The Meaning of "Anticompetitive Effects" Under Article 102 TFEU

By Massimiliano Kadar [1]

Countless pages have been written to date on the effects that a given conduct needs to produce in order for it to be considered abusive under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Many commentators conclude that there is an asymmetry in the European Union (EU) Courts' approach to the meaning of "effects" between different types of conduct. It is also often concluded that the Courts' approach is too formalistic with regard to certain conducts, namely exclusivity rebates and exclusive dealing, that are presumed by the case-law to have anticompetitive effects.

This short paper argues that not only is the Courts' case law consistent, but that it is also sensible from the point of view of legal certainty and administrative and economic efficiency. The paper focuses on exclusionary abuses and does not discuss exploitative abuses. Furthermore, it only discusses the EU Courts' case law and abstracts from the Commission's practice and its enforcement priorities as set out in the Guidance Paper on Article 102 TFEU.

I. ANTICOMPETITIVE EFFECTS AND ARTICLE 102 TFEU

To start with, it may appear slightly paradoxical to write about the meaning of "effects" under Article 102 TFEU, given that the text of Article 102 TFEU does not actually contain any reference to anticompetitive effects. This is different compared to Article 101 TFEU, which refers to the anticompetitive object or effect of an agreement.

In its 1979 judgment in *Hoffmann-La Roche*, however, the Court of Justice made clear that abuse is behavior

Which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the

[1] The author is a case handler at Unit C.3 – Antitrust: IT, Internet and Consumer electronics at Directorate General for Competition of the European Commission. The author writes in his personal capacity. The views expressed in this article are solely those of the author and cannot be seen as representing in any way those of the Directorate General for Competition of the European Commission. The author would like to thank Nicholas Banasevic, Anthony Dawes, Guillaume Loriot, Ekaterina Rousseva, Richard Whish QC (Hon) and Wouter Wils for their valuable comments on a previous version of this article. Any error or inconsistency remains the sole responsibility of the author.

transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. (para. 91)

It appears, therefore, that some kind of detrimental effect on competition has to be established in order for a given conduct to be found abusive under Article 102 TFEU. In this regard, three different questions arise. First: how likely do the anticompetitive effects of a given conduct need to be in order for such conduct to be abusive? Second: how significant do the anticompetitive effects of a conduct need to be, or in other words, is there a *de minimis* rule in the applicability of Article 102 TFEU? Third: how to show the anticompetitive effects of a given conduct?

II. HOW LIKELY DO ANTICOMPETITIVE EFFECTS NEED TO BE?

The first question is probably the one currently generating the highest uncertainty among commentators. Such uncertainty seems to stem from the fact that the EU Courts have used, and continue to use, different terms to refer to the threshold of likelihood of anticompetitive effects that a conduct needs to produce in order for it to be considered abusive.

At the outset, it must be acknowledged that the Courts have consistently recognized that there is no need for a conduct to produce actual anticompetitive effects in order to have a finding of abuse (see for instance *British Airways*, para. 145 and *TeliaSonera*, para. 64). On the other hand, it has been also held that purely hypothetical anticompetitive effects are not sufficient (see *Post Danmark II*, para. 65). These findings are important. It is clear as the law stands that a given conduct can be abusive even if it does not result in actual anticompetitive effects. Conversely, it cannot be abusive if it produces anticompetitive effects only in the abstract.

The question whether the anticompetitive effects of a given conduct would have to be merely "potential," "likely," or even "likely beyond reasonable doubt," in order to conclude that such conduct is abusive, is worthy of more debate. This is because the language employed by the EU Courts does not appear to be always strictly aligned on one, well-defined standard of probability.

In the 2011 judgment in *TeliaSonera*, for instance, the Court of Justice stated that in the circumstances of that specific case "the at least potentially anti-competitive effect of a margin squeeze is probable" (para. 71). In the 2012 judgment in *Post Danmark I*, instead, the Court of Justice stated that in order to assess the existence of anti-competitive effects, "it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests*"* (para. 44).

In the recent *Post Danmark II* judgment, concerning conditional rebates different from exclusivity rebates, the operative part states that the anticompetitive effects of a conduct must be "probable." However, the judgment also refers to other, apparently lower thresholds of likelihood. For example, while paragraph 74 of the English version of the judgment states that "only dominant undertakings whose conduct is likely to have an anti-competitive effect on the market fall within the scope of Article 82 EC", the same paragraph of the official Danish version states that Article 102 TFEU prohibits conduct which "kan have en konkurrencebegrænsende virkning" (can have an anticompetitive effect), and the French version, i.e. the version in which the judgment was originally drafted, states that Article 102 TFEU prohibits conduct which "est susceptible d'avoir un effet anticoncurrentiel" (is capable of having an anticompetitive effect). In addition, the judgment also makes reference to previous case law (e.g. *British Airways*), which made clear that a rebate scheme produces an anti-competitive exclusionary effect when it is "capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various

sources of supply or commercial partners*"* (para. 50) or when it "tends to make it more difficult for those customers to obtain supplies from competing undertakings*"* (para. 42).

It is clear that, from a strictly linguistic perspective, the fact that a conditional rebate scheme is **likely** or **probable** to produce anticompetitive effects is different from the fact that that scheme is "only" **capable of** doing so, or that it **tends** to do so, or that it is **potentially** anticompetitive. Nevertheless, this apparent inconsistency can be reconciled if one leaves aside arguments "based on a purely semantic distinction" (Opinion of AG Kokott in *British Airways*, para. 76) and acknowledges that the Courts use these terms as synonyms to identify a middle ground between purely hypothetical effects and actual effects. This middle ground, which can be perhaps best captured with the expression "potential anticompetitive effects," can be considered as the point at which a given conduct by a dominant undertaking becomes abusive.

III. HOW SIGNIFICANT DO ANTICOMPETITIVE EFFECTS NEED TO BE?

On the second question, i.e. the magnitude of the anticompetitive effects produced by a given conduct, the General Court made clear in *Intel* that there is no *de minimis* rule in the application of Article 102 TFEU (see para. 116). As such, even conduct producing relatively small anticompetitive effects is liable to constitute an abuse of a dominant position.

The General Court's *Intel* judgment is currently under appeal and a leading commentator has expressed his perplexities related specifically to this point.[2] However, it appears that the recent judgment of the Court of Justice in *Post Danmark II* has in essence confirmed that a given conduct is liable to constitute abuse even when the anticompetitive effects produced are not significant. According to the Court of Justice,

Fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates. (para. 73)

This position appears to be consistent with the Courts' jurisprudence, and in particular with the fact that, while it is not abusive for a firm to be dominant, the degree of competition in the relevant market is weakened as a result of the very presence of the dominant firm (*Hoffmann-La Roche*, para. 91), and that firm has a special responsibility not to allow its conduct to impair undistorted competition (*Michelin I*, para. 57). This also helps to understand why exclusivity provisions in EU competition law are treated differently under Article 101 TFEU and 102 TFEU, i.e. as infringement by effect under Article 101 TFEU and as infringement by object under Article 102 TFEU, as discussed in more detail in the next section.

IV. HOW TO SHOW POTENTIAL ANTICOMPETITIVE EFFECTS?

After having established that a conduct is abusive when it results in potential anticompetitive effects, and that there is no need for those effects to be significant, the third question is: how to prove to the requisite legal standard the existence of an abuse?

A preliminary point to be made in this regard is that while potential anticompetitive effects are necessary for **any** conduct to be abusive, the Courts have recognized that it is **not always necessary** to specifically prove such effects. Behavior that is by its very nature capable to negatively affect competition can indeed be qualified as "abusive by object." It appears that exclusivity rebates (*Intel,* paras. 76 and 77, and *Post*

[2] See Richard Whish, "Intel v Commission: Keep Calm and Carry on!", in Journal of European Competition Law & Practice (2015), 6.

Danmark II, para. 27), exclusive dealing (*Hoffmann-La Roche,* para. 71), and so-called "naked restrictions," i.e. conduct that is inherently anticompetitive, such as paying customers to delay the launch of a product incorporating a competitor's product (*Intel,* para 209), are considered in EU competition law as abuses "by object."

While the Commission is not required to prove the potential anticompetitive effects of abuses by object, it is also not prevented from doing so in cases where it wishes. This assessment can be carried out on the basis of qualitative or quantitative elements (see for instance the Commission decision in *Intel*). In any event, as in the case of agreements that are anticompetitive by object, it remains irrelevant for the infringer to prove that the conduct did not in practice have any anticompetitive effects. In this sense, therefore, there is an irrebuttable presumption of potential anticompetitive effects. There is no presumption of abuse, however, given that the dominant undertaking will always have the possibility to show that its conduct was objectively justified or led to efficiencies (even if sometimes it may be difficult to do so – e.g. in *Intel* there was no specific objective justification defense raised with regard to "naked restrictions"). As such, there is no concept of a "per se" abuse.

For other types of conduct, the Commission will need to establish potential anticompetitive effects to prove the existence of abuse to the requisite legal standard.

As far as pricing abuses are concerned, such evidence will normally be provided by means of the so-called "as efficient competitor test," a price-cost test that aims at establishing if an as efficient competitor is foreclosed from accessing the market because of the dominant undertaking's conduct. As recognized by the Courts, the as efficient competitor test conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (*TeliaSonera*, para. 44).

The as efficient competitor test has been explicitly endorsed by the EU Courts in predatory pricing cases. The use of a quantitative test in these cases is perfectly sensible, given that a price cannot be abusive as such, and therefore some additional elements will always be required to show potential anticompetitive effects. These additional elements are pricing below the dominant firm's own average variable costs, or pricing above average variable costs but below average total costs, coupled with additional evidence of potential anticompetitive effects, such as an exclusionary strategy (see *Post Danmark I*, paras. 27 and 28).

The as efficient competitor test has also been endorsed in margin squeeze cases in order to prove exclusion from a downstream market of competitors as efficient as the dominant firm. In these cases, the Courts also made clear that additional evidence of potential anticompetitive effects is required. This is also a sensible approach given that in margin squeeze cases, in particular, the functional relationship of the upstream products to the downstream products needs to be established. For instance, a relevant factor to determine the existence of the abuse can be that the upstream product is indispensable in order for a competitor to supply the downstream product (see *TeliaSonera*, paras. 69 and following).

While the use of the as efficient competitor test has been explicitly validated by the Courts in predatory pricing and margin squeeze cases, the Courts have consistently held that in cases concerning conditional rebates different from exclusivity rebates, the application of the as efficient competitor test is not required by the law (*Tomra)*, even if such a test can be considered an "useful tool" to show potential anticompetitive effects (*Post Danmark II*). This is not surprising given that in rebates cases, there are elements other than costs and prices that can be relevant to assess whether a certain rebate scheme has potential anticompetitive effects. For this reason, according to the Court of Justice, all the relevant circumstances of the case have to be taken into account, and in particular the criteria and rules governing the grant of the rebates, the extent of the

dominant position of the undertaking concerned and the particular conditions of competition prevailing on the relevant market (*Post Danmark II*, para. 50).

The potential anticompetitive effects of a conduct, namely in terms of market foreclosure, will also have to be shown for non-pricing abuses different from abuses by object, such as refusal to supply (*Microsoft*, para. 332 and following), and tying, where it cannot be assumed that the tying of a specific product and a dominant product has by its nature a foreclosure effect, for instance because end users have alternative ways to procure products competing with the tied product (*Microsoft*, paras. 867-869; see, however, *Tetra Pak*, para. 135). Factors that can be looked at in these cases to prove potential anticompetitive effects include market share trends, and in particular the exit or marginalization of competitors of the dominant undertaking, or effects on prices and innovation. In non-pricing abuse cases, however, the Courts have not made it clear whether the Commission would have to show that the conduct potentially results in the exclusion of an as efficient competitor. It appears difficult to argue that this would necessarily be the case, not least because it may be hard to find a benchmark for the assessment of competitors' efficiency in the context of non-pricing abuse cases, which by definition do not require the assessment of the cost structure of the dominant firm and its competitors.

In any event, it appears that proof of exclusion of equally efficient competitors may not always be required, perhaps even in the case of pricing abuses. On the one hand, it is clear that the purpose of EU competition law is not to protect inefficient competitors (see *Post Danmark* I, para. 22). On the other hand, there may be some markets in which the emergence of a competitor as efficient as the dominant undertaking is made impossible due to the presence of barriers to entry, such as regulatory barriers. In these cases, the exclusion of even less efficient competitors may be considered as abusive (*Post Danmark II*, paras. 59 and 60). While this conclusion was reached with specific regard to conditional retroactive rebate schemes, it appears that the same principle could be transposed to other types of abuses too, if the circumstances of the case justify it.

V. CONCLUSIONS

There is no real inconsistency in the EU Courts' case law with regard to the meaning of "anticompetitive effects" in the assessment of conduct under Article 102 TFEU. The perceived asymmetries in the case law are not determined by the willingness of the Courts to steer the case law in one or another direction, as some commentators occasionally claim, but rather by the type of conduct at stake in each individual case. In other words, the different standards of proof required by the Courts to show potential anticompetitive effects are justified by the different nature of the abuses in question.

It appears that the case law has identified a balance between preventing an excessive intrusion in the economic freedom of undertakings, and ensuring an effective enforcement of the competition rules. On the one hand, it does not appear recommendable to establish a lower standard of proof for pricing practices, given that a company's aggressive pricing policy can constitute the very manifestation of competition on the merits, as *Post Danmark I* makes clear (see para. 22). On the other hand, it does not seem justified to impose a higher standard of proof for "object abuses," as long as the dominant undertaking is given an opportunity to demonstrate that its conduct is objectively justified. The existence of clear obligations on dominant firms with respect to conduct that is by its very nature capable of resulting in anticompetitive effects does not appear to be unreasonable, and provides for guidance to dominant companies as to the legality of their behavior. From an administrative efficiency perspective, the Commission and national competition authorities can make the best use of their limited resources by tackling conduct which is likely to be harmful, without the need to

engage in a complex and time consuming analysis of the effects of the conduct, thereby increasing deterrence and effectiveness of enforcement.[3]

[3] See in this regard Wouter Wils, "The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance", in World Competition, Vol. 37, No. 4, 2014, pp.405-434.