

Exploring Restrictions by Object within Article 102 TFEU; Rethinking the latest Case Law with an Emphasis on Intel

By

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1. Introduction

Criticism of the approach to exclusionary abuse under Article 102 of the Treaty on the Functioning of the European Union (the “TFEU”) has been greatly expressed, and is especially a primary focus during the 21st century.² The foremost criticism causes concern for the so-called formalistic approach, entailing critique regarding the lack of focus on actual or likely (anti-competitive) effects in the individual case. In this process, an effect-based approach has been advocated. The argument, in short, suggests that by applying an effect-based approach it is assured only anti-competitive conduct is deemed illegal, and hence, stifling of pro-competitive conduct is avoided.

At same time, the proponents of the effect-based approach tend to present a choice between the approach which is applied in the formalistic case law by the EU Courts³, in comparison to the approach based on economics by analysing actual or likely effects.⁴ In contrast to such presentation, this article will explain how not only one approach is applicable to the assessment of exclusionary abuse. Instead, one must distinct between the “formalistic” approach and the “effect” approach, entailing a distinction between restrictions

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² The first serious say on the criticism of the approach is particularly Report by the EAGCP, *An Economic Approach to Article 82* (2005).

³ The European Court of Justice and the General Court.

⁴ See e.g. Wils, Wouter P.J., *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance* (2014) *World Competition: Law and Economics Review*, Vol. 37, No. 4, Forthcoming, who address this aspect.

of competition by object and by effect will be presented regarding the assessment of exclusionary abuse under Article 102 TFEU – with focus on the former.

The fact that it is not necessary for some types of exclusionary conduct to be subject to an analysis of actual or likely effects is due to the fact that they are by their very nature capable of being harmful. In this regard, General Advocate Kokott's drunk driving analogue is useful as an illustrative example. In her opinion of *T-Mobile*, Kokott explained why drunk driving is always illegal, as our experience warns us of the likelihood to cause harm. The risk of harm is sufficiently great to warrant an outright prohibition, rather than judging infringements on a case-by-case basis. With this example, the reasoning for the restrictions of competition by object in Article 101 TFEU was explained.⁵ Such categorisation of illegal conduct should however not be limited to this provision. This is explained by the European Court of Justice ("ECJ") in *Europemballage and Continental Can* in which the ECJ held Article 101 TFEU and Article 102 TFEU to seek to achieve the same aim,⁶ and it is, therefore, only logical they do so through the same means.

Section 2 sets the overall protective aim as regards Article 102 TFEU and section 3 presents the approach taken in Article 101 TFEU. These two sections will form the basis for the analyses and discussions in the following sections. Section 4 will analyse whether a distinction within Article 102 exists, and hence, whether some types of exclusionary conduct restricts competition by object. Section 5 discusses how to understand and define restrictions of competition by object within Article 102 TFEU including whether it involves per se abuse. Lastly, section 6 will address the judgment of the GC in *Intel* including how it fits with the findings in the previous sections.

2. Effective Competition and Anti-Competitive Effects; The Purpose of the Prohibition

Before embarking on an analysis of the US anti-trust rules, the understanding of the goals of the provision is necessary.⁷ The same must apply for analyses of Article 102 TFEU. Accordingly, in order to examine whether a distinction between by object and by effect restrictions can be held, the basis of the provision must be formed. In other words, the purpose of Article 102 TFEU must be discussed. In this regard, it must be pointed out that Article 102 TFEU (and European competition law in general), has overall two primary

⁵ See Opinion of Advocate General in Case 8/08, *T-Mobile*, paragraph 47.

⁶ See Case 6/72, *Europemballage and Continental Can*, paragraph 25.

⁷ See Bork, Robert; *The Antitrust Paradox: A Policy at War with Itself* (1979), page 55.

goals; the ‘economic goal’ and the ‘integration goal’.⁸ The former is concerned with consumer welfare,⁹ while the latter is concerned with the Single European Market.

2.1. Effective Competition

Whereas Article 102 TFEU and European Competition law in general may have two goals, one objective can be defined. This objective is effective competition (or undistorted competition). By ensuring effective competition, the two goals are thereby viewed as being achieved. This follows clearly from case law. The ECJ has continually specified that even though the protection of consumers is a main goal of Article 102 TFEU, the means to serve this goal is effective competition.¹⁰ *Post Danmark I* serves a good illustration. This case has been the leading case for the endorsement of an effect-based approach with focus on consumer welfare in future cases. However, as is evident from the ECJ’s statements as well as its conclusion, the anti-competitive effect is only indirectly related to consumers. Instead, the effect required by the ECJ is related directly to the (effective) competition.

This is further in agreement with the principle of Article 102 TFEU not only applies to the types of conduct harming consumers directly, but also those causing them harm indirectly. Since the ECJ has established the latter as the one associated with exclusionary abuse,¹¹ it should be clear how effective competition is the objective of Article 102 TFEU.¹²

Consequently, when assessing whether conduct constitutes exclusionary abuse within Article 102 TFEU, the objective is to establish whether it distorts effective competition.¹³

⁸ See e.g. Bishop, Simon & Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2010), 3rd edition, page 4-6.

⁹ Regarding whether consumer welfare or total welfare is the prevailing standard, one need only to look at the recent case law to see the ECJ has been focusing on consumer welfare in contrast to total welfare. See e.g. Case C-209/10, *Post Danmark I*, paragraph 20 and C-208/08 P, *Deutsche Telekom*, paragraph 170.

¹⁰ See for that effect e.g. Case C-280/08, *Deutsche Telekom*, paragraph 180; and Case C-209/10, *Post Danmark I*, paragraph 44.

¹¹ See Case C-209/10, *Post Danmark I*, paragraph 20.

¹² How effective competition (or undistorted competition) is to be understood in an economic sense is, however, unclear as effective competition is not an economic term. See e.g. Bishop, Simon & Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2010), 3rd edition, page 15-50.

¹³ This is further evident from the *Article 102 Guidance Paper*, paragraph 6 in which the Commission states: “*The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and*

2.2. Anti-Competitive Effects

The fact that effects have not been redundant in previous case law, as otherwise presented by the advocates of the effect-based approach, is also evident from case law. This has been clear as early as in *Europemballage and Continental Can*. Here the ECJ held conduct may be an abuse and prohibited under Article 102 TFEU if it has the effect of distorting competition.¹⁴ This has later been repeated in for example *Hoffman La Roche*; however, without specifying what it involves.¹⁵

It was, however, not until recent case law anti-competitive effects have been explicitly required.¹⁶ Nonetheless, this effect still relates to the effect mentioned in *Hoffman La Roche*. This is evident in for example *Telia-Sonera*. In this case, the ECJ established margin squeeze conduct only constitutes abuse if an anti-competitive effect is demonstrated and further this requirement is the consequence of the concept of abuse laid out in *Hoffman La Roche*.¹⁷

Accordingly, even if the term ‘anti-competitive effect’ is relatively new, the requirement of such an effect cannot be stated as a novelty within the assessment of exclusionary abuse. It is merely an evidence of the constant evolution taking place within the European competition law which includes, among other things, elaboration of different terms. It is worth mentioning that even if the requirement is not stated explicitly in a case, the aim of the case is still to assess such effects.¹⁸

In consequence, it can be concluded an anti-competitive effect is required in order to establish exclusionary abuse. In addition, with the latest case law this now follows explicitly. There should, therefore, not be any doubt to whether a requirement of an anti-competitive effect exists. Demonstrating such effect may, nonetheless, still be subject to debate, including when it is demonstrated to the requisite legal standard.

ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide.”

¹⁴ See Case 6/72, *Europemballage and Continental Can*, paragraph 27 and 18-27.

¹⁵ See e.g. Gormsen, Liza Lovdahl; *Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?* (2013) *World Competition*, Vol. 36, No. 2, page 226-227.

¹⁶ See for that effect e.g. See Case T-201/04, *Microsoft*; Case C-280/08, *Deutsche Telekom*; Case C-52/09, *TeliaSonera B*; and Case C-209/10, *Post Danmark I*. See also the *Article 102 Guidance Paper*, paragraph 20.

¹⁷ See Case C-52/09, *TeliaSonera*, paragraph 61.

¹⁸ See for that effect e.g. Case C-549/10, *Tomra*; and Case T-286/09, *Intel*. In neither *Tomra* nor *Intel* was the requirement of anti-competitive effects explicitly stated; however, in both cases the types of conduct were found to be capable of having anti-competitive effects.

3. The Standard in Article 101 TFEU; A Potential Reference Point for Article 102 TFEU

Identifying some types of conduct as having an anti-competitive object within Article 102 TFEU is likely to have its origin in Article 101 TFEU. In this provision, an infringement includes agreements¹⁹ having as their *object or effect* the prevention, restriction or distortion of competition. Agreements having an anti-competitive object are exempted from an analysis of the anti-competitive effect since such effect is presumed.

Contrary to Article 101 TFEU, a similar wording is not included in Article 102 TFEU. Instead, conduct constitutes abuse if it may affect trade between Member States. The General Court (“GC”) has further addressed this in for example *Michelin II*. It held Article 102 TFEU, unlike Article 101 TFEU, does not refer to the anti-competitive aim or the anti-competitive effect of a practice; in the light of the provision, conduct will be regarded as an abuse *only* if it restricts competition.²⁰ As will be addressed in the following section, such distinction is, nevertheless, evident in the application the provision.

Since the working hypothesis involves a distinction within Article 102 TFEU and such distinction most likely has similarities to Article 101 TFEU, it is appropriate to have an overview of restrictions of competition by object within this provision. In general, restrictions of competition by object are those which can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.²¹ That can be assumed to be the case where an agreement, having regard to its legal and economic context, has the specific capability and tendency to have a negative impact on competition. If the agreement does not restrict competition by object, it is then prohibited under Article 101 TFEU only if it is shown, based on an analysis of the actual and/or likely effects, it has the effect of restricting competition. In other words, restrictions by object may be held as being a presumption rule since the actual or likely effect is not need to be demonstrated. Instead such effect is presumed.

It follows from case law that in order for an agreement to be regarded as having an anti-competitive object, it is sufficient if it has the potential of hav-

¹⁹ Agreements are used in this context to describe the practices included in Article 101 TFEU. Consequently, the term agreements in this context also include collusion, concerted practice or the like.

²⁰ See Case T-203/01, *Michelin II*, paragraph 237.

²¹ See e.g. case C 67/13 P, *Cartes Bancaires*, paragraph 50; and Case C-226/11, *Expedia*, paragraph 36.

ing a negative impact on competition, that is to say, it is capable of resulting in the restriction of competition.²² Accordingly, a restriction of competition by object involves an agreement capable of restricting competition. The fact that some types of agreement are capable hereof is further the reasoning behind a distinction between restrictions of competition by object and effect.²³

However, capability is not in itself sufficient for the finding of an infringement. A core criterion is further whether the alleged agreement reveals a sufficient degree of harm to competition. This was stressed by the ECJ in *Cartes Bancaires*.²⁴ Consequently, if there is not sufficient degree of harm to competition, an agreement cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition.²⁵ Whether sufficient degree of harm is present depends on an assessment including the content of the agreement, its objectives as well as the economic and legal context of which it forms a part.²⁶ In consequence, whether an agreement can be regarded as restricting competition by object must rely on an assessment of the circumstances of the case. However, it must be stressed that such an assessment is not as comprehensive as the one needed concerning actual or likely effects.

Summarised, restrictions of competition by object are those which can be regarded, by their very nature, as being harmful to competition. This involves an assessment of the agreement in terms of whether it 1) is capable of restricting competition and 2) shows a sufficient degree of harm in the individual case. Accordingly, demonstrating such restriction requires an assessment of the capability in the individual case at hand.

4. The EU Courts' View on a Distinction; Overall Considerations on the Case Law

The idea of restrictions of competition by object within Article 102 TFEU, obviously, does not stem from a vivid imagination but from the EU Courts' case law. It is, therefore, appropriate to present the indications which can be established within the case law. Due to the impact which especially *Post Danmark I* (and *Tomra*) and *Intel* have had, respectively, this section is divided into three subsections in the analysis of recent case law.²⁷

²² See e.g. Case C-32/11, *Allianz Hungarian*, paragraph 38; and Case C-8/08, *T-Mobile*, paragraph 31.

²³ See e.g. Case C-226/11, *Expedia*, paragraph 36 (and the case law cited).

²⁴ See case C 67/13 P, *Cartes Bancaires*, paragraph 49.

²⁵ See case C 67/13 P, *Cartes Bancaires*, paragraph 75.

²⁶ See case C 67/13 P, *Cartes Bancaires*, paragraph 53 (and the case law cited).

²⁷ This article will centre on recent case law in order to limit the number of pages.

The first section addresses the case law before *Post Danmark I* and thereby the first direct indications of restrictions of competition by object in recent case law. The second section addresses *Post Danmark I* as well as *Tomra* in order to determine their place within this framework. The third section addresses *Intel* and the new light shed by the GC.

4.1. Before *Post Danmark I*

4.1.1. Michelin II

As previously stated, the GC held in *Michelin II* that a reference to neither the anti-competitive aim nor the anti-competitive effect is contained in Article 102 TFEU. Nonetheless, the GC also stated for the purposes of applying Article 102 TFEU, establishing the anti-competitive object and the anti-competitive effect are one and the same thing. The GC elaborated this by stating if it is shown that the object pursued by a dominant firm's conduct is to limit competition, such conduct will also be liable to have such an effect.²⁸

As is apparent from this statement, an anti-competitive effect is presumed if an anti-competitive object has been established. In other words, conduct can be viewed liable of producing an anti-competitive effect due to its anti-competitive object. Furthermore, by stating the object and effect is 'one and the same thing', this could be interpreted as Article 102 TFEU only being relevant if a dominant firm's conduct has an anti-competitive object. However, such an interpretation would be too far-reaching.

4.1.2. France Telekom

This aspect of restrictions of competition by object was a few years afterwards repeated in the GC's judgement in *France Telecom*. The GC stated:

*"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."*²⁹

Compared to *Michelin II*, the GC added the wording '*in some cases*' which shows, even though not incorporated in the wording of Article 102 TFEU, it includes, similar to Article 101 TFEU, a distinction between the types of

²⁸ See Case T-203/01, *Michelin II*, paragraph 241.

²⁹ See Case T-340/03, *France Telecom*, paragraph 195, upheld in Case C-202/07 P, *France Telecom*, paragraph 48.

abuse which restricts completion by object and those which restrict competition by effect. In other words, the statement illustrate the two-stage examination applied in Article 101 TFEU. This addition to the phrase further removed the possible interpretation of only conduct which restrict competition by object is subject to [treatment under] Article 102 TFEU. Furthermore, *France Telekom*, unlike *Michelin II*, was appealed to the ECJ, and since the GC's ruling was upheld, this aspect seems to have been acknowledged by the ECJ.

The agreement between the GC and EJC is illustrated in how they justified the *Akzo*-test.³⁰ Both the GC and the ECJ applied the *Akzo*-test in order to determine abuse in the case, and consequently, they both needed to address the test. The GC justified the test on the basis of it finding of some types of conduct might have an anti-competitive object. The ECJ did not apply the same wording. Instead the ECJ stated, as a principle of case law, prices below average variable costs must be considered *prima facie* abusive since a dominant firm is presumed to pursue no other economic objective save that of eliminating its competitors.³¹ The fact that the ECJ did not refer directly to restrictions of competition by object should, however, not be interpreted as the ECJ rejecting such restrictions. It illustrates that even if conduct at first sight indicates a restriction of competition, it is not enough. A sufficient degree of harm must be proven and objective justifications must be considered as well. This will be addressed in more detail in section 5.

4.2. The Uncertainty created by *Post Danmark I* and *Tomra*

4.2.1. Post Danmark I

Following the ECJ's judgment in *Post Danmark I* – which held it was for the court who made the reference to assess the existence of any, actual or likely, anti-competitive effects – some commentators have named it the landmark case regarding a shift towards an effect-based approach within the application of Article 102 TFEU.³² By applying this approach to all future cases, conduct

³⁰ Prices below AVC applied by an undertaking in a dominant position are regarded as abusive in themselves. The same applies for prices above AVC but below ATC if they are determined as part of a plan for eliminating a competitor. See Case C-62/89, *Akzo*, paragraph 71 and 72.

³¹ See Case C-202/07 P, *France Telecom*, paragraph 48.

³² See e.g. Marquis, Mel and Rousseva, Ekaterina, *Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct Under Article 102 TFEU* (July 1, 2012) *Journal of European Competition Law and Practice* (OUP), first published online: October 25, 2012 (page 19 especially); Lundqvist, Björn and Ølykke, Grith Skovgaard, *Post Danmark, Now Concluded by the Danish Supreme Court: Clarification of the Selective Low Pricing Abuse and Perhaps the Embryo of a New Test under Article 102 TFEU?* (2013) *ECLR*, Vol. 34, Nr. 9, 2013, page 485-490.

cannot constitute exclusionary abuse without actual or likely anti-competitive effects being demonstrated.

However, such interpretation is an over-interpretation of the case since it does not require an effect-based approach *in all cases*. This is, essentially, due to two aspects. First, such over-interpretation does not take into consideration the preceding case law, and let alone *Tomra* which was delivered (a few weeks) after *Post Danmark I* and therefore takes precedence. Second, an interpretation of a specific case must take into consideration the context and the facts within it; i.e. deducing principles from one type of abuse in context with another type of abuse can only be done to some extent.³³

Concerning the interpretation of *Post Danmark I* in its own context, it must be noticed that it, basically, dealt with predatory pricing.³⁴ Accordingly, the case must first of all be seen as clarifying uncertainties regarding this type of exclusionary abuse and especially the questions asked by the national court. Initially, it can be observed the ECJ established price discrimination, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest the presence of exclusionary abuse.³⁵

Secondly, and possibly the reason for arguments of applying an effect-based approach in all future cases, the ECJ clarified the legal situation in regards to two situations of general pricing behaviour. First, prices lower than the average total costs (“ATC”), but above the average incremental costs (“AIC”) (and most likely also the average avoidable costs (“AAC”) or average variable costs (“AVC”)), and second, prices above ATC. Accordingly, *Post Danmark I* did not involve prices below the lower cost benchmark (i.e. AVC or AAC), and thus, it did not deal with a type of conduct which has

³³ This aspect has been confirmed by the GC, as it has been stated that pricing practices and non-pricing practices requires different treatments. See Case T-286/09, *Intel*, paragraph 99.

³⁴ It is true that since the pricing practice had not been applied to all customers of *Post Danmark*, it did not correspond to a ‘classic’ predatory pricing case where the same low price is applied to all customers. However, if predatory pricing is to be defined so narrowly, predatory pricing might only exist in the theory. Additionally, it can be noticed the prices dealt with in *Akzo*, which is an undisputed predatory pricing case, were applied to competitors’ customers rather than *Akzo*’s own customers. In consequence, such a narrow definition would not correspond to the case law. Moreover, the type of conduct in the case was not a loyalty-inducing rebate since the issue was the specific prices and not exclusivity/loyalty.

³⁵ See Case C-209/10, *Post Danmark I*, paragraph 30. Such pricing practice is however not precluded from amounting to an abuse within the meaning of Article 102 TFEU by other means. Such practices can still be a discriminatory abuse in respect to Article 102(C) TFEU.

been established as restricting competition by object in preceding case law.³⁶ Consequently, if the prices had been below the lower cost benchmark, it is likely the ECJ would have held the prices as an abuse, depending on whether the prices revealed a sufficient degree of harm.³⁷

Regarding prices above ATC, the ECJ held such prices as being unable to be considered as having anti-competitive effects.³⁸ However, this must be understood in context of the facts within the case. Accordingly, special circumstances like those in *Compagnie Maritime Belge*³⁹ and *Irish Sugar*⁴⁰ is [still] able to cause such prices to constitute an abuse within the meaning of Article 102 TFEU. Nevertheless, the main rule must be such conduct cannot amount to exclusionary abuse given no special circumstances are present. In the event of special circumstances, it is most likely an alteration of the cost benchmark will take place.⁴¹ In other words, a hypothetical/reasonable efficient competitor test will be applied instead of the as efficient competitor test.

In regards to prices between the two cost benchmarks applied in the case,⁴² the ECJ held such prices cannot constitute exclusionary abuse simply because the price charged to a single customer by a dominant firm is lower than the ATC attributed to the activity concerned, but higher than the AIC pertaining to the latter.⁴³ The ECJ, accordingly, repeated the test established in *Akzo* in which the ECJ established such prices as being unable to constitute abuse merely due to the level they were at, but intent to foreclose competition had to be established.⁴⁴ Contrary to *Akzo*, no intent was demonstrated in *Post*

³⁶ See above in section 4.1.2 which illustrates the findings in *France Telekom* and *Akzo*. See also Case C-209/10, *Post Danmark I*, paragraph 27.

³⁷ For that effect see also paragraph 27 in the *Post Danmark I* in which the ECJ held that “prices below the average of ‘variable’ costs (those that vary depending on the quantities produced) must, in principle, be regarded as abusive, inasmuch as, in charging those prices, a dominant undertaking is deemed to pursue no economic purpose other than that of driving out its competitors (emphasis added).” This statement illustrates price below AVC, as general principle, is regarded as anti-competitive.

³⁸ See Case C-209/10, *Post Danmark I*, paragraph 36.

³⁹ See Case C-395/96P and C-396/96P, *Compagnie Maritime Beige Transports SA*.

⁴⁰ See Case T-228/97, *Irish Sugar*. The selective low pricing strategy was dealt with in paragraphs 173 to 193.

⁴¹ See for instance the *Article 102 Guidance Paper*, paragraph 24, which mentions a dynamic as relevant approach in some cases.

⁴² It seems reasonable to expect the same would have applied if the case had included AVC vs ATC or AAC vs LRAIC.

⁴³ See Case C-209/10, *Post Danmark I*, paragraph 37.

⁴⁴ See Case C-62/89, *Akzo*, paragraph 72. See also paragraph 71 in regards to the presumption of prices below the average variable costs being abusive.

Danmark I.⁴⁵ Accordingly, it was not possible to rely on the *Akzo*-test. As a result, the ECJ had to establish the demonstration of an actual or likely anti-competitive effect was needed in the case in order to find an infringement. As is evident, the requirement was therefore not due to a new approach by the ECJ. Instead, the requirement was the result of a price which could not be regarded as being capable of restricting competition in the individual case.

In consequence, *Post Danmark I* did not involve a new test but rather presented clarification on two grey areas in which a price cannot be presumed to be capable of restricting competition, but still in certain circumstances can have such effect. In other words, the requirement of actual or likely anti-competitive effect was to the prices being those that can restrict competition by effect rather than those who restrict competition by object. Moreover, the case is rather a confirmation on the distinction rather than abandonment of the preceding case law and the principle herein.

4.2.2. *Tomra*

Regarding the impact by *Post Danmark I*, *Tomra* plays a great part. Following the judgment, the ECJ has been criticised for not applying the effect-based approach suggested in *Post Danmark I*, and hence, it took a step back in terms of implementing the effect-based approach.

However, the cases differ substantially. In contrast to *Post Danmark I*, the applied conduct in *Tomra* – individual retroactive rebates – had been established as being capable of restricting competition in numerous of cases before.⁴⁶ Accordingly, focus was on the nature of *Tomra*'s conduct and not its effect.⁴⁷ It was therefore not necessary in this case to undertake an effect-based approach in terms of determining whether it had any actual or likely anti-competitive effects. Instead, it was sufficient to demonstrate *Tomra*'s exclusionary conduct was capable of restricting competition in the case at hand. This was illustrated clearly by the ECJ in its judgment:

*“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.”*⁴⁸

⁴⁵ See Case C-209/10, *Post Danmark I*, paragraph 29.

⁴⁶ See for that effect for example Case 85/76, *Hoffman La Roche*; Case 322/81, *Michelin I*; Case T-203/01, *Michelin II*; and Case C-95/04, *British Airways*.

⁴⁷ See Case C-549/10, *Tomra*, paragraph 67.

⁴⁸ See Case C-549/10, *Tomra*, paragraph 72.

When comparing this case with *Michelin II* and *France Telekom*, this statement clearly illustrates the assessment concerned whether the rebates restricted competition by object and not by effect. Accordingly, *Tomra* together with *Post Danmark I* is evidence of the distinction between restrictions of competition by object and by effect.⁴⁹

4.3. New Light Shed by *Intel*

While *Post Danmark I* created a belief of all exclusionary conduct must be assessed under an effect-based approach, *Intel* tells us such approach is not the only one. The GC held some types of conduct – in this case exclusivity rebates – are anti-competitive by their very nature,⁵⁰ hence such conduct restricts competition by object. The GC, accordingly, shed new light on the demonstration of anti-competitive effects.

Additionally, the GC further held another type of conduct by Intel having an anti-competitive object.⁵¹ This conduct concerned ‘naked restrictions’, which involved a payment on the condition that the launch of competing products was either postponed or cancelled. Additionally, the GC referred to *France Telecom* in its reasoning for stating the anti-competitive object for this type of conduct.⁵²

Consequently, the GC does not seem to acknowledge an interpretation of *Post Danmark I* which entails all exclusionary conduct being subject to an effect-based assessment. Instead, the GC rather acknowledged the principle of some types of conduct being restriction of competition by object. This is illustrated by the GC’s justification for its approach, where it stated:

*“[such] approach can be justified by the fact that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition.”*⁵³

4.4. Sub-conclusion

Accordingly, a distinction between restrictions of competition by object and by effect can be found in recent case law within Article 102 TFEU.⁵⁴ These findings illustrate the principle of some types of exclusionary conduct can be regarded, by their very nature, as being harmful to effective competition.

⁴⁹ See also e.g. Case 52/09, *TeliaSonera*, which shows margin squeeze can being presumed to constitute an abuse.

⁵⁰ See Case T-286/09, *Intel*, paragraph 85.

⁵¹ See Case T-286/09, *Intel*, paragraph 204.

⁵² See Case T-286/09, *Intel*, paragraph 203.

⁵³ See Case T-286/09, *Intel*, paragraph 85.

⁵⁴ Other relevant case law includes e.g. C-52/09, *TeliaSonera*, and T-201/04, *Microsoft*.

These findings also sit well with older case law on Article 102 TFEU. In for example *Hoffman La Roche*, the ECJ found held agreements and fidelity rebates is designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market when applied by a dominant firm, and thus, constitute abuse.⁵⁵ Accordingly, both types of conduct were by their very nature harmful to effective competition.

However, such distinction entails the need of examining which types of exclusionary conduct may constitute a restriction of competition by object. Put differently, this requires an analysis and discussion of how and when exclusionary conduct restricts competition by object; i.e. how to define by object restriction. This is done in the next section.

5. Defining the ‘By Object’; When Actual or Likely Effects are not necessary

In the previous section, it has been shown that Article 102 TFEU includes restrictions of competition by object, and hence, a distinction between restriction of by object and by effect. However, it did not contain a definition of the former. As a result, this section will address when exclusionary conduct can be held as restricting competition by object.

Since the concept of abuse is an objective concept,⁵⁶ it must be recognised for not involving a subjective object to restrict competition. I.e. the intention by the dominant firms is not a decisive element. As a result, the existence of an intention to compete on the merits, even if it were to be established, cannot prove the absence of abuse.⁵⁷ Nonetheless, intention to harm the effective competition can be one of many elements in an assessment. This is true in regards of especially predatory pricing. Consequently, the definition takes its departure in objective criteria.

The anti-competitive effect, which is presumed with the anti-competitive object, relates to the restriction of competition, or in other words, the harm to effective competition. It will therefore be shown in the following subsections that finding such restrictions involves a dominant firm’s exclusionary conduct 1) tending to restrict competition, or in other words, is capable hereof 2) in the individual case, that is to say, it reveals a sufficient degree harm. I.e. if conduct is capable of restricting competition, it can only be held as having an anti-competitive object given it has a sufficient degree of harm due to the circumstances of the case. Take for example an exclusivity agreement, which

⁵⁵ See Case 85/76, *Hoffman La Roche*, paragraph 90.

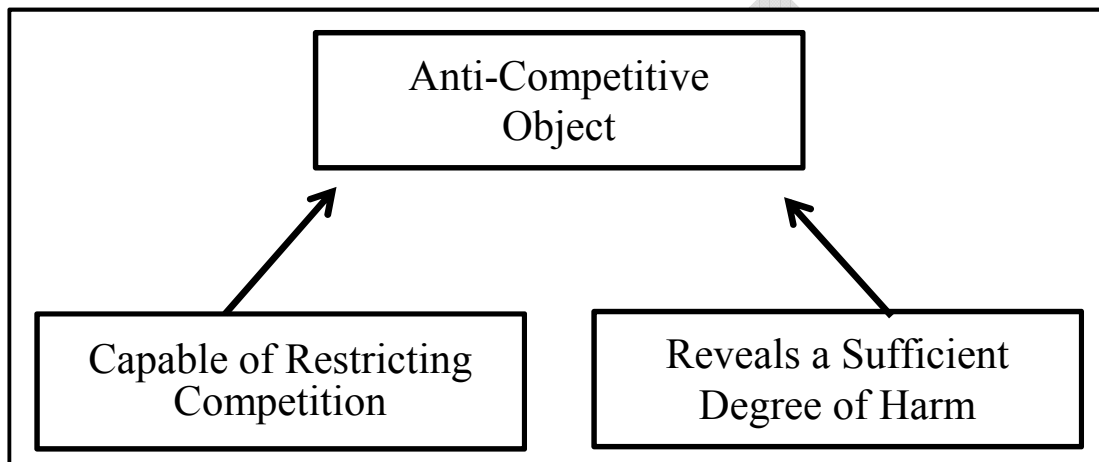
⁵⁶ See Case 85/76, *Hoffman La Roche*, paragraph 91.

⁵⁷ See e.g. Case C-549/10, *Tomra*, paragraph 22.

case law has established as being capable of restricting competition, since it is design to restrict the freedom to choose supplier.⁵⁸ However, if the dominant firm is not an unavoidable trading partner, and hence competitors can compete for the individual customers' total demand and not just a part, a sufficient degree of harm on competition is unlikely.⁵⁹

This overall definition is illustrated in figure 1 which illustrates two conditions which have to be met in order to demonstrate a restriction of competition by object under Article 102 TFEU. In the following subsections, these two conditions are discussed in more detail.

Figure 1:



Source: Own illustrations

5.1. Capable of Restricting Competition

Since a restriction of competition by object entails certain types of exclusionary conduct being regarded, by their very nature, as harmful to competition, the first condition must involve capability. Put differently, if exclusionary conduct applied by a dominant firm is not capable of restricting competition there can be no presumption of an anti-competitive effect.

This capability should further be in agreement with the European Commission ("Commission") and the EU Courts view of effective competition and as efficient competitors. This view entails, in brief, focus is not on individual competitors but on the effective competition by assessing whether a competition as efficient as the dominant firm is able to compete efficiently. Accordingly, if the dominant firm's conduct is capable of for example restricting access to the market, it does not necessarily fulfil the capability requirement. As a result, conduct must be viewed in context with an as efficient competitor

⁵⁸ See e.g. Case 85/76, *Hoffman La Roche*, paragraph 89 and 90.

⁵⁹ However, it does not exclude an exclusionary abuse since it can still restrict by effect.

since the departure from the market or the marginalisation of competitors which are less efficient than the dominant firm is (more) attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.⁶⁰

In determining whether exclusionary conduct is capable of restricting competition, the ECJ has specified how such a restriction of competition can be found. In *Michelin I*, the ECJ held it had to be examined whether:

“ [...]the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.”⁶¹

According to the ECJ's statement, four different types of restriction of competition exist. However, the third restriction – discrimination – does not apply for exclusionary abuse,⁶² and cannot by itself constitute a restriction of competition by object when assessing exclusionary conduct. Instead, such conduct can constitute an abuse itself in the same way as an excessive price.

The statement also illustrates this condition cannot only be termed as ‘capable of’, but also as ‘tend to’. Moreover, the ECJ has also applied the wording ‘designed to’. In *Hoffman La Roche* for example, the ECJ found the applied conduct were contrary to Article 102 TFEU since it were designed to restrict the customers’ freedom to choose supply. Accordingly, this condition does not distinguish between ‘capable of’, ‘tend to’ or ‘designed to’. Instead, what matter is the anti-competitive nature of a dominant firm’s conduct, that is to say, whether the firm competes on the merits or not.

Furthermore, the use of ‘tend to restrict’ illustrates the EU Courts’ and the Commissions’ perception of such exclusionary conduct normally being harmful to competition. Since such perception exists among them, it then only seems rational for an assessment of an actual or likely effect to be regarded redundant. On the other hand, however, it still requires a demonstration of these types of conduct having a tendency to restrict competition. Focus should therefore – as mentioned – continue to be on the foreclosure of an as efficient competitor when assessing whether a type of exclusionary conduct tends to restrict competition, or is capable hereof. Otherwise, chilling pro-competitive conduct is risked.

⁶⁰ This is further the approach the Commission has indicated it will apply in its assessment; see the *Article 102 Guidance Paper*.

⁶¹ See Case 322/81, *Michelin I*, paragraph 73.

⁶² See Case C-209/10, *Post Danmark I*, paragraph 30

In consequence, the first step of identifying a restriction of competition by object is assessing whether the dominant firm's exclusionary conduct tends to restrict competition, or in other words is capable hereof. Such finding is based on whether the type of conduct can be regarded as being harmful to effective competition.

5.2. Sufficient Degree of Harm

If exclusionary conduct is found capable of restricting competition, a *prima facie* abuse may be held. This entails the dominant firm is presumed to pursue no other economic objective save that of eliminating effective competition from the relevant market.

However, the first step presented in the previous section is not in itself sufficient to establish such a *prima facie* abuse. It must further be assessed whether the alleged exclusionary conduct is capable of restricting competition *in the individual case at hand*, that is to say, whether it has a sufficient degree of harm. This requires checking whether the capability is true in the case at hand. As a result, all circumstances of the individual case have to be taken into account. If not, a too strict approach including type I errors is risked. This is also in agreement with the Commission's view on foreclosure of as efficient competitors, which is defined as anti-competitive.⁶³ Such a view entails the Commission will look at all relevant circumstances of the case including the dominant firm's conduct and the context in which it forms a part.⁶⁴

This can be illustrated with the approach taken to margin squeeze. If a potential anti-competitive effect can be demonstrated by having regard to the dominant firm's conduct and circumstances of the case, case law has established that demonstrating a concrete anti-competitive effect is not necessary.⁶⁵ I.e. regard to the spread between the upstream price and the downstream price(s), and second the context which it forms a part of (whether the upstream input/service is indispensable) can be sufficient to state an abuse under Article 102 TFEU.⁶⁶ Accordingly, if the spread between the upstream price and downstream price(s) is negative, such margin squeeze conduct is capable of restricting competition. However, it is difficult to see what impact such conduct can have on the effective competition given the upstream input/service is not necessary for an as efficient competitor to be able to compete effectively on the downstream market. I.e. if an actual or potential substitute on which competitors on the downstream market can rely on is pre-

⁶³ See the *Article 102 Guidance Paper*, paragraph 6 and the guidance paper in general.

⁶⁴ See for that effect e.g. the *Article 102 Guidance Paper*, paragraph 20.

⁶⁵ See e.g. Case C-52/09, *TeliaSonera*, paragraph 64.

⁶⁶ See e.g. Case C-52/09, *TeliaSonera*, paragraph 69-74.

sent, a dominant firm's margin squeeze cannot reveal a sufficient degree of harm. However, such conduct can still restrict competition by effect depending on the actual or potential upstream substitute.⁶⁷ Consequently, regard to the context of the individual case has to be taken in order to demonstrate the presumed anti-competitive effect, and hence, the anti-competitive object of a dominant firm's conduct.

That the Commission is obliged to consider all circumstances of the case is further evident from the EU Courts' case law. In the previous subsection, a reference was made to *Michelin I* regarding how conduct can restrict competition. The same reference also includes a requirement of considering all circumstances of the case.⁶⁸ This is also apparent from the case law following *Michelin I*.⁶⁹ In *Irish Sugar*, the GC held it is an established principle in case law that regard to all relevant circumstance must be taken when the Commission assesses whether conduct is abusive,⁷⁰ and also this principle resulted from case law before *Michelin I*, for example *Hoffman La Roche*. This is further evident in the judgment of the ECJ in *Tomra*, in which it stated:

*"[...]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."*⁷¹

In consequence, demonstrating a restriction of competition by object involves demonstrating exclusionary conduct being capable of harming effective competition in the individual case. Such demonstration must have regard to all relevant circumstances of the case at hand and cannot only rely on the character of the dominant firms conduct. However, it should be stressed that such assessment does not include a comprehensive analysis, since such analysis is reserved for the demonstration of actual or likely anti-competitive effects.

The recognition of some types of conduct having harmful consequences for the effective competition creates legal certainty – especially for dominant firms. It further allows all market participants to adapt their conduct accordingly. It is further sensibly to conserves resources of competition authorities and the justice system by first assessing whether an anti-competitive object exists, and then actual or likely effects if no anti-competitive object is found.

⁶⁷ Moreover, the downstream prices may constitute exclusionary abuse in regards of predatory pricing or the upstream price may exploitive abuse in regards of excessive pricing.

⁶⁸ See Case 322/81, *Michelin I*, paragraph 73.

⁶⁹ See however section 6 in regards of the judgment of the GC in *Intel*.

⁷⁰ See case T-228/97, *Irish Sugar*, paragraph 114.

⁷¹ See Case C-549/10, *Tomra*, paragraph 43

5.3. Per Se Abuse?

When conduct is found having an anti-competitive object it has the result of an anti-competitive effect being presumed. Finding a restriction of competition by object has, therefore, great consequences as the burden of showing a concrete anti-competitive effect is removed. An important question is, therefore, whether this equals a per se abuse. However, stating such can only be dismissed as follows below.

First of all, it should be recalled it is a general principle that conduct found being contrary to Article 102 TFEU constitutes exclusionary abuse only in the absence of an objective justification. I.e. it is open to a dominant firm to provide justification for its alleged abusive conduct.⁷² This applies also in the event where conduct is found having an anti-competitive object.⁷³ In particular, such an undertaking may demonstrate, for that purpose, either its conduct is objectively necessary,⁷⁴ or the exclusionary effect produced may be counterbalanced or outweighed by advantages in terms of efficiency which also benefit consumers.⁷⁵

In that last regard, it is for the dominant undertaking to show the efficiency gains, which are likely to result from the conduct under consideration, counteract any likely negative effects on competition and consumer welfare in the affected markets. The dominant firm is also under the burden to show 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.⁷⁶ In other words, even if an anti-competitive object (or an anti-competitive effect) is established, a dominant undertaking is able to justify its conduct in the same way as under Article 101(3) TFEU.

⁷² See e.g. Case 27/76, *United Brands*, paragraph 184; Case C-52/09, *TeliaSonera*, paragraph 31 & 75; and Case C-209/10, *Post Danmark I*, paragraph 40.

⁷³ See Case T-286/09, *Intel*, paragraph 81; and Case C-202/07 P, *France Telecom*, paragraph 111. The acknowledgement was not directly visible, but in e.g. *France Telecom* the ECJ stated that showing no recoupment of cost can “assist in excluding economic justifications other than the elimination of a competitor.” Accordingly, the ECJ held indirectly economic justifications can offset the anti-competitive effect with respect to conduct involving an anti-competitive object.

⁷⁴ See e.g. Case C-311/84, *CBEM*, paragraph 27.

⁷⁵ See e.g. Case C-95/04, *British Airways*, paragraph 86; Case C-52/09, *TeliaSonera*, paragraph 31 & 75; and Case C-209/10, *Post Danmark I*, paragraph 41.

⁷⁶ See Case C-209/10, *Post Danmark I*, paragraph 42 and the *Article 102 Guidance Paper*, paragraph 30.

Furthermore, this aspect of per se abuses within Article 102 TFEU has been addressed by the referring court in *GlaxoSmithKline Services and others*. In the preliminary ruling, the ECJ did not explicitly address the question of per se abuses within Article 102 TFEU; however, the General Advocate addressed the question.⁷⁷ In the Opinion, the General Advocate concluded it was not suited to have a per se rule, since such a principle does not sit well with Article 102 TFEU even when it is clear from the circumstances of the case there is both intent and an anti-competitive effect.⁷⁸ Generally, the conclusion was reached on the foundation that dominant firm's anti-competitive conduct may have pro-competitive effects, and as consequence hereof, a dominant firm must have the opportunity to demonstrate justifications. The considerations by the General Advocate corresponds therefore with the consideration above, meaning even if an anti-competitive object can be established, conduct only constitutes an abuse if there are no objective justifications.

6. Reflections on *Intel*; the Importance of Assessing all Circumstances of a Case

Regarding the demonstration of restrictions of competition by object and also thereby whether there is a sufficient degree of harm in the individual case, a lesson can be learned from *Cartes Bancaires* – despite the fact that it concerned Article 101 TFEU. In the judgment of the ECJ, the behaviour at issue was found capable of restricting competition, but the Commission and the GC was found to have in no way explained in what respect behaviour at issue revealed a sufficient degree of harm in order for it to be characterised as a restriction of competition by object.⁷⁹ As a result, the ECJ set aside the judgment of the GC since regard to all relevant circumstance of the case had not been taken.

While the ECJ in *Cartes Bancaires* stressed the importance of an assessment of the circumstances in the individual case, the GC rejected the requirement of such an assessment in *Intel*. Accordingly, the judgments of the GC's in *Intel* and *Cartes Bancaires* share some resemblance since both judgments did not take into consideration all the relevant circumstances of the case. The question is therefore whether the judgments of ECJ in the two cases

⁷⁷ See Opinion of Advocate General in Case C-468-478/06, *GlaxoSmithKline Services and others*, paragraph 37-77.

⁷⁸ See Opinion of Advocate General in Case C-468-478/06, *GlaxoSmithKline Services and others*, paragraph 76.

⁷⁹ See Case C-67/13 P, *Cartes Bancaires*, paragraph 69.

will share similar resemblance, i.e. whether the ECJ will set aside the judgment of the GC in *Intel*. Having regard to the analyses in the following sections, the obvious answer would be that they would share resemblance. On the other hand, it seems unlikely for the ECJ to set aside the judgment of the GC as will be shown in the following.

The unlikelihood is primarily due to fact that the GC's reasoning involved a main assumption with regards of the market conditions, which were actual true.⁸⁰ This assumption involved Intel being an unavoidable trading partner, i.e. a part of the customers' demand constituted a non-contestable share. In consequence, Intel was ensured a part of the customers' demand for X-86 CPUs. Such a special circumstance is of great importance since an exclusivity rebate (or agreement) thereby enables a dominant firm to use its non-contestable share as leverage in securing (a part of) the contestable share. By requiring its customers to obtain all or most of their demand from the dominant firm, the contestable share of the market is secured since the customers are dependent on Intel. I.e. they have not much of choice but to accept exclusivity to Intel. In consequence, Intel was able to secure all or a part of the contestable share of the customers' demand without having to compete on the merits with its competitors; hence, effective competition was distorted.

On the other hand, it is likely, and advisable, for the ECJ to comment on the GC's statement regarding an assessment of all circumstance not being necessary. This is first of all due to the findings in *Cartes Bancaires* as explained above. Secondly, it is likely the ECJ may not agree with the GC in terms of the interpretation of *Tomra*. In brief,⁸¹ the GC rejected the argument of *Tomra* entailing a requirement of assessing all circumstances exclusivity rebates and not only retroactive rebates⁸². As is evident however, the comment by the ECJ in this regard was in fact a reference to a paragraph in the judgment of the GC. In this paragraph, it was stated by the GC:

“It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC 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).”⁸³

⁸⁰ See for example Case T-286/09, *Intel*, paragraph 103, in which the GC explains why Intel's conduct was capable of restricting competition in the case at hand on the fact that Intel was an unavoidable trading partner.

⁸¹ See Case T-286/09, *Intel*, paragraph 97 and Case C-549/12, *Tomra*, paragraph 72.

⁸² The reference was made in regards of retroactive rebates and not exclusivity rebates.

⁸³ See Case T-155/06, *Tomra*, paragraph 213.

The GC further concluded in its judgment:

“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.”⁸⁴

As is apparent from the paragraphs, they did not only concern retroactive rebates but further exclusivity agreements (and quantity commitments). Since an exclusivity rebate is, basically, an exclusivity agreement with a financial compensation,⁸⁵ the statement is also applicable for these rebates. Accordingly, it was incorrect to state, as the GC did, the reference in judgment of the ECJ in *Tomra* does not apply to exclusivity rebates even though the case did not deal with such rebates.

As is further evident from the judgment of the ECJ in *Tomra*, the ECJ established the fact that when demonstrating whether any type of conduct constitutes abuse, the Commission is under the obligation to conduct an analysis of all circumstances of a case at hand. The ECJ stated therefore:

“[...]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.”⁸⁶

In consequence, it should be without doubt whether it is necessary to consider all circumstances of an individual case, and as a result, the GC thereby erred in law by stating it, or the Commission, was not obliged to carry out such an analysis. As have already been discussed, however, the GC did consider the (relevant) circumstances of the case, and it seems therefore unlikely it will have the result of the ECJ setting aside the judgement. On the other hand, it would be appropriate for the ECJ to comment on this part in order to clear any confusion which the judgment of the GC may have created.

As a consequence of the above, it is concluded unlikely for the judgement of the ECJ in *Intel* to set aside the judgment of the GC. This is due to the fact

⁸⁴ See Case T-155/06, *Tomra*, paragraph 215.

⁸⁵ See Case T-286/09, *Intel*, paragraph 76. “[...] rebates the grant of which is conditional on the customer’s obtaining all or most of its requirements from the undertaking in a dominant position.”

⁸⁶ See Case C-549/10, *Tomra*, paragraph 43

that the GC did, implicitly, prove the sufficient degree of harm which Intel's exclusionary conduct revealed in circumstance of the case at hand. On the other hand, it is likely the ECJ will comment on the requirement of assessing all circumstances of a case with the result being it also applies for exclusivity rebates. In addition, such result would be in agreement with the findings in the article.

Demonstrating the capability to restrict in the individual case is, therefore, of both great importance and an established principle in the EU Courts' case law. Hopefully, this will be without any doubt after the ECJ delivers its judgment in *Intel*. Thereby, legal certainty is further created which allows dominant firms to adapt their conduct accordingly.

7. Conclusion

This article has analysed and discussed the presence of restrictions of competition by object with regards of exclusionary abuse under Article 102 TFEU. It has been argued with reference to the EU Courts' case law that such restrictions are present. The result includes further a distinction between restrictions of competition by object and by effect.

Furthermore, a definition of restrictions by object has been discussed. This resulted in two necessary conditions. This first includes capability to restrict competition, while the second involves an assessment of the (relevant) circumstance in the case at hand. This involves different circumstances must be taken into consideration, including for example market conditions and the dominant firm. Accordingly, exclusionary conduct constitutes abuse when found to be capable of restricting competition in the individual case. It should be stressed that conduct found not being capable to restrict competition in an individual case might still be abusive due to the actual or likely effect. However, demonstrating restriction by effect will require a more comprehensive analysis.

Due to the definition made, it has further been possible to discuss the judgment of the GC in *Intel*. A main conclusion of this discussion has been the error of law made by the GC. This error of law shares some resembles to the mistake made by the GC in *Cartes Bancaires*. The error involved a rejection of it being necessary to have regard to all relevant circumstances of the case in order to establish abuse within the meaning of Article 102 TFEU. Therefore, it is likely the ECJ will comment on this aspect and thereby clear any confusion which the error of law may have caused. Contrary to *Cartes Bancaires*, it is, nevertheless, unlikely the ECJ will set aside the judgment of the GC. This is because the GC indirectly had regard to the circumstances of

the case by finding Intel were an unavoidable trading partner which is fundamental in assessing whether an exclusivity rebate (or agreement) can restrict competition.

An important consequence of the findings in the article includes different types of conduct can be presumed to have anti-competitive effects due to their anti-competitive object. For that reason, it is appropriate for future research to study these types of exclusionary abuse which in case law have been found to restrict competition by object, as well as those which might be in the future, with the aim of examining whether these restrictions are economically sound. Moreover, the definition made in this article is open for further development. It should in this regard be stressed that when conducting such research, focus should be on harm to competition and not harm to consumer (welfare) since the former is the objective of Article 102 TFEU – as demonstrated in the article.

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