Anticompetitive Effects in EU Competition Law

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Abstract

This article examines the meaning and scope of the notion of anticompetitive effects in EU competition law. It does so by bringing together several strands of the case law (and this across all provisions, namely Articles 101 and 102 TFEU and merger control). The analysis is structured around a framework that considers the main variables that shape the notion in practice: the time variable (actual or potential effects); the dimensions of competition and the counterfactual; the meaning of effects and the probability threshold (plausibility, likelihood, certainty).

The exercise shows that it is possible to discern a concrete meaning to the notion of anticompetitive effects. Some central questions, including the role and operation of the counterfactual and the threshold of effects, have already been answered by the Court of Justice. In particular, it has long been clear that anticompetitive effects amount to more than a mere competitive disadvantage and/or a limitation of a firm's freedom of action. The impact on equally efficient firms' ability and/or incentive to compete would need to be established.

At the same time, some open questions and some potential areas of friction (relating, inter alia, to stakeholders' tendency to conflate appreciability and effects) remain. These are also discussed.

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1. Introduction

The 'effects-based' approach to EU competition law has been widely discussed for over two decades.[1] One would thus be forgiven to assume that the meaning and scope of the notion of anticompetitive effects in the EU legal order are, and have long been, clear. The opposite, however, is true. Some elements of the notion have not been fully teased out, and a cloud of uncertainty surrounds the evaluation of effects in concrete cases. It is true that the Court of Justice (hereinafter, the 'Court' or the 'ECJ') has made seminal contributions over the years. For instance, it has consistently held that, as a general rule, anticompetitive effects must not be equated with a negative impact on consumer welfare.[2] Beyond this point, however, many open issues remain. If, as the case law suggests, effects amount to more than a mere competitive disadvantage, what are they? How are potential effects measured? How is the analysis performed when the practice is not price-related? What is the requisite level of probability? These are just some of the questions – of major practical significance – that play a prominent role before courts and authorities.

A number of factors help explain the persistent uncertainty. The definition of its administrative priorities by the European Commission (hereinafter, the 'Commission') is one of them. It is well documented that a growing number of investigations focuses on clear-cut infringements (in particular, cartel conduct).[3] Such practices are prima facie unlawful irrespective of their impact on

[1] It would be difficult to summarise the literature dealing with the effects-based approach. Suffice it to mention, inter alia, Jacques Bourgeois and Denis Waelbroeck (eds), *Ten years of effects-based approach in EU competition law: state of play and perspectives* (Bruylant 2012); Luc Peeperkorn and Katja Viertiö, 'Implementing an effects-based approach to Article 82' (2009) 1 Competition Policy Newsletter 17; 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; and Anne Witt, 'The Enforcement of Article 101 TFEU - What Has Happened to the Effects Analysis?' (2018) 55 Common Market Law Review 417.

[2] See in particular Opinion of AG Kokott in Case C-95/04 P *British Airways plc v Commission*, EU:C:2006:133, para 86; Case T-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para 38; 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 ('*Glaxo Spain*'), para 63; Case C-286/13 P *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184 ('*Bananas*'), para 125; Case T-216/13, *Telefónica, SA v Commission*, EU:T:2016:369, para 270.

[3] For a systematic analysis of the enforcement priorities of the Commission, and how cartel conduct has gained in relevance over the years, see Pablo Ibáñez Colomo and Andriani Kalintiri, 'The Evolution of EU Antitrust Policy: 1966-2017' (2020) 83 Modern Law Review 321.

competition.[4] As a result, the analysis of effects tends to be, if at all, a marginal aspect of such cases. Second, only a fraction of decisions ever reaches review courts. In the field of merger control, and given the time-sensitive nature of transactions, the proportion of challenges is small.[5] In the context of Articles 101 and 102 TFEU, the decisions in the very cases that demand a meaningful analysis of effects are not always subject to judicial review. A substantial proportion of non-cartel cases examined by the authority have been resolved, in the past decades, by means of commitment decisions. These decisions do not formally declare whether competition law has been infringed and are rarely challenged before the EU courts.[6] In addition, the use of settlements has progressively grown over the years and across practices. Firms' incentives to bring an action are significantly reduced following an agreement with an authority, and this even when the categorisation of the practice by the Commission is not wholly uncontroversial.[7]

It is true that, since the adoption of Regulation 1/2003 – which sought to increase enforcement at the national level – there has been a steady stream of preliminary references seeking guidance on the interpretation and application of Articles 101 and 102 TFEU. These judgments provide valuable indicators about the way in which the analysis of effects is to be conducted and about the specific meaning of the fundamental underlying concepts. The very nature of preliminary rulings, however, limits the extent to which they can clarify matters. Where the impact of a practice is assessed, the analysis cannot be expected to go beyond providing the relevant factors that the national court would

[4] Case C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204 ('*Cartes Bancaires*'), para 51.

[5] For a systematic overview of the number of cases reaching the EU courts, see Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press, 2018) and the accompanying dataset.

[6] See in this sense Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. For an exhaustive analysis of their nature, see Ryan Stones, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) 38 Yearbook of European Law 361.

[7] On the rise of the use of settlements in EU competition law, see Niamh Dunne, 'From Coercion to Cooperation: Settlement within EU Competition Law' (2019) LSE Legal Studies Working Paper, 14, available at https://ssrn.com/abstract=3481419.

need to apply to the facts of the case.[8] In some instances, the concepts used may not be fully fleshed out.

As a result of this institutional reality, the aspects of the case law that shed light on the notion of anticompetitive effects tend to be available in a fragmentary (and sometimes embryonic) manner – and this, from a variety of disparate sources. The purpose of this paper, against this background, is to bring together these fragments and present them under a coherent framework. The exercise suggests that the notion of anticompetitive effects has a concrete meaning in EU competition law. The case law provides the necessary and sufficient elements to understand how effects are to be assessed in practice. The conclusion is true of all areas of EU competition law, in the sense that there are no appreciable differences in the analysis of effects between EU merger control, on the one hand, and Articles 101 and 102 TFEU, on the other. If there are variations, these relate to the applicable legal test, not the relevant provision.

Some of the principles underpinning the case law are explicit. To begin with, it does not seem possible to claim that anticompetitive effects can be equated with a competitive disadvantage, or with a limitation of a firm's freedom of action. Something more – namely an impact on efficient firms' ability and incentive to compete – is required as a matter of law. Similarly, the notions of competition and the counterfactual have acquired, over the years, a clear and stable meaning. In the EU system, competition is best understood as actual or potential lawful competition which would have existed in the absence of the practice (or transaction) under consideration. Finally, the Court has consistently held that anticompetitive effects can be actual or potential; by the same token, the analysis can be both prospective and retrospective.

Other principles are implicit or scattered across the relevant judgments. This article seeks to tease them out from the case law. The requisite level of probability that triggers intervention, for instance, has never been formulated explicitly. What is more, the Court has occasionally used as

[8] Some examples in this sense include Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172 ('*Post Danmark I*'); and Case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome*, EU:C:2015:784.

synonymous expressions that are suggestive of different thresholds of effects. If one looks at the plain meaning of the words, there seems to be a difference between showing that a practice is capable of restricting competition and requiring evidence that it is likely to do so. However, the Court has sometimes used them as synonymous.[9] Against this background, the relevant thresholds need to be inferred from the analysis as actually conducted. In this sense, this article pays attention not only to what it is declared in the judgments but also – and mainly – to what the Court does in concrete cases (that is, how the analysis is performed and, in particular, how penetrating it is).

The abovementioned questions are examined as follows. Section 2 provides the framework around which the various aspects of the case law can be organised. It identifies the main variables to consider when giving a concrete meaning to the notion of anticompetitive effects. Thus, it examines not only the ways in which the key concepts of 'competition' and 'effects' may be defined but also the levels of probability, as well as the differences between the evaluation of actual and potential effects. Sections 3 to 7, in turn, examine how the variables defined in Section 2 have been interpreted by the Court. In this regard, it considers both the case law on Articles 101 and 102 TFEU and on merger control. As far as Article 101 TFEU is concerned, it takes into account not only 'by effect' conduct (that is, conduct that only gives rise to intervention when effects are established) but also 'by object' behaviour (that is, behaviour that is deemed prima facie unlawful irrespective of its effects). Finally, Section 8 offers a summary of the main findings and identifies the aspects that are likely to give rise to frictions in the medium to long term.

[9] See for instance Case C-95/04 P *British Airways plc v Commission*, EU:C:2007:166; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83; and Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651 ('*Post Danmark II*'). For a discussion, see Opinion of AG Wahl in Case C-413/14 P *Intel Corporation Inc v Commission*, EU:C:2016:788, paras 112-121.

2. What are anticompetitive effects? Making sense of the variables

The notion of anticompetitive effects can be broken down into various components. Its scope will be broader or narrower depending on how these components are fleshed out. For instance, it would be relatively broad if effects were equated with a competitive disadvantage – or with a limitation of a firm's freedom of action. In such circumstances, anticompetitive effects would be found to exist in the vast majority of – if not all – cases. Conversely, the scope would be narrower, and effects relatively more difficult to establish in practice, if the latter were equated with harm to consumer welfare. The notion is also sensitive to the requisite threshold of probability. Effects would be relatively easy to establish if the bar were set at the level of plausibility; and they would be more difficult to establish if it were necessary to show that an anticompetitive impact is certain, or virtually certain, to occur. The purpose of this section is to identify these components and provide a template against which the case law, and its evolution, can be mapped.

2.1. *The time variable: actual and potential effects*

The evaluation of effects can be based on the actual or potential impact of a practice (or transaction) on competition. If intervention is based on the latter, intervention need not wait for the impact to be manifested or to fully display its consequences on the market. The assessment of potential effects is typically prospective in nature (and is often assumed to be prospective). For instance, action may take place before a practice or transaction is fully realised. Merger control systems typically evaluate the compatibility of concentrations prior to their implementation, and this on the basis of their anticipated effects. The same assessment of potential effects can take place in relation to agreements between undertakings or unilateral practices by dominant firms (or collectively dominant firms).[10] For

[10] The remainder of the article will refer to a 'dominant firm' as a shorthand for both single and collective dominance.

instance, an authority may intervene ex ante, before an auction is organised.[11] The analysis may also be prospective where the practice has already been implemented but the effects have not been manifested to their full extent. This may be the case, for instance, where the practice is ongoing when intervention takes place.[12]

A question that might arise in practice is whether the retrospective analysis of the impact of a practice or transaction can be based on its potential effects alone or must consider its actual effects instead. The question, in other words, is whether the ex post assessment of effects can focus exclusively on the conditions that would have potentially prevailed in its absence; or whether the assessment must take into account the actual context (that is, the subsequent developments that are contemporaneous with, or that follow, its implementation). Under the first approach (which would consider potential effects alone), the ex post evaluation would be based on hypotheticals about the possible evolution of market conditions, irrespective of actual events; under the second, the assessment would be constrained by the observable evolution of such conditions. The status of this question in the case law is considered in Section 4 below.

2.2. *The dimensions of competition and of the counterfactual*

2.2.1. Inter-brand and intra-brand competition

It is commonplace to distinguish between the inter-brand and the intra-brand dimensions of competition. Inter-brand competition refers, generally speaking, to the competition that exists among firms at a given level of the value chain, and, in particular, to the rivalry that exists between the different suppliers of a given product. Intra-brand competition, in turn, is typically defined as the

[11] See for instance *Joint selling of the media rights to the FA Premier League* (Case COMP/C-2/38.173) Commission Decision of 22 March 2006.
[12] *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017 ('*Google Shopping*').

rivalry that exists among the distributors or retailers of a particular brand of a given product. In any competition law system, a choice needs to be made, first, about whether both dimensions of competition are relevant (or whether, instead, only inter-brand competition is) and, second, where the two are deemed relevant, whether there is a hierarchy between the two dimensions. Since inter-brand competition is universally understood to be more important, it can be expected to take precedence. The status of inter-brand and intra-brand competition in the case law is addressed in Section 5.

2.2.2. The ex ante and ex post dimensions of competition

The impact of a practice (or transaction) on competition has to be measured against a benchmark. The competition that is said to be affected, in other words, needs to be given a concrete meaning. The most obvious benchmark to establish anticompetitive effects is the counterfactual, that is, the evaluation of the conditions of competition that would have prevailed had the practice (or transaction) not been implemented. An analysis of the relevant economic and legal context (including factors such as the features of the relevant market or the regulatory conditions in which firms operate) sheds light on this question. The operation of the counterfactual is exemplified by the so-called 'failing firm defence' in merger control.[13] A concentration cannot be said to have anticompetitive effects if one of the parties would have left the market irrespective of it and there would have been no less restrictive alternatives to dispose of the assets.[14] In such circumstances, there would be no causal link between the anticipated loss of competitive pressure and the completion of the transaction.

The counterfactual has an ex ante and an ex post dimension. When considering the conditions of competition that would otherwise have prevailed, one should take into account that some practices and transactions both create and restrict competition; in other words, pro- and anticompetitive effects

[13] See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, paras 89-91.
[14] Ibid, para 90.

may be closely intertwined. For instance, the development of a new technology may create a new market or intensify rivalry in an existing one. In that regard, it can be said to be pro-competitive. Once the technology has been developed, however, the firm may decide to keep it for itself to recoup its investments. Accordingly, it may refuse to share its innovation with would-be rivals. Seen from a purely ex post perspective, the decision to keep the technology for itself appears to restrict competition (insofar as would-be rivals would be denied access to the market).

When defining the counterfactual against which effects are evaluated, it is therefore necessary to decide whether both the ex ante and ex post dimensions are considered, or whether only the latter is part of the analysis. If, in the example given above, only the ex post dimension were relevant, then a refusal by the firm to share its technology with rivals would have anticompetitive effects. Seen ex post, this behaviour necessarily limits the availability of the technology that would otherwise have existed. This is not necessarily the case, however, when the ex ante dimension is considered. The investment in the development of a new technology might never have been incurred if the firm had not had the prospect of recouping it by keeping the innovation for itself. An ex ante approach to the counterfactual does not merely assume that the pro-competitive gains resulting from a practice (or transaction) would have existed. Instead, it considers whether they would have been manifested in the absence of the observable ex post restraints. As explained in Section 5, the EU system considers both the ex ante and ex post dimensions of the counterfactual.

2.3. *The meaning of effects*

2.3.1. Between freedom of action and harm to consumers

The assessment of the impact of a practice or transaction on competition is particularly sensitive to the way the concept of effects itself is defined. As already suggested, anticompetitive effects would be virtually ubiquitous (and straightforward to establish) if the concept were equated with a competitive disadvantage or with a limitation of a firm's freedom of action. The opposite would be true if it were understood to amount to harm to consumer welfare. When considering the possible meanings that can be attached to the very concept of effects, it is useful to think of such meanings as discrete points along a spectrum. The two options mentioned above (limitation of a firm's freedom of action or competitive disadvantage, on the one hand; and harm to consumer welfare, on the other) are at the opposite ends of the spectrum.

Virtually any practice that attracts the attention of competition authorities limits the freedom of action of one or several firms and/or places them at a competitive disadvantage. A distribution agreement, for instance, may limit the freedom of action of the reseller (and may thus place it at a competitive advantage relative to rivals) in a variety of ways. The reseller may be prevented from selling brands competing with those of the supplier,[15] or may be precluded from offering the contractual products via an online marketplace.[16] The same can be said of conduct implemented by dominant firms. For instance, tying places rivals on the market for the tied product at a disadvantage. In addition, the practice limits the freedom of action of the firm's customers. At the other edge of the spectrum, equating anticompetitive effects with harm to consumers (in terms of, inter alia, prices, output, quality or innovation) would require evidence that the latter are made worse off by the practice or transaction.[17] This is known to be a particularly demanding exercise.

Freedom of action*	Market structure	As efficient competitor	Consumer welfare

Fig. 1: The meaning of effects
* (or competitive disadvantage)

[15] See, for instance, Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91.
[16] See, for instance, Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941.
[17] For an articulation of what the assessment would involve, see, for instance David Spector, 'From Harm to Competitors to Harm to Competition: One More Effort, Please!' (2006) 2 European Competition Journal 145.

As seen in Figure 1, it is possible to identify at least two points in the spectrum that are between these two ends. First, one can define effects as harm to the market structure in which the practice or transaction is implemented. In such a case, the evaluation would focus on its impact on other firms on the relevant market. Second, it is possible to further refine the analysis and equate effects with an impact on equally efficient firms. If the latter definition is embraced, the consequences on firms that are not as efficient as those implementing the practice or transaction would not amount to anticompetitive effects. The departure of less efficient rivals would be deemed a natural and desirable consequence of the operation of the competitive process, not one that would trigger a prima facie prohibition.

2.3.2. The appreciability of effects

A separate but related question concerns the appreciability of effects. If a threshold of appreciability is introduced, then it would not be enough to show that a practice or transaction would have a negative impact on competition (however this is defined). It would be necessary to establish, in addition, that the impact in question is significant (or appreciable). Suppose that evidence of consumer harm is required to establish effects. In such a case, the authority would need to show not only that prices would go up following the practice or transaction, but also that the rise would be appreciable. Suppose now that harm to the market structure is enough to establish effects. In the context of an exclusive dealing agreement, for instance, it would be necessary to show not only that access to the market would be foreclosed to new entrants, but that the agreements concluded by the supplier in question make an appreciable contribution to rivals' departure from the relevant market.

Competition law systems can address appreciability in a variety of ways. The approach seems to depend, at least in part, on the meaning that is attached to the concept of effects. If, for instance, a negative impact on competition is equated with consumer harm, an appreciable restriction is one that leads to a price increase (or equivalent harm to other parameters) above a certain level (for instance 5%).[18] An alternative approach to appreciability is one that revolves around the market power – or a proxy for market power – enjoyed by the firm(s) involved in the practice or transaction. For instance, one could safely assume that the effects of a practice implemented by a dominant firm (that is, a firm with substantial market power[19]) will, if established, be appreciable. Conversely, practices and transactions implemented by firms with a modest degree of market power, could be assumed (or at least presumed) not to have appreciable effects. The choices made by the Court in this regard are explained in Section 6.

2.4. *The probability of the effects: plausibility, likelihood and certainty*

The probability threshold has already been mentioned as a crucial factor in the definition of anticompetitive effects. Competition law systems focus on certain practices and transactions that typically have at least some probability of affecting competition. All the examples mentioned above – including exclusivity obligations, tying, mergers and acquisitions – can, in certain circumstances, have negative effects on rivals and/or consumers. Accordingly, if the requisite probability threshold were set at a sufficiently low level, such practices would be found to have anticompetitive effects in virtually every instance. For the same reason, the need to show anticompetitive effects would become a formality and the distinction between practices prohibited 'by object' and 'by effect' would be meaningless in practice. Conversely, the threshold of effects may be set at such a high level that it becomes difficult to meet by an authority or claimant (which would make conduct de facto lawful). This would be the case, in particular, if the authority or claimant were required to show that the practice or transaction is certain to have a negative impact on competition.

[18] For an example of the articulation of this approach, see US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010).
[19] OECD, 'Evidentiary Issues in Proving Dominance/Monopoly Power' DAF/COMP(2006)35.

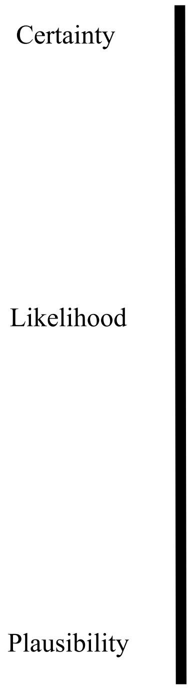

Fig. 2: The probability of effects

The main thresholds of probability are depicted in Figure 2. At the low end of the spectrum, one can identify a threshold of plausibility. The latter concept is understood to mean that a finding of anticompetitive effects in the relevant economic and legal context would not be contrary to 'logic and experience'.[20] Accordingly, this threshold is met as soon as one can identify a credible mechanism through which the impact on competition can be manifested. At the higher end of the spectrum, one can identify a threshold of certainty (that is, a 100% probability), or quasi certainty of such effects. Between the two ends, one can identify a threshold of 'likelihood', which would be met where it can be shown that the impact on competition is more likely than not to occur (that is, a level of probability right above 50%). All three thresholds are relevant in the EU competition law system, as explained in Section 6 below.

[20] The expression is borrowed from Ioannis Lianos, '"Judging" Economists: Economic Expertise in Competition Law Litigation' in Ioannis Kokkoris and Ioannis Lianos (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer 2010).

3. Anticompetitive effects in the case law: preliminary issues

3.1. *Mechanisms through which anticompetitive effects are manifested*

3.1.1. Collusion or absorption of a source competitive pressure

Anticompetitive effects, irrespective of how they are defined, may be manifested in a variety of ways. The EU competition law system captures three mechanisms through which such effects may be displayed. The first mechanism is the one that follows from collusion or the absorption of a source of competitive pressure. The most straightforward example is that of a horizontal merger, which leads, by its very nature, to the direct elimination of a rival.[21] The negative effects resulting from this first mechanism may be unilateral (that is, they may result from the increase in market power afforded by the transaction to one or several market players) or coordinated (that is, they may flow from the reduced incentive of the remaining market players to compete).[22] Practices falling within the scope of Article 101 TFEU can also display similar effects. An agreement between competitors softens the competitive pressure faced by each of them; in addition, it may lead to collusive outcomes with other market players.[23] Some vertical arrangements can also lead to collusive outcomes.[24]

3.1.2. Exclusion of a source of competitive pressure

A second mechanism through which anticompetitive effects may be manifested is exclusion, that is, the departure of one or several rivals from the market. Exclusionary outcomes may be caught by

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[21] Guidelines on the assessment of horizontal mergers (n 13) and Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission*, EU:C:1973:22.
[22] Guidelines on the assessment of horizontal mergers (n 13).
[23] See in this sense the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.
[24] See in this sense the Guidelines on vertical restraints [2010] OJ C130/1.

Article 101 TFEU, Article 102 TFEU and merger control. Just to mention an example, tying is a concern insofar as it is a prima facie plausible mechanism through which competitors may be foreclosed.[25] To the extent that tying is implemented by means of an agreement between a supplier and its customers, it can be caught by Article 101 TFEU; and, where the tie-in is imposed by a dominant firm, by Article 102 TFEU. In the context of merger control – and, more precisely, where the transaction gives rise to conglomerate concerns – the entity resulting from the transaction may have the incentive to engage in tying behaviour, which may in turn have exclusionary effects.[26]

3.1.3. Exploitation of market power

Finally, anticompetitive effects may result from the exploitation by a dominant firm of its substantial market power vis-a-vis customers and/or suppliers. As such, exploitative conduct can be caught by Article 102 TFEU.[27] In this case, anticompetitive effects are the consequence of the absence of effective competitive constraints faced by the dominant firm. The anticompetitive behaviour in these circumstances can be manifested in two main ways. First, exploitation may lead to the excessive extraction of rents from operators elsewhere in the value chain. This extraction may be manifested, for instance, in the dominant firm demanding unfairly high prices to its customers and, conversely, in offering unfairly low prices to its suppliers.[28] It may also result from imposing supplementary obligations, unrelated to the main transaction, upon them.[29]

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[25] See in this sense the 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.

[26] See in this sense the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6.

[27] This conclusion is something that directly follows from the letter of the Treaty. See in this sense René Joliet, *Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power* (Martinus Nijhoff 1970).

[28] Article 102(a) TFEU may consist in 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

[29] In accordance with Article 102(d) TFEU, an abuse may also consist in 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.

Second, exploitation may lead to the distortion of the conditions of competition on the markets neighbouring the one in which the dominant firm operates. In other words, a dominant player may, when exercising its substantial market power vis-à-vis customers and/or suppliers, favour some firms at the expense of others (and thus inflict, at the very least, a competitive disadvantage on the latter). For instance, a dominant supplier may adopt a policy of rebates that gives more favourable trading conditions (in the form, for instance, of lower prices) to those customers that choose to deal exclusively with it.[30] In addition to the exclusionary effects that such a practice might display (what have been termed primary-line effects in the literature), it may distort competition on the relevant downstream market (secondary-line effects of an exploitative nature).[31]

3.2. *The place of anticompetitive effects in the various legal tests*

A practice or transaction that is incapable of having anticompetitive effects is not subject to EU competition law.[32] In that sense, one can claim that the notion is relevant across the board. This fact does not mean, however, that it is necessary to establish anticompetitive effects, on a case-by-case basis, in relation to every practice and transaction. Some practices – such as cartels – are deemed prima facie unlawful irrespective of their impact. Anticompetitive effects are presumed to be an inherent and inevitable consequence of the implementation of these practices; accordingly, their impact need not be shown to exist in the economic and legal context of which they are a part. Conversely, some practices are presumed compatible with Articles 101 and/or Article 102 TFEU;

[30] Article 102(c) TFEU expressly provides that an abuse may consist in 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. This is an issue that complemented the exclusionary concerns in several rebate cases, including Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313 ('*Michelin I*'); Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission*, EU:T:2003:250 ('*Michelin II*'); and *British Airways* (n 9).
[31] For an analysis of the question, see Opinion of AG Wahl in Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2017:1020; and Damien Geradin and Nicolas Petit, 'Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?' (2006) 2 Journal of Competition Law & Economics 479.
[32] See in particular *T-Mobile* (n 2), para 31 and Case C-307/18, *Generics (UK) Ltd and others v Competition and Markets Authority*, EU:C:2020:52, para 154.

thus, they are deemed prima facie lawful without it being necessary to carry out an assessment of their effects. Finally, there are practices and transactions that only give rise to intervention where their impact on competition is established in the specific context in which they are implemented. For instance, mergers scrutinised under Regulation 139/2004 can only be declared to be incompatible with the internal market following a case-by-case assessment of their effects.

The distinction between practices that are prima facie unlawful irrespective of their impact – on the one hand – and practices that are only prohibited if they are shown to have such effects – on the other – is particularly apparent in the context of Article 101(1) TFEU. This provision distinguishes between agreements that restrict competition by object and by effect.[33] Evidence of the impact on competition is only required in relation to the latter. Thus, once a restriction by object is established, it is not necessary to show, in addition, that the agreement in question has anticompetitive effects.[34] However, this same divide can be identified in the context of Article 102 TFEU.[35] Some conduct is prima facie prohibited as abusive without it being necessary to evaluate, on a case-by-case basis, its impact on competition. This is the case, in particular, of tying,[36] of pricing below average variable costs,[37] and of exclusive dealing (as well as loyalty and 'loyalty-inducing' target rebates).[38] Other practices, including 'margin squeeze' behaviour[39] and standardised rebate schemes,[40] are only caught by Article 102 TFEU insofar as they have anticompetitive effects.

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[33] Article 101(1) TFEU refers to practices that 'have as their object or effect the prevention, restriction or distortion of competition within the internal market'.

[34] The consistent line of case law on this point dates back to Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, EU:C:1966:41.

[35] See in this sense Pablo Ibáñez Colomo, 'Beyond the "more economics-based approach": a legal perspective on Article 102 TFEU case law' (2016) 53 Common Market Law Review 709.

[36] Case T-30/89 *Hilti AG v Commission*, EU:T:1991:70; and Case T-83/91 *Tetra Pak International SA v Commission*, EU:T:1994:246 ('*Tetra Pak II'*).

[37] Case C-62/86 *AKZO Chemie BV v Commission*, EU:C:1991:286, para 71.

[38] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 89; confirmed in Case C-413/14 P *Intel Corporation Inc v Commission*, EU:C:2017:632, para 137. See also *Michelin I* (n 30) and *British Airways* (n 9).

[39] Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603.

[40] *Post Danmark II* (n 9) and *TeliaSonera* (n 9).

3.2.1. Anticompetitive effects and prima facie unlawful conduct

When a practice is deemed prima facie unlawful irrespective of its effects (both under Articles 101 and 102 TFEU), it is presumed to be at least 'capable' of having such effects.[41] In other words, its negative impact on competition is deemed to exist and need not be established on a case-by-case basis. The Court has been explicit about the presumption of effects that underpins prima facie unlawful conduct. In the context of Article 101(1) TFEU, for instance, it has explained that price-fixing by cartels (which amounts to a 'by object' infringement) is known from experience to be a source of allocative inefficiency.[42] The same is true in the context of Article 102 TFEU. Underpinning the prima facie prohibition of exclusive dealing and loyalty rebates, for instance, there is a presumption that these practices are capable of restricting competition.[43]

As far as prima facie unlawful conduct is concerned, arguments about the absence of anticompetitive effects may be advanced to escape the prohibition. In other words, the underlying presumption is open to rebuttal by a defendant. Thus, it is possible for the parties to an agreement, or for a dominant firm, to show that the practice is incapable of having a restrictive impact on competition in the relevant economic and legal context. That the parties can show that an agreement is incapable of restricting competition was expressly recognised, in the context of Article 101(1) TFEU, in *Murphy*.[44] In relation to Article 102 TFEU, this point was made explicit in *Intel*.[45] The two judgments clarify that defendants may bring arguments pertaining to the nature of the practice and the relevant economic and legal context. These factors are examined at length below.

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[41] *T-Mobile* (n 2), para 31.

[42] *Cartes Bancaires* (n 4) para 51; confirmed in *Maxima Latvija* (n 8), para 19; and Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and others*, EU:C:2020:265, para 36.

[43] For a discussion on presumptions generally, and on this presumption in particular, see Chapter 6 in Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement* (Hart Publishing 2019).

[44] Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, EU:C:2011:631 ('*Murphy*'), para 140.

[45] *Intel* (n 38), paras 138-140.

3.2.2. The case-by-case assessment of anticompetitive effects: ‘standard effects’ and ‘enhanced effects’ tests

The case-by-case assessment of the impact of a practice is the rule in the EU competition law system. As already pointed out, the compatibility of all mergers within the meaning of Regulation 139/2004 is evaluated on the basis of a case-specific inquiry. In the context of Article 101(1) TFEU, the Court has held that the ‘by object’ category is to be interpreted restrictively.[46] The analysis of effects can be undertaken in light of two sets of legal tests.[47] The default approach is what can be termed the ‘standard effects’ test, which requires an evaluation of the impact of the practice (or transaction) on competition in the relevant economic and legal context. There are two additional sub-tests, which depart from the default test and can be termed ‘enhanced effects’ analysis. They apply in exceptional circumstances. Under them, it is necessary to satisfy additional obligations. At the very least, an authority or claimant would need to show, first, that an input or platform is indispensable for competition on a neighbouring market and, second, that lack of access to the said input or platform would lead to the elimination of all competition on that market.[48]

3.2.3. Anticompetitive effects and prima facie lawful conduct

Some practices are prima facie lawful in the sense that they are presumed to be compatible with Article 101(1) and/or 102 TFEU without it being necessary to evaluate, case-by-case, their effects. For instance, selective distribution agreements are deemed compatible with Article 101(1) TFEU

[46] *Cartes Bancaires* (n 4) para 58; and *Budapest Bank* (n 42), para 54.
[47] For an extensive analysis of the question, see Pablo Ibáñez Colomo, ‘Legal Tests in EU Competition Law: Taxonomy and Operation’ (2019) 10 Journal of European Competition Law & Practice 424.
[48] See in this sense Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, EU:C:1995:98 (‘*Magill*’); Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others*, EU:C:1998:569; and Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, EU:C:2004:257.

where the conditions set out by the Court in *Metro I* are fulfilled.[49] The same is true of the restraints found in franchising agreements and which are necessary to preserve the know-how of the franchisor and the uniformity and reputation of its formula.[50] Concerning potentially abusive conduct, above-cost pricing is prima facie compatible with Article 102 TFEU. Quantity rebates (that is, rebates that are incremental in nature and transaction-specific) are also prima facie lawful, and this insofar as they are deemed to reflect the cost savings made by the supplier.[51]

It is possible for an authority or claimant to rebut the presumption of legality by showing that prima facie lawful conduct has or would have anticompetitive effects in a given economic and legal context. For instance, a selective distribution system may have a negative impact on competition where a network of similar agreements leads to price rigidities, forecloses access to the market and/or precludes other forms of distribution.[52] Similarly, there may be instances, explored in detail below, where quantity rebates and above-cost prices amount to an abuse of a dominant position. For instance, an authority or claimant may be able to show that a given rebate scheme does not truly reflect the cost savings made by the supplier and is designed to foreclose competition.[53]

4. The time dimension in the case law: actual and potential effects

4.1. *The prospective analysis of potential effects*

The Court has consistently held that EU competition law is concerned with both actual and potential effects.[54] Accordingly, the fact that an authority or claimant has failed to established the actual impact

[49] Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1977:167 ('*Metro I*').
[50] Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41.
[51] *Hoffmann-La Roche* (n 38), para 90; and *Post Danmark II* (n 9), para 28.
[52] Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1986:399 ('*Metro II*'), para 40.
[53] See for instance Case C-163/99 *Portugal v Commission*, EU:C:2001:189, paras 52-53.
[54] See in particular Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission*, EU:C:1987:490, para 39; Case C-7/95, *John Deere Ltd v Commission*, EU:C:1998:256, para 77; Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. and Cassa*

of a practice does not in itself mean that a restriction has not been established to the requisite legal standard.[55] That potential effects are sufficient to trigger intervention is self-evident in the context of merger control, which is by definition based on the ex ante evaluation of concentrations. It is also true in relation to Articles 101 and 102 TFEU. According to the case law, the analysis of potential effects is relevant where the analysis is prospective in nature. Thus, it may come into play in the two circumstances identified above: where the practice has not yet been implemented and where the practice has already been implemented at the time of the adoption of the decision and the analysis considers the future evolution of the relevant market. These two scenarios were considered by the Court in *British American Tobacco*[56] and are depicted in Figures 3 and 4.

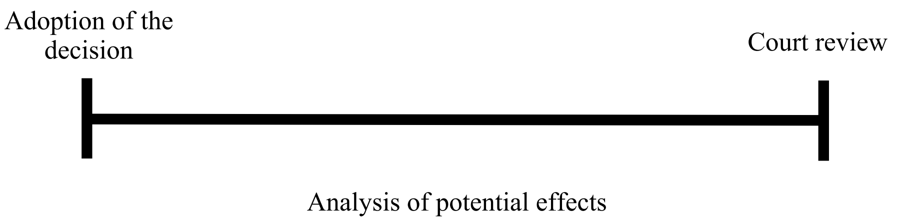

Fig. 3: The analysis of potential effects (I)

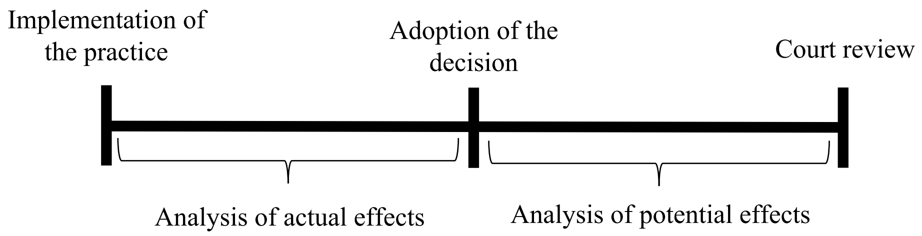

Fig. 4: The analysis of potential effects (II)

Figures 3 and 4 show, in addition, that there is typically a lag between the adoption of a decision by a competition authority and the review of its legality by a review court. As a result, by the time the court reaches its decision, it is possible to assess whether the potential effects identified by the authority are confirmed by subsequent market developments. These developments may reveal

di Risparmio di Genova e Imperia SpA, EU:C:1999:12, para 34; *TeliaSonera* (n 9), para 64; and *Post Danmark II* (n 9), para 66.

[55] *John Deere* (n 54), para 78.

[56] *British American Tobacco* (n 54).

that the forecasts made by the authority failed to materialise. For instance, the assessment might have been based on the premise that the barriers to entry on the relevant market and/or the practices would have prevented the arrival or growth of rivals,[57] and this premise may have been subsequently shown to be false; alternatively, the assessment may have been based on the premise that network effects would result in the market 'tipping' in favour of the firm involved in the practice.[58]

The question, in this regard, is whether the evaluation of the legality of the decision (and, in particular, of whether potential effects have been established to the requisite legal standard) can be informed by the actual developments that follow its adoption. According to the case law, the legality of a Commission decision must be assessed on the basis of the evidence that is available when adopted.[59] Thus, the review court would not be able to consider the subsequent evolution of the market in its assessment. The General Court (hereinafter, the 'GC') addressed this point in *Microsoft I*.[60] The fact that the theories underpinning the analysis of effects did not unfold as predicted by the Commission was not considered.[61] For the same reason, the fact that the anticompetitive effects failed to materialise is not necessarily conclusive.[62] Whether or not anticompetitive effects are established to the requisite legal standard in such a scenario depends on the relevant probability threshold, which is discussed below in Section 6.

4.2. *The retrospective analysis of actual effects*

The EU courts have addressed the question of whether the retrospective analysis can be based on potential effects alone. The issue, in other words, is whether evidence shedding light on the evolution of markets following the implementation of the practice (but before the adoption of the decision) can

[57] See for instance *Michelin II* (n 30), paras 235-246.
[58] See in this sense Case T-201/04 *Microsoft Corp v Commission*, EU:T:2007:289 ('*Microsoft I*').
[59] Joined Cases 15 and 16/76 *France v Commission*, EU:C:1979:29..
[60] *Microsoft I* (n 58), para 260.
[61] Ibid, para 943.
[62] Ibid, paras 560-564.

be disregarded by a claimant or authority. The issue has been addressed by the Court only indirectly, and this when enunciating the general principles and when providing guidance to national courts on the analysis of effects. According to a consistent line of case law, the impact of a practice on competition is to be assessed in the 'actual context' in which it is implemented.[63] This principle can be interpreted as suggesting that the observable market developments at the time of the implementation of the practice cannot be ignored.

This idea is confirmed when one examines the guidance provided to national courts. In *Post Danmark I*, for instance, it explained that, absent evidence of an exclusionary purpose, prices that cover the bulk of the costs attributable to a good or service are, 'as a general rule', not abusive (and this even when they fall below average total costs).[64] In such circumstances, the practice would only be caught by Article 102 TFEU if it is shown to have anticompetitive effects.[65] In its ruling, the Court engaged in a retrospective analysis of the impact of the conduct and noted that the dominant firm's rival had not been driven out of the market and had, in fact, been able to maintain its distribution network and win two customers back.[66] Evidence in this sense was deemed to constitute a strong indicator that the practice did not display exclusionary effects.

The GC faced the question directly when it considered the legality of the Commission decision in *Servier*.[67] In its *Krka* judgment, it held that the retrospective analysis of the anticompetitive effects of a practice cannot ignore the actual developments that follow its implementation but that precede the adoption of a decision. Thus, it concluded that the Commission had erred when claiming that, when examining the impact of an agreement concluded between an actual and a potential competitor, it can discharge its legal burden merely by considering hypotheticals about the evolution of markets

[63] See in particular Case 56/65 *Société Technique Minière*, EU:C:1966:38, 249; *John Deere* (n 54), para 76; Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v Asociación de Usuarios de Servicios Bancarios*, EU:C:2006:734, para 49; *Generics* (n 32), para 116.
[64] *Post Danmark I* (n 8), para 38.
[65] Ibid, para 39.
[66] Ibid.
[67] *Perindopril (Servier)* (Case AT.39612) Commission Decision of 9 July 2014. See also Case T-691/14 *Servier SAS and others v Commission*, EU:T:2018:922; and Case T-684/14 *Krka Tovarna Zdravil d.d. v Commission*, EU:T:2018:918.

– that is, without considering the actual context in which the agreement in question displayed its effects.[68] In the same vein, it held that the case law discussed in the preceding section – which concerned the prospective analysis of potential effects – is not applicable to instances in which it is retrospective.[69] The approach embraced in *Krka*, which is in turn consistent with the case law, reflects the approaches captured in Figures 3 and 4.

5. The meaning of competition and the counterfactual in the case law

5.1. *Competition comprises both the inter-brand and intra-brand dimensions*

In *Consten-Grundig*, the Court unambiguously held that the EU competition law system (and the 'principle of freedom of competition') is not only concerned with inter-brand competition, but also with intra-brand restrictions.[70] Accordingly, one cannot rule out, from the outset, that conduct restraining intra-brand rivalry (such as a distribution agreement providing for territorial protection) amounts to a breach of Articles 101 and/or 102 TFEU merely because it might increase inter-brand competition.[71] Following *Consten-Grundig*, there has been a consistent line of enforcement against practices with the object and/or effect of restricting intra-brand competition alone. Of these, restraints aimed at limiting cross-border trade represent the largest fraction.[72] Other practices include resale price maintenance[73] and selective distribution.[74]

[68] *Krka* (n 67), paras 317-344.
[69] Ibid, paras 345-359.
[70] *Consten-Grundig* (n 34), 342.
[71] Ibid.
[72] These cases include *Glaxo Spain* (n 2) and *Murphy* (n 44).
[73] Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284 and *Pronuptia* (n 50).
[74] *Metro I* (n 49); *Metro II* (n 52); and *Coty* (n 16).

5.2. *Competition refers to such lawful competition which would otherwise have existed*

The Court has consistently held, from the early days, that competition, for the purposes of the Treaty, must be understood as referring to such competition which would have existed in the absence of the practice or transaction.[75] Accordingly, anticompetitive effects need to be established against the relevant counterfactual, or, as the Court has consistently held, 'within the actual context in which it would occur in the absence of the [practice or transaction] in dispute'.[76] This is true across the board. In this sense, the meaning of competition does not change depending on whether the assessment under Article 101(1) TFEU relates to the object of a practice or to its effects. Similarly, it does not change depending on whether it is a transaction examined under the Regulation 139/2004 or a practice subject to Articles 101 and/or 102 TFEU. The need to consider the counterfactual has two main implications. First, it is necessary to establish a causal link between the practice or transaction and any actual or potential effects. Second, a practice that is necessary to attain a pro-competitive aim is not restrictive of competition, whether by object or as a result of its impact on competition. These two implications are examined in turn.

5.2.1. There must be a causal link between the practice or transaction and any effects

The Court has expressly held that there must be a causal link between a practice or transaction, on the one hand, and any actual or potential effects, on the other. Accordingly, where the observed or expected impact (or, more generally, the absence of competition) would have occurred in its absence, the practice or transaction is not restrictive of competition (whether by object or effect). The need to establish a causal link was made explicit, in the context of merger control, in *Kali & Salz*.[77] In relation

[75] *Société Technique Minière* (n 63), 250.
[76] See above, n 63.
[77] Joined cases C-68/94 and C-30/95 *France and others v Commission*, EU:C:1998:148 ('*Kali & Salz*').

to Article 102 TFEU, the Court held, in *Post Danmark II*, that any anticompetitive effects must not be purely 'hypothetical' and must be 'attributable' to the dominant firm.[78] These judgments are in line with a consistent line of case law, which under Article 101 TFEU, makes it necessary to establish the restriction against the relevant counterfactual.[79]

The evaluation of the causal link between the practice or transaction and its effects is to be undertaken in light of the economic and legal context of which it is a part. The analysis may reveal the absence of a causal link, and this for a variety of reasons – including the very nature of the relevant market and its evolution. Two examples illustrate the idea. To begin with, the absence of competition may not be attributable to the practice or transaction, but to the regulatory context, which may preclude any inter-brand and/or intra-brand rivalry. In relation to Article 101(1) TFEU, for instance, the Court has held that an agreement would not be capable of having anticompetitive effects where there are 'insurmountable' barriers to entry.[80] Such insurmountable barriers may exist, for instance, where there is an intellectual property right.[81] They may also exist where the regulatory framework, taken together, amounts to a de facto monopoly precluding entry.[82]

A causal link would also fail to exist, in a scenario of exclusion (or exploitation), where the deterioration of the conditions of competition can be attributed to the inefficiency of the firms that are or may be driven out of the market. In line with what has been explained above, the Court declared, in *Post Danmark I*, that the exclusion of those firms that are 'less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation' does not give rise to anticompetitive effects under Article 102 TFEU.[83] The departure of such firms from the market can

[78] *Post Danmark II* (n 9), para 47 and 65.
[79] See in particular Case C-382/12 P *MasterCard Inc. and Others v Commission*, EU:C:2014:2201, para 161; *Generics* (n 32), paras 103-122; and *Budapest Bank* (n 42), paras 55, 82 and 83.
[80] C-373/14 P *Toshiba Corporation v Commission*, EU:C:2016:26, paras 31-34; and *Generics* (n 32), para 45.
[81] See for instance Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others*, EU:C:1982:334 ('*Coditel II*'); Case C-9/93 *IHT Internationale Heiztechnik GmbH and Uwe Danzinger v Ideal-Standard GmbH and Wabco Standard GmbH*, EU:C:1994:261; and *Generics* (n 32), para 45.
[82] Case T-360/09, *E.ON Ruhrgas AG and E.ON AG v Commission*, para 104. See also Case T-370/09, *GDF Suez SA v Commission*, para 97.
[83] *Post Danmark I* (n 8), para 22.

be expected to occur irrespective of the implementation of the practice.[84] For the same reason, above-cost pricing and quantity rebates (as defined by the Court in *Post Danmark II*) are deemed prima facie lawful. It is reasonable to presume that an equally efficient rival would not be excluded as a result of such practices. In the context of merger control, the Court embraced the same idea by accepting, as a matter of principle, a variation of the 'failing firm defence'.[85]

5.2.2. A practice that is objectively necessary is not restrictive of competition

The evaluation of the counterfactual may reveal not only that a practice does not lead to a deterioration of the conditions of competition, but that it actually improves them. If the assessment reveals that the practice in question is objectively necessary to attain a legitimate or pro-competitive aim, it will not amount to a restriction of competition, whether by object or effect. There is a long line of Article 101(1) TFEU case law expressly addressing this point, starting with *Société Technique Minière*.[86] An agreement may prove to be objectively necessary for a variety of reasons. It may be the case, for instance, that a licensee would not have undertaken the necessary investments to produce and market the contractual goods in the absence of the territorial restraints provided for by virtue of the agreement.[87] It may also be the case that the parties have complementary capabilities that allow them to engage in a project that they would not have been able to pursue individually.[88]

A variation of the objective necessity test is the so-called ancillary restraints doctrine, which has been recognised as such by the Court. Under the doctrine, the question is whether the agreement would have been concluded in the absence of some clauses. The question, in other words, is whether

[84] See in this sense Luc Peeperkorn and Vincent Verouden, 'The Economics of Competition', in Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (3rd edn, Oxford University Press 2014), 1.43-1.49.
[85] *Kali & Salz* (n 77), para 115.
[86] *Société Technique Minière* (n 63), 250: '[...] [I]t may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking [...]'; *Generics* (n 32), paras 103-111; and *Budapest Bank* (n 42), paras 82-83.
[87] Case 268/78 *L.C. Nungesser KG and Kurt Eisele v Commission*, EU:C:1982:211, paras 55-58.
[88] Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd v Commission*, EU:T:1998:198, para 145.

the clauses are objectively necessary for the agreement to exist in the first place. For instance, a non-compete obligation may be necessary for the buyer to agree to the acquisition of a business.[89] To the extent that it is, it would not restrict competition, whether by object or effect. Similarly, the Court explained in *Pronuptia* that a firm would not be willing to engage in a franchising agreement if it is unable to preserve its know-how and the uniformity and reputation of its formula.[90] Accordingly, the clauses that are objectively necessary to achieve these aims fall outside the scope of Article 101(1) TFEU altogether.

The case law addressing objective necessity revolves around the application of Article 101(1) TFEU. A remaining question, accordingly, is whether the same principles apply in the context of Article 102 TFEU. If they did, a dominant firm would be able to avoid a prima facie finding of abuse on objective necessity grounds. Thus, the practice would fall outside the scope of the prohibition since it would not have anticompetitive effects (the conditions of competition would have improved, not deteriorated, following the implementation of the practice). The possibility to invoke objective necessity would be distinct from, and complementary to, the possibility for the dominant firm to provide an objective justification and/or to show that the efficiencies to which the practice gives rise outweigh any restrictive effects. Unlike objective necessity, the latter two would only come into play following the prima facie finding of an abuse.

It would be reasonable to assume that the objective necessity test is also relevant in the context of Article 102 TFEU. This is so, first, because there are express references to objective necessity in the case law.[91] Second, consistency would demand that the same principles apply across the competition law system. It would not be obvious to justify why objective necessity would apply only in relation to Article 101(1) TFEU. Such an approach would amount to attaching different meanings to the concept of competition depending on the applicable provision, which is not an easily tenable

[89] Case 42/84 *Remia BV and others v Commission*, EU:C:1985:327, para 19.
[90] *Pronuptia* (n 50), paras 16-17.
[91] Case 311/84 *Centre belge d'études de marché - Télémarketing v SA Compagnie luxembourgeoise de télédiffusion and Information publicité Benelux*, EU:C:1985:394, para 27.

position. One should consider, in this regard, that there are instances in which the same practice can be subject to both Articles 101 and 102 TFEU.[92] It is difficult to see how the same conduct could be simultaneously found to be objectively necessary (and thus pro-competitive and incapable of having restrictive effects) under Article 101(1) TFEU and prima facie abusive (and thus capable of having restrictive effects) under Article 102 TFEU.

5.3. *Both the ex ante and ex post dimensions of the counterfactual are considered*

5.3.1. The role of ex ante considerations in the analysis of effects

An important conclusion that follows from the interpretation and application of the counterfactual by the Court is that both its ex ante and ex post dimensions are considered. The case law shows that the pro-competitive gains resulting from a practice cannot simply be assumed to have existed. For the same reasons, any observable ex post restrictions cannot be examined in isolation. There are abundant examples in the case law showing how ex ante considerations play a role in the analysis. In *Nungesser*, the Court deemed justified the concerns expressed by the interveners in the case, who explained that the relevant technology (and the resulting innovation) was the outcome of 'years of research and experimentation'.[93] The assessment of any ex post restraints (which in the case gave territorial protection to the licensee), accordingly, would have to pay due regard to the 'nature of the product'.[94]

The cases spelling out the ancillary restraints doctrine further illustrate how the ex ante dimension of the counterfactual plays a role in the analysis. In *Pronuptia*, the Court noted that franchising agreements lead to pro-competitive gains by allowing the franchisor to benefit from its formula without investing its own capital, on the one hand; and by giving access to franchisees to

[92] Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA v Commission*, EU:C:2000:132, para 33; and *Generics* (n 32), para 146.
[93] *Nungesser* (n 87), para 56.
[94] Ibid, para 58.

methods they would only have been able to obtain after 'considerable efforts' and thus benefit from the franchisee's goodwill, on the other.[95] Accordingly, some ex post restraints resulting from the franchising agreement (such as non-compete obligations or limitations relating to the outlets from which the contractual goods may be sold) are inextricably linked to these ex ante pro-competitive gains. To the extent that they are, they cannot be dissociated from them.

Beyond the ancillary restraints doctrine, the case law on refusals to deal captures effectively the role that ex ante considerations play in the analysis. Seen ex post, any refusal by a vertically-integrated company to deal with a would-be rival has anticompetitive effects. However, the Court has consistently held that such refusals are only abusive in exceptional circumstances.[96] The stringent, 'enhanced effects' test laid down in *Magill*, *Bronner* and *IMS Health* can only be understood if the ex ante dimension of the counterfactual is taken into account. The ex ante factors that confine to exceptional circumstances the instances in which a refusal amounts to an abuse were discussed by AG Jacobs in *Bronner*. The Opinion emphasises that imposing an access obligation too readily would harm firms' ex ante incentives to invest and innovate.[97] Thus, an exclusive focus on the observable ex post restraints would disregard the pro-competitive gains resulting from the very same restraints and lead to less, not more, competition.

5.3.2. How ex ante considerations are incorporated in the analysis

The examples above are useful not only to show how ex ante considerations may lead to the conclusion that a practice is incapable of having anticompetitive effects, but also the different ways in which they may be incorporated in the analysis. In some circumstances, ex ante considerations are evaluated on a case-by-case basis in light of the relevant economic and legal context. Such was the

[95] *Pronuptia* (n 50), para 15.
[96] See in this sense *Magill* (n 48), *Bronner* (n 48) and *IMS Health* (n 48).
[97] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others*, EU:C:1998:264.

case, for instance, in *Nungesser*. In these instances, the firm(s) involved in the practice may provide evidence showing that the effects of any ex post restraints cannot be dissociated from the ex ante gains resulting from it – and, by the same token, why, by failing to do so, an authority may have erred in law. For instance, the parties may provide 'serious indicia'[98] showing why, in the specific circumstances of a case, the benefits resulting from an exclusive distribution agreement would not have been achieved without the restriction of active and passive sales.[99]

There are other circumstances where ex ante considerations are incorporated in the legal test itself. In fact, the 'enhanced effects' and prima facie lawfulness tests, described above, are precisely designed to take into account the ex ante dimension of the counterfactual. These legal tests seek to capture the presumption that any ex post restraints are inextricably linked to the pro-competitive gains resulting from the practice. This is obvious, as explained above, in relation to ancillary restraints. By making them prima facie lawful, the Court acknowledges that the agreements of which they are a part (and the resulting pro-competitive gains) would not take place without some ex post restraints. Similarly, the 'enhanced effects' test (and, in particular, the indispensability condition) is crafted to preserve firms' ex ante incentives to invest and innovate (and, by doing so, the pro-competitive gains resulting from them).

6. The meaning of effects in the case law

6.1. *Only appreciable effects are relevant under EU competition law*

Only appreciable effects are relevant in the EU competition law system. As the Court declared in *Völk*, practices with an 'insignificant effect' on competition (de minimis) fall outside the scope of

[98] *Budapest Bank* (n 42), paras 82-83.
[99] Guidelines on vertical restraints (n 24), para 61.

Article 101 TFEU.[100] Appreciability is also enshrined in the merger control regime. In accordance with Article 2 of Regulation 139/2004, only transactions that would lead to a significant impediment to effective competition can be declared to be incompatible with the internal market.[101] It seems clear from *Völk* that the appreciability of the restrictive effects is assessed by reference to the market power enjoyed by the firm(s) involved – or, to use the Court's expression, their weak or strong position on the relevant market(s) affected by the practice or transaction.

In principle, the assessment of the market power of a firm requires a case-by-case evaluation. However, both the Court and the Commission have resorted to proxies that dispense from a context-specific inquiry. In *Expedia*, the ECJ held that, where an agreement is found to restrict competition by object, the fact that it is capable of affecting trade between Member States is sufficient to conclude that its effect on competition is appreciable within the meaning of *Völk*.[102] For practices that are not prima facie unlawful irrespective of their effects, market shares tend to be used as a proxy. In accordance with the Preamble to Regulation 139/2004, the fact that the market share of the parties does not exceed 25%, is an indicator that the transaction is not liable to have significant effects.[103] In the context of Article 101 TFEU, the Commission has published, over the years, several versions of its De Minimis Notice, which also revolve around market shares.[104] This is also the technique used in the Guidelines on vertical restraints,[105] on horizontal co-operation agreements[106] and on technology licensing[107] provide, which shed additional light in this regard.

A logical corollary to the above is that the de minimis doctrine has no role to play in abuse of dominance cases. Given that appreciability depends on the market power enjoyed by the firm(s)

[100] Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke*, EU:C:1969:35.
[101] See Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1. See also Case T-399/16 *CK Telecoms UK Investments Ltd v Commission*, EU:T:2020:217.
[102] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and others*, EU:C:2012:795.
[103] Regulation 139/2004 (n 101), Recital 32.
[104] 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 [2014] OJ C291/1.
[105] Guidelines on vertical restraints (n 24).
[106] Guidelines on horizontal co-operation agreements (n 23).
[107] Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/3.

involved in a practice or transaction, and given that a precondition for the application of Article 102 TFEU is a finding of a position of substantial market power, any anticompetitive effects – provided that they are established to the requisite legal standard – are appreciable by definition. Against this background, it is only logical that the Court, in *Post Danmark II*, ruled that it is not appropriate to set a de minimis or appreciability threshold in abuse cases.[108] When implemented by a firm with substantial market power, 'any further weakening of the structure of competition may constitute an abuse of a dominant position'.[109] Accordingly, it is not necessary for a claimant or authority to show that the effects, once shown, are appreciable.

A key question that has not yet been addressed by the Court relates to the requisite level of appreciability. As the law stands, it is possible to gain an idea of the practices or transactions that are unlikely to yield appreciable effects. There is no dispute that the effects of a practice implemented by a dominant firm will, if established, be appreciable. However, the Court has not identified (directly or by proxy) the degree of market power above which the impact of a practice or transaction on competition becomes appreciable. It would be reasonable to assume that the threshold of appreciability is below the level of dominance.[110] However, it is unclear where it lies and, by the same token, how far below dominance it is. There is, in other words, a grey area where effects may or may not be appreciable depending on the circumstances of the case. Crucially, the EU courts have clarified, in this regard, that the issue of appreciability is to be assessed on a case-by-case basis. Thus, it would not be sufficient for an authority or claimant to show that the parties exceed the market share thresholds as defined in the De Minimis Notice.[111]

[108] *Post Danmark II* (n 9), para 73.
[109] Ibid, para 72.
[110] See in this sense the Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 26.
[111] Case T-9/93 *Schöller Lebensmittel GmbH & Co. KG v Commission*, EU:T:1995:99, para 75. See also *Expedia* (n 102).

6.2. *An effect is more than a competitive disadvantage or a limitation of a firm's freedom of action*

From the early days, the Court has held, directly and indirectly, that a limitation of a firm's freedom of action does not lead, in and of itself, to anticompetitive effects. Similarly, the fact that one or several firms are placed at a disadvantage cannot be equated with a negative impact on competition. These questions were first addressed in relation to the interpretation of Article 101(1) TFEU.[112] The essence of this consistent line of case law is captured in the rulings dealing with the status of exclusive dealing. Single-branding restrains, by definition, the freedom of action of the buyer (which is precluded from selling products competing with the supplier's); in addition, it would inflict a competitive disadvantage on the buyer where other outlets are entitled to sell several brands of a product. In spite of these facts, the Court ruled that exclusive dealing is not restrictive by its very nature, and that its effects need to be assessed by looking at the impact of the agreement on the relevant market.[113] This position has been held across a broad range of practices that limit a firm's freedom of action and/or inflict a competitive disadvantage; including, just to mention some examples, non-compete obligations,[114] non-challenge clauses in a licensing agreement[115] or bans on the use of online marketplaces.[116]

In the context of merger control, it has never been seriously disputed that limiting a firm's freedom of action and/or placing firms at a competitive disadvantage is as such insufficient to establish anticompetitive effects. This point is exemplified by conglomerate mergers. A conglomerate transaction involving firms in neighbouring markets typically gives the merged entity a competitive

[112] See in particular Case 23/67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen*, EU:C:1967:54; *Delimitis* (n 15); Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413, paras 28-34; Case C-309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, EU:C:2002:98, para. 97.
[113] *Delimitis* (n 15), paras 10-13.
[114] *Remia* (n 89).
[115] Case 65/86 *Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz Süllhöfer*, EU:C:1988:448.
[116] *Coty* (n 16).

advantage over rivals operating only on one of the markets. If there is an overlap between the customers of both products, this competitive advantage would allow the entity to offer a wider portfolio of products to its customers. The entity may also have the ability and the incentive to engage in tying and bundling. As confirmed in *Tetra Laval*, such consequences are, in and of themselves, insufficient to show that the transaction would have anticompetitive effects.[117] These principles are now encapsulated in the Non-Horizontal Merger Guidelines issued by the Commission.[118]

The evolution in the interpretation of Article 102 TFEU also leads to the conclusion that the anticompetitive effects of the practice cannot merely be inferred from a competitive disadvantage and/or a limitation of a firm's freedom of action. The Court has consistently held that, in order to establish anticompetitive effects (and, more precisely, exclusionary effects), it is necessary to ascertain whether a practice makes entry 'more difficult, or impossible'.[119] The precise meaning of this expression, which can be interpreted in more ways than one (including in support of the idea that a competitive disadvantage is enough to trigger intervention) needs to be teased out from an analysis of individual judgments. The trajectory of the case law since at least *Deutsche Telekom*[120] sheds light on the nature of the assessment, both in relation to exclusionary and exploitative strategies.

Suffice it to mention some examples. A 'margin squeeze', which necessarily places rivals at a competitive disadvantage by forcing them to sell below cost, is not in itself abusive.[121] The anticompetitive effects of the practice need to be established in light of its impact on the relevant market.[122] The same can be said, more generally, of conduct that amounts to below-cost pricing but is not predatory within the meaning of *AKZO*,[123] and of standardised rebates.[124] In relation to the

[117] Case C-12/03 P *Commission v Tetra Laval BV*, EU:C:2005:87; and Case T-5/02 *Tetra Laval BV v Commission*, EU:T:2002:264.
[118] Guidelines on the assessment of non-horizontal mergers (n 26), paras 39, 47-57, 67, 72-77, 103 and 111-118.
[119] *British Airways* (n 9), para 68; Case C-280/08 P *Deutsche Telekom* (n 39), para 177; *TeliaSonera* (n 9), para 63 *Post Danmark II* (n 9), para 31. This expression has occasionally been used in the context of Article 101 TFEU. See in particular *Maxima Latvija* (n 8), para 29.
[120] *Deutsche Telekom* (n 39).
[121] Ibid, para 250.
[122] Ibid, para 254.
[123] *Post Danmark I* (n 8).
[124] *Post Danmark II* (n 9).

latter, the criteria identified by the Court in cases like *Post Danmark II* and *Intel* are the same as those deemed relevant under Article 101 TFEU in cases like *Delimitis*.[125] Similarly, in *Generics*, the Court held that, for the effects of a pay-for-delay agreement to trigger intervention under Article 102 TFEU, the said effects need to go beyond the mere impact it has on the freedom of action of the generic producer receiving the payment.[126] Concerning, finally, exploitative conduct, the Court declared in *MEO* that a competitive disadvantage does not suffice, in and of itself, to show that discriminatory pricing amounts to a distortion of competition on the relevant market.[127]

6.3. *As a rule, an anticompetitive effect cannot be equated with harm to consumer welfare*

In the same way that an analysis of the case law shows that a limitation of a firm's freedom of action and/or a competitive disadvantage are insufficient to establish anticompetitive effects, it is clear that, as a matter of principle, evidence of direct harm to consumers is not necessary to show such effects. The question of whether anticompetitive effects can be equated with consumer harm has emerged where the mechanisms through which these effects are manifested are collusion (and more precisely the absorption of a source of competitive pressure) and exclusion. It has been contended that reduced competitive pressure is, in and of itself, insufficient to justify intervention. In other words, the elimination of a source of rivalry (whether through exclusion or collusion) would not amount, from this perspective, to anticompetitive effects. The argument, according to this interpretation of the notion, is that it would be necessary to show, in addition, that reduced rivalry makes or would make consumers worse off.[128]

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[125] *Delimitis* (n 15), paras 15-36. Compare with *Post Danmark II* (n 9), paras 29-46 and *Intel* (n 38), paras 139-140.
[126] *Generics* (n 32), paras 161 and 172.
[127] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, paras 25-26.
[128] See for instance Spector (n 17) and Pinar Akman, '"Consumer" versus "Customer": The Devil in the Detail' (2010) 37 Journal of Law and Society 315.

The Court has consistently held, in contradiction with the abovementioned view, that the EU competition law system is concerned not only with the protection of consumers, but also with the 'structure of the market' and therefore with 'competition as such'.[129] Accordingly, and as clarified in *British Airways*, it would not be necessary to show that an exclusionary strategy would make consumers worse off for it to be caught by Article 102 TFEU (or at least not in principle).[130] Similarly, the Commission would not need to show that a merger would lead to a price increase for end-users. For instance, the mere fact that a transaction would eliminate the main source of competitive pressure faced by the acquiring firm (and that there would be no perspective of new entry replicating such constraints) would be enough to declare its incompatibility with the internal market.[131]

An analysis of the case law suggests that there is only one instance in which direct evidence of consumer harm is required to establish an abuse of a dominant position. In *Magill* (as confirmed in *IMS Health*), the Court held that a refusal to license an intellectual property right amounts to an abuse of a dominant position where, inter alia, the behaviour prevents the emergence of a new product for which there is potential consumer demand.[132] This condition adds to indispensability and the elimination of 'all competition' conditions, mentioned above. The implication of the 'new product' condition is that, for a refusal to license to amount to a violation of Article 102 TFEU, the anticompetitive effects would need to go beyond those that follow inevitably from the operation of the intellectual property rights; and that the harm to consumers should be both direct and substantial.[133]

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[129] *Glaxo Spain*, para 63.
[130] *British Airways* (n 9), paras 103-108.
[131] Case T-342/07 *Ryanair Holdings plc v Commission*, EU:T:2010:280, paras 224, 225 and 445.
[132] *Magill* (n 48), para 54; and *IMS Health* (n 48), para 38.
[133] For a discussion, see Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 559-562.

6.4. *Anticompetitive effects exist where competitive pressure is reduced*

In EU competition law, anticompetitive effects exist where a practice (or transaction) harms the ability and/or incentive to compete of firms that are as efficient as the firm(s) involved in (or benefitting from) it. More precisely, an analysis of the case law suggests that the relevant question in this regard is whether the ability and/or incentive to compete are harmed to such an extent that competitive pressure is reduced. Thus, a disadvantage and/or a limitation of a firm's freedom of action would not be problematic in themselves, but only insofar as they can be expected to lead to such an outcome. In the same vein, no anticompetitive effects would exist where the competitive pressure faced by the firm(s) involved in (or benefitting from) the practice or transaction is not altered by it. This principle is expressed in different ways depending on the nature or practice and the mechanism through which the impact on competition is manifested.

6.4.1. Collusion or absorption of a source of competitive pressure

Turning to the first mechanism identified above – collusion or absorption of a source of competitive pressure – anticompetitive effects may be manifested in two ways. First, a horizontal agreement or merger may lead, as already mentioned, to unilateral effects. Unilateral effects arise where, without coordination, a practice or transaction has a negative impact on one or more firms' incentive to compete. In other words, they arise where the reduced competitive pressure faced by one or more firms leads to an increase in the degree of market power they enjoy. The most straightforward case is one where a practice or transaction creates or strengthens a position of single dominance, which is understood to mean a position of substantial market power.[134] As is true of appreciability, market shares are the most obvious proxy for dominance.[135]

Unilateral effects may also arise even where a practice or transaction does not create or strengthen a dominant position. As explained above, the threshold of appreciability seems to be below that of dominance. According to the GC in *CK Telecoms*, there are two conditions to establish unilateral effects, absent dominance, in the context of EU merger control.[136] First, the transaction must lead to an appreciable reduction of the competitive constraints faced by the merging parties prior to the transaction. Second, it must lead to an appreciable reduction of the competitive constraints placed upon competitors. In other words, the GC held that the Commission would need to show, to the requisite legal standard, that the transaction reduces the incentives to compete of all firms on the relevant market. In addition to market shares,[137] an increase in market power can be established by proxy in light of factors such as firms' closeness of competition or rivals' ability to expand capacity in response to a deterioration of the conditions of competition.[138]

Second, and as explained above, a practice (or transaction) can also lead to anticompetitive effects if it eliminates the incentives to compete by means of inter-firm coordination. The circumstances in which tacit collusion (and thus the emergence of a collective dominant position) is likely to occur, and become sustainable, were defined by the GC in *Airtours*.[139] Horizontal and non-horizontal mergers may thus be declared to be incompatible with the internal market if the criteria defined in that judgment are fulfilled.[140] In addition, agreements within the meaning of Article 101

[134] For a definition of the notion, see *Hoffmann-La Roche* (n 38), para 38. See also Guidelines on the assessment of horizontal mergers (n 13), paras 2 and 17.
[135] *Hoffmann-La Roche* (n 38), para 41 and *AKZO* (n 37), para 60.
[136] *CK Telecoms* (n 101), para 96.
[137] Guidelines on the assessment of horizontal mergers (n 13), paras 14-18 and 27. See, in the same vein, Guidelines on horizontal co-operation agreements (n 23), paras 44-46.
[138] Guidelines on the assessment of horizontal mergers (n 13), paras 28-38 and Guidelines on horizontal co-operation agreements (n 23), para 34. See also *CK Telecoms* (n 101), paras 227-250.
[139] Case T-342/99 *Airtours plc v Commission*, EU:T:2002:146, para 62. See also Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association*, EU:C:2008:392, para 123.
[140] Guidelines on the assessment of horizontal mergers (n 13), paras 39-57; and Guidelines on the assessment of non-horizontal mergers (n 26), paras 79-81.

TFEU may also be found to have restrictive effects if they create the conditions in which coordination with other rivals on the market becomes feasible and/or easier to sustain. Some of these scenarios are explored by the Commission in its Guidelines on horizontal co-operation agreements.[141]

6.4.2. Exclusion of a source of competitive pressure

Exclusionary concerns arise where actual or potential rivals' ability and incentive to compete is affected to such an extent that competitive pressure is reduced. In *Delimitis*, the Court devised a test to determine whether access to the market would be foreclosed as a result of a practice (together or in combination with other practices having the same object and/or effect).[142] The question, as confirmed in *Maxima Latvija*, would be whether there would be 'real, concrete possibilities' for a new rival to establish itself and exercise a competitive constraint on existing players.[143] The same criteria seem appropriate, *mutatis mutandis*, to inquire whether existing market players would retain their ability and incentive to exercise an effective constraint in spite of the practice. These two judgments are also compatible with the way in which the analysis is actually conducted under Article 102 TFEU and merger control. In abuse of dominance cases, a practice can be said to lead to 'foreclosure effects'[144] where it 'hinder[s] the ability of competitors'[145] to operate on the relevant market.

As a matter of principle, and in line with what has been explained above, only the exclusion of equally efficient rivals is relevant in EU competition law.[146] This principle is the corollary to the need to establish a causal link between the practice and any anticompetitive effects. Such a causal link would be missing where a firm's departure would be the consequence of its inability to provide

[141] Guidelines on horizontal co-operation agreements (n 23), para 77-85; and paras 175-182.
[142] *Delimitis* (n 15), paras 15-36.
[143] *Maxima Latvija* (n 8), para 27.
[144] *Intel* (n 38), paras 138, 142 and 143; and *Generics* (n 32), para 157.
[145] *TeliaSonera* (n 9), para 67.
[146] See above, Section 5.2.1.

attractive goods and/or services. However, there may be instances in which it the exclusion of less efficient rivals could give rise to a finding of infringement. This may be the case, the Court explained in *Post Danmark II*, where a practice is implemented by a dominant firm that is protected by regulatory barriers in a partially liberalised industry.[147] It is reasonable to assume that, as the law stands, it would be for the authority or claimant to show, to the requisite legal standard, why the departure of less efficient rivals is justified in a given case.

The case law provides several illustrations of the principle. It follows from *AKZO*, *Deutsche Telekom* and *Post Danmark I* that, if a practice does not force rivals to sell below cost, it is deemed prima facie lawful. An equally efficient rival can be expected to withstand competition that does not involve below-cost pricing.[148] A variation on this filter is the so-called 'as efficient competitor' test, which is relevant when evaluating the lawfulness of conditional rebates. This test is designed to establish whether a rebate scheme, in the circumstances in which it is implemented, would require an equally efficient rival to sell at a loss when competing for the contestable part of customers' demand.[149] In *Intel*, the Court clarified that a dominant firm may rely on the 'as efficient competitor' test to show that a loyalty rebate scheme is not capable of having anticompetitive effects.[150]

Considerations pertaining to the nature of the product, the practice and the actual context in which the latter is implemented are relevant in the (prospective or retrospective) analysis of exclusionary effects. First, the Court has had the occasion to explain how the probability of anticompetitive effects depends, at least in part, on the nature of the practice and its relative potential to cause harm. This is true of price-based and non-price-based conduct. For instance, the level of a 'margin squeeze' has an impact on its exclusionary potential. In particular, the Court held in *TeliaSonera* that a negative 'margin squeeze' (that is, an instance where the wholesale price charged by the dominant firm to its downstream rivals is higher than the retail price it charges to its end-users)

[147] *Post Danmark II* (n 9), para 59.
[148] *AKZO* (n 37), para 72.
[149] Guidance (n 25), paras 39-44.
[150] *Intel* (n 38), paras 142-143.

is a probable source of anticompetitive effects.[151] Conversely, a pricing practice that allows a rival to cover the bulk of its costs is unlikely to have such effects.[152] The case law on rebates hints at a similar idea. The exclusionary potential of a scheme depends on the 'criteria and rules' for the award of the rebate.[153] Thus, rebates conditional upon exclusivity are more likely to cause harm than standardised schemes based on the volume supplied (in the same way that retroactive rebates are more likely to cause harm than incremental schemes). By the same token, an outright refusal to deal has more exclusionary potential than dealing on less favourable terms and conditions.

Second, factors pertaining to the context in which the practice (or transaction) is implemented shed light on its impact on rivals' ability and incentive to compete. One of these factors is the degree of market power enjoyed by the firm(s) involved. In this sense, the extent of the dominant position has been frequently mentioned by the Court in Article 102 TFEU cases.[154] A second factor is the coverage of the practice, that is, the fraction of the market subject to it.[155] Third, the features of the relevant market and the nature of the product may also play a prominent role. For instance, the existence of high barriers to entry characterised by economies of scale may have an impact on rivals' ability and incentive to compete.[156] The same can be said of network effects, which may exacerbate the foreclosure effects of a practice.[157] Where the dominant firm is vertically-integrated, the indispensable nature of the product may be a factor.[158] The regulatory context is another one.[159]

Where the analysis is retrospective in nature, actual evidence relating to rivals' ability and incentive to enter and/or remain on the market is relevant, as already explained above. Anticompetitive effects would not exist, for instance, where the contemporary evolution of the market

[151] *TeliaSonera* (n 9), para 73.
[152] *Post Danmark I* (n 8), para 38.
[153] *Post Danmark II* (n 9), para 29 and 32.
[154] *TeliaSonera* (n 9), para 81; *Post Danmark II* (n 9), para 30; and *Intel* (n 38), para 139.
[155] *Delimitis* (n 15), para 19; Case C-549/10 P *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, paras 37-49; *Post Danmark II* (n 9), para 46; *Maxima Latvija* (n 8), para 29; and *Intel* (n 38), para 139.
[156] *Post Danmark II* (n 9), para 39.
[157] *Microsoft I* (n 58), para 562.
[158] *Deutsche Telekom* (n 39), para 255; and *TeliaSonera* (n 9), paras 69-70.
[159] *Post Danmark II* (n 9), para 39, which makes a reference to the 'statutory monopoly' enjoyed by the dominant firm.

reveals that the practice has not precluded entry.[160] The experience acquired over the year yields some valuable conclusions about the impact of practices in the actual context of which they are a part. It appears, to begin with, that a competitive advantage (even an unparalleled one) does not necessarily limit firms' ability and/or incentive to compete. In *Microsoft I*, for instance, the Commission noted that the tying of Windows and Windows Media Player gave the latter product an unparalleled advantage over rivals.[161] In spite of this fact, and even though the remedy failed to work as expected, the practice did not limit rivals' ability and incentive to compete.[162]

Experience also shows that a competitive disadvantage and/or a decrease in terms of market share (as evidenced, for instance, by the loss of some customers) do not necessarily impact negatively on rivals' ability and incentive to compete.[163] In and of themselves, the case law shows, these factors are insufficient to establish exclusionary effects. Decades of enforcement reveal that a competitive disadvantage may in fact have a positive impact on rivals' incentives to compete. This point is acknowledged by the Commission in its Non-Horizontal Merger Guidelines.[164] It may spur rivals to develop counterstrategies or to improve the quality of their products to make up for the disadvantage. *Post Danmark I*, in turn, provides a concrete illustration of how a firm may retain its ability and incentive to compete even after experiencing a decrease in its market share: as observed above, the dominant firm's competitor managed to retain its distribution network and win back the two major customers that were lost following the implementation of the practice. The analysis in *Post Danmark I* was retrospective in nature. Where the analysis is prospective, evidence about the features and past evolution of the market would also be a factor to consider in this regard.[165]

[160] Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission*, EU:C:2012:770, paras 194-203.
[161] *Microsoft I* (n 58), para 1038.
[162] Ibid, paras 1003-1006.
[163] See, by analogy, *Post Danmark I* (n 8), para 39 and *Deutsche Telekom* (n 39), para 250.
[164] Guidelines on the assessment of non-horizontal mergers (n 26), paras 39, 67 and 103.
[165] See in particular *British American Tobacco* (n 54), *John Deere* (n 54) and Guidance (n 25), para 20.

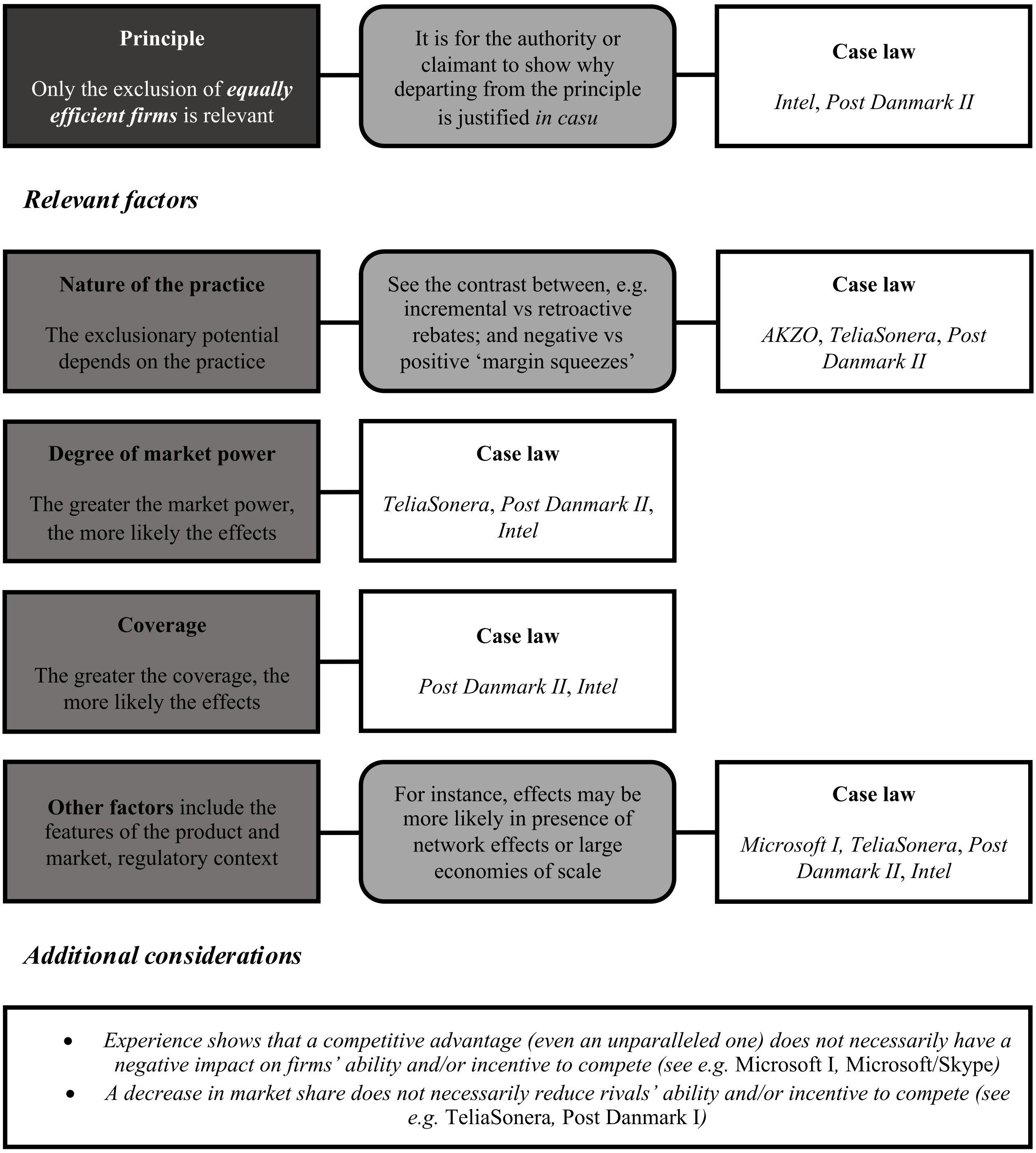

Fig. 5: The exclusion of a source of competitive pressure

6.4.3. Exploitation

Cases dealing with exploitative behaviour are relatively scarce. A question that these cases raise is whether the analysis of exploitative effects differs from that undertaken under the two mechanisms discussed above. This question is particularly relevant where the analysis concerns practices that have as their object or effect the distortion of the conditions of competition on an upstream or downstream market in which a dominant firm does not operate. The *MEO* judgment suggests that there are no fundamental differences in the approach to the analysis of such distortions. As noted above, the Court held in *MEO* that a competitive disadvantage does not amount, in and of itself, to a distortion of competition within the meaning of Article 102(c) TFEU. Accordingly, the impact of the exploitative practice on a customer's ability and incentive to compete will have to be established in accordance with the same criteria defined in cases involving exclusion.[166]

7. The probability of effects in the case law

7.1. *Semantic issues: capability and likelihood*

The applicable threshold of effects is not immediately obvious to infer from the case law. It requires a careful reading, and comparison, of the relevant judgments. Part of the reason behind the absence of clear and straightforward answers has to do with the vocabulary used when addressing the requisite probability of anticompetitive effects. The Court has held that the actual or potential anticompetitive effects must be 'capable' of occurring and/or 'likely' to occur.[167] Other terms, such as 'liable' have also been used.[168] It would be reasonable to conclude from the case law, first, that 'capability' and 'likelihood' have, at least in some judgments, been used as synonymous; and, second, that these two terms are suggestive of a single relevant threshold of effects. This is the point of view expressed by AG Wahl in his Opinion in *Intel*.[169]

[166] *MEO* (n 125), para 31.
[167] See above n 9.
[168] *Murphy* (n 44), para 140. See also *Microsoft I* (n 58), paras 560-564, where the GC addresses the point and, in particular, whether the reference to the 'risk' of the elimination of all competition sets a threshold identical or similar to that of likelihood.
[169] Opinion of AG Wahl in *Intel* (n 9).

Even if this point of view were to be accepted, a number of difficulties remain. The single most important one is that, while the two terms have been used as synonymous, they convey different meanings. As a result, the requisite threshold of effects would vary depending on the way they are interpreted. On the one hand, the literal meaning of the words 'capable' and 'capability' is indicative of a low threshold of effects,[170] which can be equated with plausibility. Practices and transactions (including the examples mentioned above, such as tying, exclusive dealing or horizontal and non-horizontal mergers) attract the attention of competition authorities and give rise to litigation precisely because they are capable of having anticompetitive effects (or, if one prefers, because it is typically plausible that they will have a negative impact on competition). If this interpretation were accepted, the threshold of effects would be presumptively met as soon as it is established that the practice or transaction has been implemented. Absent other factors pertaining to the economic and legal context, anticompetitive effects would be deemed to follow, logically and inevitably, from the very implementation of the practice.

The words 'likely' and 'likelihood', in turn, are indicative of a higher threshold. The literal meaning of the words is suggestive of an event that will probably happen or is expected to happen.[171] In her Opinion in *Post Danmark II*, AG Kokott suggested that the applicable threshold is one of likelihood. In the Advocate General's view, anticompetitive effects would be established when it is 'more likely than not' that they will be manifested.[172] AG Kokott's operational definition of the concept is not only in line with its plain meaning, but also with the meaning attached to it in Section 2.4. above. This interpretation would, as already mentioned, place the threshold of probability right

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170 The Oxford English Dictionary defines 'capable' – in its fifth entry – as '[h]aving the needful capacity, power, or fitness for (some specified purpose or activity)'. The Cambridge Dictionary defines that a person is 'capable' of something when she has 'the ability or qualities to be able to do something'.

171 The Oxford English Dictionary defines 'likely' as 'having a high chance of occurring; probable'. The Cambridge Dictionary, along the same lines, defines 'likely' as 'expected' and 'probably true'.

172 Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:343, para 82: 'According to settled case-law, it is necessary but also sufficient that the rebates in question can produce an exclusionary effect. This is the case where, on the basis of an overall assessment of all the relevant circumstances of the individual case, the presence of the exclusionary effect appears more likely than its absence'. In support of her interpretation of the case law, AG Kokott refers to *Post Danmark I* (n 8), paras 42 and 44.

above 50%. At this level, effects would no longer follow presumptively from the implementation of the practice. For the same reason, it would be easier for the firm(s) involved in the practice or transaction to rebut a finding of anticompetitive effects.

7.2. *The law as applied: plausibility, likelihood and certainty*

If one pays attention to the thresholds actually applied by the Court, it becomes possible to discern the relevant threshold that is relevant for each of the legal tests. When prima facie unlawful practices are at stake, the applicable threshold is one of plausibility. In other words, it is only in a narrow set of circumstances that the firm(s) involved are able to rebut the presumption that the behaviour is capable of having anticompetitive effects. Second, a threshold of likelihood, as defined by AG Kokott in *Post Danmark II*, is relevant to evaluate the impact of practices subject to a 'standard effects' analysis, as well as concentrations within the meaning of Regulation 139/2004. Finally, the threshold of certainty, or quasi-certainty appears to be the applicable one where the 'enhanced effects' test defines the conditions against which the legality of conduct is assessed.

7.2.1. A plausibility threshold applies to prima facie unlawful conduct

An overview of the case law reveals that conduct that is prima facie unlawful irrespective of its effects, such as cartel-like behaviour, is prohibited even when it is not particularly likely to have a negative impact on competition. In that sense, one can rule out that a threshold of likelihood is relevant in relation to these practices. It is sufficient to show that harm is a plausible outcome. In *T-Mobile*, the referring national court expressed the view that the behaviour at stake in the case – a single meeting where the reduction of remunerations paid to dealers was discussed among rivals – could not qualify as an object infringement due to the fact that it was unlikely to have anticompetitive effects. More precisely, the referring court was of the view that the 'by object' category would be appropriate 'where the actual detrimental effects are unmistakable and will occur irrespective of the characteristic features of the relevant market'.[173]

The Court dismissed this view and held that the threshold suggested by the national court (which hinted at certainty or quasi-certainty) is not the applicable one in relation to 'by object' conduct. These practices 'must simply be capable in an individual case, having regard to the specific legal and economic context', of having anticompetitive effects.[174] In *T-Mobile*, the Court used the term 'capable' in a manner consistent with its literal meaning, which is consistent, in turn, with a threshold of plausibility. *Bananas* confirmed that the requisite threshold of effects would be met in a 'by object' case where employees in an industry have bilateral discussions about pre-pricing information.[175] In *Toshiba*, it sided with the GC and concluded that a cartel-like arrangement involving a group of potential competitors was capable of having restrictive effects insofar as barriers to entry were not found to be insurmountable in its economic and legal context.[176]

Article 102 TFEU case law leads to similar conclusions. In *AKZO*, the Court held that pricing below cost is capable of leading to the exclusion of equally efficient competitors.[177] As noted in *Post Danmark I*, however, below-cost pricing is not necessarily likely to have anticompetitive effects – in particular where rivals would be able to cover the bulk of their costs. However, where the practice is an element of a strategy aimed at excluding rivals, it will be deemed abusive even when exclusion is no more than plausible.[178] The case law on rebates leads to similar conclusions. Some rebate schemes are prima facie abusive irrespective of their effects.[179] Underpinning the legal status of these practices is the idea that they can, or 'tend to', restrict competition.[180] Finally, tying is also prima facie

[173] *T-Mobile* (n 2), para 20.
[174] Ibid, para 31.
[175] *Bananas* (n 2), paras 111-135.
[176] *Toshiba* (n 80), paras 40-48.
[177] *AKZO* (n 37), para 72.
[178] Ibid.
[179] See above n 38.
[180] *Hoffmann-La Roche* (n 38), para 90.

prohibited.[181] As a result, it is sufficient for a prohibition to be grounded on the conclusion that anticompetitive effects are at least plausible.[182]

The case law also gives an idea of what firms would need to show to rebut the presumption that prima facie unlawful conduct is a plausible source of anticompetitive effects. First, and in line with *Toshiba* and *Generics*, it would be possible for them to show that the behaviour is incapable of having an impact on competition insofar as there are 'insurmountable barriers to entry'.[183] In such circumstances, any actual or potential effect would not be attributable to the practice, but to the regulatory context of which it is a part. Second, it would be possible for firms to argue that the behaviour is objectively necessary to achieve a pro-competitive aim. They could show, for instance, that an exclusive distribution agreement limiting both active and passive sales is incapable of having anticompetitive effects insofar as, in its absence, market entry by the supplier would not occur.[184] In other words, the parties may be able to provide evidence to the effect that the practice can only produce pro-competitive gains.[185] Finally, *Intel* clarified that it is possible for a dominant firm to provide evidence pertaining to the nature of the practice, its extent and the features of the relevant market.[186] The Court suggested that a dominant firm may be in a position to show that the exclusion of an equally efficient competitor is implausible given the nature and scope of the practice in its economic and legal context. *Intel* expressly refers to the 'as efficient competitor' test as a tool in this regard. It is reasonable to infer from the judgment that, more generally, a firm would be able to provide evidence showing that the practice does not deny rivals a minimum efficient scale.[187]

[181] See above n 36.
[182] See in this sense *Microsoft I* (n 58), para 1054.
[183] *Generics* (n 32), para 45.
[184] Guidelines on vertical restraints (n 24), para 61, mentioned above.
[185] See also, in this same vein, *Budapest Bank* (n 42), paras 82-83.
[186] *Intel* (n 38), paras 138-142.
[187] This conclusion seems consistent with *Tomra* (n 155). In the latter, the Court held – at para 46, an in line with *Intel* (n 38), para 137 – that the Commission would not need to apply the 'minimum viable scale' test to establish that a loyalty rebate scheme amounts to an abuse. *Intel* clarifies that, in spite of the legal status of the practice as prima facie unlawful, a dominant firm may provide evidence showing that the practice is incapable of excluding equally efficient rivals.

7.2.2. A threshold of likelihood applies to practices and transactions subject to a 'standard effects' analysis

A threshold of likelihood applies to practices and transactions subject to a 'standard effects' test, which includes mergers examined in accordance with Regulation 139/2004. *Post Danmark II* comes across as the most obvious starting point, not only because it illustrates the idea effectively, but because it is the background against which AG Kokott formalised the requisite threshold of likelihood. An overview of the facts in *Post Danmark II* unambiguously shows that the rebate scheme at stake was, in and of itself, a plausible means to exclude competition. The scheme had indeed been implemented by an incumbent in a partially liberalised industry with a very large market share; in addition, the rebates were retroactive, and the relevant reference period was of one year.[188] In spite of these considerations, the Court held that it was necessary to consider the likely impact of the practice in light of a number of factors pertaining to the relevant economic and legal context. Other Article 102 TFEU cases where the similar threshold applied include *Post Danmark I, Deutsche Telekom*, *TeliaSonera* and *MEO*, all discussed above.

In the context of Article 101 TFEU, it seems clear that, once an agreement is found not to be restrictive by object, showing that anticompetitive effects are plausible (or that there are no 'insurmountable barriers to competition') is not enough. In such circumstances, it would be necessary to establish the likely effect of the practice. Suffice it to come back to *Delimitis* (and the rulings that embraced its approach, such as *Maxima Latvija*) to illustrate the point. The practice at stake in that case – exclusive dealing – is known to be at least a plausible source of anticompetitive effects. A network of exclusivity agreements, alone or in combination with others, can lead to the exclusion of equally efficient suppliers. However, the Court devised a test requiring an authority or claimant to

[188] *Post Danmark II* (n 9), paras 30-46.

show, in light of an in-depth assessment informed by the features of the market, how the foreclosure of new entrants would likely result from their implementation in a given economic and legal context.

This same conclusion follows, from an analysis of the way mergers are scrutinised in the EU regime. That the applicable threshold is one of likelihood was already apparent from *Kali & Salz*, in which the Court concluded that the Commission had failed to establish, to the requisite legal standard, that the transaction was likely to lead to the strengthening of a collective dominant position.[189] The authority had identified several indicators suggesting that such an outcome was at least plausible in the post-merger scenario. However, the Court found that the joint market share of the parties, or that the structural links between them, did not point conclusively to the strengthening of a collective dominant position.[190] Other factors, such as the decline in the demand for the product concerned by the transaction, suggested that an anticompetitive outcome was unlikely.[191]

The threshold of likelihood was put to the test – and confirmed – when the GC evaluated the Commission decisions in *GE/Honeywell*[192] and *Tetra Laval*.[193] In the two cases, it did not dispute the authority's conclusion that the conglomerate effects of the transactions could lead to the extension of a dominant position from one market to a neighbouring one. In the economic and legal context of which the transactions were a part, such an outcome was found to be at least plausible.[194] However, the GC concluded that it was not a likely one. For that reason, it concluded that the Commission had erred in law in the two cases. In *GE/Honeywell*, for instance, the GC took the view that the strategy through which the alleged conglomerate effects would be manifested went against the 'modus operandi' of the sector.[195] Thus, an 'additional commercial effort' would be required from the merged entity for exclusion to become a reality.[196]

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[189] *Kali & Salz* (n 77), para 170.
[190] Ibid, paras 226-230.
[191] Ibid, para 238.
[192] Case T-210/01 *General Electric Company v Commission*, EU:T:2005:456.
[193] Case T-5/02 *Tetra Laval* (n 117).
[194] *General Electric* (n 192), para 404; and Case T-5/02 *Tetra Laval* (n 117), paras 192-199.
[195] *General Electric* (n 192), para 415.
[196] *General Electric* (n 192), para 423.

7.2.3. A threshold of certainty (or quasi-certainty) applies to conduct subject to a 'enhanced effects' test

As explained above, a refusal to deal within the meaning of *Bronner* is abusive if it can be shown to relate to an input or platform that is indispensable and, in addition, that it would lead to the elimination of 'all competition' on the relevant adjacent market.[197] An input or platform is indispensable, according to the case law, where there are no 'alternative solutions' to enter the relevant adjacent market and where, in addition, duplicating it would be 'impossible or unreasonably difficult'. These conditions, which are notoriously demanding in practice, amount in effect to setting a threshold of certainty for third parties requesting access to the said input or platform. In addition, the condition that the refusal eliminate 'all competition' on the adjacent market implies that no alternative input or platform is already in place.

8. Analysis and discussion

8.1. *Questions addressed in the case law*

8.1.1. The notion of anticompetitive effects has clear boundaries

The analysis above suggests that it is possible to discern, from the case law, a specific meaning of the notion of anticompetitive effects. Starting with competition and the counterfactual, the Court made it clear, from the outset, that competition comprises both its inter-brand and intra-brand dimensions. In addition, the case law is consistent in taking into account both the ex ante and the ex post aspects of the counterfactual. In this sense, the Court does not simply assume that the pro-competitive gains

[197] See above n 48.

resulting from a given practice would have existed independently of any restraints that seemingly amount, from an ex post perspective, to a restriction. What is more, the system provides for mechanisms to take the counterfactual into consideration. Not only is it possible for firms to argue that any ex post restraints are inextricably linked to the pro-competitive aspects of the practice and thus do not have anticompetitive effects; some legal tests are specifically crafted to incorporate the ex ante dimension of the counterfactual. The choices made by the Court in this regard are captured in Figure 6.

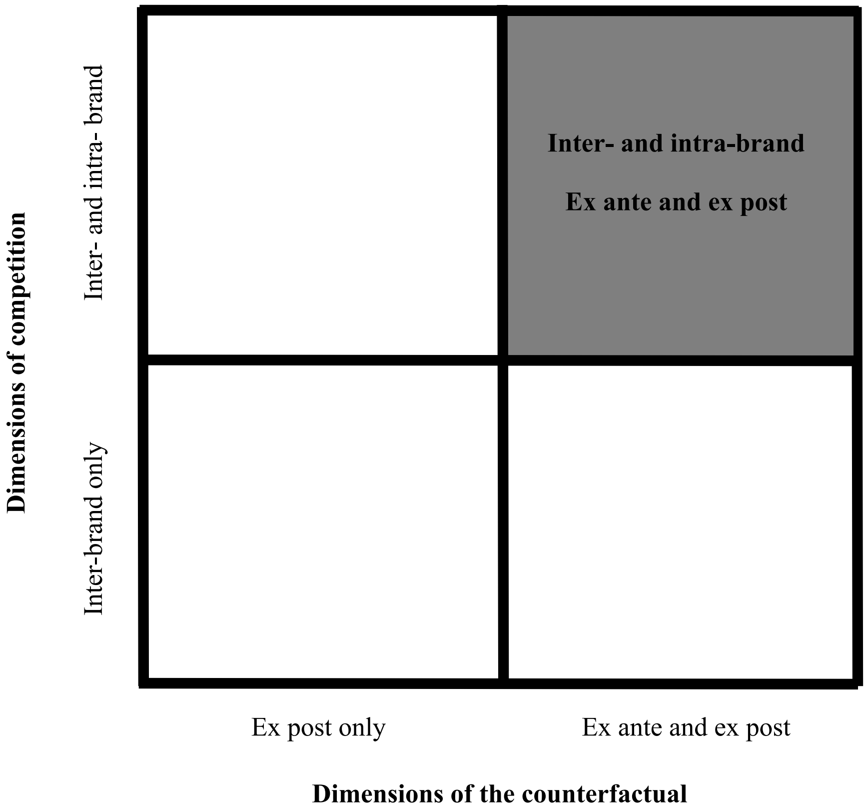

Fig. 6: The dimensions of competition and the counterfactual in the case law

It is also possible to discern, from the case law, what effects are. The probability threshold, which appears to vary depending on the applicable legal test, can also be identified. The different combinations around two variables are depicted together in Figures 7, 8 and 9. First, only appreciable effects are relevant in EU competition law. Second, effects amount to more than a mere competitive disadvantage or a limitation of a firm's freedom of action but (save a limited exception) to less than consumer harm. In addition, it is clear that – at least as a matter of principle – the departure of inefficient firms is understood to be the natural consequence of the operation of the competitive process. Against this background, it would appear that effects can be defined as those that impact on the ability and/or incentive of one or more firms to compete, and this to such an extent that competitive constraints are reduced as a result.

One can identify three probability thresholds, each corresponding to a particular legal test. To begin with, a threshold of plausibility applies to conduct that is prima facie unlawful irrespective of its impact on competition (including 'by object' conduct under Article 101(1) TFEU). Second, when practices and transactions subject to a 'standard effects' test are at stake, it is necessary to show that the practice is 'more likely than not' to restrict competition (that is, a threshold of likelihood). Finally, certainty, or quasi-certainty, is required when the impact of practices subject to an 'enhanced effects' test (both under the *Bronner* and the *Magill* doctrines) is at stake. The indispensability and the 'elimination of all competition' conditions inevitably amount to such a threshold.

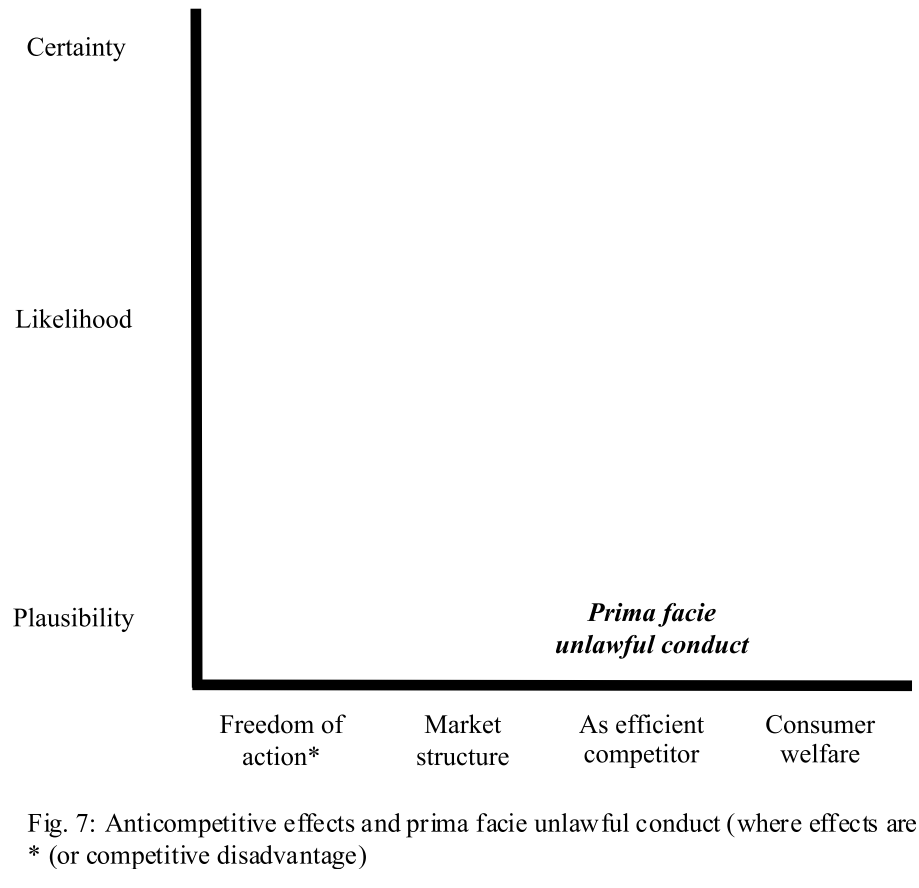

Fig. 7: Anticompetitive effects and prima facie unlawful conduct (where effects are presumed)
* (or competitive disadvantage)

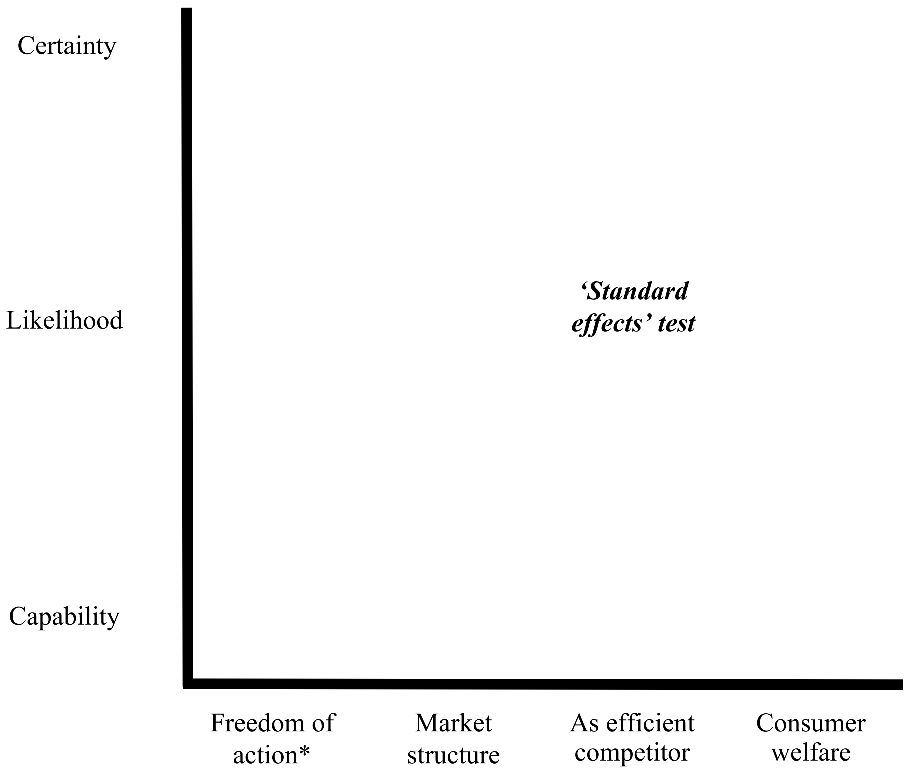

Fig. 8: Anticompetitive effects under the 'standard effects' analysis'

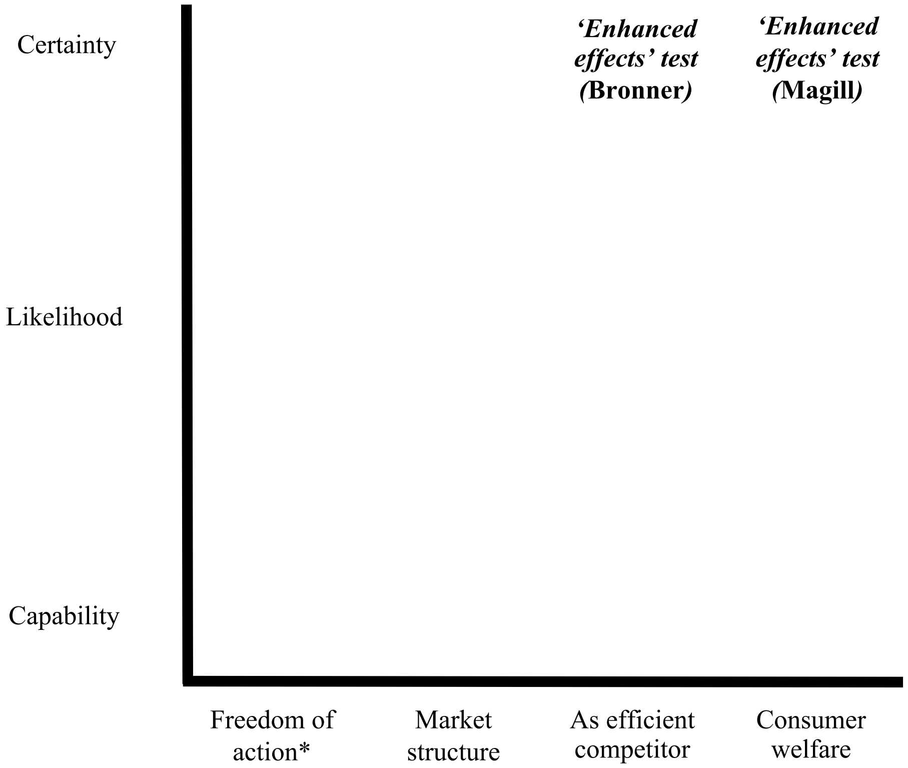

Fig. 9: Anticompetitive effects under the 'enhanced effects' analysis

8.1.2. The approach to the analysis of effects is the same across provisions

A corollary to the conclusions above is that the analysis of effects is the same across the board. When the 'standard effects' test is applicable, the assessment does not seem to vary depending on whether Article 101 TFEU, 102 TFEU or Regulation 139/2004 is at stake. This conclusion would not have been obvious to draw during the formative years of the discipline. In particular, it has not always been clear whether evidence of anticompetitive effects is required to establish an abuse of a dominant position and whether, if indeed required, the assessment was comparable to that undertaken in the context of Article 101 TFEU and merger control. The evolution of the case law, in particular following *Deutsche Telekom*, *TeliaSonera*, *Post Danmark I and II* and *Intel*, seems to have dissipated any doubts in this respect. In these judgments, the Court clarified that the practices at stake were only caught by Article 102 TFEU insofar as they were likely to have anticompetitive effects (other practices, such as pricing below average variable costs, remain prima facie unlawful). Crucially, the Court's assessment is consistent with the framework captured in Figure 8.

From a normative standpoint, the application of a single approach, across the board, to the analysis of effects seems reasonable and, arguably, inevitable. This is so, first and foremost, because practices and transactions implemented by a dominant firm can be examined under all provisions considered. Both Articles 101 and 102 TFEU can simultaneously apply to the same practice, as cases like *Generics* and *Delimitis*/*Intel* show. Similarly, the likely impact of a leveraging strategy may be examined under either under Articles 101 or 102 TFEU or, if it results from a conglomerate merger, under Article 2 of Regulation 139/2004. Just to mention a clear example, similar tying concerns were considered in *Microsoft I* (an Article 102 TFEU case) and *Microsoft/Skype* (a merger case).[198] Insofar as the underlying economic and legal context is essentially the same, it is not obvious to see what

[198] *Microsoft/Skype* (Case COMP/M.6281) Commission Decision of 7 October 2011. See also Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v Commission*, EU:T:2013:635.

would justify attaching a different meaning to the notion of effects depending on the applicable provision.

8.2. *Open questions*

8.2.1. The definition of appreciability

Even though it is clear from the case law that effects must be appreciable, the EU courts have not had the occasion to clarify how to assess the question on a case-by-case basis. On the one hand, it is clear from *Völk* and *Expedia* that, where the market power of the parties is insignificant, the appreciability threshold is not met. On the other hand (and as a corollary to the first point), the effects of a practice implemented by a firm that holds a dominant position (that is, a substantial degree of market power) will, when established, be appreciable. The difficulty in practice has to do with the identification of the point at which the degree of market power enjoyed by the firm(s) is significant enough to meet the appreciability threshold (that is, the boundary between de minimis and appreciable effects). This practical difficulty has two dimensions. One dimension relates to the problems that are inherent in establishing market power in the first place. It is an inquiry that involves considering a broad range of factors, and that is typically assisted by using proxies, in particular market shares. A second dimension is the identification of the appropriate degree of market power.

In order to address these difficulties, the system relies, at present, upon the various proxies devised over the years, both in the context of Article 101 TFEU and merger control. At best, these proxies give an idea of the approximate point at which the degree of market power falls below the threshold. In other words, these proxies do little more than flesh out, in a more precise way, the principles defined in *Völk*. Where the practice or transaction is of a horizontal nature, questions about appreciability (or rather, its absence) start where the joint market share is below 25%, which is the threshold defined in the Horizontal Merger Guidelines.[199] Where the practice or transaction is of a non-horizontal nature, the threshold is set at 30%.[200] As can be seen in Figure 10, these instruments do little more than narrow down, in a tentative way, the 'grey area' between *Völk* and dominance. The narrowing of this gap is tentative in the sense that nothing prevents a finding of appreciability below the threshold, but also in the sense that most proxies are derived from a series of soft law instruments issued by the Commission.

The difficulty that comes with the assessment of appreciability became apparent in *CK Telecoms*. This is the first merger case in which the EU courts are confronted with unilateral effects in the absence of dominance. As explained above, effects in such circumstances are to be established by reference to factors such as market shares and the closeness of competition between the parties. In addition, quantitative instruments may be used as a screen to filter out unproblematic concentrations.[201] It is apparent throughout the GC judgment in the case that it may not be easy to define ex ante the point at which the impediment to effective competition becomes 'significant' (and thus appreciable). It is a context-dependent exercise that requires an evaluation of the degree of competition between the merging parties prior to the transaction and the features of the relevant market. In this sense, *CK Telecoms* suggests that any guidance may only slowly emerge from a succession of cases addressing the 'grey area' between de minimis conduct and transactions, on the one hand, and those giving rise to dominance, on the other.

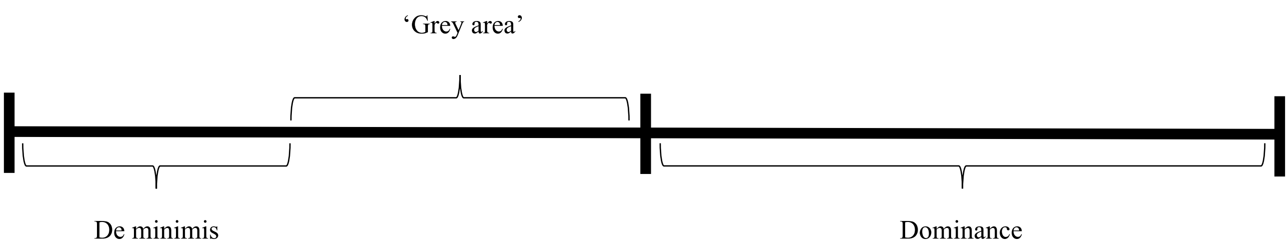

Fig. 10: The definition of appreciability

[199] See for instance *Hutchison 3G Austria/Orange Austria* (Case COMP/M.6497) Commission Decision of 12 December 2012, in particular paras 90-100.
[200] Guidelines on the assessment of non-horizontal mergers (n 26), para 25; and Guidelines on vertical restraints (n 24).
[201] *CK Telecoms* (n 101), paras 253-259.

8.2.2. The relative lack of guidance about the assessment of (exclusionary) effects

While the case law gives a sufficiently precise idea of what anticompetitive effects are (as Figures 7, 8 and 9 sought to capture), it remains relatively scant on examples setting out how the 'standard effects' test is to be conducted in practice. This reality leaves several questions unanswered. The absence of concrete illustrations of the implementation of the applicable framework becomes particularly apparent when exclusion and exploitation are the mechanisms through which effects are manifested. To focus on the former, it is true that the Court has already identified a number of factors to consider in the assessment of anticompetitive effects resulting from exclusion and which comprise, in particular, the extent of the market power enjoyed, the coverage of the practice, the economic features of the relevant market and the nature of the product.

However, the Court has not been given sufficient chances to explain, in full, how these factors are put into operation. As is true of appreciability, the case law is useful to identify the instances in which anticompetitive effects are in principle implausible, on the one hand, and when they are particularly likely, on the other. At one end of the spectrum, the Court has confirmed that above-cost prices are in principle incapable of excluding equally efficient competitors. The same can be said of prices that would allow rivals to cover the bulk of their costs. The 'as efficient competitor' test is an expression of this same idea. At the other end of the spectrum, the Court has confirmed – in relation to 'margin squeeze' conduct – that anticompetitive effects are at least likely where the relevant input is indispensable, or where the 'margin squeeze' is negative.

Beyond these filters, which are useful to identify instances that safely lie at the two ends of the spectrum of liability, the case law only sheds limited light on how to establish the likely anticompetitive effects of a practice or transaction. For instance, while the coverage of the practice is a relevant (and sometimes a fundamental) factor, there is no indication of the level below which the ability and incentive of rivals to compete would be unlikely to be affected. At most, *Post Danmark I* suggests that, where there is contemporary evidence showing that rivals were able to remain on the market in spite of the anticompetitive potential of a practice, this fact can be sufficient to rule out a finding of anticompetitive effects.

8.2.3. Capability, likelihood, certainty: between semantic and substantive issues

As explained above, there appears to be a gap between the probability thresholds as declared by the Court and as actually applied by it. The law as declared may not give a clear idea of the requisite level of probability – the words ‘capable’ and ‘likely’, sometimes used indistinctly, convey different meanings. The law as applied, on the other hand, gives a more precise idea in this regard. The gap between the law as declared and the law as applied is a potential source of legal uncertainty, which may be exploited by stakeholders. It may also be a source of inconsistencies if the confusion trickles down into the law as applied. Inconsistencies may emerge within provisions – which would arise, for instance, if both plausibility and likelihood apply to potentially abusive practices subject to a ‘standard effects’ test – and across provisions – which would arise, for instance, if the assessment of tying practices were assessed differently under Article 102 TFEU, on the one hand; and merger control, on the other.

It is submitted that the risk of uncertainty and inconsistency could be addressed by bringing in line the law as declared and the law as applied. The current gap between the two can be explained by the fact that it has not always been clear which practices were deemed prima facie unlawful irrespective of their effects and which practices were subject to a ‘standard effects’ analysis. As the law stands, and following the evolution of the past two decades, it is now possible to tell one group of practices apart from the other. For the same reason, it would come across as reasonable to define more clearly and explicitly the respective scopes of the ‘capability’ and ‘likelihood’ thresholds, on the one hand, and to use the vocabulary in a consistent way, on the other. The threshold of 'capability' seems appropriate, both in form and substance, for behaviour that is prima facie unlawful irrespective of its effects; 'likelihood', in turn, for practices and transactions subject to a 'standard effects' test.

8.3. *Areas of friction in practice*

The open questions described above, together with the relative absence of detail regarding certain aspects of the assessment, can be expected to give rise to frictions, in the sense that disagreements about the meaning and/or operation of some concepts are likely to arise before courts and authorities. One can think of six main areas of friction in practice. The first is the tendency to conflate appreciability and effects. The second concerns the assessment of effects, and more precisely what the evaluation entails in practice. Third (and in part as a result of the vocabulary used in the case law), questions about the role and relevance of the counterfactual in practice are likely to emerge. The fourth relates to the application of the application of the principle whereby only the exclusion of equally efficient firms is relevant in the analysis. Fifth, there is a tendency to conflate the legal test and the standard of proof. Finally, the time dimension and the probability threshold tend to be confused.

8.3.1. The conflation of appreciability and effects

As explained above, the definition of effects and the question of whether such effects are appreciable are different questions. The former issue involves making a choice along the continuum that ranges from a competitive disadvantage (or a limitation of firms' freedom of action) to harm to consumers. The second question, in turn, relates to the market power enjoyed by the firm(s) involved in a practice or transaction. Accordingly, market power can exist without effects. It is not necessarily the case that every practice or transaction implemented by a firm with significant market power will have a restrictive impact on competition. This is, after all, what the Court has consistently held since *Deutsche Telekom*. Where effects are an element of the legal test, an actual or potential impact on competition must be established (and not simply inferred from the market power enjoyed by the firm).

It is not difficult to see, however, why and how the two concepts can be conflated in practice. The point is easily illustrated by reference to the case law on rebates and exclusivity under Article 102 TFEU. As explained by the Court in *Post Danmark II* and *Intel*, the market coverage of the practice is one of the key factors when evaluating whether such practices have actual or potential effects. Where the coverage is limited, it is reasonable to expect firms to argue that their schemes are incapable or unlikely to have a restrictive impact on competition. In such circumstances, the ability and incentive of equally efficient rivals to enter or remain on the market may be unaffected. However, an authority or claimant may attempt to counterargue (conflating appreciability and effects in the process) that there is no appreciability threshold in the context of Article 102 TFEU and therefore arguments about the limited coverage of the practice are irrelevant.

8.3.2. The tendency to equate every competitive disadvantage with an anticompetitive effect

Experience shows that a competitive advantage – even an unparalleled one – does not necessarily lead to anticompetitive effects. However, an analysis of the administrative practice suggests that stakeholders tend to equate the former and the latter. In particular, evidence that rivals are placed at a disadvantage tends to be used as conclusive proof that a practice has exclusionary effects. This idea is aptly illustrated in light of the analysis conducted by the Commission in *Google Shopping*. The assessment in the decision revolves around the finding that the practice inflicted an competitive disadvantage on rivals (it decreased traffic from Google's general search results pages to rivals, and increased traffic to Google's own services[202]), which cannot be fully offset by other means of obtaining traffic.[203] In this sense, the scenario was not fundamentally different from that at stake in *Microsoft I* and *Microsoft/Skype*. The *Android* decision also revolves around a similar theme and displays the same tendency to equate an unparalleled advantage with anticompetitive effects.[204]

An unparalleled competitive advantage suggests, at most, that the restrictive impact of the practice is plausible. In and of itself, it is insufficient to conclude that anticompetitive effects are likely. As discussed above, the experience of cases like *Microsoft I* (Media Player) and *Microsoft/Skype* reveals that even an advantage that rivals cannot match may fail to have a negative impact on rivals' ability and incentive to compete. Competitors may be able to exploit their own strengths, develop counterstrategies or improve their products in response to the practice. In other words, an unparalleled advantage may spur rivalry (rather than reduce it) and, insofar as it does, firms' incentives to invest and innovate. In *Post Danmark I*, for instance, the dominant firm enjoyed unique advantages as the incumbent operator in a partially liberalised industry.[205] As mentioned above, its main rival was able to gain back the customers initially lost as a result of the practice.[206]

8.3.3. The role and assessment of the counterfactual

As explained above, the case law considers both the ex ante and ex post dimensions of the counterfactual. In practice, however, the ex ante dimension, which accounts for firms' incentives to invest and innovate, may be downplayed or disregarded. This is so because ex post restraints are observable whereas ex ante gains are typically assumed to exist. In other words, the pro-competitive effects of a practice a practice tend to be taken as a given, without considering that they may be

[202] *Google Shopping* (n 12), paras 452-501.
[203] Ibid, paras 542-588.
[204] *Google Android* (Case AT.40099) Commission Decision of 18 July 2018, in particular paras 896-963.
[205] *Post Danmark I* (n 8), paras 3-4.
[206] *Post Danmark I* (n 8), para 39.

inextricably linked to the observable ex post conduct (and thus that they may not have existed in the absence of the latter). This tendency is more likely to be displayed where the ex ante dimension is not enshrined in the legal test – that is, where the practice is deemed prima facie unlawful or where it is subject to a 'standard effects' test. In such circumstances, claimants and authorities, on the one hand, and defendants, on the other, can be expected to disagree about whether the pro-competitive gains resulting from the practice would have existed in their absence.

Just to mention an example, frictions might arise about whether an agreement has, as its object, the restriction of competition. Such agreements are prima facie prohibited irrespective of their effects. However, the evaluation of the object of the agreement cannot disregard the ex ante dimension of competition, as explained above. Accordingly, one can expect disagreements to emerge around whether the practice improves the conditions of competition that would otherwise have existed (and is therefore not prima facie unlawful). *Generics* and *Budapest Bank* make it clear beyond doubt that defendants in a case can challenge, in light of the counterfactual, claims that an agreement has, as its object, the restriction of competition. In the coming years, frictions can be expected to arise around whether such claims meet the requisite legal standard.

8.3.4. Anticompetitive effects and equally efficient firms

As already discussed at length, EU competition law is only concerned with firms that are as efficient as the firms involved in a practice or transaction – at least so as a matter of principle. The principle has two main implications, also addressed above. First, a firm's departure from the relevant market would not be attributable to a practice or transaction (that is, the requisite causal link would not exist) if it is the consequence of the firm's inability to prove attractive with consumers. Second, such an outcome would be a natural manifestation of competition on the merits and would thus not amount to anticompetitive effects. The fact that above-cost prices are prima facie lawful and the ‘as efficient competitor’ test is used as a filter in rebate cases follow logically from the above.

The practical difficulty that emerges in relation to this principle has to do with its practical implementation. Filters such as the ‘as efficient competitor’ test are particularly suited for instances where the price is the relevant parameter of competition. In such instances, evaluating whether an equally efficient firm would be able to withstand competition is relatively straightforward. The assessment is likely to be more complex where the practice does not involve prices directly and/or obviously (suffice it to think of exclusive dealing, tying or an outright refusal to deal). It may also be more complex where price is not the relevant (or not the most relevant) parameter of competition at stake. The fact that the filters designed by the Court do not seem relevant or immediately applicable in such instances does not mean that the fundamental underlying principle, whereby only competition from equally efficient firms is relevant in the system, does not apply.

Even though the difficulty of implementing the principle is not a reason to depart from it, one can expect frictions to arise in practice. For instance, a firm may argue – in line with the logic underpinning the case law – that there is no causal link between a practice and its actual potential effects, since the potential or likely exclusion of rivals would be attributable to the latter’s inability to offer attractive goods or services, not to its own conduct. In the same vein, a firm may claim that anticompetitive effects are implausible (and thus unlikely) insofar as the contentious behaviour is incapable of denying rivals a minimum efficient scale. On the other hand (and this is the reason why frictions might arise), the authority (or claimant) may retort that such considerations are irrelevant in the context of the case, or that they are incapable of calling into question a finding of anticompetitive effects.

8.3.5. The confusion between the legal test and the standard of proof

It has become apparent in the past two decades that there is a tendency to conflate the applicable legal test, discussed in this paper, and the standard of proof.[207] Commentators may occasionally fail to distinguish between the two; or they may refer to one when the substance of the discussion refers to the other. This confusion is primarily due to the fact that that the two concepts tend to be expressed in probabilistic terms. This is true, as explained above, of the threshold of anticompetitive effects. The Court routinely refers to the 'likely' or 'probable' impact of a practice or transaction. The various standards of proof are sometimes – at least so in some legal traditions – presented as encapsulating different probability thresholds (suffice it to think of the expressions 'balance of probabilities' and proof 'beyond reasonable doubt').[208] In addition, the two questions may arise in the context of the same case. A challenge against a decision, for instance, may relate both to the appropriate legal test and about whether the facts have been established to the requisite legal standard.

8.3.6. The confusion between actual effects and the certainty of effects

The concept of actual effects may be interpreted in more ways than one. As explained above, the Court has consistently used it in contrast with that of potential effect. In this context, it means that the retrospective analysis of the impact of a practice on competition must consider the actual context in which it was implemented as well as the contemporary evolution of the market. For instance, the analysis of actual effects may take into consideration, as in *Post Danmark I*, that rivals did not lose their ability and incentive to compete and were in fact able to gain back their main customers. In practice, however, stakeholders may conflate the time dimension with the probability threshold. More

[207] Kalintiri (n 43) 72.
[208] For a discussion, see Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017), 34-36.

precisely, there may be a tendency to assume that actual effects are only established where the expected harm to competition (collusion, exclusion or exploitation) has been fully manifested. According to this view, anticompetitive effects would not be established unless the retrospective analysis reveals that rivals have departed from the market.

As can be seen, stakeholders may assume that actual effects are synonymous with a certainty of effects. This tendency may be displayed both by authorities (or claimants) and by defendants in competition law disputes. On the one hand, defendants may be naturally inclined to equate the time dimension with the probability threshold so as to escape liability. As suggested above, claims that rivals were not excluded during the relevant period, or that one or several parameters of competition were not affected, can be expected from firms facing or challenging a finding of infringement. On the other hand, authorities and claimants may display a tendency to dismiss any contemporary evidence contradicting their theory of harm. In this sense, they may argue that conduct may infringe competition law even when it fails to fully display its impact on competition and, similarly, that competition law considers both actual and potential effects. The *Krka* judgment, discussed above, provides an example in this sense.

9. Conclusions

The impetus behind this article was to study the notion of anticompetitive effects. It does so by structuring the case law around a framework that considers the relevant variables. The exercise, which brings together several strands of the case law across all provisions, shows that it is possible to attach a concrete and consistent meaning to the notion. Some central questions, including the role and operation of the counterfactual and the threshold of effects have been answered by the Court. In addition, it has long been clear that anticompetitive effects amount to more than a mere competitive disadvantage and/or a limitation of a firm's freedom of action. Something more, namely a reduction of competitive pressure resulting from a negative impact on equally efficient firms' ability and/or incentive to compete, is required.

At the same time, several open questions remain. Since the number of cases in which the EU courts have engaged in an in-depth evaluation of the impact or transaction is relatively limited, it is also likely that additional frictions around the meaning and boundaries of the notion of anticompetitive effects will emerge. In particular, there is a consistent tendency on the part of stakeholders to conflate the issue of appreciability with the meaning of effects, to equate every competitive disadvantage with an anticompetitive effect and to downplay the role of the counterfactual in the analysis. These same tendencies, observed over the years, are likely to be displayed before the EU courts. Some pending cases will provide an opportunity to shed additional light on a notion that is central to the EU competition law system.

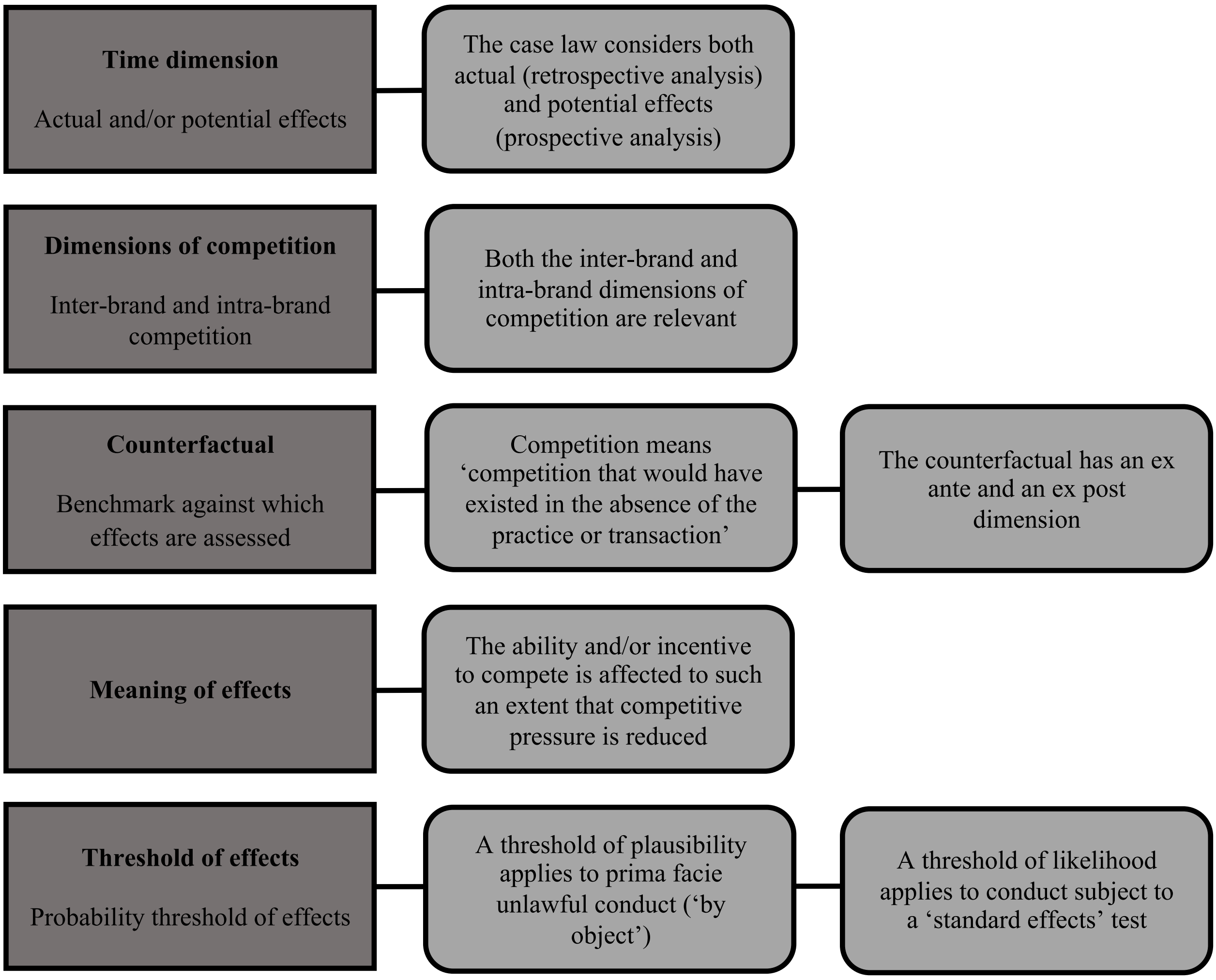

Fig. 11: The notion of anticompetitive effects – relevant variables

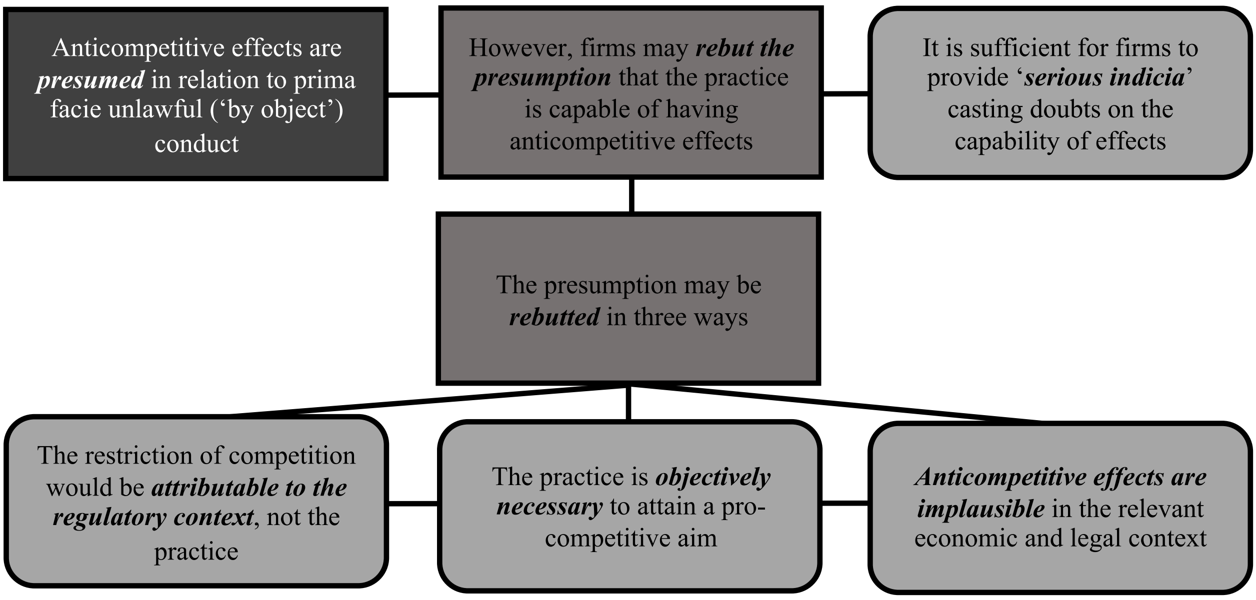

Fig. 12: Anticompetitive effects and prima facie unlawful ('by object') conduct

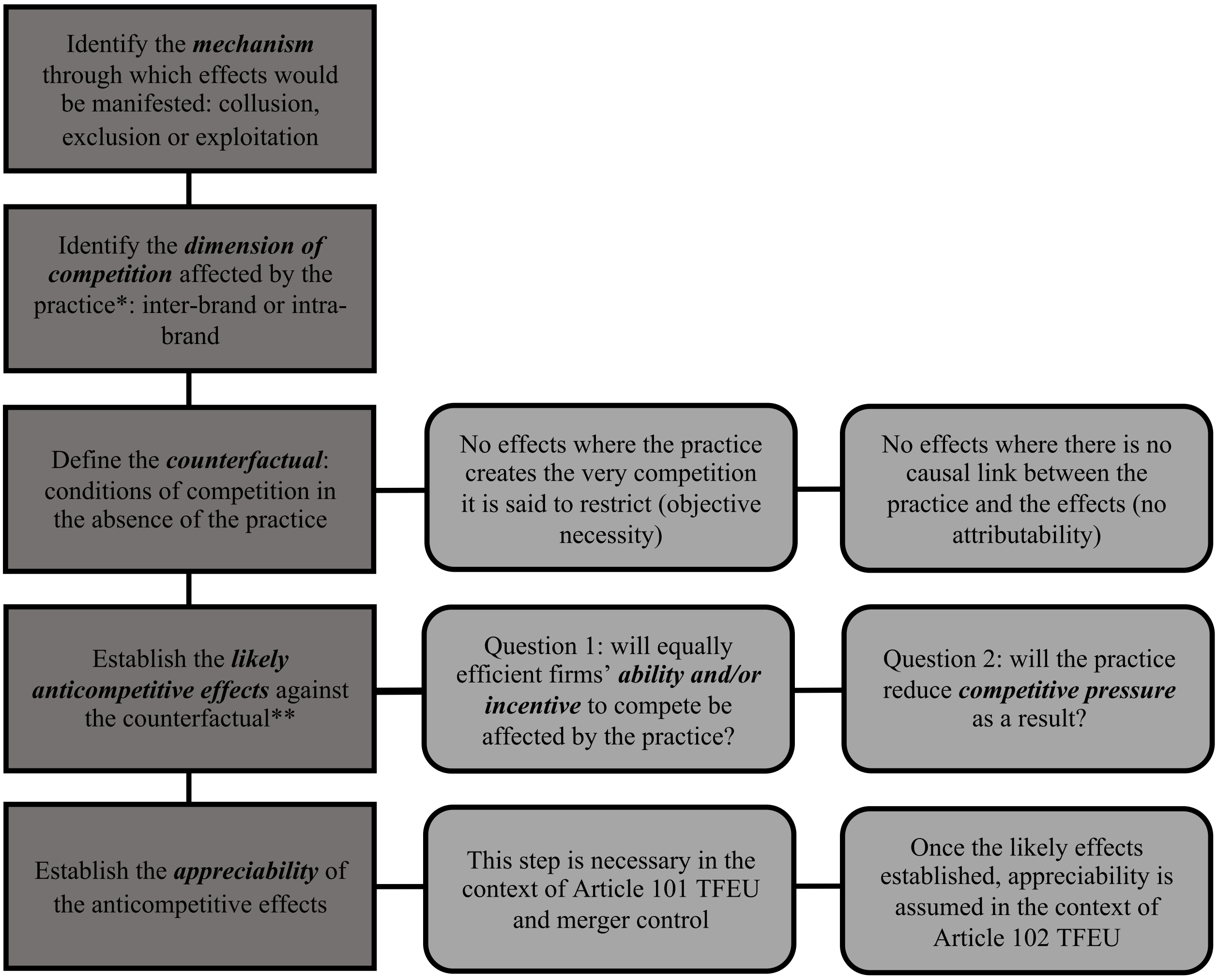

Fig. 13: Anticompetitive effects under the 'standard effects' test
* Practice is used as a shorthand for both practice and transaction
** For a detailed assessment of exclusionary effects, see fig. 5 above