

Restrictions by Object within Article 102 TFEU and a comment on *Intel*

An extract of my ongoing PhD research

The Foundation: The purpose of Article 102 TFEU

Effective competition

- Article 102 TFEU has two main goals:
 1. The 'economic goal' and
 2. The 'integration goal'
- The overall objective is effective competition
 - ♦ Also known as 'undistorted competition'

Anti-competitive effect

- Demonstrating an anti-competitive effect is, and has always been, required
 - The wording 'anti-competitive effect' is new
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Benchmarking with Article 101 TFEU

- Certain types of coordination between companies can be regarded, by their very nature, as harmful to the proper functioning of normal competition = by object
 - ♦ For example , price-fixing agreements
 - A by object restrictions involve two elements
 1. The type of coordination is found capable of restricting competition,
 2. And it reveals a sufficient degree of harm.
 - When assessing whether conduct involves a ‘by object’ restriction, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part
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Analysis of Case Law: *Michelin II* (2003) & *France Télécom* (2007)

- In *Michelin II*, the GC initially rejected a distinction between the 'by object' and 'by effect' as in Article 101 TFEU
 - The GC stated in both cases:
 - ♦ *"As regards the conditions for the application of Article [102 TFEU] and the distinction between the object and effect of the abuse, it should be pointed out that, for the purposes of applying that article, showing an anti-competitive object and an anticompetitive effect may, in some cases, be one and the same thing. If it is **shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect.**"* (T-340/03, *France Télécom*, 195)
 - *France Télécom* was upheld by the ECJ
 - ♦ Used the same reasoning for the test; however, with different wordings
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Analysis of Case Law: *Post Danmark I* (2012)

- *Post Danmark I* indicated the effect-based approach is to be applied to all future cases
 - ◆ However, the ECJ only required the 'by effect' test due to the lack of a 'by object' in the case

 - A predatory pricing case which did not satisfy the *Akzo-test*
 - ◆ Neither prices below AVC/AAC nor predatory intent

 - The ECJ clarified to grey areas:
 1. Prices above ATC
 - ◆ Unable to be considered as having anti-competitive effects
 2. Prices below ATC but above AVC/AAC + no predatory intent
 - ◆ Cannot constitute exclusionary abuse by them self
 - ◆ Can constitute exclusionary abuse if actual or likely anti-competitive effects is proven
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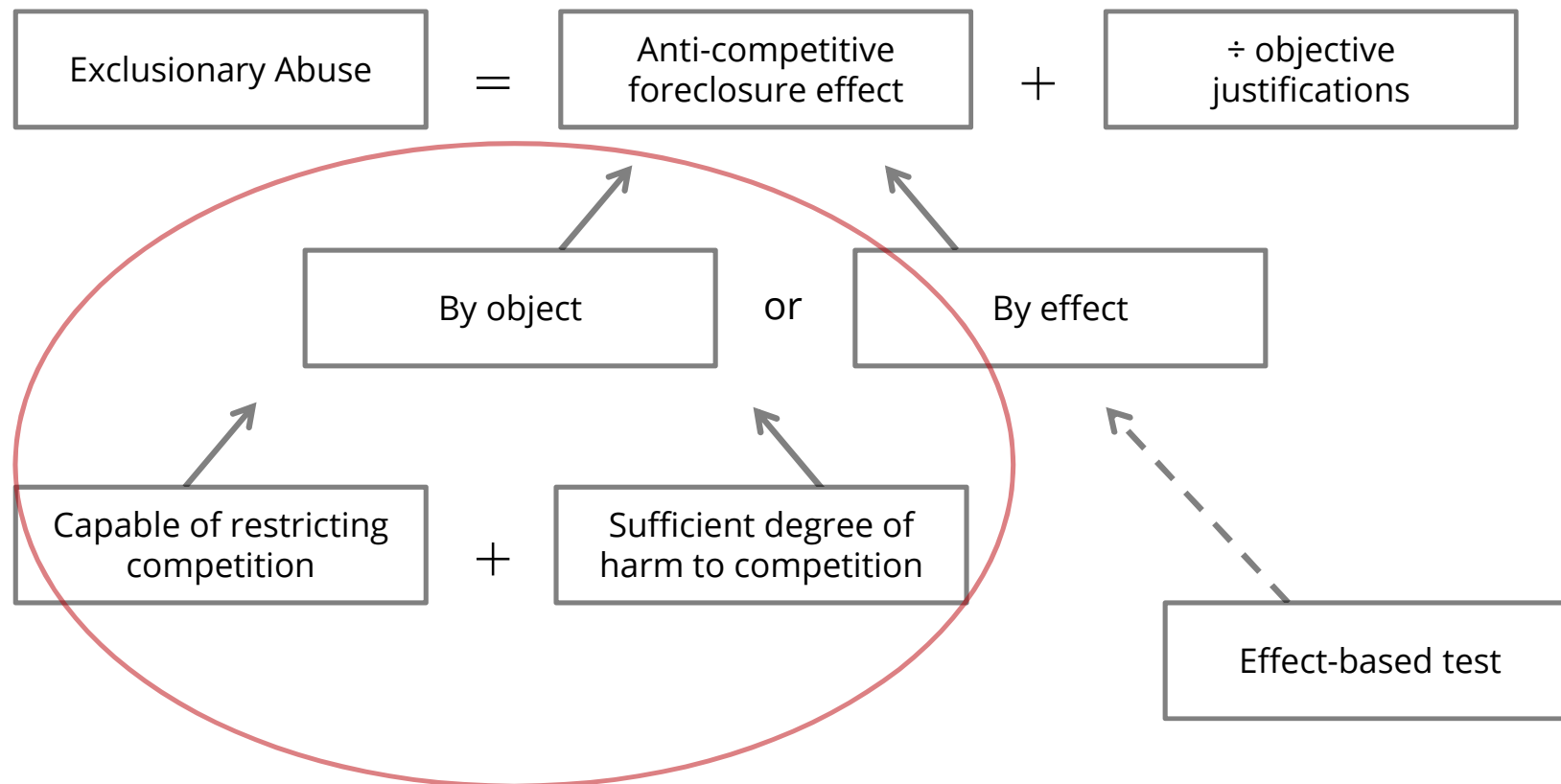
Analysis of Case Law: *Tomra* (2012 – after *Post Danmark I*)

- The purpose of the assessment was to determine whether the type of conduct had an abusive nature and not its actual or likely effect
 - The ECJ held:
 - ♦ *“As regards the present case, it is clear from paragraph 213 of the judgment under appeal that a rebate system **must be regarded as infringing Article 102 TFEU if it tends to prevent customers of the dominant undertaking from obtaining their supplies from competing producers.**”*
 - *Tomra* and *Post Danmark I* are evidence of the distinction between restrictions of competition by object and by effect
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Analysis of Case Law: *Intel* (2014)

- The GC shed new light on the distinction following the confusion of *Post Danmark I* and *Tomra*
 - Exclusionary rebates are anti-competitive by their very nature
 - ‘Naked Restrictions’ constituted a restriction by object
 - ♦ Reference to *France Télécom*
 - The case tells us some conduct can be regarded as restricting competition by object
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Attempt to define: Overview



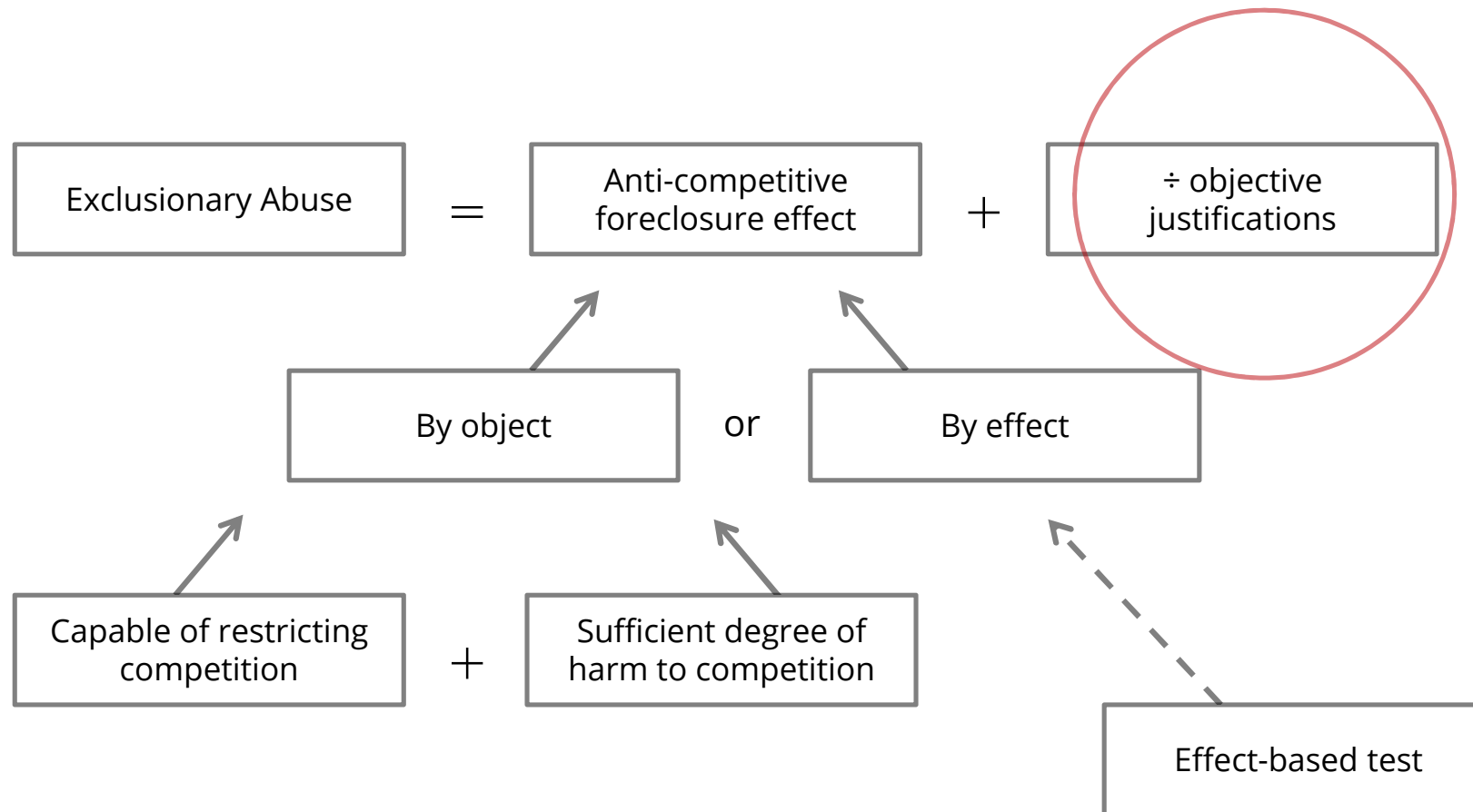
Definition: Capability to restrict competition

- Without capability no presumption can be held
 - Michelin (322/81), p. 73 as a starting point:
 - ♦ *"Tend to:*
 1. *remove or restrict the buyer's freedom to choose his sources of supply,*
 2. *bar competitors from access to the market,*
 3. *apply dissimilar conditions to equivalent transactions with other trading parties, or*
 4. *strengthen the dominant position by distorting competition."*
 - 'Capable of', tend to' and 'design to' means the same
 - ♦ 'Design to' - see e.g. *Hoffman La Roche*
 - A presumption rule
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Definition: Sufficient degree of harm

- Without sufficient degree of harm no presumption can be held
 - Requires an assessment of all relevant circumstances
 - Tomra (C-549/10), p. 43
 - ♦ “[...] **only an analysis of the circumstances of the case**, such as the analysis carried out by the Commission in the contested decision, **may make it possible to establish whether the practices of an undertaking in a dominant position are capable of excluding competition.**
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Definition: Per se abuse?



A comment on *Intel*: A requirement to have regard to the circumstances?

- A lesson to be learned from *Cartes Bancaires*
 - ♦ Important to consider all relevant circumstances of the case
 - *Intel* differs – ‘no need to consider the circumstances of the case’
 - ♦ “Exclusivity rebates are by their very nature capable of restricting competition.”
 - Will the ECJ set aside the judgment of the GC? - Unlikely
 - ♦ The relevant circumstances was considered
 - ♦ Unavoidable trading partner – sufficient degree of harm is unlikely if this is not the case
 - The ECJ will hopefully comment on the requirement
 - ♦ The requirement follows clearly from case law e.g *Tomra*
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A comment on *Intel*: A requirement to have regard to the circumstances?

- *Tomra* (T-155/06) p. 213 & 215
 - ♦ *“It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article [102 TFEU] unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors (see Hoffmann-La Roche v Commission, paragraph 90, and Michelin II, paragraph 59)”*
 - ♦ *“It may be concluded from that line of cases, as the applicants indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article [102 TFEU], it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so.”*
 - *Tomra* (C-549/10) p. 43
 - ♦ *“[...]only an analysis of the circumstances of the case, such as the analysis carried out by the Commission in the contested decision, may make it possible to establish whether the practices of an undertaking in a dominant position are capable of excluding competition.”*
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Conclusion

- Case law reveals a distinction between restrictions by object and by effect
 - An attempt to define restrictions by object can be made:
 1. Capability to restrict competition
 2. Reveals a sufficient degree of harm
 - The GC *erred* in law in *Intel*
 - ♦ Unlikely the ECJ will set aside the judgment of the GC
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Thank you for your attention

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