Article

The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review

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I. Introduction

In March 2023, the European Commission (hereinafter, the 'Commission') launched an initiative that will ultimately lead to the adoption of a set of Guidelines on exclusionary abuses.[1] The announcement gives veteran EU competition lawyers a sense of déjà-vu. Back in 2005, the authority released a Discussion Paper on Article 102 TFEU,[2] which paved the way for publication of the so-called Guidance three years later.[3] It does not take much scratching beneath the surface, however, to realise how different both exercises are. The (future) Guidelines on exclusionary abuses are destined to be more ambitious than their predecessor. The Guidance Paper was always conceived and presented as a modest attempt to explain how the authority intended to exercise its discretion.[4] The Commission clarified that it could not be construed as an interpretation of the notion of abuse.[5] The declared goal of the ongoing initiative, by contrast, is to codify existing case law.[6]

The Guidance Paper and the Guidelines-in-the-making differ from one another because they do not target the same actors within the system. The former (just like the 2005 Discussion Paper that preceded it) was primarily aimed at the business community. It sought to address what might be termed a legitimacy crisis in enforcement. The Commission's policy in relation to exclusionary abuses had come under widespread criticism from the early 2000s.[7] Decisions like *British*

Key Points

- This paper takes stock of the case law of the past decade and discusses how Article 102 TFEU can be interpreted and applied in a manner that is consistent with effective enforcement, legal certainty and meaningful judicial review.
- The Court of Justice has consistently expressed a preference for consistency and continuity, whereas the European Commission has signalled that it values flexibility and effectiveness.
- Four key principles, which could ensure that the three abovementioned interests can be reconciled, are identified.
- It is submitted, in particular, that substantive standards should be (i) administrable, (ii) built around structured legal tests, and (iii) capable of being disproved.

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1 European Commission, 'Antitrust: Commission announces Guidelines on exclusionary abuses and amends Guidance on enforcement priorities' IP/23/1911 (Brussels, 27 March 2023).

2 European Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (December 2005).

3 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.

4 Ibid, para 2.

5 Ibid, para 3: 'This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article [102] by the Court of Justice or the Court of First Instance of the European Communities'.

6 See European Commission, 'Call for evidence' Ares(2023)2189183.

7 See inter alia John Kallaugher and Brian Sher, 'Rebates revisited: anti-competitive effects and exclusionary abuse under Article 82' (2004) 25 European Competition Law Review 263; Denis Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 Journal of Competition Law & Economics 149; GCLC Research Papers on Article 82 EC (July 2005); Claus-Dieter Ehlermann and Isabela Atanasiu (eds), European Competition Law Annual 2003: What is an Abuse of a Dominant Position? (Hart Publishing 2006); Massimo Motta, 'Michelin II: The Treatment of Rebates' in Bruce Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (Cambridge University Press 2009); and Pinar Akman, The Concept of Abuse in EU Competition Law: Law and Economic Approaches (Hart Publishing 2012).

Airways[8] and *Michelin II*[9] embraced an approach that was difficult to predict, was at odds in several respects with mainstream economic analysis and failed to take into account the realities within which practices were implemented (to such an extent that evidence showing that the rebate schemes were incapable of excluding rivals was routinely dismissed as irrelevant[10]). Any practice could potentially fall under Article 102 TFEU, and, once labelled as abusive, dominant firms would struggle to escape the prohibition. The Guidance Paper was a response to these criticisms and concerns. It signalled, above all, a commitment to following the best available expertise and to paying attention to the actual or potential effects of conduct before taking action.

The process launched in March 2023, by contrast, is best understood as a dialogue between the Commission and the Court of Justice (hereinafter, the 'Court' or the 'ECJ'). The judgments that followed the publication of the Guidance Paper are very much in line with the 'more economics-based' approach that the Commission wanted to inject into its own administrative practice. Milestones in the case law include *Post Danmark I*, where the Court declared that Article 102 TFEU is not concerned with the exclusion of less efficient rivals;[11] and, above all, *Intel*, which clarified that dominant firms may provide evidence showing that the contentious practice is incapable of foreclosing competition in the relevant market (thereby triggering a duty on the Commission to evaluate, in light of several factors, its actual or potential effects).[12]

This growing body of case law, while aligned with the shift in policy announced in the Guidance Paper, raises a number of challenges for an enforcement agency. From a substantive perspective, the main practical consequence of *Intel* (and other rulings that followed, including *Servizio Elettrico Nazionale*[13] and *Unilever*[14]) is that the Commission is typically required (in fact if not necessarily in law) to consider, systematically, the actual or potential exclusionary impact of practices. The burden of proof is that the authority seems more difficult to discharge as a result. There is still precious little clarity, however, around the assessment of effects. Proving an abuse to the requisite legal standard may be more demanding than it used to be, but it is not clear how much more demanding. Uncertainty surrounds questions as basic as the very meaning of foreclosure and the applicable probability threshold. The Guidelines give the Commission an opportunity to fill remaining gaps in the case law and propose an overarching framework for the application of Article 102 TFEU to exclusionary conduct.

This remainder of this paper addresses the issues underlying the Commission's initiative. It does so in four parts. The first part identifies the point's convergence and divergence in the relationship between judges, agencies, and firms. Some of the observable preferences of these actors are aligned; some are not. Ultimately, it is for Court to interpret the notion of abuse and, when doing so, strike a balance between effective enforcement, legal certainty, and meaningful judicial review. The second part discusses what can be termed the Article 102 TFEU acquis of the past decades, that is, the points of law that the Court has unambiguously clarified. The third part, in turn, identifies the remaining uncertainties, which are precisely the areas where the Guidelines are more likely to impact on the evolution of the case law. Finally, the paper identifies some of the principles that could assist in the balancing of the three competing interests.

II. Court, Commission, dominant firms: Points of convergence and divergence

A. The Court: Emphasis on consistency and continuity

In the EU legal order, it is for the Court to interpret the meaning and scope of competition law provisions, including Article 102 TFEU. First, the ECJ has the power to rule, following an appeal on points of law,[15] on the legality of Commission decisions.[16] When controlling administrative action, it ensures that judicial review at first instance remains effective.[17] Second, the Court has jurisdiction to interpret Articles 101 and 102 TFEU in the context of a reference for a preliminary ruling.[18] These two legal

8 *Virgin/British Airways* (Case IV/D-2/34.780) Commission Decision of 14 July 1999. See also Case T-219/99 *British Airways plc v Commission*, EU:T:2003:343; and Case C-95/04 P *British Airways plc v Commission*, EU:C:2007:166.

9 *Michelin* (Case COMP/E-2/36.041/PO) Commission Decision of 20 June 2001. See also Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission*, EU:T:2003:250.

10 Ibid, para 241.

11 Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para 22.

12 Case C-413/14 P *Intel Corp. v Commission*, EU:C:2017:632, paras 138–139.

13 Case C-377/20 *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, EU:C:2022:379.

14 Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33.

15 Article 256(1) TFEU.

16 Pursuant to Article 263 TFEU, '[t]he Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties [. . .]'. For an in-depth analysis, see Chapter 15 in Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018)

17 Case C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, para 43.

avenues (action for annulment and preliminary reference) capture effectively the dual role of the ECJ in the system. It is entrusted both with overseeing the legality of decision-making and with ensuring that Treaty provisions are uniformly interpreted and applied across the EU. This dual role influences the way it goes about shaping the boundaries of Article 102 TFEU.

One of the features of the case law that immediately stands out is the Court's preference for continuity. Judgments carefully build on the existing body of precedents, and the Court often justifies its positions on grounds that it has already expressed them in a past judgment.[19] In fact, it has proved reluctant to overrule past interpretations, and especially to do so abruptly. It favours incremental refinements to its case law, as opposed to radical breaks from the existing body of precedents. The extent to which the ECJ values continuity can be illustrated by reference to *Intel*, which is widely seen as one of the milestones of the past decade. The judgment does not expressly overrule *Hoffmann-La Roche*, pursuant to which loyalty rebates are presumptively prohibited as abusive.[20] In fact, the Court declared that this ruling remains good law.[21] Instead of formally departing from *Hoffmann-La Roche*, it presented the legal innovation as a clarification that filled a gap in the case law.[22]

As an apex court, the ECJ values the consistent interpretation of EU competition law provisions. This is so not just out of a general concern with equality and non-discrimination.[23] It is also an adjustment to the specificities of the EU legal order. Regulation 1/2003[24] was designed to favour the decentralised enforcement of Articles 101 and 102 TFEU by national courts and NCAs.[25] This aspiration can only be attained if the two provisions are applied uniformly across the Union.[26] Divergences between national judges jeopardise the unity of the EU legal order and harm legal certainty.[27] Since the adoption of Regulation 1/2003, there has been a steady stream of preliminary references inviting the Court to iron out inconsistencies in the case law. In *Post Danmark I*, for instance, the question raised by the national judge focussed on the tension between *AKZO*,[28] on the one hand, and *Irish Sugar*[29] and *Compagnie Maritime Belge*,[30] on the other. In *Post Danmark II*, in turn, the Court had to deal with the uncertainty surrounding the assessment of the 'third category' of rebates and, more generally, the frictions in the case law around the exact nature of the analysis of exclusionary effects.[31]

B. The Commission, effective enforcement, and the public interest

The Commission is in charge of formulating and implementing competition policy.[32] In the EU system, administrative action must remain within the limits defined by law. If an agency intends to enforce Article 102 TFEU, for instance, it must prove that an undertaking enjoys a dominant position in the relevant market and that its conduct amounts to an abuse. The breadth and scope of EU competition policy depends on how much the law constrains the behaviour of the Commission (and, indeed, national competition authorities, hereinafter, 'NCAs'). The boundaries delineated by the Court may limit the reach of EU administrative action in two main ways. First, by defining the substance of the provisions (that is, what the authority needs to prove). Second, by setting the standard of proof that the Commission need to meet (that is, whether the 'what' has been proved based on the evidence).

Frictions between law and policy are not only inevitable but bound to be relatively frequent. An authority like the Commission may on occasion feel that the applicable substantive and/or evidentiary standards are overly demanding—whether generally speaking or in the context of a specific case. As such, they may be perceived to be an obstacle to the effective implementation of competition policy. Similarly, the said standards may be deemed excessively rigid (in the sense that they do not allow for sufficient flexibility to accommodate the demands of individual cases). Consider the example of refusals to license intellectual property rights. The

18 Pursuant to Article 267 TFEU, '[t]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:(a) the interpretation of the Treaties [. . .]'.
19 For a detailed analysis of this question, see Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).
20 Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36.
21 *Intel* (n 12), para 137.
22 Ibid, para 138.
23 For a general discussion of the role of courts as third-party arbiters, see Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2011).
24 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.
25 Wouter P.J. Wils, 'The Reform of Competition Law Enforcement—Will it Work?', in Dermot Cahill (ed*), The Modernisation of EU Competition Law Enforcement in the EU* (Cambridge University Press 2004).
26 Recital 22 of Regulation 1/2003 (n 24).
27 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452.
28 Case C-62/86 *AKZO Chemie BV v Commission*, EU:C:1991:286, paras 71–72.
29 Case T-228/97 *Irish Sugar plc v Commission*, EU:T:1999:246.
30 Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA and others v Commission*, EU:C:2000:132.
31 For an analysis, see Opinion of Advocate General Kokott in Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:343.
32 Article 104 TFEU.

Commission may be of the view (which it expressed, for instance, in *Microsoft I*[33]) that requiring it to establish, in every instance, that the three conditions laid down in *Magill*[34] and *IMS Health*[35] are met hinders its ability to tackle the abusive exercise of an intellectual property rights.

Given its role in the system, one may expect the Commission to favour an interpretation of Article 102 TFEU that allows for effective policy-making and, in the same vein, which is flexible enough to adapt to the demands of specific or unusual cases. The Policy Brief[36] that the Commission published in March 2023 (and which accompanied the rest of its initiative) illustrates these observable preferences well. The document refers to a 'dynamic and workable' approach to the interpretation of Article 102 TFEU, which in essence is one that allows for the meaningful enforcement of the provision and that is capable of adjusting to the features of individual markets and industries. For instance, the Commission takes the view, in its Policy Brief, that it would not be appropriate to require, as a matter of law, the foreclosure of equally efficient rivals in every scenario.[37]

C. Dominant firms: Legal certainty and procedural guarantees

The discussions that have taken place since the 2000s suggest that dominant undertakings value legal certainty. These firms, as well as lawyers and economists advising them, have frequently signalled the importance of being able to reasonably anticipate whether or not a practice will be found to violate Article 102 TFEU.[38] The importance attached to legal certainty implies, by extension, that undertakings potentially subject to the prohibition favour an approach to enforcement that fluctuates little (or, if one prefers, that is less prone to experimentation and innovation on the part of the authority). In *Microsoft I*, which was mentioned above as an example, the firm insisted that the refusal to deal aspects of the case be examined in light of the conditions set out in *Magill* (as opposed to a different, ad hoc, set of 'exceptional circumstances', which was the approach favoured by the Commission).

On the other hand, dominant firms value a framework that provides sufficient due process guarantees allowing them to advance their views on the alleged abuse and that accommodates arguments pertaining to the relevant context and/or the (both pro- and anticompetitive) effects of conduct. The effective judicial review of administrative action is central to the advancement of these preferences. So much so, in fact, that some of the incremental refinements introduced over the past decade are, in effect, procedural devices that followed a direct action by a dominant firm. These devices intend to ensure that the arguments put forward by dominant undertakings are duly considered by the Commission during the decision-making process. Such was, for instance, the technique relied upon in *Intel*: the duty to evaluate, in the context of the administrative procedure, the actual or potential exclusionary effects of loyalty rebates is triggered by the evidence provided by the dominant undertaking.[39]

D. Points of convergence and divergence: The pivotal role of the Court

1. Administrability and legal certainty

The analysis of the preceding sub-section suggests that both the Commission and dominant firms value the administrability of the system, albeit for different (if not complementary) reasons. From the perspective of the authority, an administrable regime is one that does not unduly interfere with the effective application of Article 102 TFEU. Such a regime is not necessarily at odds with legal certainty (see Figure 1). Both preferences can be—and often are—aligned. For instance, making some practices presumptively unlawful ensures that policy-making remains manageable from an enforcer's perspective, and may provide clarity to stakeholders. In other respects, however, the maximisation of the authority's leeway in the name of administrability may be in tension with legal certainty. The flexibility that agencies favour could make existing precedents less reliable indicators of the likelihood of a practice being prohibited, thereby making administrative action less predictable.

Dominant firms' preferences can very well be compatible with, and conducive to, administrability. If the boundaries between lawful and unlawful conduct are structured around a clear and stable set of conditions, they may not

33 *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 24 May 2004, para 647.

34 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.

35 Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, EU:C:2004:257.

36 Linsey McCallum and others, 'A dynamic and workable effects-based approach to abuse of dominance' Competition Policy Brief (March 2023), available at https://ec.europa.eu/competition-policy/publications_en.

37 Ibid, 5.

38 For a systematic overview of these concerns, see Christian Ahlborn and Jorge Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law', in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008).

39 *Intel* (n 12), paras 138–139.

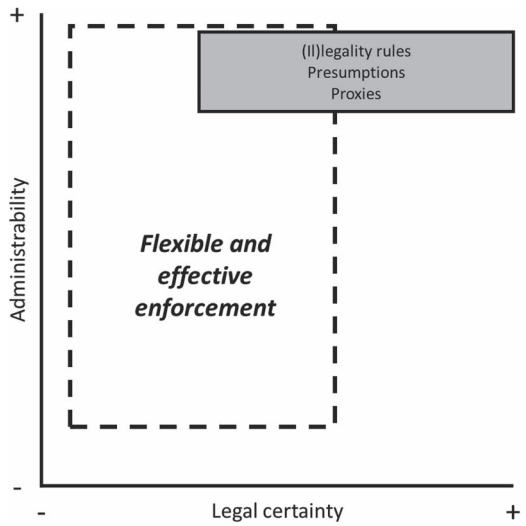

Fig. 1. Flexible and effective enforcement, and its relationship with administrability and legal certainty

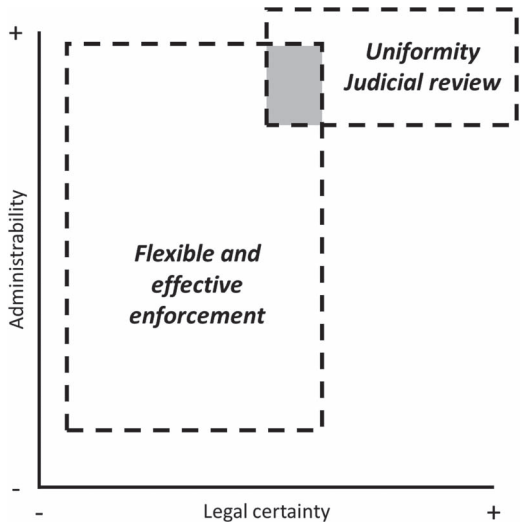

Fig. 2. Threading the needle between flexibility and enforcement and uniformity and judicial review

only provide legal certainty to undertakings, but allow for effective enforcement. On the other hand, such preferences may come into conflict with administrability. This may be the case, in particular, where the arguments they provide in support of their position are demanding in terms of resources, hence making it unduly hard for the authority to discharge its burden of proof. In addition, the relative inflexibility that undertakings typically favour (in the name of legal certainty) might sometimes be an obstacle to effective enforcement, in the sense that it may leave little scope for experimentation or for the adjustment of existing substantive standards to changing circumstances.

From the ECJ's perspective, finally, the demands of administrability and legal certainty are aligned with its own preferences and needs as an apex court. It is only possible to ensure the uniform application of Articles 101 and 102 TFEU across the Union if the substantive standards can be enforced with ease by NCAs and national judges. Administrability is also a necessity if judicial review at the EU level is to be meaningful. One should bear in mind, in this regard, that judges are inevitably subject to greater constraints in terms of resources than agencies are. Because of the value that it places on consistency and continuity, the Court's own understanding of administrability is not in conflict with legal certainty. The difficulty, from the ECJ's perspective, rather comes from the need to allow for some flexibility and change—and thus sacrifice, in occasional instances, stability in the name of effective enforcement and/or in the name of due process. In this sense, and as captured in Figure 2, the ECJ must thread the needle between both sets of considerations (those that it values as an apex court and those that ensure that the system can attain its goals).

2. Accuracy, substantive tests and the burden of proof

Avoiding enforcement errors has always been a central preoccupation in EU competition policy. In fact, the process that would lead to the adoption of the Guidance Paper was driven, to a significant extent, by the perception (widespread back then within the business community) that the enforcement of Article 102 TFEU was particularly conducive to Type I errors (that is, false positives). The Commission's ex ante commitment to evaluating, case-by-case, the actual or potential effects of practices was a response to these concerns. Perceptions have changed since the publication of the Guidance Paper. The pendulum now swings in the opposite direction. It has consistently been argued, over the past years, that the systematic evaluation of the exclusionary impact of potentially anti-competitive conduct may itself be a source of enforcement errors; and, more precisely, of Type II errors (that is, false negatives). This may be so, in particular, in markets characterised by network effects and/or extreme returns to scale.[40] These concerns found their way, among others, into the Commission's Policy Brief.[41]

The risk of enforcement errors is also a concern from a legal standpoint. From the Court's perspective, however, the challenge that comes with the avoidance of Type I and Type II errors is a different one. Given the importance that the ECJ attaches to consistency and continuity, it is illusory to think that the application of Article 102 TFEU

40 See in this sense Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era*, available at http://ec.europa.eu/competition/publications.

41 Policy Brief (n 36).

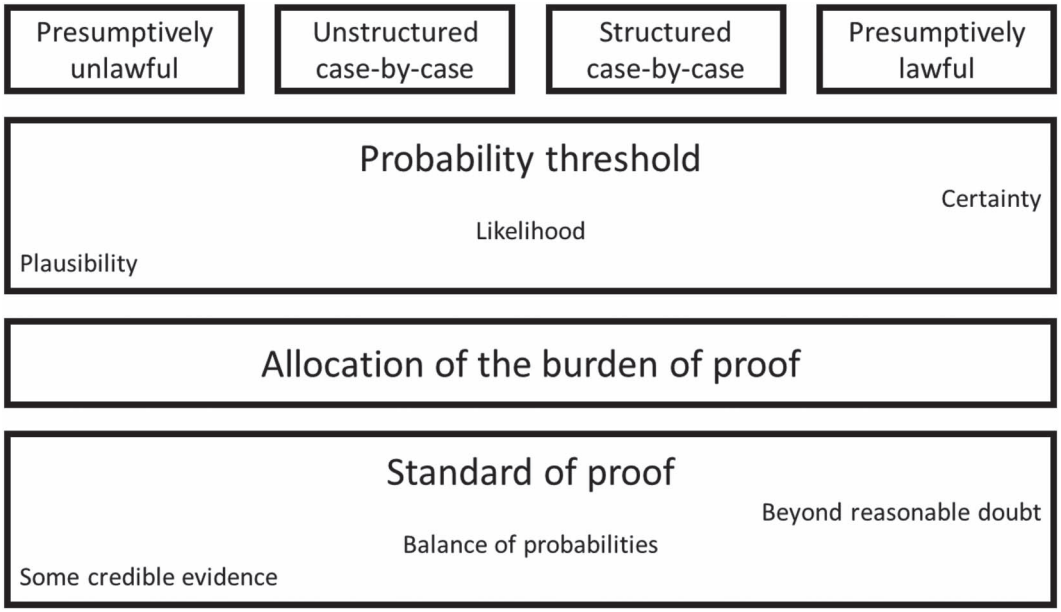

Fig. 3. Four moving parts shaping the boundaries of enforcement

will lead to accurate outcomes always and everywhere. The demands of administrability and legal certainty make false positives and false negatives an inevitable feature of the system. Therefore, the question, from the Court's perspective, is not whether enforcement errors can be eliminated as a matter of law, but how substantive (and evidentiary) standards can be crafted so that they are minimised. The challenge, in other words, is how to balance predictability and accuracy when construing the law of, and around, abuses of dominance.

A look at the case law suggests that courts rely on four main moving parts when shaping the boundaries of enforcement. One such moving part hinges on how the practice is categorised. One can think of a number of approaches that could be followed in this regard. As Figure 3 shows, these approaches can be presented along a spectrum, ranging from the categorisation of practices as presumptively abusive (that is, as prohibited in principle irrespective of their effects) to their categorisation as presumptively lawful. A second tool to calibrate substantive standards is the definition of the probability threshold of potential effects. The ease with which an infringement can be established is particularly sensitive to this question. From the perspective of an authority or claimant, there is a substantial difference between requiring that anticompetitive effects be plausible and demanding that they be likely (let alone certain) to occur in the relevant time horizon. Finally, and more generally, the legal system is sensitive to the allocation of the burden of proof and the standard of proof.

III. The article 102 TFEU acquis

A. Background

Article 102 TFEU case law has significantly evolved over the past decade. It is now possible to identify a set of principles that, taken together, provide an overarching structure and serve as a guide for the interpretation of the notion of abuse. These principles are examined hereinafter in turn. Some of them have to do with the sort of practices that fall within the scope of the prohibition. In this sense, it appears that both 'normal' and inherently 'abnormal' or 'wrongful' conduct is potentially subject to Article 102 TFEU. Other principles relate to the role and meaning of the notion of effects. Arguably, this is the area where the case law has evolved the most. Third, the 'as-efficient competitor' principle has become a central feature of virtually every judgment delivered since *Post Danmark I*. It needs to be distinguished from the 'as-efficient competitor' test.

B. Some practices are presumptively abusive; some, following an assessment of their effects

Before *Deutsche Telekom* and *Post Danmark I*, there were legitimate reasons to wonder whether a finding of abuse demands a context-specific evaluation of the actual or potential effects of the practice under consideration. Several judgments, including *British Airways*, suggested that, generally speaking, practices are in breach of Article 102 TFEU irrespective of their impact on competition. Thanks to the incremental refinements introduced by the

Court since 2010, one can draw a *summa divisio* between conduct that is presumptively abusive and conduct that is only prohibited if it can be shown that it causes actual or potential effects in the economic and legal context of which it is a part. In other words (and borrowing from Article 101(1) TFEU), one can distinguish between 'by object' and 'by effect' behaviour under Article 102 TFEU.

The above conclusion is apparent if one takes a look at judgments like *AKZO*, on the one hand, and *Deutsche Telekom*, on the other. In the first of these judgments the Court held, in unambiguous terms, that pricing below average variable costs[42] and pricing below average total costs where the behaviour is part of a broader exclusionary strategy[43] are abusive irrespective of their effects. Such strategies are, in other words, presumptively prohibited by their very nature. In *Deutsche Telekom* the Court held, in equally unambiguous terms, that a 'margin squeeze' does not, in and of itself, infringe Article 102 TFEU. It is not, in other words, abusive 'by object'. It is only caught by the prohibition where it can be shown that it is a source of actual or potential exclusionary effects.[44] The judgments that followed provide additional examples of conduct that necessitates, prior to a finding of infringement, a case-by-case analysis of their impact on competition. These include standardised rebate schemes, at stake in *Post Danmark II*[45] and the constructive refusal to deal conduct considered in *Slovak Telekom*.[46]

The idea that some conduct is abusive by its very nature, whereas other practices are only caught by Article 102 TFEU insofar as they have anticompetitive effects, was expressly confirmed in *Servizio Elettrico Nazionale*.[47] More precisely, the Court held that a strategy amounts to an abuse 'by object' (that is, it is inherently at odds with legitimate competition on the merits) where the dominant undertaking has no interest in implementing it other than as a means to exclude rivals.[48] The same is true, according to the judgment, where the behaviour involves the use of 'resources or means inherent to the holding of such a position'.[49] In other circumstances (including in those at stake in *Post Danmark II* and *Slovak Telekom*), the question of whether the practice is an expression of competition on the merits and that of whether it causes actual or potential restrictive effects collapse into one and the same issue.[50]

42 *AKZO* (n 28), para 71.
43 Ibid, para 72.
44 Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603, paras 250–251.
45 Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651.
46 Case C-165/19 P *Slovak Telekom, a.s. v Commission*, EU:C:2021:239.
47 *Servizio Elettrico Nazionale* (n 13).
48 Ibid, para 77.
49 Ibid, para 78.

C. The acquis on the notion of effects

1. A finding of abuse presupposes that the practice has actual or potential effects

The main conclusion to draw from the preceding subsection is that some practices are abusive by their very nature. In such instances, an infringement can be established without it being necessary to evaluate their impact on competition. This fact does not mean, however, that effects are irrelevant in the assessment. It simply means that effects are presumed to result from the implementation of the practice, even if they need not be established by the authority or claimant. In *Generics*, the Court clarified that a finding of abuse presupposes that the contentious practice can have a negative impact on competition.[51] The corollary to *Generics* is the clarification introduced in *Intel* (and then generalised in *Servizio Elettrico Nazionale* and *Unilever*). It is possible for a firm to rebut the presumption underpinning the 'by object' treatment of some conduct and provide evidence showing that the strategy is incapable of restricting competition on the market(s) in which it is implemented.[52] Where the dominant undertaking provides evidence in this sense, it triggers a duty on the authority to assess its impact.[53]

2. Effects can be actual or potential, but not purely hypothetical

The Court has consistently held that the application of Article 102 TFEU does not need to wait for the anticompetitive effects to materialise.[54] Effects can be actual or potential. At most, evidence of the actual impact of a practice is a factor that, as an element of the economic and legal context, must be taken into consideration when the analysis is prospective.[55] Such evidence may be particularly valuable where the behaviour has been implemented for some time.[56] Accordingly, a finding of abuse can be grounded on the potential restriction that conduct might cause further down the line.[57] Prospective analysis cannot be based on a mere possibility of harm or on a hypothetical.[58] It must be grounded on the market realities in which

50 In neither of these two cases was the issue of competition on the merits relevant in the analysis. Instead, the assessment focused on the impact of the behaviour on competition.
51 Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority*, EU:C:2020:52, para 154.
52 *Intel* (n 12), para 138. See also *Unilever* (n 14), para 47.
53 Ibid, para 139.
54 *Servizio Elettrico Nazionale* (n 13), para 53.
55 Ibid, para 54.
56 Ibid: '[. . .] where the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide evidence of the exclusionary effect of the practice in question [. . .]'.
57 Ibid, para 53
58 *Post Danmark II* (n 45), para 65.

the contentious strategy is implemented.[59] The context-specific analysis of potential effects must be conducted in light of several factors that will be discussed in detail below.

3. Effects must be attributable to the practice

In *Post Danmark II*, the Court held that effects must be 'attributable' to the dominant firm's behaviour for Article 102 TFEU to apply.[60] In other words, when assessing the exclusionary effects of a practice, an authority or claimant must show that there is a causal link between the said strategy and the actual or potential impact that it is said to produce. Accordingly, if the restrictive effects would have been occurred anyway, or if they can be attributed to other factors (such as the regulatory context of which the behaviour is a part, or to the fact that the firm would have failed irrespective of the conduct), the behaviour would escape the prohibition. For instance, if the dominant firm's prices remain above cost, the exclusion of actual or potential rivals would not be attributable to the undertaking's strategy, but to the fact that it is less efficient (and thus would have left the market irrespective of the practice).

4. An effect is more than a competitive disadvantage and a limitation of contractual freedom

The Court has never been particularly explicit about what an anticompetitive effect is. Many uncertainties remain around the concept. This said, the case law sheds light on what an effect is not. To begin with, rulings like *Post Danmark I* and *MEO*[61] make it clear that the mere fact that rivals are placed at a disadvantage does not provide evidence, in and of itself, of an actual or potential anticompetitive effect. For instance (and just to mention an example borrowed from *MEO*), the fact that they are discriminated against in terms of prices or other conditions would be insufficient to prove foreclosure to the requisite legal standard.[62] Showing that a firm's freedom of action would be limited as a result of a practice would be equally insufficient. This point was made explicit in *Post Danmark II*. Thus, the fact that a rebate scheme induces customers of a dominant firm to buy more from it does not dispense the authority or claimant from the need to consider its impact in light of the relevant market.

5. The relevant factors: Coverage, extent of the dominance and nature of the practice

While a cloud of uncertainty remains about the exact meaning of the notion of effects, the Court has identified several criteria in light of which the assessment must be conducted. One of these has already been mentioned above (see Figure 4). While not conclusive, the actual, observable impact of a practice when implemented is one of the considerations to factor in the analysis. Other criteria were identified in *Post Danmark II* and *Intel*. To begin with, the coverage of the practice is a reliable indicator of the likely effects of a strategy. Conduct is incapable of restricting competition where it only applies to a limited number of customers. Second, the Court has acknowledged that not all practices are created equal. There is a difference in the anticompetitive potential of, for instance, an exclusivity obligation (which eliminates buyers' ability to acquire rival products) and a standardised rebate scheme (which simply provides a financial incentive to increase purchases from the dominant supplier). Third, the extent of the dominant position is another factor to consider. By necessity, the higher the degree of market power enjoyed by the firm, the more likely the anticompetitive effects are. Fourth, the fact that the practice is part of a broader exclusionary strategy may play a role in the assessment. Finally, there are factors that have played a role in concrete cases, including the features of the relevant market (in *Deutsche Telekom*) and the regulatory context (in *Post Danmark II*).

6. An effect, if established, will be appreciable

The *de minimis* doctrine has long been central to the analysis of agreements under Article 101(1) TFEU. Early on, in *Völk*, the Court held that, where the parties hold a 'weak' position and, where, as a result, the practice only has an 'insignificant effect' on the relevant market, the practice does not amount to a restriction of competition, whether by object or effect.[63] By definition, this doctrine is irrelevant when Article 102 TFEU is at stake. The application of the latter presupposes a finding of dominance—that is, the very opposite of a 'weak' position. Accordingly, once effects are established to the requisite legal standard in an Article 102 TFEU case, it is not necessary to show, in addition, that such effects are appreciable.[64] This point, made explicit in *Post Danmark II*, is not controversial. If it deserves to be discussed at some length, this is so because the issue of *de minimis* tends to be conflated with related matters. The fact that there is no room for a *de*

59 Ibid.
60 Ibid, para 47.
61 Case C-525/16 *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2018:942.
62 Ibid, paras 30–31.
63 Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke*, EU:C:1969:35.
64 *Post Danmark II* (n 45), para 73.

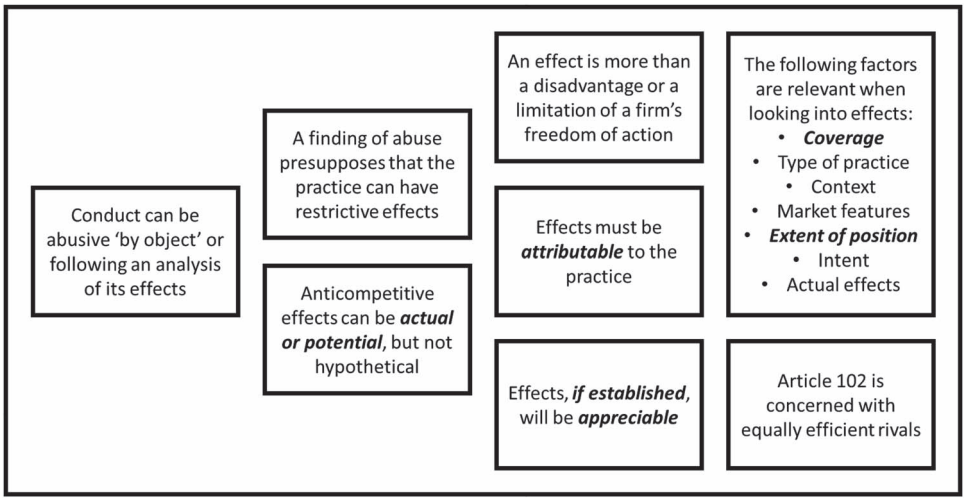

Fig. 4. The Article 102 TFEU acquis

minimis doctrine in abuse of dominance cases does not mean that every practice necessarily has an effect. It does not mean, either, that everything is an effect. Accordingly, an authority or claimant would still need to consider the factors identified in the preceding sub-section to establish an impact on competition.

D. The 'as-efficient competitor' principle

The 'as-efficient competitor' principle has emerged as one of the pivotal elements of the case law of the past decade. Even though its origins can be traced back to *AKZO*[65] and *Deutsche Telekom,*[66] it was formulated in *Post Danmark I*. The Court held in that judgment that 'not every exclusionary effect is necessarily detrimental to competition' and that '[c]ompetition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation'.[67] In other words, the ECJ acknowledged that the exclusion of less efficient rivals is a normal and desirable manifestation of the competitive process, and that it would be counterproductive (if not contrary to the very point of Article 102 TFEU) to penalise dominant firms when they get ahead in the marketplace with better and more innovative products and/or services.

The principle follows logically from other elements of the case law and, more generally, from the very nature of the EU legal order. As mentioned above, any actual or potential effects must be attributable to the practice for Article 102 TFEU to come into play. Where the exclusion of a firm is caused by the fact that it is less efficient and, more generally, less attractive (which would be the case, for instance, where it is forced to sell at a loss to match the dominant firm's above-cost prices), there would be no link between the contentious strategy and the result observed, and thus no abuse. The 'as-efficient competitor' principle is also a necessity in a system that values legal certainty. As explained by the Court in *Deutsche Telekom*, one cannot expect a firm to adjust its behaviour to the situation of its rivals, which it cannot be expected to know.[68] The status of rivals (for instance, their cost structure) is information which is not available to the dominant undertakin. Therefore, it cannot form the basis of a finding of abuse.

The 'as-efficient competitor' principle is also valuable as a reminder of what the point of Article 102 TFEU is—and what it is not. In addition to its practical relevance as a guide in concrete cases, the principle encapsulates the idea that the purpose of the provision (and of EU competition law at large) is to protect a process, not to engineer market structures. The role of Article 102 TFEU is not to dictate how many firms are to operate on the relevant market (or to allocate market shares between the dominant undertaking and its actual or potential rivals). The more modest role is simply to create the conditions in

65 *AKZO* (n 28), para 72.
66 *Deutsche Telekom* (n 44).
67 *Post Danmark I* (n 11), para 22.

68 *Deutsche Telekom* (n 44), para 202: '[The "as-efficient competitor" test] is particularly justified because, as the General Court indicated, in essence, in paragraph 192 of the judgment under appeal, it is also consistent with the general principle of legal certainty in so far as the account taken of the costs of the dominant undertaking allows that undertaking, in the light of its special responsibility under Article 82 EC, to assess the lawfulness of its own conduct. While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are'.

which genuine efforts to get ahead in the marketplace with better and/or cheaper products and services are rewarded. In this sense, Article 102 TFEU is different from sector-specific regulation, the explicit point of which is typically to alter market structures (in particular by undermining dominance) to fulfil a particular vision about how the industry is to operate.

In spite of its centrality in contemporary case law, there is some confusion around it. Part of the confusion has to do with the fact that the 'as-efficient competitor' principle tends to be conflated with the test of the same name. The latter, however, is just an expression of the former. By necessity, it also has a narrower scope of application. The point of the test is to ascertain whether, as a result of the practice, a rival that is as efficient as the dominant firm would be forced to sell at a loss. In the context of a rebate scheme, for instance, this tool allows an authority to evaluate whether, given the level of the discounts received by the customer, an equally efficient rival would be able to supply, at a profit, the part of the customer's demand that is contestable.[69] In the context of a 'margin squeeze', the issue is whether, given the spread between the wholesale and the retail prices charged by a vertically-integrated dominant undertaking, an equally efficient firm would be forced to sell at a loss.[70]

The Court has consistently held, since *Post Danmark II*, that an authority or claimant need not rely on the 'as-efficient competitor' test to establish an abuse to the requisite legal standard.[71] Anticompetitive effects may be established by other means, and more precisely in light of the factors identified by the Court in *Intel*. For instance, an authority may be able to show that a set of loyalty rebates would deny equally efficient rivals a minimum efficient scale given the substantial coverage of the scheme. It is also clear that the 'as-efficient competitor' test is not sufficient, alone, to trigger the application of Article 102 TFEU. If the coverage of a practice is insignificant, it will not amount to an abuse, even when this test suggests that it would force an equally efficient rival to sell at a loss. The fact that this particular tool is neither necessary nor sufficient to establish an abuse, in any event, does not say anything about the relevance of the 'as-efficient competitor' principle as an overarching guide.

A second point of confusion has to do with the application of the principle. It is sometimes assumed that it involves evaluating whether the actual rivals of the dominant undertaking are as efficient as the latter. This understanding ignores its underlying logic and the ideas that it encapsulates. As the examples discussed above show, the fundamental point of the principle is to emphasise the need to establish a causal link between the practice and the actual or potential effects. This requirement can be met without looking at the relative efficiency of individual rivals. In fact, the concrete manifestations of the principle (including the 'as-efficient competitor' test itself), seek to establish whether the dominant firm itself, subject to the contentious practice, would still have the ability and incentive to compete, and at no point rely on the relative performance of specific undertakings.

IV. The remaining uncertainties

A. The meaning of effects

The case law provides clarity about what an effect is not but is less explicit about what an effect is. At best, it is only possible to get a sense of the meaning of the notion by looking at how the Court conducts the analysis in practice (that is, by paying attention to what it does and not so much to—the little—it says). In this sense, it would appear that a practice does not restrict competition for as long as the competitive pressure coming from rivals remains unaffected (that is, for as long as their ability and incentive to compete is not impaired). As the analysis in *Post Danmark I* shows, conduct does not have exclusionary effects where a competitor, in spite of losing customers to the dominant firm, is still willing, and has the means to, get ahead in the marketplace.[72] The Commission appears to embrace a similar interpretation in its Policy Brief.[73]

69 Case T-286/09 RENV *Intel Corporation Inc. v Commission*, EU:T:2022:19, para 153: '[. . .] the AEC test carried out in the contested decision starts from the premiss that an as-efficient competitor, which seeks to obtain the contestable share of the orders hitherto satisfied by a dominant undertaking, must compensate the customer for the exclusivity rebate which it would lose if it purchased a smaller portion than that stipulated by the exclusivity or quasi-exclusivity condition. The AEC test is designed to determine whether the competitor which is as-efficient as the undertaking in a dominant position, which faces the same costs as the latter, can still cover its costs in that case'.

70 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para 32: 'In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as-efficient as that undertaking to compete for the supply of those services to end users'

71 *Post Danmark II* (n 45), para 57. See also *Unilever* (n 14), para 58.

72 *Post Danmark I* (n 11), para 39: '[I]t is worth noting that it appears from the documents before the Court that Forbruger-Kontakt managed to maintain its distribution network despite losing the volume of mail related to the three customers involved and managed, in 2007, to win back the Coop group's custom and, since then, that of the Spar group'.

73 Policy Brief (n 36), p. 5, which defines 'anticompetitive foreclosure' as 'a situation where the conduct of the dominant undertaking *adversely impacts an effective competitive structure, thus allowing the dominant undertaking to negatively influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as*

However, the Court had not directly addressed the issue at the time of writing.

B. The threshold of effects

The idea that Article 102 TFEU can apply both retrospectively and prospectively has never been controversial. However, the Court has not expressly clarified the probability threshold that applies, as a matter of substantive law, when the assessment considers potential effects. The relevance of this question, in theory and practice, cannot be overestimated. For as long as the applicable threshold is not defined, the notion of potential effects is insufficiently specific (as such, it just refers to the temporal dimension, not to the likelihood of an event occurring). A probability of harm of, say, 0.1% and one of 99.9% are both compatible with prospective analysis. However, the consequences of opting for one or the other are very significant, both from a legal and a policy-making perspective. The lower the probability threshold, the broader the substantive scope of Article 102 TFEU, and the greater the leeway granted to the authority.

The vocabulary used by the Court in its case law is not conclusive. It has consistently referred to 'capability' and 'likelihood' as interchangeable terms, if not synonymous.[74] However, each of these words is indicative of a different probability threshold. Requiring that a practice be capable of restricting competition suggests that it is sufficient for an authority or claimant to show that harm is plausible (and thus that the probability threshold is not particularly high, that is, in the region of 10–15%). Demanding evidence that effects be likely, on the other hand, appears to set a higher threshold. It hints at a probability of around 50%. More explicit, however, was Advocate General Kokott in her Opinion in *Post Danmark II*. She held that it must be shown, as a matter of law, that the restrictive impact is more likely than not to occur.[75]

The actual analysis performed by the ECJ in individual cases appears to be consistent with Advocate General Kokott's position. If it were sufficient to show that anticompetitive effects are plausible, then virtually every practice implemented by a dominant firm (including conduct such as exclusive dealing, loyalty rebates or tying) would meet the threshold. One should bear in mind that Article 102 TFEU applies in market realities where the conditions of competition are already weakened[76] and that the very definition of dominance presupposes the ability to harm competition.[77] The fact that potential harm, in concrete cases, has been examined in light of factors such as the coverage of the practice, its nature and the extent of dominance suggests that the analysis is context-specific and, by extension, that it is necessary to show, at the very least, that the probability of harm is somewhere around (if not above) 50%.

Because the threshold of effects has not been discussed expressly by the Court, the question, which is a substantive one, is often conflated with the applicable standard of proof, which touches upon evidentiary issues.[78] However, they are distinct. Coming back to the distinction made above, the applicable threshold of effects is about the 'what' (what needs to be proved); the standard of proof, in turn, is about whether the 'what' has been proved to the requisite legal standard. It is easy to confuse substantive and evidentiary issues. Even though they refer to different questions, they are both expressed in terms of probability. It is commonplace to hear references to the 'balance of probabilities' or to proof 'beyond reasonable doubt' when talking about the standard of proof (the 'whether'). As a result, it is sometimes assumed, incorrectly, that any use of probabilistic language necessarily refers to evidentiary issues. In other instances, commentators refer to the standard of proof when they actually refer to the substantive threshold of effects.

C. The operation of the counterfactual in the assessment of effects

If one takes together the lessons from the acquis on Article 102 TFEU, there are compelling reasons to conclude that, as the law stands, anticompetitive effects must be established against the relevant counterfactual. This is so, in particular, because of the need to show that any actual or potential restriction is attributable to the practice. The requirement of a causal link presupposes a comparison of the conditions of competition with and without the strategy (that is, against the conditions of competition that would have prevailed in the absence of the latter). One should consider, in addition, that the need to prove effects against the counterfactual is well established in the context of Article 101(1) TFEU. To the extent that Articles 101 and 102 TFEU may apply to the same practices[79]

price, production, innovation, variety or quality of goods or services' (emphasis in the original).

74 Opinion of Advocate General Wahl in Case C-413/14 P *Intel Corp. v Commission*, EU:C:2016:788, para 115. For a detailed analysis of this question, see Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (2021) 17 Journal of Competition Law & Economics 309.

75 Opinion of Advocate General Kokott in *Post Danmark II* (n 31), para 82.

76 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para 70.

77 *Hoffmann-La Roche* (n 20), para 91.

78 Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement* (Hart Publishing 2019), 72; and Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017), 34–36.

79 For instance, exclusive dealing can be examined under Article 101 TFEU, as it was in Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*,

(and occasionally jointly[80]), it would be difficult to justify that the exercise is conducted differently under each of the provisions. Following different approaches to the definition of effects would amount to attaching a different meaning to the notion of effects (and, indeed, of competition) under, respectively, Articles 101 and 102 TFEU.

D. Exceptions to the 'as-efficient competitor' principle

In *Post Danmark II*, the Court held that, in the specific circumstances of the case, the 'as-efficient competitor' principle was not the relevant benchmark for the assessment of the abusive nature of the practice. According to the judgment, this was justified by the fact that the regulatory context made the emergence of an equally efficient rival 'practically impossible'.[81] In such a scenario, the ECJ argued, Article 102 TFEU could apply to preserve the modicum of competition that the circumstances allowed.[82] While the case makes it clear that there are exceptions to the 'as-efficient competitor' principle, it is unclear where these exceptions apply. There are two possible interpretations of the judgment. Under one interpretation, the determinant factor that explains the departure from the principle is the fact that the sector-specific regime did not allow an equally efficient rival to operate. Under another interpretation, it may be justified to depart from the principle where the features of the relevant market do not allow for the emergence of such a firm, irrespective of whether this is due to the regulatory framework or to other case-specific factors. At the time of writing, the Court had not addressed this question.

V. Reconciling effective enforcement, legal certainty and meaningful judicial review

A. Summary and principles

The preceding sections give a sense of the context and the factors driving the Commission's ongoing initiative. Because the case law of the past decade has consistently signalled the Court's commitment to the meaningful analysis of effects, it is natural for the authority to express misgivings about the impact of the changing legal landscape on its ability to implement its policy goals. Overly demanding substantive (and evidentiary) standards could indeed hinder the meaningful application of Article 102 TFEU. It is also clear from the discussion above that effective enforcement is not, and cannot be, the only consideration when addressing the remaining gaps and uncertainties in the case law. This concern coexists with two considerations that are at the heart of the ECJ's mission as an apex court, namely legal certainty and meaningful judicial review. The former ensures that Article 102 TFEU is uniformly applied across the Union. The latter is consistent with the Court's role as the interpreter of primary EU law and as the guardian of fundamental rights.

An approach to the notion of abuse that takes into account all three dimensions (effective enforcement, legal certainty and meaningful judicial review) is not easy to craft and develop. Threading the needle can be assisted by four key guiding principles, which are described and discussed hereinafter. First, the substantive standards must be administrable, so that they can be meaningfully applied both by authorities (including the Commission) and by national courts. Second, they must be structured (as opposed to fluctuating, or 'liquid'), and thus convey a clear sense of what agencies need to prove and the issues that review courts need to examine. Third, the allegations made by a claimant or authority must be capable of being disproved in practice (and not just in theory, or in the abstract). It is submitted, in this sense, that one must avoid substantive legal tests that rely on conditions that are met always and everywhere. Fourth, and finally, exceptions to prevailing substantive standards (which may be a necessity to ensure effective enforcement and, more generally, to allow for the incremental refinement of the law) must be adequately substantiated.

B. Administrability and the use of proxies

Because the Court has not clearly defined the notion of effects in the case law (and, in a similar vein, because of the persistent ambiguity about the probability threshold), there are doubts about what an authority or claimant must show when arguing that a practice is a source of actual or potential effects. There are also doubts about how the factors identified in the case law (such as the coverage of the practice and the extent of the dominant position) apply in specific cases and how they are weighed against one another. The most obvious way to fill the gaps in the case law in a manner that ensures that the system remains administrable is to rely on 'bright lines' that dispense from the need to engage in complex evaluations and provide, by proxy, a reasonably accurate idea of the underlying reality that is assessed.

The use of proxies is not unknown in other areas of the case law and the administrative practice. In the context of Article 102 TFEU, the Court introduced, in

EU:C:1991:91; and Article 102 TFEU, as it was in *Hoffmann-La Roche* (n 20).

80 See for instance *Generics* (n 51); and *Compagnie Maritime Belge* (n 30).

81 *Post Danmark II* (n 45), para 59.

82 Ibid, para 60.

AKZO, a presumption pursuant to which a 50% market share provides sufficient evidence, absent exceptional circumstances, of the existence of a dominant position.[83] This proxy was intended to give effect to the principle laid down in *Hoffmann-La Roche*, whereby 'very large shares' are in themselves indicators of dominance.[84] The Commission, in turn, has relied abundantly on proxies in its block exemption regulations. The Guidelines on vertical restraints, for instance, rely on a 30% market share threshold as a proxy.[85] Thus, where the rest of the conditions are fulfilled and the position of the parties does not exceed that threshold, the agreement benefits from an exemption. Similar proxies are relied upon in relation to horizontal co-operation agreements.[86]

'Bright lines' could be an effective means to fill existing gaps in the case law. In fact, the factors identified in judgments like *Intel* and *Post Danmark II* lend themselves naturally to the use of proxies. Consider, for instance, the coverage of a practice, which was identified as a central criterion in the two rulings. A coverage of 30–40% of the market could be taken as a reliable indicator of the likely anticompetitive effects of a practice. Consider, similarly, the nature and operation of the practice. It is uncontroversial that, the longer a practice is implemented, the greater is its potential to harm competition. Against this background, it may be possible to rely on the length of at least some strategies as a proxy for their exclusionary potential. For instance, one could argue that rebate schemes exceeding a particular period (say, one year, or three years) deserve close scrutiny. Conversely, agreements allowing the customers of the dominant firm to terminate the contract at any point with no penalty could be deemed unproblematic.

Reliance on proxies would be beneficial, to begin with, from the perspective of effective enforcement. The Commission (and NCAs) would have a clear sense of what they would need to prove in relation to each of the relevant factors. Their burden of proof, in other words, would have finite boundaries and would not demand case-specific complex economic assessments. It is also an approach that would ensure that judicial review remains meaningful. If the criteria to evaluate the anticompetitive effects of conduct were allowed to fluctuate from one case to another on account of the specificities of the situation at hand, the task of a review court would be considerably more difficult. The approach, finally, would be beneficial from the perspective of legal certainty. Dominant firms would be in a position to anticipate the instances in which, absent special or exceptional circumstances, intervention is likely.

C. Consistency, continuity and structured legal tests

A question that has been abundantly discussed in recent years has to do with the nature and operation of legal tests in Article 102 TFEU. It is possible to identify two broad approaches to the substantive assessment of anticompetitive effects. One approach relies on structured tests, which revolve around a fixed, cumulative set of conditions that needs to be satisfied to establish an infringement to the requisite legal standard. The three criteria defined by the Court in *Magill* provide, as mentioned above, an example in this sense. A second approach would not hinge on whether every single condition is satisfied in an individual case. Rather than the elements of a hard test, the criteria defined in the case law would simply be indicators that need to be considered in the context of an overall, holistic assessment. According to this second approach, the fact that one or more conditions are not met in a given instance would not be fatal for a finding of infringement. The evidence, taken as a whole, may be consistent with the theory of harm underpinning the case.

Some of the most prominent commentators, speaking in favour of the second approach, have deplored the 'box-ticking' exercise that judicial review would become if the conditions laid down in the case law were taken as literal requirements to be met individually in every instance.[87] It is not difficult to rationalise this position, which captures well the anxieties of an agency. Understandable as it may be, there are compelling reasons to argue that, in fact, structured legal tests favour effective enforcement more than 'liquid' or unstructured ones. Just like proxies do, a fixed set of cumulative criteria marks clear and finite boundaries about what the authority needs to prove—and what it does not. If, by contrast, tests were liquid, they would be allowed to fluctuate and accommodate the specificities and exceptions that an authority deems relevant. By necessity, however, a liquid test could also fluctuate in the opposite direction, so as to make room for the dominant firm's arguments. Overall, unstructured

83 *AKZO* (n 28), para 60.

84 *Hoffmann-La Roche* (n 20), para 41.

85 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L134/4.

86 For a comprehensive application of market share thresholds, see Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/1.

87 See in particular Fernando Castillo de la Torre, 'On Boxes and Paradoxes: Form and Substance in Judicial Review of Competition Decisions' (*EU Law Live*, 29 September 2022).

standards inevitably become less predictable for all actors involved.

Crucially, it is difficult to see how liquid, or unstructured legal tests, can ensure the uniform application of Article 102 TFEU across the Union. By definition, such an interpretation of the provision would result in the fragmentation of the legal order. The discretion that authorities enjoy when prioritising cases would extend to the definition of the substantive standards themselves. In this sense, the issues of law could be used as a tool, among others, for authorities to manage their finite resources. Finally, structured tests are also indispensable if judicial review is to remain meaningful. A system where the legal criteria to establish an abuse vary from one case to another is one that delegates, in effect, the definition of the applicable substantive standards to the administrative authority. For all intents and purposes, such an approach, which allows the agency to decide which factors are relevant in a given investigation and which are not, is only compatible with limited judicial review—one that is confined to manifest errors of assessment.

D. The assessment of effects cannot be a mere formality

The concept of abuse could be defined to favour administrability at the expense of legal certainty and meaningful judicial review. Tempting as it may be, doing so would be difficult to justify for a number of reasons. Generally speaking, a set of conditions that is met, in practice, always and everywhere is a bad legal test. This is so, first, because it does not allow the EU courts to control administrative action in any meaningful way. In line with what has been mentioned in the preceding sub-section, it leaves no room for the exercise of full judicial review (which is the default in the EU legal order). Second, the approach would turn the analysis of effects into a mere formality. Instead of the context-specific assessment required by the case law, the anticompetitive impact of practices would be simply assumed to result from their implementation. For all intents and purposes, all conduct would be abusive by its very nature. For the same reasons, such an approach would make it impossible for dominant firms to challenge the findings of the authority.

The analysis of effects could become a mere formality in several scenarios. One such scenario would arise if the threshold of effects were set at the level of plausibility (or lower). As already explained above, a finding of abuse would be virtually automatic if a 10–15% likelihood of harm were deemed sufficient to take action. In markets where the conditions of competition are already weakened by the presence of a dominant firm, the exclusion of equally efficient rivals following the implementation of a potentially abusive practice would not be contrary to 'logic and experience' (to take the definition of plausibility proposed by a leading academic[88]). In other words, exclusionary effects could be established always and everywhere if this probability threshold were applied. In line with what has been explained, it would be difficult to reconcile this interpretation of the notion of abuse with the analysis actually conducted by the Court in individual cases. More to the point, it would make it impossible for a dominant firm to disprove a finding of anticompetitive effects.

A second scenario that would turn the analysis of anticompetitive effects into a mere formality is one that introduces a *probatio diabolica* into the system. By *probatio diabolica*, it is meant that the substantive test puts dominant firms in an impossible position: evidence could be used by authorities to support a finding of abuse, but defendants would not be able to challenge such evidence. Even though it has never been accepted by the Court, the *probatio diabolica* has occasionally emerged in the Commission's practice (and, similarly, it has been occasionally relied upon by the General Court (hereinafter, 'GC'). One such example is provided by the *Michelin II* case. The dominant undertaking argued that its behaviour could not be deemed abusive, as its market share had declined during the implementation period.[89] The Commission rejected this argument, claiming that, in the absence of the practice, rivals' market share could have increased even more.[90] The GC accepted the validity of this argument.[91] The *probatio diabolica* emerged again in *Google Shopping*.[92]

This approach to the assessment of the impact of practices, which makes it impossible to disprove an authority's findings, is based on a *sui generis* understanding of the very notion of effects. Instead of evaluating whether, and to what extent, rivals' ability and incentive to compete

88 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).

89 Commission Decision in *Michelin II* (n 9), para 332.

90 Ibid, para 336.

91 Case T-203/01 *Michelin II* (n 9), para 245: 'In any event, it is very probable that the fall in the applicant's market shares (recital 336 of the contested decision) and in its sales prices (recital 337 of the contested decision) would have been greater if the practices criticised in the contested decision had not been applied'.

92 *Google—Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017, para 603; and Case T-612/17 *Google LLC and Alphabet, Inc. v Commission*, EU:T:2021:763, para 452: '[. . .] the Commission noted that it was not required to prove actual effects (recital 602 of the contested decision), and maintained that in the absence of the practices at issue the number of comparison shopping services actively competing might have been even greater [. . .]'.

would be affected by the practice, this interpretation of the concept appears to assume that Article 102 TFEU can be triggered whenever the dominant firm's conduct handicaps rivals or, more generally, whenever it increases the competitive pressure to which they are subject. As cases like *Post Danmark I* show, a finding of abuse necessitates more than evidence that rivals are disadvantaged (and more than evidence that their market share has declined). To the extent that this is the case, the *probatio diabolica* would be problematic not just because it would make it impossible to exercise a firm's rights of defence, but because it is at odds with the case law.

E. Flexibility and the treatment of special circumstances

One of the main ideas that transpires from the preceding section is that introducing some flexibility into the system is desirable. It has already been explained that the Court held, in *Post Danmark II*, that the 'as-efficient competitor' principle is not always the relevant benchmark against which effects are assessed. One can think of other examples. For instance, there may be circumstances where a competition authority is persuaded that, in spite of its low coverage, a practice is likely to foreclose equally efficient rivals. In other cases, the agency may be persuaded that the applicable precedents are not the appropriate standard against which lawfulness of a practice, in a given case, should be assessed. Suppose—to give a specific example—that, in the Commission's view, the conditions laid down in *Magill* would not adequately capture the anticompetitive potential of a refusal to license an intellectual property right.

While the case for flexibility is unquestionably persuasive, one would expect it to be injected in a careful way that does not jeopardise other considerations. It is submitted, generally speaking, that special circumstances should be treated as such. Accordingly, it would be for the party claiming that that the prevailing legal standards should not apply in a given case to adequately substantiate why there are factors warranting a different, ad hoc approach. For instance, it would be for the authority to justify why, in a particular factual scenario, the application of the 'as-efficient competitor' principle would not be appropriate. Similarly, the onus would be on it to show why it the *Magill* conditions are not the relevant benchmark against which the lawfulness of a refusal to license is to be assessed. Because flexibility comes at the expense of continuity and consistency (and similarly, harms legal certainty), one would expect that the evidence provided in support of the ad hoc analysis is particularly convincing.

VI. Conclusions

The direction of the case law on exclusionary abuses seems unequivocal: over the past decade, the Court has embraced an interpretation of Article 102 TFEU that rests on a rigorous, context-specific assessment of the actual or potential impact of potentially abusive practices on competition. There are still some doubts, however, around how demanding the analysis of effects exactly is. In fact, the very meaning of the notion of effects has, to this date, never been expressly defined. This is the background against which the Commission's initiative in relation to exclusionary abuses must be understood. This paper has highlighted the tension that might arise between effective enforcement, legal certainty and meaningful judicial review. Closing the remaining gaps in the case law therefore makes it necessary to carefully thread the needle between all three considerations (and, similarly, to avoid tensions between the demands of, respectively, law and policy). There are several principles that can assist in this exercise.

First, there is broad consensus that the law should be administrable, so that it does not become an obstacle to the enforcement of Article 102 TFEU and agency action can be reasonably anticipated by stakeholders. The case law could easily evolve to meet this objective. It appears, in particular, that the Court has made, so far, limited use of proxies when looking into the potential effects of practices. The generalised use of bright lines could address some of the Commission's core concerns about the administrability of the system. As block exemption regulations show, proxies can ease the burden to which authorities are subject and simplify the analysis all while making enforcement more predictable. As explained above, bright lines are a useful mechanism to define instances where harm is more probable. For instance, the Court could define a market coverage percentage below which foreclosure is unlikely to occur.

As already pointed out, second, the case law makes it clear that the assessment of effects under Article 102 TFEU must be context-specific and not merely grounded on the possibility that harm might occur further down the line. In other words, the analysis of the actual or potential impact of a practice cannot become a mere formality. The piece identifies some of the legal interpretations that would be difficult to reconcile with this aspect of the case law (and, in the same vein, with effective judicial review). One such interpretation is the definition of a probability threshold which (in seeming contradiction with the case law) makes a finding of effects an inevitability in virtually every case. A second interpretation that would turn the analysis of effects into a formality is one that treats any

competitive disadvantage and/or any limitation of a firm's freedom of action as evidence of harm to competition. Such an interpretation would be problematic not just because it appears to be, again, at odds with the prevailing substance standards, but because it would make it impossible for a dominant firm to disprove a finding of anticompetitive effects.

Third, the Court must strike a careful balance between legal certainty and flexibility, so that it is possible to preserve the consistency and continuity (and, similarly, allow stakeholders to reasonably anticipate administrative action) while simultaneously allowing the system to evolve and to adjust to the demands of specific cases and/or industries. There are essentially two ways in which both interests can be reconciled. One approach relies on 'liquid' or fluctuating legal tests—that is, substantive standards that lack clear boundaries and that may change from one case to another. This technique is not easy to accommodate in the EU legal order (and the need to ensure that it is uniformly applied across the Union). It amounts, in effect, to delegating the definition of issues of law to the authority (which would be, in effect, in a position to decide, case-by-case, the benchmark against which the legality of practices is assessed). An alternative approach is one that relies, as a matter of principle, on structured legal tests. Such tests rely on a cumulative set of conditions that an authority or claimant must satisfy. This second approach, even though it is rigid as a matter of principle, can accommodate special circumstances, as well as the incremental evolution of the law.

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