Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy

Pablo Ibáñez Colomo

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Intel and Article 102 TFEU Case Law:

Making Sense of a Perpetual Controversy

Pablo Ibáñez Colomo[*]

Abstract: In June 2014, the General Court of the EU delivered its judgment in *Intel*. The debates to which it has given rise in less than six months suggest that the controversy about the legal treatment of exclusive dealing and rebates under Article 102 TFEU is still very much alive. This piece seeks to make sense of the persistence of academic and non-academic discussions around the question. It appears that the real reasons behind the contentious status of the relevant case law are more limited in their nature and scope than commonly assumed. Ongoing disagreements are merely the manifestation of what can be termed a 'friction' in the case law.

If rulings like *Intel* (and previous ones like *Michelin II* and *British Airways*) are contested, this is so because they are difficult to reconcile with other judgments addressing the same or comparable issues. First, the case law on, respectively, article 101 and 102 TFEU is based on mutually incompatible premises. Secondly, and to the extent that there is no reason to presume that exclusivity and rebate schemes are implemented for anticompetitive purposes and/or to assume that they harm the competitive process, they would be assessed more sensibly under a standard – as 'margin squeeze' abuses and selective price cuts already are.

[*] Department of Law, London School of Economics and Political Science. E-mail: P.Ibanez-Colomo@lse.ac.uk. I am grateful to Andriani Kalintiri, Alfonso Lamadrid de Pablo, Carmen Martinez Lopez, Urska Petrovcic, Martim Valente, Denis Waelbroeck and Hans Zenger for their comments on a previous version of this article.

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1. INTRODUCTION

The law on abuses of dominance has given rise to some of the most heated debates in EU competition law.[1] Article 102 TFEU requires courts and authorities to draw a meaningful line between competition on the merits and unlawful conduct, and this in a context where a dominant firm is subject to weak constraints.[2] This is a most challenging task. Controversy around the choices made in individual cases seems natural and inevitable as a result. To mention two clear examples, there are no straightforward answers to inherently complex questions such as whether a refusal to share a competitive advantage should ever be declared unlawful, or whether it is anticompetitive to react aggressively to a low-price campaign initiated by a rival. From the issue of principle (is the question adequately addressed through competition law?) to the application of the law to a concrete factual scenario (how to operationalise Article 102 TFEU in a particular context?), it is necessary to consider various factors (legal and extra-legal, substantive and institutional), which, depending on how they are combined and factored in the analysis, can lead to different outcomes. Many, if not most, of these outcomes will be defensible.

It is in relation to rebate schemes and exclusive dealing that disagreement has proved to be more persistent and profound, and has had more lasting and tangible consequences. A decade ago, and following the rulings of the General Court (hereinafter, the 'GC') in *Michelin II*[3] and *British Airways*[4] – both concerning rebate schemes – the European Commission (hereinafter, the 'Commission') initiated a systematic review of its approach to the enforcement of Article 102 TFEU, leading to the issue of a Discussion Paper in December 2005[5] and of a Guidance three years later.[6] In June 2014, the GC handed down its judgment in *Intel*.[7] The

[1] Suffice it to mention the following examples of the vast academic commentary to which the provision has given rise: Pinar Akman, *The Concept of Abuse in EU Competition Law* (Hart 2012); Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008); Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP 2010); Ariel Ezrachi (ed), *Article 82 EC: Reflections on its Recent Evolution* (OUP 2009); Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) Giorgio Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 *Journal of European Competition Law & Practice* 1; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011); Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013); Lorenzo F Pace, *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Elgar 2011); Denis Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 *Journal of Competition Law & Economics* 149.
[2] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission ('Michelin I')* [1983] ECR 3461, para 70.
[3] Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission ('Michelin II')* [2003] ECR II-407.
[4] Case C-95/04 P, *British Airways plc v Commission* [2007] ECR I-2331 and Case T-219/99, *British Airways plc v Commission* [2003] ECR 5917.
[5] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.
[6] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (hereinafter, the 'Guidance').

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amount of academic commentary which the ruling has generated in – at the time of writing – less than six months shows that the controversy around the status of these practices under Article 102 TFEU is still very much alive ten years later.[8] The GC did not depart from the principles set out in previous cases, pursuant to which exclusive dealing and loyalty rebates are, absent an objective justification, prohibited as abusive irrespective of the effects they produce on the market.[9] This position differs from the enforcement approach advocated by the Commission in its Guidance, and against which administrative action in *Intel* was measured.[10]

The depth and persistence of discussions around the case law on exclusive dealing and rebates is exceptional. It seems therefore difficult to dismiss critical voices as superficial, fundamentally misguided or as being merely concerned with the outcome of individual cases. This article seeks to make sense of the recurrence of academic and non-academic debates about the question based on a close analysis of the case law of the Court of Justice (hereinafter, the 'ECJ' or the 'Court'). In doing so, it departs from some of the arguments most commonly explored in the literature, which lack, it is submitted, sufficient explanatory power. The study of the controversy tends to be framed around the alleged reluctance on the part of EU courts to follow the so-called 'more economic approach' (or 'more economics-based approach') expressly advocated by the Commission in its soft law instruments. In this same vein, some authors tend to argue that disagreements about the principles against which exclusive dealing and rebates should be assessed simply reflect different views about the objectives of EU competition law. From this perspective, the case law in the field would be contested primarily because it does not endorse efficiency and/or consumer welfare as the aims guiding the interpretation of Article 102 TFEU.

The relevant judgments show, in contradiction with the above, that the contentious status of the case law on exclusive dealing and rebates is first and foremost the consequence of what can be termed a legal 'friction'. There are, in other words, some aspects of the relevant rulings that are not easy to reconcile with the rationale underlying other judgments addressing the same or comparable issues. The ongoing disagreement is, however strong, more modest in its nature and scope than is commonly understood. It is merely the expression of the sort of legal tension that one can expect to arise in a discipline like EU competition law. There is a wide gap between the broad and vague provisions on which administrative action is based and the demands of individual cases. Article 102

[7] Case T-286/09 *Intel Corp v European Commission* [2014] (GC, 12 June 2014).

[8] See in particular Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?' (2014) 5 *Journal of European Competition Law & Practice* 521; James S Venit, 'Case T-286/09 Intel v Commission – The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 *European Competition Journal* 203; Richard Whish, '*Intel v Commission*: Keep Calm and Carry on!' (2015) 6 *Journal of European Competition Law & Practice* (forthcoming); and 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.

[9] *Intel* (n 7), paras 80-81.

[10] Guidance (n 6), paras 37-45; and *Intel* (COMP/C-3 /37.990) Commission Decision of 13 May 2009 [2009] C227/13.

TFEU needs to be turned into a set of practicable principles and bright-lines if the regime is to be made workable in concrete factual scenarios. Inevitably in such a context, some cases will hint at a particular logic, while others will sit at odds with it. These are the instances to which the term 'friction' refers. Such frictions do not reflect a fundamental disagreement about the objectives of the law from one judgment, or from one area, to another. Instead, they are the manifestation of the fallibility of regimes that evolve from the bottom up and that are, moreover, informed by economic analysis (itself subject to evolution over time). By the same token, addressing the observed tensions does not require a major overhaul, but a mere refinement that can be achieved on an incremental basis.

One can distinguish between two major categories of rulings in Article 102 TFEU case law. In some judgments, the contentious practice is presumed to be abusive by its very nature. As a result (and absent an objective justification), it is prohibited without it being necessary to establish, in concreto, the anticompetitive impact to which it gives rise. It is, in other words, subject to a (qualified) *rule*. Pricing below average variable cost is a clear example of this first category. There are other practices that are not, it would seem, understood to be inherently abusive. The question of whether they are in breach of Article 102 TFEU depends on whether they have exclusionary effects in the market context in which they are implemented. These practices are subject to a *standard*, in the sense that the analysis of the impact of these practices is an integral element of the substantive test. 'Margin squeeze' abuses and selective price cuts fall within this category.

Exclusive dealing and rebates conditional upon exclusivity are currently deemed abusive by their very nature. The persistence of the controversy around their legal status has to do with the fact that, according to a widespread view, they are closer in their nature and effects to 'margin squeezes' and selective price cuts. It is submitted that this view is correct. More precisely, it is submitted that it would only be appropriate to make exclusivity and rebates subject to a qualified rule if it were safe to presume that they are always, or almost always, implemented by dominant undertakings for exclusionary purposes and/or if it were safe to presume that they have always, or almost always, anticompetitive effects. Neither of these two premises holds. The disputed judgments are grounded on a presumption and an assumption that, decades of experience show, do not appear to be accurate ones. It is apparent from the case law that they may be used in effectively competitive markets for pro-competitive reasons and, perhaps more importantly, that there is no reason to assume that they harm the competitive process, even when implemented by dominant firms. As can be seen, the friction behind the controversy does not relate to a disagreement about the aims of the law or the role of economic analysis in the field. The change in the treatment of these practices under Article 102 TFEU would thus not require anything else than a refinement that addresses the observed tensions in the case law.

The article is organised as follows. Section 2 discusses the purpose and role of economic analysis in competition law. This first step is important both to understand existing disagreements among commentators and to identify the legal frictions at the heart of ongoing discussions. Section 3 explains the criteria developed in Article 102 TFEU case law to make practices subject to a qualified prohibition rule or to a standard instead. Section 4 shows, in light of the relevant judgments, why a rule-based approach to the assessment of exclusive dealing and rebate practices is difficult to hold, and this, primarily as a matter of legal consistency. It also examines whether there are sufficiently compelling reasons to defend the status quo, as some authors claim, in spite of the conclusions drawn from the previous sections.

2. THE STATUS AND ROLE OF ECONOMIC ANALYSIS IN EU COMPETITION LAW

Much has been written in the past two decades about the interplay between economic analysis and EU competition law.[11] The exact status and role of the discipline are not always well understood, which explains, in turn, some aspects of the ongoing controversy around exclusive dealing and rebates. First, one cannot emphasise enough that economic analysis is inescapable in competition law. Economics is not merely a normative benchmark that reflects a particular view of the field. Whether it is done implicitly or explicitly, fleshing out competition law provisions involves the use of assumptions and presumptions that are economic in nature. The only real question in this regard is in fact whether to rely on formal or informal analysis. Over the past 20 years, the Commission has favoured the use of formal tools, which now play a prominent role in the definition of its enforcement priorities. This fact does not mean, however, that economic analysis is an exogenous force introduced by the administrative authority with a view to altering the nature of the field from the top down. An overview of the case law shows that EU courts have long had recourse to mainstream tools and insights to define rules and standards and, perhaps more importantly, to effectively constrain administrative action.

[11] See among the many contributions to the debate Jürgen Basedow, Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct* (Kluwer 2011); Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects–Based Approach in EU Competition Law: State of Play and perspectives* (Bruylant 2012); Josef Drexl, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach: Foundations and Limitations* (Elgar 2011); EAGCP, 'An Economic Approach to Article 82' (July 2005), available at <http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf>; Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, 'Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases' in Massimo Merola and Jacques Derenne (eds), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant 2012); and Anne C Witt, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really about More Economics?' (2012) 49 *Common Market Law Review* 217.

2.1. Economic Analysis as a Tool to Understand Business Conduct

When business conduct is scrutinised from a competition law angle, the analysis is inevitably bound to start from a set of preconceptions concerning (i) the motivations behind the practice under examination and/or (ii) the likelihood of negative effects on competition. Take the example of tying, which captures well the evolution of the discipline, to illustrate the first step of the analysis.[12] In order to determine whether it is anticompetitive for a firm to condition the sale of one product to the acquisition of another one, it is necessary to make a more or less educated guess about the purposes the practice may serve. If one looks back at the early case law of the US Supreme Court (and this issue is discussed at length below), it appears that the condemnation of tying as per se unlawful owes much to the fact that it was understood to be a device intended to suppress competition (that is, the underlying economic assumption was that it was intended to harm the competitive process). Take the example of conglomerate mergers to illustrate the second step. When examining whether a transaction involving non-competing firms operating on closely related markets is likely to lead to a 'significant impediment to effective competition' an authority, or a court, must speculate about the possible mechanisms through which the competitive process might we harmed, and about the plausibility of such mechanisms being implemented in the specific context of the case. A look at the history of merger enforcement provides some examples of the sort of theories that have been advanced to assess the impact of conglomerate transactions.[13]

It is possible to flesh out rules and standards in competition law in an informal way. If there is something that has become abundantly clear in the past decades, however, is that such an approach is often misleading. The unsystematic study of an issue is prone to logical fallacies and tends to be based on implicit assumptions that have a decisive impact on the outcome of the analysis. When these are acknowledged and addressed through the use of formal tools, the conclusions drawn can be surprising, in the sense that they may contradict what intuition alone might have suggested. Economics provides, in this context, a body of knowledge, accumulated over the years, upon which courts and authorities can rely to evaluate the extent to which the concerns that are understood to require intervention are accurate ones or need to be qualified or refined. The contribution

[12] On the question, see Maurits Dolmans and Thomas Graf, 'Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective' (2004) 27 *World Competition* 225; Jorge Padilla and David S Evans, 'Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf' (2004) 27 *World Competition* 503; and Nicholas Economides and Ioannis Lianos, 'The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft cases' (2009) 76 *Antitrust Law Journal* 483. See also the discussion below, and in particular the text accompanying footnotes 97 to 99.

[13] For an overview of these theories, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (West 2011) 607-620.

of the discipline to the formulation of legal principles and policies is not in any way exclusive to competition law. It can be seen as an example of the ways in which economics leads to the improved understanding of some social phenomena.[14]

It could be convincingly argued at length why the use of the insights provided by formal economic analysis should be preferred over enforcement based on intuition alone, in the same way that one could explain in detail the reasons why it seems more prudent to rely on consensus positions reflecting the contemporary understanding of an issue as opposed to other plausible, but maybe discredited or heterodox, views. For the purposes of the present paper, however, this debate does not seem necessary. EU courts have regularly had recourse to mainstream positions in their judgments to define the scope of competition law provisions. Formal economic analysis is firmly embedded in the case law. The view that depicts economics as an exogenous force at odds with EU competition law is accordingly inaccurate. In fact, it has not escaped commentators that, counterintuitive as it may sound (given the status of the latter as the expert authority), EU courts' case law on agreements within the meaning of Article 101(1) TFEU was for a long time, and until the mid-1990s, more clearly in line with economic tools and concepts than the practice of the administrative authority.[15] In this same vein, it cannot be ignored that the steps taken by the Commission to ensure that its enforcement activity would reflect consensus positions (leading, inter alia, to the creation of the position of Chief Economist) was to a significant extent the consequence of the annulment of three merger decisions by the GC in 2002.[16]

2.2. ECONOMIC ANALYSIS AS A TOOL TO FLESH OUT COMPETITION LAW PROVISIONS

There are abundant examples showing how mainstream economic analysis has contributed to the shaping of EU competition law. It is worth emphasising the following three roles to make sense of the discussion that ensues. Economic

[14] The clash between intuition and formal economic analysis is very apparent, for instance, in relation to international trade issues. See in this sense Paul Krugman, *Pop Internationalism* (MIT Press 1996), where the author addresses the contradictions and fallacies of authors approaching these matters unsystematically, and provides theoretical and empirical evidence in support of the consensus views held by professional economists. Paul Samuelson is often quoted as having said, about the theory of comparative advantage, that it is non-trivial, as attested by the fact that 'thousands of important and intelligent men […] have never been able to grasp the doctrine for themselves or to believe it after it was explained to them'.

[15] Barry Hawk, 'System failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973 and Anne-Lise Sibony, Le juge et le raisonnement économique en droit de la concurrence (LGDJ 2008) 245-277 ('[l]a "nouvelle approche" économique de l'article [101 TFUE], élaborée par la Commission est bien nouvelle pour la Commission, mais elle l'est beaucoup moins pour le juge').

[16] Mario Monti, 'EU Competition Policy' (Fordham Annual Conference on International Antitrust Law and Policy, New York, 31 October 2002) and Lars-Hendrik Roller and Pierre A Buigues, 'The Office of the Chief Competition Economist at the European Commission' (May 2005), available at <http://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf>.

analysis provides, first, a set of tools that has been relied upon to (i) develop presumptions about the motivations behind a practice and, more generally, to make sense of a phenomenon for which there are several plausible explanations. Secondly, it has proved useful (ii) to define the instances or conditions under which a given practice is likely to prove anticompetitive, whether this is assessed by reference to the object of the practices, its effects, or a combination of the two. Finally, (iii) the same analytical tools are valuable as benchmarks and bright-lines to make presumptions practicable.

Economic analysis and business motivations

Examples of the first role are more readily found in Article 101 TFEU case law. The ECJ has consistently explored the rationale behind the agreement under consideration to establish whether it is restrictive of competition by object. Economic insights are sometimes implicit in nature.[17] There are cases, however, where the Court engages confidently with formal economic concepts, which are made explicit in its reasoning. The ruling in *Groupement des Cartes Bancaires* provides a valuable example in this regard.[18] The Court made an express reference to the economic concept of two-sided platforms[19] and concluded that, due the dynamics of inter-firm rivalry, the agreement looked like a plausible means to fight free-riding and thus not liable to restrict competition by its very nature.[20] Reliance on economic analysis in this view is by no means novel or recent. In *Woodpulp II*, for instance, the ECJ held, in line with consensus positions, that evidence of parallel behaviour is, alone, insufficient to show that an agreement or a concerted practice within the meaning of Article 101 TFEU has been concluded.[21] Accordingly, intervention under the said provision is only possible if the Commission (or a claimant in a private dispute) is able to show that collusion is the only plausible explanation for the observed parallelism.[22] More importantly, the Court did not hesitate to commission an expert report, which is cited and relied upon at length in the judgment, to understand the behaviour of the firms involved in the alleged concerted practice.[23]

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[17] See for instance Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235. Sibony praises this ruling as 'avant-garde', insofar as it anticipates many of the arguments that would only become widely accepted in subsequent decades (even in the US). See Sibony (n 15) 248.

[18] Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission* [2014] (ECJ, 11 September 2014).

[19] Ibid, para 73. The Advocate General is even more explicit in his opinion. See *Groupement des Cartes Bancaires* (n 18), Opinion of AG Wahl, para 3, where he quotes the work by Jean-Charles Rochet and Jean Tirole, 'Two-sided markets: a progress report' (2006) 37 *RAND Journal of Economics* 645.

[20] Ibid, para 75.

[21] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A Ahlström Osakeyhtiö and others v Commission ('Woodpulp II')* [1993] ECR I-1307.

[22] See in this sense Case T-442/08 *International Confederation of Societies of Authors and Composers (CISAC) v Commission* [2013] (GC, 12 April 2013).

[23] See in this sense Eric Barbier De La Serre and Anne-Lise Sibony, 'Expert Evidence before the EC Courts' (2008) 45 *Common Market Law Review* 941.

Economic analysis and the likelihood of anticompetitive outcomes
The annulment of the Commission decisions in *Airtours* and *Tetra Laval* are two clear examples of instances in which economic analysis was relied upon to define the instances in which the competitive process is likely to be harmed. In the first of the rulings, the GC set out the set of restrictive conditions under which a merger can result in the emergence or the strengthening of a collective dominant position.[24] As noted by commentators at the time, the market features identified by the Court are in line with mainstream positions on the question.[25] In *Tetra Laval*, the GC echoed consensus views when it held that conglomerate mergers, given their nature, cannot be presumed to be anticompetitive and that their effects on competition are generally neutral or positive.[26] As a result, intervention in such cases makes it necessary to establish the precise mechanism through which competition can be expected to be harmed.[27]

Economic analysis and the definition of benchmarks and bright-lines
It is not easy to define the instances in which aggressive pricing is abusive under Article 102 TFEU. In *AKZO*, the ECJ had recourse to mainstream analytical tools to identify, by proxy, the cases in which the below cost prices charged by a dominant firm serve no purpose other than the elimination of a competitor. The Court held that exclusionary intent can be presumed where prices fall below average variable cost.[28] More recently, in *Post Danmark*, which revolved around similar issues,[29] the Court endorsed the same framework, this time to filter out pro-competitive conduct. The ruling suggests that, absent additional factors (and in particular direct evidence of anticompetitive intent) pricing below average total cost – but above average variable cost – is not, as a matter of principle, anticompetitive.[30] This is so insofar as rivals that are as efficient as the dominant firm would normally be in a position to match such price levels and remain on the market. The relative efficiency of competitors is explicitly relied upon by the ECJ as a practicable dividing line to identify the effects that are likely to trigger the application of Article 102 TFEU.[31]

2.3. ECONOMIC ANALYSIS AS A TOOL TO DEFINE THE BOUNDARIES OF ADMINISTRATIVE ACTION

The importance of judicial review in EU competition law is widely acknowledged, but cannot be overstated. In enforcement regimes where an authority combines

[24] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para 62.
[25] Nicolas Petit, *Oligopoles, collusion tacite et droit communautaire de la concurrence* (Bruylant 2007) 126-128.
[26] Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381 paras 154-155.
[27] Ibid, para 156. See also Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6, paras 91-121.
[28] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para 71.
[29] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172.
[30] Ibid, paras 38-39.
[31] Ibid, paras 21-22.

the role of investigator and first-instance adjudicator, it is indispensable that review courts fully engage with the legal and factual aspects of administrative decisions that are brought before them. This has been emphasised recently by the ECtHR in *Menarini*[32] and by the ECJ in several rulings since 2011.[33] A related aspect that is not always attached the relevance that it deserves is that mainstream economics provides invaluable instruments upon which courts can rely to effectively constrain administrative action, both in individual cases and over time. When the activity of an authority is not based on clearly defined substantive principles, or where these principles have the potential to fluctuate significantly from one case to another, it may be difficult for firms to anticipate the decision of an authority and thus adapt their behaviour accordingly. In this context, the use of a language and of a set of tools that, however imperfect, are widely known and used, can contribute to legal certainty by confining intervention to boundaries set in advance.

The ECJ ruling in *AKZO* can be interpreted in this light. The Commission did not consider in the case that price reductions by a dominant firm are abusive only where prices fall below cost. It held instead that costs were not a 'decisive criterion' for the application of Article 102 TFEU to such conduct.[34] The firm, in turn, challenged the criteria relied upon by the Commission as being 'nebulous or at least inapplicable'.[35] The substantive test set out by the ECJ departed significantly from that proposed by the authority. According to the Court, only where prices are below cost can Article 102 TFEU apply to aggressive pricing strategies by dominant companies. The bright lines identified as relevant in *AKZO* define a narrow range of instances in which administrative action would be justified. More importantly, these bright lines are a variation of the so-called Areeda-Turner test,[36] which is firmly grounded on formal economic tools and which had already become a golden standard by the time of the ruling. This test makes intervention more predictable insofar as it is based on criteria that can be applied across sectors, as opposed to the more holistic approach favoured by the Commission, which, by its very nature, was more likely to fluctuate depending on the circumstances of a particular investigation.

EU courts have been confronted with instances in which administrative action was seemingly in contradiction with the consensus positions found in the economic literature. As a matter of principle, there should be little doubt that nothing prevents the Commission from attempting to enforce the law in a way that disregards the mainstream. It is however the task of EU courts to shape the

[32] *A Menarini Diagnostics v Italy* App No 43509/08 (ECtHR, 27 September 2011).
[33] See in particular Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission* [2011] ECR I-13085 and C-389/10 P *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-13125.
[34] *AKZO* (n 28), para 64.
[35] Ibid, para 66.
[36] Phillip Areeda and Donald F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 *Harvard Law Review* 697.

substance of legal provisions, and one for which the Commission enjoys no discretion. The interpretations advanced by the latter in its administrative practice are subject to full review by the former.[37] In the context of an action for annulment, there may be many reasons why EU courts may favour an interpretation of the law that is compatible with consensus views (even if, again, they are imperfect and inevitably subject to flaws and biases). Mainstream positions are typically the result of incremental work and refinement by several authors over time. EU courts may feel that the interpretation advanced by the Commission may not be as robust as the principles deriving from the relevant economic literature, or that it is less suitable to be converted into administrable legal principles.

Take the example of *Airtours* to illustrate this idea. Before the GC delivered its judgement, there was great uncertainty among stakeholders regarding the exact scope of the notion of collective dominance within the meaning of Regulation 4064/89.[38] In its decision in the case, the Commission did not seem to interpret that legal notion along the lines of the economic concept of tacit collusion. Accordingly, it did not appear to consider that the reach of administrative action was confined to the instances in which the latter would be relevant.[39] The cases in which a merger in an oligopolistic market could be prohibited were therefore difficult to tell in advance from the practice of the authority. Some commentators observed with concern at the time that any operation leading to a reduction in the number of competitors could as a result be found to lead to the emergence of a position of collective dominance.[40] In this context, the GC judgment, by defining the notion by reference to the conditions under which, according to the economic consensus, a situation of tacit collusion is likely to be sustained, set a clear boundary to the powers of the Commission under the Merger Regulation of the time.[41]

2.4. CONCLUSIONS

The following conclusions can be drawn from this section:

- Economic analysis is not at odds with Article 102 TFEU case law and EU competition law at large. Mainstream tools have been frequently relied upon

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[37] This stems clearly from the letter of Article 263 TFEU. For an overview of the principle, see Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 405-407.

[38] Juan Briones and Jorge Padilla, 'The Complex Landscape of Oligopolies under EU Competition Policy: Is Collective Dominance Ripe for Guidelines?' (2002) 24 *World Competition* 307.

[39] *Airtours/First Choice* (Case No IV/M.1524) Commission Decision of 22 September 1999, paras 51-56 and 148-153. For an extensive discussion, see Petit (n 25) 121-125.

[40] Ibid, in particular 125.

[41] The definition of the notion of collective dominance has not change since the adoption of the new Regulation in 2004. See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, paras 39-57. The most contentious issue in *Airtours*, which is the availability of deterrence mechanisms within the oligopoly, is to be found in paras 52-55 of the Guidelines.

by EU courts to set benchmarks against which the anticompetitive nature of a practice may be assessed, and the theoretical findings of the economic literature have assisted them when defining the instances in which negative outcomes for the competitive process are likely to be manifested.

- Economic analysis has been primarily introduced by EU courts. The so-called 'more economics-based' approach to enforcement by the Commission, which was introduced in the mid-1990s, brought its administrative practice more in line with the logic of ECJ case law (as in the context of Article 101 TFEU) and can be seen, in many respects, as a direct reaction to the endorsement of mainstream economic principles by EU courts (as is true of merger control in the aftermath of *Airtours* and *Tetra Laval*).
- The definition of clear boundaries to administrative action is one of the key contributions of mainstream economic analysis to EU competition law, if only due to the importance of effective judicial review in systems where the administrative authority combines the role of investigator and first instance decision-maker. The use of analytical tools that are widely known and used contributes to the predictability of enforcement. It would seem that, when confronted with an issue for the first time, EU courts tend to express a preference for consensus positions.
- EU competition law is not inimical to efficiency considerations. References to conduct that has the potential to exclude rivals as efficient as the dominant firm can be traced back to *AKZO*, and were relied upon more explicitly in subsequent cases like *Deutsche Telekom* and *Post Danmark*.[42] It would seem from these cases that the role of such considerations is more modest than commonly understood. Far from defining an overarching objective guiding action across the board, efficiency has been relied upon as the basis for a benchmark that makes it possible to set a meaningful and practicable dividing line between conduct that is pro- and anticompetitive. It contributes, in this sense, to flesh out predictable legal principles.

3. RULES AND STANDARDS IN ARTICLE 102 TFEU CASE LAW

3.1. ARTICLE 102 TFEU BETWEEN RULES AND STANDARDS

An analysis of Article 102 TFEU case law shows that judgments can be grouped in two categories. In some of them, EU courts do not seem to require evidence that the practice under consideration has, in concreto, exclusionary effects. In fact, it may be prohibited even if there is evidence suggesting that rivals can compete

[42] This is pointed out in Bill Allan, 'Rule-Making in the Context of Article 102 TFEU' (2014) 13 *Competition Law Journal* 7.

effectively and that have been able to gain market share away from the incumbent in the course of the relevant period. Absent an objective justification, it will be found to be in violation of Article 102 TFEU. Such conduct is, in other words, examined in accordance with a *rule*, as opposed to a *standard*.[43] *AKZO*, discussed above, provides the archetypal example of this category of judgments. Predatory pricing is deemed abusive if the Commission (or a claimant) is able to show that the prices charged by the dominant firm are below average variable costs, without it being necessary to show that the strategy is likely to amount to foreclosure or, in the same vein, that the dominant firm would be in a position to recoup its losses.[44] The GC rulings in *Hilti*,[45] *Tetra Pak II*[46] and *Microsoft*[47] suggest that the same conclusion applies to tying practices. It would seem from these judgments that, in the absence of an objective justification, a dominant firm is not entitled to condition the acquisition of one product to the acquisition of a different one. This is so even when the tied sale of two products is a normal commercial practice.[48]

Other conduct is not deemed to be inherently abusive. The application of Article 102 TFEU in such cases depends on evidence of exclusionary effects. Accordingly, they can be said to be assessed in light of a standard, as opposed to a rule. The case law on refusals to deal illustrates this second category of rulings particularly well. It is a well-established doctrine in EU competition law that dominant firms are entitled, as a matter of principle, to deal with whom they please. As a consequence, they can only be forced to supply (or license) a rival in 'exceptional circumstances', restrictively defined by the ECJ in *Magill* and *IMS Health*.[49] Under the standard set in these two rulings, it is necessary to establish, inter alia, that the contentious refusal leads to the elimination of 'all competition' on the relevant (downstream) market.[50]

The Court made clear in *Deutsche Telekom* and *TeliaSonera* that a 'margin squeeze' is not abusive in and of itself. In this sense, it is different from tying or pricing below average variable costs. This practice is indeed only subject to Article 102 TFEU if an anticompetitive effect can be shown.[51] Interestingly, EU courts

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[43] The concept of rule is used to capture those instances in which a practice is (at least prima facie) prohibited irrespective of the context in which it is implemented and its impact on competition. The concept of standard refers to those situations where the prohibition of the practice depends on a case-by-case analysis of such factors. For an analysis of the question in the specific context of competition law, see Daniel A Crane, 'Rules Versus Standards in Antitrust Adjudication' (2007) 64 *Washington & Lee Law Review* 49. For a general overview of the rule-standard divide, see Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557.

[44] *AKZO* (n 28). See also Case C-202/07 P *France Télécom SA v Commission ('Wanadoo')* [2009] ECR I-2369, paras 109-111.

[45] Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439.

[46] Case T-83/91 *Tetra Pak International SA v Commission ('Tetra Pak II')* [1994] ECR II-755.

[47] Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.

[48] *Tetra Pak II* (n 46), para 137.

[49] Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission ('Magill')* [1995] ECR 743 and Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039.

[50] *IMS Health* (n 49), paras 40-47.

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

did not follow the Commission on this point. The administrative authority had in fact suggested in *Deutsche Telekom* that 'margin squeeze' abuses are prohibited irrespective of their effects.[52] In *Post Danmark*, the ECJ examined a practice of selective price cuts by the Danish incumbent in the postal sector. The peculiarity of the said price cuts is that they were targeted at the customers of a competitor. As explained by the Advocate General, some interested parties (including the Commission), were broadly of the view that the practice in question had to be subject to a rule. According to this view, targeted price cuts would be abusive unless they can be objectively justified (for instance by showing that they reflect the economies of scale resulting from the transaction in question).[53] This interpretation of Article 102 TFEU was rejected by the ECJ, which, as in the case of 'margin squeezes', endorsed a standard-based approach. *Post Danmark* is clear in stating that selective price cuts are not abusive in and of themselves. They would be prohibited, however, if they are shown to be predatory within the meaning of *AKZO* (as would be the case if they amount to pricing below average variable costs)[54] or if it is established that they have anticompetitive effects.[55]

3.2. MAKING SENSE OF THE LOGIC BEHIND THE TWO LINES OF CASE LAW

A careful reading of the case law shows that, if the explicit or implicit ideas underlying the rulings are taken into consideration, there is not necessarily a contradiction between them. The ECJ applies a rule-based approach to conduct that is presumed to serve an anticompetitive purpose, that is, it has no plausible explanation other than the desire to eliminate competition. This idea is very clearly stated in *AKZO*, where the ECJ held that pricing below average variable cost is, in principle, an irrational strategy for a firm to adopt, and thus can only be interpreted as an attempt to drive a rival out of the market.[56] The GC was equally explicit in *Tetra Pak II*, where it held that the tying practices under consideration in the case went 'beyond their ostensible purpose' and the 'recognized right of an

[52] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003] OJ L263/9, paras 176-180.
[53] Post Danmark (n 29), Opinion of AG Mengozzi, para 52: 'those interested parties ["FK, the Danish and Italian Governments, the EFTA Surveillance Authority and, to a certain extent, the Commission"] submit that, irrespective of costs, selective pricing by a dominant undertaking in relation to customers of its only genuine competitor leads, or may very likely lead, to the exclusion of the latter if such pricing is not justified on economic grounds, particularly economies of scale. That is said to be the situation in the main proceedings.'
[54] Ibid, paras 27-29.
[55] Ibid, paras 34-39. See also the discussion above.
[56] *AKZO* (n 28), para 71. According to the Court: '[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.'

undertaking in a dominant position to protect its commercial interest'.[57] They were instead deemed to be 'intended to strengthen Tetra Pak's dominant position by reinforcing its customers' economic dependence on it'.[58]

Conduct examined under a rule is understood to be anticompetitive by its very nature. In this sense, it can be compared to restrictions of competition by object within the meaning of Article 101(1) TFEU. The vocabulary used by EU courts in some cases further hints at the appropriateness of this comparison. In *Michelin II*, for instance, the GC suggested that predatory pricing within the meaning of AKZO has an anticompetitive object.[59] References to the abusive object of a unilateral practice can also be found in *AstraZeneca* (both in the GC and the ECJ rulings),[60] and *Intel*.[61] As in the case law on agreements, where a practice is deemed abusive by its very nature, it is not necessary to establish its exclusionary effects. The fact that it is presumed to serve an anticompetitive purpose is understood to mean that, by definition, it is also capable of having such effects.[62] The latter are, in other words, assumed to exist. As observed by Sibony, this position goes beyond a mere presumption, insofar as evidence of the absence of anticompetitive effects does not alter the conclusion that is inferred from the very existence of the practice.[63]

The analogy with restrictions by object seems all the more appropriate if one takes into account the way in which the abusive nature of these practices is established. As is true of agreements within the meaning of Article 101(1) TFEU, direct evidence of the intent of the parties may be relevant in the context of a case, but is not necessary.[64] Objective factors, alone, may suffice to conclude that, prima facie, a particular line of conduct serves no pro-competitive purpose. In *AKZO*, anticompetitive intent is inferred from the level of the prices charged by the firm. In *Tetra Pak II*, the GC inferred from a reading of the clauses of the agreement that tying provisions were part of a 'strategy aiming to make the customer totally dependent on Tetra Pak […], thereby excluding in particular any possibility of competition'.[65] Presumptions about the anticompetitive nature of the practices may be reversed if the firm is able to bring forward an objective justification. A

[57] *Tetra Pak II* (n 46), para 140.
[58] Ibid.
[59] *Michelin II* (n 3), paras 241-242.
[60] Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805, para 902; and Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission* [2012] nyr, para 165.
[61] *Intel* (n 7), paras 198-204.
[62] *Michelin II* (n 3), para 241 and *Intel* (n 7), para 203.
[63] Sibony (n 15) 534-535. On the difference between the two concepts, this article follows the distinction drawn in Oxford Dictionaries between an *assumption*, which can be defined as an instance in which something is supposed to be the case without proof, and a presumption, in which something is supposed to be the case on the basis of probability. See <http://www.oxforddictionaries.com/words/assume-or-presume>.
[64] Case C-549/10 P *Tomra Systems ASA and others v Commission* [2012] ECLI:EU:C:2012:221, paras 20-21. See, in the context of Article 101(1) TFEU, Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, para 21.
[65] *Tetra Pak II* (n 46), para 135.

similar principle – and sometimes an identical vocabulary – applies in relation to agreements that restrict competition by object.[66]

Where a practice is not deemed to be abusive by its very nature, it becomes necessary to establish that it has anticompetitive effects. Again, Article 101(1) TFEU case law comes to mind immediately.[67] It would seem that, in the EU courts' view, there are some practices that do not in themselves depart from competition on the merits and that are therefore only prohibited where they have a negative impact on the market, in the same way that there are some agreements that are only caught by Article 101(1) TFEU when it is established that they have restrictive effects on competition. This is not an idea that is found as such in the relevant Article 102 TFEU judgments, however. *TeliaSonera* and *Post Danmark* are nowhere as explicit as *AKZO* or *Tetra Pak II* – or as Article 101(1) TFEU case law – in this regard.

If one examines the nature of selective price cuts and 'margin squeezes', it is possible to identify some of the reasons why the ECJ may have placed an emphasis on the analysis of anticompetitive effects in the relevant rulings. Targeting a particular customer with a discounted tariff, which was the issue at stake in *Post Danmark*, may have been understood to be beyond reproach, at least as a matter of principle. Absent direct or objective evidence of anticompetitive intent, such conduct indeed appears to be a manifestation of healthy rivalry, which would only warrant action if it were possible to establish a negative impact on competition. 'Margin squeeze' abuses arise in instances where a vertically-integrated firm supplies its inputs to downstream rivals. The abuse relates in fact to the conditions under which access is supplied. Stating that a 'margin squeeze' is abusive irrespective of its effects on the competitive process comes very close to stating that dominant firms are under a general duty to give access to their facilities to their rivals, and this, on conditions that allow them to operate at a profit. Such a position would be at odds with the idea – explained above and well-enshrined in the case law – whereby even dominant firms are, as a matter of principle, entitled to deal with whom they please. Exploiting one's competitive advantages to outperform rivals thus looks prima facie like a valid expression of competition on the merits.

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[66] See in this sense *Groupement des cartes bancaires* (n 18), in which the Court held that an agreement that pursues a 'legitimate objective' may not restrict competition by object. See also Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419, where the Court refers to agreements with an 'objective justification'. For a discussion, see Giorgio Monti, 'Restraints on Selective Distribution Agreements' (2013) 36 *World Competition* 489.

[67] *Société Technique Minière* (n 17), Case 23/67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen* [1967] ECR 525. For an attempt to apply the object/effect divide in Article 102 TFEU, see Arjen Meij and Tristan Baume, 'Balancing Object and Effect Analysis in Identifying Abuses of a Dominant Position under Article 102 TFEU' in Bourgeois and Waelbroeck (n 11).

3.3. CONCLUSIONS

The following conclusions can be drawn from this section:

- Article 102 TFEU case law is not incompatible with what is sometimes known as an 'effects-based approach'. It is clear from some cases like *Post Danmark* or *TeliaSonera* that, in some instances, Article 102 TFEU may only be triggered if there is evidence of anticompetitive effects. As *AKZO* shows, there are other cases where evidence in this sense is not required.
- There are some practices that are deemed abusive by their very nature. It would seem from the case law that they are categorised as such insofar as they are presumed to be driven by anticompetitive purposes. This presumption can be rebutted if the dominant firm is in a position to put forward an objective justification. Negative effects on competition are assumed (not presumed) to result from these practices.
- The ECJ seems to require evidence of exclusionary effects where the practice under consideration is not inherently anticompetitive, that is, where it looks – at least prima facie – like an expression of competition on the merits. In and of itself, attracting a new customer by means of a targeted price cut (which was the issue at stake in *Post Danmark*) seems to be beyond reproach. Similarly, it is well-established in EU competition law that even dominant firms are entitled, as a matter of principle, to deal with whom they please. As a result, action under Article 102 TFEU is only justified where exclusionary effects can be shown to result from the conditions under which rivals are supplied.

4. THE LEGAL STATUS OF EXCLUSIVE DEALING AND REBATES

4.1. A RULE-BASED APPROACH TO EXCLUSIVE DEALING AND REBATES

In *Hoffmann-La Roche*, the ECJ held that exclusive dealing and rebates conditional upon exclusivity are abusive within the meaning of Article 102 TFEU.[68] The Court did not require evidence of anticompetitive effects to trigger the application of the provision. In this sense, they are subject to the same legal treatment as pricing below average variable costs and tying. The status of other rebates is different. Since *Michelin I*, it is clear that, where a rebate scheme is not formally conditional upon exclusivity, it is 'necessary to consider all the circumstances' to establish whether it amounts to an abuse of a dominant position.[69] This judgment and

[68] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para 89.
[69] *Michelin I* (n 2), para 73.

subsequent case law reveal that this contextual analysis essentially revolves around whether the scheme under consideration is functionally equivalent to a system of rebates explicitly conditional upon exclusivity. Put differently (and to use the expressions found in the case law), the question is whether the scheme has a 'loyalty-inducing' (or 'fidelity-building') effect.[70]

The analysis of 'all the circumstances' within the meaning of *Michelin I* must be distinguished from the analysis of anticompetitive effects as required in *Post Danmark*, *Deutsche Telekom* or *TeliaSonera*. In the latter, the 'effects-based' analysis revolves around an assessment of the ability and the incentive of rivals to operate on the relevant market – and an express reference is made in these cases to 'equally efficient' competitors. This analysis can be said to be *objective* insofar as it considers the effects of the practice on the competitive pressure coming from rivals. The sort of effects established in rebate cases is of a different nature. The assessment in such cases can be said to be *subjective*, by which it is meant that it seeks to establish the impact of the scheme on the ability and the incentive of the customers of the dominant firm to buy from firms competing with the dominant supplier.[71] The exclusion of rivals is inferred from the fact that the rebates are functionally equivalent to express exclusivity requirements. Put differently, exclusionary effects in the objective sense of the expression are *assumed* to exist because of their impact on the behaviour of individual customers.[72] Accordingly, the fact that rivals have been able to thrive during the relevant period and even increase their market share at the expense of the dominant firm's – in other words,

[70] *Michelin II* (n 3), para 66; and Case C-95/04 P, *British Airways* (n 4), paras 77 and 90.

[71] In particular, EU courts seem to place an emphasis on the impact of the rebate scheme on the incentive on the part of the firm's customers to buy the product from a competing firm. Great incentives (labelled 'pressure' in the case law) to maintain or increase the loyalty vis-à-vis the dominant supplier may come from the (i) uncertainty surrounding the rebate scheme; (ii) the relatively large impact of a modest increase in the amount supplied on the rebates received and (iii) the period over which the amounts are calculated. See in particular *Michelin I (n 2)*, para 81: 'The discount system in question was based on an annual reference period. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. In this case the variations in the rate of discount over a year as a result of one last order, even a small one, affected the dealer's margin of profit on the whole year's sales of Michelin heavy-vehicle tyres. In such circumstances, even quite slight variations might put dealers under appreciable pressure.' In *British Airways*, the Commission was of the view that the system implemented by the flagship airline was similar ('very close') to the one in *Michelin I*. See in this sense *Virgin v British Airways* (IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, paras 101 and 102. The Decision makes it clear that the determinant factor in the case, in light of *Michelin I*, is that the schemes under consideration are 'clearly related to loyalty rather than efficiencies'. See also *Michelin II* (n 3), para 240; and Case C-95/04 P, *British Airways* (n 4), paras 71-77 In paras 96-100 of the latter, the Court dismissed claims relating to the absence of exclusionary effects on grounds that it had been established that the schemes in question had a 'fidelity-building' effect. For an overview of the case law and administrative practice, see Luc Gyselen, 'Rebates – Competition on the Merits or Exclusionary Practice?' in Claus-Dieter Ehlermann, Isabela Atanasiu (eds), *European Competition Law Annual 2003 What is an Abuse of a Dominant Position?* (Hart 2006).

[72] A similar point is made in Liza Lovdahl Gormsen, 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?' (2013) 36 *World Competition* 223.

evidence showing that there is no *objective* foreclosure – has no impact on the application of Article 102 TFEU.[73]

As in the case of tying and pricing below average variable cost, at the heart of the rule-based approach to exclusive dealing and rebates conditional upon exclusivity there is a *presumption* that these practices are driven by anticompetitive intent, and thus serve no economic purpose other than the exclusion of rivals. The ECJ was very explicit on this point in *Hoffmann-La Roche*. On the one hand, it held that quantity rebates pursue a legitimate business objective insofar as they typically reflect the cost savings that result from the increase in the volume of purchases.[74] On the other, it considered that exclusivity obligations (whether direct or indirect) are 'not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market'.[75]

4.2. AN ANALYSIS OF THE ASSUMPTIONS AND PRESUMPTIONS UNDERPINNING THE CASE LAW

The case law on exclusive dealing and rebates would be unproblematic if the presumption and assumption underlying it were always, or almost always, accurate ones. Starting with the latter, one of the fundamental reasons why judgments like *Michelin II* and *British Airways* gave rise to considerable controversy had to do with the fact that rivals had not only not been excluded from the market, but had increased their market shares over the relevant period. The share of the two allegedly dominant firms had, in turn, declined.[76] The experience of these two cases suggests that loyalty-inducing rebates do not necessarily lead to the exclusion of competitors. This seems to be the consensus position in the economic literature, as reflected in the Guidance. The Commission explains in the latter that negative effects on competition are unlikely to arise where rivals of the dominant firm are able to compete for the entire demand of individual customers.[77] Along similar lines, contemporary economic research confirms that exclusive dealing and loyalty rebates can have anticompetitive effects in certain circumstances, but does not provide support for assuming exclusionary effects from the practice.[78]

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[73] *Michelin II* (n 3), paras 235-246; and Case C-95/04 P, *British Airways* (n 4), paras 96-100.

[74] Hoffmann-La Roche (n 68), para 90.

[75] Ibid. See also *Intel* (n 7), para 77.

[76] See in this sense *Michelin* (Case COMP/E-2/36.041/PO) Commission Decision 2002/405/EC [2002] OJ L143/1, paras 332-343 and *Virgin v British Airways* (n 71), para 107.

[77] Guidance (n 6), para 36.

[78] The literature on the instances in which exclusive dealing and similar practices may harm the competitive process is discussed in EAGCP (n 11) 47-50. Anticompetitive effects may arise, for instance, where customers of the dominant supplier are unable to coordinate their behaviour. See in this sense Eric B Rasmusen, J Mark Ramseyer and John S Wiley, Jr, 'Naked Exclusion' (1991) 81 *American Economic Review* 1137. Other mechanisms are discussed in Philippe Aghion and Patrick Bolton, 'Contracts as a Barrier to Entry' (1987) 77 *American Economic Review* 388 and Patrick Rey and Jean Tirole, 'A Primer on Foreclosure' in Mark Armstrong and Robert H Porter, Handbook of Industrial Organization, vol 3 (North Holland 2007). At the same time, and as reflected in the EAGCP report, the efficiency motivations behind exclusive dealing and similar practices are widely acknowledged. As a result, the

Some authors have taken the view that the assumption underlying the case law on rebates and exclusive dealing seems difficult to defend from a purely legal standpoint. In response to claims pointing to the evolution of the market, which suggested that rivals were thriving, the GC held, in *Michelin II*, that it was 'very probable' that, had it not implemented the contentious practices, the market share of the dominant firm could have declined even more during the relevant period.[79] Speculations about the counterfactual were therefore deemed sufficient to dismiss the evidence submitted by the firm. O'Donoghue and Padilla have, among others, argued that the position taken by the GC in the case amounts in practice to a *probatio diabolica*.[80] As mentioned above, however, the real issue with EU courts' case law – rightly identified by Sibony – is that, to the extent that it is based on an assumption (as opposed to a presumption), there was no room for a defence based on the absence of effects in the first place.[81]

The fact that the exclusionary effects are merely assumed to exist suggests, it is submitted, that the crucial factor underpinning the rule-based approach to exclusive dealing and rebates is the presumption of anticompetitive intent. The assessment of 'all the circumstances' in rebate cases is not, it would seem, aimed at establishing the anticompetitive impact of the practice on the competitive process but the absence of a pro-competitive justification for the scheme in question. EU courts have been nowhere as explicit about this matter as the GC in *Michelin II*, where it held that, by showing that the rebates in question were 'loyalty-inducing', the Commission had established that they had an anticompetitive object and as such comparable to pricing below average variable costs. The idea that exclusivity obligations (and related practices) are driven always, or almost always, by an anticompetitive intent seems difficult to defend.

Experience shows, and economic analysis confirms, that exclusivity obligations (whether they are imposed directly or indirectly through rebates) can be observed in effectively competitive markets, and that their underlying motivation does not necessarily have anything to do with the exclusion of rivals. These ideas were accepted as undisputed by the ECJ in *Delimitis*.[82] The market share of the supplier in that case was estimated at 6.4%.[83] The idea that, in such a

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adoption of a standard is typically favoured. In this sense, the articulation of a mechanism through which exclusionary effects are likely to be manifested is regarded as a precondition for intervention in the economic literature. See in this sense B Douglas Bernheim and Michael D Whinston, 'Exclusive Dealing' (1998) 106 *Journal of Political Economy* 64; Jean Tirole, *The Theory of Industrial Organization* (MIT Press 1988) 185-186; and Patrick Rey, 'On the Right Test for Exclusive Dealing' in Ehlermann and Marquis (n 1). See also Hans Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8 *Journal of Competition Law & Economics* 717 and David Spector, 'Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Structured Rule of Reason' (2005) 1 *Competition Policy International* 89.

[79] *Michelin II* (n 3), para 245.

[80] O'Donoghue and Padilla (n 1) 268.

[81] Sibony (n 15) 535 ('[l]'inférence que fait ici le juge n'est pas une présomption').

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

[83] *Delimitis* (n 82), Opinion of AG Van Gerven, para 22. The standard laid down in *Delimitis* had been announced in *Brasserie de Haecht* (n 65), concerning a similar factual scenario. In that case, the share of the supplier was even smaller (4.6%; see [1967] ECR 411).

context, the agreement was driven by anticompetitive intent (or that it reflected the ability of the brewer to exercise substantial market power vis-à-vis its customers) seemed implausible. An alternative explanation for the practice had to be found. The Court observed that exclusivity obligations are in the interest of the supplier (in the sense that they make it possible to plan its production and distribution in a more effective way) and the buyer (as they allow it to obtain guaranteed supplies on better, guaranteed conditions as well as assistance from the other party).[84] It concluded from the analysis of its pro-competitive motivations that an agreement providing for such requirements is not restrictive of competition by its very nature. The US Supreme Court followed – long before the Chicago School would become influential – a similar line of reasoning in *Tampa Electric*.[85]

The factual background behind some Article 102 TFEU cases discussed above is compatible with these conclusions. These cases indeed suggest that dominant firms may require exclusivity from their customers (or may impose requirements that amount in practice to exclusivity) for reasons that are difficult to reconcile with exclusionary motivations. Accordingly, the presumption of anticompetitive intent would be inappropriate irrespective of the degree of market power enjoyed by the firm. Following a careful analysis of *Michelin II*, Motta concluded that the available evidence did not strongly support the conclusion that the contested practices were driven by exclusionary purposes.[86] For instance, the current Chief Economist at the Commission noted that some rebates were given by Michelin to those customers willing to invest in the promotion of its products, which, in exchange, would receive support from the supplier in the form of training and funding. This arrangement does not seem to be fundamentally different from the beer supply agreement examined by the ECJ in *Delimitis*. Similarly, Motta noted that the alleged exclusionary intent was difficult to reconcile with the fact that Michelin sold competing tyres in its own outlets.

Several authors have already observed that it is difficult to reconcile *Delimitis* with *Hoffmann-La Roche*, insofar as the two rulings are grounded on mutually incompatible premises.[87] The soft law instruments issued by the Commission since the mid-2000s are in line with *Delimitis*. The Guidelines on vertical restraints examine at length, in line with mainstream economics, the reasons why suppliers may require exclusivity from its buyers. In addition, to the justifications identified by the ECJ in *Delimitis*, the Commission points out that such obligations may be an effective means to address free-riding at the level of suppliers.[88] It may also be

[84] *Delimitis* (n 82), paras 10-12.
[85] *Tampa Electric Co v Nashville Co*, 365 U.S. 320 (1961).
[86] Massimo Motta, 'Michelin II: The Treatment of Rebates' in Bruce Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (CUP 2009).
[87] See for instance Sibony (n 15) 284-285.
[88] Guidelines on vertical restraints [2010] OJ C130/1, para 107: 'Free-riding can also occur between suppliers, for instance where one invests in promotion at the buyer's premises, in general at the retail level, that may also attract customers for its competitors. Non-compete type restraints can help to overcome free-riding'.

necessary to ensure that the supplier has the incentives to engage in relationship-specific investments that may otherwise not be incurred.[89] It follows from this analysis that exclusive dealing is presumed not to have significant effects on competition where the market share of both parties to the agreement is below 30%.[90] The Guidance, in turn, accepts that there may be a justification for the 'burden or benefit' (to use the expression found in *Hoffmann-La Roche*) entailed by exclusive dealing.[91] In line with the experience drawn from cases like *Michelin II*, there are not, in the Commission's view, reasons to believe that the pro-competitive justifications behind exclusive dealing and functionally equivalent practices are any less plausible when implemented by a dominant firm.

4.3. Towards a Standard-Based Approach to Exclusive Dealing and Rebates

It follows from the above that exclusive dealing and rebate practices would be more logically subject to the analytical framework under which selective price cuts and 'margin squeezes' are scrutinised. To the extent that there is no reason to presume that exclusivity obligations are imposed for anticompetitive purposes, it seems inappropriate to conclude that such practices (and functionally equivalent ones) are abusive by their very nature (or by object). Accordingly, it would be necessary to show that they have an exclusionary effect in the specific market context in which they are implemented (and not merely assume that such exclusionary effect results from the fact that they restrict, or tend to restrict, the sources of supply of customers). This approach would require the ECJ to refine or qualify – for instance, in the appeal against the GC judgment in *Intel*[92] or in the pending reference in *Post Danmark II*[93] – the rule set in *Hoffmann-La Roche*.

A move in this direction would simply involve acknowledging that the experience acquired over the past three decades and the current state of mainstream economics strongly suggest that the assumption and the presumption underlying the old precedent do not accurately reflect the reality of business transactions. These two criteria – experience and economic analysis – played a

[89] Ibid: 'Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular requirement of one of its customers. The investor may not commit the necessary investments before particular supply arrangements are fixed'.
[90] Commission Regulation (EU) 330/2010 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 [2010] OJ L102/1, Articles 3 and 6.
[91] Guidance (n 6), para 34: 'In order to convince customers to accept exclusive purchasing, the dominant undertaking may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into an exclusive purchasing obligation with the dominant undertaking.'
[92] Case C-413/14 P *Intel Corp v European Commission*, pending.
[93] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, pending.

fundamental role in *Groupement des Cartes Bancaires*.[94] When determining whether the agreements under examination were restrictive by object within the meaning of Article 101(1) TFEU, the Court held, on the one hand, that it can be safely presumed – in light of experience – that cartel agreements lead, always, or almost always, to an inefficient allocation of resources.[95] As a result, it is appropriate to consider them to be restrictive of competition by object. The only plausible explanation for an agreement of this kind is indeed the suppression of competition among cartel members. Insights from recent advances in economics, on the other hand, made it possible for the ECJ to conclude that the agreement under consideration in the case was different in that it pursued a legitimate (or pro-competitive) objective.[96]

Revisiting the status of practices in light of experience and the available economic evidence is not exceptional in competition law. This is a discipline in a constant state of flux. If there is something that captures its evolution over the past decades, this is probably the fact that the understanding of business conduct has progressively become more sophisticated.[97] It is clear that many practices that were seen as inherently suspicious are now understood to be often, if not always, innocuous. The changing views about the nature of practices are eventually reflected in the law. Because of its longer history of enforcement, US antitrust provides some valuable examples in this regard. Take tying, already mentioned above. In 1949, the US Supreme Court held that such arrangements 'serve hardly any purpose beyond the suppression of competition'.[98] In other words, it assumed that they are driven by anticompetitive intent. This was the dominant view for a long time in the US.[99] When Justice Stevens issued his opinion in *Illinois Tool Works* in 2006, this idea had long fallen out of the mainstream, and the pro-competitive motivations for tying were widely acknowledged and undisputed.[100] The changing views about tying have been reflected in the progressive evolution

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[94] See also *Groupement des cartes bancaires* (n 18), Opinion of AG Wahl, para 56.

[95] *Groupement des cartes bancaires* (n 18), para 51.

[96] Ibid, para 75.

[97] 'The major change in the field', according to the late Phillip Areeda, 'has been the growing awareness that business affairs are more complex than they might seem initially, and that motivations for what initially appears to be a restraint of trade might in fact in a more subtle way promote competition'. See David Binder 'Phillip Areeda, Considered Top Authority on Antitrust Law, Dies at 65' (New York Times 27 December 1995). See also Herbert Hovenkamp, *The Antitrust Enterprise* (Harvard 2005) 31-56.

[98] *Standard Oil Co of California v United States*, 337 U.S. 293 (1949).

[99] *United States v Lowe's Inc*, 371 U.S. 38 (1962) and *Fortner Enterprises, Inc v United States Steel Corp*, 394 U.S. 495 (1969).

[100] *Illinois Tool Works Inc v Independent Ink, Inc*, 547 U.S. 28 (2006). As explained by Justice Stevens: 'The assumption that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," rejected in Fortner II, has not been endorsed in any opinion since.' Even authors who defend the status quo (which is often labelled 'quasi-per se') accept that tying can lead to efficiency gains and allow for efficiency considerations to be incorporated in the analysis. See in this sense Einer Elhauge, 'Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory' (2009) 123 *Harvard Law Review* 397 and Einer Elhauge, 'Rehabilitating Jefferson Parish: Why Ties Without a Substantial Foreclosure Share Should Not Be Per Se Legal' (2015) 80 *Antitrust Law Journal* (forthcoming), available at <http://www.ssrn.com>.

of the legal treatment of the practice.[101] There are reasons to believe that the process may well not be over.[102]

The experience acquired by courts and authorities in the past decades in relation to exclusive dealing and rebates is reflected in the different soft law instruments issued by the Commission and, more importantly, in *Delimitis*. Accordingly, rejecting a rule that is predicated on the presumption that exclusivity obligations are driven by anticompetitive intent would have the additional advantage of consistency in the interpretation of competition law provisions.[103] Consistency is deemed of sufficient importance in the EU system to deserve an explicit reference in the Treaty on the Functioning of the EU[104] and on the Protocol on the Statute of the CJEU.[105] The perpetuation of conflicting views about the logic behind a practice, which inevitably leads to incompatible analytical approaches, is not only undesirable from a legal standpoint but may well be impossible to sustain in the long run. EU courts have already been confronted with instances in which the two lines of case law were relevant for the outcome of a case. This situation was nowhere as clear as in *Van den Bergh Foods*, concerning the application of Articles 101 and 102 TFEU to a de facto exclusive dealing arrangement and related practices.[106] It is not surprising that this judgment was interpreted by commentators as a move away from *Hoffmann-La Roche*.[107] Not only did the Court seemingly accept the principle that exclusive dealing may have pro-competitive motivations,[108] but it appeared to hold that it is abusive only insofar as it leads to the foreclosure of a substantial fraction of the relevant market.[109] The

[101] Significant stepping stones are *United States Steel Corp v Fortner Enterprises, Inc*, 429 U.S. 610 (1977) and *Jefferson Parish Hospital Dist No 2 v Hyde*, 466 U.S. 2 (1984). See also *United States v Microsoft Corp*, 253 F.3d 34 (D.C. Cir. 2001).

[102] Some authors have anticipated that the US Supreme Court will overrule the quasi-per se rule currently applying to tying arrangements. See in this sense Gregory J. Werden, 'Next Steps in the Evolution of Antitrust Law: What to Expect from the Roberts Court' (2009) 5 *Journal of Competition law & Economics* 49 and Thomas A Lambert, 'The Roberts Court and the Limits of Antitrust' (2011) 52 *Boston College Law Review* 871.

[103] On consistency, see Nicolas Petit, 'The Future of the Court of Justice in EU Competition Law: New Role and Responsibilities' in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (TMC Asser Press 2013) and, for an application to a specific practice, see Nicolas Petit, 'Injunctions for FRAND-Pledged SEPS: The Quest for an Appropriate Test of Abuse under Article 102 TFEU' (2013) 9 *European Competition Journal* 677.

[104] See Article 256 TFEU.

[105] Articles 62 and 62b of the Protocol (No 3) on the Statute of the Court of Justice of the European Union [2010] OJ C83/210.

[106] Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653.

[107] O'Donoghue and Padilla (n 1) 431-432.

[108] *Van den Bergh Foods* (n 106), para 159. The GC accepted the argument of the applicant according to which 'the provision of freezer cabinets on a condition of exclusivity constitutes a standard practice on the relevant market'.

[109] In para 159, the GC, in what seems like an uncontroversial statement, held that '[b]usiness conduct which contributes to an improvement in production or distribution of goods and which has a beneficial effect on competition in a balanced market may restrict such competition where it is engaged in by an undertaking which has a dominant position on the relevant market'. In para 160, it suggested that the criterion to establish the abusive nature of the practice is the fact that the exclusivity obligations had foreclosed 'de facto […] 40% of outlets in the relevant market'.

tension between the standard set in *Delimitis* and the rule stemming from *Hoffmann-La Roche* arose again in *Intel*.[110]

The fundamental question one should be asking, against this background, is whether the reasons to stick to the analytical framework laid down in *Hoffmann-La Roche* are more compelling than the above. One can think of five broad arguments in favour of the status quo: (i) the fact that a rule is appropriate given the likelihood of anticompetitive effects; (ii) the fact that the risk of overenforcement is adequately addressed by making it possible for the dominant firm to provide an objective justification for its practices; (iii) the problems in terms of administrability and enforcement costs that a shift to a standard-based approach would entail; (iv) the possibility for the dominant firm to achieve the efficiencies sought through exclusive dealing and loyalty rebates through other means; and (v) the fact that Article 102 TFEU applies to dominant firms justifies a different treatment under that provision and under Article 101 TFEU, respectively. These arguments are examined in turn.

A rule-based approach as a proxy for anticompetitive effects

One could argue that a rule-based approach for the assessment of exclusive dealing and rebates is appropriate considering the likelihood of anticompetitive effects when these practices are implemented by a dominant firm. Because the structure of competition is already weakened in such circumstances, it may make sense to prohibit the practice absent an objective justification. One key problem with this argument is that it does not seem to reflect the logic of the existing case law. It fails to explain, in particular, why evidence of exclusionary effects is required for some practices but not for others. In this same vein, if the high probability of foreclosure were the true reason why exclusive dealing is scrutinised in accordance with a qualified rule, one would expect that it would be possible for a firm to defend itself by showing that its practices have not had (or are unlikely to have) any material impact on competition. Not only is this line of defence not available in the case law, but the Court has already implied that there is no such thing as a de minimis threshold under Article 102 TFEU.[111] More generally, and in line with what has already been discussed above, it appears that a rule would be appropriate if it were possible to predict, with a high degree of certainty, that anticompetitive effects will result from exclusive dealing and similar practices (as is true for instance of cartel agreements within the meaning of Article 101 TFEU). If there is a lesson one can draw from the enforcement of Article 102 TFEU, it is that this is not the case.

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[110] *Intel* (n 7), paras 89-92.

[111] *Hoffmann-La Roche* (n 68), para 123; *Tomra* (n 64), paras 37-44. The GC ruling in *Tomra* was, it would seem, more explicit in this regard. See Case T-155/06 *Tomra Systems ASA and Others v Commission* [2010] ECR II-4361, paras 239-246.

The availability of an objective justification

An alternative argument in support of the status quo relates to the availability of an objective justification for the practices. The relative rigidity of a rule-based approach is outweighed, the argument would go, by allowing the dominant firm to show that, on the whole, the practice is pro-competitive. What this argument fails to acknowledge is that not all potentially abusive behaviour is examined in accordance with the same principles. The approach found in *Hoffmann-La Roche* is not, as seen above, the only one followed in Article 102 TFEU case law. The Commission was not dispensed of the need to establish an anticompetitive effect in *Deutsche Telekom* simply because an objective justification is available to dominant firms. Similarly, it has been explained above that some interested parties suggested the adoption of a rule-based approach in *Post Danmark*, which would have resulted in the prohibition, absent an objective justification, of the selective price cuts at stake in the case. The fact that the ECJ rejected this approach in favour of a standard-based one suggests that there is a dimension that this argument is missing. It does not logically follow from the availability of a justification that the continuous endorsement of a rule is necessarily unproblematic. In the context of Article 101 TFEU, for instance, it would not be possible to argue credibly that, simply because Article 101(3) TFEU is available, it is irrelevant whether an agreement is deemed to restrict competition by object or by effect.

The administrability and costs of a standard-based approach

The shift towards a standard-based approach is sometimes seen with concern insofar as it would make the application of the law more difficult. Establishing the anticompetitive effects of a practice in the market context in which it is implemented is seen, from this perspective, as costly – in that it is resource-consuming – and less predictable. A rule, on the other hand, would have the advantage of clarity and administrability. This view seems to assume that the analysis in concreto of the exclusionary effects of a practice on competition necessarily involves a full-blown assessment in light of circumstances of the case. In doing so, it ignores that standards in competition law are typically structured around a set of bright lines that provide a proxy for the likely anticompetitive effects of a practice. Economists with a good grasp of the nature and demands of legal enforcement express a preference for what is generally known as a 'structured rule of reason'.[112] In the case of exclusive dealing, for instance, the share of the market that is foreclosed to rivals provides a valuable starting point to identify practices with a credible foreclosure potential. A bright line could be set, for

[112] See for instance Spector (n 78) and 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 2008).

instance, at 30% or 40% of the market.[113] This first step could be complemented with other factors, including the length of the exclusivity obligations, the barriers to entry or the features of the industry.[114]

An additional source of confusion in relation to the shift towards standards has to do with the fact that it is sometimes assumed that the assessment of the anticompetitive effects of rebates schemes should necessarily be based on costs. It is true that different cost-based standards have been proposed in the past years. At least to some extent, a cost-based approach amounts, in essence, to establishing the abusive nature of rebate schemes in accordance with the criteria followed to assess predatory pricing claims.[115] A test based on these principles is not without advantages. It would after all be based on a well-established standard and is compatible with the idea that above-cost price competition is legitimate. At the same time, it may not capture some of the competition concerns to which exclusive dealing and rebates give rise. As has been noted by some authors, the reason why the latter practices are potentially problematic relates not so much to the level of the price but to the foreclosure of outlets. As a result, even above-cost rebates could have foreclosure effects justifying intervention.[116] This argument is not without merit. It is not, however, one against the use of a standard for the assessment of the effects of rebates. It simply provides a convincing case for structuring the standard in a way that resembles more the analysis of exclusive dealing, as opposed to predatory pricing.

Turning now to the relatively higher costs of applying a standard, it seems clear that the issue is considerably more complex than suggested by some authors. If the ease of administration were the only relevant cost – or the only relevant criterion – EU competition law would revolve around rules much more than it currently does. A look at the long-run evolution of the discipline shows that the observed trend contradicts this view. In fact, the field progressively moves towards standards, and the range of practices assessed by means of a rule tends to decrease.[117] Mergers have always been subject to a standard, as are the vast majority of vertical restraints since the 1990s. The cost of overenforcement is one of the key reasons behind the rise of standards. The fact that a rule is easy to

[113] This is the approach followed in the US. For a discussion of the relevant case law, see Hovenkamp (n 13) 484-488; and Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart 2011) 521-550.

[114] For an overview of these issues and its application to a specific factual scenario, see *United States v Dentsply International Inc*, 399 F.3d 181 (3d Cir. 2005).

[115] See for instance Daniel A Crane, 'Bargaining over Loyalty' (2013) 92 *Texas Law Review* 253 ('loyalty discounts belong squarely within antitrust's hospitability tradition for unilateral, non-predatory price discounts even those that cause discomfiture to competitors'). See also Brief for Eighteen Scholars as Amici Curiae in Support of Petitioner, Eaton Corp. v. ZF Meritor LLC, No 12-1045, (U.S. Mar. 28, 2013), 2013 WL 1309073.

[116] This is the position of the US Court of Appeals for the Third Circuit in *ZF Meritor, LLC v. Eaton Corp*, 696 F.3d 254 (3d Cir. 2012). See also Joshua D Wright, 'Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts' (Bates White 10th Annual Antitrust Conference, Washington, DC, 3 June 2013), available at <http://www.ftc.gov>.

[117] See in this sense Crane (n 43).

administer does not mean that its application is necessarily costless. An administrative authority like the Commission can only investigate a handful of potentially abusive practices at any given point in time. If a rule-based approach applies to practices that do not always, or almost always, have a negative impact on competition, the limited resources of the authority may be devoted to conduct that proves entirely harmless to the competitive process. This, as seen above, is one of the main reasons why *Michelin II* and *British Airways* proved so controversial.

The availability of alternative practices to achieve the efficiencies sought

It is sometimes argued that the prohibition, as a matter of principle, of efficiency-enhancing practices is unproblematic if the same efficiencies can be achieved through other means. Since the potential efficiencies that can be achieved through exclusive dealing or rebates conditional upon exclusivity can also be achieved using quantity rebates, there would be no reason to question a rule-based approach to the former.[118] This understanding of EU competition law is not unproblematic. The point of the discipline is to protect the competitive process, not to shape markets in accordance with the preferences of a public official (or a scholar, or a competitor). In fact, EU competition law is – and has been since its inception – inimical to central planning. If a particular practice is compatible with the competitive process – in the sense that it does not hinder the ability and incentive of rivals to thrive in the marketplace – there seems to be no valid reason why it should be prohibited. Competition law leaves choices about commercial strategies and business methods to firms. Put differently, competition law only comes into play to remedy the actual or potential consequences of the choices made by firms. It does not dictate a particular business strategy, but may react if it such a strategy has an anticompetitive object and/or effect. For instance, it is for the firms, not for an administrative authority, to decide the most convenient way to distribute their products. So long as the competitive process is not negatively affected, firms may experiment with methods such as selective distribution,[119] franchising,[120] or may decide to vertically-integrate instead.[121] A firm may even discover, in its attempt to reach consumers, a new form of distribution not falling neatly into existing categories. Excluding one of these methods (say, franchising) merely on grounds that the same efficiencies can be achieved by an alternative method (say, selective distribution) seems indefensible as incompatible with the nature and role of EU competition law.

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[118] Wils (n 8), 426.

[119] Under some conditions, selective distribution systems fall outside the scope of Article 101(1) TFEU altogether. See Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.

[120] The same is true of franchising arrangements. See Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

[121] Vertical integration is understood to be generally pro-competitive. See in this sense the Non-Horizontal Merger Guidelines (n 27).

Article 102 TFEU as a provision applying specifically to dominant firms

One may claim, finally, that criticism directed at the inconsistent approach followed by the ECJ in *Delimitis* and *Hoffmann-La Roche* fails to acknowledge that an explicit choice has been made in the Treaty to treat dominant firms differently.[122] It is clear and undisputed, after all, that firms subject to Article 102 TFEU have a 'special responsibility' not to 'impair genuine undistorted competition',[123] by which it is meant that conduct that is open to non-dominant firms may be prohibited to them.[124] This line of criticism is problematic, first, in that it seems to assume that Article 102 TFEU mandates a rule-based approach. It is clear beyond doubt, as explained at length above, that this is not the case. If 'margin squeezes' and selective price cuts within the meaning of *Post Danmark* are subject to a standard, it is not obvious to see why applying the same approach to exclusive dealing and similar practices would be incompatible with the 'special responsibility' of dominant firms and their status under the Treaty. In fact, the observed inconsistency between Article 101 TFEU and Article 102 TFEU case law does not relate to the outcomes of intervention, but to the premises on which the formulation of rules and standards is based.

Secondly, this view fails to acknowledge that, even under a standard-based approach to exclusive dealing and similar practices, dominant firms would be subject to tighter scrutiny than their non-dominant counterparts. *Delimitis* sets out a two-step standard that seeks to ascertain, first, whether the effects of parallel networks of exclusive dealing agreements lead to market foreclosure[125] and, if so, whether the agreements under consideration contribute significantly to such anticompetitive effects.[126] The presumption underlying the ruling is that exclusive dealing does not in itself lead to market foreclosure when implemented by a non-dominant firm. As a consequence, an analysis of other factors, and in particular the cumulative impact of similar agreements, is deemed necessary for Article 101(1) TFEU to apply. To the extent that the agreements concluded by a dominant supplier may in themselves foreclose competition, the assessment of exclusive dealing and similar practices would by definition be different under Article 102 TFEU.

5. CONCLUSIONS

The case law on exclusive dealing and rebates is based on the presumption that these practices serve an anticompetitive purpose. Anticompetitive effects are, in

[122] Wils (n 8), 425.
[123] *Michelin I*, para 57.
[124] For an analysis of the concept, see Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Eherlmann and Marquis (n 1).
[125] *Delimitis* (n 82), para 19.
[126] Ibid, para 24.

turn, assumed to be the necessary consequence of their implementation (and this on account of their impact on rivals and on customers' decisions). The experience acquired since *Hoffmann-La Roche* was delivered in 1979 reveals, in line with contemporary economic research, that these premises do not reflect the reality of market dynamics and interactions. *Delimitis* shows that exclusive dealing is observed in effectively competitive markets where the exclusion of rivals is an implausible prospect. As the ECJ explained in the same ruling, and the GC conceded in Article 102 TFEU cases like *Van den Bergh Food* and *British Plasterboard*,[127] there are valid pro-competitive justifications for such practices, even when implemented by dominant firms. The aftermath of *Michelin II* and *British Airways* shows, in turn, that the exclusionary effect of exclusive dealing and rebates schemes cannot be merely assumed from the fact that they are 'loyalty-inducing' or 'fidelity-building'. This is the background against which the perennial controversy around Article 102 TFEU must be understood.

That a line of case law appears to be difficult to defend in light of the knowledge acquired over the years is not exceptional and should not be surprising. Due to the nature of the discipline, tension is inevitably bound to arise between, on the one hand, the improved understanding of business practices, and, on the other, the need to preserve the stability and predictability of the law. A rule may seem appropriate, given the available knowledge, at a given point in time. It may become clear at a subsequent stage that a standard-based approach more accurately captures the nature and the likely effects of the practice in question. This fact does not mean, however, that legal change is easy, even in the absence of a formal doctrine of stare decisis. By the same token, the fact that courts stick to a particular line of case law cannot in any way be interpreted as meaning that judges are not familiar with contemporary debates. If there is something that stems from the analysis above, it is that EU courts have a very solid grasp of mainstream economics and have regularly displayed remarkable intuition about the logic behind corporate strategies. Adherence to a well-established precedent simply reveals that there are typically other factors at play when the convenience of overruling it is considered. The question is as a result far more complex in practice.

This article has identified some consequences of adhering to a rule-based approach to exclusive dealing and rebate schemes under Article 102 TFEU. The fact that a rule is not fit for practices for which there are convincing pro-competitive motivations and that do not always, or almost always, have exclusionary effects has often been emphasised in the literature. With some exceptions,[128] consistency-related questions are not attached the same relevance. Following the precedent, in this context, involves relying upon mutually

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[127] Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission ('British Plasterboard')* [1993] ECR II-389, paras 66-67.
[128] Petit (n 103).

contradictory premises about the nature and effects of exclusive dealing under, respectively, Articles 101 and 102 TFEU. Again, this is a situation that is far from exceptional. Judges, regardless of the discipline, are routinely asked to rule in instances in which previous judgments sit at odds with each other. Refining doctrines and addressing contradictions between individual cases are essential tasks fulfilled by courts. Much could be gained – more, it is submitted, than what would be gained by sticking to precedent – if the two lines of case law (*Delimitis* and *Hoffmann-La Roche*) converged into the approach (standard-based) that is now known to be more appropriate and that has decidedly been endorsed by the ECJ in *TeliaSonera* and *Post Danmark*.