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COMPETITION ON THE MERITS

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Abstract

This article examines the meaning and contemporary relevance of the notion of competition on the merits in Article 102 TFEU case law. It also considers whether a finding of abuse presupposes that a practice is "abnormal" or amounts to a "wrongful act". The analysis identifies friction between the old and the most recent case law. This friction was exposed in Servizio Elettrico Nazionale*. Seminal rulings such as* Hoffmann-La Roche*, where the notion of competition on the merits was introduced, are grounded on the assumption that it is possible to distinguish,* ex ante *and in the abstract, between lawful and unlawful conduct. The case law that followed moved away from these ideas and clarified that whether or not a practice amounts to an abuse is typically a context-dependent inquiry. Against this background, the article provides a structure that reconciles the old and the new strands of case law and shows that there is a place for competition on the merits within Article 102 TFEU.*

1. Introduction

In its request for a preliminary ruling in *Servizio Elettrico Nazionale*, the *Consiglio di Stato* asked the Court of Justice (hereinafter, the Court or the ECJ) whether an abuse of a dominant position involves the use of methods departing from "normal" competition.[1] The question seemed surprising at the time. It raised a point of law that – one would have thought – had long been settled. Decades of enforcement show that most practices potentially falling

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1. Case C-377/20, *Servizio Elettrico Nazionale SpA and Others* v. *Autorità Garante della Concorrenza e del Mercato and Others*, EU:C:2022:379. The first question submitted by the Consiglio di Stato reads as follows: "May conduct that constitutes an abuse of a dominant position be completely lawful in and of itself and be classified as 'an abuse' solely because of the (potentially) restrictive effect created in the reference market, or must that conduct also be characterised by a specific 'unlawful' component, represented by the use of 'competitive methods (or means) that are different' from those that are 'normal'? In the latter case, what criteria should be used to establish the boundary between 'normal' and 'distorted' competition?".

within the scope of Article 102 TFEU are "normal", both in the sense that they are implemented by dominant and non-dominant firms alike and in the sense that they do not necessarily have a restrictive object and/or effect. There is nothing inherently sinister in, for instance, standardized rebates. Whether or not these are caught by Article 102 TFEU depends on a context-specific evaluation of "all the circumstances" surrounding their application.[2] Similarly, the fact that a given behaviour is actually or potentially (even generally) pro-competitive does not mean that it escapes the prohibition in every instance. A refusal to license an intellectual property right – just to mention one example – is, absent "exceptional circumstances",[3] a "normal" method of competition.[4]

The preliminary reference in *Servizio Elettrico Nazionale* revealed that, however surprising it may be, this fundamental question has not been fully resolved. One could not but come to the same conclusion when the Commission decision in *Google Shopping*[5] reached the General Court (hereinafter, the GC or the first-instance court).[6] In its direct action, the dominant undertaking argued, *inter alia*, that the self-preferencing behaviour at stake in the case fell outside the scope of Article 102 TFEU insofar as it was, objectively speaking, a product improvement.[7] This argument could have been summarily dismissed. The Court has repeatedly held that dominant undertakings have a "special responsibility" not to impair effective competition in the markets where they operate.[8] One of the implications of this principle is that conduct that would otherwise have been regarded as unproblematic (or even pro-competitive) may be prohibited as abusive.[9] The GC, instead of relying on this consistent line of case law, argued at length why, in its view, Google's behaviour was not an expression of competition on the merits.[10]

2. Case C-23/14, *Post Danmark A/S* v. *Konkurrencerådet*, EU:C:2015:651, para 29.

3. Joined Cases C-241 & 242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v. *Commission*, EU:C:1995:98.

4. The right to authorize or prohibit certain acts is part of the core of the operation of intellectual property systems and as such an act of normal competition. It must be emphasized, in this regard, that EU competition law does not question the existence of intellectual property rights. See Joined Cases 56 & 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH* v. *Commission*, EU:C:1966:41, p. 345.

5. *Google – Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017.

6. Case T-612/17, *Google LLC and Alphabet, Inc.* v. *Commission*, EU:T:2021:763.

7. Ibid., para 136.

8. Case 322/81, *NV Nederlandsche Banden Industrie Michelin* v. *Commission*, EU:C:1983:313, para 57.

9. Schweitzer, "The history, interpretation and underlying principles of Sec. 2 Sherman Act and Art. 82 EC" in Ehlermann and Marquis (Eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart, 2008), pp. 119–164.

10. Case T-612/17, *Google Shopping*, paras. 150–198.

Against this background, this article addresses two interrelated issues. The first has to do with the meaning of the notion of competition on the merits and, in the same vein, with the difference between "normal" and "abnormal" methods of competition. On this point, the article explores how the divide between proper and improper business strategies can be addressed in theory and in practice. The second issue relates to whether a finding of abuse requires evidence that the practice under consideration departs, by its very nature, from competition on the merits. The issue, in other words, is whether proof of an anticompetitive effect is sufficient to establish a breach of Article 102 TFEU, at least in certain instances (which is what the case law of the past decade indicates), or whether, instead, it is also necessary to show that the behaviour amounts to a mischief or a wrongful act (as one reading of *Servizio Elettrico Nazionale* might suggest).

The first point the article makes is that the notion of competition on the merits is an irritant in the case law. The notion reflects a characteristic assumption of the early days of the discipline, which is that one can neatly distinguish, *ex ante* and in the abstract, between prohibited conduct and legitimate expressions of normal competition. The premise underpinning the original understanding of the concept of abuse is that Article 102 TFEU deals with conduct that only dominant firms can afford to implement (conduct, in other words, that would not occur in an effectively competitive market). These views informed the case law of the 1970s and 1980s, most notably *Hoffmann-La Roche.*[11] However, they are now known to be inaccurate. It is widely accepted that potentially abusive conduct is often pervasive in the economy. In fact, Article 101 TFEU case law showed, early on, that the sort of behaviour that is scrutinized under Article 102 TFEU may be – and frequently is – implemented by undertakings with a modest degree of market power.

The second idea this article advances is that the case law does not support the proposition that conduct can only amount to an abuse when it departs by its very nature from, or is inherently at odds with, competition on the merits. The steady stream of judgments delivered by the Court in the course of the past decade shows that it is not necessary for an authority or claimant to show that conduct is abnormal (or amounts to a "wrongful act"). As a matter of principle, it is sufficient to prove that it is a source of actual or potential effects in the economic and legal context of which it is a part. Accordingly, potentially pro-competitive conduct may fall within the scope of Article 102 TFEU. One should bear in mind, in this regard, that a dominant firm can provide evidence showing that the efficiency gains resulting from a practice outweigh its negative effects.[12]

11. Case 85/76, *Hoffmann-La Roche & Co. AG* v. *Commission*, EU:C:1979:36.
12. Case C-209/10, *Post Danmark A/S* v. *Konkurrenceråd*et, EU:C:2012:172, paras. 40–42.

Third, the article shows how the old and the new lines of case law can be reconciled into a coherent whole. More precisely, one can group and potentially classify abusive strategies into three broad categories. There is, in the first place, conduct that can be said to be inherently at odds with competition on the merits. This subset of practices comprises behaviour that has a restrictive object and that is therefore abusive by their very nature. One can identify, in the second place, conduct that is at least potentially pro-competitive and as such "normal". In principle, these practices are only caught by Article 102 TFEU insofar as they negatively affect equally efficient rivals' ability and/or incentive to compete. As far as this second category is concerned, the notion of competition on the merits and the notion of anticompetitive effects collapse into one and the same point of law. In other words, conduct falling within this category departs from normality when it amounts to a restriction in the relevant economic and legal context. There are, in the third place, legitimate methods of competition that are deemed incapable of excluding equally efficient rivals.

Finally, the article shares some methodological insights on how to identify conduct that is inherently at odds with competition on the merits. It is submitted that practices can only be categorized as being abusive by their very nature in light of the lessons drawn from experience and economic analysis. The approach to the identification of these behaviours, in other words, should not be different from that followed by the Court when establishing restrictions by object within the meaning of Article 101(1) TFEU. Decades of enforcement show that intuitive analysis tends to lead to misguided conclusions. It may come across as superficially compelling. However, business practices often have a (potentially) pro-competitive rationale that only formal, systematic analysis can reveal. One should therefore be prudent before claiming that a given line of conduct is as such abnormal or is driven by an exclusionary purpose. As Article 101(1) TFEU case law shows, experience and economic analysis are valuable safeguards in this regard.

2. The concept of abuse and the idea of "normal" competition

2.1. *Background: Two understandings of the concept of abuse*

The *Consiglio di Stato* presented the Court with a question of major relevance for the interpretation and enforcement of Article 102 TFEU. It amounted to asking, in essence, whether the concept of abuse should be interpreted narrowly or broadly. Under a narrow understanding, the provision would only encompass conduct that is inherently improper, abnormal or wrongful. If this

understanding of the concept of abuse were to be followed, methods of competition that are deemed legitimate would not be caught by the prohibition. Under a broad interpretation of the concept of abuse, by contrast, both normal and abnormal expressions of rivalry potentially fall within the scope of Article 102 TFEU. Pursuant to this alternative understanding of the provision, pro-competitive practices may amount to an abuse of a dominant position where they have, or can be expected to have, anticompetitive effects.

2.2. *The narrow interpretation of the concept of abuse*

It is reasonable for an apex court to inquire whether only inherently abnormal or improper conduct can amount to an abuse. Many arguments in support of a narrow understanding of the concept of abuse have been advanced over the years. One could try and claim, to begin with, that prohibiting normal conduct amounts to penalizing the success of dominant firms. The fact that an undertaking outperforms rivals because it is more efficient should not, the argument goes, be a reason for concern. It would be the very outcome that a well-functioning competition law system should encourage, even when (indeed, in particular when) it leads to foreclosure. As famously put by Judge Hand, it "would run counter to the spirit of the antitrust laws" to punish a firm for excluding its rivals as a result of its "superior skill, foresight and industry".[13] One could try and claim, in a similar vein, that it would make little sense to challenge practices solely because they affect the existing market structure (or more generally, because they have exclusionary and/or exploitative effects). By definition, the behaviour of a firm that is more efficient than its rivals (or that offers more attractive goods or services) will alter the market structure.

One can think of a second argument in support of a narrow interpretation of Article 102 TFEU. It has to do with the fact that normal conduct is widespread in the economy (and thus not unusual or exceptional). This aspect is relevant for two reasons. It means, in the first place, that the practice is not the exclusive province of dominant undertakings. It may be put into effect by firms with a relatively modest degree of market power. The experience of decades of enforcement confirms, in fact, that many potentially exclusionary strategies are implemented by undertakings that have market shares well within the *de minimis* range.[14] The factual scenario in *Delimitis* provides a

13. *United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945), 430.

14. Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), O.J. 2014, C 291/1. According to the Notice, the Commission treats as de minimis agreements between competitors where the market share remains below the 10% threshold and

concrete example in this sense.[15] That a practice is widespread in the economy also means, in the second place, that prohibiting it as abusive would handicap dominant undertakings, since they would be prevented from relying on strategies that are open to their rivals.

A third argument follows from the second one and relates to the consequences of denying dominant firms the chance to deploy normal methods of competition. The prohibition of a practice that is the source of pro-competitive gains deprives customers and/or end-users of the benefits resulting from it. For instance, the lower prices that one can expect from the award of rebates would never be passed on to consumers. Similarly, some new products (or new combinations of products) might never materialize if tying by dominant firms is banned. In the same vein, prohibiting certain practices may have the paradoxical effect of softening competition. For instance, preventing a dominant undertaking from competing intensely on price (whether by means of conditional or unconditional discounts) can create an "umbrella effect" that insulates other firms from the rigours of rivalry and can even favour collusive behaviour.[16]

When one embraces a narrow understanding of the concept of abuse, the central legal inquiry is whether the behaviour is inherently wrongful or abnormal, in the sense that it departs from legitimate expressions of competition on the merits. There have been several attempts, over the years, to draw the line between proper and improper methods of rivalry. Under one approach, behaviour would be "abnormal" or "improper" where it makes "no economic sense" other than as a means to harm the competitive process.[17] Pursuant to this test, the relevant issue is whether the behaviour in question can be rationalized on pro-competitive grounds. Thus, if the strategy would be profitable for reasons unrelated to the exclusion of rivals, it would not be abusive.[18] The typical example that comes to mind in this regard is pricing below average variable costs. As explained by Areeda and Turner in their canonical piece, this practice must be deemed anticompetitive insofar as it is in principle irrational for a firm to price at that level unless it has an

agreements between non-competitors where the market share of each of the parties in the relevant market remains below 15%.

15. Case C-234/89, *Stergios Delimitis* v. *Henninger Bräu AG*, EU:C:1991:91.

16. Waelbroeck, "Michelin II: A per se rule against rebates by dominant companies?", 1 *Journal of Competition Law & Economics* (2005), 149–171.

17. Werden, "Identifying exclusionary conduct under Section 2: The 'no economic sense' test", 73 *Antitrust Law Journal* (2006), 413–433.

18. Ibid., 414.

exclusionary purpose.[19] In other words, there would be no pro-competitive reason why a firm would engage in it.

A second approach is the so-called "profit sacrifice test".[20] Measured against this benchmark, a practice would be inherently "abnormal" or "wrongful" where it would entail a profit sacrifice relative to an alternative course of conduct that does not have the same exclusionary effects. In essence, this test purports to establish whether the dominant undertaking has "invested" in an anticompetitive strategy with the prospect of benefitting from it in the long run. *Lithuanian Railways*[21] provides an example of a practice that would be abusive under this approach. The case concerned an incumbent railway operator's decision to dismantle 19 kilometres of its network to prevent a major customer from switching to a competitor. This strategy would amount to an abuse insofar as the dominant firms sacrificed profits (by destroying its own tracks) with a view to excluding a rival.

The common feature of these two tests is that they seek to establish, by proxy, whether a given strategy is driven by an anticompetitive purpose. In other words, a practice would be "improper" or "abnormal" under the two approaches where it is found to have an exclusionary object. One can think of an alternative methodology that is less concerned with the aim and purpose of conduct and more with the fact that it is not available to rivals. A practice would be "improper" or "abnormal", pursuant to this third test, where it would not occur in an effectively competitive market. For instance, the dominant undertaking may control critical infrastructure that has been developed with the support of the State and cannot be duplicated by rivals.[22] Alternatively, the firm may benefit from the "deep pockets"[23] that result from its ability to cross-subsidize some activities with the resources generated by a legal monopoly.[24]

19. Areeda and Turner "Predatory pricing and related practices under Section 2 of the Sherman Act", 88 *Harvard Law Review* (1975), 697–733.

20. Salop, "Exclusionary conduct, effect on consumers, and the flawed profit-sacrifice standard", 73 *Antitrust Law Journal* (2006), 311–374.

21. *Baltic Rail* (Case AT.39813) Commission Decision of 2 Oct. 2017.

22. See e.g. Guidelines on State aid for broadband networks, O.J. 2023, C 36/1, which provide for specific access obligations on account of the fact that the infrastructure has been rolled out with the support of the State.

23. The idea that dominant firms benefit from an advantage on account of their "deep pockets" has seemingly fallen out of favour in contemporary competition law, but was prominent in the 1960s and 1970s. See *FTC* v. *Procter & Gamble Co*., 386 U.S. 568 (1967). For a critical discussion, see Kolasky, "Conglomerate mergers and range effects: It's a long way from Chicago to Brussels" (George Mason University Symposium, Washington, DC, 9 Nov. 2001).

24. See e.g. *Wanadoo España* v. *Telefónica* (Case COMP/38.784) Commission Decision of 4 July 2007, paras. 304–305. For a discussion, see Buendía Sierra and Hancher, "Cross-subsidization and EC law", 35 CML Rev. (1998), 901–945.

2.3. *The broad interpretation of the concept of abuse*

Under a broad understanding of the concept of abuse, conduct may amount to an infringement even when it is, prima facie, a legitimate expression of competition on the merits. Whether or not the practice is normal (either because it is pro-competitive, because it does not entail a profit sacrifice or because it can be implemented by dominant and non-dominant firms alike) is not, accordingly, a decisive consideration. In fact, a central premise underpinning the broad interpretation of Article 102 TFEU is that there is nothing unusual, exceptional or abnormal about most potentially exclusionary strategies. This approach does not question that tying, rebates and exclusive dealing – just to mention some recurrent categories – are potentially pro-competitive and are, moreover, routinely implemented by firms that enjoy a modest degree of market power (and thus lack the ability to exclude rivals).

The broad understanding entails a shift in the focus of the analysis. While the narrow approach revolves around the nature of practices (and more precisely whether they are a legitimate method of competition), the broad one is primarily centred around their actual or potential effects. Accordingly, conduct may or may not amount to an abuse of a dominant position depending on the specific circumstances of each case. It may be caught by Article 102 TFEU in a given economic and legal context; in another one, it may not. If, for instance, a tying strategy is found to be incapable of restricting competition, it will fall outside the scope of the prohibition. The same would be true if the pro-competitive effects that it can be expected to produce outweigh any actual or potential exclusionary impact. The converse could be the case, however, in a different economic and legal context.

3. Competition on the merits: An irritant in the case law

3.1. *The inconclusive victory of the broad interpretation in the case law*

It would be reasonable to conclude, following a cursory overview of the most recent case law, that the debate around the narrow and broad understandings of the concept of abuse is an obsolete one in the EU. The fact that a practice is normal (whether because it is plausibly pro-competitive, because it does not entail a profit sacrifice or because it can be implemented by dominant and non-dominant firms alike) does not rule out a finding of abuse. Arguably, the Court sowed the seeds of the broad interpretation as far back as 1983, when it introduced, in its judgment in *Michelin I*, the doctrine of the "special

responsibility" of dominant undertakings.[25] In accordance with this doctrine, behaviour that would otherwise be unproblematic may amount to an abuse. This is so because Article 102 TFEU applies to markets where competition is substantially weakened by the very presence of the dominant player.

Because the focus of the analysis under the broad approach is not the nature of practices, but their impact on competition, it is unclear what role, if any, competition on the merits has in contemporary Article 102 TFEU analysis. This impression is further confirmed when one examines the string of judgments delivered in the course of the past decade. In *Slovak Telekom*, for instance, the Court conceded that a refusal to deal with rivals is typically an expression of competition on the merits, or – in the ECJ's own words – "generally favourable to the development of competition and in the interest of consumers".[26] Such strategy amounts to an abuse of a dominant position only in "exceptional circumstances", which revolve around its effects on rivals' ability to compete, not with the actual or presumed normality (or abnormality) of the refusal.[27] More generally, a dominant firm can escape liability if it can prove that the behaviour is on balance pro-competitive (that is, the pro-competitive gains of the strategy outweigh any negative effects on competition).[28]

In the current legal landscape, the notion of competition of the merits is, more than anything, an irritant in the case law. It hints at a methodology to identify abusive conduct that conflicts with the one underpinning the broad understanding of Article 102 TFEU (that is, it hints at one that revolves around the nature of the practice, as opposed to its effects). The resulting friction, exposed in *Servizio Elettrico Nazionale*, is a source of legal uncertainty. As the very question raised by the *Consiglio di Stato* shows, the coexistence of two methodologies makes it unclear whether they need to be applied cumulatively or alternatively. Simply put: is it necessary to prove that the contentious practice departs from competition on the merits in addition to showing that it is a source of actual or potential anticompetitive effects? Or is it enough to show that it amounts to an abuse in light of one of the two approaches?

This section explores the tension between the two alternative approaches to the interpretation of Article 102 TFEU in the case law. It shows, first, that early references to competition on the merits reflect the original interpretation of the concept of abuse in EU law. The *Hoffmann-La Roche* ruling captures, better than any other, this early understanding of Article 102 TFEU (which is best construed as a variant of the narrow interpretation described in section 2).

25. Case 322/81, *Michelin I*, para 57.
26. Case C-165/19 P, *Slovak Telekom, a.s.* v. *Commission*, EU:C:2021:239, para 47.
27. Ibid., para 49.
28. Case C-209/10, *Post Danmark I*, para 40.

This interpretation is based on a number of misconceptions that have long been abandoned as inaccurate and/or unworkable. By contrast, the most recent case law relies on the broad understanding of the concept of abuse. Accordingly, it dispenses with the need to prove that a practice is not a normal (or legitimate) method of competition. It was necessary to wait until *Servizio Elettrico Nazionale* for the tension between the two strands to become apparent.

3.2. *The origins of the notion of competition on the merits*

The definition of the concept of abuse preoccupied officials and commentators in the early days of competition law in Europe. The challenge that comes with distinguishing lawful and unlawful behaviour by dominant firms, captured in Judge Hand's formula, was well acknowledged on this side of the Atlantic. Scholars of the era were aware that positions of substantial market power are sometimes impossible to avoid, and that their emergence is sometimes attributable to the features and operation of the relevant industry, not to firm behaviour.[29] In a similar vein, authors did not dispute that the law should not penalize the acquisition of a dominant position when it results from a firm's ability to offer cheaper and/or better goods or services.[30] It was accepted early on, in other words, that performance-based competition on the merits (*Leistungswettbewerb*) should not be prohibited as abusive.[31]

The prevailing assumption during this formative period was that unlawful conduct can be neatly distinguished from legitimate expressions of normal competition. According to this understanding of the concept of abuse, it is not necessary to engage in a context-specific evaluation of the object and/or effect of a practice. This interpretation sees an abuse as an act that is inherently "mischievous" or "wrongful" (that is, a "*comportement fautif*", to use the French expression).[32] According to a widespread view during the 1960s and early 1970s, a practice departs from legitimate competition on the merits (and is therefore prohibited) where it allows a firm to obtain advantages that it would not have been able to obtain in an effectively (or workably) competitive

29. Markert, "The concept of undertaking(s) in dominant position and the systems of control in German antitrust law" in van Damme (Ed.), *La réglementation du comportement des monopoles et entreprises dominantes en droit communautaire* (De Tempel, 1977), pp. 195–221.

30. Schweitzer, op. cit. *supra* note 9.

31. For a systematic review of the early literature, see Focsaneanu, "La notion d'abus dans le système de l'article 86 du Traité instituant la Communauté économique européenne" in van Damme op. cit. *supra* note 29, pp. 324–380.

32. This is the wording used in a report issued by the Commission gathering the views of a leading group of experts. See European Commission, "Le problème de la concentration dans le marché commun", (1966) *Collection études série concurrence, n. 3*.

market.[33] Conduct would be abnormal, in other words, because only dominant firms can engage in it. A memorandum prepared for the European Commission by a group of experts in the 1960s embraced this understanding. This text is also valuable in that it gives an idea of the sort of practices that were deemed to fall within the scope of (what would become) Article 102 TFEU. The document mentions, *inter alia*, below cost prices aimed at excluding a competitor that lacks the financial means of the dominant operator.[34] It also mentions the acquisition of a rival against its will or on disadvantageous terms and conditions.[35]

This approach to the definition of what is (and what is not) competition on the merits is at odds with today's understanding of the concept of abuse (and, indeed, the case law that followed). First, the original interpretation of Article 102 TFEU is premised on the idea that non-dominant rivals are not in a position to replicate potentially problematic conduct. Experience shows that, if this understanding were to be embraced, it would be underinclusive to the point of emptying the provision of most of its substance. Second, the early interpretation of Article 102 TFEU appears to focus more on subjective considerations than on objective ones.[36] Under the contemporary understanding of abuse (and just to come back to one of the examples already discussed), it is not necessary to show that the acquisition of a rival is undertaken against the will of the latter. The fundamental question, in most instances, is whether the behaviour is, objectively speaking, a potential source of anticompetitive effects.[37]

3.3. *Competition on the merits in* Hoffmann-La Roche

The notion of competition on the merits may well be inaccurate and grounded on assumptions that no longer reflect today's views (and, indeed, the most

33. Ibid., 22, which reflects the consensus views of the group of experts: "*De l'avis du groupe, il faut admettre qu'il y a exploitation abusive d'une position dominante lorsque le détenteur de cette position utilise les possibilités qui en découlent pour obtenir des avantages qu'il n'obtiendrait pas en cas de concurrence praticable et suffisamment efficace*".

34. Ibid., 26.

35. Ibid.

36. This point was also made in Focsaneanu op. cit. *supra* note 31, who noted a discrepancy between the emphasis of the definition on subjective consideration and the claims, made by the group of experts, that the concept of abuse is an objective one.

37. This is also true of merger control, under which such an acquisition would be considered following the implementation of a regime for the control of concentrations. See in this sense Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2004, C 31/5, and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. 2008, C 265/6.

recent evolution of the case law). However, the key underlying ideas (first, that the concept of abuse encompasses conduct that is inherently improper or wrongful and, second, that a breach can be established *ex ante* and in the abstract) informed the case law, albeit intermittently, until the early 2010s. In *Hoffmann-La Roche*, the Court categorized as abusive two practices: exclusive dealing and loyalty rebates.[38] It did so without engaging in any sort of contextual analysis. The two practices were found to be at odds, by their very nature, with legitimate competition on the merits. The Court suggested that both strategies are an expression of a dominant firm's ability to extract customer concessions with the aim of excluding rivals. More precisely, it held that they "are not based on an economic transaction which justifies [the] burden or benefit but 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".[39] Quantity rebates, by contrast, were deemed to be valid expressions of competition on the merits insofar as they reflect the cost savings resulting from the supply of larger orders.[40]

This *sui generis* understanding also permeates what would become the canonical definition of the concept of abuse. In *Hoffmann-La Roche*, the Court construed it as an "objective" concept that involves behaviour which, through "recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[41] This definition suggests that, to discharge their burden of proof, claimants and authorities would need to show not just that the contentious practice is a source of actual or potential exclusionary effects, but that it is, by its very nature, at odds with legitimate manifestations of normal competition. This is the background against which the question referred by the *Consiglio di Stato* in *Servizio Elettrico Nazionale* (and the tensions that the latter made apparent) must be understood.

38. Case 85/76, *Hoffmann-La Roche*, paras. 89–90.
39. Ibid., para 90.
40. Ibid.
41. Ibid., para 91: "… The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".

3.4. *The progressive move away from* Hoffmann-La Roche

The judgments that followed *Hoffmann-La Roche* fluctuated in their approach to the analysis of potentially abusive conduct. For some time, one strand remained faithful to the logic of *Hoffmann-La Roche*. From the 1980s to the early 2000s, the original understanding of the concept of abuse was embraced in a series of rulings addressing the legal status of rebates. In *Michelin I*[42] and *Michelin II*[43] the relevant question, in the eyes of the EU courts, was whether the scheme under consideration was comparable in its nature, operation and purpose to one formally conditional on loyalty (that is, whether it was "loyalty-inducing").[44] *AKZO*,[45] on predatory pricing, followed a similar approach. Thus, below-cost pricing is abusive where it has an anticompetitive purpose, either because the behaviour makes no economic sense but for the foreclosure of a rival (that is, where prices fall below average variable costs[46]) or because there is evidence showing that it is part of a broader exclusionary strategy.[47]

However, the case law ultimately moved away from the early interpretation, thereby generating the friction that the *Consiglio di Stato*'s question exposed. The example of refusals to deal has been mentioned above. In *Magill*[48] – which concerned the question of whether a dominant firm can be compelled to license an intellectual property right – the relevant question was not whether the behaviour involved an illegitimate method of competition. The analysis focused instead on its impact (and more precisely on whether the refusal would lead to the elimination of all competition on the relevant adjacent market[49] and would prevent, in addition, the emergence of a new product for which there is potential consumer demand[50]). *Deutsche Telekom* is another key milestone marking a move away from the old ways. The Court did not hold that a "margin squeeze" is an inherently wrongful or abnormal practice. It did not hold, either, that it is abusive in and of itself.[51] The decisive factor, again, was whether the strategy led to actual or potential exclusionary effects in the relevant economic and legal context in which it was implemented.[52]

42. Case 322/81, *Michelin I*.
43. Case T-203/01, *Manufacture française des pneumatiques Michelin* v. *Commission*, EU:T:2003:250.
44. Ibid., para 241.
45. Case C-62/86, *AKZO Chemie BV* v. *Commission*, EU:C:1991:286.
46. Ibid., para 71.
47. Ibid., para 72.
48. Joined Cases C-241 & 242/91 P, *Magill*.
49. Ibid., para 56.
50. Ibid., para 54.
51. Case C-280/08 P, *Deutsche Telekom AG* v. *Commission*, EU:C:2010:603, para 250.
52. Ibid., paras. 250–252.

The ruling that marks a definitive break from the *Hoffmann-La Roche* era is arguably *Post Danmark I*.[53] The case involved a strategy of selective price cuts put in place by the Danish incumbent in the postal sector. The Court's reasoning is remarkable in several respects, some of which will be considered below. One aspect of the judgment that is worth emphasizing in this section is that the ECJ expressly held that there was nothing inherently improper or abnormal in the application of discounts to some potential customers with a view to gaining them back. Selective price cuts are not abusive in and of themselves, even if they discriminate among purchasers.[54] To the extent the practice does not amount to predatory pricing within the meaning of *AKZO*, it can only be caught by Article 102 TFEU where it leads, or can be expected to lead, to exclusion.[55] *Post Danmark II* is another milestone, primarily because it concerned the award of rebate schemes. The Court's analysis differs from that followed since *Michelin I*. It no longer revolves around whether the rebates have a "loyalty-inducing" effect, but whether they are likely to result in foreclosure.[56]

3.5. Servizio Elettrico Nazionale: *The friction exposed*

The questions raised in *Servizio Elettrico Nazionale* invited the Court to revisit an approach to Article 102 TFEU that it had progressively abandoned (most clearly since *Post Danmark I*). When the request for a preliminary ruling reached the Court, there were already convincing reasons to argue that the definition of abuse laid down in *Hoffmann-La Roche* did not reflect the reality of the case law, whether de iure or de facto. However, the *Consiglio di Stato*'s question showed that the legal issue had to be addressed directly. Insofar as the definition in the seminal 1970s judgment suggested that only conduct departing from normality can amount to an abuse of a dominant position, the Court could not circumvent it. It had to clarify whether evidence of an exclusionary effect can sometimes be sufficient, in and of itself, to establish a breach of Article 102 TFEU or whether it is necessary to show, in addition, that the contentious practice is at odds with competition on the merits.

Servizio Elettrico Nazionale provides an unambiguous answer to certain points of law. It leaves other issues open, in the sense that some passages can be interpreted in more than one way. What the Court clearly held is that some

53. Case C-209/10, *Post Danmark I*.

54. Ibid., para 30. See also Case 295/17, *MEO – Serviços de Comunicações e Multimédia SA* v. *Autoridade Tributária e Aduaneira*, EU:C:2018:942.

55. Ibid., para 39.

56. Case 23/14, *Post Danmark II*, paras. 30–46.

conduct is, by its very nature, at odds with competition on the merits.[57] The judgment distinguishes between two scenarios in this regard. The first one is a situation analogous to the one at stake in *AKZO*, where the conduct pursues an anticompetitive object (or, if one prefers, where the practice makes no economic sense other than as a restriction of competition).[58] The second scenario is one where the dominant firm enjoys a competitive advantage that rivals cannot replicate.[59] This idea is to some extent reminiscent of the primitive understanding of the concept of abuse, in the sense that it suggests that the behaviour is caught by Article 102 TFEU insofar as it would not be available to non-dominant players. The facts of the case provide a valuable – and relatively rare – example of such an instance. The alleged abuse in *Servizio Elettrico Nazionale* concerned data that only the dominant firm – as an incumbent in the energy sector – could exploit.[60]

Other aspects of the judgment (and their place in the existing body of case law) are less easy to discern. The key question that *Servizio Elettrico Nazionale* was expected to address is that of whether it is necessary for an authority or claimant to show, in every instance, that the contentious behaviour departs from normal competition on the merits. The judgment can be interpreted in two ways. It is plausible that the Court answered to this question in the affirmative (which would mean that a finding of abuse always necessitates evidence that there is something inherently abnormal and/or wrongful about the contentious practice). There are powerful reasons to believe that such an interpretation of the judgment, while plausible, is not the most reasonable one. A close reading of the ruling shows, in fact, that the Court refers to the two abovementioned scenarios as strategies in which dominant firms should "[i]n particular" refrain from engaging.[61] The literal wording appears to suggest, in other words, that the two circumstances described by the Court are just examples and do not exhaust the instances where Article 102 TFEU applies.

A second reason in support of this conclusion follows from the need to reconcile the ruling with the rest of the case law. A number of judgments

57. Case C-377/20, *Servizio Elettrico Nazionale*, paras. 76–78.

58. Ibid., para 77: "Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits …".

59. Ibid., para 78: "The same applies, as observed by the Advocate General in points 69 to 71 of his Opinion, to a practice that a hypothetical competitor – which, although it is as efficient, does not occupy a dominant position on the market in question – is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position".

60. Ibid., para 92.

61. Ibid., para 76.

discussed above – including *Magill*, *Deutsche Telekom*, *Post Danmark I* and *Post Danmark II* – show that a finding of abuse has not always been contingent on evidence that the practice is inherently at odds with competition on the merits. It is unlikely that *Servizio Elettrico Nazionale* overruled these. The most reasonable reading of the latter is therefore one that is compatible with the existing body of case law. This body of case law is useful for another reason. It provides concrete examples showing that some categories of abusive conduct do not always fit within the two scenarios expressly identified in *Servizio Elettrico Nazionale*. Consider tying. This practice can be caught by Article 102 TFEU even though it has long been accepted that its object is not necessarily exclusionary,[62] and even though non-dominant rivals can replicate (and do routinely replicate) the behaviour.[63] In fact, nothing in the case law suggests that tying is abusive only where it is available to the dominant firm alone. This practice can amount to an abuse because it is implemented in a market where the conditions of competition are already weakened, irrespective of whether rivals could or actually do replicate the behaviour.

4. Giving structure to the case law

4.1. *Competition on the merits and the "as efficient competitor" principle*

In spite of the observed tension, the original, narrow approach at which *Hoffmann-La Roche* hinted can be made to work together with subsequent case law. Both approaches are best seen as elements of a single, coherent whole. The blending exercise becomes possible as soon as one accepts that neither interpretation is capable of explaining the totality of the case law (that is, if one concedes that each line of case law is just a piece of a larger puzzle). Central to this structuring effort is the "as efficient competitor principle". The principle encapsulates, and is a contemporary incarnation of, the intuitions underpinning *Hoffmann-La Roche*. The fundamental idea behind it is that the exclusion of less efficient rivals (or, more generally, less attractive rivals) is a natural, expected and desirable consequence of the competitive process. The point of Article 102 TFEU is to create the conditions in which firms have the ability and incentive to improve their position, not to engineer or freeze market structures in time. Accordingly, a dominant firm would not abuse its dominant position – that is, it would compete on the merits – where the observed foreclosure is not attributable to its behaviour, but to the fact that competitors

62. O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 4th ed. (Hart, 2020), pp. 701–703.

63. Ibid., p. 698, where the authors note the "ubiquity of tying and bundling".

are "less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation".[64]

Against this background, it is possible to give an operational meaning to the notion of competition on the merits and reconcile it with the rest of the case law. One can think of a positive and a negative definition. From a positive standpoint, a dominant undertaking can be said to compete on the merits where it gets ahead in the marketplace by offering, *inter alia*, better, cheaper and more innovative products and/or services. The corollary to this idea is that a finding of abuse presupposes a causal link between the alleged abuse and any actual or potential effects. In *Post Danmark II*, the Court was explicit about the need to show that the latter are attributable to the former for Article 102 TFEU to apply.[65] Thus, in the absence of a causal link – that is, where the actual or potential effects would have occurred anyway, because rivals are less efficient and/or less attractive – the practice is a lawful expression of competition on the merits.

From a negative perspective, a firm would not be competing on the merits in three main instances. First, where the dominant undertaking's behaviour cannot be rationalized as a means to improve its methods or, more generally, to get ahead in the marketplace via, *inter alia*, lower prices and better and more innovative products (that is, where the behaviour has an exclusionary object). Second, where the strategy involves the use of assets that have not been acquired on the merits. Third, conduct that is a potential source of pro-competitive gains, may amount to an abuse where it leads – or can be expected to lead – to foreclosure. As the law stands, foreclosure is understood to mean the exclusion of equally efficient rivals. The applicable test of effects is not a uniform one, however. It is modulated depending on the nature of the practice and the relevant economic and legal context of which it is a part. In particular, it is stricter where intervention would involve compelling a dominant firm to deal with third parties.

One can group practices into four broad categories on the basis of these ideas. There is, to begin with, conduct that is deemed a legitimate method of competition insofar as it is presumptively incapable of excluding equally efficient rivals. One can think, in the second place, of refusals to deal, which are, absent exceptional circumstances, lawful expressions of competition on the merits. Third, there are practices the legality of which hinges on an analysis of their actual or potential anticompetitive effects. Finally, there is conduct that is, by its very nature, at odds with competition on the merits. The latter is presumptively abusive and thus does not necessitate an evaluation of its impact on competition. However, it is open to dominant undertakings to show

64. Case C-209/10, *Post Danmark I*, para 22.
65. Case C-23/14, *Post Danmark II*, para 47.

that they are incapable of having restrictive effects in the relevant economic and legal context.

4.2. *Valid expressions of competition on the merits under Article 102 TFEU*

There are two practices that, according to the case law, are valid expressions of competition on the merits. As such, they are presumptively lawful and fall outside the scope of Article 102 TFEU. The Court held, in *Hoffmann-La Roche*, that genuine quantity rebates are not abusive. It then clarified, in *Post Danmark II*, that the category encompasses a narrow category of schemes, namely those that are granted "in respect of each individual order" and that are conditional "solely on the volume of purchases".[66] The legal status of this practice is not difficult to rationalize. Insofar as the lower prices resulting from the award of these rebates would merely reflect the "cost savings"[67] that come with the supply of a larger volume of goods, any exclusionary effects would not be attributable to the scheme, but to the fact that rivals are less efficient than the dominant firm. Accordingly, an authority or claimant would only be able to establish an infringement of Article 102 TFEU if they can show that the rebates are not granted based on the volume supplied, but disguise other conditions.[68]

Second, it seems clear since *Post Danmark I* that above-cost (unconditional) pricing by a dominant firm falls outside the scope of Article 102 TFEU. This conclusion was already implicit in *AKZO*, if one considers that the Court only contemplated two instances of predatory pricing, and that both involved below-cost pricing. A core idea in *Post Danmark I*, in a similar vein, is that a firm that is as efficient as the dominant undertaking can be expected to sustain an aggressive price campaign that does not force it to sell its products at a loss. In fact, the Court went as far as to hold that a strategy that allows a rival to recover "the great bulk of the costs attributable to the supply of the goods or services in question" is unlikely to restrict competition, even when it is loss-making. As is true of quantity rebates, any actual or potential anticompetitive effects would, in such circumstances, be attributable to the superior efficiency of the dominant undertaking, not to the strategy.

66. Ibid., para 28.
67. Ibid.
68. See e.g. Case C-163/99, *Portugal* v. *Commission*, EU:C:2001:189, para 52.

4.3. *Refusal to deal and the "exceptional circumstances" doctrine*

Refusals to deal – in particular the fact that a dominant undertaking can only be compelled to share an input or infrastructure with rivals in "exceptional circumstances" – have already been addressed in some detail above. There are two issues relating to the practice that are worth emphasizing in this section. The first is that its *sui generis* status in the legal order reflects the importance that the Court attaches to the long-run dimension of competition on the merits and, more generally, to the preservation of firms' incentives to invest and innovate.[69] Thus, a dominant undertaking can only be ordered to deal with rivals where strict conditions are met. At the very least, an authority or claimant must show that the relevant input or infrastructure is indispensable for rivals to enter an adjacent market[70] and that the refusal would lead to the elimination of all competition therein.[71]

The second issue worth emphasizing relates to the boundaries of the "exceptional circumstances" doctrine. There are scenarios where the lawfulness of a refusal (or a practice akin to a refusal) is not evaluated in light of the strict conditions sketched above. Such scenarios can be rationalized through the prism of competition on the merits. One scenario in which the "exceptional circumstances" doctrine does not apply is one where the relevant input or infrastructure has been developed with the support of selective advantages granted by the State. For instance, the firm may benefit (or have benefitted) from a subsidy or, more generally, a measure falling within the scope of Article 107(1) TFEU.[72] Alternatively, or in addition, the dominant undertaking may be, or may have been, insulated from competition by means of exclusive or special rights (as defined in Art. 106(1) TFEU).[73] In these scenarios, it seems difficult to argue that mandating shared access to the relevant input or infrastructure would run counter to long-run competition on the merits. The support given by the State means that the dominant undertakings' incentives to invest and innovate are not at stake (or at least not

69. Case C-165/19 P, *Slovak Telekom*, para 47.

70. Case C-7/97, *Oscar Bronner GmbH & Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, EU:C:1998:569, para 41.

71. Ibid.

72. The notion of State aid is broader than that of subsidy. For an overview of the sort of measures falling within the scope of this provision, see Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, O.J. 2016, C 262/1.

73. See Case C-475/99, *Firma Ambulanz Glöckner* v. *Landkreis Südwestpfalz*, EU:C:2001:577, para 24.

to the same extent than they would be if competition had not been distorted by government intervention).[74]

A second scenario where the indispensability and elimination-of-all-competition conditions would not be the relevant benchmark to assess the legality of a refusal is, according to *Slovak Telekom*, one where the dominant undertaking voluntarily chooses to share access to its input or infrastructure (and, in the same vein, where there is a regulatory regime in place mandating access). This is so because, in such a scenario, the relevant legal issue is not whether the refusal (or the functional equivalent of a refusal) is an expression of long-run competition on the merits, but whether, in the short run, the unfair terms and conditions of access can lead to the exclusion of equally efficient rivals. *Slovak Telekom*, together with *TeliaSonera*, appears to suggest that the usual concern with a firm's incentives to invest and innovate is not relevant when the dominant undertaking has already chosen a business model that relies on shared access (and/or where there is a regulatory regime in place mandating access).[75]

4.4. *Anticompetitive effects and the "as efficient competitor test"*

A majority of practices are in a grey area. On the one hand, they are not inherently at odds with competition on the merits. On the other hand, they are not presumptively lawful (or subject to the high bar of the "exceptional circumstances" doctrine). The legality of this "middle ground" of practices hinges on whether they are a source of actual or potential anticompetitive effects in the relevant economic and legal context. Accordingly, the question of whether they have a restrictive impact and that of whether they amount to a valid expression of competition on the merits collapse into one and the same issue. The latter, accordingly, plays no autonomous role in the assessment. This conclusion seems inevitable in light of the case law discussed above, in particular *Post Danmark I*, *Deutsche Telekom*, and *Post Danmark II*.

As a matter of principle, the analysis of the anticompetitive effects of these practices is undertaken by evaluating their impact on equally efficient rivals' ability and/or incentive to compete. For instance, a "margin squeeze" by a dominant undertaking is not problematic in and of itself. A necessary – but not sufficient – condition for the practice to trigger the application of Article 102 TFEU is that the spread between the wholesale and the retail prices forces an

74. This is the point made by the Commission in *Telefónica* (Case COMP/38.784), paras. 304–305. See also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/7, para 82 (hereinafter, the Guidance Paper).

75. Case C-165/19 P, *Slovak Telekom*, para 50. See also Case C-52/09, *Konkurrensverket* v. *TeliaSonera Sverige AB*, EU:C:2011:83.

equally efficient rival to sell at a loss.[76] It is still necessary to show that the "margin squeeze" is a source of actual or potential anticompetitive effects. This analysis can be assisted by a number of techniques. Of these, the "as efficient competitor" test (which is not to be conflated with the principle itself) has emerged as the most prominent and widely discussed one.[77] In relation to this particular technique, the Court has consistently held that it is just one tool among others, and that it need not be relied on by an authority or claimant.[78] Accordingly, an abuse can be proved to the requisite legal standard by other means. For instance, it may be possible to show that a practice (say, an exclusive dealing arrangement) denies rivals a minimum efficient scale.[79]

The Court has also held that there may be instances where anticompetitive effects are not assessed by reference to their impact on equally efficient competitors. *Post Danmark II* provides an example where a departure from the principle was deemed justified. An analysis of the regulatory context in the case revealed that the dominant undertaking was partially protected from rivalry insofar as it benefitted from a legal monopoly covering 70 percent of the mail on the relevant market. Such circumstances – which are not the result of legitimate competition on the merits – do not allow for the emergence of an equally efficient rival (or make it very difficult).[80] The Court appears to suggest that the role of Article 102 TFEU in this factual scenario is to preserve the modicum of competition that the distortions introduced by the State permit.[81]

Post Danmark II is, so far, the only case where a deviation from the "as efficient competitor" principle has been deemed justified. It remains to be seen whether other departures will be accepted by the Court.[82] The concept of

76. Case C-52/09, *TeliaSonera*, para 32.

77. For an explanation of the test, see Guidance Paper, paras. 23–27 and Case T-286/09, *Intel Corporation Inc.* v. *Commission*, EU:T:2022:19, paras. 152–159. See also Gaudin and Mantzari, "Google shopping and the as-efficient competitor test: Taking stock and looking ahead", 13 JECLAP (2022), 125–135.

78. Case C-23/14, *Post Danmark II*, para 61. See also Case C-680/20, *Unilever Italia Mkt. Operations Srl* v. *Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33, para 54.

79. See e.g. Klein, "Exclusive dealing as competition for distribution 'on the merits'", 12 *George Mason Law Review* (2003), 119–162.

80. Case C-23/14, *Post Danmark II*, para 59.

81. In these circumstances, competition law would be adopting a role that is not fundamentally different from a utilities regulator. See in this sense Directive (EU) 2018/1972 of the European Parliament and the Council of 11 Dec. 2018 establishing the European Electronic Communications Code, O.J. 2018, L 321/36, which provides for a number of mechanisms allowing new entrants in the telecommunications sector to thrive in the liberalized marketplace.

82. The Commission has explored a number of avenues in this regard. See in particular McCallum et al., "A dynamic and workable effects-based approach to abuse of dominance", 1 *Competition Policy Brief* (2023).

competition on the merits may provide useful guidance in this regard. One may argue, in particular, that the "as efficient competitor" principle is not the appropriate benchmark in a scenario where the dominant firm derives its competitive advantage from the use of assets that have not been developed on the merits, but with the support or protection of the State. This is, as pointed out above, the factual context at stake in *Servizio Elettrico Nazionale*. The Court expressly held that, in the post liberalization scenario, the incumbent "must refrain . . . from using means available to it on account of its former monopoly and which, for that reason, are not available to its competitors, in order to preserve, other than on its own merits, a dominant position".[83]

4.5. *Conduct that is inherently at odds with competition on the merits*

Some practices are presumptively unlawful insofar as they are deemed to be inherently at odds with competition on the merits. As suggested above, this category encompasses, first and foremost, conduct that has no plausible pro-competitive purpose; that is, conduct that cannot be rationalized as a means to improve the dominant undertaking's methods, goods or services. *AKZO* (and in particular pricing below average variable costs, which is irrational but for an exclusionary motive) and *Lithuanian Railways* (which involved the destruction of the dominant undertaking's own property with a view to driving a rival out of the market) are prominent examples that have already been discussed. A second set of practices – less prominent in theory and practice – includes behaviour aimed at restricting cross-border trade, and in particular strategies of market segmentation.[84]

Because these practices are deemed to be at odds, by their very nature, with normal methods of competition, they are abusive without it being necessary for the authority or the claimant to show that they foreclose, actually or potentially, equally efficient rivals. This is at least what cases like *AKZO* suggest. The fact that an infringement can be established without showing its impact does not mean that effects are irrelevant. It simply means that these practices are presumed to restrict competition. In fact, the Court has expressly held that the application of Article 102 TFEU presupposes that the contentious behaviour is capable of affecting competition.[85] As *Intel* clarified, and *Unilever* confirmed, it is possible for a dominant firm to rebut the

83. Case C-377/20, *Servizio Elettrico Nazionale*, para 92.

84. Joined Cases C-468 to 478/06, *Sot. Lelos kai Sia EE* v. *GlaxoSmithKline AEVE Farmakeftikon Proionton*, EU:C:2008:504. These practices are prohibited insofar as they hinder market integration. To the extent that they do, they constitute a peculiarity of the EU legal order.

85. Case C-307/18, *Generics (UK) Ltd and Others* v. *Competition and Markets Authority*, EU:C:2020:52, para 154.

presumption by providing evidence pertaining to the relevant economic and legal context.[86] If the evaluation of "all the circumstances" reveals that the practice is incapable of foreclosure, the logical implication is that its object can no longer be deemed to be anticompetitive. The explanation for the conduct must be a different, pro-competitive one.

There is a point where *Servizio Elettrico Nazionale* left some scope for ambiguity. According to one possible interpretation of the ruling, the exploitation of means or assets that cannot be replicated by rivals is, by its very nature, at odds with competition on the merits.[87] The discussion above, however, shows that it would not be possible to reconcile this *sui generis* understating with the "exceptional circumstances" doctrine (at least if taken literally). *Bronner* and *Magill* make it clear that a refusal to deal (including a refusal to license an intellectual property right) is in principle a legitimate method of competition. These rulings show, moreover, that the non-replicability of the asset is insufficient, in and of itself, to establish the abusive nature of a refusal. Against this background, it appears that *Servizio Elettrico Nazionale* is best understood as stating that the use of a non-replicable asset is inherently at odds with normal competition where (and only where) it has not been developed on the merits (which, as already explained, would be the case where the State has distorted the competitive process by means of, *inter alia*, exclusive rights and/or the transfer of State resources in a way that involves the award of a selective advantage).

86. Case C-413/14 P, *Intel Corporation Inc* v. *Commission*, EU:C:2017:632, para 138; and Case C-680/20, *Unilever*, para 47.

87. This is the interpretation one might infer from Case C-377/20, *Servizio Elettrico Nazionale*, para 78.

	Against competition on the merits?	**Reason**	**Examples**
Presumptively abusive conduct ("by object")	Against competition on the merits by its very nature	No plausible pro-competitive rationale	*AKZO*, *AstraZeneca*
		Conduct involves assets not obtained on the merits (exclusive rights or State aid)	*Servizio Elettrico Nazionale*, *Post Danmark II*
Conduct subject to a case-by-case assessment	Against competition on the merits only insofar as it excludes equally efficient rivals	The exclusion of less attractive rivals is a normal expression of the competitive process	*Deutsche Telekom*, *TeliaSonera, Post Danmark I*
	Against competition on the merits if, *inter alia*, it involves the use of an indispensable asset	Firms should only be required to deal with rivals in "exceptional circumstances"	*Magill*, *Bronner*, *IMS Health*
Presumptively lawful conduct	Legitimate expression of competition on the merits	An equally efficient rival would be able to withstand competition	*Post Danmark I* (above-cost pricing) and *II* (quantity rebates)

Table 1: Competition on the merits in contemporary case law

5. The role of experience and economic analysis

5.1. *Why and when is a practice inherently at odds with competition on the merits?*

The structure provided in the preceding section is useful to reconcile the various strands of the case law. It remains silent, however, about the methodology to follow when trying to distinguish between practices that are

inherently at odds with competition on the merits (and as such presumptively unlawful) and those that necessitate a case-by-case evaluation of their restrictive effects. The question, in other words, is that of how an authority or claimant can show that a practice can only be rationalized as an exclusionary strategy. This question is relevant in theory and practice. Showing that conduct is, by its very nature, at odds with competition on the merits means, in principle, that an authority or claimant is dispensed from the need to prove actual or potential foreclosure. Accordingly, it makes it easier to establish an infringement to the requisite legal standard.

In spite of the relevance of the question, there is a vacuum in the case law. The existing gap was exposed by the first-instance ruling in *Google Shopping*. The firm in the case argued, in its challenge against the Commission decision, that its behaviour fell outside the scope of Article 102 TFEU insofar as it represented a product improvement (and thus a legitimate expression of competition on the merits).[88] The analysis above shows that Google's argument is not easy to derive from the case law. As noted in the decision, there is nothing that stands out particularly about product improvements relative to other conduct.[89] The mere fact that the design of a good or service is a source of pro-competitive gains does not rule out a finding of abuse. A product improvement is no different in this regard from other potentially pro-competitive strategies such as standardized rebate schemes, tying, and refusals to license an intellectual property right. It is therefore not surprising that the Commission, in its decision, summarily dismissed the argument raised by Google.[90]

The GC, by contrast, engaged extensively with the question. It sought to establish at length that, irrespective of its effects, the self-preferencing conduct at stake departed by its very nature from legitimate competition on the merits. The GC went as far as to claim that the behaviour involved a "certain form of abnormality".[91] The essence of the first-instance court's overarching argument appears to be that the favouring, by Google, of its own shopping service, is inconsistent with the "universal vocation" of its search engine. The judgment hints at several reasons why the observed inconsistency would be inherently at odds with normal competition. First, the GC suggests that Google can only engage in this conduct because of the substantial degree of

88. Case T-612/17, *Google Shopping*, paras. 120–127.

89. Commission Decision in *Google Shopping* (Case AT.39740), para 652.

90. Ibid.: "there is no indication in the case law that alleged improvements in product designs should be assessed under a different legal standard to that developed to assess the use of a dominant position on one market to extend that dominant position to one or more adjacent markets".

91. Case T-612/17, *Google Shopping*, para 176.

market power it enjoys.[92] In this regard, the ruling aligns with the primitive understanding of the notion of competition on the merits, as laid down in *Hoffmann-La Roche*. Second, the GC claims that it is "not necessarily rational" for Google to prioritize search results based on affiliation, as opposed to relevance.[93] This second argument seems to be inspired by *AKZO*. Finally, the first-instance court infers an anticompetitive purpose from the fact that the firm changed its behaviour over time.[94]

The accuracy of the GC's arguments was considered by commentators in the aftermath of the ruling.[95] The most remarkable aspect of the judgment, in any event, is that the first-instance court reached its conclusions without backing them up with theoretical or empirical evidence.[96] For instance, it offers no support for the proposition that non-dominant search engines would not be able to afford a self-preferencing strategy. In particular, the GC does not examine whether Google's rivals engage in comparable behaviour and/or whether their methods vary based on the degree of market power they enjoy. Similarly, the judgment does not explain why it would be irrational, or inherently problematic, for a firm to pursue two business strategies simultaneously (one based on the non-discriminatory display of search results and another on the favouring of its own search results) or to change its business model over time (from one based on openness to another one based, at least partially, on integration).

Decades of enforcement show that intuition and informal analysis, such as the one displayed by the GC in the ruling, are not always reliable indicators of the objective purpose of a practice. Behaviour that, at first glance, comes across as an exclusionary device often turns out to be, upon formal and systematic inspection, a (potentially) pro-competitive mechanism. Examples abound. *Hoffmann-La Roche* is – if only because it has been widely discussed – one that illustrates why intuition frequently fails. The Court treated exclusive dealing and loyalty rebates as abusive because it assumed that these practices

92. Ibid., para 178: "for a search engine, limiting the scope of its results to its own entails an element of risk and is not necessarily rational, save in a situation, as in the present case, where the dominance and barriers to entry are such that no market entry within a sufficiently short period of time is possible in response to that limitation of internet users' choice".

93. Ibid.

94. Ibid., para 179.

95. Bougette, Gautier and Marty, "Business models and incentives: For an effects-based approach of self-preferencing?", 13 JECLAP (2022), 136–143.

96. With the sole exception of a piece of legislation introducing the principle of net neutrality in Europe. See Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 Nov. 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union, O.J. 2015, L 310/1.

serve no purpose other than the restriction of competition. It became abundantly clear in subsequent years that this intuition, however appealing (and reasonable), is not an accurate one. In *Delimitis* – an Article 101(1) TFEU case – the ECJ accepted that there are valid pro-competitive motivations behind exclusive dealing, and that the practice benefits both the supplier and the customer (and is therefore not just an extractive device put in place by the former).[97] Tying, which was for decades considered to be anticompetitive by its very nature, is another one.[98]

5.2. *Competition on the merits against experience and economic analysis*

The examples discussed in the preceding subsection show that there are compelling (legal and economic) reasons to avoid relying on intuition and informal analysis when evaluating the object of a potentially abusive practice. Strictly speaking, the question of whether conduct can be plausibly explained on pro-competitive grounds (or, similarly, whether it is rational or normal conduct) is not an issue of law. It is an economic matter that informs the interpretation of Article 102 TFEU. As such, it is difficult to see what would justify construing the concept of abuse in a manner that disregards formal analysis. What is more, an intuitive or informal approach would be at odds with the practice of the EU courts and their relationship with expertise. In *Woodpulp II*, the Court relied on external advice from an economist.[99] In *Airtours*, the legal notion of collective dominance remained within the boundaries of the economic notion of tacit collusion.[100] These and similar precedents suggest that there is a general duty on EU institutions to interpret legal provisions in light of the best available expertise.[101] If there is expert consensus about an issue, for instance, it cannot be simply disregarded by the EU courts or the Commission.

The Court's approach to the interpretation of Article 101(1) TFEU confirms this conclusion. It held, in *Budapest Bank*, that a practice can only be found to restrict competition by object where there is sufficient experience about its

97. Case C-234/89, *Delimitis*, paras. 11–12.

98. It is sufficient to compare in this regard Case T-30/89, *Hilti AG* v. *Commission*, EU:T:1991:70, which regards it as self-evident that it is abusive for a dominant firm to engage in tying; and Case T-604/18, *Google LLC and Alphabet, Inc.* v. *Commission*, EU:T:2022:541.

99. Joined Cases C-89, 104, 114, 116, 117 & 125 to 129/85, *A Ahlström Osakeyhtiö and Others* v. *Commission*, EU:C:1993:120, para 31.

100. Case T-342/99, *Airtours plc* v. *Commission*, EU:T:2002:146, para 62.

101. This argument is developed in Ibáñez Colomo, "Law, policy, expertise: Hallmarks of effective judicial review in EU competition law", 24 CYELS (2022), 143–168.

nature and operation.[102] Thus, where there is ambiguity about its potential to lead to pro-competitive gains, and the accumulated knowledge does not shed sufficient light on the matter, an analysis of its effects is necessary.[103] In the same vein, where there is already evidence that an agreement has a net pro-competitive impact (in the sense that it is capable of improving the conditions of competition that would otherwise have existed), the "by object" treatment would not be justified.[104] This case law (which addresses directly the relationship between the law and expertise) seems to be fully applicable to the concept of abuse. It would not be obvious to justify engaging with experience differently under, respectively, Articles 101 and 102 TFEU. Divergent outcomes would be equally difficult to rationalize. One should note, in this regard, that there are instances where the two provisions apply jointly to the same factual scenario.[105]

It is submitted, finally, that allowing intuition and informal analysis to dominate the question of whether a practice is inherently at odds with normal competition could lead to the categorization of conduct as being abnormal or irrational for purely arbitrary and capricious reasons, which are by definition immune to meaningful challenge by firms. This fact alone would be at odds not just with the Article 101(1) TFEU judgments mentioned above, but also with the general trend in the case law at large. The Court has consistently held that authorities must meaningfully engage with challenges to the assumptions and presumptions underlying their claims and that they cannot simply dismiss them. For instance, evidence that a practice is a source of pro-competitive effects (and therefore can be plausibly explained on grounds other than the restriction of competition) must be considered as part of the evaluation of the relevant economic and legal context.[106]

6. Conclusions

The notion of competition on the merits is a remnant of the formative period of EU competition law. It was introduced at a time when the prevailing view among authorities and commentators was that abusive practices can be distinguished, *ex ante* and in the abstract, from legitimate methods of rivalry. This view no longer reflects the contemporary consensus, enshrined in the most recent case law. It is widely accepted by lawyers and economists alike

102. Case C-228/18, *Gazdasági Versenyhivatal* v. *Budapest Bank Nyrt. and Others*, EU:C:2020:265.
103. Ibid., para 76.
104. Ibid., paras. 82–83.
105. See e.g. Case C-307/18, *Generics*.
106. Ibid., para 103.

that practices that are normal (in the sense that they have pro-competitive potential and that they can be implemented both by dominant and non-dominant firms) fall, under certain circumstances, within the scope of Article 102 TFEU. More often than not, in fact, the provision applies to such conduct. Rather than an abstract and *ex ante* categorization, a finding of abuse typically necessitates a context-specific assessment. Only a small subset of the universe of potentially abusive behaviour can be safely presumed to be at odds, by its very nature, with competition on the merits.

In spite of the gap between the old and the new paradigms, it seems possible to reconcile the notion of competition on the merits and the most recent judgments. The former notion can be accommodated in the current framework if interpreted in light of the "as efficient competitor principle", which is central to contemporary case law. More precisely, prima facie normal conduct is a legitimate expression of competition on the merits (and thus lawful) where it is incapable of excluding equally efficient rivals. In such a scenario, any actual or potential exclusionary effects would not be attributable to the contentious behaviour, but to the fact that the dominant firm is more attractive in terms of, *inter alia*, price, quality and innovation. Typically, the question of whether the strategy is in keeping with competition on the merits demands a case-by-case evaluation of its restrictive impact. Under this assessment, the question of whether it is a legitimate method of competition and that of whether it has anticompetitive effects become one and the same issue. Evaluating the latter implicitly addresses the former. These are the lessons one can draw from landmarks such as *Deutsche Telekom*, *TeliaSonera*, *Post Danmark I* and *Unilever*.

There is an issue that remains to be addressed in the case law. It is clear, since *AKZO*, that conduct that has no plausible aim other than an exclusionary one is inherently at odds with competition of the merits and as such presumptively abusive. However, the Court has not been explicit about the methodology to follow when evaluating the objective purpose of a strategy. It is submitted, in this regard, that there would be every reason to rely on the lessons of experience and economic analysis. This is so, as explained above, for two reasons. First, informal analysis and intuition are known to be unreliable. Second, the evaluation of the rationale behind business conduct under Article 102 TFEU is not fundamentally different from the identification of the object of agreements under Article 101(1) TFEU. It would therefore be difficult to justify adopting a divergent approach under the former.