Pablo Ibáñez Colomo

Appreciability and de minimis in Article 102 TFEU

Article (Accepted version)
(Refereed)

Original citation: Ibáñez Colomo, Pablo (2016) *Appreciability and de minimis in Article 102 TFEU*. Journal of European Competition Law and Practice . ISSN 2041-7764
DOI: 10.1093/jeclap/lpw072

Appreciability and *de minimis* in Article 102 TFEU

Forthcoming in (2016) 7 *Journal of European Competition Law & Practice*

Pablo Ibáñez Colomo*

Key points

- In *Post Danmark II*, the Court held that, in the context of Article 102 TFEU, it is not necessary to show that an anticompetitive effect is of a 'serious' or 'appreciable' nature to apply that provision.
- In this context, the notion of 'appreciability' must be distinguished from that of 'likelihood', which refers to the probability of the anticompetitive effects of the practice.
- The notion must also be distinguished from that of effects as, contrary to what has sometimes been suggested, ruling out the need to show the appreciability of an anticompetitive effect does not say anything about what an effect is.

* Department of Law, London School of Economics and Political Science. E-mail: P.Ibanez-Colomo@lse.ac.uk.

1. Introduction

In *Post Danmark II*, the Court of Justice (hereinafter, the 'Court') held that it is not justified to set a *de minimis* threshold for practices falling under the scope of Article 102 TFEU.[1] Once an anticompetitive effect is shown to exist, it is not necessary to establish, in addition, that it is of a 'serious' or an 'appreciable' nature. This position is justified, according to the Court, given that competition is already weakened by the very presence of the dominant firm.[2] It seems difficult to dispute this aspect of the ruling, which is in line with the relevant precedents, in particular *Hoffmann-La Roche*.[3] The *de minimis* doctrine dates back to *Völk*, where the Court held that agreements having 'insignificant effects on the markets' fall outside of Article 101(1) TFEU.[4] Considering that *Völk* refers explicitly to the 'weak position [of] the persons concerned' as an indicator of the (in)appreciable impact of the agreement on competition, it is only reasonable to conclude that the *de minimis* doctrine has no meaningful role to play in the context of Article 102 TFEU.

The purpose of this piece is not to challenge the position taken by the Court in *Post Danmark II*, which seems sound and uncontroversial. The idea is instead to clarify the meaning of the concepts of appreciability and *de minimis*, which are prone to misunderstandings. The fact that the Court found it unjustified to set a *de minimis* threshold in the context of Article 102 TFEU does not mean that it is not necessary to show an anticompetitive effect, or that any impact on the market structure is sufficient to establish an abuse of a dominant position. There is a risk that the issue of appreciability is conflated with other related questions. Contrary to what has been suggested by some commentators, the question of whether the *de minimis* doctrine is applicable in the context of Article 102 TFEU is different from the issue of effects itself. The former refers to the significance of

[1] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651 ('*Post Danmark II*'), para 73.
[2] Ibid, para 72.
[3] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 123.
[4] Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke*, EU:C:1969:35, paras 5-7.

restrictive effects, but does not define what these effects are, or should be. Similarly, there is a risk of that appreciability and likelihood are mixed up. *Post Danmark II* is clear in stating that, while appreciability need not be established, it is still necessary to show that the practice had, or is likely to have, an effect on competition. The coverage of the conduct and whether the dominant firm is an unavoidable trading partners are factors that need to be considered in this regard.[5]

It is submitted that the most reasonable interpretation of the issue of *de minimis* and appreciability in the context of Article 102 TFEU is one that is compatible with the analysis of the question under Article 101 TFEU. It would be illogical if these concepts had a different meaning depending on the provision at stake. Several issues become clear when one examines how the *de minimis* doctrine is interpreted and applied under Article 101 TFEU. First of all, agreements that restrict competition by object are deemed to have appreciable effects on competition where they affect trade between Member States. As a result, the *de minimis* doctrine has no practical role to play in relation to conduct that is deemed anticompetitive by its very nature. Secondly, a practice does not necessarily have restrictive effects simply because the firms involved in it have a significant degree of market power. Even when market power is found to exist, a restriction of competition will have to be established, on a case-by-case basis, in light of the nature of the product, the features of the relevant market and the coverage of the practices. These were the factors identified by the Court both in *Delimitis* (an Article 101 TFEU case) and *Post Danmark II* (an Article 102 TFEU case).

The remainder of this paper is structured as follows. First of all, it explains why the issue of appreciability need not be confused with the question of whether it is necessary to establish an anticompetitive effect in the first place. This distinction is important in the context of both Articles 101 and 102 TFEU. Secondly, it distinguishes between appreciability and likelihood. It shows why a practice implemented by a dominant firm may fall outside the scope of Article 102 TFEU where it is

[5] *Post Danmark II (n 1)*, para 67: '[…] only dominant undertakings whose conduct is likely to have an anti-competitive effect on the market fall within the scope of Article [102 TFEU]'; para 40; and para 46: '[…] the fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect'.

unlikely to have an anticompetitive effect. The fact that is not necessary to establish the appreciability of such an effect is not a relevant factor in this regard. Again, this question is explained by identifying the issues that are common to abusive practices and restrictive agreements. Finally, the paper seeks to distinguish between the assessment of appreciability and the issue of effects as such.

2. Appreciability and the need to establish anticompetitive effects

It may not be easy to distinguish between the issue of appreciability, on the one hand, and the need to establish the anticompetitive effects of potentially abusive behaviour, on the other. Because the Court held that it is not necessary to show that the exclusionary effects of potentially abusive conduct are appreciable, one could argue that it is not really necessary to establish these effects in practice and on a case-by-case basis. According to this interpretation of the case law, the mere fact that the conduct is capable of having an exclusionary impact would be sufficient to trigger the application of Article 102 TFEU. An analysis of the case law suggests that this conclusion is only appropriate for practices that are abusive by their very nature (or 'by object'). Where evidence of an anticompetitive effect is a prerequisite to trigger the prohibition, a case-by-case assessment of the effects of the practice is necessary.

2.1. *Appreciability in 'by object' practices*

Where a practice is found to restrict competition 'by object', its impact is deemed appreciable if the other conditions that are necessary to trigger the prohibition are fulfilled. This is true under both Articles 101 and 102 TFEU. Thus, if a 'by object' agreement between two undertakings is found to have an effect on trade between Member States, it is caught by Article 101(1) TFEU without it being necessary to show that it has an appreciable impact on competition.[6] According to the case law, it is sufficient that it is 'capable' of having restrictive effects.[7] The question of whether the 'capability' threshold is met can be inferred from an analysis of the nature of the agreement and of the economic and legal context of which it is part.[8] Insofar as 'object' and 'effect' are alternative conditions in the context of Article 101(1) TFEU, it seems only logical to rule out the need to establish the significance of the effects when a practice is deemed restrictive by its very nature.[9] The fact that the agreement is capable of affecting trade between Member States would be sufficient to show that its impact is appreciable enough to trigger intervention under EU competition law.

There are also some practices that are abusive by their very nature under Article 102 TFEU. This category comprises conduct such as exclusive dealing,[10] loyalty rebates[11] and tying.[12] As is true of agreements that restrict competition by object, these practices are prohibited without it being necessary to show that they have a restrictive effect on competition. By the same token, a dominant firm cannot avoid the application of Article 102 TFEU by claiming that the practice only had (or is only likely to have) insignificant effects on competition. This line of argument has been unambiguously rejected by the EU courts. In *Michelin II*, the General Court (hereinafter, the 'GC') relied explicitly on the concepts of object and effect and held that once the former is established, it is not necessary to evaluate the latter. According to the GC, conduct that has an anticompetitive object

---

[6] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795.
[7] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para 31.
[8] For two recent examples, see Case C-286/13 P *Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184 ('*Bananas*'); and Case C-373/14 P *Toshiba Corporation v European Commission*, EU:C:2016:26. On the other hand, it is always possible for the parties to put forward evidence showing why the agreement is not capable of restricting competition in the economic and legal context of which it is part. See in this sense Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, EU:C:2011:631 ('*Murphy*'), para 143.
[9] For an explanation of this question, see the Opinion of AG Kokott in Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, ECLI:EU:C:2012:544.
[10] *Hoffmann-La Roche (n 3)*, paras 89-90.
[11] Ibid.
[12] Case T-30/89 *Hilti AG v Commission*, EU:T:1991:70 ; and Case T-83/91 *Tetra Pak International SA v Commission*, EU:T:1994:246.

is also capable of having such effects.[13] Similarly, the Court rejected in *Tomra* arguments relating to the ability of rivals to remain on the market.[14]

The practical consequence of the position of the Court in *Tomra* is that exclusive dealing obligations, or a system of loyalty rebates, would be prohibited even when they are very unlikely to have exclusionary effects. Suffice it to mention an extreme example in this sense. When implemented by a dominant firm, the abovementioned practices are prima facie abusive even when they cover just 1% of the market. This outcome has been criticised by some authors.[15] However, it is consistent with the position of the Court in the context of Article 101(1) TFEU. There are examples in the case law that show that an agreement that restricts competition 'by object' is prohibited even when there are reasons to believe that it is unlikely to have restrictive effects on competition. A recent example is *Bananas*, where the Court confirmed a Commission decision finding that an exchange of information capable of removing uncertainty about rivals' behaviour is caught by Article 101(1) TFEU by its very nature. This is so even when the employees involved in the practice are not responsible for setting quotation prices and even when the information is far removed from actual prices.[16] More generally, 'by object' conduct is prohibited even when it is not implemented.[17]

2.2. *Appreciability in 'by effect' practices*

Where an agreement is not restrictive of competition by object, it is necessary to establish that it has restrictive effects within the meaning of Article 101(1) TFEU. It is in this context that the issue of

[13] Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission*, EU:T:2003:250 ('*Michelin II*'), para 241.
[14] Case C-549/10 P *Tomra Systems ASA and Others v European Commission*, EU:C:2012:221, para 42.
[15] See in particular Richard Whish, 'Intel v Commission: Keep Calm and Carry on!' (2015) 6 Journal of European Competition Law & Practice 1.
[16] See *Bananas* (n 8), paras 111-135.
[17] For an overview of the case law, see Vivien Rose and David Bailey (eds), *Bellamy and Child: European Union Law of Competition* (7th edn, Oxford University Press 2013), para 2.115.

appreciability becomes a relevant one. If the agreement has only an insignificant impact on competition, it is not caught by the prohibition. The case law suggests that the analysis of the appreciable effects of an agreement comprises two distinct dimensions: a first dimension relating to the position of the parties on the relevant market and a second one relating to the actual or likely impact of the practice on competition. These two dimensions are nowhere as clearly defined as in *Delimitis*. The Court ruled in that case that the compatibility of an exclusive dealing agreement with Article 101(1) TFEU must consider, first, whether access to the market is foreclosed to a new entrant (that is, the impact of the practice on competition), and, second, whether the supplier in question makes an *appreciable* contribution to market foreclosure (that is, whether it enjoys significant market power).[18]

The first dimension, which is the one to which the Court referred in *Völk*, is useful to identify those agreements that are unlikely to have appreciable restrictive effects on competition. In this sense, it is negative in nature. In other words, it makes it possible to define what an appreciable restriction is not (as opposed to what it is). The Commission has developed a set of presumptions in order to provide clarity about its enforcement priorities in relation to agreements of minor importance.[19] The instruments issued by the Commission rely upon the market share of the parties as a proxy for their degree of market power and thus for the likely impact of the practice on competition. For instance, an agreement between non-competitors is presumed to fall outside the scope of Article 101(1) TFEU where the joint market share of the parties is below 10%.[20] The Commission has defined higher, more specific, thresholds for various categories of potentially restrictive conduct. The current approach to block exemptions is based on the idea that, where the market share of the parties falls below the threshold defined in the Regulation, an agreement that is

---

[18] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, EU:C:1991:91, paras 19-26.
[19] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] 2014 C291/1.
[20] Ibid, para 8.

not restrictive by object is unlikely to have appreciable effects on competition.[21] The presumption on which this first dimension is based can be reversed in certain instances. The Commission refers in its soft law instruments to situations in which the cumulative effects of several practices lead to market foreclosure.[22]

The second dimension of the analysis comes into play when the market share thresholds are exceeded. According to the case law, an agreement may fall outside the scope of Article 101(1) TFEU even when the market share of the parties is above the threshold defined by the Commission in its *De minimis* Notice or in the guidelines and regulations.[23] As the example of *Delimitis* shows, the assessment of this second dimension requires an evaluation of the practice, the nature of the product, the features of the relevant market and the position of the parties and its rivals therein. In *Gøttrup-Klim*, for instance, the Court noted that a joint purchasing agreement may not appreciably restrict competition where the parties are relatively small, face strong suppliers and rivals and the prices of the products vary with the volume of orders.[24] Similarly, in *Maxima Latvija*, which concerned – in essence – a non-compete obligation, the Court held that it is necessary to consider whether there are 'real concrete possibilities' for a competing operator to enter or to remain on the market in light of the economic and legal context as well as the duration of the contractual obligations.[25]

Against this background, it seems easy to make sense of Article 102 TFEU case law. In the same way that some agreements are not restrictive by object, some potentially abusive practices are not prima facie prohibited by their very nature. This category comprises, for instance, the standardised rebate scheme examined by the Court in *Post Danmark II* and the 'margin squeeze' at

[21] See in particular Guidelines on vertical restraints [2010] OJ C130/1, paras 96-99.
[22] De Minimis Notice (n 19), para 10; and Guidelines on vertical restraints (n 21), paras 74-85.
[23] See Expedia (n 6), para 22; which refers to Joined Cases C-215/96 and C-216/96 *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. and Cassa di Risparmio di Genova e Imperia SpA*, EU:C:1999:12, para 35.
[24] Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413, paras 31-32.
[25] Case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome*, EU:C:2015:784, para 27.

stake in *Deutsche Telekom* and *TeliaSonera*.[26] Because 'by effect' practices are only prohibited insofar as they have an exclusionary impact, the issue of appreciability is potentially relevant in such cases. In *Post Danmark II*, however, the Court ruled that it is unjustified to set a *de minimis* threshold in Article 102 TFEU cases, or to show that the effects are serious or appreciable. This reference in the judgment is best understood as referring to the first dimension of the analysis (that is, the market position of the dominant firm), which should not be conflated with the second.

Seen from this perspective, the conclusion drawn by the Court in *Post Danmark II* appears to be sound. Where an undertaking enjoys a dominant position, the conditions of competition on the relevant market are already weakened. In such circumstances (in which the market share of the firm will at least exceed 40% and, typically, 50%), it cannot be presumed that the practices implemented by the firm are unlikely to have restrictive effects on competition. As a result, a case-by-case assessment of the second dimension (that is, an evaluation of the economic and legal context of the behaviour, and of the position of suppliers and rivals) becomes necessary. The need to consider the exclusionary effects on a case-by-case basis was in fact emphasised in *Post Danmark II*. The Court referred, inter alia, to the regulatory framework, the status and position of the dominant firm and the coverage of the practice. This is also true of prior case law. In *Deutsche Telekom*, for instance, it noted that access to the incumbent's infrastructure was indispensable to compete on the relevant downstream market and that the practice was likely to have exclusionary effects as a result.[27]

Post Danmark II reflects the approach taken by the Commission in the context of Article 101(1) TFEU, and is compatible with it. Suffice it to mention an example to illustrate this idea. It is explained in the Guidelines on vertical restraints that a distribution agreement does not necessarily have restrictive effects on competition simply because the market share of the seller and the buyer exceeds the 30% threshold set in the Regulation.[28] This agreement would be above the level below

[26] Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603, paras 250-251; and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para 64.
[27] *Deutsche Telekom* (n 26), para 255.
[28] See Article 3 of Commission Regulation (EU) No 330/2010

which restrictive effects are presumed not to exist. However, it may fall outside the scope of Article 101(1) TFEU altogether. This would be the case where a case-by-case analysis (that is, an analysis of the second dimension referred to above) reveals that it is unlikely to have a negative impact on competition. Conversely, if the agreement involving two firms with such a degree of market power is found to have restrictive effects on competition, these effects will be appreciable.

3. Appreciability and likelihood

According to well-established case law, intervention under Articles 101 and 102 TFEU can take place before anticompetitive effects are materialised. From a temporal standpoint, it is sufficient to show that the restrictive impact of the practice is potential.[29] This aspect of the case law seems uncontroversial. There would be little point in having an EU competition law system if it were necessary to wait until the exclusion of rivals for intervention to take place.[30] One should note, on the other hand, that prospective intervention raises a number of substantive issues. In particular, it makes it necessary to define the standard of effects that triggers intervention. Depending on the level that is set in this regard, the scope of the prohibition will be narrower or broader. There is indeed a significant difference between claiming that a potential anticompetitive effect is plausible and arguing that it is likely to materialise.

As the case law stands, a standard of likelihood or of plausibility applies depending on the nature of the practice. The definition of the relevant threshold is further complicated by the fact that it is an issue that may be conflated with that of appreciability. There is a tendency by commentators

of 20 April 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; and, in particular, Guidelines on vertical restraints (n 21), para 96: '[…] there is no presumption that agreements falling outside the scope of the block exemption because the market share threshold is exceeded fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3)'.

[29] See *Post Danmark II (n 1)*, para 66; which refers in turn to *TeliaSonera* (n 26), para 64. In relation to Article 101 TFEU, see Case C-7-95 P *John Deere Ltd v Commission*, EU:C:1998:256, para 77.

[30] Case T-201/04 *Microsoft v Commission*, EU:T:2007:289, para 561; and Case T-219/99, *British Airways plc v Commission*, EU:T:2003:343, para 297.

to assume that it is not necessary to evaluate the likelihood of an anticompetitive effect because the Court ruled in *Post Danmark II* that it is not necessary to establish its serious or appreciable nature. As will be argued in greater detail below, these are separate questions. It is not because the *de minimis* doctrine is of no practical relevance in the context of Article 102 TFEU that it is not necessary to carry out an analysis of the likely effects of the practice. This is an issue that transpires from the case law, and which *Post Danmark II* contributed to clarify by making it explicit.

3.1. *Standards of effects: capability and likelihood*

As already pointed out above, the fact that a practice is capable of having restrictive effects on competition does not necessarily mean that it is likely to do so. A reading of the case law suggests that a practice meets the 'capability' standard where it is deemed plausible, in light of the economic and legal context of which it is part, that it will have a negative impact on competition. For instance, the Court has conceded that it is plausible that a set of exclusive dealing obligations has restrictive effects on competition.[31] Similarly, it is plausible that a policy of below-cost pricing by a dominant firm – or a 'margin squeeze' – leads to the exclusion of equally efficient rivals.[32] As far as agreements are concerned, it is plausible that an exchange of information between rivals concerning one or more parameters of competition allow them to coordinate their behaviour.[33] It has already been pointed out that the most common categories of conduct are known to be capable of having restrictive effects. As a result, they can be safely assumed to meet this standard, unless there are factors pertaining to the economic and legal context of the practice that lead to the opposite conclusion.

The standard of likelihood is higher. As explained by Advocate General Kokott in *Post Danmark II*, this threshold is met where it can be shown that the practice is 'more likely than not' to

[31] *Hoffmann-La Roche (n 3)*, para 90; and *Maxima Latvija* (n 25), para 22.
[32] Case C-62/86 *AKZO Chemie BV v Commission*, EU:C:1991:286, para 72; and *Deutsche Telekom* (n 26), para 183.
[33] *T-Mobile* (n 7), para 41; and *Bananas* (n 8), para 122.

have a negative impact on competition.[34] In other words, it is necessary to establish that the probability of an anticompetitive effect is above 50%. As a result, it seems indispensable to engage in a case-by-case assessment of the restrictive impact of the practice. As a logical corollary, it is also necessary to establish a causal link between the contentious behaviour and the effects alleged.[35] The factors that need to be taken into consideration when assessing the impact of the practice on competition have already been mentioned. They include, inter alia, the coverage of the practice and the ease with which rivals are able to enter and remain on the market. Thus, if the practice does not prevent rivals from doing so, it is unlikely to have restrictive effects.

The difference between capability and likelihood is perhaps best illustrated by reference to two concrete examples. It is plausible, for instance, that an exclusive dealing agreement that covers just 1% of the market has restrictive effects on competition if it is implemented by a dominant firm. Such effects, however, are improbable. A practice with such limited coverage cannot be expected to prevent rivals from thriving and competing on the merits. As a result, it would not meet the threshold of likelihood. Similarly, it has also been mentioned that a below-cost pricing campaign by a dominant is capable of having exclusionary effects. Such an outcome, in other words, is plausible. However, it is not always a likely one, as the case law and administrative practice shows. As explained by the Commission in its Guidance on exclusionary abuses, the likelihood of an anticompetitive effect depends, inter alia, on the position of the firm implementing the below-cost pricing campaign and on the features of the relevant market.[36] It has long been understood that predation is only likely to lead to the permanent exclusion of rivals when some relatively strict conditions are met.[37] The case law provides concrete evidence in this sense. In *Post Danmark I*, for instance, the Court noted that the main rival of the dominant firm had been able to endure the below-

[34] Opinion of AG Kokott in Case C-23/14 *Post Danmark A/S v Konkurrencerådet,* EU:C:2015:343 (‘*Post Danmark II*’), para 82.
[35] *Post Danmark II (n 1)*, para 47.
[36] 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, paras 67-73.
[37] EAGCP, ‘An economic approach to Article 82’ (July 2005), available at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf, pp. 50-53.

cost pricing campaign, to keep its network and even to gain back the customers it had initially lost as a result of the strategy.[38] More generally, the Court suggested that, where the prices charged by the dominant firm are below average total costs but above average variable costs, it is unlikely that equally efficient rivals will be driven out of the market.[39]

The difference between capability and likelihood is an important one in practice. As explained above, where a practice is restrictive of competition by object (whether under Article 101 or 102 TFEU), it is sufficient that it is 'capable' of having a negative impact on competition. The stricter standard – likelihood – applies where it is necessary to show, on a case-by-case basis, the restrictive effects of a practice (the standard applies, in other words, to 'by effect' conduct). The Court, in line with the position of the Advocate General, endorsed a threshold of likelihood in *Post Danmark II*. This judgment is valuable in that the national court expressly asked for clarification about the relevant standard of effects. In any event, it was possible to infer from prior case law on 'by effect' practices that the relevant threshold is one of likelihood, in particular from *Post Danmark I*[40] and *TeliaSonera*.[41]

3.2. *The tendency to conflate appreciability and likelihood*

In the aftermath of *Post Danmark II* and the *Intel* judgment of the GC, there has been a tendency to conflate the issue of appreciability with the need to establish the likelihood of an anticompetitive effect. Whish, for instance, has regretted the fact that the EU courts refuse to set a *de minimis*

---

[38] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172 ('*Post Danmark I*'), para 39: '[...] it is worth noting that it appears from the documents before the Court that Forbruger-Kontakt managed to maintain its distribution network despite losing the volume of mail related to the three customers involved and managed, in 2007, to win back the Coop group's custom and, since then, that of the Spar group'.

[39] Ibid, para 38: 'to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term'.

[40] Ibid, para 44, which refers to a pricing policy that 'produces an actual or likely exclusionary effect'.

[41] *TeliaSonera* (n 26), para 67: '[…] it is for the referring court to examine whether the effect of TeliaSonera's pricing practice was likely to hinder the ability of competitors at least as efficient as itself to trade on the retail market'.

threshold for some categories of potentially abusive conduct.[42] It would seem that this line of criticism does not really refer to the issue of appreciability. What Whish calls an 'abuse of minor importance' seems to be a practice that is unlikely to have restrictive effects on competition. Coming back to the example used above, it would be an instance in which the coverage of the practice would limited to 1% of the market. The question of whether this 'abuse of minor importance' is prohibited depends on the applicable standard.

If the standard of likelihood applies to the behaviour, Article 102 TFEU would not come into play in such a case. Contrary to what this author suggests, the very limited coverage of the practice would rule out a finding of abuse. For instance, a standardised rebate scheme such as the one examined in *Post Danmark II* would fail to meet the threshold of likelihood (and would thus fall outside the scope of Article 102 TFEU) if its coverage were limited to 1% of the market. The fact that the Court does not find it justified to set a *de minimis* threshold for potentially abusive practices does not alter this conclusion. The same would be true of other 'by effect' abuses such as 'margin squeeze' practices and selective price cuts. In *TeliaSonera*, for instance, the Court suggested that it is less likely that a 'margin squeeze' will have exclusionary effects where access to the infrastructure of the dominant firm is not indispensable for downstream rivals, even though such effects could not be ruled out.[43]

Authors like Whish regret, it would seem, not so much the rejection of the *de minimis* doctrine in the context of Article 102 TFEU but the fact that some practices are deemed abusive by their very nature. He appears to suggest that the 'by object' label is not appropriate for practices such as exclusive dealing and loyalty rebates, both of which are prohibited irrespective of the effects they produce. When he argues that 'abuses of minor importance' should be left outside of the prohibition, Whish appears to be claiming, in reality, that a standard of likelihood – as opposed to capability – should apply to these practices. There is definitely merit to this position. It can be

[42] Whish (n 15).
[43] *TeliaSonera* (n 26), paras 69-72.

convincingly argued that the standard of capability is not appropriate for exclusive dealing and loyalty rebates. These are practices that may have pro- or anticompetitive effects depending on the context in which they are implemented. In this sense, they are fundamentally different from cartels, which are known to lack any redeeming virtues.[44] This discussion, however, has little to do with the issue of appreciability and the *de minimis* doctrine.

At the time of writing, the convenience of the application of the 'by object' label to exclusive dealing and loyalty rebates is being examined by the Court in the pending *Intel* case.[45] If the Court decides to change its case law, the standard of likelihood will apply to these practices. As a result, what Whish calls an 'abuse of minor importance' would no longer be caught by Article 102 TFEU. For as long as exclusive dealing and loyalty rebates fall under the 'by object' label, however, the Court cannot be criticised for prohibiting prima facie these practices, even when they are of 'minor importance'. The position of the Court is consistent with its general approach to 'by object' conduct, which is deemed to infringe EU competition law irrespective of its impact on competition. As *Bananas* shows, a 'by object' infringement falls within the scope of Article 101(1) TFEU even when it concerns an exchange of information of 'minor importance' or when it is unlikely to have a negative impact on competition.

4. Appreciability and the meaning of 'anticompetitive effects'

It has been explained above that the issue of appreciability tends to be conflated with the question of whether it is necessary to establish an anticompetitive effect. There is another related confusion that needs to be addressed. Even if one accepts that effects and appreciability are separate matters, it is still necessary to define what effects are. An anticompetitive effect can mean many different

[44] See in this sense Luc Peeperkorn, 'Defining "by object" restrictions' (2015) Concurrences 40; and Pablo Ibáñez Colomo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) 53 Common Market Law Review 709.
[45] Case C-413/14 P *Intel Corp v Commission*, pending.

things, from a disadvantage to rivals to harm to consumer or total welfare. Determining the meaning of this concept is different from the issue of appreciability. However, it tends to be conflated with it. Since the Court has ruled that it is not necessary to show that an anticompetitive effect is of a serious or appreciable nature, one could argue that any impact on competition is sufficient to trigger the application of Article 102 TFEU. This section explores the many meanings that can be attached to the notion of effects, and how this question must be distinguished from that of appreciability. The logical consequence is, again, that effects need to be established, on a case-by-case basis, in relation to practices that are not abusive 'by object'.

4.1. *The many meanings of effects*

It cannot be disputed that some practices are only abusive where they have, or are likely to have, an anticompetitive effect. However, there is not much guidance in the case law about the meaning of the very notion of effect. In spite of the importance of the matter, it is only possible to have any certainty about what it is not. To begin which, an anticompetitive effect cannot be equated with a decrease in consumer welfare. EU competition law is not only concerned with practices that harm consumers in a direct way – including excessive pricing – and those that harm them indirectly, through their impact on the market structure.[46] As a result, an exclusionary practice may be prohibited even when there is no evidence that consumers have been made – or are likely to be made – worse off as a result. Another principle that stems from the case law is that the exclusion of less efficient competitors – that is, of firms that are less attractive in terms of price, quality or innovation – is not, as a rule, problematic under EU competition law.[47] The departure of these firms from the

[46] See in this sense See in this sense Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission*, EU:C:1973:22, para 26; Case C-95/04 P *British Airways plc v Commission*, EU:C:2007:166, para 106; and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610, para 63.

[47] See in particular *Post Danmark I* (n 38), para 22; *TeliaSonera* (n 26), para 64; and *Deutsche Telekom* (n 26), para 253. The possible exceptions to this rule were considered in Post Danmark II (n 1), para 59. The Court noted in that

market is typically not attributable to the behaviour of the dominant firm. There is not, in other words, a causal link between the conduct and their exclusion.

In spite of these principles, there is considerable uncertainty about the instances in which an impact on competition triggers the application of Article 102 TFEU. The fundamental problem is that, in a sense, every practice influences, at least to some degree, the market structure and/or the behaviour of operators. Thus, one could argue that any behaviour that disadvantages rivals has an exclusionary effect. From this perspective, an aggressive price war, for instance, would have an anticompetitive effect insofar as it would make it more difficult for the rivals of the dominant firm to keep their clients, or to expand their business. The practice may even force them to lower their prices and thus to reduce their profitability. Similarly, a rebate scheme that requires the customers of a dominant firm to buy, say, 50% of their needs from it can also be said to have exclusionary effects insofar as it prevents rival suppliers from competing for the whole of the demand of these customers, and may force them to find alternative ways to sell their products. However, it is also possible to take a different perspective, and argue that only practices that harm rivals' ability and incentive to compete are exclusionary. In such a case, a mere disadvantage to rivals would not be sufficient to trigger intervention.

The case law is not entirely unambiguous about which of these two approaches more accurately reflects the meaning of effects in the context of Article 102 TFEU. Some passages can be interpreting as suggesting that, indeed, any disadvantage to rivals is sufficient to trigger the prima facie prohibition. There are rulings that suggest that an anticompetitive effect exists where rival entry is made 'more difficult, or impossible' as a result of the behaviour of the dominant firm.[48] Similarly, in *Tomra*, the Court held that rivals of a dominant firm 'should have the opportunity to

---

judgment that there may be instances in which the emergence of an equally efficient competitor is precluded by the regulatory framework and the features of the relevant market. In particular, it referred to a situation in which the dominant operator enjoys 'structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market'.

[48] See for instance the Case C-95/04 P *British Airways* (n 46), para 68; *Deutsche Telekom* (n 26), para 177; *TeliaSonera* (n 26), para 63; and *Post Danmark II (n 1)*, para 42.

benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it'.[49] Since intense competition makes it more difficult for rivals to remain on the market, one could claim that the requisite level of effects is satisfied virtually in every instance.

It is possible to argue convincingly, however, that the notion of effects does not simply refer to any disadvantage faced by competitors. To begin with, there are several cases that show that not every practice that makes it 'more difficult' for rivals to compete is necessarily a violation of Article 102 TFEU. The policy of selective price cuts examined by the Court in *Post Danmark I,* for instance, was not found to have exclusionary effects, even though it made it more difficult for its main rival to remain on the market and reach its customers.[50] The fact that this rival retained its ability and incentive to compete appeared to be sufficient to exclude a finding of abuse.[51] The same conclusion can be drawn from *Deutsche Telekom* and *TeliaSonera*. By definition, a 'margin squeeze' makes it more difficult for the rivals of the dominant firm to compete on the relevant downstream market. This was in fact the argument made by the Commission in its decision in *Deutsche Telekom*.[52] However, the Court expressly rejected that evidence of a 'margin squeeze' suffices, in and of itself, to establish an abuse. It made it clear that it is necessary to show, in addition, that the practice has an exclusionary effect.[53] Evidence of such an effect may be inferred, as pointed out above, from the fact that access to the infrastructure is indispensable for rivals to compete on the relevant downstream market.[54]

[49] *Tomra* (n 14), para 42.
[50] Unsurprisingly, this is a point that was raised by the Commission and other participants in the proceedings. See in this sense Opinion of AG Mengozzi in Case C-209/10 *Post Danmark A/S v Konkurrencerådet,* EU:C:2011:342 ('*Post Danmark I*'), para 52.
[51] See above, notes 38 and 39.
[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] *Deustche Telekom* (n 26), para 250. The Court held that 'the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article [102 TFEU], and that it is not necessary for an anti-competitive effect to be demonstrated'.
[54] See above, note 27.

Another reason in favour of the latter understanding of the notion of effects is that it more accurately reflects how the anticompetitive impact of a practice is assessed in other areas of EU competition law. It is submitted that it would be difficult to justify giving different meanings to the notion of effects depending on the provision at stake. In the context of Article 101(1) TFEU a restrictive effect justifying intervention is more than a disadvantage or a mere difficulty to compete. The example of *Delimitis* has already been mentioned above. The analysis of effects sketched by the Court in that judgment aims at establishing whether access to the market is foreclosed, that is, whether rivals would have the ability and incentive to compete in spite of the cumulative impact of exclusive dealing obligations.[55] The assessment comprises the coverage of the practice (that is, the number of customers bound by exclusivity agreements) and whether it is possible for the firm to enter the market through vertical integration.

The same is true in the context of merger control. As the Commission explains at length in its Non-Horizontal Merger Guidelines, it is not sufficient to show that the rivals of the merged entity would be disadvantaged (and this even when the merged entity holds a dominant position on one of the markets). Remedial action would only be justified where rivals' ability and incentive to compete would be reduced as a result of the transaction. For instance, the Commission noted in *Microsoft/Skype* that rivals could be disadvantaged in various ways by Microsoft, which enjoyed a dominant position on the market for operating systems for PCs.[56] An analysis of the features and dynamics of the relevant markets showed, however, that the operation would not harm these rivals' ability to thrive. Thus, the Commission cleared the merger without conditions. The GC validated the analysis of the Commission when challenged by Cisco Systems.[57]

[55] See above, note 18.
[56] *Microsoft/Skype* (Case No COMP/M.6281) Commission Decision of 7 October 2011.
[57] Case T-79/12 *Cisco Systems, Inc and Messagenet SpA v Commission*, EU:T:2013:635.

4.2. *Appreciability is independent of the notion of effects*

The Court will have to clarify in the future what the notion of effects means in the context of Article 102 TFEU. It is clear, however, that the question does not depend on the applicability of the *de minimis* doctrine to abuse of dominance cases. It is independent from the issue of appreciability, and should not be conflated with it. As a result, it would be wrong to infer from *Post Danmark II*, as some authors have done,[58] that any disadvantage caused to rivals is sufficient to trigger the application of Article 102 TFEU. Evidence that the two issues are independent from one another can be found in *Post Danmark II* itself. The Court went in detail into the factors that need to be considered when establishing the exclusionary impact of a system of standardised rebate schemes. This analysis would be plain irrelevant if a mere disadvantage on rivals sufficed to apply Article 102 TFEU. Inevitably, a system of standardised rebates applying over a period of one year places rivals at a disadvantage.

Arguably, *Post Danmark II* is best interpreted in light of *Delimitis*. It has already been explained that, in the latter, the Court neatly distinguished between the issue of effects and that of appreciability. The foreclosure effects of exclusive dealing obligations are to be established first, followed by an assessment of the appreciability of the contribution made by the supplier to such effects. Against this background, it would seem that what the Court held in *Post Danmark II* is simply that it is not necessary to assess the second step in the context of Article 102 TFEU. When the market is foreclosed as a result of the obligations imposed by the dominant firm, it seems unnecessary to establish that such obligations make an appreciable contribution to foreclosure. When a dominant firm is involved, and exclusion is established, appreciability can indeed be safely

[58] James S Venit, 'Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning' (2016) 7 Journal of European Competition Law & Practice 165.

assumed to exist. This is also the factor that distinguishes the analysis of restrictions under Articles 101 and 102 TFEU.

5. Conclusions

It is now clear that some potentially abusive practices are prohibited only insofar as they are likely to have an anticompetitive effect. Because these practices do not fall under the 'by object' category, it is necessary to engage in a case-by-case assessment of their impact on competition. It is natural that, at this stage, some aspects relating to this assessment have not been explored in sufficient detail. The issue of *de minimis* and appreciability is one of them. This piece shows that this question tends to be conflated with the need to show the likelihood of an anticompetitive effect, and with the very meaning of the notion of effect. As a result, some commentators have come to the conclusion that the Court, by holding that it is not necessary to establish the serious or appreciable nature of the impact of a practice on competition, it was in practice ruling out the need to establish an effect in any meaningful way.

It is submitted that this reading of *Post Danmark II* is inaccurate. What the Court held in that judgment is that it is not justified to set a *de minimis* threshold in the context of Article 102 TFEU. It did not hold that it is not necessary to establish an exclusionary effect, or that any disadvantage on rivals is exclusionary. Thus, where a 'by effect' practice is unlikely to have an anticompetitive impact (as is the case, for instance, where its coverage is very limited), it falls outside the scope of Article 102 TFEU. The fact that it is not necessary to establish the serious or appreciable nature of the effect is not a relevant consideration in this regard. This looks like the most reasonable interpretation of *Post Danmark II*. Similarly, the *de minimis* doctrine refers to the insignificance of the effects, but does not provide a definition of what an anticompetitive effect is. There are reasons to believe that an impact on competition is more than a mere disadvantage. The fact that the rival of the dominant firm was able to win back its customers in *Post Danmark I*, for instance, was sufficient to rule out a finding of abuse, even though the below-cost pricing campaign at stake in the case was capable of having exclusionary effects. Article 101 TFEU and EU merger control case law approach the notion of effects in the same way. From the perspective of consistency, it would be reasonable to attach the same meaning to concepts across EU competition law provisions.

It would seem that many of the discussions around appreciability and *de minimis* in the context of Article 102 TFEU do not really concern this issue. When commentators regret that some practices – like exclusive dealing and loyalty rebates – are abusive even when they are unlikely to have an exclusionary effect, they regret, in reality, that these practices are deemed abusive by object and thus that they are prima facie prohibited irrespective of their impact on competition. As explained above, there are powerful reasons to argue that the ‘by object’ label is not appropriate for some of the most common categories of potentially abusive practices, including the abovementioned two. However, that question, which will be addressed by the Court in *Intel*, is a separate one. As Article 101 TFEU case law shows, the qualification of a practice as restrictive by object or effect, is different from the question of whether anticompetitive effects are appreciable.