

Wandering in the Land of the EU Abuse of Rights *Coordinates from the Antitrust Experience?*

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Our interest for the abuse of rights doctrine started out when the first AstraZeneca decision was adopted in 2005. By looking at this case from the IP law standpoint, we wondered whether and how there would be room to prosecute abusive IP-related practices even when a dominant position did not exist, i.e. even when article 102 could not be applied. In other words, we questioned whether practices similar to the AstraZeneca ones could have amounted to an offence equivalent to a U.S. IP misuse, which does not require any market dominance.

While we were looking for an IP-related answer, we came across a complex and emerging doctrine named “the abuse of rights” and started reconstructing the sparse case law on the matter. In doing this, we did not only find an IP-independent answer to our question, but we also became very interested in understanding what makes the use of any right – not only IP rights – be abusive. In exploring this second issue, we took inspiration from the antitrust law experience as to the abuse of rights, because it very clearly defines under which conditions the exercise of a right – any right – is abusive.

In the following sections, thus, we first retrace the boundaries of the EU abuse of rights showing the establishment of the EU principle of prohibiting the abuse of law. We then describe the antitrust experience and consider it as a benchmark for the test to recognize abusive uses of rights. Finally, we try to make sense of the **different tests** that are adopted in the EU law to deem abusive the exercise of a right.

1. Retracing the abuse of rights boundaries in the EU caselaw

1.1 The early infancy of the abuse of rights

Before coming across the real abuse of rights doctrine, we first identified a stream of cases where, absent the possibility of applying antitrust law, IP related practices could be however prosecuted by using another piece of EU law, i.e. the EC Treaty provisions regarding Freedom of Movement (Articles 34-36).¹ Under those provisions the EU courts recognized that national IP rights used beyond their scope and so abused could be prosecuted if and when their exercise damaged the Single Market.² Yet, this line of cases, whereas clarified that misused IPRs could be forbidden also

¹ Articles 34-36 prohibit restrictions on the free movement of goods between Member States. Specifically, Articles 34 and 35 prohibit restrictions on imports and exports – and equivalent measures – between Member States. Article 36 specifies limited derogations from this ban, as well as any equivalent measure, on grounds including, *inter alia*, the “protection of industrial and commercial property”, under which the ECJ has construed IPRs to fall. Therefore, the existence of state-based IPRs, per se, does not run afoul of the Treaty. When a conflict arises between free movement of goods and IPRs a “qualified priority” should be given to the latter. However, the Treaty requires that such restrictions “shall not constitute a means of **arbitrary discrimination** or a **disguised restriction on trade between Member States**” (Article 36). EU law, therefore does not affect the *existence* of IPRs, but can limit their *exercise* when this comprises a restriction on trade between Member States violating Article 34.

² *Consten and Grundig v Commission* Joined Cases 56 & 58/64 [1966] ECR 299; [1966] CMLR 418; *Deutsche Grammophon v Metro* (78/70) [1971] ECR 487; Case C-15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147; [1974] 2 CMLR 480

with a piece of law different from antitrust law, still did not specify under what conditions an IP right could be deemed abused.

Afterwards, we identified a second stream of cases within various areas of European law, which were more related to the emerging abuse of right doctrine. A way to categorize these cases, regardless of the area of law to which they belonged, was to consider the national or regional nature of the rules that they abused.

(i) Several cases concerned the attempt by economic actors to circumvent **national rules** by recourse to the European law of **fundamental freedoms**, such as the free movement of goods, services, capital and persons and the freedom of establishment. In the *TVIO* decision on broadcasting services, for example, the ECJ held that:

«... the Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it **to avoid the rules which would be applicable to it if it were established within the first State.**»³

The principle emerging from these decisions was that *Community law cannot be used to circumvent national legislation* and national courts can prevent such conduct by showing artificial arrangements **solely aiming at avoiding national provisions.**

(ii) In other cases we observed that the attempt was not exactly that of avoiding national provisions (although this actually occurred) but rather that of *using European law to unduly benefit from another Member state national law.*⁴ For example, a French student relied on the freedom of movement for workers principle to benefit from the Hannover University grants provided to nationals as well as to foreigners who had been employed for at least 5 years within the country.⁵ Member States, like Germany, in the case above mentioned, can take measures to prevent such conduct, provided that objective evidence of the **intent** was achieved and that an **undue benefit** was actually sought.

(iii) All the above situations were systematized by the ECJ in *Centros*,⁶ which represents the first decision fully articulating the doctrine. Here the court categorized the abuse of rights cases as falling within two different contexts. The first comprised **the attempts to use the rights created by the Treaty to improperly circumvent national provisions and obtain excessive benefits.** The second – at that time less explored but definitively more significant – context was where **EU law is relied on for abusive or fraudulent ends, that is, where Community law provisions are abusively relied upon to gain advantages in a way that conflicts with the purposes and objectives of those very provisions.**

In the same vein, in *Diamantis*, the ECJ addressed again the misuse of **EU law** provisions placing it at the core of the abuse of rights doctrine. It held that the EU provisions are abused when exercised in order *to obtain improper advantages manifestly contrary to the objectives pursued by those very same provisions:*

³ Case C-23/93 *TVIO* [1994] ECR I-4795

⁴ Case 39/86 *Lair v Universitat Hannover*, [1998] ECR 3161; Case C-200/02 *Zhu and Chen*, [2004] ECR I 9925

⁵ In the case at hands the ECJ, in its preliminary ruling, stated that a national of another Member State who undertakes university studies in the host State leading to a professional qualification, after having engaged in occupational activity in that State, must be regarded as having retained his status as a worker and is entitled as such to the benefit of Article 7(2) of Regulation No 1612/68, provided that there is a link between the previous occupational activity and the studies in question. At the same time the host Member State cannot make the right to social advantages provided for in Article 7(2) of Regulation No 1612/68 conditional upon a minimum period of prior occupational activity within the territory of that State .

⁶ Case C-212/97 *Centros* [1999] ECR I-1459

«Community law cannot be relied on for abusive or fraudulent ends' as would occur if a shareholder, in reliance on Article 25(I) of the Second Directive, brought an action for the purpose of deriving, to the detriment of the company, an improper advantage, **manifestly contrary to the objective of that provision.**»⁷

In a very clear (and narrow) way, in *Diamantis* the ECJ pointed out that an abuse would take place whenever an objective **contrary to** the objective of the Community provision that is invoked is achieved or pursued.

1.2 *The emergence and consolidation of a doctrine of abuse of rights*

In *Emsland-Stärke*, this last avenue of the abuse of rights was further articulated *in a more wide way*.⁸ The abuse of rights was deemed to require

first «a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, **the purpose of those rules has not been achieved**» and, second, «a subjective element consisting in the **intention to obtain an advantage from the Community rules** by artificially creating the conditions laid down for obtaining it».⁹

Notwithstanding the difficulty to interpret the objective and subjective conditions laid down by this decision, they are those that still now happened to be more often referred to as the requirements for the abuse of rights. Indeed, the definition set by *Emsland-Stärke* is much more often recalled than the far clearer two-prong test adopted by Advocate General Maduro in the *Halifax* opinion, which in a way reminds more of the narrow definition of *Centros* and *Diamantis*. Indeed, in *Halifax*, AG Maduro, starting from the *Emsland-Stärke*, arrived to a less wide and more precise test that defines the elements of the abuse of rights offence as to:

«a) **the aims and results pursued** by the legal provisions formally giving rise to the right **would be frustrated** if the right claimed were actually conferred; and b) the right invoked derives from **activities for which there is no other explanation than the creation of the right claimed**».¹⁰

In this way AG Maduro meant to determine a shift from a subjective to a more objective interpretation of the abuse of rights, as also confirmed by the ECJ in its reference for preliminary ruling,¹¹ especially in relation to the subjective element that was tending to refer more to the *purpose* than to the *intention* first mentioned in *Emsland-Stärke*. In relation to the subjective element, in the opinion we can read that:

«the Court takes the view that an abuse exists whenever the activity at issue cannot possibly have **any other purpose or justification** than to trigger the application of Community law provisions in a manner **contrary** to their purpose.»¹²

⁷ Case C-373/97 *Diamantis* [2000] ECR I-1705

⁸ C-110/99 *Emsland-Starke* [2000] ECR I-11569

⁹ *Id.*, paragraphs 52-53

¹⁰ Opinion of Advocate General Maduro of 7 April 2005, C-255/02 *Halifax plc*, [2006] ECR I-1609, § 91

¹¹ C-255/02 *Halifax plc and Others*, § 74-75

¹² Opinion of Advocate General Maduro, § 70. The AG also affirmed that: "... the notion of abuse operates as a *principle governing the interpretation of Community law*, as stated by the Commission in its written observations. What appears to be a decisive factor in affirming the existence of an abuse is the *teleological scope of the Community rule invoked*, which must be defined in order to establish whether the right claimed is, in effect, conferred by such provisions, to the extent to which it does not manifestly fall outside their scope." (§ 68) (emphasis added)

While in *Centros/Diamantis* and *Halifax* the effect or the purpose of abusing a EU provision need to *conflict* (*Centros*) or *frustrate* (*Halifax*) the real goal of that provision, in *Emsland-Stärke* it is enough that the purpose of the abused provisions is *not achieved*, and it will then be the *intention to obtain an advantage from the Community rules* that will need to be proved to affirm that an abuse have taken place.

Notwithstanding the *Halifax* narrow and more objectively based interpretation of the abuse of rights, around mid-2000 the abuse of rights principle established as the one defined in *Emsland-Stärke* (sic!). Just to give an example, in 2008, in his opinion in *Cavallera*, the same AG Maduro gave for granted the establishment of a principle prohibiting abusive practices under which “Community law cannot be relied on for abusive or fraudulent ends”. He then described the content of the principle as “relatively well established within the caselaw of the EU courts” and as requiring the meeting of two criteria which were defined as “inherently connected and ... both based on objective elements.” Specifically, in order to be able to conclude that an abusive practice exists, the opinion clearly stated *again* that:

«it must **first** be evident from all of the objective evidence that, despite formal compliance with the conditions laid down by the Community rules, **the purpose of those rules has not been achieved** and, second, it must be clear from that evidence that the main aim of the transaction undertaken is to derive **an advantage** from the Community rules by creating artificially the conditions laid down for obtaining it.»¹³

1.3 *The last wave of abuse of rights cases*

In the second half of 2000s, the abuse of rights doctrine was perceived as so established that many decisions addressed it as a general principle of the EU law, named ***the principle prohibiting the abuse of law***. Still, a subsequent wave of cases regarding community trademarks shows the difficulties of interpreting this principle because of the “flexibility” of its requirements and its increasingly wider scope deriving from its acquired status of principle of general application. Probably in reason of this change in *status* this line of cases refers to the widest definition of abuse possible under which an abuse takes place whenever the purpose of the allegedly abused rule is not achieved (that is to say, whenever purposes **other than** the one of allegedly abused rule are achieved), while previous definitions referred to the achievement of a purpose **contrary to** or at least in **conflict with** the one laid down by the abused rule. It is in between this “other than” and “contrary to/conflict with” that the abuse of rights boundaries become very fuzzy.

Within this last stream of case law concerning CMTs, many remained at the level of OHIM scrutiny,¹⁴ while few others reached the EU courts, which was called to consider the claim of abuse in relation to the opposition to a CMT application or to the application for a CTM invalidity. Nevertheless, these decisions did not deepen the analysis of the abuse of rights doctrine, leaving our

¹³ Case C-311/06, *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera*. Similarly, in the years after, the same definition applied in Opinion of Advocate General Trstenjak, delivered on 10 February 2010 1, Case C-569/08 *Internetportal und Marketing GmbH v Richard Schlicht*, and in Opinion of Advocate General Trstenjak, delivered on 2 June 2010 1, Case C-118/09, *Mag. Lic. Robert Koller* (Reference for a preliminary ruling from the Oberste Berufungs- und Disziplinarkommission (Austria)).

¹⁴ For example, OHIM, Decision of 27/05/2009, ruling on opposition No B 668 600, *Ferrero S.p.A. against Harald Wohlfahrt*. In 2002 Harald Wohlfahrt filed application to register as a CMT including the word “Kinder” and was opposed by Ferrero owner in Italy of the Kinder TM on the grounds of likelihood of confusion because of the similarity of the marks and because the goods covered by the marks are similar or identical. The applicant argued that Ferrero’s opposition constituted an abuse of right, as it was using defensive trade marks in order to block competitors. The applicant then requested proof of use of the earlier marks. The OHIM stated that “The request of the applicant to reject the opposition on the ground that the opposition is based on defensive marks and that it constitute an abuse of right to file an opposition not having a real interest in the goods in classes 16 and 28 is rejected. In the practice of the Opposition Division no legal basis is seen for rejecting the opposition in the given circumstances, as the Law does not foresee expressly to reject an opposition on the ground that the opposition is filed in bad faith”.

understanding of it uncertain and vague and paving the way to unclear and unsolid pleadings claiming the abuse of rights.

One of the first cases to reach the EU court concerned the CTM Budweiser,¹⁵ since 2000 registered and owned as British national trademarks by both Budějovický Budvar ('BB'), a brewery established in Czech Republic, and AnheuserBusch Inc. ('AB'), a brewery established in St. Louis (Missouri, United States), in reason of their being active in the British market since in 1973 and 1974 respectively.¹⁶

Four years and 364 days after the national registration of the parties' 'Budweiser' marks and the peaceful coexistence of the two national TMs, AB applied to the UK Trade Marks Registry for a declaration of invalidity of 'Budweiser' mark registered for BB as, though they both received the registration the same day of 2000, AB's was an earlier trademark and the acquiescence period of 5 years had not passed yet (STILL one day to go!). The case ended up in front of the ECJ and one of the claim was whether applying for declaration for invalidity at the very end of the term amounted to an abuse of rights *because* it deprived BB of the possibility of defending itself against the application.

In his opinion on the case Advocate General Trstenjak¹⁷ recalled the abuse of rights and stated its requirements (as laid down in *Emsland-Stärke*) – **first**, “a **combination of objective circumstances** in the particular case in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved”; and **second**, “a **subjective element consisting in the intention to obtain an advantage from the European Union rules** by creating artificially the conditions laid down for obtaining it”.¹⁸

He concluded that the abuse of rights argument was not convincing as a rightholder must be conceded the right to apply the rules of substantive and procedural law in the way that is most to his advantage without laying himself open to an accusation of abuse of rights and, in any case, the subject element of the abuse was not proved.¹⁹

Interestingly enough the ECJ in its preliminary ruling did not tackle the issue of the abuse of right, however, it concluded by saying that in the case at hands there were the special circumstances (among which the pacific coexistence of the two identical TMs within the same territory for over 30 years without generating confusion in the market) that made fall the application for invalidity, made by the proprietor of the first TM, falling outside the scope of Article 4(1)(a) of Directive 89/104. In other words, in this case the registration and use of the later trade mark had not any adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods, thus an application for invalidity could not be requested.

¹⁵ Case C-482/09 *Budějovický Budvar, národní podnik v AnheuserBusch, Inc.* of 3 February 2011.

¹⁶ Indeed in 2000, following a proceedings, the Court of Appeal allowed registration of the trademark 'Budweiser' for both AB and BB on the base of the 'honest concurrent use' doctrine, recognized both in the common law and in the codified law of England, which under certain conditions allows such coexistence.

¹⁷ Opinion of Advocate General Trstenjak, of 3 February 2011, Case C-482/09 *Budějovický Budvar, národní podnik V AnheuserBusch, Inc.*

¹⁸ *Id.*, § 119

¹⁹ In a subsequent case, *Lancôme parfums et beauté & Cie v. OHIM* (Judgment of the General Court (Eighth Chamber) 5 October 2012, C-593/12, T-160/07) the EU General Court similarly rejected the argument that the application for invalidity of the CTM FOCUS was abuse of rights. The court stressed that “... the applicant merely claim(ed) that the intervener's application for a declaration of invalidity constitute(d) an abuse of right, without producing evidence likely to establish that the latter registered the mark FOCUS with the fraudulent intention of not using it, in order to prevent other economic operators from registering certain marks. ... The applicant ha(d) not proved the subjective element, within the meaning of the case-law ...” (§ 61) usually used to argument an abuse of right. That is the one that the General Court refers to at paragraph 60 of the decision (see note *supra*): “which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it (see, by analogy, Case C-515/03 *Eichsfelder Schlachtbetrieb* [2005] ECR I-7355, paragraph 39 and the case-law cited).”

Without entering into the analysis of the abuse of rights two-prongs, the ECJ deemed AB's conduct as falling outside the scope of the provision conferring the right to apply for a TM invalidity using a very objective reasoning: determined the purpose of the TM law provisions that provides the right to apply for invalidity of a TM – i.e. to avoid confusion about the origins of goods – this purpose would not be satisfied by the declaration of invalidity because of the specific circumstances of the case in hands. Hence, in this case, the right to apply for a declaration of invalidity should not be deemed within the scope of TM law.

Conflicting decisions in this stream of cases have been adopted is the recent *Donaldson Filtration Deutschland v ultra air* saga.²⁰ Here the General Court first and the ECJ later deepen the reasoning on the reasons why exercising the right to apply for a CTM invalidity cannot amount to abuse of rights and answered to the question as to **whether exercising a right that is conferred to everyone in the sake of the public interest could amount to an abuse of right insofar as the person that is initiating the procedure is doing it for its own private interest.**²¹

The story started in 2008 when the OHIM considered whether ultra air's application for invalidity for lack of distinctiveness was vitiated by abuse of rights, as ultra air did not pursue any public interest objectives (as laid down in Articles 7(1)(b) and (c) and Article 7(3) of regulation 207/2009).²² Rather, it sought to use the sign "ultrafilter" itself as a trade mark, alone or in combination with other terms. Besides, ultra air resorted to the application for invalidity only after its own application for registration of a figurative CTM comprising the word "ultrafilter" had been rejected (*i.e. the objective elements of the abuse of rights?*). Proof of the *hidden intentions* of ultra air (*i.e. the subjective element of the abuse of rights?*), according to the OHIM Board of appeal, came from the fact that the manager of the applicant had previously defended the distinctive character acquired by the contested mark through use, when he was a manager of the CTM's owner (the "venire contra factum proprium" argument). The OHIM decided that the application was an abuse of rights as the applicant had sought to attain objectives **other than those** which are legitimate under trade mark law.

However, in 2013 the General Court did not uphold the OHIM decision and clarified that, in light of the public interests enshrined in the CTM provisions, the motives and earlier conduct of the applicant cannot affect the scope of the assessment conducted by OHIM. OHIM is not supposed to rule on the question whether the rights of the proprietor of the mark take precedence over any rights which the applicant for a declaration of invalidity might have, but it is called to ascertain whether the rights of the proprietor of the mark were validly obtained in the light of the rules governing the registrability of marks (2014 order of the court §20). Therefore, an abuse of rights cannot preclude the examination of an application for a declaration of invalidity for lack of distinctiveness or of other requirements, and the OHIM should not have investigated, nor taken into account, the applicant's possible bad faith in requiring the declaration of invalidity. That would equal to say that it is not within the OHIM competence to investigate the abuse of rights existence.

The same reasoning has been confirmed in 2014 by the ECJ's Court Order which rejected the appellant's argument that the General Court had erroneously affirmed that an alleged abuse of rights in an invalidity proceedings would not have been relevant, without substantiation and without taking into consideration EU case-law on the abuse of rights. What the General Court meant – pinpoints the Court order – is that OHIM's task is to assess whether a mark under examination is descriptive and/or devoid of distinctive character in light of the rules governing the registrability of marks, without considering motives and earlier conduct of the applicant for a declaration.

²⁰ Case C-450/13P

²¹ In this case the interest of the applicant to have the CTM declared invalid so to be entitled to use it for its products.

²² The public interest underlying Article 7 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services.

«Because OHIM's assessment must be made exclusively in the light of the public interest underlying Article 7(1)(b) and (c) and Article 56(1)(a) of Regulation No 207/2009, the potential or actual economic interest pursued by the applicant for a declaration of invalidity is not relevant and, consequently, there can be no question of an 'abuse of rights' on the part of the applicant for a declaration of invalidity, as the General Court was entitled to rule" (2014 court order § 42).»²³

The ECJ also rejected the argument of “venire contra factum proprium” according to which the aspect of contradictory conduct may lead to the identification of abuse (*subjective element??*), and the alleged abuse of rights cannot be rejected in principle in invalidity proceedings. Against this background, the OHIM asserted that what is relevant and should be considered as proof of abuse is the fact that the person who had first enabled a trade mark to be registered by proving the distinctive character which that mark had acquired through use is now challenging his own conduct. The Court rejected this argument on the basis that the issue at stake should not consider the person's attitude towards the TM, which is then irrelevant, but just the public interest to declare invalid those CTMs that do not meet the requirements.

2. The principle of prohibiting the abuse of law: looking for a test

The above description of the EU case law shows that nowadays there exists a principle of general application that prevents right holders – not only IPR holders but any individual entitled with a right – from manipulating their rights. This is thus the answer to our initial question: even outside antitrust law, abuses of rights can be prosecuted and possibly punished.

However, the same analysis of the previous case law paves the way to another question regarding the boundaries of the notion of abuse. In other words, when does a right holder manipulate his/her right? As a matter of practice, which test should be applied to ascertain whether a formally legitimate conduct amounts to an abuse of rights?

At the moment there is a lot of fuzziness about the elements of the abuse of rights offence. Although in *Halifax* the abuse of rights was designed as an offence made of two elements, which were further articulated by AG Maduro in an intelligible way, the following decisions stuck with the difficult and murky *Emsland-Stärke* quotation that calls for a double check as to whether the alleged abuser (*i*) achieved the aim of the allegedly abused rule and (*ii*) had the intention of obtaining an advantage by artificially creating the conditions for the application of the rule.

An attempt to provide guidance to the interpretation of this complex test has been provided in *Donaldson* where it is affirmed that when the allegedly abused provision protects a public interest, it is not relevant whether the right is exercised in the pursuit of a private interest as long as the protection of the public interest is met.

In the alternative, we decided to go back to where everything started. We look at the antitrust experience hoping that it may contribute to identify a clear test to detect when rights are abused.

3. A brief description of the antitrust experience about the abuse of rights

Roaming in the fuzziness of the abuse of rights principle, we looked at the European antitrust experience to find some clues.

The EU competition law has come across abuse of rights scenarios in dealing with dominant firms behaviors. In what follows, hence, we account for scenarios where dominant firms took advantage of some legitimate governmental procedures to harm competition. In particular, we focus on two paradigmatic cases: (*i*) the case where the legislator did not design the procedure, then misused by the dominant firm, to exclude competitors (as in the case of the second abuse contested to

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Astrazeneca) and (ii) the opposite case where the legislator designed the procedure, then misused by the dominant firm, to exclude competitors (as in the Italian case Pfeifer).

3.1 *The second abuse contested to Astrazeneca*

During the '90s, the EU pharmaceutical legislation (Directive 65/65) aimed at protecting public health without hindering market development. Thus, on the one hand, it required that the commercialization of any drug follow the issuance of a market authorization, which in turn was conditioned to the submission of pharmacological tests and clinical trials called to ensure the quality, safety and efficacy of the medicine that was going to be marketed. On the other hand, the same legislation granted generic companies an abridged procedure to market generic versions of branded drugs. If the generic drug was essentially similar to the original reference product, if six or ten years have passed from the date when the branded company submitted the above-mentioned scientific data, and **if the original reference product was still marketed when the generic application was filed**, generic companies had the right to commercialize their products without supplying their own results of pharmacological tests and clinical trials. They could rely on the data submitted in respect of the reference product which had already been authorized.

In such a context, at the end of the '90s, the company AstraZeneca, which dominated the market for omeprazole with its branded drug *Losec* whose patent was about to expire, substituted *Losec capsules* with *Losec tablets* (the so-called *Losec MUPS*) and withdrew the market authorizations covering the commercialization of *Losec capsules* in some Member States (Denmark, Norway and Sweden). Thus, **by preventing the original reference – Losec capsules – from being authorized to be marketed when the generic application was filed**, AstraZeneca prevented the generics from enjoying the above-mentioned abridged procedure, *de facto* unduly prolonging the AstraZeneca exclusive right to make use of the results of its tests and trials in those Member States.

The **European Commission** found that the withdrawal of the market authorizations was an abuse of dominance, by applying **the usual test inherent into article 102**: the practice not only strengthened the dominant position of AstraZeneca by prolonging its monopoly power, but also harmed competition by preventing the price of *Losec* from dropping down. What is important for our discussion about the abuse of rights is that **AstraZeneca elaborated its defense by claiming that it had the right to withdraw the market authorizations covering Losec capsules and, hence, that the European Commission could not use competition law to characterize as unlawful a practice that another piece of EU legislation does not forbid**.

Nevertheless, the European Commission **firstly** answered that,

«[t]he use of public procedures and regulation, including administrative and judicial processes, may also, in specific circumstances, constitute an abuse, as the concept of abuse is not limited to behavior in the market only, and **misuse** of public procedures and regulations **may result in serious anticompetitive effects on the market**»²⁴.

In other words, according to the Commission, the existence of a piece of EU law allowing a specific behavior could not exempt that behavior from the application of EU competition law if and when the same behavior was misused and if and when that behavior produced anticompetitive effects.

Secondly, the European Commission discussed under what conditions the misuse of a governmental procedure may take place. By interpreting some **documentary evidence**²⁵ and by

²⁴ COMMISSION DECISION, 15 June 2005, Case COMP/A.37.507/F3, *AstraZeneca*, paragraph 328.

²⁵ *Id.*, paragraphs 794-799

focusing upon the very same **selective nature** of the deregistration planned by AstraZeneca,²⁶ the Commission specified that the AstraZeneca behavior did not find any autonomous business justification.²⁷ Neither did it represent a standard industry practice.²⁸ Differently from what one could have expected in light of the purpose of market authorizations, the withdrawal was not meant to protect consumers from a drug that had turned out to be unsafe and/or ineffective. The practice was adopted **«for reasons unrelated to interests protected by the legislation»**.²⁹ **It was meant to take advantage of the opportunity, made available by the EU legislation, of disrupting generic competition.**

In summary, hence, the Commission decided that the choice to cash in on the administrative procedure for deregistering some market authorizations covering *Losec capsules* was a decision to misuse that procedure.³⁰ It was an additional hurdle, strategically exploited by AstraZeneca,³¹ to raise rivals' costs, that is to delay generics' entrance that did not find any justification in the relevant legal texts or principles related to EU pharmaceutical law.³²

In the same vein, the **General Court** observed that,

«whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked ... it cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, **in the absence of grounds relating to the defense of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification**».³³

Therefore,

although AstraZeneca «was entitled to request the withdrawal of [the market authorization for *Losec capsules*],»³⁴ «such conduct was not based in any way on the **legitimate protection of an investment** which came within the scope of competition on the merits». Instead, according to the General Court it was apparent that «AstraZeneca's deregistration of the marketing authorizations **was only such as to prevent** applicants for marketing authorizations in respect of essentially similar medicinal products from being able to make use of the abridged procedure ... and, therefore, to obstruct or delay the market entry of generic products.»³⁵

The General Court, indeed, clarified that the market authorizations should have been withdrawn to protect public health,³⁶ or – as AstraZeneca maintained, but only out of time – for preventing the pharmaceutical company from sustaining undue costs.³⁷

²⁶ Id., paragraphs 800-806.

²⁷ Id., paragraph 790.

²⁸ Id., paragraph 791 and 829, **where the Commission clarifies that the industry used to withdrawing market authorizations for reasons connected to public health.**

²⁹ Id., paragraph 821.

³⁰ Id., paragraph 817.

³¹ Id., paragraph 842.

³² The objective of the generic procedure is to enable generic manufacturers to demonstrate that their products fully comply with all requirements of safety, quality and efficacy without the need for the generic manufacturers to take their products through preclinical and clinical tests and submit the relevant data to the competent national authority. By the requests for the deregistration AZ in fact seeks to undermine the very *raison d'être* of the generic procedure and to extend *de facto* the protection afforded by the data exclusivity well beyond the period provided for in the applicable rules – Id., paragraph 841.

³³ General Court, T-321/05, 1 July 2010, paragraph 672

³⁴ Id., paragraph 677

³⁵ Id., paragraph 676

³⁶ Id., paragraph 670

³⁷ Id., paragraph 685. The applicants plead that AZ no longer had a commercial interest in selling *Losec capsules* and, therefore, in maintaining the marketing authorisation in a situation where such maintenance imposed upon it continuing 'updating' and pharmacovigilance obligations. Yet, the General Court specified that AstraZeneca should have shown –

In addition, the General Court pointed out that, whereas AstraZeneca repeatedly claimed that there was no documentary evidence expressly indicating its ‘malevolent’ or ‘intentional’ strategy to deregister the marketing authorizations in order to delay the market entry of generic products:

«the concept of abuse of a dominant position is an objective concept and does not require that an intention to cause harm be established ... [Nevertheless, it] is common ground that AZ carried out those deregistrations in Denmark, Norway and Sweden. The alleged absence of any malevolent intention underlying that conduct cannot therefore preclude the Commission’s classification of that conduct as an abuse of a dominant position where it is established that, in view of the objective context in which that conduct took place, the conduct was such as to delay or prevent the introduction of generic products and parallel imports».³⁸

In other words, the General Court was clear in its attempt to keep separated the intent motivating AstraZeneca conduct from the previous analysis of the objective justifications explaining that conduct and leading to the conclusion that the selective deregistration of the market authorizations in Denmark, Norway and Sweden «**was only such as to prevent**» generics’ entrance into the relevant market.

The **European Court of Justice** affirmed the holding of the General Court and, when AstraZeneca claimed that the General Court ought to have explained **how the exercise of a legitimate right could ever constitute an abuse** (of dominance), the ECJ replied that:

«the preparation by an undertaking, even in a dominant position, of a strategy whose object it is to minimize the erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from practices coming within the scope of competition on the merits, which is such as to benefit consumers. However ... the deregistration, **without objective justification** and after the expiry of the exclusive right to make use of the results of the pharmacological and toxicological tests and clinical trials ... by which AstraZeneca **intended ... to hinder the introduction of generic products and parallel imports**, does not come within the scope of competition on the merits»³⁹.

«[T]he fact ... that under [EU legislation] AZ was entitled to request the withdrawal of its [market authorizations] for Losec capsules in no way causes that conduct to escape the prohibition laid down in Article 82 EC. ... **the illegality of abusive conduct under Article 82 EC is unrelated to its compliance or non-compliance with other legal rules** and, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law».⁴⁰

To be sure, the ECJ could have been clearer in affirming that, had AstraZeneca withdrawn the market authorizations for *Losec capsules* to either protect public health or a genuine industrial interest, the withdrawal would have been a legitimate exercise of one of its rights and, hence, would have not represented an abuse of dominance. Nevertheless, we can still argue that, in relation to the abuse of rights doctrine the second of the abuses contested to AstraZeneca suggests that a firm misuses a procedure when it uses it *only* to harm competition, that is to say, to pursue *no goals other than the anticompetitive effects* that the procedure happens to produce in the given scenario under scrutiny. This given that, according to the EU institutions, this analysis about the purposes of the firm’s behavior has nothing to do with the intent of the firm or with its awareness of the unlawful nature of the conduct. According to the EU institutions, indeed, this analysis regards the

in due time – that, if it had not deregistered the marketing authorizations in Denmark, Norway and Sweden, it would have suffered an **additional burden** that, differently, the still in place marketing authorizations in Germany, Austria, Spain, France, Italy and the Netherlands did not entail – Id., paragraph 689.

³⁸ Id., paragraph 813

³⁹ ECJ, C-457/10 P, 6 December 2012, paragraphs 129-130

⁴⁰ Id., paragraph 132

business justifications explaining the use of the procedure and their relationship with the genuine goal of the procedure.

Then, it should not be forgotten that given this analysis of the abusive use of the procedure, the abuse of dominance exists if the (mis)use of the procedure strengthens market power and is actually capable of producing anticompetitive effects.

3.2 *The Italian Pfizer case*

European patent law as set forth by the European Patent Convention envisages the case of divisional patents. A divisional patent stems from a previous main patent when one part – or, more commonly, one of the uses – of the original invention can be patented separately from the main one. Once obtained, a divisional patent covering a drug grants to the patent holder the right to ask for a supplementary protection certificate (SPC) covering the related pharmaceutical product, given that since this last is a sort of specification of the main patent, the submission date and the validity time of the divisional patent are borrowed from those of the main patent.

In the 2000s Pfizer was the dominant producer of *Xalatan*, a drug for the treatment of glaucoma. The main patent connected to *Xalatan*, EP 417, was going to expire on July 17 2011 in almost all the European States parts of the European Convention. Because of the failure to request the related SPCs, the Italian and the Spanish EP 417 patents were going to expire almost two years before 2011, in September 2009. Yet, in January 2009 Pfizer, after obtaining the divisional patent, EP 418, stemming from its EP417, requested and gained the SPCs for Italy and Spain to eliminate the misalignment as to the European duration of the patent protection of *Xalatan*.

In 2012, the **Italian Competition Authority** (AGCM) applied article 102 of the TFEU against Pfizer holding that, through the application of the divisional patent EP 418 which was validated only in Italy and in Spain and followed by the requests of the SPCs for Italy and Spain, Pfizer spuriously extended the duration of the national patents there covering *Xalatan* to prevent or delay the entry of generics into those two national markets for glaucoma treatments. In other words, the AGCM maintained that, as **the perfect overlap of their respective scopes showed, the application for the divisional patent was not meant to protect any therapeutic use other than the ones already protected by the main patent.**⁴¹ Rather, the divisional patent application was a mere tool, a stratagem, to obtain the renewed possibility to ask for the Italian and Spanish SPCs that would have covered not only the divisional patent but also the main one, EP417, with the ultimate result of aligning the Italian and Spanish protections to the other European ones. In other words, according to the Italian Competition Authority, the timing of the divisional application, the fact that EP418 was validated only in Italy and Spain, the fact that the related SPCs were requested only for Italy and Spain, the fact that the corresponding divisional drugs were never commercialized in those two countries, and the documentary evidence showing the Pfizer intent⁴² to prolong the duration of the patents in Italy and Spain showed, altogether, **that the divisional patent EP 418 was nothing more than an opportunistic way to remedy to the initial failures to request the SPCs for Italy and Spain.**⁴³ And, since SPCs are meant to prolong patents and exclude competitors from the use of the related inventions, the AGCM concluded that in the case of the monopolized *Xalatan* Pfizer practice caused the exclusion of rivals from the relevant market and the subsequent consumer welfare harm.

⁴¹ Provv. Agcm n. 23194 del 2012, *Ratiopharm/Pfizer*, paragraph 193.

⁴² Id., paragraph 219-221

⁴³ Id., paragraph 203

The **Tar Lazio**, the Italian administrative tribunal in charge of the appeals against the decisions of the Italian Competition Authority, reversed the holding observing that, as a matter of fact, the AGCM did not proffer enough evidence to conclude that Pfizer misused the application for the divisional patent EP418. Beyond this evidentiary issue, it must underlined that, according to the Tar Lazio, competition authorities that want to enforce EU competition law against firms holding the right to use some governmental procedures must show first and foremost that the regarded procedures have been somehow manipulated and, thus, that the related rights have been abused/misused. In other words, the Tar Lazio made a point in arguing that: **absent such a *quid pluris* – that is to say, absent this kind of additional evidence about the misuse of the procedures under scrutiny – the application of EU law according to its specific liability conditions would amount to nothing different from the mere dis-application of the regulation granting the right to use the procedures in question.**⁴⁴

The **Consiglio di Stato**, the ultimate tribunal reviewing the holdings of the Italian competition authority, rejected the Tar Lazio decision. In general terms, the Consiglio di Stato clarified that the abuse of rights offence takes place when the right holder makes an opportunistic use of his/her right, that is to say, when he/she uses the right in a way **which is not consistent with the purpose in the name of which the legislator chose in the first place to grant him/her the right.**⁴⁵ Indeed, in a different decision, which was not related to antitrust law, the Consiglio di Stato had already specified that a right is abused when: (i) someone holds a right; (ii) the law does not dictate how he/she must actually carry out that right; (iii) the practical exercise that he/she does of that right, although formally consistent with the law, violates another principle of law; and (iv) the benefit that the right holder gains from that concrete exercise of the right is unduly higher than the sacrifice that it casts upon the others, so that it happens that as a whole **the abuse of rights offence, far from implying an apparent violation of the right in question, requires that it be used to achieve a goal different from the one indicated by the legislator.**⁴⁶ Thus, looking at the *Pfizer* case, the Consiglio di Stato observed that the AGCM was right in holding abusive the request for the divisional patent that: (i) protected the same therapeutic use already covered by the main patent; (ii) was never commercialized and, even more importantly, (iii) was made just in a peculiar factual scenario where the patent holder had the opportunity to prolong the duration of the main patent via the SPC following the divisional patent. In sum, according to the Consiglio di Stato, the Pfizer request for the divisional patent EP418 did not aim at achieving the goal for the pursuit of which the general provision of divisional patents exists: it did not aim at protecting a new invention, because the related invention was already protected by the main patent EP 417. **That request aimed at pursuing another and diverse goal**, that of prolonging the duration of EP 417 and, thus, at exploiting the inherent exclusionary effect of patents with the effect of harming the competition in the already monopolized market for *Xalatan*.

4. The abuse of rights offence within the theoretical antitrust framework

Suppose that: **(I)** firm A, operating the market M, has the right to use the governmental procedure, P, which is meant to produce a great array of effects. Further, suppose that: **(II)** by using P, A becomes – either directly or indirectly – the only firm allowed to have access to a certain resource, R, or the only firm permitted to offer a specific good, G. In other words, suppose that those last facts are among the effects that P produces. **(III)** Finally, suppose that: (i) A dominates M; (ii) A's rivals are excluded from M because of the prohibition to use R or supply G; and that (iii) such an exclusion is likely to cause a consumer welfare reduction. In fewer words, suppose that, by using P, A ends up

⁴⁴ Tar Lazio, n. 7467, 3 September 2012, paragraph 4.1

⁴⁵ Consiglio di Stato, n. 693, 12 February 2014, paragraph C

⁴⁶ Consiglio di stato, n. 2857, 17 May 2012

to *both* strengthening its dominant position *and* producing anticompetitive effects, such as an increase in market price, an output limitation, a block to innovation or a reduction in the quality and variety of output.

Granted that article 102 of the TFEU (as well as Section 2 of the Sherman Act) bans dominant firms from strengthening their positions via practices that harm consumer welfare, the scenario meeting conditions (I), (II) and (III) begs the following question: **does A retain the right to use P notwithstanding the competitive repercussions that the use of A entails?** Or, to put it in another way, the issue is whether antitrust law prevails over the other piece of law that grants A the right to use P, even when A holds a dominant position and P excludes A's rival from the relevant market in an anticompetitive way.

Many diverse **policy arguments** can be played to answer these issues. For example, one may argue that antitrust law must prevail over any other conflicting piece of law, such as sector regulations, when there is no regulator that, effectively applying the latter, takes anticompetitive concerns into account.⁴⁷ Differently, one may argue that, given two pieces of law pursuing somehow different goals, like public health and competition, or innovation and competition, it is not up to antitrust authorities and judges decide that the defense of competition is preordained to the protection of public health or innovation. The separation of powers principle, indeed, prevents antitrust enforcers from second guessing the choices of those who wrote the specific legislations, like pharmaceutical and patent laws, that either neglect the protection of competition at all, or consider it less relevant than the other interests justifying the existence of the very same law.⁴⁸ In the opposite, one may argue that the pieces of law endorsing a general, *ex ante* approach, such as those granting rights to firms irrespective of their market positions, should yield to antitrust law just because antitrust law is meant to endorse an *ex post*, case-by-case analysis of the competitive pros and cons that characterize any given situation.⁴⁹

Nevertheless, there is a scenario when it is not necessary to discuss those difficult policy arguments. Suppose that the above conditions (I), (II) and (III) are met and further suppose that: (IV) A uses the procedure spuriously. In other words, suppose that the procedure P is legitimate but the way in which A employs it is not. In such a case, there is plenty of room to argue that the government did not want anybody, A included, to benefit from the array of effects that the procedure entails, anticompetitive effects included. In other words, when P is misused, even the ones that would make the general law prevail over antitrust law change their mind. The real gist, hence, becomes understanding when it can be said that a dominant firm *spuriously* uses P, a legal and valid procedure knowingly producing also exclusionary and anticompetitive effects.⁵⁰

(IV-1) The easiest possibility addresses the case of a firm using the procedure in a fraudulent way.⁵¹ Suppose, for example, that A must meet some standards or conditions to gain the right to use P. If A cheats about its compliance with those standards or about its meeting those conditions, then A is an usurper who does not deserve to use P and to benefit from whatever effects P produces. In such a case, hence, antitrust law well applies, because the fraudulent use of P is nothing more than a monopolistic practice strengthening market power and producing anticompetitive effects.

⁴⁷ Typically, this is the main criterion according to which the U.S. courts solve the potential conflict between federal antitrust law and federal sector regulations.

⁴⁸ For example, this set of arguments can be used to argue that antitrust authorities should not second guess the choices of IP legislators.

⁴⁹ Once it is agreed that both antitrust law and IP laws aims at protecting innovation and competition, the distinction between the *ex ante*/generalist approach of IP laws and the *ex post*/specific approach of antitrust law is what supports the imposition of duties to license to dominant firms holding IPRs.

⁵⁰ Though the ascertained misuse of a right could remove from the table the discussion about the hierarchy of the policy goals pursued by antitrust law and the pieces of law that conflict with it, sometimes the EU antitrust enforcers however argue that antitrust law can prevail over the pieces of law that do not take competitive concerns into account. See, ECJ, C-457/10 P, 6 December 2012, paragraph 133.

⁵¹ This was, indeed, the case of the first abuse contested to Astrazeneca.

(IV-2) **A much more questionable possibility** arises when it is found that, absent the anticompetitive effects of the procedure, the dominant firm would have not applied it. In other words, A is said to spuriously use the procedure P, when A seems not interested in pursuing the social good for which the procedure stands because the occurrence of the procedure's anticompetitive effects represents the only reason why the dominant firm decides to use the procedure.⁵² The above cases – AstraZenca and Pfizer – well fit this second scenario, because antitrust authorities found that the dominant firms were using the procedures at stake only to achieve anticompetitive effects, that is, with no other business justification than the pursuit of those effects.⁵³

But, is this kind of analysis focused on the purposes informing the strategies of dominant firms admissible? Does not it regard a sort of subjective element that should not be a part of the abuse of dominance offence and of the antitrust discourse in general?

The following paragraph shows that the inquiry about the business justifications of monopolistic conduct does not regard the intentions, wills or mindsets of dominant firms but the factual consequences of the practices at stake as they can be expected by any rational agent.

5. The expectations as to the consequences of the exercised rights and dominant firms behaviors

To better understand what case the scenario (IV-2) addresses, one must focus on the fact that P is meant to produce a great array of effects, procompetitive, neutral and anticompetitive ones. Therefore, the following statements are true at the same time:

$P \Rightarrow$ procompetitive or neutral effects, say $E^+(P)$, and

$P \Rightarrow$ exclusionary and anticompetitive effects, say $E^-(P)$

According to antitrust law, firms are rational agents who undertake only those behaviors entailing more benefits than costs. Thus, call $C_A(P)$ the costs and expenses that P casts upon A and $B_A(P)$ the benefits that A gains from the application of P, the dominant firm decides to use the procedure P when:

$$B_A(P) \geq C_A(P)$$

Now, consider that the benefits that the dominant firm gains from P depend on both the procompetitive and anticompetitive effects that P itself causes on market functioning. Namely, suppose that:

$$B_A(P) = \mathcal{F}[E^+(P)] + \mathcal{F}[E^-(P)]$$

and distinguish the following three scenarios:

⁵² Consider, indeed, what the European Commission wrote about the use of patent clusters and divisional applications. It stated, «both patent clusters and divisionals seemingly serve to prevent or delay generic entry. While this, during the period of exclusivity, is generally in line with the underlying objectives of patent systems, it may in certain cases only be aimed at excluding competition and not at safeguarding a viable commercial development of own innovation covered by the clusters» (emphasis added) - *Reports on the Monitoring of Patent Settlements*

⁵³ The same reasoning characterizes also other recent decisions of the Italian competition authority. In Provv. Agcm n. 23639, 6 June 2012, A437 – *Esselunga/Coop Estense*, the AGCM states clearly that the conduct of the dominant firm did not had any economic justification alternative to the exclusion of competitors. In particular, according to the AGCM, the economic interest that could rationally explain the practice of the dominant firm was devoid of any grounding – paragraphs 170 and 193. Likewise, in a 101 case, the AGCM argued that the only reason why a firm used a specific pharmaceutical procedure to remove one of its drugs from the list of the ones apt at treating glaucoma was to harm competition in the furtherance of an anticompetitive agreement to partition the market. The delisting, indeed, left the market for glaucoma treatments to the other part of the agreement. Yet, it is clear that absent such an agreement, the company would have never used the delisting procedure. See Provv. Agcm n. 24823, I-760, 27 February 2014, *Novartis/LaRoche*.

(α) suppose that the benefits $\mathcal{F}[E^+(P)]$ that A receives from the procompetitive effects caused by P are large enough to overcome the costs, $C_A(P)$, that P casts upon A. In this case A would choose to employ P even in the absence of any benefit, $\mathcal{F}[E^-(P)]$, deriving from the anticompetitive effects that P may bring about. In other words, in this scenario it would be true that:

$$\begin{aligned} &\text{if } \mathcal{F}[E^+(P)] \geq C_A(P), \text{ then} \\ &B_A(P) \geq C_A(P), \text{ even when } \mathcal{F}[E^-(P)] = 0 \end{aligned}$$

(β) suppose that the benefits $\mathcal{F}[E^-(P)]$ and $\mathcal{F}[E^+(P)]$ that A receives from the procompetitive and anticompetitive effects caused by P are both necessary to overcome the costs that P cast upon A, $C_A(P)$. In this case A would choose to employ P because of the all effects that it produces. In other words, it would be true that:

$$\begin{aligned} &\mathcal{F}[E^+(P)] \leq C_A(P) \text{ and} \\ &\mathcal{F}[E^-(P)] \leq C_A(P) \\ &\mathbf{but} \\ &\mathcal{F}[E^+(P)] + \mathcal{F}[E^-(P)] \geq C_A(P), \text{ so that} \\ &B_A(P) \geq C_A(P) \end{aligned}$$

(γ) suppose that A does not gain any benefit because of the procompetitive consequences of P but gets $\mathcal{F}[E^-(P)]$ that are large enough to overcome $C_A(P)$. In other words, suppose that the benefits resulting from the anticompetitive impact of P are the only effects making the procedure P be worthwhile for the dominant firm. Thus, it is true that:

$$\begin{aligned} &\mathcal{F}[E^+(P)] = 0 \text{ and} \\ &\mathcal{F}[E^-(P)] \geq C_A(P), \text{ so that} \\ &B_A(P) \geq C_A(P) \end{aligned}$$

In this last case, hence, the interest of the dominant firm is not aligned to that of the market (or the social planner), because the dominant firm undertakes a behavior that is profitable for itself and not for the market. Thus, it is reasonable that policy makers want to prevent it. Whereas in (α) and (β) the procompetitive and neutral effects of the procedure redeem its anticompetitive impact and, thus, justify its use by whomever (dominant firms included), in (γ) there is no reason to allow a dominant firm to harm market functioning when no social good arises from the use of the procedure. In the (γ) case, hence, the social reasons justifying the existence of A's right to employ the procedure P disappear and, as a consequence, A's right should succumb to antitrust law.

Not by chance, hence, **the (γ) case is just what we previously call as the (IV-2) scenario, the situation when the dominant firm uses P with no other business justifications than the pursuit of the anticompetitive effects.** And the (γ) case clearly fits not only disputes like AstraZeneca, where the dominant firm twisted a procedure that was not designed to produce anticompetitive effects, but also cases like Pfizer, where divisional patents and SPCs were meant to produce both procompetitive and anticompetitive effects, but the dominant firm would have never required them, if it had not been for their anticompetitive impact.

Interestingly, this analysis focuses on elements, like incentives and factual circumstances, that fall quite far away from any traditional inquiry as to the intent and the awareness of individuals. Indeed, when talking about the justifications explaining the dominant firms conduct, the antitrust authorities consider what any rational agent would have done in the given factual setting and not what the dominant firms wanted to do or were aware of. The linchpin of above analysis is only what any rational agent would have expected as a consequence of his/her use of the procedure.

7. Comparing the tests adopted to assess whether a right is abused

From the analysis of the antitrust context we can derive that antitrust authorities have developed a test for detecting abuses of rights which is very precise because the only thing that actually matters

is whether the conduct under scrutiny had **as its only rationale justification** the pursue of anticompetitive effects.

The same cannot be said for the other abuse of rights tests elaborated so far, which range from:

- (i) the only reason to exercise the allegedly abused rights is to circumvent a national law (TVIO);
- (ii) the only reason to exercise the allegedly abused rights is to gain an undue benefit from the national law of another Member State (*Liar v Universitat Hannover*);
- (iii) the allegedly abused rights is exercised to obtain improper advantages manifestly contrary to the objectives pursued by the right (*Centros/Diamantis*);
- (iv) (i) the aim of the allegedly abused right is not achieved and (ii) the abuser had the intention of obtaining an advantage by artificially creating the conditions for the application of the right (*Emsland Starke*);
- (v) (i) the aims and results of the allegedly abused rights would be frustrated if the right claim were actually conferred, and (ii) the right invoked derives from activities for which there is no other explanation than the creation of the right claimed (*Halifax*);
- (vi) the allegedly abused rights is exercised to attain objectives other than those which are legitimate under the law at stake (*Donaldson*).

In other words, in a first phase of the abuse of rights, i.e. the one leading to the establishment of the doctrine, the courts made the efforts to elaborate a test that was increasingly articulated as well as to systematize the diverse cases of abuses that were taking place. *Halifax* was the climax of this phase as it represents the maximum expression of this articulation and, at the same time, the moment into which the principle of prohibiting the abuse of law was affirmed. From that moment on the recurring reference to the principle of general application seemed to have relieved those who relied on it from still looking for a stringent test to show that an abuse of rights had actually taken place.

8. The principle of prohibition of abuse of law: a first evaluation

The abuse of rights principle goes straight to the core of the EU legal order for two reasons. First it contributes to limit the scopes of the rights granted by governments. Second, in order to do that, it requires to investigate the rationales of those rights, i.e. the reasons why the governments grant them. This makes the abuse of right principle so powerful that it can enormously impact the legal order in a twofold way.

On the one hand, it reduces the risks of opportunistic and bad faith uses of the law (not by chance it is also named “the principle of prohibition the abuse of law”). And this in turn increases the trust that citizens have toward the legal system devoid of tricks and stratagems.

On the other hand, the abuse of right principle, given the blurred boundaries and the vague notion that has acquired over the years, generates uncertainty of law till the point that, in a very perverse way, it becomes one of those stratagems and tricks that it is supposed to fight.

The antitrust experience is of little help in providing hints to reduce the backdrops of the abuse of rights principles. True, within the antitrust context the abuse of right offence acquires very clear boundaries. Yet, that is because within antitrust an abuse of rights may take place even regardless of the exact determination of the purposes of the abused rule, since what matters is that the *only* consequence of the abusive use of the right is the generation of anticompetitive effects.

Unfortunately, in the EU abuse of rights context the analysis that is carried out follows the opposite algorithm. We are required to first identify the purpose of the allegedly abused rule, and then to establish whether the abuser is pursuing a goal: (i) manifestly contrary; (ii) not achieved; (iii). frustrated; (iv) other than the one/s protected by the allegedly abused rule. This is even truer now that, differently from its inception within tax law, it is clear that the abuse of right has become a principle of general application to all areas of EU law.