Pablo Ibáñez Colomo

# Beyond the 'more economics-based approach': a legal perspective on Article 102 TFEU case law

## Article (Accepted version) (Refereed)

**Original citation:**
Ibáñez Colomo, Pablo (2016) *Beyond the 'more economics-based approach': a legal perspective on Article 102 TFEU case law*. Common Market Law Review, 53 (3). pp. 709-739. ISSN 0165-0750

# Beyond the 'more economics-based approach': a legal perspective on Article 102 TFEU case law

Forthcoming in (2016) 53 Common Market Law Review

Pablo Ibáñez Colomo*

**Abstract**

The interpretation of Article 102 TFEU by the EU courts has given rise to considerable controversy in the past decade. However, it is not always well understood. The purpose of this contribution is to uncover the rationale underpinning the case law on exclusionary practices and to provide a legal perspective on ongoing debates. An analysis of the case law reveals that some practices are deemed prima facie abusive while others are only subject to Article 102 TFEU insofar as they are likely to have an anticompetitive effect. This difference mirrors the object/effect dichotomy that is observed in the context of Article 101 TFEU. The criteria used to draw the line between abuses 'by object' and 'by effect' is also the same. Against this background, it appears that the 'frictions' observed in the case law can be understood and addressed following the principles sketched by the ECJ in *Cartes Bancaires*.

* Department of Law, London School of Economics and Political Science. E-mail: P.Ibanez-Colomo@lse.ac.uk. I am grateful to the two anonymous reviewers and to the colleagues at LSE who attended the Staff Seminar where I presented a previous version of this paper.

## 1. Introduction

It is difficult to define whether, and in what instances, practices implemented by dominant firms are unlawful. In particular, it is a challenge for courts and authorities to draw the line between prohibited exclusionary behaviour and valid competition on the merits. Conduct that has the potential to harm rivals may be pro-competitive, in the sense that it may improve the functioning of markets. Vigorous administrative action may thus have the unintended consequence of depriving consumers and society of the gains resulting from the practice. What is more, it may penalise firms for their success in the marketplace and favour less successful rivals. On the other hand, timid enforcement may further strengthen the position of dominant firms and eliminate the few constraints to which they are subject. Consumers and society would also suffer as a result.

The ongoing controversies around the scope of Article 102 TFEU[1] provide the most noticeable and prominent example of the practical problems involved in the definition of workable boundaries on exclusionary conduct. 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 the enforcement of Article 102 TFEU. The Discussion Paper issued in 2005[4] and the

[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')*, EU:T:2003:250 and Case T-219/99, *British Airways plc v Commission*, EU:T:2003:343. See also the ruling in the latter on appeal: Case C-95/04 P, *British Airways plc v Commission*, EU:C:2007:166.
[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>.

Guidance[5] that was eventually adopted represent a clear commitment to bringing administrative action in line with mainstream economics.[6]

Contrary to what happened in other areas of EU competition law,[7] the efforts to clarify the enforcement priorities of the Commission have not put an end to the controversies around the principles applicable to exclusionary conduct. Debates concerning the application of Article 102 TFEU remain very much alive. This is explained, at least in part, by what some commentators believe is the reluctance of the EU courts to embrace the principles endorsed by the Commission in its soft law instruments. The 2014 judgment of the GC in *Intel* is taken by many as the epitome of this alleged reluctance. The GC departed from the approach set out in the Guidance. It explicitly rejected the need to show the actual or likely exclusionary effects of exclusive dealing and loyalty rebates to establish an abuse.[8]

*Intel* is not interesting because of the legal stance taken by the GC, which simply followed a well-established line of case law and is as such uneventful. Its interest relates to the (arguably unprecedented) amount of academic commentary to which it gave rise.[9] What the growing number of articles devoted to the judgment reveals is that the endorsement of mainstream economic principles as a guide for law and policy-making is far from gathering a consensus. Even within the

---

[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>

[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*, EU:T:2014:547, 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) 11 European Competition Journal 26; 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.

Commission, the approach outlined in the Discussion Paper and the Guidance remains controversial. It has been praised by some officials and openly contested by others.[10] Debates still revolve 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 these discussions, the case law on exclusionary abuses is often misunderstood. This is not surprising considering that the thrust of the literature has been devoted, first, to explaining the ways in which the different judgments are allegedly at odds with mainstream economic positions and, secondly, to proposing administrable and sound principles. There is relatively little interest in making sense of the rationale that underpins the case law. It is true that there have been attempts to establish a link between the EU courts' stance in abuse cases and ordoliberalism.[11] However, some of the key assumptions underlying this approach have been challenged as reflecting an inaccurate understanding of the tenets and evolution of that school of thought.[12] More generally, the use of the 'ordoliberal' label has never been given very clear boundaries, and is therefore not operational or meaningful. As other attempts to explain a complex legal phenomenon from the top down, this approach fails to capture the richness of the case law.

[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.

[11] The tendency among authors who have explored this question is to present, from a top-down perspective, the EU courts' stance in abuse of dominance cases as an expression of some ideas that are typically labelled as 'ordoliberal'. 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 of Ordoliberalism' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP 2010).

[12] The features in the EU courts' case law that are deemed to reflect such ideas have sometimes little to do with the ordoliberal understanding of competition law and policy See in this sense 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 Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008). Other authors have explained that the literature that seeks to establish a link between ordoliberalism and Article 102 TFEU has a tendency to equate ordoliberal ideas and the Freiburg school. See in this sense Peter Behrens, 'The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU' in Paul Nihoul and Iwakazu Takahashi (eds), *Abuse Regulation in Competition Law* (Elgar, forthcoming).

Against this background, this contribution seeks to provide a systematic, bottom-up analysis of the principles underpinning the interpretation of Article 102 TFEU by the EU courts. The case law on exclusionary practices is puzzling in several respects. This is so not for the reasons that commentators tend to emphasise, but because the different strands of the case law are not immediately obvious to reconcile. Potentially exclusionary practices are not all subject to the same principles. Some conduct is prima facie prohibited as abusive irrespective of its impact on competition. For instance, exclusive dealing and loyalty rebates are in principle 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 prohibited where their exclusionary effects can be established. Suffice it to think of 'margin squeeze' abuses and of refusals to deal.[14] In *Post Danmark I*, the Court of Justice (hereinafter, the 'ECJ' or the 'Court') came to a similar conclusion with respect to selective price cuts.[15]

This article contends that there is a logic in the differential treatment of exclusionary behaviour. In the same way that Article 101(1) TFEU distinguishes between agreements that restrict competition 'by object' and 'by effect', the Court takes the view that some practices are abusive by their very nature, while others are only caught by Article 102 TFEU 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 prima facie prohibited irrespective of the impact they have on the market.[16] Other practices, in turn, are put on a par with agreements that are presumed to pursue a 'legitimate objective' and which include selective distribution, franchising or technology licensing.[17]

[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*, EU:C:2010:603, paras 250-251; and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para 61
[15] Case C-209/10 *Post Danmark A/S v Konkurrencerådet ('Post Danmark I')*, EU:C:2012:172.
[16] Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284 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* EU:C:2009:610.
[17] Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41; Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de*

The remainder of the paper explores the above issues as follows. Section 2 shows that the EU courts do not apply a single substantive test to exclusionary conduct: some practices are deemed abusive in and of themselves and some are not. Section 3 provides an analytical framework to reconcile the observed divide in the case law. It would seem that the EU courts prohibit some practices irrespective of their effects when they presume that they have no plausible redeeming virtues. Section 4 evaluates the choices made by the EU courts. Some of the presumptions found in the context of Article 102 TFEU are at odds with the way in which the same practices are treated in other areas of EU competition law. There is conduct that is deemed prima facie abusive under Article 102 TFEU, but not prohibited by object under Article 101 TFEU – or not presumed incompatible with the internal market in EU merger control. In addition, practices that are similar in their nature, purpose and likely effects are not always treated in the same way under Article 102 TFEU. The conclusion is therefore that there is scope for the (incremental) refinement of the case law.

## 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 exclusionary practice for Article 102 TFEU to come into play. As the law stands, this statement is true, but only as far as certain conduct – including the behaviour examined in the *Intel* case – is concerned. Suffice it to think of some recent rulings, including *Deutsche Telekom*, *TeliaSonera* or *Post Danmark I* to conclude that the Court is sometimes unambiguous in requiring evidence of the actual or likely exclusionary impact of a potentially abusive practice. There are, moreover, some practices that are presumed to fall outside the scope of the prohibition. This section provides an overview of the legal status of some of the main categories of exclusionary practices.

*l'Industrie et de l'Emploi*, EU:C:2011:649; and Case 258/78, *L.C. Nungesser KG and Kurt Eisele v Commission,* EU:C:1982:211.

### 2.1. *Practices that are prima facie prohibited*

It is not difficult to think of examples of practices that are prima facie unlawful, in the sense that they are presumed to be abusive irrespective of the effects they have on the market. Prohibitions under Article 102 TFEU are not categorical, however. A dominant firm can escape the prima facie finding of infringement if it is able to show that the conduct under examination is objectively justified.[18] In particular, it is possible for the dominant company to explain that the practice serves a pro-competitive rationale[19] or that it is a source of efficiency gains that outweighs any negative effects.[20] It seems equally clear that, where a practice is prima facie unlawful, a dominant firm cannot avoid the application of Article 102 TFEU simply by claiming that it did not have an exclusionary effect and/or that its rivals remained on the market during the relevant period.

#### 2.1.1. Exclusive dealing and loyalty (including 'loyalty-inducing') rebates

The Court categorically stated in *Hoffmann-La Roche* that exclusive dealing is 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 of exclusivity obligations for Article 102 TFEU to apply to them. A dominant firm would only be able to escape the prohibition if it is in a position to put forward an objective justification for the practice. The principle underpinning this line of case law is straightforward. The precise scope of the rule is less so. According to *Hoffmann-La Roche*, the prohibition encompasses, first and foremost, obligations imposed on a customer to buy all, or

---

[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 and Case C-23/14, *Post Danmark A/S v Konkurrencerådet ('Post Danmark II')*, EU:C:2015:651, paras 47-49.
[21] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 89.

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] Rebates that are conditional upon customers acquiring all, or almost all, of their requirements from the dominant firm are also prima facie contrary to Article 102 TFEU. Schemes 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, very often, rebate schemes do not fit into clear-cut categories. Rebates that are not formally conditional upon exclusivity may have the same purpose and/or effects in practice. This is an issue with which the EU courts have been confronted since the 1980s. 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] It is obvious that, if the targets correspond to the customers' individual requirements, the rebate scheme would work exactly like one that is formally conditional upon exclusivity. In *Michelin I*, the Court concluded that the lawfulness of target rebates is to be established in light of 'all the circumstances' relating to its nature and operation.[26] In *British Airways* and *Michelin II*, this assessment focused on whether the contentious scheme was of a 'loyalty-inducing' or a 'fidelity-building' nature;[27] in other words, on whether the rebates increase customers' incentives to increase their purchases from the dominant firm.[28]

The exclusionary effects of exclusive dealing obligations and loyalty (and 'loyalty-inducing') rebate schemes are assumed to be the necessary consequence of their implementation.

---

[22] Ibid.
[23] See for instance 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*, 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'),* EU:C:1983:313.
[26] Ibid, para 73.
[27] See in this sense *Michelin II* and *British Airways* (n 2). The expressions 'loyalty-inducing' and 'fidelity-building' have been used interchangeably in the case law.
[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.

The Court explained in the *Hoffmann-La Roche* that loyalty rebates 'tend to consolidate' the position of the dominant supplier.[29] It is therefore not surprising that evidence showing the absence of exclusionary effects is deemed irrelevant by the EU courts. The position expressed in this line of case law is eloquently captured by *Michelin II*, where the GC held that, in the context of Article 102 TFEU, 'establishing the anti-competitive object and the anti-competitive effect' of a potentially abusive practice 'are one and the same thing'.[30] Thus, once it is established that the rebate scheme is of a 'loyalty-inducing' nature, it can be safely assumed that it is capable of having such effects. When confronted with evidence suggesting the absence of observable anticompetitive effects, both the Commission and the 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.[31]

In *Hoffmann-La Roche*, the Court held that quantity rebates, that is, rebates that depend on the amounts supplied by the dominant firm, are not abusive.[32] One could have inferred from this position that the ECJ was laying down a are prima facie legality rule. Subsequent case law created some uncertainty in this regard. In *Michelin II*, the GC held that schemes based on volume may also be abusive where it can be shown that they are of a 'loyalty-inducing' or a 'fidelity-building' nature.[33] In that case, the GC took the view that quantity rebates should be subject to the principles applying to target-based schemes. As will be explained below, only in *Post Danmark II* did the Court clarify that rebate schemes based on volume are only abusive insofar as they are likely to have an exclusionary effect. In addition, it held that they are prima facie lawful in some circumstances.[34]

[29] *Hoffmann-La Roche* (n 21), para 90.
[30] *Michelin II* (n 2), para 241.
[31] See for instance Case T-219/99, *British Airways* (n 2), para 298.
[32] *Hoffmann-La Roche* (n 21), para 90.
[33] *Michelin II* (n 2), paras 82-95.
[34] *Post Danmark II* (n 20), para 28.

### 2.1.2. Predatory pricing

Predatory pricing is an expression generally used to refer to a below cost pricing campaign undertaken by a dominant firm. Under certain conditions, this practice is prohibited without it being necessary to show that it has an actual or likely effect on the ability and incentive of rivals to compete. In particular, and according to the rule set by the Court in *AKZO*, pricing below average variable costs is prima facie prohibited under Article 102 TFEU.[35] As is true of exclusive dealing and rebates, this practice is assumed to be capable of driving equally efficient competitors out of the market. This rule in *AKZO* follows the approach defined by Areeda and Turner in a celebrated article that had become a standard by the time when the Court delivered its judgment.[36]

Pricing below cost is also in breach of Article 102 TFEU if it can be shown to be part of a plan to eliminate a competitor. In this second scenario, the prohibition is justified by the fact that pricing below cost is driven by exclusionary purposes and that it is in itself capable of excluding equally efficient competitors. Subsequent case law has confirmed that it is not necessary to establish the likely effects of predatory pricing for it to be caught by Article 102 TFEU. In *Wanadoo*, the ECJ rejected explicitly the idea that, as part of the assessment of the practice, it is necessary to show that the dominant firm would have the ability to recoup the losses incurred during the predatory pricing campaign.[37]

It is reasonable to infer from *AKZO* that pricing above cost is – at the very least – presumptively lawful under Article 102 TFEU. Aggressive price competition that does not amount to below-cost pricing would be a legitimate strategy that is not capable of excluding equally efficient rivals. This conclusion is at odds with *Irish Sugar* and *Compagnie Maritime Belge*, where the EU courts accepted that aggressive pricing campaigns can be abusive even absent evidence of

[35] Case C-62/86 *AKZO Chemie BV v Commission* EU:C:1991:286, para 71.
[36] Phillip Areeda and Donald F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697.
[37] Case C-202/07 P, *France Télécom SA v Commission ('Wanadoo')*, EU:C:2009:214, paras 103-114.

below-cost pricing.[38] An analysis of the two cases gives the impression that even above-cost prices can be deemed abusive if there is direct evidence of a plan to drive out a competitor and the position of the dominant firm approaches that of a monopoly. The unclear boundaries of the case law in this regard became apparent when the preliminary reference in *Post Danmark I* – which will be discussed below – reached the Court.

### 2.1.3. Tying

There are relatively fewer cases addressing the status of tying. However, they support the conclusion that this practice is, absent an objective justification, prohibited as abusive. Cases like *Hilti*[39] and *Tetra Pak II*[40] made it clear that the lawfulness of tying under Article 102 TFEU does not depend on its actual or likely exclusionary effects. Interestingly, this is also true when it appears to be a normal commercial practice in the relevant market(s) in which it is implemented.[41] The legal status of tying was addressed more explicitly in *Microsoft I*. 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, it spelled out the mechanism through which the exclusion of rivals on the market for the tied product was to be expected.[42] When reviewing the legality of the Commission decision, the GC did not consider it necessary to show the likely effects of tying. In line with what had been

[38] Case T-228/97, *Irish Sugar v Commission*, EU:T:1999:246 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*, EU:C:2000:132.
[39] Case T-30/89 *Hilti AG v Commission*, EU:T:1991:70.
[40] Case T-83/91 *Tetra Pak International SA v Commission ('Tetra Pak II')*, EU:T:1994:246.
[41] 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.
[42] Case T-201/04 *Microsoft Corp. v Commission*, EU:T:2007:289, para 857.

suggested in previous cases, the mere fact that tying gives a competitive advantage to the dominant firm on the market for the tied product was deemed sufficient to establish an abuse.[43]

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

#### 2.2.1. Refusals to deal

In *Magill*, the Court held that a refusal to license an intellectual property right may be abusive. As a rule, however, dominant firms are not required to deal with rivals. It is only in a restrictive set of 'exceptional circumstances' that this practice is contrary to Article 102 TFEU. It would be necessary to show, at the very least, that the input to which access is requested is 'indispensable' to compete on a neighbouring market and that it leads, in addition, to the elimination of 'all competition' therein. The essence of this principle has not been disputed in subsequent case law. In *Bronner*, the Court examined a preliminary reference concerning the applicability of this case law to an instance where the refusal concerned a physical input, as opposed to an intellectual property right.[44] In *Microsoft I*, the GC examined, in light of *Magill*,[45] 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.[46] In *Huawei*, the Court addressed a related question. It defined an additional set of 'exceptional

[43] Ibid, para 1058.
[44] 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,* EU:C:1998:569.
[45] 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.
[46] *Microsoft I* (n 42), paras 560-564.

circumstances' in which the exercise of an intellectual property right amounts to an abuse within the meaning of Article 102 TFEU.[47]

### 2.2.2. 'Margin squeeze'

In *Deutsche Telekom*, the ECJ confirmed that a 'margin squeeze' is only abusive insofar as it has an anticompetitive effect. The Commission had contended the contrary in its decision. It argued that 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.[48] The GC – and, on appeal, the ECJ – disagreed with this interpretation of Article 102 TFEU. They took the view that the practice is not abusive in and of itself. In *Deutsche Telekom*, the exclusionary effects were understood to be the necessary consequence of the fact that the incumbent's infrastructure was indispensable to compete on the relevant downstream market.[49] The need to establish the anticompetitive impact of 'margin squeeze' practices was reiterated by the ECJ in *TeliaSonera*.[50] In that case, the Court did not exclude that that practice may have exclusionary effects even when access to the dominant firm's infrastructure is not indispensable.[51]

### 2.2.3. Selective price cuts

[47] Case C-170/73 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, EU:C:2015:477. According to the Court, the likely exclusionary effects of the practice would derive from the fact that, in the case at hand, the intellectual property right was essential to practise a standard. As a result, the right holder 'can prevent products manufactured by competitors from appearing or remaining on the market and, thereby, reserve to itself the manufacture of the products in question' (para 52).

[48] *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.

[49] *Deutsche Telekom* (n 14), paras 231 and 234.

[50] *TeliaSonera* (n 14), paras 55-59.

[51] Ibid, para 72.

In *Post Danmark I*,[52] the Court was asked to rule on the lawfulness of a policy of selective price cuts. The policy had ostensibly been adopted by the dominant firm to attract the customers of a rival. One could infer from that fact that it was driven by an exclusionary attempt and that it should be prohibited as a result. Some previous rulings, like *Irish Sugar*[53] and *Compagnie Maritime Belge*,[54] suggested that, indeed, a policy of selective price cuts is prima facie abusive.[55] The Court departed from this approach in *Post Danmark I*. It clarified that this practice is not in itself contrary to Article 102 TFEU. Thus, it is only possible to establish an infringement if a competition authority – or a claimant – is able to show that the prices charged by the dominant firm are predatory within the meaning of *AKZO* (and thus abusive by its very nature) or, alternatively, if they are likely to have an exclusionary effect.[56]

### 2.2.4. Standardised rebates

The Court held in *Hoffmann-La Roche* that rebate schemes based on volume are prima facie lawful under Article 102 TFEU. In *Post Danmark II*, it clarified that the scope of the legality rule is confined to quantity rebates 'granted in respect of each individual order'. The scheme at stake in *Post Danmark II* was based on the volume supplied (that is, it was based on standardised threshold applicable to all customers). Because it did not correspond to individual orders, however, it was not found to be presumptively compatible with Article 102 TFEU. Moreover, the scheme was

[52] *Post Danmark I* (n 15).
[53] *Irish Sugar* (n 38). 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.
[54] *Compagnie Maritime Belge* (n 38). In this case, the Commission challenged a policy of 'fighting ships', whereby the firm reacted aggressively to market entry.
[55] See the explanation above. This is something noted by the Advocate General in his opinion in *Post Danmark I* (n 15), Opinion of AG Mengozzi, paras 69-95.
[56] *Post Danmark I* (n 15), para 30 ('the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as "price discrimination", that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse'). See also paras 36-39 and 42-44.

retroactive, in the sense that it applied to all quantities supplied (and not only to those exceeding a certain threshold) and the reference period for the calculation of the rebates was of one year.

The Court laid down an ad hoc test that was suited for the particular nature of the scheme at hand. The test is notable in that it departs from that followed in other rebate cases. The assessment of 'all the circumstances' in *Post Danmark II* was not merely confined to the nature and the operation of the scheme. The Court found it necessary to consider, in addition, the features of the relevant market and the conditions of competition prevailing therein.[57] The analysis is not fundamentally different from that performed in *Deutsche Telekom*. For instance, the Court noted that, because Post Danmark enjoyed a statutory monopoly in relation to some of the activities, part of the demand of its customers was not contestable[58] (which made it impossible for customers to switch to an alternative supplier) and that – in part due to the features of the industry, in part due to the fact that it had been liberalised only recently – the incumbent operator had geographic coverage that its rivals were unable to match.[59]

## 3. An attempt to reconcile the case law

As can be seen from the above, there are two broad categories of potentially exclusionary conduct. In some cases, anticompetitive effects have been assumed to result from the practice and evidence to the contrary has been dismissed; in others, the Court has made it clear that the practice is abusive only insofar as it has a negative impact on competition. The challenge for scholars is to make sense of this divide. It is possible to do so if one thinks of structure of Article 101(1) TFEU. In the same way that some agreements are deemed to restrict competition by object, some

[57] *Post Danmark II* (n 20), para 30: 'Having regard to the particularities of the present case, it is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market'.
[58] Ibid. para 35.
[59] Ibid, para 39.

practices are considered to be abusive by their very nature. Other practices would only be prohibited when an anticompetitive effect can be shown.

The (presumed) purpose of the practice under examination is the fundamental criterion used by the Court to draw the line between conduct that is abusive by their very nature and conduct that is not. Where it is established or presumed that a given line of conduct is part of an exclusionary strategy, it is not necessary to show any negative effects on competition. Paraphrasing the GC in *Michelin II*, it would be one of the instances in which object and effect are understood to be one and the same thing. Even though the case law is less explicit on the question, effects seem to be required when the purpose of the practice is not presumed to be anticompetitive and there is no direct evidence that it has an exclusionary object.

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

If one examines the range of practices that are deemed abusive by their very nature, it appears that they share a common feature. In all cases, the analysis of the Court is based on the premise that they are not a legitimate form of rivalry or, put differently, that they are not a manifestation of competition on the merits.[60] In one way or the other, the purpose of the practice under consideration is understood to be inherently anticompetitive. There are some cases in which direct or objective evidence of an anticompetitive intent is relied upon. In most cases, however, the anticompetitive motives of the firm are simply presumed. This interpretation of the case law explains why it is possible for dominant firms to rebut the presumption that their practice serves an exclusionary purpose by providing an objective justification.

[60] 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*, EU:T:2010:266, para 902; and Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission* [2012] ECLI:EU:C:2012:770.

### 3.1.1. Exclusive dealing and loyalty (including 'loyalty-inducing') rebates

In *Hoffmann-La Roche*, the ECJ set out the reasons why exclusive dealing and loyalty rebates are deemed abusive by their very nature. The Court distinguished between these practices and others, like volume-based rebates, which were found to be prima facie lawful. The latter (that is, rebates granted in consideration for an increase in the amounts supplied) were presumed to have a business justification. Prices that decrease with the amount supplied were understood to reflect the cost-savings made by the supplier. 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 were driven by an exclusionary intent. According to the Court, these practices 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'.[61]

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 underlying analysis is typically very similar. When determining whether an agreement is restrictive by its very nature, the EU courts essentially examine whether the restraints contained in it are objectively justified or pursue a legitimate objective. If they come to the conclusion that they are a plausible means to achieve a pro-competitive aim, the EU courts 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*[62] and *Cartes Bancaires*, mentioned above.[63]

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. The Court confirmed in

---

[61] *Hoffmann-La Roche* (n 21), para 91.
[62] *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.
[63] Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, EU:C:2014:2204.

*T-Mobile* that it is sufficient that the agreement is capable of having restrictive effects on competition.[64] As is true in the context of Article 102 TFEU, it is not a valid defence for the parties to claim that an agreement that restricts competition by object did not have (or is unlikely to have) restrictive effects on competition. It has long been clear that object and effect are two alternative notions under Article 101(1) TFEU.[65] Against this background, it is easier to make sense of the statement of the GC in *Michelin II*, where it held that 'if it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect'.[66] The Court 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' in *Michelin II* and *British Airways* focused on establishing the *object* of the rebate schemes. In other words, the Commission and the EU courts sought to determine whether the purpose of the rebate schemes was exclusionary or whether it was an expression of competition on the merits instead. This conclusion is clear not only in light of the GC judgment in *Michelin II*, where the object/effect vocabulary was explicitly relied upon. In its decision in the same case, the Commission referred to *Compagnie Maritime Belge* to suggest that the aim of the rebates was exclusionary.[67] In *British Airways*, the Commission argued that the scheme under consideration was 'clearly related to loyalty rather than efficiencies' and as such abusive by its very nature.[68] Similarly, the GC concluded that British Airways 'can have had no interest in applying its reward schemes other than ousting rival airlines and thereby hindering

[64] 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*, EU:C:2009:343, para 31. See also Case C-286/13 P *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission ('Bananas')*, EU:C:2015:184, paras 111-135 and Case C-373/14, *Toshiba Corporation v Commission*, EU:C:2016:26, paras 30-33.
[65] Ibid, para 28. See also Case 56/65, *Société Technique Minière*, EU:C:1966:38.
[66] *Michelin II* (n 2), para 241.
[67] *Michelin* (COMP/E-2/36.041/PO) Commission Decision 2002/405/EC [2002] L 143/1, para 333.
[68] *Virgin v British Airways* (IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, paras 101 and 102.

maintenance of the existing level of competition or the development of that competition'.[69] On appeal, the ECJ took the view that the abusive nature of the rebate scheme depends on whether it provides an 'advantage not based on any economic service justifying it'.[70] This formula reflects the logic underpinning *Hoffmann-La Roche*.

### 3.1.2. Predatory pricing

The purpose of the legal test found in the *AKZO* ruling is to identify the instances in which an aggressive pricing campaign pursues an anticompetitive object. Where the dominant firm charges prices below average total cost and there is direct evidence of a plan to drive a competitor out of the market, the Court finds it appropriate to presume that the practice lacks pro-competitive virtues and is abusive by its very nature. Where the dominant firm prices below average variable cost, in turn, it is reasonable to infer that the practice has no plausible explanation other than the exclusion of a rival. 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.[71]

### 3.1.3. Tying

The case law on tying suggests that the rationale for the prima facie prohibition of the practice is not fundamentally different from the logic underlying the legal status of exclusive dealing and loyalty rebates. In cases like *Tetra Pak II*, the GC suggested that the practice is prohibited primarily because it is presumed to serve an exclusionary purpose. In that case, the GC concluded

[69] Case T-219/99, *British Airways* (n 2), para 288.
[70] Case C-95/04 P, *British Airways* (n 2), para 67. See also *Michelin II* (n 2), para 240; and *Intel* (n 8), para 78.
[71] *AKZO* (n 35), 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'.

that 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'.[72] In the same vein, it held that they 'beyond their ostensible purpose' and were instead 'intended to strengthen Tetra Pak's dominant position by reinforcing its customers' economic dependence on it'.[73]

### 3.2. *Practices that might have exclusionary effects*

The Court has not been very explicit about the reasons why some practices are abusive only when an exclusionary effect can be shown. In cases like *Deutsche Telekom* or *Post Danmark II*, the Court required evidence of an anticompetitive impact, but did not provide the rationale for treating these practices differently from conduct that is prima facie prohibited. It is useful to resort to Article 101(1) TFEU case law to understand why a 'by effect' category has emerged in Article 102 TFEU case law. As explained above, the question of whether an agreement is restrictive by its very nature typically revolves around whether the contentious restraints can be objectively justified (or whether they can be said to pursue a 'legitimate objective') in the economic and legal context of which they are part. Against this background, it seems reasonable to argue that practices such as a 'margin squeeze' or a refusal to deal are understood to be a plausible form of competition on the merits. This fact would explain, in turn, why the Court finds it inappropriate to consider them abusive by their very nature.

This interpretation of the case law is useful to explain, first, refusal to deal cases. The Court has confined to 'exceptional circumstances' the instances in which a dominant firm can be required to license an intellectual property right or give access to a facility. Advocate General Jacobs explained at length in his opinion in *Bronner* why it is generally pro-competitive, and in

[72] *Tetra Pak II* (n 40), para 135.
[73] Ibid, para 140.

the interest of consumers, for a company to refuse to deal with a rival.[74] 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. Thus, imposing a general duty to deal with rivals can be said to be anticompetitive in the sense that it would harm firms' incentives to improve their position in the marketplace by developing new products and alternative competitive strategies.[75] Against this background, it seems only logical to set a strict test that reflects the idea that a refusal to deal is generally a valid expression of competition on the merits.

The reasons why the Court required evidence of an anticompetitive effect in 'margin squeeze' cases like *Deutsche Telekom* and *TeliaSonera* are probably not very different. This practice can be seen as – and amounts in essence to – a constructive refusal to deal with a rival.[76] Moreover, 'margin squeeze' scenarios typically arise where a vertically-integrated firm is required, by virtue of regulation, to deal with 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 relevant downstream market. Thus, irrespective of the substantive test that is applied, competition law intervention in the context of an alleged 'margin squeeze' interferes with the way in which firms deal with rivals. In light of *Magill* and *Bronner*, it seems natural to conclude that, as a matter of principle, Article 102 TFEU should not dictate the way in which dominant players make use of their property. Intervention would thus be confined to instances in which an anticompetitive effect can be established.

---

[74] 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*, Opinion of AG Jacobs, EU:C:1998:264.

[75] 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'.

[76] See in this sense *Pacific Bell Telephone Co v linkLine Communications, Inc,* 555 US 438 (2009).

In *Post Danmark I*, the Court seemingly reached the same conclusion in relation to selective price cuts. There seems to be nothing inherently anticompetitive in an attempt by a dominant company to attract new customers by means of targeted discounts. So long as the discounts do not amount to predatory pricing, the practice looks like the very manifestation of the competitive process and, by extension, of the behaviour that competition law seeks to encourage. It would therefore be inappropriate to presume that a policy of selective price cuts lacks a pro-competitive rationale – unless, of course, one claims that trying to thrive in the marketplace is anticompetitive. In the same vein, the EU courts had already held in several rulings before *Post Danmark I* that dominant firms are entitled to compete on the merits and to take proportionate measures aimed at protecting their commercial interests.[77]

It is submitted that a similar idea explains why quantity rebates are deemed prima facie legal and standardised schemes are only prohibited where they are likely to have exclusionary effects. Rebates 'linked solely to the volume of purchases' are lawful insofar as they are understood to reflect the cost savings made by the dominant supplier.[78] It is difficult to infer an anticompetitive motivation from such schemes. The Court considers that, in such a case, the lower prices strictly reflect the economies of scale resulting from an increase in output. Accordingly, they would be a valid form of competition on the merits. The legality rule does not extend to standardised rebates granted 'on the basis of the aggregate orders placed over a given period'. Insofar as they are primarily based on volume, however, they are formally closer to those that are prima facie lawful than to those that are prima facie prohibited.

## 4. Towards legal consistency in Article 102 TFEU case law

[77] See in this sense *Irish Sugar* (n 38), para 112.
[78] *Hoffmann-La Roche* (n 21), para 100.

It cannot be emphasised enough that competition policy is implemented through law. Broad and vague prohibitions such as those found in Articles 101 and 102 TFEU have to be fleshed out and given an operational meaning in concrete factual scenarios. It is therefore difficult to expect that all rulings will be inspired by a single, all-encompassing logic. EU courts draw inspiration from a variety of – legal and economic – sources, which tend to change over time. As a result, the rationale underlying some rulings might hint at a particular understanding of the discipline, whereas others may be interpreted as reflecting another, possibly conflicting, approach to competition law issues. These tensions became particularly apparent when *Post Danmark I* and *Tomra* were delivered by the Court within a few weeks' difference. The issues of principle raised in *Post Danmark I* strongly suggested that Article 102 TFEU is only concerned with the exclusion of equally efficient rivals. *Tomra*, in turn, reiterated the traditional approach towards exclusive dealing and rebates, which is not informed by such considerations.[79]

The tensions that exist within the case law suggest that there are compelling reasons to question the legal status of some practices under Article 102 TFEU. In particular, the classification of some conduct as abusive by its very nature is open to criticism. This is so, first and foremost, for reasons of legal consistency. Like practices are not always treated alike, in the sense that they are subject to conflicting substantive tests. For instance, evidence of an anticompetitive effect may be required for some practices but not for functionally equivalent ones. There are, in addition, examples that show that a practice is not always treated uniformly across EU competition law provisions. Some conduct is prima facie prohibited as anticompetitive by its very nature under Article 102 TFEU but not under Article 101 TFEU (or EU merger control). For instance, exclusive dealing is deemed abusive by its very nature but it is not considered to be restrictive of competition by object within the meaning of Article 101(1) TFEU.

[79] See, in particular Bill Allan, 'Rule-Making in the Context of Article 102 TFEU' (2014) 13 Competition Law Journal 7 and 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.

This section provides a legal perspective on the internal tensions within the case law. This approach makes it possible to determine the ways in which consistency could be achieved in the context of Article 102 TFEU and across EU competition law provisions. It is submitted that, where there are two conflicting lines of case law, it is 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 *Cartes Bancaires*[80] and that already guide the interpretation of Article 101 TFEU.[81]

### 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. Conduct may thus be analysed simultaneously under that provision and under Article 102 TFEU. The fundamental consequence of this substantive overlap is that two parallel lines of case law may emerge and evolve separately under each of the provisions. The legal treatment of exclusive dealing under, respectively, Articles 101 and 102 TFEU exemplifies this question particularly well. Exclusive dealing is not restrictive of competition by its very nature under Article 101(1) TFEU, even when implemented by a dominant firm. The same practice is prima facie prohibited under Article 102 TFEU. The tension between the two lines of case law cannot be sufficiently explained by the fact that Article 102 TFEU only applies to dominant players whereas Article 101 TFEU applies to all agreements, or by the fact that exclusive dealing is more likely to have an anticompetitive effect when implemented by a

[80] *Cartes Bancaires* (n 63), para 51.

[81] Case C-345/14, *SIA "Maxima Latvija" v Konkurences padome*, EU:C:2015:784; Case C-172/14, *ING Pensii - Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurenței*, EU:C:2015:484; and *Toshiba* (n 64).

dominant firm. The observed tension is the consequence of the fact that the two lines of case law are based on mutually incompatible premises.

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. It concluded they are not, in and of themselves, contrary to Article 101(1) TFEU.[82] The Court pointed out 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).[83] Against this background, the Court set out the principles that an authority or a claimant must follow to establish the restrictive effects of exclusive dealing obligations. According to the ruling, it would be necessary to show that access to the relevant market by a new entrant would be foreclosed and that the supplier contributes significantly to such an outcome.[84]

Had the logic of *Delimitis* been applied in the context of Article 102 TFEU, the case law would, in all likelihood, have evolved differently. As observed above, the ECJ held in *Hoffmann-La Roche* that exclusive dealing is abusive by its very nature because it was presumed to lack a valid pro-competitive justification. As explained at length above, this presumption was endorsed – and often articulated explicitly – in subsequent case law. In addition, the Court assumed in *Hoffmann-La Roche* that exclusive dealing has exclusionary effects when implemented by a dominant firm. This assumption is at odds with the rationale underpinning *Delimitis*, in which the Court made it clear that foreclosure cannot simply be assumed to be the inevitable consequence of exclusivity obligations. According to the latter ruling, it is necessary to explore the features of the

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

[83] 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'.

[84] Ibid, paras 15-26.

market as a whole.[85] Interestingly, the factors identified by the Court in *Delimitis* are close to those that were deemed relevant to define the lawfulness of standardised rebate schemes in *Post Danmark II*.[86]

The difficulty to reconcile *Delimitis* and *Hoffmann-La Roche* became apparent in several Article 102 TFEU rulings, including *British Plasterboard*[87] and *Intel*. In these cases, the GC was confronted with the principles set out by the ECJ in *Delimitis*, which suggested that exclusive dealing cannot be considered to be anticompetitive by its very nature. Both in *British Plasterboard* and *Intel*, the GC acknowledged that exclusivity obligations may have a pro-competitive justification and that they may be normal commercial practices in some industries. However, it did not directly address the tension between the two lines of case law. Instead, the GC pointed out that dominant firms have, in any event, a 'special responsibility' not to impair the functioning of markets.[88] The practical consequences of the tension between Article 101 and 102 TFEU case law became apparent in *Van den Bergh Foods*.[89] The GC examined the status of a set of (de facto) exclusive dealing obligations under both Articles 101 and 102 TFEU. As a result, it was required to carefully consider (in line with *Delimitis*) whether the anticompetitive effects of the arrangement had been established by the Commission to the requisite legal standard. On the other hand, and somewhat paradoxically, it suggested, in no more than two paragraphs, that such a lengthy analysis of the exclusionary effects of the practice is not necessary where the supplier holds a dominant position on the relevant market.[90]

---

[85] 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'.

[86] *Post Danmark II* (n 20), paras 39-46.

[87] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission ('British Plasterboard')*, EU:T:1993:31, paras 66-67.

[88] *Intel* (n 8), paras 89-90.

[89] Case T-65/98 *Van den Bergh Foods Ltd v Commission*, EU:T:2003:281.

[90] Ibid., paras 159-160. It is not surprising that the ambiguous language used by the Court in the ruling has been interpreted as suggesting that it is necessary to establish the anticompetitive effects of exclusive dealing under Article 102 TFEU. For an example of such an interpretation, see O'Donoghue and Padilla (n 18) 431-432.

### 4.1.2. Tying under merger control and Article 102 TFEU

The anticompetitive impact of a merger may result from the ability and the incentive of the new entity to engage in tying. The analysis of the likely exclusionary effects of tying under Regulation 139/2004[91] differs substantially from that observed in the context of Article 102 TFEU. Under the latter, the practice is deemed abusive by its very nature, and its implementation is assumed to be capable of having an anticompetitive impact. Under Regulation 139/2004, on the other hand, transactions giving the merged entity the ability to engage in tying are not deemed prima facie anticompetitive, even when one of the parties to the operation enjoys a dominant position on one or more of the relevant markets.[92] As explained at length in the Non-Horizontal Merger Guidelines, the Commission would have to show not only that the merged entity would have the ability to exclude rivals via tying but also that it would have the incentive to do so and that the operation would have, overall, a negative impact on competition.[93]

The fundamental reason behind the observed divergence relates to the fact that conglomerate mergers are not presumed to have an anticompetitive object. In *Tetra Laval*, the GC noted expressly that, irrespective of the position enjoyed by the merging parties on one of the relevant markets, these operations are often beneficial for competition. Because conglomerate mergers are not deemed exclusionary by their very nature, it is not sufficient to conclude that they are capable of having an anticompetitive effect. As is true of agreements that do not restrict competition by object under Article 101(1) TFEU, administrative action would require

[91] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[92] See in this sense Case C-12/03 P, *Tetra Laval BV v Commission*, EU:C:2005:87, which involved a dominant firm, 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.
[93] Non-Horizontal Merger Guidelines (n 92), paras 91-118.

establishing the precise mechanism through which anticompetitive foreclosure would result from the operation.[94]

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

#### 4.2.1. 'Margin squeeze' and refusal to deal

As the case law stands, practices that can be seen as functionally equivalent are not always subject to the same substantive legal test. The substantive test that applies to one practice is sometimes stricter than that applying to comparable conduct. For instance, one practice may be deemed abusive by its very nature, while functionally equivalent behaviour one may not. Similarly, the threshold of anticompetitive effects may be higher in one case. The latter issue is best exemplified by the tension that exists between the case law on refusals to deal, on the one hand, and 'margin squeeze' abuses, on the other. As pointed out above, a 'margin squeeze' amounts in practice to a refusal to deal. A dominant firm may indeed refuse to deal with its downstream rivals altogether or may instead choose to do so on terms and conditions that make it impossible or unreasonably difficult for them to remain on the market. Insofar as the two practices are functionally equivalent, one could argue convincingly that they should be subject to the same substantive standards. In particular, there would be compelling reasons to claim that evidence of (actual or likely) 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 within the meaning of *Bronner* and *Magill*.

In *linkLine*, the US Supreme Court concluded that a 'margin squeeze' is not a stand-alone breach of Section 2 of the Sherman Act.[95] Accordingly, a claimant would need to show that the

[94] *Tetra Laval* (n 92), paras 41-44.

defendant is under a duty to deal with downstream rivals as a matter of competition law, or that the retail prices it charges to end-users are predatory. When confronted directly with the same question, raised by the national court in *TeliaSonera*, the ECJ reached a different conclusion. It is clear after this ruling that it is not necessary to show that the relevant input is indispensable for Article 102 TFEU to apply to an alleged 'margin squeeze'. Evidence of an anticompetitive effect alone would be sufficient to establish an abuse. In *TeliaSonera*, the Court denied the relevance of *Bronner* as a precedent, the scope of which was narrowly interpreted as concerning a refusal to deal alone.[96] The Court also suggested that a 'margin squeeze' abuse is the consequence of the unfair (or excessive) nature of the prices charged by the vertically-integrated supplier.[97] In the aftermath of *TeliaSonera*, 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 that result from the tension between these two lines of case law have been abundantly discussed in the literature.[98]

### 4.2.2. Selective price cuts and rebates

*Post Danmark I* is in several respects at odds with the logic underpinning the case law on loyalty (including 'loyalty-inducing') rebates. The latter are deemed not to have an economic justification. It is from the (presumed) absence of an objective justification that the exclusionary intent of the dominant firm is inferred in rebate cases. If one applied the same logic to the conduct examined by the Court in *Post Danmark I*, it would be reasonable to conclude that selective price cuts are also prima facie abusive. Unlike quantity rebates, selective price cuts do not reflect any cost savings made by the dominant firm. They are merely intended to attract customers away from a rival.

[95] *linkline* (n 76).
[96] *TeliaSonera* (n 14), paras 47-59.
[97] Ibid, paras 25-34.
[98] For an analysis, see O'Donoghue and Padilla (n 18) 399-404.

Accordingly, it would be appropriate to label them as 'disloyalty-inducing' discounts and thus to presume that they lack a valid economic justification. This was in fact the interpretation of Article 102 TFEU proposed by several interested parties taking part in the proceedings – including the Commission. As pointed out by the Advocate General in his opinion, these parties submitted that Post Danmark's practices should be prima facie prohibited.[99] According to them, selective price cuts should only escape the prohibition if the dominant firm were in a position to show that the difference in prices is justified on economic grounds. By ruling that selective price cuts are not abusive in and of themselves, the Court opened an alternative line of case law that departs from the logic of rulings like *British Airways* and *Michelin II*.

The tension between *Post Danmark I*, on the one hand, and the case law on rebates, on the other, becomes also apparent when one considers the way in which the exclusionary effects are assessed under the two lines of case law. As pointed out above, evidence of the anticompetitive impact of a loyalty or a loyalty-inducing scheme is not necessary to establish an abuse. It is simply assumed that, by their very nature, such rebates are capable of having exclusionary effects. Selective price cuts, on the other hand, are not assumed to be anticompetitive. The Court held in *Post Danmark I* that, as a general rule, equally efficient competitors are in a position to match prices that are above the average variable costs (or a comparable measure) of the dominant firm. Therefore, it would be necessary for a competition authority or a claimant to establish the actual or likely exclusionary effects of the practice in the context in which it is implemented.

These divergences are not obvious to rationalise. First, there seems to be no compelling reason why one would presume, on the one hand, that selective price cuts are an expression of competition on the merits and, on the other, that loyalty rebate schemes are devices aimed at excluding competition. Indeed, it is difficult to understand what makes the former less suspicious

[99] *Post Danmark I* (n 15), Opinion of AG Mengozzi, EU:C:2011:342, 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 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'.

and/or more clearly pro-competitive than the latter. As already explained, the ostensible purpose of selective price cuts is to expand the customer base at the expense of a competitor. This can also be said to be the very object of discounts conditional upon exclusivity. Secondly, it is not easy to see what makes loyalty rebates more exclusionary than selective price cuts. The latter can be an effective strategy to increase the dominant firm's market share at the expense of rivals, which is why they were considered to be abusive by their very nature in *Irish Sugar* and *Compagnie Maritime Belge*.

#### 4.2.3. Standardised and loyalty rebates

Following *Post Danmark II*, the legal status of rebate schemes is uncertain. The case law is no longer internally consistent. Before the ruling, rebates were deemed unlawful when they were formally conditional upon exclusivity or when they had equivalent effects (that is, whether they had a 'loyalty-inducing' effect). As explained above, the assessment of 'all the circumstances' in cases like *Michelin II* and *British Airways* related to the nature and the operation of the rebates, not to their actual or likely impact on competition. The anticompetitive effects of such schemes were assumed to result from their impact on customers' purchasing decisions. *Post Danmark II* did not endorse this logic and analytical approach. The lawfulness of the rebate scheme was not established only by reference to its nature and operation. The circumstances considered by the Court included aspects such as the extent of the dominant position, the coverage of the practice and the regulatory context. As already pointed out above, the ruling can be said to endorse an 'effects-based' approach comparable to the one found in 'margin squeeze' cases.

The legal landscape is fragmented after *Post Danmark II*. In the current state of the case law, it is possible to identify four substantive tests: (i) loyalty rebates would be prohibited by their very nature; (ii) target rebates would be abusive if they are shown to be 'loyalty-inducing'; (iii) a fully-fledged analysis of the exclusionary effects would be required for standardised schemes; (iv) finally, quantity rebates in respect of individual orders are deemed prima facie lawful. The fundamental question raised by *Post Danmark II* is whether there are compelling reasons to apply four different tests to these practices. This is questionable considering that the different categories of rebates are comparable in their nature, purpose and potential anticompetitive effects. It is not surprising that the Commission does not distinguish between loyalty, loyalty-inducing and quantity-based schemes in its Guidance. All three fall within the category of 'conditional rebates'. They are deemed to be a plausible source of the same pro-competitive benefits and their likely foreclosure effects are evaluated in accordance with the same criteria.[100]

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

EU competition law provisions are fleshed out in an incremental manner through their application to concrete scenarios. Tensions and internal contradictions in the case law are therefore inevitable. Far from reflecting fundamental disagreements about the nature and objectives of the discipline, they are above all the necessary consequence of the way in which the law is shaped and evolves over time. The assumptions and presumptions underpinning a particular ruling may seem accurate at the time when it is delivered. It may become apparent at a subsequent stage that the premises on which they are based are at odds with the experience and the knowledge acquired after the ruling was delivered. Given the way in which the law evolves, however, addressing inconsistencies and refining legal tests is not always easy. If may be a challenge to incorporate new experience or knowledge if it is at odds with a long line of case law. The stability and predictability of the law are values that courts take into consideration when evaluating the convenience of departing from well-established legal principles.

[100] Guidance (n 5), paras 37-45.

If tensions in the case law are assessed in this light (that is, as a natural and inevitable consequence of legal evolution), it becomes clear that some features of Article 102 TFEU case law need to be refined. This is so not because they reflect a particular objective or view of the field, but because they do not capture the knowledge and experience acquired over the years. It is submitted that the logic underlying some rulings is a source of 'frictions' that is difficult to defend on theoretical grounds and is as such unlikely to survive in the long run. Cases like *Hoffmann-La Roche* (on exclusive dealing) and *Tetra Pak II* (on tying) are based on plausible premises about the nature and purpose of, respectively, exclusive dealing and tying. The fact that *Delimitis* (on exclusive dealing) and *Tetra Laval* (on tying) reflect conflicting views about the same practices means that they are grounded on a more accurate understanding of the instances in which they are likely to have anticompetitive effects and of the reasons why firms (including dominant firms) resort to them.

The examples that follow show that the tensions observed in the case law can be meaningfully addressed in the same way courts typically address inconsistencies in other legal fields. The approach proposed to address the observed tensions is based on the criteria defined by the Court in *Cartes Bancaires*. According to that ruling, the question of whether a given practice is restrictive of competition by object is to be established in light of the lessons of experience and economic analysis. Both criteria shed light on whether conduct can be safely presumed to be driven by exclusionary purposes and whether anticompetitive effects are the inevitable consequence of their implementation. The Court referred to horizontal price-fixing by cartels as an example of an agreement that meets the two conditions.[101] Where experience and economic analysis suggests that one of this two is not fulfilled (as would be the case if the practice is found to be plausibly pro-competitive), the 'by object' category would be inappropriate.

[101] *Cartes Bancaires* (n 63), para 51.

### 4.3.1. Predatory pricing and selective price cuts

*Post Danmark I* provides a valuable example of the sort of tensions that have arisen in relation to the application of Article 102 TFEU. It also illustrates the way in which conflicting lines of case law may be reconciled by means of incremental decision-making. As explained above, the ECJ and the national court submitting the reference were confronted with two competing logics. As defended by, inter alia, the Commission, it was possible to argue, in light of *Compagnie Maritime Belge* and *Irish Sugar*, that a policy of selective price cuts is presumptively abusive irrespective of its effects. From this perspective, the targeted nature of the discounts would be presumed to have no justification other than the exclusion of competition. On the other hand, one could infer from *AKZO* that the practice could only be presumed to be anticompetitive if the discounts were found to amount to pricing below average variable costs. By relying upon the latter line of case law, the ECJ opted for a benchmark which prior research in the field had already shown to be a safe one, in the sense that it makes it possible to establish an accurate presumption of the instances in which a practice serves no purpose other than the exclusion of a rival.

### 4.3.2. Exclusive dealing and rebates

The presumption that exclusive dealing and loyalty rebates lack a valid economic justification pervades the case law. This presumption would be unproblematic if it captured the nature and purpose of the abovementioned practices. If one looks at the experience acquired after decades of enforcement, it appears that it does not. An analysis of the relevant rulings reveals, first, that exclusive dealing obligations 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.[102] More

[102] *Delimitis* (n 82), Opinion of AG Van Gerven, EU:C:1990:358, para 22.

generally, it is difficult to dispute that exclusive dealing arrangements are widespread.[103] This fact alone suggests that a presumption that the practice is driven by exclusionary purposes is at odds with the observable behaviour of firms across sectors. The experience drawn from some Article 102 TFEU cases suggests that these conclusions are not affected by the degree of market power enjoyed by the firm. In other words, they also hold true also for dominant firms. 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 part of an exclusionary strategy.[104] In several respects, the rebate schemes examined by the GC in that case looked closer in nature to arrangements such as selective distribution and franchising, both of which are prima facie compatible with Article 101(1) TFEU.[105]

Secondly, the experience acquired after decades of case law strongly suggests that exclusive dealing and rebates are not invariably exclusionary. The fundamental reason why *Michelin II* and *British Airways* gave rise to considerable controversy related to the fact that rivals had been able to thrive during the relevant period, and even improve their position at the expense of the dominant firm.[106] The evidence resulting from these rulings is consistent with the consensus positions of economists, reflected in the report issued in 2005 by the Economic Advisory Group on Competition Policy.[107] Economic analysis provides no support for a position that assumes that exclusive dealing and functionally equivalent practices are necessarily exclusionary.[108]

### 4.3.3. Tying

[103] See in this sense the Guidelines on vertical restraints (n 7), paras 129-150.
[104] Massimo Motta, 'Michelin II: The Treatment of Rebates' in Bruce Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (CUP 2009).
[105] 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.
[106] *Michelin* (n 67), paras 332-340 and *Virgin v British Airways* (n 68), para 107.
[107] EAGCP Report (n 6).
[108] Ibid, 47-50.

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 old formula of the US Supreme Court according to which '[t]ying arrangements serve hardly any purpose beyond the suppression of competition'.[109] The decades of experience accumulated since this principle was first enunciated reveal that firms often engage in tying and bundling for reasons that are not exclusionary. The integration of different products is known to be a credible manifestation of competition on the merits. It is in fact not by chance that the GC held in *Tetra Laval* that conglomerate mergers may have beneficial effects on competition. Similarly, the Commission explains in the Non-Horizontal Merger Guidelines that the pro-competitive gains resulting from conglomerate mergers may be manifested, inter alia, by means of tying and bundling strategies.[110] There seems to be no valid reason why these practices should be regarded as potentially beneficial for competition when assessed in the context of a conglomerate transaction and to presume that they serve an exclusionary purpose when assessed under Article 102 TFEU. It is submitted that the logic underpinning *Tetra Laval* should in principle prevail across provisions.

On the other hand, and as is true of exclusive dealing, tying cannot be assumed to have anticompetitive effects. There are instances in which the dominant firm lacks the means or the incentive to foreclose competition on a neighbouring market. Examples of such instances can be found in the administrative practice of the Commission. One such example is *Microsoft/Skype*, a merger cleared unconditionally in Phase I.[111] The Commission argued in the decision that Microsoft held a dominant position 'in a number of products', including, in line with its previous

[109] For a discussion of the evolution of the case law, see *Illinois Tool Works Inc v Independent Ink, Inc,* 547 U.S. 28 (2006).
[110] Non-Horizontal Merger Guidelines (n 92), 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'.
[111] *Microsoft/Skype* (Case No COMP/M.6281) Commission Decision of 7 October 2011.

practice,[112] operating systems for PCs.[113] Even though it took the view that Microsoft had the ability to engage in a foreclosure strategy,[114] the Commission concluded that the operation was unlikely to have anticompetitive effects.[115] The analysis and the conclusions reached were subsequently validated by the GC.[116] Another example is *Microsoft I*. The Commission decision in that case was controversial because the alleged tying did not have appreciable exclusionary effects, in the sense that it did not have an observable impact on rivals' ability and incentive to thrive in the relevant market.[117]

## 5. Conclusions

It is remarkable that debates around the appropriate treatment of potentially abusive practices remain as alive as they were a decade ago. The purpose of this piece is to show the potential of legal analysis to shed light on the ongoing controversies. The rationale behind the case law is not often given the prominence it deserves by commentators, and it is not always well understood as a result. 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. The difference between the two appears to be 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 some authors tend to assume.

[112] See *Microsoft I* (n 42), paras 30-32, concerning the position of the firm on the market for operating systems for PCs. See also *Microsoft (tying)* (Case COMP/C-3/39.530) Commission Decision of 16 December 2009 [2010] OJ C36/7, paras 24-30.
[113] *Microsoft/Skype* (n 111), paras 133-142.
[114] Ibid, para 143.
[115] Ibid, paras 159-170.
[116] Case T-79/12, *Cisco Systems, Inc. and Messagenet SpA v Commission*, EU:T:2013:635.
[117] *Microsoft I* (n 42), paras 996-998.

This approach is a promising starting point to engage in a critical analysis of the case law. A legal perspective reveals, first, that the case law 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 by the EU courts. 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, such positions are not uniformly reflected in all rulings. As seen above, judgments are sometimes based on conflicting premises. If this is so, Article 102 TFEU may very well evolve, but not against an externally defined benchmark. It may evolve in the way legal disciplines typically change, by addressing, on an incremental basis, tensions between rulings.

From a legal standpoint, the relevant question is whether the qualification of some practices as anticompetitive 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 prima facie prohibited (irrespective of their effects) under Article 102 TFEU, but not when their lawfulness is considered 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 assessing their likely effects on competition.

It has been argued that the natural approach to deal with the observed tensions in the case law is to resort to the test developed by the Court in *Cartes Bancaires*. In order to qualify an agreement as restrictive of competition by object, it is necessary to consider the lessons of experience and economic analysis. Such insights 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 *Cartes Bancaires*) and/or to assume that they have anticompetitive effects.

Even though it is implicit in the ruling, this approach is not fundamentally different from that found 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 have to address similar frictions in the future. This piece has shown how they can be effectively and meaningfully tackled by trying to ensure consistency within the EU competition law system.