of a dominant position and not the undertaking that is enjoying such position, it is relevant to assess what kind of connection that must have been established between the alleged abuse and the state measure in order to create a Treaty infringement. Given that article 102 TFEU applies on all undertakings, no matter the legal form, in order for the combined articles to apply on Member States, public undertakings and undertakings that benefits from exclusive or special rights must have been deprived responsibility of their own behaviour. The Treaty is silent on to what extent an undertaking must act on the influence of a state measure in order for the responsibility of an abuse to be derived to the Member State. Buendia Sierra claims that there are two different doctrines existing on the interpretation of how strong the relation between the abuse and the state measure ought to be in order for the responsibility to fall on the Member State: the Effects Doctrine and the Behaviour Doctrine. The Effects Doctrine insists that the mere appearance of an effect that normally follows an abusive behaviour could be sufficient in order for the state measure to lead to an abuse of a dominant position, while the Behaviour Doctrine holds that a state measure must lead an undertaking to behave abusive. The issue of how strong the link between a state measure and an abuse ought to be in order for a Member State to be held responsible for a Treaty infringement is therefore necessary to investigate to understand the function of the articles 106(1) and 102 TFEU in combination. Following case law addresses that issue in particular.

76 Article 106(1) TFEU.
77 Buendia Sierra., [supra note 5], p. 151.
78 Ibid., pp. 149 and 151.
An Italian National Court referred to the CJEU for a preliminary ruling over a dispute between Siderurgica Gabrielli SpA (hereinafter referred to as Siderurgica) and Merci Convenzionali Porto di Genova SpA (hereinafter referred to as Merci). Due to national legislation the right to organize dock-work within a given port was reserved to dock-work companies who in turn were obliged to engage in such work, only dock-work companies consisting of workers with Italian nationality. Siderurgica had imported steel from Germany to be delivered with a chartered ship to the port of Genoa, where Merci was conferred with the exclusive right to organize the unloading of such goods. The chartered ship contained all necessary equipment for unloading, but due to the national legislation and its premises on nationality, Siderurgica was unable to carry out the task on its own. Due to strikes within the appointed workforce, Siderurgica suffered from delays and demanded compensation accordingly. The National Court posted a question (among others) in its referral to the CJEU regarding the national law that granted exclusive rights over dock-work organization and its compatibility with articles 106(1) and article 102 TFEU read in conjunction. The Court first confirmed that the two companies in the case where undertakings granted exclusive rights by the state (exclusive rights to organize and to carry out, dock-work, respectively) and that the Member State through the granting, must refrain from measures that breaches the Treaty provisions, all in accordance with article 106(1) TFEU. The Court confirmed that the mere creation of a dominant position through the granting of an exclusive right was not in itself an abuse to article 102 TFEU, but with reference to previous case law, the Court assured that the Member State was in breach with the Treaty if the granting of the exclusive right put the undertaking in a position where it couldn’t avoid abusing its dominant position. Also based on previous case law, the Court established that the Member State was in breach of the Treaty when it by granting the exclusive right, was “liable to create a situation in which that undertaking was induced to commit such
The Court confirmed that the services in the case could have been carried out more cost efficient if it wasn’t for the exclusive rights that prohibited such solutions. With reference to the list of potential abuses in article 102 TFEU, the Court suggested that the undertakings conferred with exclusive rights were induced to commit such abuses of their dominant position, either by charging for services not demanded, by charging inappropriate prices, by refusing to use modern technic that could make the service less costly or by price discriminating between consumers. The national legislation with its requirement for undertakings conferred with exclusive rights to engage only undertakings that consisted exclusively of nationals was thus precluded by the Treaty provisions.

3.2 La Crespelle v the Mayenne Cooperative

A French National Court referred to the CJEU for a preliminary ruling over questions among others, the application of article 106(1) and 102 TFEU in conjunction. The legal dispute had occurred due to national legislation that granted exclusive rights to carry out artificial insemination of animals to the undertaking Coopérative d’Élevage et d’Insémination Artificielle du Département de la Mayenne (hereinafter referred to as the Mayenne Cooperative). The Mayenne Cooperative initiated the case and brought proceedings against another insemination centre called Société Civile Agricole du Centre d’Insémination de la Crespelle (hereinafter referred to as La Crespelle) and claimed that they had infringed on the Mayenne Cooperative’s exclusive right to carry out artificial insemination. According to the national law that granted the exclusive rights, the breeding procedure was divided into two main activities, the production of semen and the actual insemination. Insemination centres were through their authorization to enjoy the exclusivity to assist breeders in a specific geographical area. If the insemination centre were not also production centres, they were normally supplied

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88 Case C-179/90, Merci v Siderurgica, [supra note 59], para 17.
89 Ibid., para 22.
90 Ibid., paras 18-19.
91 Ibid., para 24.
92 Case C-323/93, La Crespelle v the Mayenne Cooperative, ECR [1994] I-5077, (the case will hereinafter be referred to in text as “La Crespelle”)
93 Ibid., para 1.
94 Ibid., para 2.
95 Ibid., para 12.
96 Ibid., paras 3-4.
97 Ibid., para 4.
with semen from production centres, and they were obliged to assist breeders in inseminations with other semen of their choice as well, although to an additional cost for the breeder. The reference court asked the Court of justice whether the additional cost borne by the breeders that asked insemination centres for semen of their choice was contrary to the prohibition of abuse of a dominant position, established with articles 106(1) and 102 TFEU, read in conjunction. The Court first confirmed that the territorial monopoly granted to several undertakings conformed a dominant position in a substantial part of the internal market, and enhanced that the mere creation of such position was not, in itself, contrary to the prohibition laid out in article 102 TFEU. The Court assessed whether or not the additional costs that were imposed on breeders who required different semen than what the insemination centre in their district did produce, could constitute an abuse of dominant position. The Court further assessed whether or not the additional cost was a direct effect of the state measure, and found that the national law only allowed (but did not require) the insemination centres to charge the additional fee for the inconvenience of supplying the breeders with the semen of their choice. Based on previous case law, the Court held that the Member state is breaching the provisions laid out in articles 106(1) and 102 TFEU only when the undertaking through the mere exercise of the exclusive right conferred upon it by the state, cannot avoid abusing its dominant position. When assessing the link between the state measure and the alleged abuse, the Court concluded that although the undertakings granted exclusive rights enjoyed the possibility of charging a self-estimated extra cost, the state measure did not lead the undertakings in question to charge disproportionate costs, and hence, to abuse their dominant position. The alleged abuse was therefore not considered to be the direct effect of the national law that granted the exclusive right, and hence, the Member State could not be found infringing the Treaty provisions.

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98 Case C-323/93, La Crespelle v the Mayenne Cooperative, [supra note 92], paras 4-5.
99 Ibid., para 13.
100 Ibid., paras 17-18.
101 Ibid., para 19.
102 Ibid.
103 Ibid., para 18.
104 Ibid., paras 20-21.
105 Ibid., para 22.
3.3 ERT v DEP\textsuperscript{106}

Elliniki Radiophonia Tileorassi Anonimi Etaireia, (hereinafter referred to as ERT), a Greek TV and Radio undertaking owned and controlled by the Greek state held a monopoly position on the market for TV- and radio broadcasts and retransmissions in Greece through the granting of exclusive rights by virtue of national legislation.\textsuperscript{107} The national legislation that granted ERT the exclusive rights prohibited other actors from activities that fell within the exclusive right of ERT, without a prior approval from ERT.\textsuperscript{108} The legal case was initiated by ERT as a response to the activities of a municipal information company in Thessalonikis, Dimotiki Etaireia Pliroforissis (hereinafter referred to as DEP) and the mayor of Thessalonikis, who, despite the exclusive right conferred to ERT, had started to broadcast programmes from their own television channel.\textsuperscript{109} With reference to previous case law, the Court confirmed that exclusive rights and thus the creation or maintenance of monopolies on markets are not as such deemed to infringe any Treaty provision, but given the manners the monopoly is organised or exercised, it may infringe the combined Treaty provisions in article 106(1) and 102 TFEU.\textsuperscript{110} The court further held that the provision that granted the exclusive rights to the transmissions and retransmissions were in contrast with article 102 and 106(1) TFEU in conjunction, since the undertaking given a discriminatory policy was favouring its own programmes.\textsuperscript{111}

3.4 Corsica Ferries v Gruppo Antichi Ormeggiatori del porto di Genova and Others\textsuperscript{112}

An Italian National Court referred to the CJEU for a preliminary ruling due to a dispute that had arisen between Corsica Ferries France SA (hereinafter referred to as Corsica Ferries) and Gruppo Antichi Ormeggiatori del porto di Genova and others (hereinafter referred to as Porto di Genova).\textsuperscript{113} Porto di Genova and other mooring groups were granted the exclusivity to

\textsuperscript{106} Case C-260/89, ERT v DEP, [supra note 9].
\textsuperscript{107} Ibid., paras 2-3.
\textsuperscript{108} Ibid., para 3.
\textsuperscript{109} Ibid., para 2.
\textsuperscript{110} Ibid., paras 10-11.
\textsuperscript{111} Ibid., paras 37-38.
\textsuperscript{112} Case C-266/96, Corsica Ferries v Gruppo Antichi Ormeggiatori del porto di Genova and Others, ECR [1998] I-3949.,(The case will hereinafter be referred to in text as “Corsica Ferries”)
\textsuperscript{113} Ibid., para 2.
provide with mooring services in ports due to national legislation.\textsuperscript{114} Corsica Ferries had demanded to be compensated for fees paid to the mooring service providers and argued in its favour among other things that the undertakings were abusing their dominant positions since they left consumers with no choice but to use their services although they had their own competent staff, and since they charged unfair tariffs (that did not correspond with the actual costs of the services provided) that additionally varied from port to port although the circumstances were the same.\textsuperscript{115} The National Court therefore posted questions on the Italian legislation’s compatibility with 106(1) and 102 TFEU.\textsuperscript{116} The Court indicated that article 106(1) and 102 are applicable to the situation and manifested as established case law that the mooring groups covers a substantial part of the internal market.\textsuperscript{117} The state measure to grant the mooring groups the exclusive rights were according to the Court and based on previous case law, compatible with the Treaty as long as the undertakings in question, merely by exercising the exclusive rights granted to it, was not led to abuse its dominant position and as long as such rights were not liable to create a situation in which that undertaking was led to commit such abuses.\textsuperscript{118} The Court then investigated whether the provision that the mooring groups excused their behaviour in accordance to, article 106(2) TFEU, was applicable given the circumstances, indicating that an abuse had been committed.\textsuperscript{119}

3.5 Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH \textsuperscript{120}

In this case, a National Court in Germany referred to the CJEU for a preliminary ruling over a dispute regarding the cost for delivery abroad using non-physical re-mail that had arisen between the postal monopoly of Germany, Deutsche Post, and some of its customers.\textsuperscript{121} The National Court asked whether the national law which was established to ratify the Conventions

\textsuperscript{114} Case C-266/96, Corsica Ferries v Gruppo Antichi Ormeggiatori del porto di Genova and Others, [supra note 111], paras 2,9 and 12-13.
\textsuperscript{115} Ibid., para 7.
\textsuperscript{116} Ibid., para 20.
\textsuperscript{117} Ibid., para 39.
\textsuperscript{118} Ibid., paras 40-41.
\textsuperscript{119} Ibid., paras 43-44.
\textsuperscript{120} Joined Cases C-147/97 and C-148/97, Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH, ECR [2000] I-825, (hereinafter the case will be referred to in text as “Deutsche Post”)
\textsuperscript{121} Ibid. paras 1-2
of the Universal Postal Union of 14 December 1989\textsuperscript{122} (hereinafter referred to as UPC) was a state measure prohibited according to article 106(1) TFEU given that it breached article 102 TFEU.\textsuperscript{123} Due to an amendment in the UPC, the Deutsche Post had started to charge international post at their internal rate, without considering deducting from it the terminal dues that was paid to the postal service at the terminal destination, and hence, the dispute regarded payments for forwarding and delivery of mail in large quantities where the sender and the addressee (using non-physical re-mail) were citizens of another Member State.\textsuperscript{124} The Court firstly confirmed as to previous case law that an undertaking enjoying the exclusive rights from a statuary monopoly over a substantial part of the internal market was the holder of a dominant position in the lights of article 102 TFEU and that dominance is not in itself incompatible with the mentioned Treaty provision.\textsuperscript{125} The Court confirmed that although dominance was not an abuse in itself, Member States were to restrain from adopting and maintaining measures that might harm the efficiency of article 102 TFEU.\textsuperscript{126} Given the exclusivity that was granted to the Deutsche Post, the Court pointed out that the Member State was by that required not to enact or maintain in force measures that that were incompatible with the Treaty.\textsuperscript{127} The Court answered the question posed by the National Court and explained that the exclusive right conferred upon the Deutsche Post had created the possibility for it to treat international postage as internal and hence, created a situation where the undertaking might be led to abuse its dominant position, and therefore, that state measure was in breach of articles 106(1) and 102 TFEU in conjunction.\textsuperscript{128} This, because the users of the postal service in that particular scenario, were left with no other choice but to pay the full internal postage if they wanted to return items of mail to its origin.\textsuperscript{129} The Court specified in the judgment that the potential abuse was due to the situation that was created by the granting of the exclusive right, which indicates that the link between state measure and abuse was focused on by the Court.\textsuperscript{130} The AG developed on this issue in his opinion, where he firstly concluded that the exclusive right granted by the state did

\textsuperscript{122} For more information regarding the Universal Postal Union and its conventions, see http://www.upu.int/en.html (Last viewed: 11-03-2015 17:38) and http://news.upu.int/insight/faq/ (Last viewed: 11-03-2015 17:38).
\textsuperscript{123} Joined Cases C-147/97 and C-148/97, Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH. [Supra note 120], paras 3 and 25.
\textsuperscript{124} Joined Cases C-147/97 and C-148/97, Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH. [Supra note 120], paras 5-6 and 20.
\textsuperscript{125} Ibid., paras 38-39.
\textsuperscript{126} Ibid., paras 38-39 and 48.
\textsuperscript{127} Ibid., para 40.
\textsuperscript{128} Ibid., paras 47-48 and 58.
\textsuperscript{129} Ibid., para 59.
\textsuperscript{130} Ibid., para 48.
only allow, but not require from the undertaking to commit the identified abuse in the case, but given that the undertaking was a statuary monopolist with the economic incentive to maximize its income, it followed directly from the exclusive right that the undertaking would commit alleged abuses and the law was hence, in his opinion, breaching articles 106(1) and 102 TFEU read in conjunction.\textsuperscript{131}

3.6 Analysis of the Cases

The cases above have all indicated on how closely connected the abuse must be to state measure in order to constitute a Treaty infringement committed by a Member State. In Merci, the Court found that the undertakings due to the exclusive rights granted on them, were induced to abuse their dominant position. Although stating in the judgment that the undertakings must be unable to avoid abuse in order for the responsibility to fall on the Member State, the judgment is vague in the sense that it does not clarify how much independent choice the undertakings had to avoid the particular abuse but the case could implicate that the abuse followed directly by effect of the granting of the exclusive right. In La Crespelle, an alleged abuse was identified with the possibility that the insemination undertakings charged extra fees to inappropriately excessive costs, however, the risk of that to occur was not considered enough for the exclusive right to have resulted in an abuse of a dominant position. Thus the judgment was based on the same perception as in Merci, holding that the state measure must automatically lead to the abusive behaviour or the effect of an abuse and must leave the undertaking with no choice but to behave abusive. This since the undertaking had the choice to decide the charges itself. The judgment hence indicates that the articles 106(1) and 102 TFEU can only be applied if the abuse is a direct result of a state measure (the granting of an exclusive right, in this case). To merely create the possibility for an undertaking to behave abusive is according to this judgment not a Treaty breach, since the undertaking still can avoid an abusive behaviour or effect. This seems like a logical way of reasoning, since the Member State would else be held responsible for an undertakings independent behaviour. However, as logically convincing the reasoning of the Court was in La Crespelle, that approach was contrasted with the judgments in the three following cases. In ERT v DEP, the alleged abuse was observed by the Court as the conduct of

\textsuperscript{131} Opinion of Advocate General Mr. Antonio Mario La Pergola in Joined Cases C-147/97 to 148/97, (Deutsche Post), delivered on 1 June 1999, Para 21.
favouring their own TV-programmes when given the exclusive right to approve alternative broadcasters. The way the national law was designed was indeed anticompetitive and created invaluable benefits for ERT on the broadcasting market, and the Court reiterated in its reasoning that the organisation and the exercise of an exclusive right could impose an infringement. Just like the circumstances in *La Crespelle* however, the alleged abuse was still an optional conduct that could have been avoided if ERT would have chosen to avoid favouring its own programmes although it was given a legal opportunity to do so. If this judgment was to follow the reasoning in *La Crespelle*, the CJEU must have held that organisation of the exclusive right was such that it had created a situation where the undertaking could not avoid but abuse its dominant position, or that the organisation had led to a situation where an abusive exercise of the exclusive right was unavoidable for ERT. This was not the case, since the Court judged that an abuse followed directly from the exclusive right. The Court’s reasoning must instead hold that the exclusive right must not create the opportunity for an undertaking to on its individual act, exercise such right in a way that it abuses its dominant position. This indicates that also the behaviour of undertakings is included in Member States’ responsibilities over public undertakings and undertakings granted special or exclusive rights. This implies that a state measure should not create any opportunity for the undertaking to behave abusive. In *Corsica Ferries*, the Court relied on the assumption that the Member State could only be held responsible for an abuse of dominant position if the granting of an exclusive right had led the undertaking directly to commit such abuse, or if it had created such a situation where the undertaking was led to commit an abuse in the same way. As the Court directly investigated the possibilities to justify the undertakings’ behaviour in accordance with article 106(2) TFEU, it can be assumed that the Court judged that an abuse was committed and that the Member State, by the granting of the exclusive rights was responsible for that act. This is again in contrast to *La Crespelle*, since the abuse (charging prices that did not correspond with the actual costs) was not directly followed by the state measure. In accordance with the reasoning of the Court it must then be held that the exclusive right had created a situation where the undertaking was led to an abusive behaviour. Here lies an important different from *La Crespelle*: the requisite that the undertaking must not be able to avoid the abuse in order for the Member State to be held responsible for the abuse is replaced with the softer requirement that the undertaking merely must have been led to commit an abuse. This confirms the reasoning in *ERT v DEP*, and thus indicates that the granting of exclusive rights should not create situations where undertakings might chose to commit abuses. For Member States, this is a responsibility that entails that although monopolies and exclusive rights are still permitted, a greater responsibility to make the undertakings in question act as in
a competitive market is thus transferred on them. In Deutsche Post a similar judgment is provided. An abuse was identified based on the undertaking’s behaviour as response to a situation that was the directly derived from the exclusive right. The opinion of the AG in this case is very interesting since it indicated that an undertaking enjoying the position of a statuary monopolist (given that it didn’t have any competitors to challenge its position) would in every given chance act for its income maximization, which in this case makes a possibility to commit an abuse the inevitable effect of an exclusive right.\textsuperscript{132} Although the Court did not specify this in the same clear way as the AG, they did not contradict it and judged in favour of the AG’s reasoning, and opened up for a softer interpretation of how strong the link between the relevant state measure and the abuse by the undertaking must be. It is clear that the case law from La Crespelle has changed in terms of how direct the abuse must follow from the state measure. Although undertakings were left with the choice not to commit an abuse also in the three later cases, since the possibility to abuse was considered a direct consequence of the state measure, the Member States could be held responsible for the conduct of the undertakings in all the three latter cases. This shows that the interpretation of the link between abuse and state measure is broader than what La Crespelle indicated. La Crespelle and Merci differ from the other cases in the sense that the actual abuse was never established in detail. It opens up for questions on how abuses must be identified in order to link it to the state measure in question. This will be discussed in the following chapter.

\textsuperscript{132} Opinion of Advocate General Mr. Antonio Mario La Pergola in Joined Cases C-147/97 to 148/97, (Deutsche Post), delivered on 1 June 1999, para 21.
4. The Abusive Conduct

It has been established in earlier sections of this paper that article 102 TFEU applies on undertakings and not on Member States as such. This in combination with the fact that article 106(1) TFEU provides Member States with the possibility to own public undertakings and to grant certain rights to undertakings, such state measure should not in itself create an abuse of a dominant position. It is still required an actual or potential abuse in order for a Treaty infringement to be constructed. That given, the following cases will illustrate that there is a fine line between what could actually be entailed with an abusive conduct and the mere state measure of granting of exclusivity.

4.1 Guiseppe Sacchi

An Italian National Court referred to the CJEU for a preliminary ruling in a criminal proceeding where Mr. Guiseppe Sacchi was accused by a private TV-station for the possession of TVs made available for the public and used for receiving Cable-TV-broadcastings without having paid the subscription fee for such broadcasts. The National Court posed questions relating to the Treaty compatibility for national legislation that granted exclusive rights to broadcast television, and asked among other things about the interpretation of articles 106(1) and 102 TFEU, read in conjunction. After the Court established the fact that article 106(1) allows for Member State to grant exclusive or special rights to undertakings, it specifically explained that even if such exclusive right entails that competition on that specific market is eliminated, there is nothing in the Treaty that prohibits such arrangement, and hence, not the combined provisions in article 106(1) and 102 TFEU. The Court also confirmed that if monopoly, or the elimination of competition happened to be result of any additional state measure that extended a special or exclusive right, this would also not be incompatible with the Treaty. The Court further addressed the issue of what an abuse could comprise in, and mentioned as example for the TV-monopoly in Italy that unfair charges and terms of conditions applied on TV-users and

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133 Case C-155/73, Guiseppe Sacchi, [supra note 8], (hereinafter the case will be referred to in text as “Sacchi”)
134 Ibid., para 1
135 Ibid., paras 1 and 12.
136 Ibid., para 14.
137 Ibid.
discrimination on the basis of nationality when it came to select potential commercial suppliers could be such abusive conducts. The Court referred for such assessments back to the National Court.

4.2 Klaus Höfner and Fritz Elser v Macrotron GmbH

In this case, a German national law ensured that all forms of employment services were reserved for one national institution only, and that all contracts resulting from recruitment firms outside of that agency encountered the risk of annulment. Despite the exclusive right conferred upon that institution, consultants that specialised in recruitments for higher positions existed and were partially accepted on the market and Klaus Höfner and Fritz Elser (hereinafter referred to as Höfner) were consultants that provided such services. The dispute in the National Court regarded the remuneration that Höfner claimed from a consumer for using the service in question. The National Court referred to the CJEU for a preliminary ruling and asked among other things whether the national law establishing the monopoly over employment services was contrary to articles 106(1) and 102 TFEU. The Commission made a statement in the case and held that the maintenance of a monopoly comprises an infringement if the holder of the exclusive right lack the will or the possibility to deliver the service sufficiently according to the market demand. The Court judged that an abuse of a dominant position was established to exist when the undertaking appointed with exclusive rights through the mere exercise of that right was abusing its dominant position. The abuse thus consisted in the limitation in supply to consumers, which was derived from the circumstance that the undertaking couldn’t on its own satisfy the market and private actors were hindered by national law to carry out demanded, unfulfilled tasks sufficiently.

138 Case C-155/73, Guiseppe Sacchi, [supra note 8], para 17.
139 Ibid., para 18.
140 Case C-41/90 Klaus Höfner and Fitz Elser v Macrotron GmbH, [supra note 44].
141 Ibid., paras 3-4 and 10.
142 Ibid., paras 8 and 11.
143 Ibid., para 11.
144 Ibid., paras 1 and 12.
145 Ibid., para 18.
146 Ibid., para 29.
147 Ibid., para 37.
4.3 Criminal Proceedings against Paul Corbeau\textsuperscript{148}

In this case, a Belgian correctional court asked the CJEU in a preliminary reference, questions regarding the Belgian legislation establishing its postal monopoly’s compliance with article 102 and 106(1) TFEU.\textsuperscript{149} In the National Court, Mr Paul Corbeau was alleged with criminal charges for providing a service of mail collection and distribution, a service which was exclusively conferred upon the public undertaking Regie de Postes through the national legislation at issue.\textsuperscript{150} The service provided by Corbeau was described in the Court to differ in parts from services provided by Regie de Postes, since it fetched postal items at the sender for delivery given that the receiver remained in the same city.\textsuperscript{151} The Court first confirmed in accordance with previous case law that the Regie de Postes was an undertaking, and that it like all statuary monopolies, held a dominant position on the market, in the meaning of article 102 TFEU.\textsuperscript{152} The Court confirmed with reference to previous case law that article 102 TFEU could only be applied on anti-competitive conduct that was performed by the undertaking, and not on state measures as such.\textsuperscript{153} The Court then prompted that article 106(1) TFEU constructed a prohibition for Member States to adopt or maintain measures that are contrary to the Treaty, and thus, when granting exclusive rights to undertakings, although the creation of a dominant position was not considered to form an infringement in itself, to enact or maintain measures contrary to the Treaty was considered a Treaty infringement.\textsuperscript{154} The Court then confirmed that an abuse had been established, without indicating any conduct by the undertaking, by moving directly to test whether the state measure could be justified through the derogation rule in article 106(2) TFEU.\textsuperscript{155} The Court thus held that the national legislation was prohibited if it could be shown in the national court that the services offered by Corbeau did not compromise the economic equilibrium of the service performed by Regie de Postes.\textsuperscript{156}

\textsuperscript{148} C-320/91 Criminal Proceedings against Paul Corbeau, [supra note 11], (hereinafter the case will be referred to in text as “Corbeau”)
\textsuperscript{149} Ibid., para 1.
\textsuperscript{150} Ibid., para 2.
\textsuperscript{151} Ibid., Paras 4 and 21.
\textsuperscript{152} Ibid., paras 8-9.
\textsuperscript{153} Ibid., para 10.
\textsuperscript{154} Ibid., paras 11-12.
\textsuperscript{155} Ibid., paras 13-21.
\textsuperscript{156} Ibid., para 21.
A National Court of the Netherlands referred to the CJEU for a preliminary ruling due to a dispute that had arisen between the textile company Albany International BV (hereinafter referred to as Albany) and the pension fund Stichting Bedrifspensionsfonds Textielindustrie (hereinafter referred to as the fund) over some payments for statutory contributions and the possibility of being exempted from affiliation with the fund. According to national law, Albany was required to affiliate to a sectorial pension fund, and the impossibility to be exempted from it and instead chose the fund of its’ choice made the national court post the question whether or not it was precluded through article 102 in conjunction with 106(1) TFEU to confer on a pension fund the exclusive right to a supplementary pension scheme in a given sector. In this judgment, the Court found that the provisions did preclude such granting of exclusive rights due to its deteriorative effect on competition. With reference to the Höfner-case, the Court saw the similar lack of choices and hence the restriction on competition between the undertakings inability to get the best suitable recruitment service for their purposes and Albany’s inability to freely select a superior pension fund for its employees. In addition to that, the Court argued that if it could be assumed that some undertakings might want to select another, superior, pension fund available on the market, but were incapable of doing so due to the national legislation, the incapability of satisfying the market demand and hence the restriction of competition was an abuse and the direct effect of the exclusive right conferred on the pension fund.

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157 Case C-67/96, Albany International BV v Stichting Bedrifspensionsfonds Textielindustrie, ECR [1999] I-5751, (hereinafter the case will be referred to in text as “Albany”).
158 Ibid., paras 1-2, 27, 29-32.
159 Ibid., paras 5, 25, 88.
160 Ibid., paras 94 and 97.
161 Case C-41/90, Klaus Höfner and Fitz Elser v Macrotron GmbH, [supra note 44], para 34.
162 Case C-67/96, Albany International BV v Stichting Bedrifspensionsfonds Textielindustrie,[supra note 157], para 95.
163 Ibid., para 97.
4.5 Brentjens\textsuperscript{164} and Drijvende Bokken\textsuperscript{165}

The joined cases in Brentjens are more or less identical to Drijvende Bokken, which is why they are presented together. The cases address the system of compulsory affiliation to a supplementary pension scheme in the Netherlands. In the cases, National Courts of the Netherlands referred to the CJEU for a preliminary ruling by virtue of action that had risen between employers and two different pension funds operating in different labour sectors.\textsuperscript{166} The main proceedings regarded the employers’ refusal to pay contributions to the respective funds, based on the claim that compulsory affiliation to the funds was contrary to the Treaty rules.\textsuperscript{167}

One of the questions posted by the National Court questioned whether article 106(1) TFEU read in combination with article 102 TFEU precluded authorities to grant to a fund, an exclusive right to manage a supplementary pension scheme in a given sector.\textsuperscript{168} In both cases, the Court followed the same proceedings as in the other cases and could confirm that the fund was an undertaking granted an exclusive right, which upheld a dominant position in accordance with articles 102 TFEU and 106(1) TFEU.\textsuperscript{169} The Court referred to the Höfner-case and stated that abuse of dominant position could consist in an undertaking’s failure to satisfy the market demand and maintained the position that a Member State was in breach of article 106(1) TFEU first when the undertaking conferred with exclusive rights couldn’t avoid infringing its dominant position, given that it was a mere consequence of the exclusive right.\textsuperscript{170} In order to decide whether such abuse existed in the cases the court considered the benefits available from the fund and confirmed that they were generally inadequate since the benefits were too low and did not correspond to wages in a satisfying manner and that undertakings might want to affiliate to a superior option.\textsuperscript{171} The Court further held that given the system of compulsory affiliation to the funds, undertakings were deprived the freedom to affiliate to another pension scheme, and hence, the market demand was not satisfied by the undertaking conferred with exclusive

\begin{footnotesize}
\textsuperscript{164} Joined Cases C-115/97, C-116/97, Brentjens, ECR [1999] l-06025.
\textsuperscript{165} Case C-219/97, Drijvende Bokken, ECR [1999] l-06121.
\textsuperscript{166} Joined Cases C-115/97, C-116/97, Brentjens,[supra note 164], paras 1-2., and Case C-219/97, Drijvende Bokken [supra note 165], paras 1-2.
\textsuperscript{167} Joined Cases C-115/97, C-116/97, Brentjens,[supra note 164], para 2.
\textsuperscript{168} Ibid. para 88.
\textsuperscript{169} Joined Cases C-115/97 to C-116/97, Brentjens,[supra note 164], paras 90-92., and Case C-219/97, Drijvende Bokken [supra note 165], paras 80-82.
\textsuperscript{170} Joined Cases C-115/97 to C-116/97, Brentjens,[supra note 164], paras 93 and 95., and Case C-219/97, Drijvende Bokken [supra note 165], para 83.
\textsuperscript{171} Joined Cases C-115/97 to C-116/97, Brentjens,[supra note 164], paras 94 and 97., and Case C-219/97, Drijvende Bokken [supra note 165], paras 84-87.
\end{footnotesize}
right, which in the two cases was described as the restriction of competition. The Court then moved on to investigate whether the fund (and the exclusive rights) could be justified through article 106(2) TFEU, thus confirming that an abuse of a dominant position existed.

4.6 Pavel Pavlov and Others

A National Court in the Netherlands referred to the CJEU for a preliminary ruling by reason of a dispute between on the one side, Mr Pavel Pavlov (a medical specialist), and others with the same occupation (hereinafter referred to as Pavlov and others) and on the other side, the pension fund Stichting Pensioenfonds Medische Specialisten (hereinafter referred to as the fund). The dispute had occurred when Pavlov and others had refused to pay their contributions to the fund, claiming that since the membership of the fund was compulsory, the fund was contrary to, among other Treaty provisions, articles 106(1) and 102 TFEU. The National Court asked whether the conferral of exclusive right to manage such supplementary pension scheme for members of a particular profession was precluded by abovementioned articles, read in conjunction. The Court concluded that the fund was an undertaking that held a dominant position in a substantial part of the internal market due the exclusive right granted to it, in accordance with articles 106(1) and 102 TFEU. Along with established case law, the Court reaffirmed that the mere creation of such dominance as a result of a state measure was not an abuse in itself, and held that Member States would only be in breach of article 102 TFEU in combination with article 106(1) TFEU if the undertaking by exercising the exclusive right would abuse, or was put in a position where it was led to abuse, its dominant position. The Court then pointed out, with reference to the Höfner-case, that an abusive conduct could consist in that the undertaking conferred with exclusive right failed to satisfy the demand on the specific market. In this case the Court however went further to examine whether there actually existed

172 Joined Cases C-115/97 to C-116/97, Brentjens,[supra note 164], paras 96-97., and Case C-219/97, Drijvende Bakken [supra note 165], para 87.
173 Joined Cases C-115/97 to C-116/97, Brentjens, supra note 164, para 98, and Case C-219/97, Drijvende Bakken [supra note 165], para 88.
174 Joined Cases C-115/97-C-117/97, Pavel Pavlov and Others, [supra note 37], (hereinafter the case will be referred to in text as “Pavlov”).
175 Ibid., paras 1-2.
176 Ibid., para 2.
177 Ibid., para 120.
178 See to that effect chapter 2 in this thesis where the Court’s discussion on that matter is further developed.
179 Ibid., para 127.
180 Ibid.
an unsatisfied demand on the market, and whether such market failure could have been directly derived from the state measure, the exclusive right.\textsuperscript{181} Due to the lack of evidence to prove that the fund did not satisfy the needs of Pavlov and others and when it came to establish that the possible abuse could be derived directly from the fund’s exercise of its exclusive right, the Court could not find that the Member State had infringed article 106(1) read in combination with article 102 TFEU.\textsuperscript{182}

4.7 \textit{AG2R Prévoyance v Beaudout Père et Fils SARL} \textsuperscript{183}

A French National Court referred to the Court of Justice for a preliminary ruling due to some questions that had arisen in a dispute between the social insurance institution, \textit{AG2R Prévoyance} (hereinafter referred to as AG2R), and the \textit{Beaudout Père et Fils SARL} (hereinafter referred to as Beaudout), an undertaking specialised in bakery.\textsuperscript{184} The dispute had risen for the reason that Beaudot had refused to join a complementary insurance scheme with compulsory affiliation by virtue of national legislation and codes that was managed by AG2R, and instead, chosen another insurance company to provide similar service.\textsuperscript{185} Beaudout had claimed that the law which granted AG2R the exclusive right to manage such insurances was unlawful and the National Court had identified that there was no legal way to exempt from the compulsory affiliation, and posted for that reason questions to the Court of Justice on the national legislation’s compatibility with, among other articles, articles 106(1) and 102 TFEU in combination.\textsuperscript{186} When answering that question, the Court first referred to the National Court to decide under the circumstances if AG2R actually was an undertaking in the meaning of article 102 TFEU, and then confirmed that if it would be addressed as such, it was also a statutory monopoly in a substantial part of the internal market with a dominant position which made article 102 TFEU applicable.\textsuperscript{187} The court than relied on previous case law and reaffirmed that the mere creation of a dominant position was not in itself an abuse.\textsuperscript{188} When deciding whether

\textsuperscript{181} Joined Cases C-115/97-C-117/97, Pavel Pavlov and Others, [supra note 37], paras 128-129.
\textsuperscript{182} Ibid., paras 129-130.
\textsuperscript{183} Case C-437/09, AG2R Prévoyance v Beaudout Père et Fils SARL, [supra note 46], (hereinafter the case will be referred to in text as "AG2R")
\textsuperscript{184} Ibid., para 2.
\textsuperscript{185} Ibid., paras 3, 4, 6 and 18.
\textsuperscript{186} Ibid., paras 21-22.
\textsuperscript{187} Ibid., paras 40-42 and 66-67.
\textsuperscript{188} Ibid., para 68.
AG2R actually was abusing its dominant position, the Court referred to the Höfner-case, where the court had ruled that abuse could exist in an unfulfilled market demand, and that such was the case if there were insurance companies offering a better cover for Beaudout than the compulsory option. The Court confirmed that in relation to the state measure, the abuse or the unsatisfied market demand could be directly derived, which indicated that the Member State had enacted or maintained a measure that conflicted with the Treaty provisions, which could have formed an infringement. The Court then referred to the opinion of the AG that stated that it was never shown in the National Court or in the further proceedings that the insurance company chosen by Beaudout actually provided a better cover than the compulsory one offered by AG2R. With no further examination on whether an abuse was established or not, the Court moved on to assessing whether AG2R could be an undertaking conferred with services of general economic interests, so that Treaty infringements could be justified by virtue of article 102 TFEU. The Court concluded that AG2R was such undertaking, and articles 106(1) and 102 TFEU applied in conjunction, therefore did not preclude the state measure in question due to the derogation in article 106(2) TFEU.

4.8 Analysis of the Cases

In Sacchi, the Court was firm on the notion that the mere creation of exclusivity and the elimination of competition due to such granting can never, in itself, constitute an abuse of a dominant position. The Court further insisted that a particular conduct and not just the state measure in itself, was needed to be established in order for an abuse to exist. In Höfner, the Court considered the national law as a state measure that infringed article 106(1) TFEU since the Member State maintained a law under which the appointed undertaking could not avoid but infringing article 102 TFEU. The Court considered the unfulfilled market demand as an abusive conduct that was the direct effect of the state measure, and hence, no additional conduct from the undertaking was needed in order to establish an abuse of a dominant position. This is not necessarily in contrast to the Sachhi-judgment, since that judgment merely stated that the elimination of competition was not in itself an abuse and that a particular conduct was needed.

189 Case C-437/09, AG2R Prévovance v Beaudout Père et Fils SARL, [supra note 46], paras 69-70.
190 Ibid., paras 25 and 71.
191 Ibid., para 72.
192 Ibid., para 73.
193 Ibid., para 81.
In the Höfner-case, the conduct existed due to the elimination of competition, but if the market did not demand additional services, the mere distinction of competition would not in itself have constituted an infringement. The CJEU in Corbeau clearly indicated that the state measure, in that case the granting of an exclusive right, could not in itself constitute an abuse of a dominant position. The Court however applied articles 106(1) and 106(2) TFEU simultaneously, and by that, the Court did not elaborate on the abusive conduct. In this way, it seems like the Court avoided to assess if an abusive conduct existed since a justification through article 106(2) TFEU could be made. This could be interpreted as the ambition of the Court to broaden the applicability of article 106(1) TFEU, indicating that a state measure can be abusive in itself, in relation to article 102 TFEU.\(^{194}\) It could however be argued that the same abuse as in Höfner, the unfulfilled market demand, was present, since the service provided by Mr Corbeau was superior for some consumers in relation to the services provided by the postal monopoly. Such argumentation was not spelled out in the judgment, and the Court consequently made way for a vaguer interpretation of what could constitute an abuse in terms of public undertakings and undertakings granted exclusive rights, in relation to article 102 TFEU. By that, the interpretation of article 106(1) TFEU is given a more independent role, since no actual abuse was constructed in order to establish that the undertaking due to the state measure, had abused its dominant position. The mere occurrence of an unfulfilled market demand was again proved to be sufficient in order to constitute an abuse of dominant position in Albany, (due to the effect’s direct link to the state measure). It is clear by the Court’s reasoning that it is the incapability of choosing a superior option than the one attached with the exclusive right that is abusive and not the lack of competition in the sense of too few options available for the consumers on the market. That should implicate that granting of exclusive rights would lead the undertaking to abusive conduct only as long as there are other superior options imaginable (although not legally available). The same reasoning is present in Brentjens and Drijvende Bokken which contributes to its generalizability. With the Pavlov-judgment, the Court illustrates this further, by not considering the lack of choice over affiliation as an abuse but stating that it needed to be proved that the compulsory option was not sufficient enough for the market demand. That is, the lack of choices did not constitute an abuse, but it was necessary to be proved that consumers had unfulfilled demands in order to establish an abuse, which they didn’t attempt to in the case. This judgment could also be interpreted as indicating that there must be a potentially better

alternative to the service provided by the monopoly in order for it to fail to satisfy the market, since that would exemplify how insufficient the only option is. The AG2R-judgment illustrates that even if there are other options available besides the compulsory one (although illegal options), and the consumer actually had chosen such option instead of the compulsory, it still needs to be proved that such option is better in a comparable way, in order for the undertaking conferred with exclusive rights to be abusing its dominant position. This judgment strongly adds up to the generalizable notion that the lack of options, and hence elimination of competition or the exclusivity in itself, is not considered an abuse, but the conduct of not suffice the market demand is. It could be argued that unfulfilled market demand comes naturally with the establishment of a monopoly, and hence, that the granting of such exclusivity is the actual abuse in the abovementioned cases, thus contradicting the idea that the granting of an exclusive right can never be considered an abuse in itself. However, these abovementioned cases clearly indicate the opposite, since although competition is eliminated in all, there are cases were the exclusive right will lead the undertaking to abuse and cases were exclusive rights will not lead the undertaking to abuse. In terms of conditions laid out in article 102 TFEU, the conjunction with article 106(1) TFEU does not in these cases remove the requirement of an abusive conduct (except for perhaps in Corbeau). The cases thereby confirm that state measures derived from article 106(1) TFEU cannot be addressed as abusive conducts in themselves, but the distinction is rather fine. It is worth to mention in terms of unfulfilled demands as the abusive conduct, that the possibility for Member States to grant exclusive rights is made more unpredictable. This is due to the difficulties of overlooking market developments in advance, and hence, Member States will struggle to assess how insufficient the only option might be in relation to article 102 TFEU. In the following section, this established way of reasoning around the requirement of an abusive conduct is challenged by the Court’s judgments where the creation or maintenance of dominance as the result of a state measure actually constitutes an abuse in itself.
5. When Dominance Constitutes Abuse

As has been stated in the previous chapter, the mere existence of dominance is not in itself prohibited as an abuse by article 102 TFEU (dominance is a requisite for article 102 TFEU to apply, not an abuse in itself). This should apply also when article 102 TFEU is applied in conjunction with article 106(1) TFEU, or else the function of that article as a way for Member States to grant certain undertakings exclusive rights would not prevail. When creating state monopolies or when undertakings are given certain rights that make them dominant on a market, it is given that competition is affected. In the following section, two particular conducts that are potentially abusive are addressed: when equality of opportunity between actors on a market is distorted, and when reinforcement or extension of a dominant position eliminates competition on an additional market. These types of conducts are of particular interest to the discussion whether the mere creation or maintenance of dominance actually can be enough to constitute an abuse of a dominant position, which is the second research question in this paper. The strength of the link between abusive conduct and the state measure and how abuse is constructed have been discussed in the two previous chapters and will remain questionable in relation to the phenomena of dominance as the abusive conduct. In the recent case, *Commission v DEI*, the CJEU annulled the GC’s judgment in favour of a broader interpretation of how dominance in itself could constitute an abuse. Due to the complexity of that judgment, it will dealt with more extensively compared to the other cases. That judgment also indicates on the current interpretation of the functioning of the combined provisions, which is why it will be given a more prominent role in the analysis.

5.1 RTT v GB-Inno-BM SA

This case was initiated with a dispute in a Belgian National Court, where *Régié des Télégraphes et des Téléphones* (hereinafter referred to as RTT) claimed that the company *GB-Inno-BM SA* (hereinafter referred to as GB-Inno) by providing with non-approved telephones for sale on the

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195 Case C-18/88, *RTT v GB-Inno-BM SA*, ECR [1991] I-5941, (hereinafter the case will be referred to in text as "RTT v GB-Inno").
market had infringed on RTT’s exclusive right to supply and approve equipment connected to the national telephone network that was granted to RTT by virtue of national law. GB-Inno on the contrary claimed that the exclusive right of RTT led it to abuse its monopoly position by favouring equipment that was either RTT’s own, or approved by itself. The National Court referred to the CJEU to answer questions on the national law’s compatibility with the Treaty. The relevant market for which the exclusive right was granted was determined to be the market for establishment and operation of the telephone network, the Court however confirmed that the exclusive right had extended to also eliminate competition on the market for importation, marketing, connection, commissioning and maintenance of equipment for connection to telephone network. According to the Court and based on previous case law on the application of article 102 TFEU, an abuse could consist in a dominant undertaking’s reservation of an ancillary activity on a neighbouring but different market, if it had the possibility to eliminate all competition on such market. The extension of a monopoly to a neighbouring but separate market constituted an abuse of dominant position in accordance with article 102 TFEU, according to the Court. That interpretation of article 102 TFEU, was read in conjunction with article 106(1) TFEU, and the Court held that the Member State was considered to have infringed the Treaty rules if the exclusive rights granted by the state did put public undertakings or undertakings conferred with exclusive rights in positions where such undertakings “could not attain themselves by their own conduct” without abusing a dominant position in accordance with article 102 TFEU. It was thus made clear from the court that if an extension of a dominant position was the result of a state measure regarding public undertakings or undertakings granted special or exclusive rights, it constituted such conduct that was considered abusive in accordance with article 102 TFEU read in conjunction with article 106(1) TFEU. The Court also clarified that it was the extension of the monopoly in itself which infringed the two provisions, and in that sense, no other abusive conduct by RTT was considered necessarily in order to create an infringement of articles 106(1) and 102 and in conjunction.

196 Case C-18/88, RTT v GB-Inno-BM SA, [supra note 196], para 2.
197 Ibid., para 4.
198 Ibid., para 1.
199 Ibid., para 19.
200 Ibid., para 18.
201 Ibid., para 19.
202 Ibid., para 20.
203 Ibid.
204 Ibid., para 21.
205 Ibid., para 24.
5.2 Criminal Proceedings against Silvano Raso and Others

In a criminal proceeding against Silvano Raso and others in an Italian National Court, questions were referred to the CJEU for a preliminary ruling, and among them, the question whether a national legislation ought to be precluded due to the provisions in articles 106(1) and 102 TFEU in combination. The alleged parties were accused for unlawful supply of labour in accordance contrary to a prohibition that stemmed from a national provision that reserved for a previous statuary monopoly in the dock work market to supply other authorised companies on the market with temporary labour. The relevant regulation did not only grant abovementioned exclusive right, but also enabled for the previous statuary monopoly to compete with other authorised dock work-companies in the supply of dock work services in the port in question. The Court confirmed that the undertaking conferred with exclusive rights enjoyed a dominant position since its relevant market was also a substantial part of the inner market. Consequently, The Court relied on established case law and reiterated that the Member State would be in breach of the articles 106(1) and 102 TFEU first when the undertaking, merely by exercising the exclusive right granted to it, or due to such right was put in a situation where it, was led to abuse its dominant position. The Court considered whether equal conditions of competition among the competitors on the secondary market prevailed despite the monopoly to supply temporary labour, and argued that the granted exclusive rights, merely by being exercised, enabled for the previous monopoly to distort those conditions to its own advantage. It was therefore held that the national law was a state measure in itself contrary to the Treaty rules, and it was hence not necessary for the national court to distinguish an additional abusive conduct to prove that matter. It was however specified in the judgment that the undertaking due to its exclusive right was led to abuse its dominant position by demanding disproportionately high prices for the supply of labour or by supplying labour less suitable to its competitors.

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206 Case C-163/96, Criminal Proceedings against Silvano Raso and Others, ECR [1998] I-553, (hereinafter the case will be referred to in text as “Raso and Others”).
207 Ibid., paras 1-2 and 21.
208 Ibid., paras 15 and 19-20.
209 Ibid., para 17.
211 Ibid., para 27.
212 Ibid., paras 28-29.
213 Ibid., para 31.
214 Ibid., para 30.
judged that the combined provisions in article 102 and article 106(1) TFEU precluded such national legislation that reserved for one dock work-company the right to supply undertakings with temporary labour since it was also authorised to carry out the same services as such undertakings.\textsuperscript{215}

5.3 \textbf{Connect Austria v Telekom-Control-Kommission}\textsuperscript{216}

The Austrian telecom company, \textit{Connect Austria Gesellschaft für Telekommunikation GmbH} (hereinafter referred to as Connect Austria) had brought to proceedings in a National Court due to the decision by the \textit{Telekom-Control-Kommission} to allocate to a public undertaking who already enjoyed the exclusive licence to provide digital mobile telecommunication-services in accordance to the older frequency band, additional frequencies in the frequency band reserved for a different standard, without imposing a separate fee.\textsuperscript{217} The decision was opposed by Connect Austria since new operators on the market had to pay a fee to be able to use the same frequency band.\textsuperscript{218} The National Court referred to the CJEU for a preliminary ruling and asked among other things, whether the CJEU’s interpretation of articles 106(1) and 102 TFEU precluded such allocation of rights to a public undertaking with dominant position on the market.\textsuperscript{219} The Court mentioned the importance that the National Court assessed the relevant market in this case, in order to establish if the public undertaking actually enjoyed a dominant position and on which specific market in that case.\textsuperscript{220} The Court judged that Member States were in breach of the combined articles 106(1) and 102 TFEU when a public undertaking, or an undertaking granted special or exclusive rights, if a state measure such as national law, regulation or administrative provision created a situation in which the undertaking could not avoid abusing its dominant position.\textsuperscript{221} The Court specified that such situation could exist where the undertaking in question as a result of the state measure, adopted a conduct which, by distorting competition, reinforced its dominant position or extended the dominant position in to

\textsuperscript{215} Case C.163/96, \textit{Criminal Proceedings against Silvano Raso and Others}, [supra note 207], para 32.
\textsuperscript{216} C-462/99, \textit{Connect Austria v Telekom-Control-Kommission}, [supra note 52], (hereinafter the case will be referred to in text as “Connect Austria”).
\textsuperscript{217} Ibid., paras 1 and 2.
\textsuperscript{218} Ibid., paras 2 and 28.
\textsuperscript{219} Ibid., paras 1 and 29.
\textsuperscript{220} Ibid., paras 74-77.
\textsuperscript{221} Ibid., para 80.
a neighbouring but separate market. According the Court, competition was distorted as the equal opportunities among economic operators no longer could be ensured due to the way the undertaking in question benefited from the frequency allocation and hence was given different opportunities than its competitors to compete on the market, as a direct result of the state measure. Depending on how the National Court assessed the relevant market in question, it could also be addressed that the undertaking had distorted competition by either reinforcing its dominant position on the same market, or by exceeding its dominant position into a separate, but neighbouring market. The Court concluded that given that the fee imposed only on new competitors actually created different opportunities for market players (an assessment to be done by the National Court and which included complicated economic evaluation of the fee that the public undertaking had paid for access to the first frequency band) the national law that allocated the frequency band was precluded by the provisions in articles 106(1) and 102 TFEU.

5.4 MOTOE v Elliniko Dimosio

A conflict in a National Court of Greece had arisen between a Greek Motorcycling Federation, Motosykletistiki Omospondia Ellados NPID (hereinafter referred to as MOTOE) and the Greek State, Elliniko Dimoso (hereinafter referred to as the State) regarding financial compensation for the harm MOTOE claimed to have suffered from the State’s refusal to grant it authorization to organise motorcycling competitions. According to the Greek Road Traffic Code, all competitions involving motor vehicles had to be authorized by the Minister of Public Order, as well as consented by the Greek representative of the International Motorcycling Federation, which in this case was the Elliniki Leskhi Afiokinikton Kai Perigiseon (hereinafter referred to as ELPA) before they were allowed to take place. MOTOE learned that its application was not consented by ELPA (who besides from handling applications, also organized motor competitions and engaged in sponsor agreements on its own) and brought to proceedings where the National Appeal Court eventually referred to The Court of Justice for a preliminary ruling.

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222 C-462/99, Connect Austria v Telekom-Control-Kommission, [supra note 52], paras 81-82.
223 Ibid., para 84.
224 Ibid., paras 82 and 85.
225 Ibid., para 95.
227 Ibid., paras 1-2.
228 Ibid., para 3.
over the Greek Road Traffic Code’s compatibility with Treaty rules 106(1) and 102 TFEU.\textsuperscript{229} The CJEU referred to previous case law to establish that the articles 106(1) and 102 TFEU, were infringed already when a state measure resulted in a risk for the undertaking to abuse its dominant position.\textsuperscript{230} The Court argued for this purposes in relation to the system of undistorted competition, such as provided by the Treaty, and held that it could only be guaranteed if equality of opportunity among participators on a market was secured.\textsuperscript{231} By stating that, the Court concluded that the right granted to ELPA distorted competition since the equality of opportunity no longer could be guaranteed:

“To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount de facto to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors [...]”\textsuperscript{232}

The Court thus judged that the national provision was incompatible with articles 106(1) and 102 TFEU, read in conjunction.\textsuperscript{233}

\section*{5.5 Firma Ambulanz Glöckner\textsuperscript{234}}

\textit{Firma Ambulanz Glöckner} (hereinafter referred to as Glöckner) was a private provider of non-emergency patient transport services in Germany and initiated legal proceedings against the \textit{Administrative District Landkreis Südwestpfalz} (hereinafter referred to as Landkreis) after they had refused to renew the authorisation to provide these services.\textsuperscript{235} According to established regional law, Landkreis was appointed by the state to grant authorisations to provide emergency

\begin{footnotesize}
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\item \textsuperscript{229} Case C-49/07, \textit{MOTOE v Elliniko Dimosio}, [supra note 226], paras 10, 16 and 19.
\item \textsuperscript{230} Ibid., para 50.
\item \textsuperscript{231} Ibid., para 51.
\item \textsuperscript{232} Ibid.
\item \textsuperscript{233} Ibid., paras 52-53.
\item \textsuperscript{234} Case C-475/99, \textit{Firma Ambulanz Glöckner}, [supra note 14], (hereinafter the case will be referred to in text as “\textit{Ambulanz Glöckner}”).
\item \textsuperscript{235} Ibid., paras 1-2.
\end{itemize}
\end{footnotesize}
patient transport services to recognised medical aid organisations and to grant authorisations to provide with non-emergency transport services to private independent operators after an assessment based on efficiency, reliability and professional qualifications of the operators. However, Glöckner who had previously enjoyed such authorisation, was refused renewal since Landkreis argued that a new law precluded them to grant authorisation to independent operators when that was likely to have a considerable adverse effect on the impact of the public ambulance services, and since such medical aid organisations were operating at a loss with underutilized capacities at the time, the refusal was considered legitimate. The National Court referred to the CJEU for a preliminary ruling and posted questions including whether or not the granting of exclusive rights to provide ambulance services was in conflict with article 106(1) TFEU read in conjunction with article 102 TFEU. The CJEU first confirmed that the medical aid organisations were undertakings in the meaning of the Treaty and that the undertakings were granted special or exclusive rights in the meaning of article 106(1) TFEU, without assessing any distinction between these different rights. The Court further referred back to the National court to determine the relevant market or markets for the ambulance services and if any of the, or the combined, medical aid organisations held a dominant position on a substantial part of the Internal market. The Court noted the importance that a possible dominance on the market was not in itself the creation of an abuse, but that the undertaking should be put in a position due to the exclusive or special right granted to it where it, merely by exercising it, was led to abuse its dominant position. The Court then assessed whether the medical aid organisations’ previous exclusive right to the emergency transport market had extended with the new regional law to also include the market for non-emergency transport services. The Court relied for that purpose on the RTT v GB-Inno-judgment that it was established case law that abuse of a dominant position existed where an undertaking held a monopoly on one market and then extended this position by eliminating all competition on a neighbouring but different market, and since the possible extension in this case was the direct effect of a state measure, it constituted an abuse of dominant position prohibited through the combined articles 106(1) and

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236 Case C-475/99, Firma Ambulanz Glöckner, [supra note 14], paras 4-7.
237 Ibid., paras 9 and 13.
238 Ibid., paras 9 and 13.
239 Ibid., paras 15 and 17.
240 Ibid., paras 19-22 and 25.
241 Ibid., para 36.
242 Ibid., para 40.
243 Case C-18/88, RTT v GB-Inno-BM SA [supra note 195], para 18.
The Court held that it was indeed due to the regional legislation that the medical aid organisations had extended their exclusive right to also include the exclusive right to non-emergency transport services, and that this had the effect of limiting markets for consumers, which constituted an exemplified abusive conduct in article 102(c) TFEU.  

5.6 Commission v DEI

The Commission Decision

This case has its origin in 2003 when the Commission received a complaint from an individual, informing them that based on Greek law, the Greek State had maintained a granted exclusive license to explore and exploit Lignite used for electricity production conferred upon the undertaking Dimosia Epicheirisi Ilektrismou AE (hereinafter referred to as DEI). The electricity market in Europe was (since January 2001) liberalised by virtue of the transposition of the EU directive on common rules for the internal market for electricity. DEI was the former legal electricity monopoly which after liberalisation of the market had managed to keep its position as the main electricity generator and supplier in Greece due to the maintenance of the exclusive right to Lignite. When the market was liberalised, DEI converted into a company limited by shares, where the state kept 51.12% of the ownership.

The complaint was communicated to the Greek Republic and to DEI, and later formulated in a Commission Decision, where the granting of the exclusive right was considered a state measure in breach of articles 102 and 106(1) TFEU, since the quasi-monopolistic access to Lignite resulted in the opportunity for DEI to maintain a dominant position also on the wholesale electricity market, by excluding or hindering new market players from entering. The Commission thus held in its decision that the state measure to grant exclusive access to lignite to DEI constituted an abuse of dominant position in violation of article 102 TFEU.

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244 Case C-475/99, Firma Ambulanz Glöckner, [supra note 14], para 40.
245 Case C-475/99, Firma Ambulanz Glöckner, [supra note 14], paras 41-43.
246 Case C-553/12 P, Commission v DEI, [supra note 17].
247 At the time for the initiation of the proceedings, the undertaking in question was referred to as “Public Power Corporation S.A (PPC)”. In this paper however it will be referred to as “DEI”, as stated above.
248 Commission Decision C(2008) 824 final of 5 March 2008, concerning the grant or maintenance by the Hellenic Republic of rights in favour of Dimosia Epicheirisi Ilektrismou AE (DEI) for the extraction of lignite, para 117.
249 Ibid., para 4.
252 Ibid., paras 4-5.
253 Ibid., para 238.
distorted competition in the sense that it created inequality of opportunity between economic operators on the wholesale for electricity market.\textsuperscript{254}

\textit{The judgement of the GC}

With support from the Greek State, DEI appealed the Commission’s Decision and claimed before the GC that the Court annulled the Decision.\textsuperscript{255} DEI held for that matter that in all previous case law where the abuse lied in the extension of a dominant position, such abuse was derived from an exclusive right as the decisive state measure.\textsuperscript{256} DEI argued to that fact that they were not beneficiaries of any exclusive right since there was a possibility that other undertakings also could get access to Greek lignite in the future, they also argued that they were not granted a special right since there was no state decision that regulated how many undertakings that could benefit from the access to lignite.\textsuperscript{257} To that concern, the GC judged that DEI was not conferred with exclusive or special rights in accordance with article 106(1) TFEU, and therefore it could not be held that an abuse of a dominant position was established by conduct of exceeding its dominant position into a neighbouring market.\textsuperscript{258} DEI further held that the Commission other than that had failed to indicate the nature of the abusive conduct they were supposed to have committed, and argued further that they could not be held responsible for any abusive conducts directed at their competitors.\textsuperscript{259} DEI also argued that there was no harm to competition itself or to consumers attached with their presence on the market.\textsuperscript{260} The GC assessed the contested decision and stated that in order for a Treaty infringement to be established in accordance with the combined articles of 106(1) and 102 TFEU, the nature of at least a potential abuse must be specified.\textsuperscript{261} The GC further confirmed DEI’s remark that the Commission had failed to provide with an actual or potential abuse that could be derived from the state measure.\textsuperscript{262} The GC held that the Commission’s attempt to establish an abuse due to the mere fact that the undertaking was enjoying a dominant position on the market could not in itself constitute an abuse of a dominant position.\textsuperscript{263} The GC also commented previous case law, relied on by the Commission, where the state measure had led to the creation of inequality of

\textsuperscript{256} Ibid., para 61.
\textsuperscript{257} Ibid., para 62.
\textsuperscript{258} Ibid., para 83.
\textsuperscript{259} Ibid., para 63.
\textsuperscript{260} Ibid., paras 63-64.
\textsuperscript{261} Ibid., para 86.
\textsuperscript{262} Ibid., para 93.
\textsuperscript{263} Ibid., para 103.
opportunities, and argued that it did not follow from such judgments that the mere creation of inequality of opportunities due to a state measure was sufficient to establish an abuse of a dominant position, without identifying an abuse that followed from the same state measure.\textsuperscript{264} The GC therefore annulled the Commission’s Decision and held for that matter that for an infringement to be established through articles 102 and 106(1) TFEU, it must have been established that the undertaking conferred with exclusive or special rights must have been led by, or could have been led by the state measure to abuse its dominant position.\textsuperscript{265}

\textit{The Judgment of the CJEU}

The Commission appealed to the CJEU and argued that it ought to set aside the judgement of the GC since the previous judgement contained error in the interpretation and application of the two articles applied in conjunction and based on the notion that the GC’s reasoning was deficient, incorrect and based on insufficient reasoning.\textsuperscript{266} The Commission based its appeal on the principle of inequality of opportunities between economic operators, which they claimed held that the state measure in itself constituted an infringement to the combined articles since distortion of competition on the wholesale market for electricity could be derived from the state action in question.\textsuperscript{267} The Commission further pointed out their previous argument that there existed a risk of abuse of a dominant position given the preventive effect the exclusive rights had on new competitors’ possibilities to enter the wholesale market.\textsuperscript{268} DEI and the Greek Republic maintained with the argumentation of the GC, and held that an abusive conduct derived from the state measure must be established in order for Treaty infringement to exist in accordance to articles 106(1) and 102 TFEU.\textsuperscript{269} Attached to that, DEI and the Greek State also revealed their concern that by ignoring the fact that at least a possible abusive conduct must be derived from the state measure in question to establish a Treaty infringement, article 106(1) was given too broad interpretation, indicating that it could then be held that it could be applied to establish abuse without being connected to article 102 TFEU: \textit{“The Commission is seeking in essence to transform Article 86(1) EC [now Article 106(1) TFEU] into an autonomous, higher-ranking provision.”}\textsuperscript{270} In its reasoning the CJEU held based on previous case law that a Member State is in breach of the Treaty provision if a state measure gives rise to a risk of an

\textsuperscript{264} Case T-169/08, \textit{DEI v Commission}, [supra note 255], paras 104-105, 109, 111, 113 and 118.
\textsuperscript{265} Ibid., paras 118-119.
\textsuperscript{266} Case C-553/12 P, \textit{Commission v DEI}, [supra note 17], para 33.
\textsuperscript{267} Ibid., para 34.
\textsuperscript{268} Ibid., para 37.
\textsuperscript{269} Ibid., para 38.
\textsuperscript{270} Ibid.
abuse of a dominant position, relying on the fact that it is not necessary to establish that an abuse should actually occur.\textsuperscript{271} The CJEU interpreted the case law especially derived from \textit{Connect Austria} in a different manner than the GC did, explaining that it followed from that judgment that if inequality of opportunity results from a state measure, it is enough to establish an infringement on article 106(1) and 102 TFEU.\textsuperscript{272} By referring to the opinion of the AG, the CJEU further argued that it was enough for the Commission in order to establish such infringement to “identify a potential or actual anti-competitive consequence liable to result from the state measure at issue”.\textsuperscript{273} Furthermore, the Court specified that besides the establishment of an anti-competitive consequence that was liable to result from the state measure at issue, there was no need of any additional abuse to be identified.\textsuperscript{274} The CJEU also assessed whether DEI could have committed an abuse by exceeding its dominant position into a neighbouring but separate market and held in contrary to the GC’s interpretation that it was not necessary for the undertaking to be conferred with exclusive or special rights for that to be established, since DEI was undoubtedly a public undertaking, to which the combined articles 106(1) and 102 TFEU also applied.\textsuperscript{275} The Court therefore annulled the previous judgment of the GC in that matter and referred it back to the GC to address remaining alternative questions that were not addressed in the previous judgment of the GC.\textsuperscript{276}

5.7 Analysis of the Cases

In \textit{RTT v GB-Inno}, the Court relied on case law confirm that an abuse of a dominant position could consist in the extension of dominance into a separate market. In comparison to that previous case law where a state measure was not in itself addressed as the source of the abuse,\textsuperscript{277} this judgment viewed the abuse as a direct effect of the granting of an exclusive right, since the undertaking was considered unable to, by its own conduct, avoid the elimination of competition on the market attached to its approval service. The infringement thus consisted merely in the extension of the dominance which followed from the exclusive right. It was however present in the case that the exclusive right did not decide how RTT would act when approving equipment.

\textsuperscript{271} Case C-553/12 P, \textit{Commission v DEI}, [supra note 17], paras 41-42.
\textsuperscript{272} Ibid. para 44-45
\textsuperscript{273} Ibid. para 46
\textsuperscript{274} Ibid. para 47
\textsuperscript{275} Ibid. para 68
\textsuperscript{276} Ibid. para 70
\textsuperscript{277} C-311/84 CBEM [supra note 12], paras 26-27.
and thus, it is not given that all competition necessarily would disappear on the secondary market, but merely that RTT enjoyed the advantage of being both the approver of goods on one market, and a market player on the attached market. The additional dominance that RTT potentially had gained from the side effects of the exclusive right was thus enough to establish an abuse of a dominant position. In Ambulanz Glöckner, the Court relied on the RTT v GB-Inno-judgment to indicate that an abuse was established according to article 102(c) and 106(1) TFEU if undertakings conferred with exclusive rights on one market, merely by the exercise of such rights also eliminated all competition on a separate but neighbouring market. This judgment is a stronger indication that exceeding dominance derived from a state measure that grants an exclusive right can constitute an abuse of dominant position. This since RTT merely gained a beneficial position on the secondary market while the Medical aid organisations actually eliminated all competition on the secondary market, as the direct effect of the exclusive right. In Raso and Others, the Court never claimed that the undertaking conferred with an exclusive right in one market was eliminating all competition in a secondary market to which it also had access, but held that it distorted competition through the establishment of inequality of conditions between the competitors, which was enough to constitute a Treaty infringement in accordance with articles 106(1) and 102 TFEU. This judgment can thus be interpreted as an extension of the judgment in RTT v GB-Inno. These two judgments thus strengthens the theory that dominance or actually strong benefits on a secondary market as the result of an exclusive right to a primary market, is enough to hold a Member State responsible for Treaty infringement. From that should follow that a Member State must be careful when granting or maintaining exclusive rights to an undertaking, given that the undertaking also has access to a separate but closely related market where it can enjoy benefits gained in the primary market. This assumption holds that markets that are liberalised must stay that way and cannot be affected by the benefits of public undertakings or undertakings granted exclusive rights, which indicates that the freedom for Member States to withhold certain markets from competition by the granting of exclusive rights is limited to a primary market that must not affect the equality of conditions on a separate but neighbouring market. This interpretation of how dominance can constitute an abuse was further strengthen with the Connect Austria-judgment, where the Court held that it was not necessary to establish whether an undertaking by the exercise of its exclusive right also had reinforced or exceeded its dominant position into a separate market, since the equality of opportunity among competitors were distorted, and hence the Member State was breaching the Treaty provisions. From MOTOE it stems that merely the risk that an undertaking might take advantage of its position gained from an exclusive right on one market, is enough to
establish that the equality of opportunities are distorted on a secondary market where that undertaking also is present. The granting of dominance can thus be abusive since it might distort competition on a market separate from the market where the exclusive rights were granted. Thus, the case law holds that dominance in itself can be constructing an abuse of a dominant position where dominance is gained in relation to other actors on a market not initially covered by the exclusive right. In *Commission v DEI*, The CJEU’s judgment differs from the one provided by the GC in such that an abuse was judged to be established merely if a state measure had resulted in an actual or potential anti-competitive consequence (by affecting the market structure in such way that equality of opportunities could not remain), whereas the GC held that an additional abuse from the undertaking was required. It could be argued as clear from the cases above, although the abuse in *Commission v DEI* did not result from an exclusive right (but from a state measure), that the CJEU’s interpretation was well founded based on previous case law although it was not establishing any abusive conduct. Such interpretation can be contrasted by the claim that the CJEU made an extension from previous case law, since the previous cases besides from establishing inequality of opportunity, also held that a risk to commit additional abuses on the secondary market was submitted with their possibility of influencing their respective downstream markets. By that it is meant that the circumstances in *Commission v DEI* differ from the other cases since DEI did not have any influence over the downstream market conferred to them through the state measure, apart from its dominance. The AG stated to that regard in his opinion, that the fact that the two articles were applied together is decisive and implies that the abuse of a dominant position need not stem from a particular conduct as when article 102 TFEU is applied on its own, but need only establish an anti-competitive consequence as a result from a state measure that granted the benefit. The argument brought forward by DEI and the Greek State, which held that CJEU’s interpretation of the combined provisions indicated that article 106(1) was given too broad interpretation, since it was applied in conjunction with article 102 TFEU, but the criteria of an abusive conduct was ignored. As given by the Treaty, article 106(1) TFEU simply cannot be applied on its own without another reference rule, and it is true that such premises is challenged if the Court ignores the essence of the reference rules too much. It is however premature to state that case law on the issue is set by the DEI v Commission judgment, the amount of cases where articles 106(1)

and 102 TFEU are applied in conjunction are still few and the field of law underdeveloped. However, the development of current case law seems to indicate that it will be rather difficult for Member State to maintain or grant exclusive rights to undertakings or other preferential rights to public undertakings, if it affects liberalised and neighbouring but separate markets in an anti-competitive way. This development might serve the efficiency of internal market to the cost of the sovereignty of the Member States.
6. Conclusion

Difficulties combining articles 102 and 106(1) TFEU appear since the combined provisions are aimed at Member States while article 102 TFEU was created to address undertakings. When the two articles are combined, the function of article 102 TFEU is extended to additionally include the effects of certain state measures, this has led to some changes in the intentional meaning of the article, indicating on different requisites applicable when it comes to state authorities compared to undertakings.\(^{280}\) The first problem addressed in the analytical part of this thesis is the strength required of the relation between the abuse and the state measure in question. Depending on how closely linked that relation is required to be, Member States’ possibilities to grant exclusivity or other benefits to public and other undertakings are affected. Case law shows that different strength (that is, how directly connected they are) between abuse and state measure has been required. *La Crespelle* embodied the assumption that an undertaking in relation to a state measure must be unable to avoid abusing its dominant position in order for the responsibility of a treaty infringement to fall on the Member State. This was however clearly contrasted with later judgments that moved towards the interpretation that the mere opportunity to abuse that followed from a state measure, was enough for a Member State to be held responsible for a Treaty infringement. When the required relation between the state measure and the abuse is made broader to also include certain independent behaviour from undertakings, the Member States’ responsibility over public undertakings or undertakings granted exclusive or special rights increase. This indicates that also the opportunities for Member States to determine the ownership structure on certain markets is restricted if it can create legal opportunities for undertakings to abuse their dominant position. While the Courts’ stricter way of reasoning (as seen in *La Crespelle*) is more accurate in accordance with the two articles in the sense that it clearly requires the abuse to be directly derived from the state measure in order for them to apply, there are benefits with the latter interpretation since it protects effective competition. The link between abuse and state measure is therefore a critical element in the interpretation of the two provisions in conjunction. How distinguished the abusive conduct must be from the state measure itself is the other side of the interpretational problem with the link between the abuse and the state measure. In the case law analysed in chapter 4, it is present that the fine line between an actual abuse, and what is the mere state measure itself was interpreted.

\(^{280}\) Papaconstantinou, H. [supra note 10]., pp. 75-76.
with consistency by the CJEU. Accordingly, it could be held that the consumers’ lack of options, the elimination of competition or the creation of exclusivity in itself, that is the state measure, was not considered an abusive conduct. However, the Court held also with consistency, that for an undertaking, due to its granted exclusivity, to fail to suffice the market demand was considered an abusive conduct. This fine line separating the two outcomes is indeed vague, and it needs to be taken into consideration that in cases where an abusive conduct is not explicitly constructed by the Court, article 106(1) TFEU is given a more independent role, indicating that the state measure might constitute a Treaty infringement, without taken into consideration article 102 TFEU. The current interpretation on that matter is also problematic in terms of foreseeability for the Member States. This since it will be hard to predict market developments when granting exclusivity, and hence, the question whether a service provided by an undertaking will suffice the demand or not can change over time. The theory of how undistorted competition cannot be maintained unless the equality of opportunities between competitors is not upheld has proved to be a source for Treaty infringement by Member States that grant benefits to public undertakings or exclusive rights to undertakings. From the cases where granted dominance actually constitutes abuse if it might also affect a neighbouring but separate market where the beneficiary is also a market player, the problem with the requirement of an abusive conduct in accordance to article 102 TFEU is again present. The current interpretation by the CJEU holds that an actual or potential anti-competitive consequence as an effect of a state measure is enough in order to constitute a Treaty infringement. It could therefore be stated that yes, for a Member State to breach the Treaty provisions, it is enough to create dominance for one undertaking on a market, given that such dominance will affect the equality of opportunities between competitors on a separated, but neighbouring market. This also implies that article 106(1) TFEU is given a more independent role in relation to article 102 TFEU. It does not hold that it might be applied on its own, but it clearly weakens article 102 TFEU’s requirement of an abusive conduct. For Member States, the case law thus hold that they cannot without infringing the Treaty, grant benefits to undertakings that creates such dominance that also spill over on a neighbouring, but separate market. This hard approach can arguably be an efficient way of showing that state interventions are merely not acceptable if they distort liberalised markets and hence prevents competition in any way. This can be problematic since it has the effect of creating something new (a broader article 106(1) TFEU that might be used on its own, or at least, demands a weaker connection to article 102 TFEU). This result indicates on decreased possibilities for Member States to reserve certain markets from competition, given that their responsibilities over undertakings conferred with exclusivity on such markets is quite
extensive according to case law. In terms of state sovereignty, this could be a problematic development that might upset certain Member States where public undertakings and undertakings granted special or exclusive rights constitute important parts of the national business environment and the state income. For purposes of trade between Member States, the result can imply that the current interpretation of the combination of articles 106(1) and 102 TFEU, has a positive effect. At least if the Member States’ decreasing space to influence market structures lead to lower entry barriers on markets previously attached with reluctance from new competitors due to the presence of dominant market players. Such developments are affected by the applicability of the derogation rule in article 106(2) TFEU (which is not included in this thesis), and therefore no stronger conclusions should be drawn to that matter. Additionally, the case law on the combination of articles 106(1) and 102 TFEU is limited, and provides different interpretations on how the articles ought to be applied together. Therefore, the result in this thesis is not necessarily to be set in stone.
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