Uncovering the rationale of Article 102 TFEU: The real nature of abuse of dominance provisions

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1. Introduction

It is difficult to draw the line between lawful and unlawful practices implemented by dominant firms. This is true in any competition law regime. Arguably, the ongoing controversies around the scope of Article 102 TFEU[1] provide the most noticeable and prominent example of the practical problems to which the definition of workable boundaries on unilateral conduct gives rise in practice. In 2003, two rulings of the General Court (hereinafter, the 'GC')[2] – in *Michelin II* and *British Airways* – met with criticism from academics and practitioners.[3] The European Commission (hereinafter, the 'Commission') reacted by shifting its approach to Article 102 TFEU. The Discussion Paper issued in 2005,[4] followed by the – relatively more modest – Guidance of 2008,[5] represent a clear commitment to bring enforcement in line with mainstream economic principles.[6]

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[1] Article 102 TFEU prohibits as incompatible with the internal market '[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it' and this insofar as it 'may affect trade between Member States'.

[2] Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission ('Michelin II')* [2003] ECR II-407 and Case T-219/99, *British Airways plc v Commission* [2003] ECR 5917. See also the ruling in the later on appeal: Case C-95/04 P, *British Airways plc v Commission* [2007] ECR I-2331 and Case T-219/99, *British Airways plc v Commission* [2003] ECR 5917..

[3] See in particular John Kallaugher and Brian Sher, 'Rebates revisited : anti-competitive effects and exclusionary abuse under Article 82' (2004) 25 European Competition Law Review 263 and Denis Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 *Journal of Competition Law & Economics* 149.

[4] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

[5] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (hereinafter, the 'Guidance').

[6] EAGCP, 'An economic approach to Article 82' (July 2005), available at <http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf>

Contrary to what happened in other areas of EU competition law,[7] the policy shift on the part of the Commission has not put an end to the abovementioned controversies. If debates remain very much alive in the context of Article 102 TFEU, this is primarily explained by the observed reluctance of EU courts to embrace the enforcement principles on which the Discussion Paper and the Guidance are based. The 2014 judgment of the GC in *Intel* epitomises, better than any other, this reluctance. The Court refused to follow the principles set out by the Commission in the Guidance when establishing whether exclusive dealing and loyalty rebates amount to an abuse of a dominant position. It explicitly rejected the need to show the actual or likely exclusionary effects of such practices for Article 102 TFEU to apply.[8]

The interest of *Intel* goes beyond the position of the GC, which simply follows a well-established line of case law and is as such unsurprising. It is a ruling that has generated a – probably unprecedented – amount of academic commentary.[9] What the growing number of articles reveals is that the endorsement of mainstream economic principles as a guide for law and policy-making is far from gathering a consensus among academics and practitioners. Even within the Commission, the approach outlined in the Discussion Paper and the Guidance remains controversial, and has been openly contested by some authors.[10] The debates, in 2015, still revolve

[7] For instance, the policy approach towards vertical restraints was subject to criticism during the 1980s and 1990s. See in particular Barry Hawk, 'System failure: Vertical restraints and EC competition law' (1995) 32 *Common Market Law Review* 973 and Valentine Korah, 'EEC Competition Policy – Legal Form or Economic Efficiency' (1986) 39 *Current Legal Problems* 85. The shift in approach, reflected in the current version of the Guidelines on vertical restraints [2010] OJ C130/1, para 107, seems to gather a wide consensus among commentators and stakeholders. The same can be said in relation to horizontal mergers following the adoption of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, paras 39-57.

[8] Case T-286/09 *Intel Corp v European Commission* [2014] (GC, 12 June 2014), paras 77 and 81.

[9] See in particular Christian Ahlborn and Daniel Piccinin, 'The Intel judgment and consumer welfare – a response to Wouter Wils' (2015) 1 Competition Law & Policy Debate 60; Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?' (2014) 5 Journal of European Competition Law & Practice 521; Luc Peeperkorn, 'Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates' (2015) 12 Concurrences 43; Nicolas Petit, Intel, Leveraging Rebates and the Goals of Article 102 TFEU' (2015) European Competition Journal (forthcoming); James S Venit, 'Case T-286/09 Intel v Commission – The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 European Competition Journal 203; Wouter Wils, 'The judgment of the EU General Court in *Intel* and the so-called 'more economic approach' to abuse of dominance' (2014) 37 World Competition 405.

[10] For instance, the pieces by Luc Peperkorn and Wouter Wils, mentioned above, advocate contradictory approaches to the interpretation and enforcement of Article 102 TFEU.

around fundamental issues, including the objectives of EU competition law and the role of economic analysis in the definition of the substantive principles of the discipline.

In spite of the high profile of the debates, EU courts' case law on Article 102 TFEU is still poorly understood. This is not surprising considering that the thrust of the literature has been devoted to explaining the ways in which the different judgments are at odds with mainstream positions and to proposing administrable and economically-sound legal principles. Understanding the rationale or the ideas underpinning the case law has attracted relatively little interest. The tendency among authors who have explored the matter is to present EU courts' stance in abuse of dominance cases as an expression of ordoliberal ideas.[11] This hypothesis has been the subject of criticism by some German scholars who have remained close to the ordoliberal tradition. The features in EU courts' case law that are deemed to reflect ordoliberal ideas have sometimes little to do with the tenets of this school of thought.[12] More importantly, the 'ordoliberal hypothesis' has very reduced practical importance. Indeed, claiming that the ideas in the case law can be traced back to a particular school of thought contributes very little to understanding the said ideas. What is more, there is a risk that the richness of the case law is not fully captured when an attempt is made to make it fit into a mould that is representative of only a fraction of the relevant rulings.

Against this background, the purpose of the present contribution is to provide a systematic analysis of the principles underpinning the interpretation of Article 102 TFEU by EU courts. The case law is puzzling in several respects. This is so not for the reasons generally emphasised by commentators (outlined above), but primarily because it is – at least at first glance – a source of

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[11] See for instance See in particular David Gerber, *Law and competition in twentieth century Europe: protecting Prometheus* (OUP 1998); Liza Gormsen, *A principled approach to abuse of dominance in European competition law* (CUP, 2010); Philip Marsden, 'Some Outstanding Issues from the European Commission's Guidance on Article 102 TFEU: Not-so-faint echos Ordoliberalism' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP 2010).

[12] See in particular Ernst-Joachim Mestmaecker, 'The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008' in Lorenzo Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011); and Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008).

contradictions. Potentially abusive practices are not all subject to the same principles. Some practices are always prohibited as abusive irrespective of their impact on competition. For instance, exclusive dealing and loyalty rebates are caught by Article 102 TFEU even when there is evidence suggesting that competitors have been able to thrive – and even increase their market share – during the relevant period.[13] Other practices are only subject to the prohibition where their exclusionary effects can be established. Suffice it to think of 'margin squeeze' abuses or of refusals to deal.[14] More recently, in *Post Danmark I*, the Court of Justice came to a similar conclusion in relation to selective price cuts.[15]

This article contends that there is a logic in the differential treatment of potentially abusive practices. In the same way that Article 101(1) TFEU distinguishes between agreements that restrict competition by 'object' or by 'effect', the Court seems to take the view that some potentially abusive practices are abusive 'by their very nature', while others only prohibited where they have restrictive effects on competition. Some unilateral conduct, in other words, is put on a par with cartels, vertical price-fixing and parallel trade restrictions, which are prohibited irrespective of the effects they produce on the market.[16] Other practices, in turn, are put on a par with agreements which are deemed to pursue a 'legitimate objective' and which include selective distribution, franchising or technology licensing.[17]

The remainder of the paper seeks to explore this question as follows. Section 2 provides an overview the two main lines of case law and shows how they do not follow a uniform approach across the board. Section 3 is an attempt to reconcile them under a single analytical framework. It

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[13] *Michelin II* (n 2), paras 235-246; and Case C-95/04 P, *British Airways* (n 2), paras 96-100.

[14] Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-9555, paras 250-251; and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, para 61

[15] Case C-209/10 *Post Danmark A/S v Konkurrencerådet ('Post Danmark I')* [2012] ECLI:EU:C:2012:172.

[16] Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015 and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

[17] Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353; Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419; and Case 258/78, *L.C. Nungesser KG and Kurt Eisele v Commission* [1978] ECR 2015.

would seem that EU courts prohibit some practices irrespective of the effects they produce where they consider that they have no plausible redeeming virtues, and as such deemed to be inherently anticompetitive. In other cases, evidence of exclusionary effects is a precondition for the application of Article 102 TFEU. An analysis of the case law reveals that the presumptions underpinning the analysis of the different practices explains why they are subject to one analytical framework or the other. Section 4 provides a critical examination of the choices made by EU courts. It appears that some of the presumptions made in Article 102 TFEU are at odds with the way in which the same practices are treated in other areas of EU competition law. In addition, practices that are similar in their nature, purpose and likely effects are not treated uniformly under Article 102 TFEU. The conclusion of this study therefore suggests that there may be grounds for criticism of the case law in its current state. At the same time, it suggests that most criticism of the case law seems to be misguided. The problem with Article 102 TFEU case law seems to be, first and foremost, a legal – rather than an economic – one.

2. Two lines of Article 102 TFEU case law

It is often claimed that it is not necessary to establish the anticompetitive effects of a potentially abusive practice for Article 102 TFEU to apply. This is true of certain lines of conduct, including the ones examined in the *Intel* case, but not of all of them. Suffice it to think of some recent rulings, including *Deutsche Telekom*, *TeliaSonera* or *Post Danmark I* to show that the Court of Justice (hereinafter, the 'ECJ' or the 'Court') sometimes requires evidence of the actual or likely exclusionary impact of a practice. There are, moreover, some practices that are presumed to fall outside the scope of Article 102 TFEU. The purpose of this section is to provide a taxonomy of the main practices. A distinction is drawn between the notion of *rule* and that of *standard*. When a practice is subject to a rule, it is prima facie prohibited (or prima facie authorised) irrespective of its impact on the market. When a practice is subject to a standard, instead, an analysis of the market context in which it is implemented is necessary to determine whether it is prohibited or authorised.

2.1. *Practices that are prima facie prohibited*

It is not difficult to think of examples of practices subject to a rule. The ECJ has frequently dispensed the Commission, and private claimants, from the need to establish the anticompetitive effects of a practice to show an abuse. It is clear that such a prohibition is not a categorical one. A dominant firm has the power to escape the prohibition if it is able to show that the practice under consideration is objectively justified.[18] Thus it is possible for the dominant company to explain that the practice has a pro-competitive rationale[19] or that it is a source of efficiency gains that will benefit consumers.[20] It seems equally clear that a dominant firm cannot avoid the application of Article 102 TFEU simply by claiming that the practice has not had any exclusionary effects and that its rivals had been able to thrive during the relevant period.

2.1.1. Exclusivity and rebates

The Court categorically stated in *Hoffmann-La Roche* that exclusive dealing and loyalty rebates are prima facie prohibited as abusive.[21] In *Intel*, the GC reiterated that it is not necessary to carry out an analysis of the actual or likely exclusionary effects for them to be caught by Article 102 TFEU. Thus a dominant firm would only be able to escape the prohibition if it is in a position to

[18] On the scope of this notion, see Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013) 282-290 and Albertina Albors Llorens, 'The role of objective justification and efficiencies in the application of article 82 EC' (2007) 44 Common Market Law Review 1727.
[19] *Michelin II* (n 2), paras 98-110.
[20] *Post Danmark I* (n 15), paras 40-43.
[21] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para 89.

put forward an 'objective justification' for the practices. The principle is straightforward but the precise scope of the prohibition is less so. According to *Hoffmann-La Roche*, the prohibition encompasses requirements imposed on a customer to buy all, or almost all, of its requirements from the dominant firm.[22] It is generally accepted that an obligation to buy 80% or more of the customers' requirements from the dominant firm amounts to an exclusivity obligation.[23] In addition, rebates conditional upon the customers acquiring all, or almost all, of their requirements from the dominant firm are also deemed contrary to Article 102 TFEU. Rebates of this nature are known as fidelity or loyalty rebates in the case law and administrative practice of the Commission.[24]

The difficulty comes from the fact that rebates are not easily subject to clear-cut categorisation. Rebates that are not formally conditional upon exclusivity may have the same purpose and/or effects in practice. This is an issue with which EU courts were confronted early on. In *Michelin I*, the ECJ examined the lawfulness of a rebate scheme that was not conditional upon exclusivity, but on the customer meeting an individualised sales target.[25] The Court concluded in this case that, in such a case, it is necessary to consider 'all the circumstances' before establishing whether it is abusive.[26] In light of subsequent case law, it seems clear that this assessment revolves around an analysis of whether the rebate scheme in question works like one formally conditional upon exclusivity. The question, put differently, is whether the rebate scheme in question is of a 'loyalty-inducing' or a 'fidelity-building' nature.[27] What needs to be established, in practice, is

[22] Ibid.
[23] Guidelines on vertical restraints (n 7), para 129.
[24] In *Hoffmann-La Roche* (n 21), the Court referred to fidelity rebates. In Case C-549/10 P *Tomra Systems ASA and others v Commission [*2012] ECLI:EU:C:2012:221, the expression 'loyalty rebates', with the same meaning, is preferred. *Intel* (n 8), in turn, refers in para 76 to 'fidelity rebates within the meaning of *Hoffmann-La Roche*'.
[25] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission ('Michelin I')* [1983] ECR 3461.
[26] Ibid, para 73.
[27] See in this sense *Michelin II* and *British Airways* (n 2).

whether they increase customers' incentives to increase their purchases from the dominant supplier.[28]

The exclusionary effects of exclusive dealing and rebate schemes (whether formally conditional upon exclusivity or having the same effects in practice) need not be shown. Such effects are assumed to be the necessary consequence of their implementation. For instance, in *Hoffmann-La Roche*, the Court explained that the two practices 'tend to consolidate' the position of the dominant supplier.[29] It is therefore not surprising that in subsequent cases evidence showing the absence of exclusionary effects was deemed irrelevant by EU courts. The position expressed in the case law is eloquently captured in *Michelin II*, where the GC held that, in the context of Article 102 TFEU, establishing the anticompetitive object and the exclusionary effects of a practice are one and the same thing. Thus, once it is established that the rebate scheme of a 'loyalty-inducing' nature, it can be safely assumed that it will be have such effects. When confronted with evidence suggesting the absence of observable anticompetitive effects, both the Commission and EU courts have pointed out that such evidence does not rule out the possibility that the conditions of competition could be even better in the absence of the contested behaviour.

In *Hoffmann-La Roche*, the Court held that quantity rebates, that is, of rebates that are granted with an increase in the amounts supplied by the dominant firm, are not abusive.[30] One would have assumed from this statement that the Court was setting a rule whereby such rebates are prima facie lawful under Article 102 TFEU. Given the difficulty of drawing formal distinctions between the different types of rebates, however, the case law has evolved in a different direction. Since *Michelin II*, it seems clear that rebates the amount of which depends on the amounts supplied by the dominant firm may also be abusive where it can be shown that they

[28] In practice, increased incentives are established in light of (i) the uncertainty surrounding the amount of the rebates received; (ii) the reference period over which the amount of the rebate is calculated; and (iii) the impact of a modest increase in the amounts acquired from the dominant supplier.
[29] *Hoffmann-La Roche* (n 21), para 90.
[30] Ibid.

are of a 'loyalty-inducing' or 'fidelity-building' nature.[31] Thus, the scope of the legality rule seems to be narrow and remains unclear.

2.1.2. Predatory pricing

There are certain instances in which pricing below cost by a dominant firm is also prohibited without it being necessary to show that the practice has an actual or likely effect on the ability and incentives of rivals to compete. In particular, and according to *AKZO*, pricing below average variable costs is prima facie prohibited as abusive.[32] As is true of exclusive dealing and rebates, the anticompetitive effects were assumed to be the necessary consequence of the practice. This principle follows the rule set by Areeda and Turner in a celebrated article that had become a standard by the time when the Court delivered its ruling. In other cases, pricing below cost can be deemed contrary to Article 102 TFEU if it can be established that it is part of a plan to eliminate a competitor.[33] In this second scenario, the ECJ did not require any anticompetitive effects either. The fact that pricing below cost is capable of excluding equally efficient competitors from the market seemed sufficient to justify the prohibition. Subsequent case law has confirmed that it is not necessary to show anticompetitive effects for predatory pricing to fall under the scope of Article 102 TFEU. In *Wanadoo*, the ECJ rejected explicitly that, as part of the assessment of the practice, it would be necessary to establish that the dominant firm would have the ability to recoup the losses incurred during the predatory pricing campaign.[34]

A contrario, it is reasonable to infer from *AKZO* that pricing above cost is – at the very least – presumptively lawful under Article 102 TFEU. The evolution of the case law contradicts this idea, however. EU courts have deemed abusive aggressive pricing strategies even though

[31] *Michelin II* (n 2), paras 82-95.
[32] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para 71.
[33] Phillip Areeda and Donald F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697.
[34] Case C-202/07 P, *France Télécom SA v Commission ('Wanadoo')* [2009] ECR I-2369, paras 103-114.

there was no evidence in the case that they were predatory within the meaning of *AKZO*. *Irish Sugar* and *Compagnie Maritime Belge* are two clear examples in this regard.[35] An analysis of the two cases suggests that even above-cost pricing can be abusive if there is direct evidence of anticompetitive intent and that the position of the dominant firm approaches that of a monopoly (that is, it is superdominant).

2.1.3. Tying

There are fewer cases addressing the status of tying, but they support the conclusion that this practice is, absent an objective justification, also prohibited as abusive. Cases like *Hilti*[36] and *Tetra Pak II*[37] made it clear that the status of the practice under Article 102 TFEU did not depend on its actual or likely effects. Interestingly, this conclusion does not seem to vary depending on whether tying is a normal commercial practice in the relevant market(s) in which it is implemented.[38] It is however in *Microsoft I* that the issue was addressed more explicitly. In its decision, the Commission took the view that it could not be concluded, without more, that the integration of WMP into Windows amounted, in and of itself, to an abuse of a dominant position. As a consequence, the authority established the mechanism through which the exclusion of rivals on the market for the tied product was to be expected.[39] The GC did not consider it necessary to show the likely effects of tying. In line with what had been suggested in previous cases, the mere

[35] Case T-228/97, *Irish Sugar v Commission* [1999] ECR II-2969 and Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365.
[36] Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439.
[37] Case T-83/91 *Tetra Pak International SA v Commission ('Tetra Pak II')* [1994] ECR II-755.
[38] Ibid, para 137. The letter of Article 102(d) suggests that tying is not prohibited when it is a normal commercial practice, as it seems to prohibit the practice only where the obligations imposed on the customer have no connection to the 'nature' or the 'commercial usage' of the products.
[39] Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para 857.

fact that tying gives a competitive advantage to the dominant firm on the market for the tied product is sufficient to establish an abuse.[40]

2.2. *Practices that may be prohibited if an exclusionary effect is shown*

In the early 2000s, when *Michelin II* and *British Airways* were delivered by the GC, it was not unusual to read that evidence of exclusionary effects is not required to establish an abuse under Article 102 TFEU. In light of the developments in the case law that have taken place over the past decade, it is no longer possible to make such a claim. In addition to refusals to deal – which had long been understood to be pro-competitive absent 'exceptional circumstances' – it cannot be disputed that there are some practices that are not deemed abusive in and of themselves and that are thus subject to a different legal test than for instance exclusive dealing or tying. If this issue was already apparent in the case law relating to 'margin squeeze' practices, it was subsequently confirmed in *Post Danmark I*.

2.2.1. Refusals to deal

In *Magill*, the Court held that a refusal to license an intellectual property right may be abusive. It is clear from the judgment that, as a general rule, dominant firms are not required to deal with rivals. Thus, it is only in a restrictive set of 'exceptional circumstances' that this practice is contrary to Article 102 TFEU. Inter alia, a refusal may only be abusive when the input to which access is requested is 'indispensable' to compete on a vertically-related market and when it leads to the elimination of 'all competition' therein. This principle has not been disputed in subsequent case law. In *Bronner*, the Court addressed a preliminary reference concerning the applicability of

[40] Ibid, para 1058.

the Magill case law to an instance where the refusal concerned a physical input, as opposed to an intellectual property right.[41] In *Microsoft I*, the GC endorsed – at least formally[42] – these conditions, and examined whether the Commission had established to the requisite legal standard that the firm's refusal to supply interoperability information would lead to the elimination of competition from rival work group servers.[43]

2.2.2. Margin squeeze

In *Deutsche Telekom*, the ECJ confirmed that it is necessary to show that a 'margin squeeze' has an anticompetitive effect for Article 102 TFEU to apply to the practice. The Commission had contended the contrary in its decision. According to the authority, it would be sufficient to show that the wholesale margins charged by the vertically-integrated firm to its downstream rivals do not allow the latter to operate at a profit.[44] The GC disagreed with this analysis, and took the view that the practice itself amounts to an abuse of a dominant position. In the specific context of the case, the exclusionary effects derived from the fact that, at the time of the facts, access to Deutsche Telekom's infrastructure was indispensable for rivals to provide their services on the downstream market.[45] In the same vein, the ECJ held in *TeliaSonera* that evidence of an anticompetitive effect is necessary to establish the abusive nature of a 'margin squeeze'.[46] On the

[41] Case 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-7791.
[42] For an analysis of the way in which the conditions set in the case law were interpreted in *Microsoft I*, see Bo Vesterdorf, 'Article 82 EC: Where do we stand after the Microsoft Judgment' (2008) 1 Global Antitrust Review 1 and Christian Ahlborn and David S. Evans, 'The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe' (2009) 75 Antitrust Law Journal 887.
[43] *Microsoft I* (n 38), paras 560-564.
[44] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003] OJ L263/9, paras 176-180.
[45] *Deutsche Telekom* (n 14), paras 231 and 234.
[46] *TeliaSonera* (n 14), paras 55-59.

other hand, it did not exclude that such effects may exist even when access to the dominant firm's infrastructure is not indispensable.[47]

2.2.3. Selective price cuts

In *Post Danmark I*,[48] the Court was asked to rule on the lawfulness of a policy of selective price cuts implemented by the dominant firm. The policy was adopted to attract the customers of its rivals. Accordingly, they could be presumed to be driven by an attempt to expand its business at the expense of its rivals'. It is therefore not surprising that there were some previous rulings, like *Irish Sugar*[49] and *Compagnie Maritime Belge*,[50] suggesting that such a practice is, absent an objective justification, abusive.[51] However, the Court took the view that, absent concrete evidence of an anticompetitive intent, this practice was not in itself contrary to Article 102 TFEU. Action would only be justified if a competition authority – or a claimant – were able to show that the prices are so low that they are predatory within the meaning of *AKZO* or, alternatively, if they are likely to have an exclusionary effect.

3. An attempt to reconcile the case law

In light of the above, it seems difficult to dispute that there are two lines of case law under Article 102 TFEU. It is a challenge for competition law scholars to make sense of this disparity. In some cases, exclusionary effects are assumed and evidence to the contrary is dismissed; in others, the

[47] Ibid, para 72.
[48] *Post Danmark I* (n 15).
[49] *Irish Sugar* (n 34). One of the practices challenged by the Commission in this case related to a policy of selective rebates granted to those customers based closed to the border with the UK, which were more likely to switch suppliers.
[50] *Compagnie Maritime Belge* (n 34). In this case, the Commission challenged a policy of 'fighting ships', whereby the firm reacted aggressively to market entry.
[51] This is something noted by the Advocate General in his opinion in *Post Danmark I* (n 15), Opinion of AG Mengozzi, paras 69-95.

Court has made it very clear that the practice is abusive only insofar as it has a negative impact on competition. It is immediately possible to make sense of this apparent contradiction if one thinks of the distinction drawn in Article 101(1) TFEU between restrictions by object and by effect. It would seem that, in the same way that some agreements are deemed to restrict competition by object, some practices are considered to be abusive by their very nature. By the same token, there would be some practices that would require a careful assessment of their effects, as is true of some agreements.

The line between practices that are abusive by their very nature and those that are not seems to be drawn in light of the perceived purpose of the dominant firm. Where it is established or presumed that a given line of conduct serves an anticompetitive purpose, it is not deemed necessary to show any negative effects on competition. It would be one of this instances in which – paraphrasing the vocabulary used by the GC in *Michelin II* – object and effects are assumed to be one and the same thing. Even though the case law is less explicit on the question, exclusionary effects seem to be required for those practices which are perceived to have a pro-competitive dimension and for which a presumption of an anticompetitive purpose is not appropriate.

3.1. *Abusive practices by their very nature (or by object)*

If one examines carefully practices that are deemed abusive by their very nature, it appears that they share a common feature. In all cases, the Court takes the view that they are not a legitimate form of competition or, put differently, that they are not a manifestation of competition on the merits.[52] In one way or the other, the Court seems to hold that the purpose of the practice under consideration is anticompetitive. There are some cases in which direct evidence of an

[52] In *Hoffmann-La Roche* (n 21), the Court refers (in para 91) to 'normal competition in products and services'). The Court has frequently relied upon the notion of competition on the merits in subsequent cases to draw the line between lawful and unlawful conduct. See for instance Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805, para 902; and Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission* [2012] ECLI:EU:C:2012:770.

anticompetitive intent is relied upon. In most cases, however, the anticompetitive motives of the firm are simply presumed. This analytical approach explains, in turn, why it is possible for dominant firms to rebut the presumption and provide an objective justification for their conduct.

3.1.1. Exclusive dealing and rebates

In *Hoffmann-La Roche*, the ECJ set out very clearly the reasons why it considers exclusive dealing and loyalty rebates to be abusive by their very nature. The Court distinguished between these practices and others like quantity rebates, which were held to be presumptively legal. The rebates granted in consideration for an increase in the amounts supplied were deemed to have a business justification. Loyalty rebates and exclusive dealing, on the other hand, were not considered to be 'based on an economic transaction which justifies this burden'. Instead, the Court presumed that they are 'designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market'.[53]

It is easy to draw immediate analogies between this passage from *Hoffmann-La Roche* and the case law on restrictions by object within the meaning of Article 101(1) TFEU, where the analysis seems to be very similar. When determining whether an agreement is restrictive by its very nature, EU courts essentially examine whether they are objectively justified or whether they pursue a legitimate objective. If they come to the conclusion that they are plausibly pro-competitive, they exclude the by-object qualification and examine their effects on the relevant market(s) concerned. This analytical approach has become very apparent in relatively recent Article 101(1) TFEU rulings like *Pierre Fabre*[54] and *Groupement des Cartes Bancaires*.[55]

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[53] *Hoffmann-La Roche* (n 21), para 91.
[54] *Pierre Fabre* (n 17). In this case, the Court uses the expression 'objective justification' in para 39, and refers to the 'legitimate' 'aims', 'requirements' or 'goals' of a restriction in pars 39-46.
[55] Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission* [2014] (ECJ, 11 September 2014).

If it is established that an agreement is restrictive by its very nature under Article 101(1) TFEU, it is not necessary to show any restrictive effects on competition. As the Court confirmed in *T-Mobile*, it would be sufficient for the agreement to show that the agreement is capable of having restrictive effects on competition.[56] As is true in the context of Article 102 TFEU, it is not a valid defence for the parties to an agreement to claim that it did not have restrictive effects on competition if it has been found to restrict competition by object. It has long been clear that object and effect are two alternative notions under Article 101(1) TFEU.[57] Against this background, it is easier to make sense of the statement made by the GC in *Michelin II*. It seems reasonable to argue that the Court seemingly transposed to Article 102 TFEU a line of case law that was already well-established and uncontroversial in the context of Article 101(1) TFEU.

If Article 102 TFEU case law is examined in this light, it becomes also clear that the analysis of 'all the circumstances' surrounding rebate schemes that are not formally conditional upon exclusivity concerns their object, as opposed to their effect. An analysis of the relevant rulings indeed suggests that the analysis seems to revolve around the nature and purpose of the rebate scheme under consideration. More precisely, the Commission and EU courts traditionally examined whether the rebates were intended to reward loyalty or were intended to reflect the gains made by the dominant firm with the increase in the volume supplied. If one examines the relevant decision, it appears that the Commission essentially challenged the presumed anticompetitive purpose of the rebate scheme.[58] The rulings since *Michelin I*, in turn, essentially seek to ascertain whether the rebate scheme provides an 'advantage not based on any economic service justifying it'.[59]

[56] Case C-8/08 P, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 31.
[57] Ibid, para 28.
[58] See in this sense *Virgin v British Airways* (IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, paras 101 and 102. The Decision makes it clear that the determinant factor in the case, in light of *Michelin I*, is that the schemes under consideration are 'clearly related to loyalty rather than efficiencies'. See also *Michelin II* (n 2), para 240.
[59] See for instance Case C-95/04 P, *British Airways* (n 2), para 67; *Michelin II* (n 2), para 240; and *Intel* (n 8), para 78.

3.1.2. Predatory pricing

That the *AKZO* ruling seeks to establish the anticompetitive object of a predatory pricing campaign seems clear in light of the case law. Where the dominant firm prices below average total cost and there is direct evidence that the practice is part of a plan to exclude a rival setting a rebuttable presumption whereby the practice lacks pro-competitive virtues and is thus abusive by its very nature seems appropriate. Likewise, where the dominant firm prices below average variable cost, it is reasonable to infer that the practice has no plausible explanation other than the elimination of a competitor. As explained by the ECJ in *AKZO*, it is in principle irrational for a firm to price at this level, since an increase in output would lead to an increase in the losses made by the company.[60]

3.1.3. Tying

The case law on tying suggests that the rational for the prima facie prohibition of the practice is not fundamentally different from that underlying the status of exclusive dealing and loyalty rebates. If one examines cases like *Tetra Pak II*, it would seem that the practice is prohibited primarily because it is presumed to be driven by an anticompetitive intent. According to the GC in that case, the tying practices under consideration were part of a 'strategy aiming to make the customer totally dependent on Tetra Pak […], thereby excluding in particular any possibility of competition'.[61] In the same vein, it held that they 'beyond their ostensible purpose' and were

[60] *AKZO* (n 32), para 71. As explained by the Court, '[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced'.
[61] *Tetra Pak II* (n 36), para 135.

instead 'intended to strengthen Tetra Pak's dominant position by reinforcing its customers' economic dependence on it'.[62]

3.2. *Practices that might have exclusionary effects*

In contrast with the practices described above, the Court has never explained why some practices are deemed abusive only when an anticompetitive effect can be shown. Again, if one examines comparable Article 101(1) TFEU rulings it becomes possible to get a sense of the reasons behind this line of case law. As mentioned above, the analysis of the nature agreements revolves around whether they are objectively justified (or whether they pursue a 'legitimate objective') in the context in which they are implemented. One could argue, against this background, that the Court considers that potentially abusive practices such as 'margin squeezes' or refusals to deal have a plausible pro-competitive rationale and therefore cannot be presumed to be driven by an anticompetitive intent.

This interpretation suits particularly refusals to deal with rivals, where the Court confined to 'exceptional circumstances' the instances in which a dominant firm is required to license an intellectual property right or give access to a facility. The Court was never explicit about the question, but Advocate General Jacobs explained at length in his opinion in *Bronner* why it is as a rule pro-competitive, and in the interest of consumers, for a company to refuse to deal with a rival.[63] It is logical for a firm that has invested in the development of a product, a technology or a facility to keep the results of its efforts for itself. More importantly, the very purpose of competition law is to promote such efforts. By the same token, imposing a general duty to deal with rivals can be said to be anticompetitive in the sense that it would harm firms' incentives to

[62] *Tetra Pak II* (n 36), para 140.
[63] Case 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-7791, Opinion of AG Jacobs.

improve their position in the marketplace by developing new products and competitive strategies.[64]

Against this background it seems easier to understand the reasons why the Court might have required evidence of anticompetitive effects in 'margin squeeze' cases like *Deutsche Telekom* and *TeliaSonera*. 'Margin squeeze' scenarios arise where a vertically-integrated firm gives access to an input to its rivals. Article 102 TFEU comes into play where the terms and conditions under which access is granted do not allow the latter to compete effectively on the downstream market. It can in fact be examined as a constructive refusal to deal with a rival, as the Commission does in its Guidance and the US Supreme Court in *linkLine*.[65] At the very least, it seems appropriate to state that intervention in this context interferes with the way in which a firm deals with its rivals. This background makes it possible to understand why the Court may have been reluctant to state that a 'margin squeeze' is anticompetitive irrespective of the market context in which the practice takes place.

In *Post Danmark I*, it is likely that the Court reached the conclusion that, as a rule, there is nothing anticompetitive in the award of selective price cuts by a dominant firm. So long as the cuts do not amount to below-cost pricing, trying to attract new customers by means of targeted offers looks like the very essence of the competitive process and, again, the very behaviour that competition law seeks to encourage. It would therefore be inappropriate to infer from such conduct that it lacks a pro-competitive rationale – unless, of course, one claims that trying to thrive in the marketplace is anticompetitive. EU courts have held in several rulings that dominant firms are entitled to compete on the merits and to take proportionate measures aimed at protecting

[64] As explained by AG Jacobs, '[i]n the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it'.

[65] *Pacific Bell Telephone Co v linkLine Communications, Inc,* 555 US 438 (2009).

their commercial interests.[66] It is likely that the Court has concluded that selective price cuts fit with these principles.

4. A legal analysis of the case law

It has become commonplace to state that Article 102 TFEU case law is problematic insofar as it is at odds with mainstream economics. On the other hand, it is not unusual to present the perpetual debates around the appropriate test for the assessment of potentially abusive practices as reflecting divergent values. From this perspective, commentators that advocate for the so-called effects-based approach (that is, the use of standards across all potentially abusive practices) endorse a particular view of competition law and favour certain values.[67] Commentators who defend the status quo, in turn, would have a different idea of the discipline, which would be equally defensible.

It is difficult to deny that there may be some truth in the above statements. Values and preconceptions, in a field like competition law, necessarily have an influence on the way in which the discipline is perceived. At the same time, such views are not always particularly helpful in furthering the understanding of the law. Positions about the overarching principles that should guide the interpretation and enforcement of competition provisions tend to ignore the fact that the reality of the case law and administrative practice is more complex and multifaceted. This piece contends that legal analysis, which is often under-appreciated or disregarded as irrelevant, has the potential to shed much light on ongoing debates in the field. Upon closer scrutiny, it appears that many of the controversies are in fact of a legal nature. In the same vein, it also shows how some of the observed points of disagreement among institutions and commentators could be effectively addressed through the use of legal techniques.

[66] See in this sense *Irish Sugar* (n 34), para 112.
[67] See in this sense Wils (n 9).

It cannot be emphasised enough that competition policy is implemented through legal provisions. In practice, this means that broad and vague prohibitions such as those found in Articles 101 and 102 TFEU will have to be fleshed out and given an operational meaning in concrete factual scenarios. As a result, it becomes difficult to expect that rulings will all be inspired by a single, all-encompassing logic. More often than not, some rulings will hint at a particular understanding of the discipline, whereas others can be seen as endorsing another, conflicting, objective. In recent years, authors have struggled to reconcile *Post Danmark I*, described above, with *Tomra*, which reiterated the traditional approach towards exclusive dealing and rebates.[68]

It is submitted that there are compelling reasons to question the legal status of some practices under Article 102 TFEU. In particular, the classification of some practices as abusive by their very nature is open to criticism for reasons of legal consistency. There are some cases in which the legal treatment of comparable practices is different: some practices are subject to a standard while others are subject to a rule. In other cases, the same practice is treated differently under different legal provisions. For instance, exclusive dealing is deemed abusive by its very nature under Article 102 TFEU while it is not considered to be restrictive by object under Article 101(1) TFEU. By mapping the internal tensions within the case law, it becomes possible to determine the ways in which the case law could be reconciled and across-the-board consistency achieved. In presence of two conflicting lines of case law, it seems sensible to choose the interpretation of Article 102 TFEU that best captures the lessons of experience and economic analysis. These are the principles upon which the ECJ relied to draw the line between restrictions by object and by effect in *Groupement des Cartes Bancaires*.[69]

[68] See, in particular Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU' (2013) 4 Journal of Competition Law & Practice 32.
[69] *Groupement des Cartes Bancaires* (n 55), para 51.

4.1. *The legal treatment of a single practice across provisions*

4.1.1. Exclusive dealing under Articles 101 and 102 TFEU

Potentially abusive practices are often implemented by means of an agreement within the meaning of Article 101(1) TFEU. As a result, they may be analysed simultaneously under the two provisions. In addition, it is possible that two lines of case law evolve separately, one under each provision. These issues are exemplified by the legal treatment of exclusive dealing under both Articles 101 and 102 TFEU. The principles underlying the two lines of case law are difficult to reconcile with one another. The observed tension cannot be sufficiently explained by the fact that Article 102 TFEU deals with the behaviour of dominant players while Article 101 TFEU applies to all agreements. Judgments are based on what look like mutually incompatible premises that would lead to different outcomes irrespective of the market power enjoyed by the firm.

In *Delimitis*, the ECJ examined whether exclusive dealing is restrictive by object. As in other cases, it noted that agreements requiring exclusivity from the distributor may serve pro-competitive purposes and cannot as such be deemed to be contrary to Article 101(1) TFEU by its very nature.[70] The Court noted that such agreements may be in the interest of both suppliers (which would be able to plan their production more effectively and preserve their investments) and distributors (which would obtain better contractual conditions and secure guaranteed supplies).[71] In addition, the Court set out the principles that an authority or a claimant should follow when establishing the restrictive effects of exclusive dealing. According to the ruling, it

[70] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935, paras 10-12.

[71] In para 11, the Court noted that 'as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods. The supply agreements, moreover, [allow] the supplier to plan his sales over the duration of the agreement and to organize production and distribution effectively'. In para 12, it noted that these arrangements 'also have advantages for the reseller, inasmuch as they enable him to gain access under favourable conditions. […] The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance in guaranteeing product quality and customer service'.

would be necessary to establish that access to the relevant market by a new entrant would be foreclosed and that the supplier contributes significantly to such foreclosure.[72]

If the logic of *Delimitis* were applied in the context of Article 102 TFEU, the case law would have evolved very differently. As observed above, the fundamental reason why the ECJ concluded in *Hoffmann-La Roche* that exclusive dealing is abusive by its very nature has to do with the absence of a valid pro-competitive justification for the practice (in contrast with quantity rebates, which are presumed to reflect the efficiency gains made by the supplier). In addition, *Delimitis* makes it very clear that foreclosure cannot simply be assumed to be the necessary consequence of imposing exclusivity obligations on some distributors, or of the market position of the firm. It is instead necessary to explore the features of the market as a whole, including the possibility of entering the market by means of vertical integration.[73]

The difficulty to reconcile *Delimitis* and *Hoffmann-La Roche* becomes apparent when one examines several rulings, like *British Plasterboard*[74] and *Intel*, where the GC was confronted with the principles set out by the ECJ in *Delimitis* and which suggested that a rule-based approach to the practice was not warranted. In both cases, the GC acknowledged that such practices may have a pro-competitive justification and that they may be normal commercial practices. At the same time, it resorted to the well-established principle whereby dominant firms have a 'special responsibility' not to impair the functioning of markets.[75] The tension between the two lines of case law became also apparent in *Van den Bergh Foods*.[76] In that case, the GC had to examine the status of exclusive dealing both under Articles 101 and 102 TFEU. As a result, it was simultaneously required to establish the anticompetitive effects of the arrangement and to

[72] Ibid, paras 15-26.
[73] Ibid, para 20, where the Court explains that '[t]he existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised […]. The other factors to be taken into account are, in the first instance, those also relating to opportunities for access'.
[74] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission ('British Plasterboard')* [1993] ECR II-389, paras 66-67.
[75] *Intel* (n 8), paras 89-90.
[76] Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653.

conclude that it was anticompetitive by its very nature. It is therefore not surprising that the ruling can be reasonably interpreted as suggesting that it is necessary to establish the anticompetitive effects of exclusive dealing under Article 102 TFEU.[77]

4.1.2. Tying under merger control and Article 102 TFEU

The anticompetitive effects of a merger may be the consequence of the ability and the incentive of the new entity to engage in tying practices. However, the analysis of such scenarios under Regulation 139/2004[78] differs substantially from that observed in the context of Article 102 TFEU. Under the latter, the practice itself is deemed abusive by its very nature, and its implementation has been interpreted as a strategy by the dominant companies to drive its rivals out of the market. Under Regulation 139/2004, on the other hand, transactions giving the merged entity the ability to engage in tying are not always prima facie anticompetitive, even when one of the parties to the operation enjoys a dominant position.[79]

The fundamental reason behind the observed divergence seems to be the fact that conglomerate mergers are not assumed to have an anticompetitive object. In *Tetra Laval*, the GC noted expressly that these operations are in fact often beneficial for competition, and this, irrespective of the position enjoyed by the merging parties on one of the relevant markets. Because EU courts do not take the view that conglomerate mergers are anticompetitive by their very nature, it is not sufficient to conclude that they are capable of having anticompetitive effects. As is true of agreements that do not restrict competition by object under Article 101(1) TFEU, administrative action would require showing the precise mechanism through which

[77] O'Donoghue and Padilla (n 18) 431-432.
[78] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[79] See in this sense Case C-12/03 P, *Tetra Laval BV v Commission* [2005] ECR I-987 and the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ('Non-Horizontal Merger Guidelines') [2008] OJ C265/6, paras 91-121.

anticompetitive foreclosure would result from the operation.[80] As now described at length in the Non-Horizontal Merger Guidelines, the Commission has to show not only that the merged entity would have the ability to foreclose competition via tying but also that it has the incentive to do so.[81]

4.2. *The legal treatment of comparable practices within Article 102 TFEU*

4.2.1. 'Margin squeeze' and refusal to deal

It is not obvious to understand, in light of the case law, why some practices are deemed abusive by their very nature and other comparable practices only prohibited insofar as they may have anticompetitive effects. It may be sufficient to compare, for the purposes of the present paper, the tension that exists between the case law on refusals to deal and 'margin squeeze' abuses, on the one hand; and the case law on rebates and on selective price cuts, on the other. As mentioned above, 'margin squeeze' abuses can be seen as constructive refusals to deal. If this is so, one could claim that it is reasonable to set the same standard for the two practices. In particular, it would make sense to claim that evidence of exclusionary effects would not be sufficient to establish the abusive nature of a 'margin squeeze'. It would, in addition, be necessary to show that access to the input or the facility is indispensable to operate on the relevant downstream market.

In *linkLine*, the US Supreme Court concluded that a 'margin squeeze' cannot be an abuse unless it is established that the defendant is under a duty to deal with rivals as a matter of competition law. When confronted directly with the same question, raised by the national court in the preliminary reference in *TeliaSonera*, the ECJ did not come to the same conclusion. Thus, evidence of indispensability is required for Article 102 TFEU to apply to 'margin squeeze'

[80] *Tetra Laval* (n 79), paras 41-44.
[81] Non-Horizontal Merger Guidelines (n 79), paras 91-118.

practices. On the one hand, it denied the relevance of *Bronner* as a precedent, the scope of which was narrowly interpreted as concerning a refusal to deal alone.[82] On the other, it suggested that the abuse in an instance of 'margin squeeze' is the consequence of the unfair (or excessive) nature of the prices charged.[83] As the case law stands, accordingly, it is safer for a dominant company to refuse to deal with a rival altogether than to deal with a rival on disadvantageous terms and conditions. The theoretical and practical problems raised by such a tension have been abundantly discussed in the literature.[84]

4.2.2. Selective price cuts and rebates

Post Danmark I can be said to be in several respects at odds with the logic underpinning the case law on rebates. Loyalty and 'loyalty-inducing' rebates are deemed not to have an economic justification underlying their award. It is from the absence of an objective justification that the anticompetitive intent of the dominant firm is inferred. If one applied the same logic to *Post Danmark I*, it would have been reasonable to conclude that the practice was prima facie abusive. Unlike quantity rebates, the selective price cuts at stake in the case did not reflect any cost savings made by the dominant firm. They were merely intended to attract customers away from a rival. Accordingly, it would even be appropriate to label them as 'disloyalty-inducing'. This was in fact the argument made by several third parties taking part in the proceedings – including the Commission. As pointed out by the Advocate General in his opinion, they submitted that Post Danmark's practices should be deemed unlawful in the absence of an objective justification.[85]

[82] *TeliaSonera* (n 14), paras 47-59.
[83] Ibid, paras 25-34.
[84] For a discussion, see O'Donoghue and Padilla (n 18) 399-404.
[85] *Post Danmark I* (n 15), Opinion of AG Mengozzi, para 52: 'those interested parties ["FK, the Danish and Italian Governments, the EFTA Surveillance Authority and, to a certain extent, the Commission"] submit that, irrespective of costs, selective pricing by a dominant undertaking in relation to customers of its only genuine competitor leads, or

The legal test developed by the ECJ in *Post Danmark I* gives rise to additional consistency issues. It has been mentioned above that, at least since *Michelin II*, quantity rebates can be deemed abusive if they are shown to be 'loyalty-inducing'. In light of the case law, the factors that are likely to lead to a finding of abuse include the relatively long reference period (for instance, one year)[86] or the fact that rebates are retroactive (that is, that they apply to all units acquired from the dominant supplier and not simply to the units exceeding a certain threshold).[87] As a result, under the current state of the case law it is easier to show that quantity rebates are contrary to Article 102 TFEU than to establish the abusive nature of selective price cuts.

There are several reasons why this reality seems counterintuitive and difficult to defend on theoretical grounds. It would seem that, if anything, quantity rebates are inherently less suspicious and more obviously pro-competitive than selective price cuts. As already explained, the latter have no justification other than the desire to expand the client base at the expense of a competitor. On the other hand, it is difficult to infer from a system of quantity rebates that its only plausible explanation is to attract customers away from a rival. In fact, and as the GC pointed out in *Michelin II*, quantity rebates were presumed to reflect the cost savings made by the firm in *Hoffmann-La Roche*.[88] Moreover, selective price cuts have the effect of applying dissimilar conditions to equivalent transactions, which was an anticompetitive effect identified by the Court in *Hoffmann-La Roche*.[89] Quantity rebates, on the other hand, apply standardised conditions across the board to all customers. As this piece is being completed, there is a pending reference before the Court in *Post Danmark II*, where the Court will have the chance to address these tensions in the case law.[90]

may very likely lead, to the exclusion of the latter if such pricing is not justified on economic grounds, particularly economies of scale. That is said to be the situation in the main proceedings'.

[86] *Michelin I* (n 25), para 81.

[87] *Michelin II* (n 2), para 88.

[88] *Hoffmann-La Roche* (n 21), para 90 and *Michelin II* (n 2), para 58.

[89] *Hoffmann-La Roche* (n 21), ibid.

[90] Case C-23/14, *Post Danmark A/S v Konkurrencerådet ('Post Danmark II')*, pending.

4.3. *Reconciling the divergent approaches in the case law*

EU competition law provisions are fleshed out in an incremental manner by applying to concrete scenarios. Tensions and internal contradictions in the case law are therefore inevitable, and far from a discipline-specific phenomenon. Similarly, the nature and scope of the disagreements between cases is more modest than is often assumed. Far from reflecting fundamental disagreements about the nature and objectives of the discipline, they are a consequence of the way in which the law is shaped and evolves over time. The principles underpinning a particular ruling may seem accurate and appropriate at the time when it is delivered. It may become apparent at a subsequent stage that the premises on which it is based need to be refined to incorporate new knowledge. Given the way in which the law evolves, however, this is not always an easy task. By the time new knowledge has been acquired, there may be a long line of well-established case law, which may prove difficult to ignore in the context of a particular practice, or a particular provision. As a result, newly developed ideas may only influence the outcome of rulings relating to other practices or may only come into play in the context of other provisions.

If tensions in the case law are scrutinised as a natural and inevitable consequence of legal evolution, it becomes that some features of Article 102 TFEU case law are difficult to defend not because they are reflect a particular objective or view of the field, but because they do not always reflect the knowledge and experience acquired over the years. Cases like *Hoffmann-La Roche* and *Tetra Pak II* are based on plausible premises about the nature and purpose of, respectively, exclusive dealing and tying. By the same token, the fact that *Delimitis* (on exclusive dealing) and *Tetra Laval* (on tying) reflect conflicting views about the same practices is simply the consequence of an improved understanding of the instances in which they are likely to have anticompetitive effects and the reasons why firms (including dominant firms) resort to them.

4.3.1. Exclusive dealing and rebates

The presumption that exclusive dealing and loyalty (or 'loyalty-inducing') rebates lack a valid economic justification would be unproblematic if it truly reflected the reality of business transactions. If one looks at the experience acquired after decades of case law, it seems difficult to say that this is the case. An analysis of the relevant rulings reveals, first, that exclusive dealings are often required by firms that lack the ability to foreclose competition. The market share of the supplier in *Delimitis* was modest by any standard.[91] More generally, it is difficult to dispute that exclusive dealing arrangements are widespread across sectors and markets.[92] This fact alone suggests that a legal test that revolves around a presumption of anticompetitive intent for exclusive dealing does not capture the nature or the purpose of the practice. There are some cases that suggest that these conclusions are not affected by the degree of market power enjoyed by the firm. After a careful analysis of the rebate schemes at stake in *Michelin II*, Motta concluded that were several factors strongly suggesting that they were not driven by exclusionary motivations.[93] In several respects, such rebates looked closer in nature to arrangements such as selective distribution and franchising, both of which are deemed pro-competitive in the case law.[94]

Another fundamental conclusion that follows from the case law is that exclusionary effects cannot be assumed to be the necessary consequence of the implementation of exclusive dealing and rebates. If *Michelin II* and *British Airways* were criticised by commentators, this is primarily due to the fact that an abuse was established even though there was clear evidence that rivals had been able to thrive during the relevant period, and even improve their position at the expense of the dominant firm's share. The empirical evidence resulting from the case law is consistent with

[91] *Delimitis* (n 70), Opinion of AG Van Gerven, para 22.
[92] See in this sense the Guidelines on vertical restraints (n 7), paras 129-150.
[93] Massimo Motta, 'Michelin II: The Treatment of Rebates' in Bruce Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (CUP 2009).
[94] This is the case, in particular of the Michelin Friends Club. Michelin opened this scheme to distributors willing to enter into a closer relationship with it. In particular, Michelin assisted its partners by means of training and funding.

the consensus positions of economists, reflected in the report issued in 2005 by the Economic Advisory Group on Competition Policy.[95] Economic analysis suggests that exclusive dealing, when implemented by a dominant firm, can have exclusionary effects under certain conditions that need to be established in the context in which intervention is considered.[96]

4.3.2. Tying

The understanding of tying has greatly evolved over the past decades. The ideas found in *Tetra Pak II* faithfully reflect past consensus views about the practice. Such views are probably best captured in the formula of the US Supreme Court according to which '[t]ying arrangements serve hardly any purpose beyond the suppression of competition'.[97] The decades of experience accumulated since this principle was first enunciated show that the reasons why firms engage in tying and bundling very often have little to do with the elimination of competition. The integration of different products is understood to be a manifestation of competition on the merits. It is in fact not by chance that, as mentioned above, the GC held in *Tetra Laval* that conglomerate mergers may have beneficial effects on competition. In the same vein, the Commission explains in the Non-Horizontal Merger Guidelines that such benefits may be manifested, inter alia, through tying and bundling.[98] Accordingly, there seems to be no valid reason why tying should be regarded as potentially beneficial for competition when assessed in the context of a conglomerate merger and to presume that it is driven by anticompetitive purposes when assessed under Article 102 TFEU. The logic underpinning *Tetra Laval* should in principle prevail across provisions.

[95] EAGCP Report (n 6).
[96] Ibid, 47-50.
[97] For a discussion of the evolution of the case law, see *Illinois Tool Works Inc v Independent Ink, Inc*, 547 U.S. 28 (2006).
[98] Non-Horizontal Merger Guidelines (n 79), para 93. The Commission explains that '[t]ying and bundling as such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways'.

On the other hand, as is true of exclusive dealing, there seems to be sufficient evidence confirming what that tying cannot be assumed to have anticompetitive effects. There are instances in which the dominant firm simply lacks the ability to foreclose competition on a neighbouring market. Examples of such instances can be found in the case law. In *Microsoft I*, the Commission described the mechanism through which rivals would be driven out of the market for media players.[99] It would become clear in the years before the GC delivered its ruling that such prediction did not materialise, and that rivals had retained the ability to thrive on the relevant market.[100] In *Microsoft II*, the Commission developed again a theory whereby the elimination of competition on the market for web browsers was likely.[101] The subsequent evolution of the market showed very clearly that such concerns were unjustified.[102]

4.3.3. Predatory pricing and selective price cuts

Post Danmark I provides a valuable example of the ways in which conflicting lines of case law may be reconciled in practice. As explained above, the Court was confronted with two competing logics. It was possible to infer from some rulings, in particular *Compagnie Maritime Belge* and *Irish Sugar*, that the practice under consideration was abusive by its very nature. From this perspective, the selective nature of the discounts would have no justification other than the exclusion of competition. On the other hand, the *AKZO* ruling suggested that, absent direct evidence of the firm's intent, the practice could only be presumed to be anticompetitive if the discounts amount to pricing below average variable costs. In choosing the latter, the ECJ chose a benchmark which prior research in the field had already shown to be a safe one.

[99] *Microsoft I* (n 38), paras 842-871.
[100] Ibid, paras 996-998 and 1089.
[101] 16.12.2009 *Virgin v British Airways* (IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1 Microsoft (tying) (Case COMP/C-3/39.530) Commission Decision of 16 December 2009 [2010] OJ C36/7, paras 39-54.
[102] 'Chrome rules the web' *The Economist* (London, 10 August 2013).

5. Conclusions

It is remarkable that debates around the appropriate treatment of potentially abusive practices remain as alive as they were a decade ago. Interestingly, legal considerations tend to be left outside these debates. The purpose of this piece was to show how the essence of ongoing disagreements can be illuminated through legal analysis. The rationale behind the case law is not often given the prominence it deserves by commentators, and is not always well understood. It is possible to discern two different categories of practices in the case law. There is, on the one hand, conduct that is considered to be anticompetitive by its very nature and, on the other, conduct that is only prohibited if an anticompetitive effect can be shown. It would seem that the difference between the two is the same that exists between agreements that restrict competition by object and by effect under Article 101(1) TFEU. Where the case law is seen in this light, it becomes clear that the controversies surrounding Article 102 TFEU are not as far-reaching and fundamental as commonly understood.

This approach is a useful and promising starting point to engage in a critical analysis of the case law. A legal perspective reveals, first, that it is richer than commonly understood. There is a tendency to provide an overly simplified picture of the ways in which Article 102 TFEU has been interpreted over the years. Upon closer scrutiny, it appears that the case law already captures the essence of some positions with which it is sometimes assumed to be at odds. Because the evolution of Article 102 TFEU depends on its application to concrete factual scenarios, however, such positions are not uniformly reflected in all rulings. As seen above, some judgments may be based on conflicting premises. If this is so, Article 102 TFEU may very well evolve, but not against an externally defined benchmark, as defended by some commentators. It may evolve in the way legal disciplines typically evolve, by addressing, on an incremental basis, tensions between rulings and seeking to achieve coherence through the case-by-case application of the law to concrete scenarios.

From a legal standpoint, the relevant question is whether the qualification of some practices as abusive by their very nature is an appropriate one. In this regard, it appears, first, that such qualification is not uniform across competition law provisions. Some practices are subject to a qualified prohibition rule under Article 102 TFEU, but not when examined under Article 101 TFEU or EU merger control. This is the case, for instance, of exclusive dealing. Similarly, tying concerns may arise in the context of a conglomerate merger, when one of the parties to the transaction holds a dominant position. However, these operations are not prima facie prohibited. Their legality is established instead by considering their likely effects on competition.

A possible approach to deal with these tensions in the case law – and arguably the natural one – is to resort to the test developed in *Groupement des Cartes Bancaires*. The Court held in that ruling that, in order to qualify agreements as restrictive of competition by object, it is necessary to consider the lessons of experience and economic analysis. Such insights will show whether it is accurate to presume that the practices serve no pro-competitive purpose (or that they have no ‘legitimate objective’, which is the expression used in *Groupement des Cartes Bancaires*) and to assume that they have anticompetitive effects. Even though it is implicit in the ruling, this approach is not fundamentally different from that in *Post Danmark I*. In that case, the Court was confronted with two conflicting lines of case law, and concluded that the practice was not in itself anticompetitive. The Court will be confronted with similar conflicts in the future. This piece has shown how they can be effectively and meaningfully addressed simply by trying to ensure consistency within the EU competition law system.