

## Legal Tests and the Object–Effect Dichotomy under Article 102 TFEU

### Table of contents

- I. Introduction
- II. Objective justifications and the efficiency defence
- III. Practices that are (rebuttably) presumed to have no objective justification (naked restrictions)
- IV. Practices that are (rebuttably) presumed to have anticompetitive effects (restrictions by object)
- V. Practices that infringe Article 102 TFEU on account of their effects
- VI. The way forward: Is there scope for a unified analytical framework under Articles 101 and 102 TFEU?
- VII. Conclusion

### Summary

Despite the adoption of the “more economic approach” in the assessment of unilateral conduct, the object–effect dichotomy is still relevant under Article 102 TFEU, as it is under Article 101 TFEU. This article examines the tripartite classification of abusive conduct under Article 102 TFEU, namely “restrictions by object”, “restrictions by effect”, and “naked restrictions”, as a specific form of restrictions “by object”. It analyses the implications of this classification for the allocation of the burden of proof between the dominant undertaking, on the one hand, and the competition authority or private plaintiff, on the other.

**Key words:** abuse of dominance; restrictions by object; naked restraints; objective justifications.

**JEL:** K21

## Testy prawne i dychotomia cel–skutek w świetle art. 102 TFUE

### Spis treści

- I. Wstęp
- II. Obiektywne uzasadnienia i obrona efektywnościowa
- III. Praktyki, co do których istnieje (wzruszalne) domniemanie, że nie mają obiektywnego uzasadnienia (bezpodstawne ograniczenia)

\* Hellenic Competition Commission. The views expressed in this article are strictly personal and do not necessarily reflect those of the HCC. E-mail: [iapostolakis@epant.gr](mailto:iapostolakis@epant.gr).

Edition of that article was financed under Agreement Nr RCN/SP/0326/2021/1 with funds from the Ministry of Education and Science, allocated to the “Rozwój czasopism naukowych” programme.

- IV. Praktyki, co do których istnieje (wzruszalne) domniemanie antykonkurencyjnych skutków (ograniczenia ze względu na cel)
- V. Praktyki naruszające art. 102 TFUE ze względu na ich skutki
- VI. Dalsze działania: czy istnieje możliwość wprowadzenia jednolitych ram analizy odnośnie do art. 101 i 102 TFUE?
- VII. Wniosek

### Streszczenie

Pomimo przyjęcia „bardziej ekonomicznego podejścia” do oceny praktyk jednostronnych, dychotomia cel–skutek jest nadal tak istotna w przypadku art. 102 TFUE, jak ma to miejsce w przypadku art. 101 TFUE. W artykule zbadano trójpodział zachowań stanowiących nadużycie w rozumieniu art. 102 TFUE na „ograniczenia ze względu na cel”, „ograniczenia ze względu na skutek” i „ograniczenia bezpodstawne (nagie)” jako specyficzną formę ograniczeń „ze względu na cel”. Artykuł analizuje skutki tej klasyfikacji dla rozkładu ciężaru dowodu pomiędzy przedsiębiorstwem dominującym z jednej strony a organem ochrony konkurencji lub powodem prywatnym z drugiej.

**Słowa kluczowe:** nadużycie dominacji; ograniczenia ze względu na cel; bezpodstawne („nagie”) ograniczenia; obiektywne uzasadnienia.

**JEL:** K21

## I. Introduction

As a result of the move towards an ‘effects-based approach’ to Article 102 TFEU in the second half of the 2000s, and the evolution of the European Courts’ case law thereafter, the analytical framework of the antitrust provisions of the Treaty on the Functioning of the European Union (‘TFEU’) has been marked by a certain degree of consistency, in that the distinction between restrictions of competition ‘by object’ and ‘by effect’ is applicable not only to collusive schemes that fall within the scope of Article 101 TFEU, but also to a dominant undertaking’s unilateral conduct that could be characterised as abusive (Ibáñez Colomo, 2016, p. 709).

In *Irish Sugar*, the General Court relied on the wording of Article 102 TFEU in holding that the anticompetitive object of a particular practice is indistinguishable from its anticompetitive effect.<sup>1</sup> Similarly, in *Michelin II*, the General Court confirmed that, in the context of Article 102 TFEU, a dominant undertaking’s conduct may be found to have as its object the restriction of competition, in which case it will automatically be presumed to have anticompetitive effects.<sup>2</sup> This approach evidently echoes the established case law on the rationale behind the object–effect dichotomy under Article 101(1) TFEU: once the anticompetitive object of an agreement has been established, it is not necessary to examine its effects on competition.<sup>3</sup>

<sup>1</sup> Case T-228/97, *Irish Sugar plc v Commission*, EU:T:1999:246, para 170.

<sup>2</sup> Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission*, EU:T:2003:250, para 241 (‘If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect’). See also Case T-340/03, *France Télécom SA v Commission*, EU:T:2007:22, para 195.

<sup>3</sup> See, e.g., C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, EU:C:2020:265, paras 33–34.

More recently, in *Unilever Italia*, the CJEU confirmed that the distinction between anticompetitive object and effect, as alternative requirement for establishing abuse of dominance, is still relevant under Article 102 TFEU. In particular, the Court held that ‘abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, **or where that conduct was based on the use of means other than those which come within the scope of ‘normal’ competition, that is to say, competition on the merits**’.<sup>4</sup>

The CJEU has clarified that an undertaking is said to compete on the merits when it relies on grounds relating to the defence of its legitimate interests or on objective justifications.<sup>5</sup> On the contrary, ‘[a]ny practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits’.<sup>6</sup>

In any event, it has been established that there are no ‘per se’ illegal forms of abuse under Article 102 TFEU. This was stressed by AG Colomer, who, in his Opinion in *GSK*, noted that ‘the examples listed in subparagraphs (a) to (d) of the second paragraph of Article [102 TFEU] do not operate as legal presumptions, unlike those in Article [101](1)(a) to (e). At most they should be understood, due to their underlying economic logic, as rebuttable presumptions which lighten the burden of proof for the party relying on them [...]’.<sup>7</sup> More recently, this position was reiterated by AG Rantos in *Servizio Elettrico Nazionale*.<sup>8</sup> This approach implies that, once it is established that an undertaking has engaged in a specific form of conduct that is considered as giving rise to a presumption of exclusionary effect, the competition authority has successfully discharged the burden of proof and is now on that undertaking to justify its practice on objective grounds.

In addition to the foregoing, in its 2009 *Intel* decision, the Commission introduced the term ‘naked restrictions’, to denote that certain forms of unilateral conduct are demonstrably inconsistent with competition on the merits.<sup>9</sup> The purpose of this paper is to examine the tripartite classification of abusive conduct under Article 102 TFEU in ‘restrictions by object’, ‘restrictions by effect’, and ‘naked restrictions’, as a specific – yet distinguishable – form of ‘by object’ restrictions, and to analyse the implications of this classification for the allocation of the burden of proof between the dominant undertaking, on the one hand, and the competition authority or private plaintiff, on the other.

The structure of this paper is as follows: Section II discusses the defences available to the dominant undertaking under investigation and their function within the analytical framework of Article 102 TFEU. Sections III, IV and V look into the three categories of abusive practices, namely naked restrictions, ‘by object’ restrictions and practices that fall within the scope of Article 102 TFEU only insofar as they are shown to have anticompetitive effects. In this context, the types of

<sup>4</sup> Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, para 39 (emphasis added).

<sup>5</sup> See Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v Commission*, EU:C:2012:770, para 149.

<sup>6</sup> Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, EU:C:2022:379, para 77.

<sup>7</sup> Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEEVE*, Opinion of AG Colomer, EU:C:2008:180, para 70.

<sup>8</sup> Case C-377/20, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, Opinion of AG Rantos, EU:C:2021:998, para 55.

<sup>9</sup> Case 37.990 – *Intel*, Commission decision of 13.05.2009, paras 1641 ff.

defence that an undertaking may invoke will be examined, depending on the characterisation of its conduct. Finally, Section VI discusses the possibility of the application of a unified analytical framework under Articles 101 and 102 TFEU, in light of the endorsement of the object–effect dichotomy in the context of both provisions.

## II. Objective justifications and the efficiency defence

In EU competition law, the rules on the allocation of the burden of proof are set out in Article 2 of Regulation 1/2003,<sup>10</sup> according to which the burden of proving an infringement of Articles 101(1) or 102 TFEU is on the party or the authority alleging the infringement, whereas '[t]he undertaking or association of undertakings claiming the benefit of Article [101(3) TFEU] shall bear the burden of proving that the conditions of that paragraph are fulfilled'. Although the wording of the provision is limited only to the parties' burden of proving that their agreement meets the requirements for individual exemption under Article 101(3) TFEU, it is nevertheless apparent that, once the competition authority or court has established that the unilateral conduct of a dominant undertaking falls within the scope of Article 102 TFEU, the burden should shift to the latter to produce the required evidence in an attempt to demonstrate that the practice under investigation should not qualify as abusive. An undertaking's right to plead a defence against an alleged infringement is not only consistent with a principle of equality of arms, but also emanates directly from paragraph 5 of the Preamble of Regulation 1/2003, which acknowledges that '[i]t should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied'.

Although Article 102 TFEU does not explicitly acknowledge the possibility of an efficiency defence equivalent to that of Article 101(3), it is established that there is always room for a dominant undertaking to argue that the contested practice is not abusive within the meaning of that provision. In particular, the dominant undertaking may argue that it resorted to the conduct under investigation in an attempt to protect its own commercial interests and that the action was both reasonable and proportionate to the threat.<sup>11</sup> Alternatively, the undertaking may demonstrate that the practice was objectively justified.

The concept of objective justification under Article 102 TFEU appears to be two-fold. More specifically, a dominant undertaking may defend its conduct by demonstrating either that (i) its conduct is objectively necessary, or that (ii) the exclusionary effect may be counterbalanced, or even outweighed, by efficiencies that also benefit consumers.<sup>12</sup> The notion of objective necessity is associated with factors external to the undertaking, such as health or safety considerations related to the nature of the product in question.<sup>13</sup> On the other hand, the efficiency defence under Article 102 is associated with the existence of an 'objective **economic** justification', as per the

<sup>10</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] [2003] OJ L 1/1.

<sup>11</sup> See, e.g., Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission*, EU:C:1978:22, paras 189–190; Joined cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proionton, formerly Glaxowellcome AEEVE*, EU:C:2008:504, para 69.

<sup>12</sup> See, e.g., Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para 41 (and the case law cited).

<sup>13</sup> See Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 29.

CJEU's wording in *British Airways*,<sup>14</sup> and mirrors the four criteria set out in Article 101(3) TFEU. That is to say, the undertaking under investigation must show that 'the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition'.<sup>15</sup> Evidently, the burden is on the dominant undertaking to put forward an objective justification defence and provide all supporting arguments and evidence to this effect.<sup>16</sup>

While ostensibly similar from an analytical standpoint, at first glance an analysis carried out within the framework of Article 102 TFEU does not follow the same structured pattern as under Article 101 TFEU. In the context of the latter provision, the competition authority or court first looks into the object of an agreement or concerted practice and, if the agreement does not reveal in itself a sufficient degree of harm to competition, the enforcer proceeds with the examination of its effects. Once the anticompetitive object or effect has been substantiated, an infringement of Article 101(1) TFEU has been established and the parties to the agreement are given the opportunity to escape the prohibition by showing that the agreement is eligible for an exemption on an individual basis following a balancing of possible pro- and anticompetitive effects under Article 101(3) TFEU.

It is submitted that the purpose of an efficiency defence within the framework of Article 102 TFEU is in its essence different from the function of a balancing exercise under Article 101(3). More specifically, in the context of the bifurcated Article 101 TFEU, in order for a balancing of pro- and anticompetitive effects to be carried out under the third paragraph, it is necessary first that the restrictive nature and impact of the agreement be established.<sup>17</sup> Once the competition authority or plaintiff discharge their burden of proving the object or effect of the agreement, it is on the parties to show that the agreement is on balance pro-competitive and thus qualifies for exemption.

On the contrary, under Article 102 TFEU, this balancing exercise is embedded in the inquiry into the nature of the conduct under investigation as abusive or not. For example, in *Tetra Pak II*, the CJEU, in holding that contractual tying is by its very nature capable of producing a foreclosure effect, stated that the tied sales of two products may 'constitute abuse within the meaning of Article [102] **unless they are objectively justified**'.<sup>18</sup> That is to say, the examination of possible objective justifications – provided, of course, that these have been invoked by the undertaking under investigation – is an essential step in determining whether a certain practice is abusive or benign in the first place (for a relevant discussion, see Loewenthal, 2005, pp. 455, 459–460, arguing that the defence of "objective justification" can be compared to the Commission's treatment of the "efficiency defence" in the appraisal of mergers). This understanding of the function of objective justifications within the framework of Article 102 is consistent with the CJEU's earlier ruling in

<sup>14</sup> Case C-95/04 P, *British Airways plc v Commission*, EU:C:2007:166, paras 85–87.

<sup>15</sup> See Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para 42. In this regard, compare the respective test elaborated by the Court in *British Airways*, which appears to be less stringent in that it omits the requirement that the conduct in question does not eliminate effective competition; Case C-95/04 P, *British Airways plc v Commission*, EU:C:2007:166, para 86.

<sup>16</sup> See Case T-201/04, *Microsoft Corp. v Commission*, EU:T:2007:289, para 688.

<sup>17</sup> See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] (hereinafter "Article 101(3) Guidelines") [2004] OJ C 101/97, para 12.

<sup>18</sup> Case C-333/94 P, *Tetra Pak International SA v Commission*, EU:C:1996:436, para 37.

*Ahmed Saeed*, where the Court took the view that, unlike Article 101(3), once a practice has been found to be abusive, there is no possibility for the dominant undertaking to pursue an exemption.<sup>19</sup>

It is interesting to note that, initially, the CJEU maintained that both types of objective justification (namely the objective necessity and the efficiency defence) could be invoked by the undertaking under investigation after the competition authority or court has established the anticompetitive effects brought about by the conduct.<sup>20</sup> However, the Court subsequently appeared to distance itself from its earlier case law regarding the methodology applied in the analysis of potentially abusive conduct. More specifically, in *Intel* it took the view that, first, the efficiency defence is a concept which is distinct from that of ‘objective justifications’ and, second, that while an objective justification may be more appropriate when examining the object of a certain practice, the examination of an efficiency defence may be carried out only after the anticompetitive effects of that practice have been substantiated.<sup>21</sup>

The approach advocated by the Court in *Intel* aligns the analytical framework of Article 102 TFEU with the methodology applied under the bifurcated Article 101 TFEU. It should be recalled that, in the context of Article 101 TFEU, the General Court has stated that all anticompetitive practices are in principle eligible for an exemption, provided that all criteria laid down in Article 101(3) TFEU are met.<sup>22</sup> Moreover, once it is shown that an agreement pursues a legitimate objective, a finding of anticompetitive object can be put into question.<sup>23</sup>

### III. Practices that are (rebuttably) presumed to have no objective justification (naked restrictions)

The origins of the concept of ‘naked restrictions’ under Article 102 TFEU can be traced back to the very definition of abuse of dominance in *Hoffmann-La Roche*, where the CJEU noted that ‘[t]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position 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 transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth

<sup>19</sup> Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Centrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, EU:C:1989:140, para 32. To this effect, see also Case C-53/03, *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEE*, Opinion of AG Jacobs, EU:C:2004:673, para 72 (‘Article [102 TFEU], by contrast with Article [101 TFEU], does not contain any explicit provision for the exemption of conduct otherwise falling within it. Indeed, the very fact that conduct is characterised as an ‘abuse’ suggests that a negative conclusion has already been reached, by contrast with the more neutral terminology of ‘prevention, restriction, or distortion of competition’ under Article [101 TFEU]. In my view, it is therefore more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all. [...]’).

<sup>20</sup> See Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, EU:C:2012:172, para 40.

<sup>21</sup> Case C-413/14 P, *Intel Corp. v. Commission*, EU:C:2017:632, para 140 (‘The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission’s decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.’).

<sup>22</sup> Case T-17/93, *Matra Hachette SA v. Commission*, EU:T:1994:89, para 85.

<sup>23</sup> See 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*, EU:C:2011:649, para 39 (‘As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market [...]. Such agreements are to be considered, in the absence of objective justification, as “restrictions by object”.’).

of that competition’.<sup>24</sup> In its 2014 *Intel* judgment, the General Court interpreted this definition as meaning that a practice which is ‘clearly’ inconsistent with competition on the merits should be regarded as unlawful.<sup>25</sup>

The term ‘naked restrictions’ was first introduced by the Commission in its *Intel* decision, where it scrutinised *inter alia* the payments offered by Intel to certain original equipment manufacturers (‘OEMs’), namely HP, Acer and Lenovo, on condition that they delay, cancel and, generally, restrict the commercialisation of AMD-based products.<sup>26</sup> The Commission characterised these practices as ‘naked restrictions’ and distinguished them from Intel’s other practices (conditional rebates and payments) in that the former were shorter in duration, targeted specific products or sales channels and, more importantly, constituted ‘tactical moves to foreclose AMD’.<sup>27</sup> In concluding its analysis, the Commission summarily dismissed the possibility that the naked restraints in question be justifiable from an economic standpoint, as there was ‘no link between the conducts and any criterion which could potentially be a legitimate objective justification’.<sup>28</sup>

On appeal, the General Court upheld the Commission’s findings, stating that ‘[t]he grant of payments to customers in consideration of restrictions on the marketing of products equipped with a product of a specific competitor **clearly** falls outside the scope of competition on the merits’.<sup>29</sup> For this reason, in the General Court’s view, the Commission was not required to demonstrate the capability of the practices to restrict competition in more detail.<sup>30</sup> Subsequently, upon referral from the CJEU, the General Court reiterated its earlier view, noting that nothing in the CJEU’s judgment suggests that the application of the methodology outlined for the assessment of loyalty rebates should also extend to naked restrictions or that the as-efficient competitor test should be carried out in this regard.<sup>31</sup>

One cannot fail to observe that the very use of the term ‘naked’ restrictions, in and of itself, has a very specific connotation, being rather associated with the ‘per se’ treatment of horizontal collusive practices under US antitrust law.<sup>32</sup> By contrast, to the best of my knowledge, the term has never been formally used by the European Commission or Courts in the context of Article 101 TFEU. This comes as no surprise, as it is established that there are in principle no practices that are *a priori* excluded from the possibility of an individual exemption under Article 101(3) TFEU. In light of the above, the assumption that there are no per se illegal forms of abuse under Article 102 TFEU does not fit well with the explicit characterisation of Intel’s conditional payments as ‘naked’ restrictions.

Against this backdrop, it could be argued that the concept of naked restrictions represents a presumption that a practice which falls within this category cannot be objectively justified. In other words, the term is associated with a presumption of anticompetitive intent, as the practice

<sup>24</sup> Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 91.

<sup>25</sup> Case T-286/09, *Intel Corp. v European Commission*, EU:T:2014:547, para 219.

<sup>26</sup> Case 37.990 – *Intel*, Commission decision of 13.05.2009, paras 1641 ff.

<sup>27</sup> *Ibid*, para 1642.

<sup>28</sup> *Ibid*, para 1680.

<sup>29</sup> Case T-286/09, *Intel Corp. v Commission*, EU:T:2014:547, para 205 (emphasis added).

<sup>30</sup> *Ibid*, para 209.

<sup>31</sup> Case T-286/09 RENV, *Intel Corporation Inc. v Commission*, EU:T:2022:19, paras 88–96.

<sup>32</sup> See, e.g., *United States v. Topco Associates, Inc.* [1972] 405 U.S. 596, 610 (‘In applying these rigid [per se] rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition’).

is *prima facie* inconsistent with competition on the merits. This presumption should be regarded as rebuttable, since the dominant undertaking under investigation should always be able to plead that the restriction was objectively necessary or that, by implementing the practice, it was merely defending its economic interests.

In line with the understanding of an abuse as an ‘objective’ concept, for the purposes of its analysis, the competition authority or court is not required to take into account the dominant undertaking’s subjective intent. In other words, a finding of an abuse cannot be precluded from the mere fact that the undertaking demonstrates its intention to compete on the merits.<sup>33</sup> This, however, does not deprive the fact-finder from the possibility to examine the motives behind the conduct at issue when establishing the infringement, as part of a broader investigation,<sup>34</sup> in light of the assumption that the dominant undertaking’s intention reflects the nature and objectives pursued by its strategy.<sup>35</sup> This assumption is consistent with the Court’s established approach that the examination of the abusive nature of a dominant undertaking’s practice pursuant to Article 102 TFEU must be carried out by taking into consideration all the specific circumstances of the case.<sup>36</sup>

In the early stages of the evolution of EU case law, the approach taken to Article 102 TFEU was that no defence would be admissible where the contested conduct has an exclusionary object (or ‘purpose’). In *United Brands*, the CJEU took the view that a ‘meeting competition defence’ would not be accepted where the actual **purpose** of the practice is to strengthen the undertaking’s dominant position and abuse it.<sup>37</sup> In *Hoffmann-La Roche* the Court held that exclusivity clauses and loyalty rebates are inherently anticompetitive, as ‘they 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’.<sup>38</sup> Subsequently, in the early 1990s, the Court adopted a similar stringent approach to predatory pricing, albeit without attributing a specific characterisation to the respective practice. In *AKZO*, the Court held that, where a dominant undertaking is charging below its average variable costs, it can be presumed that its sole objective is to eliminate a competitor, in order to be able to increase its prices subsequently, once it has established its monopolistic position.<sup>39</sup> From the Court’s language in *AKZO* (as in *Hoffmann-La Roche*) it could be deduced that its purpose was to apply a presumption of anticompetitive intent and not one of anticompetitive effects. The Courts appeared to take the view that a dominant undertaking which charges below average variable costs is not competing on the merits, irrespective of whether the practice is actually capable of producing exclusionary effects.

In its 2009 Guidance Paper, while advocating for the application of an effects-based approach to the concept of ‘abuse’, the Commission nevertheless embraces the idea that certain types of conduct may give rise to a presumption of anticompetitive effects *prima facie*. In such cases, the

<sup>33</sup> For the application of this principle in the context of Article 101(1) TFEU, see C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*, EU:C:2008:643, para 21 (‘an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives’).

<sup>34</sup> See C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, paras 19–22.

<sup>35</sup> Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, para 45.

<sup>36</sup> See Case C-152/19 P, *Deutsche Telekom AG v Commission*, EU:C:2021:238, para 42 (and the case law cited).

<sup>37</sup> Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission*, EU:C:1978:22, para 189. This position was subsequently reiterated in a number of cases; see, e.g. Case T-219/99, *British Airways plc v Commission*, EU:T:2003:343, para 243 (and the case law cited).

<sup>38</sup> Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 90.

<sup>39</sup> See Case C-62/86, *AKZO Chemie BV v Commission*, EU:C:1991:286, para 71.



Commission clarifies that it shall not carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. This presumption is appropriate in cases where it appears that the conduct under investigations can only raise obstacles to competition and that it creates no efficiencies. As examples of practices that will be presumed to be unlawful, the Commission cites cases where the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products or pays a distributor or a customer to delay the introduction of a competitor's product.<sup>40</sup>

A similar analysis is applied to practices whereby a dominant undertaking seeks to prevent all parallel exports between Member States, thus compartmentalising the internal market. In this regard, the Court stated in *GSK* that 'there can be no escape from the prohibition laid down in Article [102 TFEU]'.<sup>41</sup> While this wording clearly implies that such conduct is subject to a conclusive presumption of competitive harm, the Court left the possibility open for dominant undertakings to argue that, in implementing practices that prevented parallel exports, it was merely taking steps that were reasonable and proportionate to the need to protect its own commercial interests.<sup>42</sup> It has been submitted that, although the Court's ruling is in line with the assumption that there are in principle no forms of unilateral conduct that are considered as abusive in themselves, it nevertheless makes only a limited range of objective justifications available to a dominant undertaking that seeks to defend a practice that partitions the national markets (Lianos, Korah and Siciliani, 2019, p. 908).

#### **IV. Practices that are (rebuttably) presumed to have anticompetitive effects (restrictions by object)**

As stated earlier, the notion of restrictions of competition 'by object' is not incongruent with Article 102 TFEU, despite the absence of any reference to this concept in the wording of the provision. From an analytical perspective, the notion of 'by object' restrictions has the same meaning under both Articles 101(1) and 102 TFEU, in the sense that it is associated with a presumption that the relevant practice is capable of producing anticompetitive effects, without it being necessary for the competition authority or plaintiff to establish these effects, unless the undertaking(s) under investigation challenge the validity of the presumption (on the notion of 'by object' restrictions under Articles 101 and 102 TFEU, see Ibáñez Colomo, 2018, p. 293).

In the landmark *Intel* case, the CJEU confirmed that loyalty rebates amount to an abuse of dominance, however it read a burden-shifting mechanism into its earlier case law: where the undertaking concerned challenges the presumption of exclusionary effects, the competition authority is required to assess the probative value of the evidence produced by the former, in deciding whether the rebates at issue have as their object the restriction of competition.<sup>43</sup> It is only after the 'intrinsic capacity' of loyalty rebates to foreclose as efficient competitors has been refuted that the authority can proceed to a balancing exercise of the pro- and anticompetitive effects of

<sup>40</sup> See Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 22.

<sup>41</sup> See Joined cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEEVE*, EU:C:2008:504, para 66.

<sup>42</sup> Joined cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEEVE*, EU:C:2008:504, para 69.

<sup>43</sup> Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, paras 137–138.

the practice.<sup>44</sup> This methodological sequence clearly reflects the analytical process applied within the framework of the bifurcated Article 101 TFEU.

This approach was relied upon more recently, in *Unilever Italia*, where the CJEU dealt with the compatibility of exclusivity clauses with Article 102 TFEU.<sup>45</sup> It should be reminded that the earlier case law of the European Courts had ostensibly drawn an analytical distinction between contractual and *de facto* exclusivity, applying different legal standards to each type of conduct. More specifically, in *Hoffmann-La Roche*, the Court had adopted a formalistic approach to exclusive purchasing, effectively holding that the respective clauses are by their very nature abusive, and without explicitly acknowledging the possibility for the undertaking under investigation to put forward an objective justification for its conduct.<sup>46</sup> Subsequently, in *Van den Bergh Foods*, the General Court applied an effects-based analysis, arguing that the conduct of a dominant undertaking that amounted to *de facto* exclusive dealing (provision of freezer cabinets on condition of exclusivity) constituted an abuse of dominance on account of its exclusionary effects.<sup>47</sup>

In *Unilever Italia*, the CJEU revisited the legal test applied to contractual exclusivity and subtly qualified its earlier judgment in *Hoffmann-La Roche*. In particular, the Court noted that, even though exclusivity clauses imposed by a dominant undertaking raise competition concerns ‘by reason of their nature’, their ability to foreclose the market cannot be conclusively presumed.<sup>48</sup> Once the competition authority demonstrates the application of exclusivity clauses, it is entitled to declare them incompatible with Article 102 TFEU, unless the undertaking (i) produces evidence that cast doubt on the capacity of the clauses to exclude equally efficient competitors or (ii) pleads that its conduct is objectively justified.<sup>49</sup> Hence, the competition authority, albeit not required to establish the alleged harmful effects of the practice in question, it is nevertheless under the obligation to examine any evidence submitted by the dominant undertaking, once the latter discharges its burden of proof.<sup>50</sup>

By contrast to the category of naked restraints presented in the previous section, it is clear from both *Intel* and *Unilever Italia* that, as far as loyalty rebates and exclusivity clauses, respectively, are concerned, the focus is on the ability of the practice at issue to exclude a competitor. There is nothing in those two judgments to suggest that the CJEU regards the practices at issue as presumably inconsistent with competition on the merits. Quite the contrary: the Court has conceded that it is only natural that competition – on the merits may result in less efficient competitors being driven out of the market.<sup>51</sup> In fact, the conduct of a dominant undertaking will be considered as problematic only if it produces ‘exclusionary effects in respect of competitors that [are] as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality’.<sup>52</sup>

<sup>44</sup> *Ibid*, para 140.

<sup>45</sup> Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33.

<sup>46</sup> See Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 89 (‘An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102 TFEU] [...]’). See also Case T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission*, EU:T:1993:31, para 68 (‘the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market’).

<sup>47</sup> See Case T-65/98, *Van den Bergh Foods Ltd v Commission*, EU:T:2003:281, para 160.

<sup>48</sup> Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, para 51.

<sup>49</sup> *Ibid*, paras 52–53.

<sup>50</sup> *Ibid*, paras 54–55.

<sup>51</sup> Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para 136; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, para 37.

<sup>52</sup> Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, para 39.

It is submitted here that, in the context of Article 102 TFEU, restrictions of competition by object are distinct from naked restrictions, in that the latter cannot be justified from an economic standpoint, other than as outright attempts to exclude a competitor. In this sense, they are considered as being driven by an anticompetitive intent and are rebuttably presumed to fall outside the scope of competition on the merits. The dominant undertaking could refute this presumption following a two-prong test:

- first, the dominant undertaking should be required to demonstrate that the impugned conduct was objectively justified. While it is unclear whether an argument that the practice at issue was not capable of producing anticompetitive effects would be acceptable, it is submitted here that the General Court’s judgment in *Intel* clearly stands for the proposition that the enforcer is under no obligation to carry out an as-efficient competitor test with regard to naked restraints;<sup>53</sup>
- second, if and only if the undertaking discharges its burden of proof by successfully pleading an objective justification defence, this means that the restriction is not ‘naked’, in which case the burden shifts back to the enforcer to substantiate that the practice is capable of producing, at least potential, anticompetitive effects.

The same logic should underpin the legal tests applied to the other examples of naked restraints discussed above, namely predatory pricing and the restriction of parallel exports. With regard to the former, it is clear from *AKZO* and subsequent case law<sup>54</sup> that the presumption against pricing below average variable costs is primarily one of anticompetitive intent, not exclusionary **effects**. It has been observed in this regard that ‘some decisions and judgments refer to the “object” or “purpose” of the dominant undertaking as an alternative to analysing the “effects” of a practice on the market’ (Akman, 2014, p. 316, 317). In this sense, pleading that the practice is objectively justified should be regarded as more appropriate for the purpose of rebutting the presumption.

On the contrary, with regard to forms of unilateral conduct constituting restrictions of competition by object, these may be presumed to violate Article 102 TFEU, however it is on the dominant undertaking to demonstrate that its behaviour is not capable of producing exclusionary **effects** or, in other words, that it is not likely to result in the elimination of an as-efficient competitor. Since restrictions by object are not presumed to lack an objective justification, an argument that an exclusivity clause or a loyalty rebate scheme is objectively justified is not likely to absolve the dominant undertaking from antitrust liability in the absence of a showing that the conduct is not likely to produce exclusionary effects.

A possible criticism of the different approaches taken to naked restrictions and ‘by-object’ restrictions could be that a naked restraint will be prohibited even if it is likely to result in the exclusion of **less efficient** competitors. This assumption is at odds with the established principle that ‘Article [102 TFEU] covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an **effective** competitive structure’.<sup>55</sup> In turn, an effective competitive structure is said to be impaired where the competitors harmed by the dominant undertaking’s conduct are as efficient as itself (Lovdahl Gormsen, 2013, p. 223, 231).

<sup>53</sup> See note 32 above and accompanying text.

<sup>54</sup> See Case C-202/07 P, *France Télécom SA v Commission*, EU:C:2009:214, para 109.

<sup>55</sup> See Case T-201/04, *Microsoft Corp. v Commission*, EU:T:2007:289, para 664 (and the case law cited).

However, according to the preceding analysis, the notion of naked restraints is not related to the effects of a given practice, but rather to the exclusionary intent of the dominant undertaking which is manifested in a way so obviously inconsistent with competition on the merits that the examination of its impact on the market would be redundant.

## V. Practices that infringe Article 102 TFEU on account of their effects

This last category of abuses comprises most forms of conduct that may potentially qualify as abusive, within the meaning of Article 102 TFEU. It concerns practices that are not considered as having the intrinsic capacity of foreclosing competition; thus, the burden is on the competition authority to establish that, under the circumstances of a specific case, these practices may produce, actual or potential, exclusionary effects.

An example of practices that fall within this category is margin squeeze. As the CJEU held in *TeliaSonera*, margin squeeze can be found to be abusive only if it is shown to have an exclusionary effect on competitors that are at least as efficient as the dominant undertaking itself.<sup>56</sup> According to the Court, in the absence of an effect – whether actual or potential – on the competitive situation of competitors, in the sense that entry into the affected market has not been hindered as a result, the practice under investigation shall not be caught by the prohibition of Article 102 TFEU.<sup>57</sup> Accordingly, the Court clearly places the burden on the competition authority to perform the as-efficient competitor test and demonstrate that the contested practice produces anticompetitive effects.

Similarly, in order for price discrimination to fall within the scope of Article 102 TFEU, the competition authority is liable to establish that the conduct tends to distort the competitive relationship between the dominant undertaking's trading partners, by placing some of them at a competitive disadvantage vis-à-vis the others.<sup>58</sup> In doing so, the competition authority must examine all relevant circumstances of the case and substantiate that the conduct in question has an effect on the costs, profits or any other relevant interest of one or more of the trading partners, in a way that it affects their competitive situation.<sup>59</sup> As far as technical bundling is concerned, in *Microsoft* the General Court distanced itself from earlier case law that treated tying as having by its nature foreclosure effects. The Court noted that, in light of the specific circumstances of the case at hand, a mere presumption of anticompetitive effects was not appropriate.<sup>60</sup> Finally, refusal to deal, whether outright<sup>61</sup> or constructive,<sup>62</sup> may be found abusive subject to an examination of its impact on competition in a vertically-related market.

Once a given conduct has been found to fall within the scope of Article 102 TFEU, it is open to the dominant undertaking to plead an efficiency defence in order to escape the prohibition. However, it could be argued that it is rather impossible for an undertaking to survive the relevant

<sup>56</sup> See Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para 63 (and the case law cited).

<sup>57</sup> *Ibid*, para 66 (and the case law cited).

<sup>58</sup> See C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2018:270, para 25.

<sup>59</sup> *Ibid*, para 37. As part of its analysis, the competition authority is expected to assess the undertaking's dominant position, the parties' negotiating power, the conditions and arrangements for charging the contested prices, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market a trading partner that is at least as efficient as its competitors; see *ibid*, para 31.

<sup>60</sup> Case T-201/04, *Microsoft Corp. v Commission*, EU:T:2007:289, para 868.

<sup>61</sup> Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569, para 41.

<sup>62</sup> Case C-165/19 P, *Slovak Telekom, a.s. v Commission*, EU:C:2021:239, paras 50–51.

test formulated in *Post Danmark* (effectively transplanting the Article 101(3) TFEU criteria into the analytical framework of Article 102 TFEU).<sup>63</sup> Once the competition authority or plaintiff has discharged its burden of proof by substantiating the harmful effects of the contested conduct, the dominant undertaking will be required to show inter alia that the practice ‘does not eliminate effective competition, by removing all or most existing sources of actual or potential competition’. Such a requirement, though, is effectively an oxymoron since, at that stage, the competition authority or plaintiff will have already established that the conduct is capable of excluding an as-efficient competitor or, in refusal to deal cases, that it is likely to eliminate all competition in the affected market.

On the basis of the foregoing, it could be argued that the framework for the assessment of efficiency defences, as set out in *British Airways*, appears to be more appropriate – and, in any event, makes more sense – than the test set out in *Post Danmark*.<sup>64</sup> Otherwise, it would be effectively impossible for the dominant undertaking to justify its conduct on the basis of a pro-competitive rationale, despite the reversal of the burden of proof. Having said that, even an approach whereby the ‘no elimination of competition’ requirement is omitted raises an important concern: could the exclusion of an as-efficient competitor ever be justified in light of possible efficiencies generated by the conduct?

The Commission’s Article 101(3) Guidelines expressly take the view that the protection of the competitive process takes precedence over any efficiency gains that may emanate from a restrictive agreement.<sup>65</sup> There is no reason to think that the standard applied under Article 102 TFEU would be any different, especially given that, due to the very presence of the dominant undertaking, the structure of competition in the market is already weakened. Under these circumstances, a practice which has already been shown to result in a (further) disruption of the competitive process by eliminating a rival which is at least as efficient as the dominant undertaking, cannot be expected to be exonerated by means of an efficiency defence. Against this backdrop, arguing that a certain practice is objectively justified could prove to be the only way-out for a dominant undertaking.<sup>66</sup>

## VI. The way forward: Is there scope for a unified analytical framework under Articles 101 and 102 TFEU?

The evolution of the European Courts’ case law with regard to the legal tests applied to certain forms of conduct by dominant undertakings reveals an attempt to enhance the internal consistency of EU competition law, in terms of the analytical framework of Articles 101 and 102 TFEU. On the one hand, the interpretation of the concept of ‘abuse’ has implicitly introduced the object–effect dichotomy in Article 102, while allowing the undertaking under investigation to challenge a finding of anticompetitive object by showing that its behaviour was objectively justified. Additionally, a dominant undertaking’s ability to plead an efficiency defence – at least as envisaged by the CJEU in *Intel* – opens the door to a balancing exercise equivalent to that of Article 101(3) TFEU,

<sup>63</sup> See *supra* section II.

<sup>64</sup> See *supra* note 16 and accompanying text.

<sup>65</sup> Article 101(3) Guidelines, para 105.

<sup>66</sup> See, e.g., Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569, para 41.

with a view to determining the net competitive effects of a certain unilateral practice. Having said that, one could observe some discrepancies between the two provisions.

First, as has already been mentioned earlier, in the case of practices that are considered as abusive by object, a dominant undertaking may claim that its conduct is not likely to result in the elimination of an as-efficient competitor, in order to rebut the presumption of anticompetitive effect. On the contrary, this does not seem to be possible in the context of Article 101 TFEU: once an agreement has been found to be restrictive by object, there is no room for the parties other than to seek an exemption on an individual basis under Article 101(3) TFEU. The very concept of ‘by-object’ restrictions under Article 101(1) is premised on the assumption that certain types of coordination between undertakings reveal a sufficient degree of harm to competition, so that there is no need to examine their effects.<sup>67</sup>

Second, according to the Court’s established case law, the notion of restrictions of competition by object under Article 101(1) TFEU is associated with certain forms of collusion that, in light of experience, are deemed so likely to have negative effects on the price, quantity or quality of the affected goods and services, that it is considered redundant to prove that they have actual effects on the market.<sup>68</sup> As far as Article 102 TFEU is concerned, though, a practice will be considered as intrinsically abusive if, on the face of it, it makes no economic sense other than as a means to eliminate a competitor. Hence, in *Hoffmann-La Roche*, a judgment which, although substantially qualified by *Intel* and *Unilever Italia*, still stands for the proposition that exclusivity obligations and loyalty rebates are abusive by their nature,<sup>69</sup> the CJEU noted that, save for exceptional circumstances, the relevant practices ‘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’.<sup>70</sup> Similarly, in *France Télécom*, a predatory pricing case, the CJEU noted that a *prima facie* finding of an abuse is associated with a presumption that the conduct at issue pursues no other economic objective apart from the exclusion of competitors.<sup>71</sup> Put differently, a dominant undertaking employing strategies that are regarded as abusive by their nature is presumed not to be competing on the merits.

Third, as was argued in Section IV above, putting forward a pro-competitive justification under Article 102 TFEU, appears to be far less likely to prove successful than under Article 101(3) TFEU. In cases of practices that demonstrably produce exclusionary effects by eliminating competitors that are at least as efficient as the dominant undertaking pleading an efficiency defence is extremely unlikely to survive a balancing exercise in markets in which the competitive process is already substantially disrupted by the presence of a dominant undertaking. In this sense, the analytical mechanisms for the assessment of pro-competitive justifications are bound to be applied in a different manner in the context of each provision.

<sup>67</sup> See, e.g., Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, EU:C:2020:265, para 35 (and the case law cited).

<sup>68</sup> *Ibid*, para 36 (and the case law cited).

<sup>69</sup> See Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, paras 137–139; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, paras 46–47.

<sup>70</sup> Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 90.

<sup>71</sup> Case C-202/07 P, *France Télécom SA v Commission*, EU:C:2009:214, para 109.

## VII. Conclusion

The purpose of this article was to demonstrate the rationale underpinning the tripartite distinction of exclusionary abuses under Article 102 TFEU and examine the implications of this categorisation for the analytical frameworks applied to the assessment of naked restraints, practices that have as their object the restriction of competition and forms of unilateral conduct that may be found abusive on account of their effects. It was argued that this distinction affects the allocation of the burden of proof and the defences available to the dominant undertaking under investigation. The adoption of a more economic approach to Article 102 TFEU, as interpreted by the case law of the European Courts, enhances the internal consistency of EU competition law by aligning – although not unifying completely – the analytical framework applied to abusive practices with that of Article 101 TFEU.

### References

- Akman, P. (2014). The role of intent in the EU case law on abuse of dominance. *European Competition Journal*, 39(3).
- Ibáñez Colomo, P. (2016). Beyond the “More Economics-Based Approach”: A Legal Perspective on Article 102 TFEU. *Common Market Law Review*, 53. <http://dx.doi.org/10.2139/ssrn.2755656>.
- Ibáñez Colomo, P. (2018). The Future of Article 102 TFEU after Intel. *Journal of European Competition Law & Practice*, 9(5).
- Lianos, I., Korah, V. and Siciliani, P. (2019). *Competition Law: Analysis, Cases and Materials*. Oxford University Press.
- Loewenthal, P.J. (2005). The Defence of “Objective Justification” in the Application of Article 82 EC. *World Competition: Law and Economics Review*, 28(4), 455–460.
- Lovdahl Gormsen, L. (2013). Are Anti-Competitive Effects Necessary for an Analysis under Article 102 TFEU? *World Competition: Law and Economics Review*, 36(2).