Procompetitive Effects in EU Competition Law[1]

Abstract

This chapter examines the meaning and function of the notion of procompetitive effects in EU competition law. It argues that in accordance with the case-law and the European Commission's practice, in principle, such effects derive from practices that intensify (or at least do not harm) competition to the benefit of consumers. Four key criteria are used to concretize this principle. An agreement or a practice will count as having procompetitive aspects or effects if it: (a) addresses a market failure in a non-anticompetitive manner, (b) increases or at least does not decrease competitive pressure, (c) makes possible a welfare-enhancing arrangement or increases the value of a product or a service without eliminating or overly restricting rivalry, or (d) directly increases consumers' welfare. These criteria suggest that the concepts of market failure, efficiency, consumer welfare, and rivalry serve as the inspiration for procompetitive effects. Against this backdrop, the present study identifies the role that procompetitive effects play in the application of the three pillars of EU competition law, claiming that they feature either as a *counter-indicators* of the existence of a restriction of competition or as a *justification* for it. The overall purpose of the analysis is to flesh out how the concept and legal function of procompetitive effects have evolved in EU competition law and in what way they predicate this legal field's capacity to sets 'bounds in power'.

I. Introduction

It would not be controversial to say that the purpose of crafting legal tests[2] in competition law is to distinguish anticompetitive effects from procompetitive or neutral effects.[3] Which practices, conduct or benefits count and should count as procompetitive under EU competition law? Is there a consistent meaning of procompetitive effects across all key competition law provisions? What is their role in the legal analysis of restrictive agreements, abuses of dominance, and anticompetitive mergers? How could the parties prove the actual or potential existence of procompetitive effects and under what circumstances are they

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[2] The problem of legal tests relates to the rules v standards problem. See HLA Hart, *The Concept of Law* (first published 1961, 2nd edn, Clarendon Press 1994) 124-154, Luis Kaplow, 'Rules v Standards: An Economic Analysis' (1992) 42 *Duke L.J.* 557; Arndt Christiansen and Wolfgang Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs. Rule of Reason"' *Marburg Papers on Economics* No. 06-2006; Daniel Crane, 'Rules Versus Standards in Antitrust Adjudication' (2007) 64 *Washington & Lee Law Review* 49.

[3] In this study I use the term procompetitive effects to refer to both beneficial and neutral effects on competition. If a practice or an agreement is only capable of or has only a neutral effect on competition then declaring it unlawful is not warranted in light of a general harm principle or a presumption of liberty (in dubio pro libertate). John Stuart Mill, *On Liberty* ('The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others') (first published 1859, Dover Publications 2002); F. Polock and F. W. Maitland, *The History of English Law, Before the Time of Edward I* (2nd ed., Vol. I, New Jersey 1996) 417; Peter Schneider, 'In dubio pro libertate' in E. von Caemmerer, E. Friesenhahn, R. Lange, *Hundert Jahre deutsches Rechtsleben* (Karlsruhe 1960) 263.

obliged to do so? Even though the so-called procompetitive gains or effects are ubiquitous in EU competition law, a systematic treatment of the concept and its legal role is missing.

This chapter teases out the key features and legal functions of procompetitive effects by examining their role under all three key competition law regimes: Articles 101 and 102 TFEU and Regulation 139/2004 (EUMR).[4] It argues that in accordance with the case-law and the European Commission's practice such effects, in principle, derive from practices that intensify (or at least do not harm) competition to the benefit of consumers. An analysis of the case-law reveals that four key criteria are used to identify such effects (identification criteria). A practice or an agreement would be considered procompetitive if it: (i) addresses a market failure without employing anticompetitive means; (ii) intensifies a dimension or parameter of competition while softening another; (iii) makes possible a welfare-enhancing arrangement or increases the value of a product or a service without eliminating or overly restricting rivalry; or (iv) increases net consumer welfare. Cases where procompetitive effects have been identified might fall into more than one of these categories. Yet, arguably, these criteria maintain their analytical autonomy and suggest that the concepts of market failure; productive, allocative and dynamic efficiency; consumer welfare; and rivalry serve as the key sources of procompetitive effects.

Furthermore, the present study identifies the role that procompetitive effects play in the competitive assessment of each relevant provision claiming that they feature either as a *counter-indicators* of the existence of a restriction of competition or as *justifications* for it. In the context of Article 101(1), if a practice or agreement is a plausible source of procompetitive effects the characterisation of 'restriction by object' is not warranted, while the existence of actual or potential procompetitive effects suggests that a restriction by effect is absent.[5] In the context of the effects analysis, the ancillarity doctrine is used to identify likely procompetitive effects and functions as an analytical shortcut[6] to avoid balancing and overenforcement.[7] A balancing exercise enters the scene under Article 101(3) TFEU once a restriction of competition is established. At this stage the crucial question is whether a restriction of competition can be justified on the basis of offsetting procompetitive effects (e.g. efficiency gains that are passed on to consumers and achieved without overly restricting competition).

[4] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation) OJ L 24, 29.1.2004, p. 1–22.

[5] This author takes the view that the notions of by object and by effect restriction do not refer to types of practices (the so-called "black box" approach) but to modes of analysis organised around decision theory concerns and the key question: how much we need to know to condemn a practice as anticompetitive. See Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (4th edn, Wolters Kluwer Law & Business 2017) 1500, 1507 ('the modes of antitrust analysis represent a continuum, or "sliding scale," with different fact finding requirements for different situations'); Richard Whish and David Bailey, *Competition Law* (10th ed, OUP) 125-131 and especially p.130 (even though these authors seem to favour a black box approach, they recognise that 'irrespective of how large or small the object box might be, there remains a riddle: how much analysis should be undertaken when determining whether a particular agreement belongs to one box or the other?').

[6] Andriani Kalintiri, 'Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises and Presumptions' (2020) 16(3) *Journal of Competition Law & Economics* 392.

[7] European Commission, Guidelines on the application of Article [101(3) TFEU] OJ [2004] C 101/97, para 11 '[t]he balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article [101(3)]'. Frank Easterbrook, 'Limits of Antitrust' (1984) 63(1) *Texas Law Review* 1, 14-17 13 (noting that 'in restricted distribution cases the "reduction in intrabrand competition" is the source of the competitive benefit that helps one product compete against another (…). The reduction in dealers' rivalry in the price dimension is just the tool the manufacturer uses to induce greater competition in the service dimension. There is no "loss" in one column to "balance" against a gain in the other')

The Vertical Block Exemption Regulation (VBER) is another legal tool to avoid case-by-case analysis and balancing of procompetitive and anticompetitive effects. To do so VBER relies on the premise that under certain conditions vertical restraints are more likely to generate procompetitive than anticompetitive effects and uses various proxies, benchmarks and filters to make inferences about the likely effects of different types of vertical restraints.[8]

In similar vein, in the area of Article 102 TFEU, there are two pathways through which the dominant undertaking can use procompetitive effects to challenge a finding of abuse: one in disproving the negative effects and another in showing positive effects. Especially after *Intel* and *ENEL*, it has become clear that the dominant undertaking can escape a finding of abuse by showing that the practice at issue is incapable of restricting competition by producing foreclosure effects.[9] Arguably showing foreclosure effects has become fairly demanding for the plaintiff as they have to use more economic evidence and engage in a deeper analysis.[10] As a result, the defendant has a greater leeway to argue the absence of anticompetitive effects or the existence of procompetitive aspects at the initial stage of the analysis, and avoid a finding of harm by using procompetitive effects as counter-indicators. If an abuse is established the dominant undertaking can still escape a finding of abuse by showing that the exclusionary effect is counterbalanced or outweighed by positive effects for the consumers that do not eliminate competition in a substantial part of the market.[11] In such a case procompetitive effects would be used as justification of a prima facie abuse. Similarly in merger control, procompetitive effects could be used to show that the proposed transaction is unlikely to have non-coordinated or coordinated effects or that such effects are outweighed or counteracted by merger-specific and verifiable efficiencies that benefit consumers.[12]

Undoubtedly, the concept of procompetitive effects has always played an important role in competition assessments. Its meaning, though, has been incrementally developed by the European Court of Justice (ECJ) in tandem with the concepts of restriction of competition and anticompetitive effects. The four criteria identified here suggest that procompetitive effects are understood in a concrete and consistent manner across all competition norms and derive from the same epistemic cradle. Nonetheless, this key concept remains open-textured. Given the overall concrete and consistent way procompetitive effects are understood, the said conceptual openness should not be deemed problematic. It allows the notion of procompetitive effects to be applied in a context-specific manner and incorporate new knowledge, enhancing, thereby, competition law's adaptability and capacity to set boundaries to power.[13]

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[8] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] (VBER) OJ L 102, 23.4.2010, p.1–7.

[9] Case C-413/14 P *Intel Corp. v European Commission (Intel)* ECLI:EU:C:2017:632, [138]; C-377/20 *Servizio Elettrico Nazionale and Others (ENEL)* ECLI:EU:C:2022:379, [51-52, 77] (noting that if a practice has no plausible purpose other than the restriction of competition it can be inferred that it departs from competition on the merits).

[10] *Intel* (n 9) [139] (establishing a capacity to foreclosure requires examining five factors: extent of dominance, market coverage, granting conditions of the rebate scheme, duration and capacity to foreclose as-efficient competitors).

[11] *Ibid,* [140]; Case C-95/04 P *British Airways v Commission* EU:C:2007:166, [86].

[12] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (HMG) OJ C 31, 5.2.2004, p. 5–18; European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (NHMG) OJ C 265, 18.10.2008, p. 6–25.

[13] Stavros Makris, 'EU Competition Law as Responsive Law' (2021) *Cambridge Yearbook of European Legal Studies* 1 (arguing that EU competition law is a field in constant epistemic change that needs to remain relatively open

In addition, the analysis suggests that procompetitive effects play an increasingly more prominent role in competition assessments. *Cartes Bancaires, Budapest Bank, Generics, Intel, Enel* and *CK Telekoms* suggest that the EU Courts are frontloading procompetitive effects in the analysis of Articles 101 and 102 TFEU, and Article 2 EUMR, rather than leaving their analysis to the assessment of Article 101(3) TFEU, Article's 102 TFEU and merger control's efficiency defence. In other words, procompetitive effects have come to play a more prominent role as counter-indicators than as justifications of a restriction of competition. This change in the sequencing of procompetitive effects is indicative of the moving boundaries of EU competition law.[14] Such development may make competition analysis less formulaic and more accurate,[15] increase the evidentiary burden for the plaintiffs and reduce the risk of overenforcement. Yet, it can increase administrative and enforcement costs and the risk of underenforcement.

The chapter unfolds as follows. Section II discusses the notion of procompetitive effects in its association with other fundamental concepts such as 'restriction of competition', 'abuse of dominance', 'merger that leads to a significant impediment of effective competition' and 'anticompetitive effects', suggesting that in principle a practice that enhances or does not affect rivals' ability and incentives to compete and benefits consumers would be considered as procompetitive. Section III analyses the existing case-law to flesh out the four key criteria used to identify procompetitive effects. In doing so, this section highlights the types and range of procompetitive effects recognized under the existing case-law, shows that there is coherence across the board, and suggests that procompetitive effects derive from four fundamental concepts: market failure, efficiency, consumer welfare and rivalry. Section IV discusses the legal techniques through which procompetitive effects are considered, arguing that procompetitive effects can function as either counter-indicators of the existence of an anticompetitive practice or agreement or as justification for it. Section V concludes with some observations about the evolving meaning and role of procompetitive effects and a discussion of the potential causes of this development. The ultimate purpose of the study is to contribute to the broader discussion about what are and what should be the boundaries of EU competition law. To this discussion Amato's *Antitrust and the Bounds of Power*, written a quarter of a century ago, continues to offer an essential reading.[16]

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conceptually to secure its integrity. The latter is understood as value-laden consistency and coherence aligned to rule of law principles. Openness does not mean nor does it entail that EU competition is indeterminate. Interpretive struggles, institutional practices and input from extra-legal knowledge (e.g. economics) is what allows EU competition law to secure its integrity and be relatively determinate: to pursue its core mission in a relatively coherent and consistent way. Inevitably, though, frictions (manifestations of law's openness) remain. Arguably, instead of being a necessary evil, such frictions and uncertainties allow the law to adapt to new knowledge, different values, and market contexts.

[14] C. Frederick Beckner III and Steven C. Salop, 'Decision Theory and Antitrust Rules' (1999) 67 *Antitrust LJ* 41 (Sequencing is inevitable since courts are essentially decision makers operating under limited and imperfect information. Two key questions affect or should affect sequencing: (a) what is an optimal decision and (b) which information should be gathered, how much and in what order).

[15] A usual criticism of certain decisions of the Commission and EU Courts has been that they adopt a formulaic approach especially to Article 102 TFEU, when they condemn practices of dominant undertakings that may have been procompetitive Whish and Bailey (n 5) 198, 205; Alison Jones, Brenda Sufrin, Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 295-299; Nicolas Petit, 'From Formalism to Effects—The Commission's Communication on Enforcement Priorities in Applying Article 82 EC' (2009) 32 *World Competition* 485.

[16] Giuliano Amato, *Antitrust and the Bounds of Power* (Hart Publishing 1997).

II. The notion of procompetitive effects

It is hard to provide an uncontroversial definition of 'competition', or to obtain consensus about the reasons for having competition law.[17] Since the core objective of EU competition law, namely the protection of market competition, is multifaceted and elusive, this law is bound to remain relatively open to new understandings of what is competition, under which conditions it operates effectively, and under which circumstances can it be restricted.[18] Competition could be understood as 'dynamic' or 'static', 'price-driven' or 'non-price-driven', and a restriction of competition might have an impact not only on output and prices, but also on innovation, product quality, sustainability, income/wage inequalities and employment.[19] Market players may compete not only on the basis of price or output, but also in terms of brand positioning, choice, quality, innovation or another scarce resource that consumers appreciate.[20] Market players might, for instance, compete to provide products or services that fare better in terms of privacy, sustainability, environmental protection, and labour standards. To these it should be added that competition could be understood in consequentialist terms, namely as a device that maximizes efficiency (defined for instance as total or consumer welfare)[21] or in deontological terms, namely as a process of meritorious rivalry,[22] or as decentralized information processing.[23] It can also be understood in a hybrid way[24] as a 'plebiscitary' coordination process for the allocation of resources resting upon freedom, equality of opportunity and efficiency.[25]

The way competition is understood inevitably affects the interpretation of the key competition rules and predicates how competition law sets bounds to public and private power.[26] For instance, Article 101 TFEU prohibits agreements that restrict competition by object or by effect, Article 102 TFEU prohibits abuses of dominance, whereas Article 2 EUMR prohibits concentrations[27] with an EU dimension[28] that could significantly impede effective competition (SIEC). Fleshing out a conception of the concept[29] of competition and understanding how a particular practice or agreement might or actually affects this conception is necessary for finding a restriction of competition, an abuse of dominance, or a merger leading to a SIEC.[30] In a similar vein, different understandings of the idea of competition can affect what types of effects are recognised as procompetitive and how much weight is attributed to them.

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[17] Giorgio Monti, *EC Competition Law* (CUP 2007) 2.
[18] For the reasons why EU competition law must be open see Stavros Makris, 'Openness and Integrity in Antitrust' (2021) 17(1) *Journal of Competition Law & Economics* 1, 14-31; Makris (n 13) 19-25.
[19] Ioannis Lianos, 'Competition Law for the Digital Era: A complex systems; perspective' (2019) *CLES Research Paper Series*, 3 and 15-31.
[20] OECD, 'Considering non-price effects in merger control – Background note by the Secretariat', DAF/COMP(2018)2; Neil Averitt and Robert Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10(1) *Loyola Consumer Law Review* 44.
[21] Richard Posner, *Antitrust Law* (2nd ed, University of Chicago Press 2001) 11–17, 73; Robert Bork, *The Antitrust Paradox* (first published 1978, Free Press, 1993) 91.
[22] Oliver Black, *The Conceptual Foundations of Antitrust* (CUP 2005) 8-16.
[23] Friedrich A. Hayek, 'Competition as a Discovery Procedure' (2002) 5(3) *The Quarterly Journal of Austrian Economics* 9.
[24] As an ideal that combines consequentialist and deontological elements.
[25] Franz Böhm, 'Freiheit und Ordnung in der Marktwirtschaft' [1971] in Nils Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 305.
[26] Amato (n 16) 108-29.
[27] Article 3 EUMR.
[28] Article 1 EUMR
[29] For the distinction see Hart (n 2) 1149-159.
[30] An abuse of dominance and a SIEC-inducing merger equally amount to a restriction of competition.

Untangling the core concepts of competition norms can shed light on the meaning of anti- and pro-competitive effects, and, vice versa, investigating the meaning of such effects can elucidate when and under what conditions a commercial activity restricts or promotes competition.

Despite the relative indeterminacy of the concept of competition and the open-textured nature of virtually all key competition law terms, an analysis of the case-law can reveal some clear-cut definitions.[31] A restriction of competition could be understood as a practice that is capable of having or actually has a net negative impact on firms' ability and incentive to compete.[32] Such reduction of rivals' ability and incentives to compete to the detriment of consumers can be achieved through either exclusion or collusion.[33] An abuse of dominance could be understood as covering any practice[34] pursued by a dominant[35] undertaking that has as actual or potential effect either the elimination of a competitor with means that deviate from competition on the merits,[36] or the exploitation of consumers by charging them excessively high and unfair prices.[37] Put differently, a practice that is at least capable of restricting competition and either has no plausible procompetitive rationale or its anticompetitive effects outweigh any procompetitive gains, will count as an abuse of dominance.[38] A merger can lead to an SIEC either by generating non-coordinated (i.e. increasing market power or leading to a non-collusive oligopoly) or coordinated effects (i.e. tacit collusion), if horizontal,[39] or by leading to market foreclosure (i.e. input or customer foreclosure) or tacit collusion, if non-horizontal.[40]

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[31] Makris (n 13) 22; Makris (n 18) 27-31.

[32] Pablo Ibañez Colomo and Alfonso Lamadrid, 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017) 21, 35, 44.

[33] For instance, a horizontal agreement that allows various players to coordinate their behaviour and fix prices or reduce output leads to collusion, whereas a vertical agreement that guarantees exclusivity to a supplier's product might deny their rivals access to the market and lead to market foreclosure. See Richard Posner, *Antirust Law* (2nd edn, University of Chicago Press 2019) 132-164 and 449-456.

[34] Abuse could be understood as any behaviour that deviates from competition on the merits and is possible due to substantial market power. Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* (*Hoffmann-La Roche*) [1979] ECR 461, [91] (defining abuse as '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 transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition').

[35] Ibid, [39] (noting that 'such a position enables the undertaking which profits by it if not to determine at least to have an appreciable influence on the conditions under which competition will develop and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment').

[36] C-209/10, *Post Danmark A/S v Konkurrencerådet (Post Danmark I)* ECLI:EU:C:2012:172, [21] (noting that Article 102 prohibits a dominant undertaking from, among other things, adopting practices that have an exclusionary effect by using methods other than those that are part of competition on the merits).

[37] Case 27/76 *United Brands v Commission (United Brands)* ECLI:EU:C:1978:22, paras. 65. Typically, abuses are classified as either exploitative or exclusionary. The first including abuses have as their object or effect to harm the customer of the dominant undertaking (e.g. excessive pricing) while the latter have as their object or effect the exclusion of rivals on the market in which the dominant firm operates or on a neighbouring one. Excessive pricing as an abuse does not fit into Posner's taxonomy mentioned in ft 31 and is not cognizable as antitrust offence under US law. See *Berkey Photo, Inc. v Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979); *U.S. v. Aluminum Co. of America,* 148 F.2d 416, 430 (2d Cir. 1945).

[38] Pablo Ibañez Colomo, 'What is an Abuse of a Dominant Position? Deconstructing the Prohibition and Categorizing Practices' forthcoming in Pinar Akman, Or Brook and Konstantinos Stylianou (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Elgar 2022) 32-33.

[39] HMG (n 12) 24-57.

[40] NHMG (n 12) 29-81.

All of these practices are considered unlawful under EU competition law either because they are capable of generating anticompetitive effects, as they are not a plausible source of procompetitive gains, or because (and when) their actual or potential anticompetitive effects outweigh the pro-competitive ones. Against this backdrop it could be argued that procompetitive effects refer to practices or other factual elements that cancel out a restriction of competition, an abuse of dominance or an SIEC-inducing merger. In principle, an agreement or a practice that enhances or does not affect rivals' ability and incentives to compete and benefits consumers would be considered as procompetitive. In line with this abstract definition, the analysis of the case-law in the following section suggests that there are four main criteria used by the EU Courts to infer procompetitive effects.

III. Four identification criteria

i. Avoiding market failures through non-anticompetitive means

One question used by the EU Courts to identify procompetitive effects is whether the practice or agreement at stake deals with a market failure in a non-anticompetitive manner, i.e. without unnecessarily diminishing rivals' ability and willingness to compete. Article 101 TFEU case-law is illuminating in this regard. To establish a restriction of competition within the meaning of this provision the plaintiff must show that the agreement restricts competition either by object or by effect.[41] To show the existence of a restriction by object the plaintiff would have to analyse the content of the provisions of the agreement and its objective purpose within the economic and legal context of which it forms a part[42] and the intentions of the parties.[43] The plaintiff must also show that the relevant agreement is by its very nature 'injurious to the proper functioning of normal competition'[44] or – in less ontological and more analytical vocabulary – that it 'reveals in itself a sufficient degree of harm to competition'[45] in light of the existing experience and economic knowledge.[46] On such an occasion the agreement would be considered presumptively unlawful on the basis that it is *more* than capable of having anticompetitive effects.[47] Hence, if the multifactored and context-sensitive analysis of an

[41] The two categories are alternative. Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* ECLI:EU:C:2008:643, [15, 16].

[42] Ibid, [15-21] (When determining the context, it is also relevant to look at the nature of the goods or services affected, the real conditions of the functioning of the market, and the structure of the market. The subjective intention of the parties is not determinative, but just one factor that may indicate a by object restriction); Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, [48]; Case C-67/13P *Groupement des Cartes Bancaires v European Commission (Cartes Bancaires)* ECLI:EU:C:2014:2204, [53].

[43] *BIDS* (n 41) [21].

[44] *BIDS* (n 41) [17].

[45] *Cartes Bancaires* (n 42) [57].

[46] Ibid, [51]; Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others (Budapest Bank)* ECLI:EU:C:2020:265, [36, 76, 79].

[47] How much capable is a matter of degree and remains a controversial issue indicative of the moving boundaries of EU competition law. Compare *T-Mobile* or *Allianz Hungaria* and subsequent case-law such as *Cartes Bancaires*, *Budapest Bank* and *Generics*. Case 8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (T-Mobile)* ECLI:EU:C:2009:343, [31] ('in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition') with Case C-307/18 *Generics (UK) Ltd v Competition and Markets Authority (Generics)* ECLI:EU:C:2020:52, [18, 82]; *Cartes Bancaires* (n 42) [69] ('[A]lthough the General Court thereby set out the reasons why the measures…are capable of restricting competition and, consequently, of falling within the scope of the prohibition laid down in Article [101(1)], it in no way explained…in what respect that restriction of competition reveals a sufficient degree of harm in order to be characterised as a restriction 'by object' within the meaning of that provision…').

agreement reveals that it can in itself harm competition on the market to a sufficient degree, then the agreement will qualify as a restriction by object and its anticompetitive effects will be presumed.[48] The plaintiff would not have to establish actual or potential anticompetitive effects.

In *Bids*, the ECJ assessed whether an industry-wide agreement to reduce the processing capacity of Irish beef sector constituted a restriction by object.[49] Beef producers suffering from an overcapacity crisis[50] sought to set up an industry-wide rationalisation plan which would fix the number of meat producers (stayers) by encouraging the exit of goers through a compensation fund.[51] To find out whether such an agreement constitutes a restriction by object, the Court followed the method described above.[52] Even though the agreement had a commercial rationale and was pursuing other legitimate objectives,[53] the Court found it to restrict competition by object since its object was 'to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors'.[54] Specifically, 'the BIDS arrangements [were] intended to improve the overall profitability of undertakings supplying more than 90% of the beef and veal processing services on the Irish market by enabling them to approach, or even attain, their minimum efficient scale'.[55] Therefore, these arrangements were aimed at solving a market failure (i.e. overcapacity) and could generate some productive efficiencies (e.g. enable the transition to a more efficient equilibrium at lower transaction costs). Yet, they would do so by substituting 'practical cooperation for the risks of competition'[56] and by inhibiting independent action by each economic operator.

In the absence of these agreements, rivalry would be intensified in the market and lead – in a less oraganized manner – to the higher concentration levels necessary for the efficient operation of producers.[57] Instead, the Irish producers were seeking to set up a cartel-like arrangement and plan the exit and presence of market players in the market. They had an efficiency rationale, i.e. to address a market failure by allowing the stayers to reach minimum efficient scale. But, they were seeking to achieve this efficient outcome in an anticompetitive manner, by fully eliminating rivalry or by cooperating instead of competing. Hence, simply generating economies of scale or scope or solving a market failure does not suffice to establish a procompetitive effect under Article 101(1) TFEU, if such outcome is to be achieved by excessively restricting the competitive process.[58] On the contrary, an agreement that seeks

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[48] *T-Mobile* (n 47) [29] ('in deciding whether a concerted practice is prohibited by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition').
[49] *BIDS* (n 41) [6-14].
[50] Ibid, [4].
[51] Ibid, [8].
[52] Ibid, [15-17].
[53] Ibid, [21] (noting that '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').
[54] Ibid, [31].
[55] Ibid, [32, 33] (These arrangements were intended 'to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale').
[56] Ibid, [34].
[57] Ibid, [35].
[58] Opinion of Advocate General Trstenjak in *BIDS* (n 41) [101] (the aim of BIDS is to create production benefits through economies of scale. However, it is clear from the connection between Article 81(1) EC and Article 81(3) EC that such an aim can only be considered under Article 81(3)'. See also Case T-14/89 *Montedipe* v

to tackle a market failure without employing anticompetitive means would be considered as having procompetitive aspects or effects.

Other cases where a horizontal agreement is used to solve another type of market failure, collective action problems, are equally suggestive of this point.[59] In *Gøttrup-Klim* the Court had to assess a horizontal purchasing agreement in a market in which the price paid for supplies depended on the volume of the order and in which purchasers were in a relatively weak bargaining position. This agreement was not found to restrict competition by object in spite of the fact that it involved price fixing, as it would 'make way for more effective competition'.[60] In *Luttikhuis* a withdrawal fee scheme of a cooperative association did not qualify as a restriction by object as it was considered necessary to ensure that the cooperative functions properly, has a sufficiently wide commercial base and stable membership.[61] In *Tournier* the refusal by the members of a copyright collecting society to license parts of their repertoire, ostensibly a restriction of output, was found to fall outside the scope of Article101(1) TFEU in that it pursued a 'legitimate aim', namely it solved a collective action problem.[62] In the absence of the agreement, the search and enforcement cost would be prohibitively excessive.[63]

For similar reasons, standard setting agreements enjoy a 'soft safe harbour', according to the Commission, and do not run counter to Article 101(1) TFEU, as long as participation in standard-setting is unrestricted; the procedure for adopting the standard in question is transparent; the agreements do not contain an obligation to comply with the standard; and access to the standard is provided on fair, reasonable and non-discriminatory terms.[64] These conditions are in place to ensure that the standard setting agreement will solve a collective action problem without eradicating or overly delimiting the competitive process.[65] Similarly agreements providing for the joint licensing of a technology through a pool of 'essential'

Commission ECLI:EU:T:1992:36, [265]; Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, [109]; and Case T-112/99 *M6 and Others* v *Commission* ECLI:EU:T:1995:68, [72-74].

[59] Robert Cooter and Thomas Ulen, *Law & Economics* (6th ed, Pearson 2016) 41, 102-105.

[60] Case C-250/92 *Gøttrup-Klim and Others Grovvareforeninger v Dansk Landbrugs Grovvareselskab* ECLI:EU:C:1994:413, [31-34].

[61] Case C-399/93 *Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie Coberco* ECLI:EU:C:1995:434, [12-14] (since 'organizing an undertaking in the specific legal form of a cooperative association does not in itself constitute anti-competitive conduct').

[62] Case 395/87 *Ministère public v Jean-Louis Tournier (Tournier)* ECLI:EU:C:1989:319, [29-31].

[63] Ibid, [31] ('Copyright-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article 85 unless the contested practice exceeds the limits of what is necessary for the attainment of that aim. Those limits may be exceeded if direct access to a sub-division of a repertoire, as advocated by the discothèque operators, could fully safeguard the interests of authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works').

[64] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Guidelines on horizontal co-operation agreements) OJ C 11, 14.1.2011, [277-286].

[65] Collective action problems occur when there are disincentives that tend to discourage joint action by individuals in the pursuit of a common goal. Illustrative in this regard is the simple, one-shot 'prisoner's dilemma' game which shows that even when it would be in the interests of both players to cooperate, they could end up not cooperating when they can see the advantages of free riding and fear the dangers of being taken for a ride. If a collective good is nonexcludable a free-riding problem may block its provision. A supply-side response is to attempt to convince would-be free riders that if they do not contribute, the good will not be provided at all. See Mancur Olson, *The Logic of Collective Action* (Harvard University Press 1971) 5-52, 153-58.

patents[66] are prima facie lawful as long as they solve a collective action problem without employing anticompetitive means.[67]

Information asymmetries can be another type of market failure.[68] As long as an agreement can address the negative consequences of asymmetric information, it would be considered as a plausible source of procompetitive effects and escape the restriction by object characterization.[69] In *T-Mobile*, the ECJ held that information sharing can be a restriction by object when it affords the parties the possibility of 'removing uncertainties concerning the intended conduct of the participating undertakings' and engages in a concerted practice.[70] Yet, in *John Deere*, the ECJ and the General Court (GC) did not deny that, in light of a variety of factors, information exchanges may improve the conditions of competition on a particular market.[71]

In *Asnef-Equifax*, the ECJ stressed that information sharing agreements may fall outside the scope of Article 101(1) TFEU altogether when they are a proportionate reaction to a market failure.[72] In this case the Court had to assess whether an information exchange between competing credit organisations restricted competition by object.[73] The Court, after noting that Article 101 TFEU 'requires companies to determine their commercial policies autonomously and prohibits them from any direct or indirect contact which could influence the conduct of competitors', highlighted that this 'does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors'. The Court then considered that the purpose of the registers in question was 'to increase the amount of information available to credit institutions on potential borrowers, reducing the disparity between creditor and debtor as regards the holding of information, thus making it

[66] Communication from the Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements OJ C 89, 28.3.2014, [220] ('When a pool is composed only of technologies that are essential and therefore by necessity also complements, the creation of the pool as such generally falls outside Article [101(1)] irrespective of the market position of the parties. However, the conditions on which licences are granted may be caught by Article [101(1)]').

[67] Ibid, [226] (the Commission requires that the pool licenses its technology on a fair, reasonable and non-discriminatory basis). As highlighted by Olson the relative costs of taking part into collective action can be determinative of whether the action will be undertaken or not. Olson (n 65) 2, 3, 9, 21-36.

[68] This concept is defined as a situation in which the information about the features of the product subject to exchange is not evenly distributed among buyers and sellers. The archetypal example is of the seller of a good that has more information about its quality than does its buyer. Cooter and Ulen (n 59) 38-41 87-88; George Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) 84 *Quartely Journal of Economics* 488.

[69] Guidelines on horizontal co-operation agreements (n 64) [95-100] (The Commission acknowledges that information exchange agreements may be a source of efficiency gains in this sense. The exchange of information in the insurance sector may allow competing firms to identify the risk profile of end-users and thus avoid adverse selection).

[70] *T-Mobile* (n 47) [35].

[71] Case C-7/95 P *John Deere Ltd v Commission of the European Communities* ECLI:EU:C:1998:256, [89-90] (noting that crucial factors for this assessment are the nature of information, the frequency of dissemination, the persons to whom it is disclosed, whether the data is aggregated or individualised). See also Guidelines on horizontal co-operation agreements (n 64) [86-94].

[72] Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Asnef-Equifax)* ECLI:EU:C:2006:734, paras 55-56. Guidelines on horizontal co-operation agreements (n 64) [75–94]. See also M. Bennett and P. Collins, 'The Law and Economics of Information Sharing: The Good, the Bad and the Ugly' (2010) 6 *European Competition Journal* 311.

[73] *Asnef-Equifax* (n 72) [7] (Asnef-Equifax, a group of financial organisations, set up a register to exchange solvency and credit information about their customers to evaluate the risks undertaken when engaging in credit or lending activities).

easier for the lender to foresee the likelihood of repayment'.[74] By increasing the available information, the registers were in principle capable of reducing the rate of borrower default and of improving the functioning of the supply of credit. Hence, the purpose of the agreement was to tackle information asymmetries, reduce the risk of lending and the number of borrowers who default on repayments, and improve the functioning of the credit supply system as a whole. On this basis a finding of a restriction by object was not warranted.

Cases such as *BIDS Gøttrup-Klim, Luttikhuis*, *Tournier, John Deere, Asnef-Equifax* suggest that an agreement which addresses a market failure (e.g. excessive capacity, collective action and information asymmetry problems) without eliminating or restricting more than necessary market players' ability to act autonomously and independently should be deemed procompetitive and prima facie lawful.

ii. Intensifying rivalry

In a similar vein, when undertakings seek to achieve an efficient outcome by intensifying one dimension of rivalry while softening another, their behaviour might be deemed prima facie procompetitive. Rivalry is to be understood as referring to the competitive process as a means to preserve firms' incentives to create, invest and innovate. If overall rivalry is intensified, the practice would be safely assumed to be procompetitive regardless of any efficiencies. Such efficiencies would be assumed and not required to be demonstrated.[75] Hence, procompetitive effects can be identified by considering whether a practice or an arrangement affects positively rivals' ability and incentives to compete.[76]

The treatment of vertical restraints provides a good illustration of how this second identification criterion works.[77] There is a stark difference in the treatment of horizontal and vertical agreements under the current system. Vertical restraints (e.g. exclusive dealing, exclusive distribution, selective distribution, non-compete clauses, territorial protection clauses) involve intra-value chains restrictions and complementary products or services. As a result, they are generally considered less harmful than horizontal ones since they are usually a plausible source of efficiency-enhancing effects, especially when the parties of the agreement

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[74] Ibid, [47].

[75] Case T-111/08 *MasterCard, Inc and MasterCard Europe v European Commission* ECLI:EU:T:2012:260, [80] (noting that the analysis of the 'objective necessity' of a restraint under art.101(1) TFEU 'cannot be but relatively abstract'). In *Société Technique Minière*, *Metro I* and *Pronuptia* the restraints in question were found, in general, to be a plausible source of efficiency gains, and that fact alone allowed the Court to conclude that they were not restrictive by object. Case 56-65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) (Société Technique Minière)* ECLI:EU:C:1966:38, p. 250; Case 26/76 *Metro SB-Großmärkte v Commission (Metro I)* EU:C:1977:167, [26-27, 32-45]; Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis (Pronuptia)* EU:C:1986:41, [15-17, 21, 23, 27]. These cases suggest that if the defendant shows that the restraint is necessary, it would be deemed a plausible source of procompetitive effects. The *Metro I* criteria could be read as a more structured way to demonstrate procompetitive effects.

[76] Ibañez Colomo and Lamadrid (n 32) 24-29; Giorgio Monti, 'EU Competition Law and the Rule of Reason Revisited' (2020) *TILEC Discussion Paper*, available at https://ssrn.com/abstract=3686619;

[77] European Commission, Guidelines on Vertical Restraints OJ C 130, 19.5.2010, [24] ('an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'). The most common types of such restraints are those for the supply, distribution, production, purchase and sale of goods, and research and development agreements. They tend to include restrictions relating to, inter alia, the number of buyers a seller will trade with within a specified territory, the number of providers a buyer is allowed to purchase from, and the conditions (price, location, customers) under which the goods can be resold. Whish and Bailey (n 5) 649-52.

do not enjoy market power.[78] Therefore, in principle vertical restraints are considered capable of boosting inter-brand competition even when they soften intra-brand competition.[79]

A cursory look at the relevant case-law, the VBER and the *Guidelines on Vertical Agreements* suggests that, in principle, such restraints do not raise any competition concerns as long as the intensity of inter-brand competition compensates for the ensuing softening of intra-brand competition.[80] For instance, exclusive distribution or an exclusive territorial licensing agreement restricts intra-brand competition, and may lead to some price rigidity or increases. Yet, these agreements are likely to be found lawful where the parties to the agreement have low market shares (i.e. indication of lack of market power) and face competitive pressure by their rivals.[81] In addition, as discussed below, such restraints are lawful when they are necessary to intensify competition at some other segment of the value chain.[82] Consequently, as long as a contractual restriction delimits one dimension of competition only to intensify competition in another, it would be deemed as capable of generating procompetitive effects.[83]

Apart from the obvious example of vertical restraints, there are cases involving horizontal agreements suggesting that an agreement that softens one dimension (e.g. inter-brand v. intra-brand) or parameter (e.g. price v. quality) of competition while it intensifies another, will be considered to have procompetitive effects. Illustrative in this regard is *Cartes Bancaires*.[84] In this case the main banks of France set up the CB Group which sought to ensure the interoperability of the systems for payment and withdrawal by bank cards issued by its members and to solve a free-riding problem.[85] That interoperability enabled, in practice, a CB card issued by a member of the CB Group to be used for payments to all traders affiliated to

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[78] Recital 7 VBER. Such requirement suggests that generating efficiencies alone does not suffice to establish procompetitive effects. This requirement is aimed at balancing efficiencies with rivalry. In this sense there is an interplay between criteria (ii) and (iii)

[79] Oxera Consulting LLP and Accent, *Vertical restraints: new evidence from a business survey* (2016) survey prepared for the Competition and Markets Authority, available at https://www.gov.uk/government/publications/vertical-restraints-roundtable-discussion-and-business-survey (further suggests that vertical restraints may be used to limit the expansion of e-commerce).

[80] Guidelines on Vertical Restraints (n 77) [153] ('The market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more serious is the loss of intra-brand competition').

[81] Ibid, [152] (Exclusive distribution is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share each do not exceed 30 % and does not contain hardcore restrictions) and 154 ('The position of the competitors can have a dual significance. Strong competitors will generally mean that the reduction in intra-brand competition is outweighed by sufficient inter-brand competition. However, if the number of competitors becomes rather small and their market position is rather similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition').

[82] For instance, a reseller may not have distributed the products in the absence of mechanisms allowing it to capture the positive externalities generated by its activity; or a holder of an intellectual property right would not have accepted to license the rights without it being able to preserve the value of the public good in question. Pablo Ibañez Colomo, 'Market Failures, Transaction Costs and Article 101 TFEU' (2012) 37 *European Law Review* 541, 555.

[83] Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities. Selective distribution system (AEG Telefunken)* ECLI:EU:C:1983:293, para 33; 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 (Pierre Fabre)* EU:C:2011:649, [40] ('it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of *price competition* in favour of competition relating to *factors other* than price', italics added).

[84] *Cartes Bancaires* (n 42) [37].

[85] In this sense, *Cartes Bancaires* could be read as a case satisfying also criterion (i) as the said agreement was purported to solve a collective action problem.

the CB system through any other member of the Group and/or to make withdrawals from automatic teller machines (ATMs) operated by all other members. The fees paid by CB Group members depended on the issuing/acquisition ratio of the members of the group.[86] The Commission considered that these measures artificially increased prices to the advantage of the major banks of the group and to the detriment of new entrants, and on this basis it argued that they constituted a by object restriction of competition.[87] The GC concurred.[88]

Nonetheless, the ECJ set aside the GC judgment, finding that the GC could not properly have concluded that the pricing measures adopted by CB had as their object the restriction of competition. The pricing measures were adopted in the context of a payment system and were to be applied in a two-sided market.[89] These measures sought to establish a certain balance between the issuing and acquiring activities of the members of the CB Group and tackle a free-riding problem. Although capable of restricting competition, the ECJ noted, the measures did not reveal in themselves a sufficient degree of harm to competition to be characterised as restrictive by object.[90] The measures were aimed at intensifying overall rivalry, and thereby had a plausible procompetitive explanation. Hence, they could not qualify as a restriction by object, even though they restricted rivalry in a particular segment of the market. It should be noted though that even though the said measures did not qualify as a by object restriction, on further review they were found to have restrictive effects.[91] Beyond the specificities of the case however there is a key takeaway of the *Cartes Bancaires* saga that is relevant for the purposes of this study. This case suggests that if an agreement or a practice softens one dimension or parameter of competition to enhance rivals' ability and incentives to compete in another, it would be considered a plausible source of procompetitive effects, and escape the restriction by object characterisation.[92]

iii. Making possible a welfare-enhancing arrangement or increasing the value of a product or a service without eliminating or overly restricting rivalry

Another criterion for identifying procompetitive effects is asking whether the practice or the agreement in question makes possible a welfare-enhancing arrangement which would not have existed otherwise or whether it increases the value of a product or a service, without

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[86] Ibid, [4] (banks had to pay a higher membership fee if their issuing activities were considerably larger than their acquiring activities, or if the stock of payment cards they had issued tripled over a defined period).

[87] Commission Decision C (2007) 5060 final of 17 October 2007 relating to a proceeding under Article [81 EC] (COMP/D1/38606 — Groupement des cartes bancaires 'CB').

[88] Case T-491/07 *Groupement des cartes bancaires (CB) v European Commission* ECLI:EU:T:2016:379.

[89] Two-sided markets provide a good example of the multi-dimensional character of competition and how restricting one dimension of rivalry might be justified on the basis of the ensuing intensification of rivalry on another dimension. Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) *Journal of the European Economic Association* 990.

[90] *Cartes Bancaires* (n 42) [69, 73] (According to the ECJ, the GC was entitled …"at the most to infer [. . .] that those measures had as their object the imposition of a financial contribution on the members which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system").

[91] The GC concluded that the Commission was correct in finding that the measures in question had restrictive effects on competition. Case T-491/07 *RENV Groupement des cartes bancaires (CB) v European Commission* ECLI:EU:T:2016:379, [80-90, 105-214].

[92] A similar conclusion can be inferred by General Courts reasoning in *O2 Germany*. The agreement in question was restricting rivalry in national roaming between the two network operators but allowed O2 to enter the 3G market. Hence, the Court said that the assessment of such an agreement requires an effects analysis and that both dimensions of competition had to be analysed to establish the restrictive effect. Case T-328/03 *O2 (Germany) GmbH & Co, OHG v Commission of the European Communities (O2 Germany)* ECLI:EU:T:2006:116, [71-79, 85-98].

eliminating or overly restricting rivalry.[93] This point could be exemplified by examining the treatment of vertical restraints. Such restraints are likely to enable better coordination within a chain of production or distribution; reduce transaction and distribution costs, promote non-price competition; improve quality of services; solve free-rider problems; open up or allow undertakings to enter new markets; solve hold-up problems or vertical externality problems; achieve economies of scale in distribution; correct capital market imperfections, and ensure product uniformity and quality standardisation.[94] Such efficiency-enhancing effects are likely to outweigh any potential anti-competitive effects especially when the undertakings involved enjoy a low degree of market power and face competition from other suppliers of goods or services.[95]

These requirements suggest that generating efficiencies alone does not suffice to establish procompetitive effects: If certain efficiencies are expected, while competition as a process of rivalry is not likely to be diminished or is likely to be intensified, then procompetitive effects can be safely inferred.[96] This is the reason why market power, barriers to entry, the market position of the parties and of existing and potential competitors, the countervailing power of buyers, the maturity of the market and the level of trade are factors that are regularly taken into consideration in the assessment of vertical restraints.[97] Such factors ensure that the expected efficiencies will not overly restrict rivalry, and that vertical restraints will remain procompetitive.

It is not surprising, thus, that in virtue of their procompetitive effects most types of vertical agreements (i.e. the ones that do not include hard-core restrictions) have been granted the VBER benefit and are considered to automatically satisfy the conditions of Article 101(3) TFEU.[98] Even among the restraints that do not qualify for the VBER benefit, only a handful would be considered as restrictive by object (e.g. absolute territorial protection,[99] minimum

[93] Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty OJ C 101, 27.4.2004, [33] (referring the achievement of 'procompetitive effects by way of efficiency gains, explaining that efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. Criteria (ii) and (iii) might be two sides of the same coin and most cases that fall under the former can fall under the latter and vice versa. Arguably, though the two criteria retain their analytical autonomy as we could imagine a practice that simply intensifies a dimension of rivalry with demonstrated efficiencies).

[94] Guidelines on Vertical Restraints (n 77) [106-107].

[95] Recital 7 VBER ('for most vertical restraints competition concerns can only arise if there is insufficient competition at one or more levels of trade').

[96] Guidelines on Vertical Restraints (n 77) [47, 161].

[97] Ibid, [97-99, 106, 110-21, 134, 156, 194, 215, 220, 223].

[98] Recital 5 VBER. In this sense there is an interplay between criteria (iii) and (iv).

[99] Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community (Consten Grundig)* ECLI:EU:C:1966:41. Note, though, that in *Coditel II*, the ECJ concluded that an exclusive territorial licensing agreement providing for absolute territorial protection was not restrictive by object, because that absolute territorial protection was necessary to ensure that the intellectual property rights exploited can be appropriated by the licensee. The value of a broadcast to a licensee may depend on its ability to prevent other operators from exploiting it at the same time. Case C-262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision v Ciné-Vog Films SA (Coditel II)* ECLI:EU:C:1982:334, [15-16, 19-20]. In *Nungesser* the ECJ held that exclusive territorial protection may be a necessary means to induce a licensee to engage in the necessary investments to manufacture the product. Case 258/78 L*.C. Nungesser KG and Kurt Eisele v Commission of the European Communities (Nungesser)* ECLI:EU:C:1982:211, [57]. Along similar lines, in *Erauw-Jacquery* the Court considered that an exclusive territorial licensing agreement was not restrictive by object, because when a licensor has undertaken financial effort to develop a new technology, the licensor should be allowed to protect itself against any improper handling of such technology. Case C-27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* ECLI:EU:C:1988:183, [10].

resale price maintenance,[100] restrictions of cross-supplies in selective distribution systems; and restrictions on the sale of components[101]), while the vast majority of them would be analysed under an effects analysis.[102] Notably, if a vertical agreement does not meet the VBER conditions,[103] and falls within the scope of Article 101(1) TFEU, it will be prohibited only if actual or potential anticompetitive effects are shown and as long as it cannot be justified under Article 101(3) TFEU. The reason behind this choice lies to the fact that vertical restrains by being able to make increase the value of a product or a service are generally considered procompetitive, as long as they do not overly restrict rivalry.

When the ECJ engaged in an effects analysis of specific types of vertical restraints (where the by object characterisation was found to be inappropriate), it clarified the conditions under which particular types of agreements will be lawful. A selective distribution system for luxury goods will be compatible with Article 101(1) TFEU provided that (a) resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion; (b) the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use; and (c) the criteria laid down do not go beyond what is necessary (the *Metro I* criteria).[104] In *Pierre Fabre*, the Court held that a total ban on Internet sales in a selective distribution system is a by object restriction,[105] while in *Coty* it ruled that it is legal to limit online sales in order to preserve the luxury image of the goods, as long as the requirements are not applied in a discriminatory manner, and are proportionate to the objectives pursued.[106] According to *Pronuptia* the contractual restrictions of a franchise agreement that are 'indispensable' to protect the franchisor's know-how and maintain the identity and reputation of the franchise network are procompetitive and lawful, but the restrictions that carve up markets between the franchisor and its franchisees or fix retail prices are not.[107] These specific conditions under which particular types of vertical agreements are prima facie lawful can be viewed as a way to ensure that they will bring about the expected efficiencies without restricting rivalry more than necessary.[108]

In this regard, it could be said that an agreement that is likely to generate efficiencies (e.g. make possible a welfare-enhancing arrangement or increase the value of a product or a service), would be cleared as long as it does not overly restrict competition, or, to put it differently, as long as it does not dangerously increase the likelihood of collusion or exclusion.[109] Hence, if an agreement makes possible a welfare-enhancing arrangement or increases the value of a product or a service without restricting rivalry more than necessary

[100] When the ECJ examined the status of vertical price fixing under art.101(1) TFEU in *Binon*, it did not deny that such a restraint is a potential source of substantial efficiency gains, yet it concluded that is restrictive of competition by their very nature, seemingly on account of the fact that it limits the freedom of the distributor to set prices in their dealings with third parties. Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse* ECLI:EU:C:1985:284, [44, 46]. This same position would be confirmed in *Pronuptia* (n 75) [25, 74]; *Erauw-Jacquery* (n 99) [15].
[101] Article 4 VBER.
[102] Guidelines on Vertical Restraints (n 77) [96-121].
[103] These conditions are: (1) the market share of each of the parties to the agreement does not exceed 30%; and (2) the agreement does not contain hardcore restrictions. See Articles 3, 4 VBER.
[104] *Metro I* (n 75) [20, 27].
[105] *Pierre Fabre* (n 83) [41, 47].
[106] Case C-230/16 *Coty Germany GmbH vs Parfüˮmerie Akzente GmbH (Coty)* EU:C:2017:941, [36].
[107] *Pronuptia* (n 75) [12, 16, 17].
[108] As already indicated these cases could be read as also satisfying criterion (ii).
[109] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG (Delimitis)* ECLI:EU:C:1991:91, [13-27]; Case C-345/14 SIA *'Maxima Latvija' v Konkurences padome (Maxima Latvija)* ECLI:EU:C:2015:784, [25-31].

it will be considered as having procompetitive effects. This identification criterion seems to overlap with criterion (ii) discussed above, and indeed most of the actual cases where procompetitive effects were identified under criterion (iii) satisfy also criterion (ii). For instance, most vertical agreements are prima facie lawful as they are associated with both types of procompetitive effects.[110] Yet, the two criteria are distinct from an analytical point of view, since under criterion (ii) efficiencies are assumed in abstracto and deduced from an intensification of overall rivalry.

iv. Net consumer welfare gains without fully eliminating competition

A fourth analytical criterion for identifying procompetitive effects asks whether an agreement or a practice leads to net consumer welfare gains. Even though this criterion includes the procompetitive effects recognized under criteria (i)-(iii), it is not necessarily included in them: an agreement might solve a market failure, intensify rivalry, or generate efficiencies without directly benefiting consumers, even though it can be safely assumed that such procompetitive effects will ultimately benefit consumers. This fourth criterion can be traced to the fact that under all three key competition law pillars, if the defendant manages to show that their conduct generates efficiencies that are passed on to consumers, counterbalance or outweigh the relevant anticompetitive effects and do not eliminate competition in a substantial part of the market, their conduct will be deemed procompetitive and lawful.

In particular, according Article 101(3) an agreement that restricts competition could be justified if it contributes to improving the production or distribution of goods or to promoting technical or economic progress; ensues a fair share of the benefits to the consumers; includes restrictions that are essential to achieving these objectives; and does not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question.[111] Along similar lines, a dominant undertaking can avoid a finding of abuse under Article 102 TFEU by demonstrating that its practice is objectively necessary or that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers.[112] To make out the latter defence the undertaking would have to show that the efficiencies have been or are likely to be realised as a result of the conduct; that the conduct is indispensable to the realisation of those efficiencies (i.e. there is no less restrictive alternative); that the likely efficiencies outweigh any likely negative effects on competition and consumer welfare; and that the conduct in question does not eliminate effective competition by removing all or most existing sources of actual or potential competition.[113] The latter condition needs to be satisfied irrespective of any consumer benefits, since 'rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation' and 'in its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains'.[114] Hence, 'where there is no residual competition and no

[110] *Maxima Latvija* (n 109) [21].
[111] Guidelines on the application of Article 81(3) (n 93) [105-116].
[112] *United Brands* (n 37) [184]; Case 311/84 *Centre Belge d'études de marché — Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* ECLI:EU:C:1985:394, [27]; Case T-30/89 *Hilti v Commission (Hilti)* ECLI:EU:T:1991:70, [102-119]; Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* ECLI:EU:T:1994:246, [136, 207]; *British Airways v Commission* (n 11) [69, 86].
[113] *Hilti* (n 112) [118-19]; *Tetra Pak II* (n 112) [83, 84, 138]; *Intel* (n 9) [140]; *British Airways v Commission* (n 11) [86].
[114] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance Paper) OJ C 45, 24.2.2009, [30] (In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly normally cannot be justified on the grounds that it also creates efficiency gains).

foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains'.[115] Similarly, any merger likely to lead to anticompetitive effects can be cleared as long as the merging parties can demonstrate that there are likely and timely, merger-specific and verifiable efficiencies that benefit the consumers and outweigh or counteract the anticompetitive effects.[116] Yet, a merger to monopoly is unlikely to be found as generating efficiencies sufficient to counteract its potential anticompetitive effects.[117]

Consequently, the most clear-cut case of procompetitive effects is when a practice or an agreement necessarily and directly benefits consumers without eliminating competition. Under the current framework it is not possible to claim that a practice that does not eliminate competition and directly and unequivocally benefits consumers is anticompetitive. Under these conditions, net consumer gains could be used to establish procompetitive effects.

v. Coherence across the board

The analysis undertaken so far reveals that when the EU Courts seek to identify pro-competitive effects they do not simply ask whether a practice or an agreement is associated with efficiency gains. Instead they use certain economically-informed identification criteria as heuristic devices.[118] If the defendant shows that their agreement or practice is aimed at addressing a market failure without employing any anticompetitive means; intensifies a dimension or parameter of competition while softening another; generates efficiencies without overly restricting rivalry; or produces or is likely to produce net consumer welfare gains without eliminating residual competition, they would be able to credibly claim that the said agreement or practice is a source of procompetitive effects.[119] The benchmark for finding procompetitive effects is the competition that would have otherwise existed in the market.[120]

These four identification criteria can be also traced in the abuse of dominance case-law, even though the Court refers explicitly to procompetitive effects only in a handful of cases. Yet, the high-level interpretation of Article's 102 TFEU key terms, the treatment of individual categories of abuses and the general 'as-efficient competitor' principle reveal that Court's understanding of what is a procompetitive effect is similar under both provisions. These three issues will now be examined in turn.

First, the existence of the dominance threshold reveals a fundamental assumption that unilateral conduct by firms without substantial market power is considered general procompetitive.[121] In other words, the way the Court interprets 'dominance' suggests that, in

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[115] Ibid, [30].
[116] HMG (n 12) [76-88]; NHMG (n 12) [53].
[117] HMG (n 12) [84].
[118] By doing so they also allocate the burden of showing procompetitive effects between the plaintiff and the defendant. For instance, the counterfactual test or the ancillarity doctrine could qualify as heuristic devices. For a broader and in-depth discussion of the role of presumptions, proxies and premises see Kalintiri (n 6) 395-401 (providing a taxonomy of analytical shortcuts and distinguishing between proxies, premise and presumptions); Easterbrook (n 7) 10-11.
[119] Cooter and Ulen (n 59) 87-91. Transaction costs are the costs of exchange and involve (1) search costs (i.e. the costs of finding a commercial partner selling the good in question); (2) bargaining costs (i.e. those incurred to strike a deal); and (3) enforcement costs (i.e. those that relate to ensuring that the terms of the deal are respected) and may create allocative inefficiencies.
[120] *Société Technique Minière* (n 75) p. 250.
[121] Guidance Paper (n 114) [9-18] (where dominance is not understood in a static but in a dynamic way as an ability to prevent effective competition or raise prices profitably above the competitive level for a significant

the absence of substantial market power, competition is considered to be sufficiently robust. By relying on such assumption the Court recognizes the value of vigorous rivalry. In the absence of dominance, rivalry is vigorous enough to ensure that no market player would be able to alone restrict output and raise prices. Nonetheless, having a dominant position is not prohibited as such,[122] and finding an Article 102 TFEU violation requires an abuse, namely a conduct that deviates from competition on the merits. Hence the abuse component of Article 102 TFEU and the way it is interpreted reveals another fundamental assumption according to which dominance can be the by-product of 'performance competition',[123] superior efficiency and reflect consumer preferences. Consequently, the main architecture of Article 102 and the high-level interpretation of its key terms (i.e. dominance and abuse) suggest that behaviour that is constrained by a vigorous competitive process or intensifies rivalry, generates efficiencies and benefits consumers should be considered procompetitive, and thereby lawful.

Second, a cursory look at individual categories of abuses reveals that the same analytical criteria are used to identify procompetitive effects under both Articles 101 and 102 TFEU. For example, providing misleading information to patent authorities to extend the length of a patent is considered a 'naked restriction' as it does not deal with any market failure, nor does it intensify rivalry, make possible a welfare-enhancing outcome or directly and unequivocally benefit the consumers. In other words, this practice is considered a 'naked restriction' because of a lack of procompetitive benefits as these were defined above. Pricing below average variable cost (AVC) is considered abusive irrespective of its effects.[124] Such a presumption relies on the premise that this kind of behaviour does not solve any market failure, nor does it intensify rivalry among as-efficient rivals, or generate efficiencies or benefit consumers. Hence, prohibiting such a practice on the basis that it is not a plausible source of procompetitive effects suggests that the Court understands the latter as discussed in subsections III(i)-(iv) above.

Another example is refusal to supply which is unlawful only under strict conditions.[125] The underlying premise of the so-called *Bronner* conditions is that a refusal of a dominant undertaking that (a) does not eliminate all competition; (b) can be objectively justified; and (c) does not preclude access to an indispensable input or facility, is capable of intensifying

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period of time. Such ability is conditioned upon the features of the market and the role of existing and potential rivals, as well as buyers).

[122] *Intel* (n 9) [135]; Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (*Michelin I*), ECLI:EU:C:1983:313, [10] (noting that 'a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the [internal] market').

[123] For the distinction between performance and impediment competition see also Viktor Vanberg, The Freiburg School: Walter Eucken and Ordoliberalism, Freiburg Discussion Papers on Constitutional Economics 04/ 11 (2011), 13– 14; Elias Deutscher and Stavros Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016)11(2) *Competition Law Review* 181, 192.

[124] Case C-62/86 *AKZO Chemie BV v Commission (AKZO)* EU:C:1991:286, [64, 71]; Case C-202/07 P *France Télécom SA v Commission of the European Communities* ECLI:EU:C:2009:214, [32, 36, 52, 109, 110]. Contrast with *Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 226 (1993) (which focused almost entirely on the recoupment requirement and consider it necessary element for finding predation). Note that the Commission uses average avoidance cost (AAC) as a better cost benchmark and does not narrow down predation only to pricing below AAC. Conduct that predictably leads to short term net revenue lower than the one that could have been expected from an alternative conduct could be also found to predatory. See Guidance Paper (n 114) [63-74].

[125] 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 (Oscar Bronner)* ECLI:EU:C:1998:569, [41-46].

competition, generating long-run efficiencies, stimulating innovation incentives, and benefiting consumers.[126] The refusal to deal case-law suggests also that if a dominant undertaking makes impossible a welfare-enhancing outcome without any reasonable justification, its conduct is likely to be considered abusive.[127] Moreover, according to *Intel*, if an undertaking offers rebates that are incapable of excluding an as-efficient competitor there is no abuse.[128] The underlying premise of such a holding is that exclusivity rebates are generally likely to intensify rivalry, generate efficiencies (e.g. address externalities, allow the manufacturer to cover some fixed costs) and increase consumer welfare.[129] Thus, by considering that exclusivity rebates are a plausible source of procompetitive effects as long as they lead to the exclusion of less efficient rivals, the Court shows that it understands procompetitive effects in the way defined here.[130]

Third, beyond individual categories of abuse, a consistent line of case-law suggests that as a matter of principle[131] Article 102 does not seek 'to prevent an undertaking from acquiring, on its own merits, [a] dominant position' but to ensure that only firms willing and able to compete on the merits remain on the market.[132] In other words, the aim of this provision is not to protect market players that are less efficient than the dominant undertaking.[133] Only the exclusion of equally efficient rivals would count as inappropriate softening of competition.[134] This general principle applies to pricing and non-pricing abuses,[135] is distinct from the 'as efficient test' that is applicable to particular categories of abuse, and suggests that if a dominant undertaking marginalises a rival by providing more attractive products or services to consumers in terms of, among other things, price, choice, quality or innovation, this conduct will be deemed procompetitive.[136] Consequently, this general 'as-efficient competitor' principle suggests that the same criteria for identifying procompetitive effects are used under both Articles 101 and 102 TFEU. If a dominant undertaking achieves certain efficiencies that benefit consumers without diminishing the ability and incentives of equally efficient rivals to compete or without overly restricting competition, it can credibly claim that its conduct is a plausible source of procompetitive effects. Similarly, if dominant undertaking's conduct intensifies rivalry between equally efficient rivals, makes possible products that would not have existed otherwise, or generates net consumer gains without eliminating residual competition, that conduct will be deemed as a source of procompetitive effects.[137]

The same identification criteria can be traced in merger control. Most mergers are deemed lawful because they can intensify rivalry, generate efficiencies and benefit consumers. On this

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[126] Opinion of Advocate General Jacobs in *Oscar Bronner* (n 125) [57-62].
[127] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magil)* ECLI:EU:C:1995:98, [54-55].
[128] *Intel* (n 9) [138].
[129] Derek Ridyard, 'Interpreting the As-Efficient Competitor Test in the Abuse of Dominance Cases' (2014) 10(2) *Competition Law Review* 125, 134-136.
[130] Ibid, [133-134].
[131] For an exception to this principle see Case C-23/14 *Post Danmark A/S v Konkurrencerådet (Post Danmark II)* ECLI:EU:C:2015:651, [58-60].
[132] *Intel* (n 9) [133].
[133] *Post Danmark I* (n 36) [21].
[134] *Enel* (n 9) [51]. Not all exclusionary effects are considered problematic; only the ones that hamper rivals' ability and incentives to compete to the detriment of consumers. *ENEL* makes it clear that the '*Intel* rule' (according to which where the dominant undertaking submits, on the basis of evidence, that its conduct is not capable of restricting competition, the Commission must examine this issue) applies to all exclusionary practices.
[135] *ENEL* (n 9) [45-46] (the case is about non-pricing conduct and the associated principle lies at its heart).
[136] *Post Danmark II* (n 131) [22]; *ENEL* (n 9) [46].
[137] Criterion (i) is less likely to be used under Article 102 TFEU as it requires firm cooperation, while Article 102 refers to unilateral conduct.

basis they are presumed procompetitive.[138] The EUMR thresholds is a clear indication that under the current regime only mergers between sufficiently large undertakings can trigger structural changes in the market and raise competition concerns.[139] In addition, the market share and the Herfindahl-Hirschman Index (HHI) function as filters that screen out the mergers that although falling within the scope of EUMR are unlikely to harm competition.[140] The use of such filters suggests that most concentrations are unlikely to raise competition concerns due to their innate procompetitive virtues (as these are defined above). For instance, mergers between entities with insignificant market shares are unlikely to curtail rivalry or harm consumers; mergers reasonably raising the concentration levels within a market can resolve coordination problems or enable the undertakings to reach minimum efficient scale.[141] In general, mergers between market players with low market shares operating in modestly concentrated markets, can intensify rivalry, reduce merging parties' costs and increase consumer welfare. On this basis, such mergers are considered procompetitive and prima facie lawful.

Nevertheless, horizontal mergers can significantly impede effective competition by generating non-coordinated or coordinated effects.[142] For instance, a merger between two actual and close competitors with large market shares operating in a market where barriers to entry are high is likely to have anticompetitive effects, especially when the customers of the merging parties face high switching costs and the rivals of the merging parties are incapable of increasing output in case of a price increase.[143] Such a merged entity will have a strong incentive to reduce output below the combined pre-merger levels, thereby raising market prices. Thus, a merger that removes an important competitive constraint on one or more sellers, who consequently will acquire increased market power can have as direct effect the loss of competition between the merging firms and reduce competitive pressure between the non-merging parties.[144] Such a merger will be prohibited on the basis that it creates or solidifies a dominant position as long as it is unlikely to generate procompetitive effects.[145]

Another type of non-coordinated effects leading to a prohibition of a merger could be found in the following scenario: a merger in an oligopolistic market eliminates important competitive constraints exerted by the merging parties upon each other, and reduces the competitive pressure on the remaining competitors. Such a merger would create a non-collusive oligopoly, and even where there is little likelihood of coordination between the members of the oligopoly, will be considered unlawful as long as it is not accompanied by offsetting consumer beneficial efficiencies.[146] In addition, a horizontal merger may make coordination within the market easier, more stable and more effective (i.e. tacit collusion), if it is relatively simple for the remaining players to reach post-merger a common understanding on the terms of

[138] Recitals 4, 29 EUMR; HMG (n 12) [11, 12]; NHMG (n 12) [13, 16, 21, 22, 28].
[139] Article 1 EUMR.
[140] HMG (n 12) [14-21]; NHMG (n 12) [23-27].
[141] HMG (n 12) [18]; NHMG (n 12) [13-14].
[142] HMG (n 12) [24-57].
[143] Ibid, [24-36].
[144] Ibid, [24].
[145] Commission Decision of 27/06/2007 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.4439 – Ryanair / Aer Lingus).
[146] HMG (n 12) [25]; Recital 25 EUMR; Commission Decision of 26 April 2006 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3916 — T-Mobile Austria/tele.ring) (In this case the key concern of the Commission was that the proposed acquisition would remove from the Austrian mobile telephony market the operator that had offered the best prices for consumers in recent years. Hence, the Commission sought to remedy the loss of a maverick).

coordination; monitor to a sufficient degree each other and easily spot deviators; retaliate or credibly threat to retaliate deviators; and outsiders remain unable to jeopardise the results of the said coordination.[147]

The three theories of harm (i.e. single dominance, non-collusive oligopoly, tacit collusion) discussed in the two previous paragraphs suggest that horizontal mergers that are likely to have non-coordinated or coordinate effects will be banned, in the absence of offsetting efficiencies benefiting consumers. The rationale behind such a ban is that such mergers diminish merging and non-merging parties ability and incentives to compete without solving a market failure, generating efficiencies or benefiting consumers. In other words the three theories of harm briefly discussed above seek to ensure that only mergers that are unlikely to have procompetitive effects (as these were defined in subsections III(i)-(iv) above) will be blocked under EUMR. Mergers likely to generate procompetitive effects, are unlikely to give rise to anticompetitive effects, and on this basis should not and will not be banned.

The same conclusion can be reached by examining the three main theories of harm pertaining vertical or conglomerate mergers. Unlike horizontal mergers that bring together manufacturers of substitute products and could remove a direct competitive constraint, non-horizontal mergers bring together suppliers of complementary or unrelated products. Hence, they do not directly eliminate a competitive constraint. In addition, they are likely to generate efficiencies that increase consumer welfare (e.g. reduce prices, improve product quality generate economies of scale/scope, reduce transaction costs).[148] Due to these procompetitive virtues, non-horizontal mergers are considered, in general, less harmful for competition than horizontal mergers.[149]

Nonetheless, non-horizontal mergers may alter existing market structures making coordination between the merged entity and its competitors more likely and they may lead to price increases or other competition harms.[150] Alternatively, such mergers can result in input or customer foreclosure when the merged entity has an ability and an incentive to foreclose access to its input or customer base. Such mergers can raise the costs of downstream rivals by restricting their access to an important input or to sufficient customer base.[151] These outcomes are likely to be manifested if the new entity post-merger has (i) the ability to substantially foreclose access to inputs or customers; (ii) the incentive to do so; and (iii) the foreclosure strategy can have a significant detrimental effect on competition downstream (e.g. upward pricing pressure in the downstream market).[152] Such detrimental effect is likely when barriers to entry are high, downstream competitors do not pose any credible and sufficient threats, countervailing factors (e.g. buyer power or entry) are unable

[147] HMG (n 12) [39-57]; Case T-342/99 *Airtours v Commission* ECLI:EU:T:2002:146, [62].
[148] NHMG (n 12) [12-14]; Simon Bishop, Andrea Lofaro, Francesco Rosati, Juliet Young, 'The Efficiency-Enhancing Effects of Non-Horizontal Mergers' (2012) Report produced by RBB Economics on behalf of the Enterprise and Industry Directorate-General of the European Commission, available at https://www.researchgate.net/figure/3-Vertical-integration-between-upstream-and-downstream-sectors_fig2_265271786. For a more critical approach see Steven C Salop, 'Invigorating Vertical Merger Enforcement' (2018) 127 *The Yale Law Journal* 1962, 19874-1982.
[149] NHMG (n 12) [11].
[150] Ibid, [79-90].
[151] Ibid, [30].
[152] Ibid, [31-57] (input foreclosure), [58-77] (customer foreclosure).

to discipline the merged entity, and there are no merger-specific and consumer-relevant verifiable efficiencies.[153]

Accordingly, like in the case of horizontal mergers, the theories of harm articulated for non-horizontal mergers seek to ensure that such concentrations will be unequivocally cleared (or cleared upon certain conditions), if and only if they are a plausible source of procompetitive effects as these were understood under criteria (i)-(iv) above. In other words, the said theories of harm use various criteria, filters and benchmarks to sort out when non-horizontal mergers are likely to have procompetitive virtues. The less likely the latter are, the more likely a finding of a SIEC would be. Consequently, not only horizontal but also vertical or conglomerate mergers that intensify a dimension or parameter of competition while softening another, solve a market failure without overly restricting rivalry, or generate efficiencies that benefit consumers without eliminating residual competition will be considered a credible source of procompetitive gains. Simultaneously, they will also be considered unlikely to have anticompetitive effects and on these grounds will be deemed lawful.

vi. The sources of procompetitive effects

The analysis of the case-law undertaken above fleshed out four analytical criteria that have been used by the EU Courts to identify procompetitive effects. In doing so it identified the range and types of procompetitive effects. In most of the cases discussed above, it could reasonably be argued that the EU Courts used more than one of these analytical criteria to infer procompetitive effects. In this sense, the examples of the case-law used might satisfy more than one of the identified criteria. Arguably, though, it suffices to satisfy only one to demonstrate procompetitive effects. All four identification criteria clearly suggest that fundamental economic concepts such as market failure,[154] efficiency[155] and consumer welfare[156] are the key sources from where procompetitive effects flow.

Furthermore, the notion of rivalry, even though less concrete from an economic standpoint, makes its way into the notion of procompetitive effects, and features in all identification

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[153] Ibid, [47-57, 72-77].

[154] On the notion of market failure in general, see e.g. Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, NJ: Prentice Hall 2012) 38-41, and Gregory Mankiw, *Principles of Economics* (6th edn, Stamford, CT:Southwestern 2012) 135-51, 195-229.

[155] On the notion of efficiency see Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010). As already noted efficiency includes productive, allocative and dynamic efficiency, and reductions of transaction costs counts as an efficiency enhancement. Cooter and Ulen (n 154) 87. Efficiency can be understood as Pareto efficiency (i.e. an allocation of resources is Pareto optimal if no individual can be made better off without making someone worse off) or as Kaldor-Hicks efficiency (i.e. an allocation that results in some persons being better off and some worse off, and the winners could compensate the losers in such a way that, on balance, everybody is better off. Allan M. Feldman, 'Welfare Economics' in Steven N. Durlauf & Lawrence E. Blume (eds) *The New Palgrave Dictionary of Economics* (2nd ed. 2008) 721, 722–23; David Winch, *Analytical Welfare Economics* (Penguin 1971) 143. Efficiency or total welfare 'refers to the aggregate value that an economy produces, without regard for ways that gains or losses are distributed'. See Areeda and Hovenkamp (n 5) 114a.

[156] Consumer welfare refers to the aggregate welfare of consumers as consumers, disregarding the welfare of producers. Under such a standard if consumers lose from a practice then it is counted as inefficient, or anticompetitive, even if producers gain more than consumers lose. Steven A. Salop, 'Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard' (2010) 22 *Loyola Consumer Law Review* 336, 348–53. Consumer welfare can capture short-term and long-term effects on price and output, as well as the non-price dimensions or parameters of competition such as privacy, innovation, and quality OECD, Considering Non-Price Effects in Merger Control — Background Note By the Secretariat, DAF/COMP (2018) 25-32.

criteria. For instance, under criterion (i) the Court does not simply ask whether the agreement addresses a market failure, but whether it does so without unnecessarily[157] restricting the competitive process. If, for instance, a collecting society as in *Tournier* or a patent pool as per Commission's *Guidelines on technology transfer agreements* is necessary to solve a collective action problem, then competition is not restricted. The same applies to information exchange schemes as suggested by *Asnef-Equifax*. On the contrary, a coordination scheme capable of addressing a market failure but aiming to do so by substituting cooperation for rivalry will not pass the procompetitive effects test as hinted at by *BIDS*. Criterion (ii) compares different dimensions of the competitive process and does so by using certain economic indicators, benchmarks and filters.[158] In criterion (iii), rivalry features through concerns about market power, barriers to entry, the position of existing and potential competitors, and buyers' countervailing power that play a role in the analysis of well-recognised welfare-enhancing arrangements such as vertical restraints. Rivalry is also relevant under criterion (iv) because a practice that eliminates effective competition by removing all or most existing sources of actual or potential competition cannot be justified as procompetitive even if it generates efficiencies that are passed on to the consumers.

Against this backdrop, the following section discusses the legal function that procompetitive effects play, suggesting that they function either as counter-indicators of prima facie unlawful conduct or as justifications of evidently anticompetitive conduct. In other words, procompetitive effects are used (i) to deny an object finding under either Article 101(1) or 102 TFEU; (ii) to show no harm to competition under an effects analysis under both provisions or (iii) to provide a justification of a restrictive agreement under Article 101(3) TFEU or of an abuse under Article 102 TFEU.[159] Similarly, when it comes to merger control, procompetitive effects can be used to cast doubt to the existence of non-coordinated or coordinated effects, or to excuse a merger likely to produce such anticompetitive effects in virtue of offsetting procompetitive benefits.

IV. The role of procompetitive effects in competition analysis

i. Procompetitive effects as counter-indicators under Article 101(1) TFEU

When it comes to Article 101 TFEU, procompetitive effects can either cast doubt to the characterisation of an agreement or a practice as a restriction by object or effect under paragraph (1), or once if an agreement or a practice is found to have a restrictive object or effect, they can provided a justification for it under paragraph (3). In the former case procompetitive effects play the role of counter-indicators of what would otherwise be a restriction of competition, while in the latter they provide a justification for an evidently anticompetitive agreement or practice.

A long line of case-law is telling of how procompetitive effects operate as counter-indicators under paragraph (1) of Article 101 TFEU. In *Société Technique Minière*, the Court ruled that an agreement that is 'really necessary' for a supplier to enter a new market is not restrictive of

[157] A proportionality test is used in this respect. Cases such as *Gøttrup-Klim, Luttikhuis*, *Tournier, John Deere, Asnef-Equifax* suggest that the agreement should not go beyond what is necessary in restricting competition to solve the relevant market failure. *Société Technique Miniere, Metro I*, *Pronuptia*, *Perre Fabre* are also indicative of a proportionality or necessity assessment for identifying procompetitive effects under criterion (ii).
[158] Easterbrook (n 7) 14-17.
[159] Even though Article 102 TFEU does not contain an Article 101(3) equivalent, it is well recognized in the case-law that a prima facie abusive practice can be justified.

competition, whether by object or effect.[160] In *Asnef-Equifax* the information exchange system among credit providers did not qualify as a restriction by object, since it was 'in principle capable of improving the functioning of the supply of credit' and 'of increasing the mobility of consumers of credit'.[161] In *Gottrup-Klim* a joint purchasing agreement was not considered to be a buyers' cartel, and therefore did not qualify as a restriction by object,[162] for it was making 'way for more effective competition'.[163]

In *Pierre Fabre*, the Court held that clauses in a selective distribution agreement that would otherwise be restrictive by object fall outside Article 101(1) TFEU if there is an 'objective justification' for them.[164] If an agreement is aimed at the 'attainment of a legitimate goal capable of improving competition' – in other words if it is capable of having procompetitive effects – then it would obtain this objective justification.[165] In *Cartes Bancaires*, the Court objected to the characterisation of the arrangement as a by object restriction since the contentious clauses could be understood as a proportionate means to tackle a free-rider problem.[166]

In *Budapest Bank* the ECJ considered that a MIF agreement, imposing a uniform amount for interchange fees relating to payments made by cards issued by banks belonging to the card payment system offered by Visa or MasterCard, did not qualify as a restriction by object for the following reasons: the examination of the content and the provisions of agreement did not demonstrate a sufficient degree of harm; the objective of the agreement was to maintain a balance between issuing and acquiring activities within payment systems; there was not sufficient 'solid and reliable' and 'general and consistent' experience that the agreement was harmful to the proper functioning of competition; and, in the absence of the agreement, interchange fees would have been higher.[167] Given that the agreement had a procompetitive explanation (i.e. sought to tackle a collective action and a free-rider problem) an effects analysis was required to assess the impact of the agreement on competition. Hence, *Budapest Banks* suggests that it is necessary to consider the procompetitive effects of an agreement, before concluding that the agreement restricted competition by its object. Thus, 'any time an agreement appears to have ambivalent effects on the market, an effects analysis is required'.[168] If there are 'a priori, strong indications capable of demonstrating' that the agreements are

[160] *Société Technique Minière* (n 75) p. 250.
[161] *Asnef-Equifax* (n 72) [46-56].
[162] Guidelines on horizontal co-operation agreements (n 64) [200] (noting that joint purchasing can be a cartel-like arrangement if it serves as a tool to engage in price fixing, output limitation or market allocation).
[163] Ibid, [32] (noting that 'in a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition').
[164] Ibid, [39].
[165] Ibid, [40].
[166] Ibid, [74]. As already noted though in the end the agreement was found unlawful in virtue of its anticompetitive effects (see ft 91 above).
[167] *Budapest Bank* (n 46) [82-83] ('In addition, if there were to be strong indications that, if the MIF Agreement had not been concluded, upwards pressure on interchange fees would have ensued, so that it cannot be argued that that agreement constituted a restriction 'by object' of competition on the acquiring market in Hungary, an in-depth examination of the effects of that agreement should be carried out, as part of which, in accordance with the case-law recalled in paragraph 55 of the present judgment, it would be necessary to examine competition had that agreement not existed in order to assess the impact of the agreement on the parameters of competition and thereby to determine whether it actually entailed restrictive effects on competition').
[168] Opinion of Advocate General Bobek in *Budapest Bank* (n 46) [81].

procompetitive or even ambivalent, the restriction by object characterisation is not warranted.[169]

In all these judgments, the ECJ started its analysis by identifying the procompetitive effects that the agreements might have. Such elements are taken into consideration under the by object analysis as elements of the context of the agreement, 'in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition'.[170] The fact that the agreements were a plausible source of procompetitive effects was sufficient to conclude that they were not restrictive by object. Consequently, the procompetitive effects of an agreement or a practice can propel against its characterisation as presumptively unlawful, and necessitate an effects analysis for finding an infringement.

It should be also noted that the Court in *Generics* set a precise standard for proving procompetitive effects and repudiating a finding of by object restriction. Following AG Kokott, the Court noted that procompetitive effects should be demonstrated, relevant, specifically related to the agreement concerned and sufficiently significant 'to justify a reasonable doubt as to whether the settlement agreement concerned caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object'.[171] The mere existence of procompetitive effects cannot as such preclude the characterisation as a 'restriction by object'.[172] If such effects are minimal or uncertain they would not pass the test.[173] Therefore, after *Generics* it is clear what is the requisite legal standard for the defendant to make out their case.

The role of procompetitive effects as counter-indicators under Article 101(1) TFEU does not end in the by object analysis; it extends further to the by effect inquiry. The purpose of the effects analysis is to demonstrate whether a practice or agreement that has not been found to restrict competition by object has a negative actual or potential effect on competition.[174] This analysis consists in three main steps. First, the plaintiff would have to show that the agreement is capable of restricting competition (e.g. rivalry) that would have otherwise existed by comparing the conditions in the market with and without the agreement (the so-called counterfactual test).[175] In other words, if the defendant shows either that the conditions of competition would have been the same with and without the agreement because, for

[169] Opinion of AG Trstenjak (n 58) [53].
[170] *Generics* (n 47) [103-104] (where the parties to that agreement rely on its pro-competitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterization as a 'restriction by object'… in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition'. Such effects are relevant because they are indicative of 'the objective seriousness of the practice concerned').
[171] *Generics* (n 47) [105-107].
[172] Ibid, [106].
[173] Ibid, [108, 110].
[174] *Delimitis* (n 109) [13-25].
[175] *Pronuptia* (n 75) [16-17].

instance, of the risks and/or the level of the investments involved in a project;[176] the agreement will not be considered as restricting competition.[177]

Second, if an overall procompetitive agreement contains certain suspicious clauses, then the relevant question becomes whether this agreement would have been concluded in the absence of such clauses. If the suspicious clauses are found to be objectively necessary for the procompetitive agreement to exist, then the clauses in question cannot be said to restrict competition (the so-called ancillarity doctrine).[178] If, for instance, a clause is necessary for a franchise agreement[179] or to bring a novel product in the market,[180] then such a clause would not be found as restricting competition in virtue of the procompetitive features of the overall arrangement. For example, in *Pronuptia*, the Court after discussing the economics of franchise agreements,[181] considered that certain ostensibly restrictive clauses aimed at preserving the know-how of the franchisor and the uniformity and reputation of their formula were necessary for the overall agreement to take place. On this basis, the Court found that there was no violation of Article 101(1) TFEU (at the time Article 85(1)).[182] Hence, if the clauses in question are strictly necessary for an overall procompetitive agreement, no restriction of competition would be established.

Third, in case the clauses at stake are found not to be objectively necessary to attain a legitimate or procompetitive aim, the plaintiff's job is not done yet. To demonstrate the existence of a restriction by effect they would have to conduct a full-blown effects analysis which essentially involves defining the market, identifying the relevant competitive constraints and ascertaining a mechanism through which anticompetitive effects could be incurred. Such a mechanism can take two forms: anticompetitive effects could be incurred either via collusion (i.e. absorption of a source of competitive pressure or reduction in the incentives to compete) or via exclusion (i.e. removal of a source of competitive pressure or inhibiting a competitor's ability to compete). In the first scenario rivals' incentive to compete are diminished, whereas in the second what is lessened is their ability to compete. On both occasions a negative effect to the parameters of competition (i.e. price, output, choice, quality, innovation) to the

[176] For example, two pharmaceutical companies seek a medicine that none of them would have been willing to produce alone because of the risks involved. Another example could be an agreement which is necessary for an undertaking to penetrate a new market or an agreement that allows the parties to combine skills and capabilities and develop a product that would not have been able to developed otherwise.

[177] The impact of a practice on competition is to be assessed in the 'actual context' in which it is implemented. *Société Technique Minière* (n 75) pp 249, 250; *John Deere* (n 54) [76]; *Asnef-Equifax* (n 72) [49]; *Generics* (n 47) [116].

[178] Case 42/84 *Remia BV and others v Commission* EU:C:1985:327, [19] (suggesting that a noncompete obligation may be necessary for the buyer to agree to the acquisition of a business to the extent that it is, it would not restrict competition, whether by object or effect).

[179] Franchise agreements have been found in general as procompetitive for various reasons. For instance because they allow an undertaking penetrate a new market. See *Société Technique Minière* (n 75) p. 250; *Pronuptia* (n 75) 15-17.

[180] Guidelines on Vertical Restraints (n 77) [172, 185, 191, 202, 207].

[181] *Pronuptia* (n 75) [15-17]. The Court noted that such agreements grant (a) to independent traders, for a fee, the right to establish themselves in other markets using their business name (i.e. a way for an undertaking to derive financial benefit from its expertise without investing its own capital) and (b) to traders, who do not have the necessary experience, access to methods which they could have learned with considerable effort, and allows them to benefit from the reputation of the franchisor.

[182] Ibid, [16-17] (noting that for such a to work it is necessary (a) to protect the know-how of the franchisor via non-compete obligations and prior-approval for transfers, and (b) to protect the uniformity and the reputation of the franchise).

detriment of consumers is to be expected.[183] Hence, the purpose of this analysis is to show that the agreement is unlikely to have any procompetitive virtues and likely to bear anticompetitive effects before declaring it null and void.

iii. Procompetitive effects as counter-indicators under Article 102 TFEU

When it comes to Article 102 TFEU the role of procompetitive effects as counter-indicators is similar to the role they play under 101(1) TFEU. They can either deny a finding of a by object abuse or show no harm to competition. Arguably a similar distinction between by object and by effect abuses (or types of analysis) exists under Article 102 TFEU.[184] Naked restrictions, exclusive dealing,[185] tying,[186] loyalty rebates,[187] and predatory pricing (i.e. pricing below average variable cost)[188] could qualify as by object abuses, whereas selective price cuts,[189] standardized rebates,[190] refusal to deal[191] and margin squeeze[192] could be categorized as by effect abuses.

While it is true that if a 'naked restriction' is established, it cannot be countered based on efficiency claims or on the absence of actual anticompetitive effects,[193] it would not be accurate to say that procompetitive effects do not function as counter-indicators on this occasion. The existence of procompetitive effects, as defined in subsections III(i)-(iv), would suggest that there is no naked restriction in the first place. In other words, the practices that are recognized as naked restrictions under Article 102 TFEU are deprived of procompetitive rationale. If the practice has a procompetitive explanation, it will not qualify as a naked restriction. Hence, the defendant can raise procompetitive claims even at the initial stage of the analysis to block a finding that their practice is a naked restriction. For example, in *Intel*, Intel's payments to customers who agreed to delay or cancel the marketing of competitor's products were described as 'naked restrictions' of competition.[194] Other examples of naked restrictions are Irish Sugar's purchases of a competitor's sugar from customers in order to

[183] *Delimitis* (n 109) paras 24-27, 30-32; Pablo Ibañez Colomo, 'Anticompetitive Effects in EU Competition Law' (2020) 17(2) *Journal of Competition Law & Economics* 337-342.
[184] Whish and Bailey (n 5) 206.
[185] *Hoffmann-La Roche* (n 35) [89-90]; *Intel* (n 9) [138-139].
[186] Guidance (n 114) [48] (Tying refers the commercial practice according to which customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product); *Hilti* (n 112) [99-101, 115-119]. Even though in *Microsoft* the Commission examined closely the actual effects and sought for a foreclosure effect. Case T-201/04 *Microsoft Corp. v Commission of the European Communities (Microsoft)* ECLI:EU:T:2007:289, [43-45, 842, 846-859].
[187] Case C-549/10 P *Tomra Systems and Others* v *Commission* EU:C:2012:221, [70, 71] (noting that 'in that regard, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition).
[188] *AKZO* (n 124) [71, 72].
[189] *Post Danmark I* (n 36) [20-28].
[190] *Post Danmark II* (n 131) [7, 20, 32, 37].
[191] *Magil* (n 127) [49-55]; *Oscar Bronner* (n 125) [27-47].
[192] Case C-280/08 P *Deutsche Telekom AG v European Commission* ECLI:EU:C:2010:603, [148, 155-185, 199, 234-236 253-259]; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB (TeliaSonera)* EU:C:2011:83, [60-77].
[193] *ENEL* (n 9) [53-56].
[194] Commission Decision of relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel) [1641-1681], upheld on appeal Case T-286/09 *Intel v Commission* EU:T: 2014:547, [198–220] (this practice was not discussed on further appeal to the Court of Justice)

replace it with its own sugar;[195] AstraZeneca's misuse of regulatory procedures;[196] and Lithuanian Railways' dismantling of a section of rail track to prevent a customer from using a competitor's services.[197] The common denominator of all these practices is that they are not a plausible source of any procompetitive effects as these are understood here. If such procompetitive effects existed they would indicate the absence of a naked restriction.

Exclusivity rebates could be considered another type of by object abuse according to *Hoffmann Laroche*.[198] Yet, if a prima facie exclusionary rebate scheme is shown to be incapable of excluding an as-efficient competitor, it would not qualify as an abuse since it would be considered as a credible source of procompetitive gains.[199] Thus, it is clear post-*Intel* that rebates that may have a loyalty-inducing effect would not be considered abusive if they are incapable of having a market foreclosure effect to an undertaking as-efficient as the dominant undertaking (the AEC test).[200]

With regards to predation the ECJ has repeatedly said that there is no recoupment requirement.[201] This inability to justify predation by proving the lack of a dangerous probability of recoupment may signal that when it comes to predation, procompetitive effects could not function as counter-indicators. Yet, this would not be accurate. The Court adopted this position pertaining recoupment because it considered that pricing below average variable cost cannot be a credible source of procompetitive gains. Such a pricing strategy is highly likely to generate anticompetitive effects as it does not make economic sense except as a monopolization strategy.[202] Hence procompetitive effects were already incorporated in the crafting of the test.[203] Would the addition of a recoupment requirement for establishing predation bring additional coherence to the abuse of dominance law in virtue of *Intel*[204]? In other words, should the existing law on predation be considered as an outlier, implying that a "clarification" is due to allow the defendant to claim procompetitive effects on the basis of low likelihood or impossibility of recoupment? Arguably, such a development would be problematic since it would give more than appropriate weight to claims of procompetitive effects at the initial stage of the analysis.[205]

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[195] Case T-228/97 *Irish Sugar plc v Commission* EU:T:1999:246, [226-35]
[196] Case T-321/05 *AstraZeneca AB v Commission* EU:T:2010:266, [352-613]; Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission* EU:C:2012:770, [36-52, 55-60, 74-100, 105-113, 129-141, 147-156].
[197] Case T-814/17 *Lietuvos geležinkeliai AB v Commission* EU:T:2020:545, [76–283].
[198] *Hoffmann-La Roche* (n 34) [89-91].
[199] *Intel* (n 9) [136-144].
[200] *Post Danmark I* (n 36) [29].
[201] *France Télécom v Commission* (n 124) [110] ('it does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by the applicant, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive').
[202] *France Télécom v Commission* (n 124) [112] ('lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss').
[203] In line with Intel the existing test suggests that pricing below AVC is incapable of foreclosing an equally efficient competitor and should be presumed procompetitive. See *Intel* (n 9) [138, 139].
[204] Ibid, [138-147].
[205] Pricing below AVC is unlikely to be a plausible source of procompetitive effects. Furthermore, if the authority intervenes only when recoupment is probable it will not be able to prevent predatory strategies aimed at a) preventing the competitor from competing vigorously instead of eliminating them, b) preventing or delaying a decline in prices that would have otherwise occurred. Guidance Paper (n 114) paras 69, 71 Herbert Hovenkamp, 'Predatory Pricing under the Areeda-Turner Test' (2015) *Faculty Scholarship at Penn Law* 1, 3-11 available at

Another type of abuse that could lead to an objection to the proposition that procompetitive effects function as counter-indicators also under Article 102 TFEU is tying. As things currently stand, the plaintiff has to only show that an undertaking is dominant in the tying market; the tying and tied products are distinct products; and the tying practice is likely to lead to anti-competitive foreclosure.[206] Accordingly, this test could be viewed as entailing that procompetitive effects are to be used only to justify a prima facie anticompetitive tying, and not to counter its finding in the first place.[207] Yet, the dominance prong[208] requires that the defendant can argue that that their practice does not consist in anticompetitive tying for it is not able to act 'to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[209] In addition, the distinct product requirement allows the defendant to claim that the tying and tied products in fact are not distinct – e.g. no substantial number of consumers would buy the tied product –, and show thereby that the tie-in generates procompetitive gains because it brings to the market a product which would not have been produced otherwise, as its stand-alone production would not be profitable.[210] Hence, the legal test for tying allows the defendant to use procompetitive effects as counter-indicators of an abuse. In addition, after *Intel* and *ENEL* it can be argued that the dominant undertaking can rebut a finding of anticompetitive tying by showing that its practice is not capable of producing foreclosure effects.[211]

According to the ECJ's case-law, if it is not the object of a dominant firm's conduct to harm competition, a finding of abuse is warranted only if actual or potential anticompetitive effects are demonstrated.[212] Actual or potential consumer harm is not required to establish such restrictive or distorting effects; harm to the structure of competition will suffice to infer consumer harm and find a breach of Article 102 TFEU.[213] As noted in *ENEL*, a competition authority is not required to show that a practice has the capacity to harm consumers; it will

https://scholarship.law.upenn.edu/faculty_scholarship/1825 (arguing that such a test would suffer from a serious problem of underdeterrence).

[206] Guidance Paper (n 114) [47-62]. Although a common commercial practice, tying may violate Article 102 TFEU where. The requirement of foreclosure effects was added in *Microsoft*. *Microsoft* (n 186) [842, 859-62, 867-69].

[207] Guidance Paper (n 114) [62] (suggesting that type-(ii) or (iv) procompetitive effects can be raised only as a defence). In *Hilti* and *Tetra Pak II* the Commission and the Court presumed anticompetitive effects and were strict on procompetitive claims. *Hilti* (n 112) [99-101, 115-119]; *Tetra Pak II* (n 112) [82-85, 134-141]. In *Microsoft* and *Google Shopping*, the two undertakings claimed that there tie-ins were procompetitive. Their claims where assessed by the Court mainly as possible justifications of a prima facie abusive conduct. See *Microsoft* (n 186) [1091-1101]; Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission (Google Shopping)* ECLI:EU:T:2021:763, [140, 251, 513, 544, 545, 557, 558, 560 615].

[208] As already noted in subsection III.v above, the dominance requirement functions as a general-application filter of pro- and anti-competitive effects.

[209] *United Brands* (n 37) [65].

[210] The distinct product test can be understood as a filter to screen out procompetitive tying. If both products are not distinct, i.e. are in general demanded and offered as a tie by the industry regardless of market power of firms, it is safe to assume that the tie-in or bundle is efficient. David Evans, Jorge Padilla and Christian Ahlborn, 'The Antitrust Economics of Tying: A Farewell to Per Se Illegality' (2003) available at SSRN: https://ssrn.com/abstract=381940; Kai-Uwe Kuhn, Stillman, Robert Stillman and Cristina Caffarra, 'Economic Theories of Bundling and Their Policy Implications in Abuse Cases: An Assessment in Light of the Microsoft Case' (2004), available at SSRN: https://ssrn.com/abstract=618589; *Microsoft* (n 186) [917-22].

[211] Guidance Paper (n 114) [52-58].

[212] *TeliaSonera* (n 192) [64]; *Post Danmark I* (n 36) [26]; *Post Danmark II* (n 131) [29]; In several cases the Commission sought to produce anticompetitive effects. *Microsoft* (n 186) [1031-1090]; *Google Shopping* (n 207) [368-95, 401-42, 432-59].

[213] *ENEL* (n 9) [44].

satisfy its burden of proof by demonstrating that a practice is likely to undermine competition, by using resources or means other than those governing an effective competitive structure.[214]

Consequently, to establish a by effect abuse, the plaintiff must show that the practice pursued by the dominant undertaking is capable of having actual or potential anticompetitive effects. Yet, the plaintiff is not required to establish actual effects; it suffices to show that the conduct in question is capable of restricting competition and/or to demonstrate potential effects depending on the category of abuse.[215] In this context, it could be argued that when it comes to by effects abuses (i.e. categories of practices that are in principle considered as plausible sources of procompetitive effects), procompetitive effects could be used to deny the existence of anticompetitive effects. Therefore, with regard to a by effect abuse the defendant can either show a lack of anticompetitive effects[216] or demonstrate that the effects deriving from the practice are essentially procompetitive, to indicate that there is no prima facie abuse.

For example, selective price cuts will be found abusive only if, without objective justification they produce an actual or likely exclusionary effect on as-efficient competitors.[217] Such price cuts would be detrimental for competition and reduce consumer welfare. Otherwise, price discrimination would be considered procompetitive and lawful as the exclusion of less efficient rivals is likely to generate efficiencies, intensify rivals and benefit consumers. Standardized or quantity rebates will also be found unlawful if the plaintiff demonstrates actual or potential anticompetitive effects.[218] This test presumes that such rebates are a plausible source of procompetitive effects and allows the defendant to cast doubt on a finding of anticompetitive effects. The defendant may claim that the features of the rebate scheme (e.g. granting criteria, reference period, market coverage, economic justification) and the market context suggest that the practice in question is, for instance, likely to generate efficiencies without softening rivalry.[219]

Another example of a by effect abuse is refusal to deal which is notoriously hard to establish as the plaintiff has to show indispensability, the absence of objective justification, and the elimination of all effective competition.[220] The indispensability requirement is an avenue through which the defendant can claim that there is no abuse since (a) access to their input

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[214] Ibid, [47, 53].
[215] Ibid, [50, 53].
[216] As already noted the dominant undertaking cannot escape liability only by showing the absence of concrete anticompetitive effects; it has to show in addition that this absence is not attributable to external factors (Ibid, para 56). Yet, the categorisation of a practice as abusive cannot be altered simply by the fact that it ultimately did not achieve the desired result. See *Google Shopping* (n 207) [442]; *TeliaSonera* (n 192) [64, 65].
[217] *Post Danmark I* (n 36) [22, 25].
[218] *Post Danmark II* (n 131) [23, 28-42].
[219] Ibid, [31] ('it first has to be determined whether those rebates can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners. It then has to be examined whether there is an objective economic justification for the discounts granted'). If competition on the market is very limited (e.g. high barriers to entry, existence of significant economies of scale, structural advantages enjoyed by the dominant undertaking, a must stock item) a rebate scheme can make it more difficult for dominant undertaking's customers to obtain supplies from competing undertakings, and thus it can produce an anti-competitive exclusionary effect). See also *Tomra* (n 187) [72].
[220] *Magil* (n 127) [52]; *Oscar Bronner* (n 125) [46] ('For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish, as the Advocate General has pointed out at point 68 of his Opinion, that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme').

or facility is not necessary for intensifying competition or for producing a new or better product or service, and (b) a duty to deal would undermine their R&D investments and innovation efforts.[221] In this sense, the indispensability requirement[222] operates as a limiting principle precluding overenforcement. This requirement makes procompetitive effects cognizable at the stage of establishing a refusal to supply as the defendant can highlight the procompetitive aspects or effects of their conduct (and the absence of competition harm) when debating this point of law. For instance, they can argue that access to the input is not necessary for rivals to compete upstream or downstream or that a refusal to supply does not preclude an equally efficient competitor from providing the target product.

In margin squeeze cases the legal test is two-fold. First, it should be examined whether given the wholesale and retail price charged by the dominant undertaking an equally efficient rival could not profitably offer their products (or would have to sell at a loss); and second, whether the margin squeeze is likely to exclude equally efficient competitors.[223] Yet, in the absence of any effect on the competitive situation of competitors, the Court said, such a pricing practice cannot be classified as an exclusionary practice.[224] Hence, to find an abuse, the authority or the court would have to examine if the pricing practice at stake hinders 'the ability of competitors at least as efficient as the dominant undertaking to trade on the downstream market'.[225] Therefore, there is scope for the defendant to oppose a finding of an abuse by demonstrating the procompetitive effects of the practice (e.g. by showing that the practice did not create any barriers to the growth of the retail market).[226]

Generally, to ascertain a prima facie abuse under Article 102 TFEU the nature of the practice, and its potential to harm competition and consumers should be established.[227] If the conduct is not a plausible source of procompetitive effects, satisfying any of the four identification criteria presented above, it would be presumptively unlawful irrespective of its impact on competition (i.e. naked restriction).[228] If the conduct is presumed to be capable of having procompetitive effects (e.g. if it can intensify competition by excluding a less efficient rival, generate efficiencies or net consumer benefits), it will be deemed a valid expression of competition on the merits, and thereby it will be considered prima facie lawful.[229] In this case only if actual or potential anticompetitive effects are shown (e.g. anticompetitive foreclosure) will such a practice be considered abusive. In such an occasion the dominant undertaking can deny the existence of anticompetitive effects or claim procompetitive effects – as understood in subsections (i)-(iv) – to cast doubt to the existence of competition harm. To be sure, the absence of actual anticompetitive effects is not sufficient, in itself, to preclude the application

[221] AG Jacobs in *Oscar Bronner* (n 125) [57-58].
[222] It could be argued that the indispensability requirement is a manifestation of the as-efficient competitor principle discussed in subsection III.v above as it requires showing that the input cannot be replicated in an economically viable manner by a firm that is equally efficient as the dominant one.
[223] *Deutsche Telekom* (192) [177-183]; *TeliaSonera* (n 192) [31-34, 61-77]. The cost and prices of the dominant undertaking are the relevant benchmark (only exceptionally those of competitors [46]. Demonstrating concrete or actual effects is not necessary, but at least a potential effect affecting as efficient competitors needs to be established [64, 66, 72].
[224] *TeliaSonera* (n 192) [66]; *Deutsche Telekom* (192) [254].
[225] *TeliaSonera* (n 192) [54-55, 67].
[226] Ibid, [62].
[227] Ibañez Colomo (n 38) 3.
[228] *Hoffmann-La Roche* (n 34) [89-91]; Case T-286/09 *RENV Intel Corporation Inc. v European Commission* ECLI:EU:T:2022:19, [27, 32, 45, 86-96]; Ibañez Colomo (n 38) 17. Conduct may be said to be inherently abusive where it can be safely presumed to have anticompetitive effects irrespective of the context of which it is a part
[229] Ibañez Colomo (n 38) 5, 8, 25.

of Article 102 TFEU,[230] but it can be an indication that the conduct in question was not capable of restricting competition.[231]

It is not entirely clear what is the threshold for proving procompetitive effects as counter-indicators under Article 102 TFEU. No similar statement as the one found in *Generics* exists with regards to by object or by effect abuses. The ECJ has not expressed any overarching principle in this regard, and as a result the standard of proof of procompetitive effects has raised controversies in numerous cases. Yet, this absence of an overarching principle for establishing procompetitive effects should not come as a surprise. Competition assessments under Article 101 TFEU consist in a by object and a by effect inquiry, whereas the Article 102 TFEU analysis is structured around legal tests associated with particular categories of abusive conduct. Hence, the threshold of procompetitive effects could be assumed to vary with the category of abuses and symmetrically to the threshold of anticompetitive effects. The more likely the anticompetitive effects of a specific type of abuse are assumed to be, the higher the threshold for establishing procompetitive effects must be. The less likely the anticompetitive effects are assumed to be, the lower the threshold must be for establishing procompetitive effects.

For instance, in case of naked restrictions, i.e. practices assumed to be deprived of any procompetitive virtues, establishing actual or potential anticompetitive effects is not necessary since such effects can safely assumed to be likely. Thus, it would be reasonable to expect from the defendant to prove with certainty or quasi-certainty the relevant procompetitive effects to repudiate a 'naked restriction' characterisation. For predation the threshold for demonstrating procompetitive effects could be a tad lower (e.g. high likelihood), but still relatively high. This would be reasonable since if an authority or plaintiff has managed to provide evidence of pricing below an appropriate level of cost, anticompetitive effects could be safely likely.[232] Therefore, the defendant would have to make a compelling case of procompetitive effects to repudiate a finding of abuse. For exclusivity rebates, tying and bundling, the threshold appears to (or should be) be even lower since these practices are considered generally capable of procompetitive effects, and likely to produce anticompetitive effects only under specific conditions.[233] The threshold for proving procompetitive effects could be assumed to be even lower for margin squeeze and refusal to deal as such practices are less likely to bear anticompetitive effects.[234] For this reason margin squeeze and refusals to deal are subject to different, but relatively strict conditions.[235]

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[230] *ENEL* (n 9) [55, 54] (noting that even when a conduct has been in place for a sufficiently long time, the fact that it did not produce concrete anti-competitive effects does not automatically mean that such conduct did not have such capacity).

[231] Ibid, [56] (noting that it is up to the dominant undertaking to supplement this prima facie evidence with evidence showing that the lack of concrete effects was indeed the consequence of the inability of the conduct to have such effects and para 54 noting that such a lack of effects could result from other causes such as changes in the relevant market or dominant firm's inability of the dominant undertaking to carry out the anticompetitive strategy'.

[232] Intel (9) [139].

[233] Intel (9) [139].

[234] *TeliaSonera* (n 192) [31-34, 61-77]; *Oscar Bronner* (n 125) [37-47]; *Magil* (n 127) [49-56].

[235] Opinion of AG Jacobs in *Oscar Bronner* (n 125) [57]; *TeliaSonera* (n 192) [41-48, 69-74] (clarifying that clarified that the *Oscar Bronner* requirements do not need to be satisfied in order to establish margin squeeze liability. Hence refusal to supply and margin squeeze are treated by the ECJ as two distinct infringements, with the latter requiring a less demanding test. The potentially exclusionary effect of negative margin squeeze suffices to be 'probable' to establish an abuse, while in the case of a positive margin it must be demonstrated that that the

Accordingly, as a matter of principle it could be said that the more likely the competition harm, the higher the threshold of procompetitive effects should be, and the more remote or unlikely the anticompetitive effects, the easier it should be to establish procompetitive effects.[236] Nonetheless, no such overarching principle can be discerned in the abuse of dominance case-law at the moment.

iii. Procompetitive effects as justifications of anticompetitive conduct

The previous analysis shows that procompetitive effects can function as counter-indicators (a) debunking a presumption of unlawfulness when it comes to agreements or practices that are deemed prima face unlawful irrespective of their actual or potential anticompetitive effects, or (b) casting doubt to the existence of actual or potential anticompetitive effects when an effects analysis is carried out. However, the role of procompetitive effects in competition analysis does not stop there. The procompetitive aspects or effects of an agreement or practice can excuse it, despite its anticompetitive object or effects. For example, if an agreement is found to be restrictive by object or by effect under Article 101(1) TFEU, it can still be saved if it satisfies the cumulative conditions of Article 101(3) TFEU as already noted above. Hence, Article 101(3) TFEU exists to ensure that an agreement that has an anticompetitive object or actual or potential anticompetitive effects could still be lawful as long as its positive effects to competition and consumers outweigh its negative ones.

In this regard, one might argue that Article 101(3) TFEU serves no purpose since the procompetitive effects of an agreement are already considered under Article 101(1) TFEU. Nonetheless, such an argument would be misguided. First, Article 101(3) TFEU involves a balancing exercise whereby anticompetitive effects are measured against procompetitive ones, whereas Article 101(1) involves mainly a screening exercise aimed at identifying the anticompetitive object of effects of an agreement.[237] Such screening exercise can be more superficial (i.e. by object analysis) where there is already established knowledge or experience suggesting that an agreement of that kind is obviously inimical to competition or more in-depth (i.e. by effect analysis) when the agreement has ambivalent effects and a more cautious analysis is required to identify actual or potential negative effects.

Consequently, in the context of Article 101(1) TFEU, the procompetitive aspects of an agreement are indispensable to discern either the object of the agreement in question (i.e. what it can objectively achieve, irrespective of the subjective intent of the parties) or whether the agreement is likely to have anticompetitive effects (e.g. lead to collusion or market foreclosure). In this respect, procompetitive effects are indicia that could be used to either deny a finding of a restriction by object or to cast doubt on the existence of harm to competition under an effects analysis.[238] On the other hand, in the context of Article 101(3) TFEU, the role of procompetitive effects is to substantiate a justification of a (by object or by effect) restrictive agreement. The analysis of procompetitive effects is more intense at this stage. Under Article 101(1) TFEU, the question is whether the agreement is a plausible source

conduct is 'likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned').

[236] Ibañez Colomo (n 183) 343-348.

[237] *O2 (Germany)* (n 92) [69-73].

[238] The analysis of the pro-competitive aspects of an agreement is relatively superficial under the first paragraph as indicated by *Asnef-Equifax* (n 72) [46-63], *Pierre Fabre* (n 83) [32-47]; *Cartes Bancaires* (n 42) [48-94]; *Pronuptia* (n 75) [9-27]; *Delimitis* (n 109) [10-12].

of procompetitive gains. A cursory analysis suffices, and no quantification is needed.[239] The analysis is much deeper under Article 101(3) TFEU. If the authority establishes anticompetitive effects, the burden of proof shifts, and it is for the defendant to show that the procompetitive gains generated by the agreement are likely to outweigh its anticompetitive ones. Such burden-shifting is reasonable since it relies on a proximity principle,[240] and takes place when it is established that the agreement, despite the relevant counter-indications, is restrictive by object or by effect.

In voluminous case-law the ECJ has reiterated that it is open to a dominant undertaking to provide justification for behaviour liable to be caught by the prohibition under Article 102 TFEU.[241] To make out such a justification the dominant undertaking has two options: either to demonstrate that its conduct is objectively necessary,[242] or that it produces or is likely to produce efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.[243] To successfully plead the latter the dominant undertaking has to show that there are efficiency gains likely to result from the conduct under consideration; that such gains counteract or outweigh any likely negative effects on competition and consumer welfare in the affected markets; that the conduct in question is indispensable for the realization of the said efficiencies (no less anticompetitive alternative); and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.[244] Therefore, as in the case of Article 101 TFEU, procompetitive effects could be used in the context of Article 102 TFEU to make out a justification for anticompetitive conduct, even though such a justification is unlikely to succeed.[245]

Procompetitive effects play a similar role also in merger control. It is well recognized that mergers can bring about efficiencies.[246] Therefore, in order to assess whether a merger would significantly impede effective competition,[247] the Commission needs to perform an overall competitive appraisal which involves analysing the likelihood of non-coordinated[248] or coordinated effects[249] against any merger-specific and verifiable efficiencies that benefit the consumers.[250] These three conditions are cumulative and exist to ensure that the efficiencies generated by a merger would likely enhance the ability and incentive of the merged entity to compete fiercely for the benefit of consumers.[251] In other words, the raison d'etre of these three conditions is to ensure that the procompetitive aspects or effects of the proposed concentration would counteract or outweigh the adverse effects on competition which it

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[239] Case T-111/08 *MasterCard, Inc. and Others v European Commission*, ECLI:EU:T:2012:260 [80].
[240] The actors who have cheaper access to the relevant to relevant evidence are asked to provide them.
[241] *United Brands* (n 37) [184]; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, [54, 55]; and *TeliaSonera* (n 192) [31, 75].
[242] Case C-311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* ECLI:EU:C:1985:394, [27].
[243] *British Airways v Commission* (n 11) [86]; *TeliaSonera* (n 192) [76].
[244] *Post Danmark I* (n 36) [42].
[245] It is not sufficient for the dominant undertaking to put forward 'vague, general and theoretical arguments' in support of an objective justification. *Microsoft* (n 186) paras 698; Guidance Paper (n 114) [31]. Whish and Bailey (n 5) 222 (noting that they are not aware of any case where an efficiency defence has succeeded under Article 102).
[246] Recital 4 EUMR (noting that mergers are capable of increasing dynamic competition and the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community).
[247] Article 2(2) and (3) EUMR.
[248] HMG (n 12) [24-38]; NHMG (n 12) [29-78].
[249] HMG (n 12) [39-57]; NHMG (n 12) [79-90].
[250] HMG (n 12) [76-88]. NHMG (n 12) [53].
[251] HMG (n 12) [77].

might otherwise have. Therefore, also under merger control procompetitive effects function as a justification of an otherwise anticompetitive practice.[252]

V. Conclusion: the changing role of procompetitive effects and the bounds of EU competition law

Procompetitive effects have always played an important role in the analysis of the key provisions of EU competition law. Yet, as the law evolves we can observe that the concept has acquired a more concrete meaning.[253] When the EU Courts or the Commission seek to identify whether a practice or an agreement is capable of having procompetitive effects, they examine whether it alleviates a market failure in a non-anticompetitive manner; whether it intensifies a dimension or parameter of competition while softening another; whether it makes possible a welfare-enhancing arrangement or increases the value of a product or a service without eliminating or overly restricting rivalry; or whether it leads to net consumer welfare gains. There could be overlaps between these identification criteria and a particular finding of procompetitive effects may satisfy more than one of these criteria. Yet, it is argued here that under the existing case-law it is sufficient to satisfy one of these criteria to establish procompetitive effects. Against this background, it could be also said that the fundamental economic concepts of market failure, efficiency and consumer welfare, and the less-concrete, yet still economically-informed notion of rivalry operate as the main sources of inspiration for procompetitive effects.

Furthermore, this study showed that not only the meaning but also the legal role of procompetitive effects is similar in all three main areas of EU competition law: they function as either counter-indicators or justifications. Two clarifications are due in this regard. First, it should be noted that the legal techniques through which procompetitive effect may be inferred differs depending on the relevant provision.[254] This is hardly surprising given that competition analysis under Article 101 TFEU consists in a by object and a by effect inquiry; under Article 102 is structured around legal tests attached to particular categories of abuse; and under EUMR involves a two-steps exercise under which the authority examines, first, if a concentration is likely to generate non-coordinated or coordinated effects and, second, if these effects are outweighed by merger-specific and verifiable efficiencies that benefit the consumers.

The second clarification pertains the relationship between the four identification criteria and the two legal roles that procompetitive effects play. Arguably, procompetitive effects type (i)-(iii) function as counter-indicators, while type (iv) are usually invoked as justifications of a prima facie unlawful practice or agreement. Type (iv) procompetitive effects are mainly used as justifications because at this later stage of analysis competition harm has already been established, and effects need to be clear-cut and highly probable to excuse the practice. Undoubtedly, type (iv) procompetitive effects are the most clear-cut case of effects beneficial to competition. However, the fact that type (iv) procompetitive effects usually serve as justification, it does not imply that they cannot also function as a counter-indicator. For instance, when an agreement or practice is highly likely to generate type (iv) procompetitive

[252] As in the case of Article 102 TFEU, this author is not aware of any case where an efficiency defence was successful.
[253] Arguably, the more economic approach and the effects-based approach have contributed to this evolution. See Anne C Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 110-158.
[254] See for instance the discussion on tying in subsection IV(i) below.

effects, it will be considered prima facie lawful or easily escape the by object characterization and be subjected to an effects analysis. Under the latter, the same type of procompetitive effects could be also used to deny the existence of competition harm.

Another crucial point is that the concept of procompetitive effects remains relatively open. The category of procompetitive effects is not exhaustive and it could be maintained that new economic[255] insights can reveal new types of procompetitive effects. In this sense, the bounds of EU competition law, even though relatively stable, are simultaneously sufficiently flexible to allow for contextualised application and adaptation to epistemic change. As observed by Amato the border of antitrust law shifts in light of new economic knowledge, market developments, broader policy considerations and value judgments.[256]

In this regard, a particular trend is observable: the EU Courts are frontloading procompetitive effects at the first stage of the analysis of all key regimes rather than leaving them to the assessment of Article 101(3) TFEU, Article's 102 TFEU and merger control's efficiency defence. Take, for instance, *BIDS*. In her Opinion, AG Trstenjak considered that to find whether the agreements at issue constitute a restriction by object the reviewing court should examine whether 'the restrictive elements are necessary in order to achieve a pro-competitive object'.[257] Having not found an unobjectionable procompetitive object of the BIDS agreements, the AG considered that the agreement will have, as a necessary consequence, a restriction of competition.[258] The Court arrived to a similar conclusion without however referring to procompetitive effects. The Court considered that such type of arrangement 'conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market' as it deliberately substitutes practical cooperation between undertakings for the risks of competition.[259] Therefore, *BIDS* suggests that a restraint can qualify as a restriction by object if it can be safely presumed to have anticompetitive effects.[260]

Gradually the role of procompetitive effects as counter-indicators became more prominent. After *Cartes Bancaires*, *Budapest Bank* and *Generics* it would be safe to say that a restriction by object is not an arrangement that is obviously anticompetitive as per *BIDS*, but one that is deprived of any plausible procompetitive explanation.[261] Similarly, in the abuse of dominance area, *Post Danmark I*, *Intel*, and the recent *ENEL* make it clear that a unilateral practice that is

[255] Here economics are understood in the broadest sense possible as including not only microeconomics but also behavioural economics, feminist economics and environmental economics.
[256] Amato (n 16) 96.
[257] Opinion of AG Trstenjak in *BIDS* (n 41) [60].
[258] Ibid, [94, 100]. It was clear in the eyes of the AG Trstenjak that even if an agreement pursues a legitimate objective or a sector experiences a cyclical or structural crisis, the agreement can still count as a restriction by object except if it 'pursues either a pro-competitive object or an object which is neutral from a competition point of view'.
[259] *BIDS* (n 41) [34-38] (In the absence of the BIDS agreements, the Court noted, the involved undertakings would have no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations).
[260] Guidelines on the application of Art. 81(3) (93) [21]; Jones, Sufrin and Dunne (n 15) 203; R. Whish, "Object Restrictions", New Frontiers of Antitrust Conference (February 10, 2012), http://www.concurrences.com.
[261] Ibañez Colomo (n 82) 549 (anticipating this development).

not capable of having foreclosure effects cannot but be procompetitive, and therefore not qualify as abusive, unless actual or potential anticompetitive effects are shown.[262]

A similar trend could be discerned in merger control. *CK Telecoms* is the first case where a theory of non-collusive oligopoly is assessed by the GC as a stand-alone theory of harm.[263] The purpose of such a theory of harm is to capture the mergers that although do not lead to the creation or strengthening of a dominant position, eliminate an important competitive constraint and reduce the competitive pressure exercised by the remaining competitors. In doing so, according to this theory of harm, a merger could significantly impede effective competition on the market.[264] According to the Commission, the acquisition of Hutchison 3G UK Ltd ('Three') by O2 was likely to have significant non-coordinated effects on the retail market, because Three was an important competitive force and exerted an important competitive constraint. Therefore, the proposed transaction would eliminate an important competitive constraint, reduce the intensity of competition in the market, exercise an upward price pressure in prices for mobile telephony services in UK, and restrict consumers' choice.[265] However, the GC was not convinced by the Commission's analysis and annulled its decision in its entirety.[266] One of the Commission's mistakes – according to the GC – was that in its quantitative analysis of price effects failed to consider standard efficiencies which would be the direct consequence of the transaction resulting from the rationalisation and integration of production.[267] Hence, *CK Telecoms* introduced with the efficiency credit and the concept of standard efficiencies an additional filter to screen out pro-competitive mergers[268] at the characterization stage where the authority is supposed to examine the existence of non-coordinated or coordinated effects. In this sense *CK Telecoms* enlarged the scope of procompetitive effects as counter-indicators and seems to follow the logic of frontloading discerned in *Cartes Bancaires*, *Budapest Bank*, *Generics*, *Intel* and *Enel*.

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[262] *Post Danmark I* (n 36) [25, 38], *Intel* (n 9) [138], *Enel* (n 9) [50] (noting that the abusive nature of exclusionary conduct presupposes that such conduct has the capacity to restrict competition, and in particular, produce the alleged exclusionary effect).

[263] Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission (CK Telecoms)* ECLI:EU:T:2020:217.

[264] HMG (n 12) 25; Recital 25 EUMR.

[265] Commission Decision of 11.5.2016 declaring a concentration to be incompatible with the internal market (Case M.7612 Hutchison 3G UK / Telefonica UK) C(2016) 2796 final.

[266] According to the GC the Commission mistakenly confused the two criteria focusing on reduction of competitive pressure without demonstrating sufficiently well that an important competitive constraint would be eliminated *CK Telecoms v Commission* (n 263) [175] (noting that the Commission mistakenly confused the two criteria and focused on the reduction of competitive pressure without demonstrating sufficiently well that an important competitive constraint would be eliminated), [172] (holding that the Commission wrongly considered that 'the mere decline in the competitive pressure which would result, in particular, from the loss of an undertaking having more of an influence on competition than its market share would be sufficient, in itself, to prove a SIEC'); [175] (holding that the Commission disregarded the fact that an 'important competitive force' needs to stand out from its competitors to qualify as such) and [247] (holding that the Commission did not establish that the merging entities were 'particularly close mobile network operators' only that they were 'relatively close competitors').

[267] Ibid, [277] (noting that 'any concentration will lead to efficiencies, the extent of which will also depend on external competitive pressure').

[268] Ibid, [278, 279] (noting that 'efficiencies within the meaning of the Guidelines must be taken into account in the overall competitive appraisal of the concentration, in order to ascertain whether they are likely to counteract the restrictive effects of the concentration. However, the category of efficiencies at issue in the present case is merely a component of a quantitative model designed to establish whether a concentration is capable of producing such restrictive effects. It is therefore an evidential matter relating to the existence of restrictive effects which arises prior to the overall competitive appraisal as provided for in paragraph 76 of the Guidelines'.).

Thus, we can observe that procompetitive effects as counter-indicators of a restriction of competition play an increasing more prominent role than as justifications of an established restriction. The causes of this phenomenon could be various. Perhaps the courts are aware of the actual difficulties of a case-by-case balancing, and therefore use proxies, heuristic devices and shortcuts[269] to decipher the nature and the potential implications of an agreement or a practice instead of requesting an actual balancing of anticompetitive and procompetitive effects. Another reason might have to do with the increasing use of economics in competition assessments: the abundance of procompetitive effects indicates that efficiency and consumer welfare have come to occupy an ever more prominent role in analysing and rationalising commercial conduct. The more economic approach, the effects-based approach and the increasing use of economics could be the catalysts for such a development.[270] As Amato observed the use of economics cannot but transform the way competition law is understood and interpreted, and move its shifting boundary.[271]

Another possible explanation of the aforementioned development could relate to due process considerations, the right to be heard, and the principles of good administration and full justification of administrative decisions: the frontloading of procompetitive effects might be intended to achieve a more equitable balance between plaintiffs and defendants.[272] Decision theory considerations, assumptions of the likelihood and magnitude of false positives and false negatives[273] and postulations about the institutional strengths and weakness of the current public enforcement institutional apparatus may have also played a role in this trend. Be that as it may, this change in the sequencing of procompetitive effects is indicative of the moving boundaries of EU competition law.[274] This development may make competition analysis less formulaic and more accurate, increase the evidentiary burden for the plaintiffs and the risk of overenforcement. Yet, it can increase administrative and enforcement costs and the risk of underenforcement.

At this point it is worth asking how the prominent role of efficiency and consumer welfare in the definition of procompetitive effects and the Court's frontloading of procompetitive effects at the first stage of competition analysis affect the shifting boundaries of EU competition law. One could argue that the law has moved away from a Jeffersonian or Ordoliberal ideal of 'equal liberty for all' towards a legal regime predominantly occupied with maximising a version

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[269] Kalintiri (n 6) 424-426; Easterbrook (n 7) 14-17.
[270] Witt (n 253) 7-76.
[271] Amato (n 16) 20-38, 95, 115.
[272] Hasan Dindjer, What Makes an Administrative Decision Unreasonable? Modern Law Review (2021) 84(2) *Modern Law Review* 265. Paul Daly, 'Updating the Procedural Law of Judicial Review of Administrative Action' (2018) 25 *University of Cambridge Faculty of Law Research Paper*, available at https://ssrn.com/abstract=3145268. See *Intel* (n 9) [138-140]; *ENEL* (n 9) [51-52] (noting that '…where a dominant undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct did not have the capacity to restrict competition, the competition authority concerned must examine whether, in the circumstances of the case, the conduct in question did have such capacity').
[273] A false positive occurs where an authority incorrectly prohibits procompetitive behaviour (overenforcement problem), while a false negative when an anticompetitive practice is permitted (underenforcement problem). Given the inherent difficulty of determining which practices are anticompetitive and which are pro- competitive, it is inevitable that courts and authorities will sometimes make errors. Hence when legal tests are designed a key question is to decide which of the two errors is preferable. Whish and Bailey (n 5) 193-194.
[274] Beckner III and Salop (n 14) 42 (arguing that courts should consider low cost and easily available information in the initial stage of antitrust analysis, and not engage in a quantitative evaluation of the magnitude of likely efficiency benefits. According to these authors a more refined analysis of the likelihood of efficiency benefits is warranted when there are probable market power harms. On this basis, they claim that judicial bodies should use sequential information gathering and decision analysis to reduce informational costs).

of efficiency.[275] This would be a development that Amato already anticipated when he discussed the history and the evolution of both US and EU antitrust and observed a tendency of both jurisdictions to focus almost exclusively on efficiency.[276] On this basis, Amato was wondering whether EU competition law will remain faithful to its original inspiration to protect the market as an institution of freedom and competition as a device for taming economic power, or if it will turn into a legal tool exclusively focused on efficiency.[277]

Our analysis of the concept of procompetitive effects suggests that the original inspiration of EU competition law to 'defend the freedom of small producers to stay in the market', to 'fight against economic power' and to protect 'the fight itself'[278] has not been fully abandoned. Even though efficiency and consumer welfare play an increasingly important role in the interpretation and application of the notion of procompetitive effects, concerns pertaining rivalry have not vanished. A key finding of this study was that an analysis of the case-law suggests that it would be inaccurate to simply equate procompetitive effects with efficiency gains. The concern to maintain a vigorous competitive process – or to not overly restrict rivalry – features in all four identification criteria. The Court has always combined the notions of efficiency, consumer welfare and rivalry when identifying an agreement or a practice as procompetitive. Thus, it could be argued that Amato's call for caution has been heard by the EU antitrust institutions and EU competition law has not transformed into a branch of microeconomics, single-mindedly focused on efficiency. Far from being monolithically focused on the value of efficiency, the Court has incorporate in its analysis of procompetitive effects concerns associated with rivalry which can be associated with freedom to compete and equality of opportunity.

Already from the beginning of the *Antitrust and the Bounds of Power*, Amato cautions the reader that the intellectual DNA of antitrust is complex and that technical arguments involve and rely on 'political and philosophical options with which antitrust law still remains bound up'.[279] As he insightfully pointed out, competition law was not invented by the technicians of commercial law, nor by economists, but 'by politicians and scholars attentive to the pillars of the democratic system'.[280] Due to this reason, competition law (on both sides of the Atlantic) seeks to address a crucial problem for democracy: to tame private power so that it does not infringe the economic freedom of other private individuals, nor does it undermine public decision-making.[281] From this perspective, the key mission of competition law is to prevent

[275] Amato (n 16) 97-98 (describing the Jeffersonian ideal as 'a society of producers as far as possible equal among themselves and all independent of each other, so as to avoid the inequality of wealth and that disparity of power it entails, not only in civil relationships but in the relationship with political power itself, which may be corrupted both by the abuses of the powerful and by redistributive claims by the mass of dependent workers') and 98 (observing that 'when liberal culture managed to make its way among the meshes of the many varieties of European statalism and began to impose antitrust law (and not the State) as the means to combat that power, the similarities with the original principles of American antitrust law became considerable').

[276] Ibid, 10-19 (noting that the Sherman Act was inspired by an urge to fight against trust or against economic power in defence of small producers and small traders who risked being crushed by it), 20-36 (presenting the Chicago revolution and its impact), 46-64 (discussing the evolution of case-law on restrictive agreements) 65-92 (discussing the evolution of the abuse of dominance law) 95.

[277] Ibid, 96-97.

[278] Ibid, 95.

[279] Ibid, 2.

[280] Ibid, 2-3.

[281] (bid, 2-3 noting (noting that 'power in liberal democratic societies is, in the public sphere, recognized only in those who hold it legitimately on the basis of law, while in the private sphere, it does not go beyond the limited prerogatives allotted within the firm to its owner).

private power 'from becoming a threat to the freedoms of others'.[282] Such a mission requires bold intervention as well as self-restrain from antitrust institutions. According to Amato, it is of paramount important that courts and enforcers, while pursuing competition law's mission, they do not enlarge their powers 'to the point of destroying the very freedoms [they] ought to protect'.[283] The careful way the EU Courts and the Commission approach the issue of procompetitive effects echoes these concerns.

At an era where there is growing discontent about the predominant consumer welfare paradigm and increasing trepidation about the economic power of digital giants in virtue of the special characteristics of digital markets,[284] Amato's framing of the nature and key dilemmas of competition law is more topical than ever. Against this backdrop, we could argue that the notion of procompetitive effects suggests that the boundaries of EU competition law are indeed shifting and that technical arguments are indeed interwoven with value-laden judgments. The purpose of this contribution was to flesh out the meaning and the role of procompetitive effects in EU competition. Whether the meaning given to these effects and the key legal mechanisms through which they currently are cognizable allow EU competition law to effectively set boundaries to power is a matter of further examination. Amato's *Antitrust and the Bounds of Power,* with its rigorous descriptive analysis and solid theoretical underpinnings offers a solid vantage for such a normative inquiry. This fact alone is a testament of the timeless value of a book published 25 years ago.

[282] Ibid, 3.
[283] Ibid, 95-100.
[284] Ioannis Lianos, 'Competition law for the digital era: a compex systems; perspective' (2019) 6 *CLES Research Paper Series* 1; Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67(2) *Antitrust Bulletin* 302; Oles Andriychuck, 'Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-platform Competition' (2021) 44(3) *World Competition: Law and Economics Review* 261; Frederic Jenny, Changing the way we think: competition, platforms and ecosystems (2021) 9(1) *Journal of Antitrust Enforcement* 1;