

# The Efficient Abuse: Reflections on the EU, Italian and UK Experience

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## 1. Introduction

Unlike other areas of competition law, which explicitly incorporate a theory of efficiencies, in many jurisdictions antitrust rules on abuse of dominance and monopolization do not provide for an efficiency justification. In the EU, restrictive agreements may be exempted if they satisfy the conditions laid down in Article 101(3) TFEU, and recital 29 of Regulation No. 139/2004 states that a merger leading to anticompetitive effects can proceed if the efficiencies it brings about counteract the potential harm to consumers. However, Article 102 TFEU seems to establish an absolute prohibition of abuses of dominance. The same is true in many Member States, whose substantive law is generally modelled on EU rules, and in jurisdictions outside the EU, such as the United States and Canada,<sup>1</sup> even though the antitrust laws of some States provide for an efficiency defence of unilateral practices.<sup>2</sup>

Notwithstanding the lack of an explicit exception in many jurisdictions, most policy makers and

commentators agree that, even in abuse and monopolization cases, efficiency considerations should form an essential part of the analysis. In the EU, the Commission and EU Courts have explicitly accepted the availability of an efficiency defence under Article 102 TFEU. However, efficiency claims have not played an appreciable role in decision practice and case law at the EU and national level, and many aspects relating to their assessment remain open to question.

This paper focuses on the role and limits of the efficiency defence in abuse cases. In particular, after some preliminary remarks on the role of efficiencies in the assessment of abuse cases (section 2), this paper analyses the evolution of the EU approach (section 3) and the experience in Italy and the UK (section 4). The analysis of the EU, Italian and UK experience will provide the basis for some remarks on the reasons for the very limited use of the defence (section 5), the stage of antitrust analysis where efficiency considerations should play a role (section 6), and their relevance in an effects-based approach (section 7). Section 8 draws some conclusions.

## 2. The Role of Efficiencies in Abuse Cases

Antitrust analysis frequently involves a trade-off between different values and economic effects. This is also true for the assessment of efficiencies in abuse cases. Economists usually distinguish between different types of efficiencies, namely allocative, productive and dynamic efficiencies. Commercial practices that increase one type of efficiency may lead to a loss of another type of

<sup>1</sup> See Section 2 of the Sherman Act and Section 79 of the Canadian Competition Act.

<sup>2</sup> For example, in France, under Article 420-4 of the Commercial Code, agreements and unilateral practices are lawful if the firms concerned can prove that: (i) the conduct ensures economic progress; (ii) it does not eliminate competition in a substantial part of the relevant market; and, (iii) a fair share of the resulting profit is transferred to consumers. Under Article 10 of the Mexican Competition Act, the antitrust authority has to examine whether the efficiency gains resulting from the conduct concerned favourably affect the competitive process. Similarly, pursuant to Section 8 of South Africa's Competition Act, efficiencies may justify an otherwise potentially anticompetitive practice, if the dominant firm is able to show technological efficiency or other pro-competitive gains which outweigh the anticompetitive effects of its conduct.

efficiency. A practice that enables a dominant firm to save costs, or to launch new or better products, may increase productive or dynamic efficiency, respectively, but may also allow the firm to strengthen its market power, thus leading to an increase in price and reducing allocative efficiency.

Different types of efficiencies are heterogeneous and often difficult to measure. Furthermore, different scholars and policy-makers may have different views as to the type of efficiency that should prevail in the case of conflict. Many scholars deem that dynamic efficiency is crucial to foster economic development. However, antitrust enforcers tend to focus on short-term allocative efficiency, on the assumption that short-term anticompetitive effects and price increases can hardly be justified by long-term and less certain dynamic efficiencies that may result from investments in new products and improvement of existing ones.

The question of the weight to be given to different types of efficiencies in antitrust cases is closely related to the never-ending debate on the objectives of antitrust law. If the objective pursued by competition policy is the promotion of total welfare, a commercial practice that reduces costs but leads to higher prices would be unobjectionable as long as the welfare of the society as a whole is increased. In contrast, if antitrust rules aim at protecting consumer welfare, productive efficiency gains would only count if they are so significant that prices will not increase.

Article 101(3) TFEU and the EU merger regulation support the view that the primary economic objective of EU competition law is the protection of consumer welfare. Indeed, they clarify that productive and dynamic efficiency gains can justify negative effects on competition, and the ensuing allocative inefficiency, only if consumers are not harmed. Although the text of Article 102 does not provide a clear indication of the type of welfare that it seeks to ensure, it is commonly accepted that Articles 101 and 102 pursue the same objective,<sup>3</sup> as they both aim at protecting consumers by means of undistorted competition.<sup>4</sup>

<sup>3</sup> See Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, para. 25.

<sup>4</sup> See, e.g., Joined Cases C-468/06 to C-478/06 *Sot. Léloukas and Others* [2008] ECR I-7139, para. 68; Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para. 110; Case C-52/09 *Konkur-*

This also implies that efficiency gains can hardly justify serious harm to the competitive process. Indeed, the incentive of firms to pass possible cost efficiencies on to consumers depends, to a significant extent, on the intensity of competitive pressure from the remaining firms in the market and potential entrants.<sup>5</sup> Furthermore, pursuant to Article 101(3) TFEU, to invoke an efficiency defence, firms have to prove, *inter alia*, that the agreement does not eliminate effective competition. EU case law and decision practice confirm that, under EU law, the protection of the competitive process is a fundamental value, which may prevent the application of the efficiency defence.<sup>6</sup>

The adoption of a consumer welfare standard and the emphasis on the protection of the competitive process put significant limits on the role and availability of the efficiency defence, especially in abuse cases. The defence is not absolute, as efficiencies may justify an anticompetitive practice only if they counteract the possible negative effects on consumers, and the competitive process is not compromised.

### 3. The Evolution of the EU Approach

Efficiencies have traditionally played a very limited role in EU decision practice and case law on unilateral conduct. The notion of abuse inherited from the Ordoliberal school, focusing on the deviation from a virtuous model of competition on the merits, did not leave much scope for efficiency arguments. In principle, efficiency gains were taken into account only to the extent that the dominant firm's practice merely reflected lower costs or other efficiencies, so that the conduct concerned could be considered a form of competition on the merits, which does not fall, by definition, within the notion of abuse.

Moreover, the absence of an explicit exception in the wording of Article 102 TFEU has provided arguments supporting the view that there is no efficiency defence in abuse cases. It has been

*rensverket/TeliaSonera* [2011] ECR I-00527, para. 76; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), paras. 5 and 6.

<sup>5</sup> See, e.g., Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para. 92; Commission decision of 4 July 2007, Case COMP/38.784 *Wanadoo España/Telefónica*, paras. 655-657.

<sup>6</sup> "Ultimately, the protection of rivalry and the competitive process is given priority over possible short-term efficiency gains". *Id.*, para. 657.

argued that the differences in the wording of Articles 101 and 102 TFEU are justified because an already existing sub-optimal structure of the market differentiates abuse cases from restrictive agreements.<sup>7</sup> If the degree of competition is already weakened as a result of the presence of a dominant firm, and the latter's behaviour hinders the maintenance or growth of competition, the practice would be unlikely to enhance efficiency to the benefit of consumers, as a competitive market environment ensures that firms have sufficient incentive to operate efficiently and to pass efficiency gains on to consumers.<sup>8</sup> Furthermore, it has been argued that an efficiency defence in abuse cases contradicts the requirement of non-elimination of competition provided for by Article 101(3) TFEU, which is linked to the existence of dominance, as confirmed by the fact that, in principle, restrictive agreements entered into by dominant firms cannot be exempted.<sup>9</sup>

## The emphasis on consumer welfare and the competitive process limits the availability of the efficiency defence

In the past, some rulings of the EU Courts seemed to exclude the possibility of relying on efficiencies once a practice engaged in by a dominant firm is found to restrict competition. In 1983, in *Michelin I*, the European Court of Justice (ECJ) held that neither the intent to increase sales nor the objective of spreading production more evenly could justify a target rebate scheme capable of hindering access to the market.<sup>10</sup> In 1989, in *Ahmed Saeed Flugreisen*, the ECJ stated that “no exemption may be granted, in any manner whatsoever, in

respect of abuse of a dominant position”, as such abuse is “simply prohibited by the Treaty”.<sup>11</sup> In 1990, the General Court (GC) held that Article 102, “by reason of its very subject-matter (abuse), precludes any possible exception to the prohibition it lays down”.<sup>12</sup> In 2003, in *Atlantic Container*, the General Court stated that, as Article 102 does not provide for any exemption, abusive practices are prohibited “regardless of the advantages which may accrue to the perpetrators of such practices or to third parties.”<sup>13</sup> In 2007, in *France Télécom*,<sup>14</sup> the General Court refused to accept that economies of scale and learning effects could justify predatory pricing.

However, in other cases, such as *Michelin II*,<sup>15</sup> *British Airways*<sup>16</sup> and *Microsoft*,<sup>17</sup> the EU Courts endorsed the idea that unilateral conduct may be objectively justified if the exclusionary effects are outweighed by efficiency gains to the benefit of consumers. In these cases, the EU Courts also clarified that the defence would fail if the exclusionary effect bears no relation to the benefits for the market and consumers, or if it goes beyond what is necessary to attain those benefits.

At the time of the adoption of the 2005 Discussion Paper and the 2009 Commission Guidance on exclusionary conduct,<sup>18</sup> the treatment of the efficiency defence under Article 102 TFEU arose as a topic of great importance. The introduction of an effects-based approach, focusing on the impact of the contested practice on consumer welfare, resulted in a change of perspective. The framework set out by the Guidance made it necessary to analyse possible redeeming virtues even if the contested conduct falls within the scope of Article 102 TFEU. Once the notion of abuse is framed in terms of foreclosure leading to consumer

7 See, e.g., V. Mertikopoulou, “Evolution of the objective justification concept in European competition law and the uncharted waters of efficiency defences”, *Concurrences* (2014), No. 2-2014.

8 See, e.g., Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), para. 103; Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para. 92.

9 *Id.*, para. 106.

10 Case 322/81 *Michelin v Commission* [1983] ECR 3461, para. 85.

11 Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803, para. 32. See also Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container v Commission* [2003] ECR II-3275, para. 1109; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and others v Commission* [1996] ECR II-1201, para. 152.

12 Case T-51/89 *Tetra Pak Rausing v Commission* [1990] ECR II-309, para. 25.

13 Joined Cases T-191/98, T-212/98, and T-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275, para. 1112.

14 Case T-340/03 *France Télécom v Commission* [2007] ECR I-107; on appeal, Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369.

15 Case T- 203/01 *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071, para. 98.

16 Case C- 95/04 *British Airways v Commission* [2007] ECR I- 2331, paras. 84-86.

17 Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para. 1114 et seq.

18 Guidance, *supra* note 4.

harm (anticompetitive foreclosure),<sup>19</sup> antitrust authorities and courts can hardly refrain from the difficult and challenging task of balancing negative and positive effects on economic efficiency and consumers.

## The Guidance and some recent EU rulings clarified the conditions to benefit from the defence

However, instead of analysing the efficiencies in the context of an overall assessment of the impact of the conduct on the market, the Guidance stated that they should be taken into account as a possible justification subject to stringent conditions. According to the Guidance, dominant firms have to demonstrate with a sufficient degree of probability, and on the basis of verifiable evidence, that four cumulative conditions are fulfilled: (i) the efficiencies have been, or are likely to be, realized as a result of the conduct; (ii) the conduct is indispensable to the realization of those efficiencies; (iii) the likely efficiencies resulting from the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and (iv) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. In essence, the efficiency defence under Article 102 TFEU is modelled on the exemption of restrictive agreements provided for by Article 101(3) TFEU. While the first three conditions may be found in earlier rulings on abuse of dominance, the requirement that effective competition is not eliminated was introduced by the Guidance.

A few years later, in *TeliaSonera*, the ECJ confirmed the need to take into account efficiency gains to the extent that they benefit consumers.<sup>20</sup> However,

<sup>19</sup> *Id.*, para. 19.

<sup>20</sup> Case C-52/09 *Konkurrensverket v TeliaSonera* [2011] ECR I-527, para.

it did not make reference to the four cumulative conditions provided for in the Guidance. In 2012, in *Post Danmark I*, the ECJ endorsed for the first time the attempt to introduce a test akin to that provided for by Article 101(3),<sup>21</sup> as it stated that the efficiency defence is subject to four cumulative conditions, identical to those set out in the Guidance. Thus, the requirement of non-elimination of effective competition appeared in EU case law for the first time.

In two recent rulings, the EU Courts adopted a rigorous approach to the analysis of rebate systems, but confirmed that dominant firms may justify an anticompetitive practice by proving efficiency gains capable of counterbalancing or outweighing its negative effects.

In particular, in the *Intel* judgment, delivered in 2014,<sup>22</sup> the GC stated that exclusivity rebates granted by a dominant firm are by their very nature capable of restricting competition and foreclosing competitors.<sup>23</sup> The GC held that, for a finding of abuse, it is sufficient to demonstrate a loyalty-inducing mechanism. According to the Court, a price-cost test is not only not necessary, but would also be erroneous, because it “only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult”.<sup>24</sup>

However, the Court added that it is open to the dominant firm to justify the use of an exclusivity rebate system by showing that its conduct is objectively necessary or that the potential foreclosure effect may be counterbalanced or outweighed by advantages in terms of efficiencies that also benefit consumers.<sup>25</sup>

In 2015, in *Post Danmark II*,<sup>26</sup> the ECJ analysed the retroactive quantity rebate system implemented by the Danish incumbent in the postal sector. The Court stated that the as-efficient competitor test is not a prerequisite for a finding of abuse, but

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<sup>21</sup> Case C-209/10 *Post Danmark* ECLI:EU:C:2012:172, paras. 40-43.

<sup>22</sup> Case T-286/09 *Intel v Commission* ECLI:EU:T:2014:547.

<sup>23</sup> *Id.*, paras. 85 and 87.

<sup>24</sup> *Id.*, para. 150.

<sup>25</sup> In the case concerned, the GC noted that the dominant firm had put forward no argument in that regard. *Id.*, para. 94.

<sup>26</sup> Case C-23/14 *Post Danmark v Konkurrencerådet* ECLI:EU:C:2015:651.

only “one tool amongst others”.<sup>27</sup> A tendency to remove or restrict the buyer’s freedom to choose is sufficient for a finding of abuse. In the case in question, the as-efficient competitor test was “of no relevance” because: (i) given the characteristics of the market, the emergence of as-efficient competitors was not credible; and (ii) less efficient competitors could exert a useful constraint on the dominant firm.<sup>28</sup>

However, even in this case, the ECJ added that it is open to a dominant firm to provide justification for behaviour liable to be caught by Article 102 TFEU, by demonstrating that the exclusionary effect may be counterbalanced or outweighed by advantages in terms of efficiencies that also benefit consumers. The Court confirmed that, in order to benefit from the defence, the dominant firm has the burden of proving that the four cumulative conditions set out in the Guidance and *Post Danmark I* are met.<sup>29</sup>

Even though the availability of an efficiency defence under Article 102 TFEU is now unambiguously accepted by the EU institutions, efficiency claims have been addressed in a specific and transparent way only in a very few cases, and have always been rejected by the Commission.<sup>30</sup>

#### 4. The Experience at the National Level: Italy and the UK

The experience in Italy and the UK provides interesting indications on the role of efficiencies in abuse cases. In both systems, competition

authorities and courts apply not only EU, but also national rules that (i) are heavily modelled on Articles 101 and 102 TFEU,<sup>31</sup> and (ii) must be interpreted and applied in a manner that is consistent with the principles established by EU case law and decision practice.<sup>32</sup> Thus, it should be expected that the internal practice promptly reflects developments at the EU level. However, even at the national level, the explicit acknowledgement of the efficiency defence by the EU institutions does not seem to have had a significant impact on decision practice and case law.

##### 4.1. The Italian experience

In Italy, decision practice and case law still reflect, to a large extent, the traditional form-based approach of the EU institutions. The delay in the transition towards a more effects-based approach has resulted in a very limited application of the efficiency defence in abuse cases. Efficiency claims have so far been put forward by dominant firms only in a few cases and, even in these cases, they have not played a significant role in the analysis of the contested practice, which has focused on actual or potential foreclosure.

In *TNT Post Italia/Poste Italiane*, the Italian Competition Authority (ICA) held that Poste Italiane, the incumbent in the postal sector, had offered below-cost prices for a new certified date delivery service in order to protect its dominant position in the traditional market for bulk mail from the competitive pressure exerted by the certified date and time delivery service launched some years before by TNT Post Italia.<sup>33</sup> Bulk mail and certified delivery services were considered separate, albeit related, relevant product markets. In the market for certified delivery services, TNT was by far the leading firm, with a share exceeding 90%, and offered prices lower than those charged by the incumbent. Indeed, in the period under investigation, TNT had continued to grow more than the incumbent.

On appeal, the Regional Administrative Court of Lazio (TAR) held that the ICA had not adequately

<sup>27</sup> *Id.*, para. 61.

<sup>28</sup> *Id.*, paras. 59-62.

<sup>29</sup> *Id.*, paras. 47-49.

<sup>30</sup> In particular, in *Intel*, the dominant firm argued that its rebate system was necessary to achieve several efficiencies in terms of lower prices, scale economies, other cost savings, risk-sharing and marketing efficiencies. The Commission held that the alleged efficiencies related to rebates, and not to the exclusivity condition. Furthermore, the dominant firm had not provided sufficient evidence supporting its claims and excluding less restrictive means. See Commission decision of May 13, 2009, Case COMP/37.990, *Intel*, paras. 1617-1639. In *R el/Alcan*, the dominant firm tried to justify tying by arguing for product-related efficiencies due to joint development and production, operational efficiencies, and reputational efficiencies arising from avoiding the use of its product with an inferior product. The Commission rejected these claims on the grounds that: (i) the joint development and production would not require contractual tying; (ii) customers strongly requested unbundled products; (iii) the prices of the combined products were higher. See Commission Decision of 20 December 2012, Case COMP/39230, *Rio Tinto Alcan*, paras. 86-84. On the EU decision practice, see H.W. Friederiszick and L. Gratz, “Hidden Efficiencies: The Relevance Of Business Justifications In Abuse Of Dominance Cases”, 11(3) *Journal of Competition Law & Economics*, 671 (2015).

<sup>31</sup> See Article 3 of Law No. 287/1990 and Section 18 of the UK Competition Act 1998.

<sup>32</sup> See Article 1(4) of Law No. 287/1990 and Section 60 of the UK Competition Act 1998.

<sup>33</sup> Decision of 14 December 2011, No. 23065, Case A413, *TNT Post Italia/Poste Italiane*, Bulletin No. 48/2011.

proved that the prices offered by the incumbent were predatory.<sup>34</sup> *Inter alia*, the Court found that: (i) the ICA had erroneously identified the long-run average incremental cost (LRAIC) borne for the provision of the new service, as it had qualified as incremental some resources that would have been in any case used for the provision of other services; (ii) the ICA had verified whether the prices offered covered costs only with regard to the first full year of activity, without taking into account the likely reduction in unit costs resulting from the increase in sales in the following years; (iii) the absence of a predatory strategy was confirmed by the fact that TNT had maintained its preeminent position in the market for certified delivery services.

During the administrative proceedings and the subsequent judicial phase, the incumbent argued that, even if its commercial practice had had exclusionary effects, it would have been justified. The prices offered for the certified delivery service represented a proportionate reaction to the competitor's commercial policy, as they were higher than those charged by TNT for a service characterized by a better performance level. Furthermore, the contested conduct was justified by the efficiencies realized to the benefit of customers because the offer of competitive prices had enabled the incumbent to achieve a minimum scale in the relevant market, so as to spread the initial investment over a higher volume of mail and to reduce unit costs. Indeed, even assuming that the LRAIC calculated by the ICA was correct, the increase in sales had made it possible to achieve a positive margin starting in the second full year of activity. This had enabled the incumbent to offer a new service, which exerted a competitive constraint in a market almost monopolized by TNT.

Even though it was not necessary, the TAR also upheld the grounds of appeal based on the existence of business justifications. However, it did not analyse in depth the efficiency claim, as it focused on the errors committed by the ICA in the analysis of the alleged predatory prices. The TAR ruling was confirmed by the Supreme Administrative Court, which did not specifically address the issue of the efficiency defence.<sup>35</sup>

Efficiency arguments were raised also in *Viaggiare*/

*Ryanair*.<sup>36</sup> *Viaggiare*, an online travel agency (OTA), brought a damages action for breach of Article 102 TFEU against Ryanair before the Court of Milan. *Viaggiare* offered online services that allowed for the comparing of flights and prices of various airlines and the purchasing of tickets. In order to carry out its activity, it needed information on flights and prices of different airlines. The OTA claimed that Ryanair had abused its dominant position by refusing to grant access to up-to-date information on its flight tickets and by hindering its intermediation activity.

The Court of Milan assessed Ryanair's conduct under the essential facility doctrine. The Court found that Ryanair was dominant in upstream markets for air transportation services, given its *de facto* monopoly in 49 intra-EU routes and its share exceeding 50% in 19 routes. As a consequence, the activities performed by the OTAs in the downstream market largely depended on access to information on Ryanair flight tickets, which was considered an essential facility for OTAs seeking to offer their services.

Ryanair argued, *inter alia*, that the decision to prevent the OTAs from selling its tickets had resulted in lower prices for consumers. The fact that Ryanair's tickets were sold only on the airline's website allowed collecting additional revenues through the sale of advertising spaces and ancillary services (such as insurance, local transport and car rental). In turn, these additional revenues made it possible to lower the prices offered to passengers.

The Court of Milan accepted that it was necessary to verify whether: (i) Ryanair's conduct could be considered justified in light of ancillary revenues and their alleged positive effects on flight ticket prices; or (ii) the interest of the OTA should prevail due to the need to provide consumers with a different and more complete service. In this respect, however, the Court limited itself to making reference to the standard established by EU case law for the assessment of refusal to license intellectual property rights. According to this standard, such a refusal may be abusive if, *inter alia*, it prevents the emergence of a new product or service for which there is potential demand.<sup>37</sup>

<sup>36</sup> Judgment of 4 June 2013, No. 7825.

<sup>37</sup> See, in particular, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* ("Magill") [1995] ECR I-743, para. 54; and Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, para. 38.

<sup>34</sup> TAR Lazio, Judgment of 25 June 2012, No. 5769.

<sup>35</sup> Council of State, Judgment of 6 May 2014, No. 2302.

In the case at hand, Ryanair's refusal to allow the consultation of its website was capable of hampering the development of different and more complete services provided by the OTAs, consisting of consultation of multiple flights, intermediation and sale of tickets. On this basis, the Court concluded that Ryanair's conduct was not justified by possible benefits for consumers<sup>38</sup>.

## In Italy, efficiency claims have not played a significant role in the analysis of unilateral practices

### 4.2. The UK experience

Even in the UK, there have been very few decisions that discussed efficiency defences under Article 102 TFEU or the prohibition laid down in Chapter II of the UK Competition Act.<sup>39</sup>

Efficiencies were discussed in the 2002 decision of the Director General of Fair Trading in *The Association of British Travel Agents and British Airways*.<sup>40</sup> The complainant (ABTA) alleged that British Airways was abusing its dominant position by making excessively low booking payments to travel agents, which did not allow agents to cover their costs.<sup>41</sup>

The Director General considered that BA was not obliged to make booking payments covering the full cost incurred by agents in issuing the tickets. Travel agents could supplement the

booking payment by charging passengers a service fee, given that they provided a service that was useful to passengers.<sup>42</sup> Competition between agents and other distribution methods would not be eliminated if BA were to sell tickets through its website at prices lower than those available through agents, as there were "significant differences" in the nature of the two channels.<sup>43</sup> Furthermore, there was an objective justification for tickets being available through BA's website at a lower price than through travel agents, in so far as online distribution costs were lower than those of the traditional channel. The price difference could simply reflect the additional costs and services relating to distribution through travel agents.<sup>44</sup>

Instead of accepting a true efficiency defence, the decision appears consistent with the traditional approach of the EU institutions, according to which pricing practices that reflect different cost levels are in principle compatible with antitrust rules.

Efficiency arguments were rejected in two cases concerning alleged anticompetitive practices in the pharmaceutical sector. In *Genzyme*,<sup>45</sup> the OFT found that Genzyme, holding a dominant position in the market for the supply of drugs used to treat a rare disease, had imposed a margin squeeze on a provider of homecare services, Healthcare at Home (H@H), by offering to provide H@H with the drug at the same price offered to the National Health Service (NHS) for supply of the drug together with its own newly launched homecare service.

Genzyme argued, *inter alia*, that its own method of distribution was the most cost-effective and, therefore, the best option for the NHS. However, the OFT noted that no document submitted by Genzyme during the investigation supported its argument.<sup>46</sup> The OFT added that, in any case, it was not for Genzyme to determine what is in the best interest of the NHS or other purchasers, while denying them the option of obtaining a better deal through competition. The NHS should have the possibility to decide whether it would be more cost-effective for it to purchase the drug

38 In 2015, the finding of abuse was annulled by the Court of Appeals of Milan, according to which the plaintiff had not adequately proved that Ryanair was dominant and its conduct was capable of restricting competition. The Court of Appeals did not address the issue of possible efficiencies. See judgment of 12 October 2015, No. 3900.

39 On the UK experience, see C. Brown, "Efficiency defences under the Chapter II prohibition and Article 102 TFEU: The UK experience", *Concurrences* (2014), No. 2-2014.

40 Decision No. CA98/19/2002 (11 December 2002).

41 According to ABTA, if travel agents charged customers an additional service fee to cover their costs, customers would be encouraged to book their tickets online at British Airways' website instead of through a travel agent.

42 *Id.*, para. 32.

43 *Id.*, para. 42.

44 *Id.*, paras. 44-45.

45 *Exclusionary behaviour by Genzyme Limited*, Decision No. CA98/3/03 (27 March 2003).

46 *Id.*, para. 360.

and homecare services together as a package or separately.<sup>47</sup>

In *Reckitt Benckiser*,<sup>48</sup> the OFT found that Reckitt Benckiser (RB) had abused its dominant position by withdrawing and delisting NHS presentation packs of a drug shortly in advance of the publication of a generic name relevant to the product, which would have facilitated full generic competition. According to the OFT, RB's decision to withdraw and delist NHS packs aimed at hindering the development of such competition.

The OFT did not specifically address the issue of the possible efficiency defence, but it did consider whether RB foresaw pro-competitive gains as a result of the withdrawal of the drug. RB expected that the withdrawal would have ensured higher profitability and revenues, which would have provided, in turn, a viable base to invest in R&D and to preserve much of its specialised workforce. However, the OFT did not regard either of these effects as pro-competitive efficiency gains, since they stemmed from the restriction of competition caused by the conduct, rather than directly from the conduct itself.<sup>49</sup>

Efficiency considerations were more successful in two cases concerning alleged predatory pricing in the transport sector. In *First Edinburgh/Lothian*,<sup>50</sup> Lothian Buses (Lothian) complained that First Edinburgh (FE) had abused its dominant position in the market for commercial bus services by offering predatory prices and increasing the number and frequency of services in the Edinburgh area.

FE held a dominant position in one or more markets in the area surrounding Edinburgh, while Lothian was likely to be dominant in Edinburgh. Lothian argued that FE was using the profits deriving from its operations in the area surrounding Edinburgh to subsidise its expansion within the city, but the OFT held that the contested conduct was not anticompetitive. According to the OFT, even though the prices offered by

FE were below average variable cost (AVC) on some routes for some of the time, the evidence collected was consistent with intense competition, instead of anticompetitive foreclosure, because FE was incurring short-term losses in an attempt to establish a more secure commercial basis for its Edinburgh operations.<sup>51</sup> Internal evidence confirmed that the short-term losses incurred by FE were not motivated by an intent to exclude Lothian from the market, but by the future benefits deriving from establishing a more comprehensive network in Edinburgh and rationalising its depots.<sup>52</sup> Accordingly, the ordinary presumption of predation arising from below AVC pricing could be rebutted.<sup>53</sup>

The OFT did not specifically address the issue of the possible efficiency defence, but efficiency considerations and, in particular, the prospect of a pro-competitive outcome seem to have played a significant role in the analysis of whether the conduct was predatory.

In the UK, efficiency considerations seem to play a role, but in an integrated way

The efficiency defence was explicitly considered by the OFT in the *FlyBe* case,<sup>54</sup> concerning the alleged predatory prices offered by an airline (FlyBe) to establish itself on a new route. The OFT held that FlyBe's entry and low pricing on the Newquay-London Gatwick route did not amount to an abuse, principally because the company was not dominant on that route, and any conduct on that market was not capable of maintaining or strengthening its dominance on other routes.

<sup>47</sup> *Id.*, para. 361. On appeal, the Competition Appeal Tribunal (CAT) confirmed the OFT's findings: see *Genzyme Limited v OFT* [2004] CAT 4, para. 592.

<sup>48</sup> *Abuse of a dominant position by Reckitt Benckiser Healthcare (UK) Limited and Reckitt Benckiser Group plc*, Decision No. CA98/02/2011 (12 April 2011).

<sup>49</sup> *Id.*, para. 6.36.

<sup>50</sup> Decision No. CA98/05/2004 (29 April 2004).

<sup>51</sup> *Id.*, para. 58.

<sup>52</sup> *Id.*, para. 68.

<sup>53</sup> *Id.*, para. 75.

<sup>54</sup> *Alleged abuse of a dominant position by FlyBe Limited* (5 November 2010).

Nonetheless, for completeness, the OFT proceeded to consider FlyBe's arguments on business justifications. The OFT found that initial losses experienced in the first one or two years after entering a route are the result of normal commercial practice for an airline, and are due to the need to stimulate market demand for the route. Thus, there was an objective justification for FlyBe's decision to enter the route despite the expected initial losses.<sup>55</sup>

In addition, FlyBe argued that efficiencies had been generated as a result of its entry on the route in competition with a small regional airline already active on that route. The alleged efficiencies included: (i) a substantial consumer benefit (of almost £4.5 million) reflecting the fall in prices due to the entry of a new player; (ii) greater choice for consumers; (iii) the offer of direct flights (while the incumbent's flights were indirect); (iv) the possibility to purchase FlyBe's flights as part of a journey comprising several flights through a "Global Distribution System"; and (v) the fact that it had stimulated demand in the south east of England by increasing advertising in the area.<sup>56</sup>

The OFT accepted that some of these possible benefits had been realised, but noted that some of them could also be the result of predatory behaviour. The lower fares since FlyBe's entry and other benefits were an advantage for consumers, but there was no guarantee that they would continue if FlyBe were to become the sole operator on the route. Ultimately, the OFT held that there was insufficient evidence to conclude that the alleged efficiencies would have offset the long-term impact of a predatory strategy on consumer welfare, had FlyBe needed to rely on the defence.<sup>57</sup>

The efficiency defence has not explicitly been considered in the jurisprudence of UK courts.<sup>58</sup> However, in some cases, the courts seem to have integrated efficiency considerations within their analysis of whether conduct is at all abusive.<sup>59</sup>

<sup>55</sup> *Id.*, paras. 6.98-6.99.

<sup>56</sup> *Id.*, para. 6.102.

<sup>57</sup> *Id.*, paras. 6.104-6.108. In its analysis, the OFT made explicit reference to the Commission Guidance. However, in view of its finding that FlyBe's conduct did not amount to an abuse, the OFT did not address the efficiency arguments advanced by FlyBe in much detail.

<sup>58</sup> See C. Brown, *supra* note 38.

<sup>59</sup> For instance, in the *Attheraces v British Horseracing Board* case, [2007] EWCA Civ 38, the Court of Appeal considered whether the pricing of pre-race data, required *inter alia* by bookmakers, at levels

## 5. The Limited Use of the Efficiency Defence in Abuse Cases

The assessment of efficiencies has yet to become a significant part of the analysis carried out by the Commission, national competition authorities (NCAs) and national courts under Article 102 TFEU and similar internal rules. Indeed, it is difficult to find any abuse cases closed by a decision finding that an exclusionary practice does not infringe competition rules because of alleged efficiencies. Furthermore, efficiency arguments have been discussed only in a limited number of cases.

Several factors may contribute to explaining why efficiencies have not played an appreciable role in decisional practice and case law despite the Guidance. It has been argued that the paucity of decisions on the efficiency defence may be a sign of maturity of EU competition law enforcement because it may be due to the application of an effects-based approach, which would make efficiency defences unnecessary.<sup>60</sup> Firms may not need to rely on the efficiency defence because the possible benefits have already been taken into account in the assessment of whether the investigated practice raises competitive concerns.

Efficiency considerations may be the reason why the competent authority does not adopt a prohibition decision, or closes its investigation with a decision rejecting a complaint. Efficiency gains may also induce the competent authority to adopt a commitment decision aimed at reducing the possible negative effects, instead of banning the practice altogether, furthermore they may play a role in the assessment of the adequacy and proportionality of the offered commitments. In these cases, efficiencies are not formally treated as a defence, but they play a role in the reasoning at an earlier stage, possibly even before a competition authority decides to open proceedings.<sup>61</sup>

significantly above the production cost was unfairly high. It held that a simple "cost +" approach was not appropriate, since pre-race data was not a standalone product, but a by-product of British horseracing. The existence and value of the by-product depended on the existence, quality and integrity of the primary activity. The Court found that, as the economic value of the pre-race data was much greater than its production cost, the use of a simple "cost +" approach was not appropriate.

<sup>60</sup> See, e.g., E. Rouseva, "Efficiency defence under Article 102 TFEU: Retrospective and Prospective", *Concurrences* (2014), No. 2-2014.

<sup>61</sup> *Id.*

A more comprehensive and detailed assessment of the existence of a material adverse effect on competition implies that there is less need to rely on the efficiency defence. At the same time, the emphasis on material anticompetitive effects means that firms wishing to invoke the efficiency defence have to overcome a high hurdle to prove that the alleged benefits of the contested conduct outweigh its negative impact on competition and consumers. Accordingly, firms under investigation may have little incentive to advance the defence.

This view may be supported by the experience of some Member States. In the UK, the adoption of an effects-based, rather than a formalistic, approach to Article 102 and the Chapter II prohibition seems to have led in many cases to findings of non-infringement or “no grounds for action” decisions. Efficiency considerations seem to play a role in competition law enforcement, but more in an integrated way, at the stage of the analysis of whether a given conduct is anticompetitive in the first place.<sup>62</sup>

However, the tendency to anticipate the analysis of efficiency considerations in an integrated effects-based approach is not the only factor explaining the limited use of the defence. Indeed, it is open to question whether the effects-based approach has fully established itself in EU case law and throughout the European competition network. The EU Courts have rejected some of the most innovative aspects of the Guidance.<sup>63</sup> Even the Commission adopted an ambiguous attitude towards the effects-based approach. Indeed, in some cases it continued to rely on the traditional approach of EU decision practice and case law, which implies a much lower standard of proof and guarantees a wider margin of manoeuvre and discretion in the assessment of unilateral conduct.<sup>64</sup> The contrary views expressed by EU Courts on some aspects of the Guidance and the ambiguous attitude of the Commission have

not encouraged the transition towards a more economic approach at Member State level.

In some States such as Italy, the NCA's reluctance to embrace a full effects-based approach in abuse cases may have limited the scope for the analysis of possible efficiencies. This may also have had a bearing on the defensive strategy of firms concerned. Given the limited economic analysis of exclusionary effects carried out by some authorities in abuse cases, it seems even more unlikely that they will take into account alleged efficiencies. As a consequence, firms tend to focus their defence on the finding of an exclusionary practice.<sup>65</sup>

Furthermore, some NCAs may still be sceptical about the fact that an exclusionary practice implemented by a dominant firm does not harm consumers. After all, competition stimulates economic performance, increases consumer choice and induces firms to offer competitive prices.

## Several factors may explain the limited role of efficiencies in decisional practice and case law

Agreements between parties holding low levels of market power may be considered efficiency-enhancing even if they have some restrictive effects. However, when the degree of competition is already weakened as a result of the presence of a dominant firm, a practice that further hinders the development or maintenance of competition is much less likely to be considered capable of benefiting consumers.<sup>66</sup> In addition, in some cases, the competent authority may consider that the efficiencies arising from an anticompetitive practice may strengthen its exclusionary impact, if they result in a competitive advantage for the dominant firm. Thus, efficiencies may be considered an offence rather than a defence.

<sup>62</sup> Furthermore, efficiency considerations may have affected the OFT's decisions to close certain investigations and give priority to other cases that could have a more significant impact on consumer welfare. See C. Brown, *supra* note 38.

<sup>63</sup> For instance, in *Intel and Post Danmark II*, the GC and the ECJ, respectively, held that a properly defined price-cost test is not a necessary step for a finding of abuse in the case of loyalty-inducing discounts. In *TeliaSonera*, the ECJ stated that a price squeeze may be abusive even though the requirements for the application of the essential facility doctrine are not met.

<sup>64</sup> See, e.g., Case COMP/37.990, *Intel*, *supra* note 30.

<sup>65</sup> See G. Faella and A. Schettino, “The efficiency defence in abuse cases: some reflections on the Italian experience”, *Concurrences* (2014), No. 2-2014.

<sup>66</sup> See, e.g., V. Mertikopoulou, *supra* note 7.

Finally, a central reason for the very limited use of the efficiency defence in abuse cases is the fact that the conditions for a successful defence are very stringent and the burden of proof is extremely high. In a dominated market it is very difficult to meet the requirement that the conduct does not eliminate effective competition. This requirement increases the risk that efficiencies may be treated as an offence rather than as a defence,<sup>67</sup> to the extent that they contribute to reinforcing the position of the dominant firm and the exclusionary impact of the practice. Furthermore, it is very difficult to prove that efficiency gains are sufficient to outweigh any negative effects on competition and consumers. Quantifying dynamic efficiencies and the long-term effect of the lessening of competition on consumers may be extremely complex. In many cases, dominant firms may be able to provide qualitative arguments, but a balance between different effects may well require quantitative evidence, which may not be available. In addition, it is very difficult to prove that efficiency gains will be passed on to consumers in markets where competition is already weakened by the presence of a dominant position.<sup>68</sup>

In many cases, the burden of proof on dominant firms may amount to a *probatio diabolica*. This may be the case, for instance, with price abuses. Most competition authorities and courts seem willing to accept that bearing short-term losses to enter a market is normal commercial practice. However, if the product concerned is already marketed, proving that the benefits of below-cost pricing outweigh the possible long-term negative effects requires a forward-looking assessment of variables that could hardly be quantifiable even in a limited time-span.

The main efficiency gain that may arise from below-cost pricing is the achievement of economies of scale. However, these economies are extremely difficult to estimate. As the decrease in unit costs due to an increase in output depends on total volumes, economies of scale may be ascertained only *ex post*, and may significantly

vary over the years depending on the level of sales. Estimating the impact of the possible economies of scale on the price level is even more difficult. Based on economic theory, there is no clear link between a decrease in fixed cost and a reduction in prices, as the price level is influenced mainly by marginal cost.

Similar difficulties arise when estimating the possible negative effects on price levels and consumer welfare. In a predatory pricing scenario, such effects materialize only in a subsequent phase, when the anticompetitive strategy leads to the exclusion of competitors, thus strengthening the dominant firm's market power. It is very difficult, or even impossible, to estimate the negative impact that predatory pricing may have, in the future, on the price level, which depends on a number of factors, including demand elasticity, entry, and the number and importance of competitors remaining in the market after the implementation of the predatory strategy.<sup>69</sup>

As dominant firms bear the burden of demonstrating, on the basis of verifiable evidence, that the cumulative conditions provided for by the Guidance and EU case law are fulfilled, the fact that, in most cases, efficiencies and negative effects cannot be precisely measured and balanced against each other inevitably restricts the scope for the use of an efficiency defence. Indeed, it has been argued that, due to its “difficult, almost impossible, evidentiary threshold”, the efficiency defence remains “a mere theoretical possibility”.<sup>70</sup>

## 6. Integrated versus Two-Step Approach

The limited role of efficiency arguments reflects the lack of a clear and consistent theoretical framework for the assessment of efficiencies under Article 102 TFEU. In principle, antitrust authorities and courts can analyse efficiencies as a part of an overall assessment of the effects of the investigated practice or in a subsequent phase, as a

67 See, e.g., D. Waelbroeck, “The assessment of efficiencies under Article 102 and the Commission's Guidance Paper”, in F. Etro and I. Kokkoris (Eds.), *Competition Law and the Enforcement of Article 82* (Oxford University Press, 2010).

68 See, e.g., J.-F. Bellis and T. Kasten, “Will Efficiencies Play an Increasingly Important Role in the Assessment of Conduct Under Article 102?”, in F. Etro and I. Kokkoris (Eds.), *supra* note 66.

69 Actually, some of the few cases in which efficiency considerations have been accepted concerned alleged predatory prices. However, in those cases, competition authorities and courts had already concluded that the practice was not anticompetitive. Accordingly, it was not necessary to precisely estimate the alleged efficiencies nor to balance them against the possible negative consequences on competition and consumer welfare. Indeed, in *FlyBe*, the OFT stated that, had the practice been considered predatory, there would have been insufficient evidence to conclude that the alleged efficiencies would have offset the negative long-term impact of the strategy on consumer welfare. See *supra*, para. 4.2.

70 See V. Mertikopoulou, *supra* note 7.

defence for an alleged anticompetitive behaviour. It is still open to question whether the two-step approach introduced by the Guidance and endorsed by the ECJ, based on the Article 101(3) model, is the most appropriate way to incorporate efficiency considerations in the analysis of abuse cases.

Some commentators have argued that the assessment of competitive harm and possible advantages under Articles 101 and 102 TFEU should be consistent, also in light of the fact that the two provisions pursue common objectives and may apply at the same time to certain practices.<sup>71</sup> Furthermore, it may not make sense from a practical perspective for enforcers and courts to follow different approaches under the two provisions.

However, most scholars seem to believe that a two-stage approach based on strict conditions, similar to those set out in Article 101(3) TFEU, does not fit abuse cases. Some years before the adoption of the Guidance, some scholars argued that, as Article 102 does not expressly provide for an exception, efficiencies could not be a defence, but only an integral part of the assessment of the abuse.<sup>72</sup> In his opinion in *Syfait*, Advocate General Jacobs held that a two-step analysis of abuse and objective justification is “somewhat artificial”. He noted that Article 102 TFEU, in contrast with Article 101 TFEU, does not contain any explicit provision for the exemption of anticompetitive conduct. The very fact that conduct is characterised as an abuse suggests that a negative conclusion has already been reached. Therefore, it would be more accurate to say that certain types of conduct on the part of a dominant firm do not fall within the category of abuse at all.<sup>73</sup>

After the Guidance was adopted, many scholars argued that the introduction of a defence similar

to Article 101(3) was the inferior method of dealing with efficiencies, in comparison with incorporating efficiencies in the concept and finding of abuse.<sup>74</sup> Anticompetitive behaviour and justifications are intrinsically linked in Article 102 TFEU cases because positive and negative effects are often “deeply intertwined” and cannot be analysed separately.<sup>75</sup> The Commission should therefore carry out an integrated assessment, through a transparent and detailed analysis of both anticompetitive effects and efficiency considerations.<sup>76</sup>

The artificiality of the separation between the two stages of analysis is confirmed by the fact that the legal standard used for certain categories of abuse already involves an assessment of possible efficiencies. For instance, the standards applicable to refusal to deal and to license intellectual property rights are based on a balance between the preservation of incentives and the protection of competition. In principle, a refusal to deal is unlawful only if the input is indispensable and the practice may eliminate effective competition on a downstream market. EU case law on refusal to license intellectual property rights requires, in addition, that the contested conduct prevents the emergence of a new product for which there is potential consumer demand. The indispensability, elimination of competition and new product requirements are based on efficiency considerations, as they are intended to protect the dominant firm's and its competitors' incentives to invest and innovate. A balance between anticompetitive effects and efficiencies is inherent in the standard used for the assessment of these practices.<sup>77</sup>

At the same time, the analysis of the requirements for a finding of abusive refusal to deal may be sufficient to rule out the conditions to benefit from an efficiency defence. In principle, if the indispensability and the related elimination of competition requirements are satisfied, the

71 See, e.g., E. Rousseva, *supra* note 59; “The Concept of “Objective Justification” of an Abuse of a Dominant Position: Can It Help to Modernise the Analysis under Article 82 EC?”, 2(2) *Competition Law Review* 27 (2005); and “Objective Justification and Article 82 EC in the Era of Modernisation”, in G. Amato and C.D. Ehlermann (Eds.), *EC Competition Law: A Critical Assessment* (Oxford: Hart Publishing, 2007), 377.

72 See, e.g., R. Nazzini, “The Wood Began to Move: an Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 EC Cases”, 31(4) *European Law Review* 516 (2006).

73 See Opinion of AG Jacobs in Case C-53/03 *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline* [2005] ECR I-4609, para. 72.

74 See, e.g., G. Faella and R. Pardolesi, “Squeezing Price Squeeze under EC Antitrust Law”, 6(1) *European Competition Journal* 255 (2010); P. Akman, *The concept of abuse in EU competition law*, Oxford: Hart Publishing, 2015, p. 282; H.W. Friederiszick and L. Gratz, *supra* note 30.

75 *Id.*

76 *Id.*

77 Indeed, even scholars that defend the use of similar standards under Articles 101 and 102 TFEU note that, at least for certain practices, efficiencies are normally taken into account in the first stage of the analysis. See E. Rousseva, *supra* note 60.

conditions required by the Guidance and the ECJ for a valid efficiency defence (including the non-elimination of competition) cannot be met. Thus, efficiencies can only be taken into account in the first stage of the analysis.

The Italian and UK experiences seem to confirm that efficiencies may play a real role, and are normally analysed, only within an integrated assessment of the effects of the practice.<sup>78</sup> Efficiency arguments have been invariably rejected when the contested conduct has been found to restrict competition in the first place. The only cases in which efficiency considerations have been (explicitly or implicitly) accepted are predatory pricing cases where judges and competition authorities concluded that the contested practice was not exclusionary.<sup>79</sup> There are significant similarities between these cases:

- The firm under investigation was not dominant in the relevant market where it offered allegedly predatory prices;
- The firm intended to increase its sales in order to establish itself on that market, which was dominated by another player;
- The offer of an alternative service at low prices increased, rather than decreased, the degree of competition in the relevant market.

In sum, the practice represented a legitimate form of competition, instead of a predatory strategy. Allocative and productive efficiencies arising from the decrease in price, the increase in consumer choice and the reduction of unit costs seem to have played an important role in the assessment of whether the practice was anticompetitive. At the same time, in *FlyBe*, the OFT deemed it necessary to clarify that, had the strategy been considered predatory, the alleged efficiencies would likely not have prevented a finding of infringement.

An integrated approach seems to be not only more in line with national decision practice and case law, but also theoretically sound. Unilateral

conduct that increases efficiency and benefits consumers should be considered, in principle, a legitimate form of competition and not an anticompetitive practice, even though it may have some negative effects on competitors, just like any other legitimate competitive initiative does. One could argue that this is competition on the merits. Ultimately, there is no efficient abuse.

It is questionable whether a two-step approach based on the Article 101(3) model is appropriate

## 7. Efficiency Defence and Effects-Based Approach

The question arises as to whether the introduction of a (theoretical) efficiency defence in abuse cases has fostered the transition towards a more sophisticated and economically sound analysis of unilateral conduct.

The answer is probably no. What is necessary to improve the accuracy of antitrust analysis and to reduce the risk of false positives in alleged abuse cases is not an efficiency defence subject to very strict conditions, which are almost impossible to satisfy, but a real effects-based approach. This effects-based approach should integrate the analysis of possible efficiency gains within a comprehensive and detailed assessment of the effects of the practice.

From this point of view, the *Intel* and *Post Danmark II* rulings are worrying. Apparently, they have reinforced the role of efficiencies in abuse cases. In fact, they have restricted the scope for a more economic and effects-based analysis of rebate systems. The Guidance introduced an as-efficient competitor test for rebate systems, which aimed at integrating economic analysis insights and, ultimately, efficiency considerations into the competitive assessment. Contrary to the Guidance, the EU Courts stated that the application of

<sup>78</sup> For instance, in *Viaggiare/Ryanair*, the Court of Milan did not carry out a separate analysis of the alleged efficiencies, but seemed to consider that they were outweighed by negative effects because the contested conduct prevented the emergence of a different and more complete product.

<sup>79</sup> See the *TNT Post Italia/Poste Italiane*, *First Edinburgh/Lothian* and *FlyBe* cases, discussed *supra*, paras. 4.1 and 4.2.

a properly structured as-efficient test is not a necessary step, as a tendency to remove or restrict the buyer's freedom to choose is sufficient for a finding of abuse. The GC held that a price-cost test would be erroneous, since it would not allow for the detection of practices that make it "more difficult" to enter the market.<sup>80</sup> The ECJ considered that the as-efficient test is only "one tool amongst others", which in many cases may be irrelevant, as less efficient competitors could also exert a useful constraint on the dominant firm.<sup>81</sup>

The *Intel* ruling was criticised because it seemed to endorse an almost per se illegality rule to exclusivity rebates, which seemed difficult to reconcile with the effects-based approach. According to some commentators, much of the criticism of the *Intel* judgment was misplaced because the presumption introduced by the GC is not absolute. The dominant firm has the right to argue that there is a justification for the exclusivity rebate. Accordingly, the *Intel* judgment did not introduce (or perpetuate) a per se rule, but simply reversed the evidential burden of proof where exclusivity is practiced by a dominant firm, in that it is for the firm concerned to adduce evidence of the objective justification.<sup>82</sup>

Even though it is open to question whether the EU Courts' approach to certain retroactive rebates amounts to a per se illegality rule, in practice the possibility to rely on an objective justification seems to be illusory, as efficiencies are narrowly interpreted by the Commission and EU Courts.<sup>83</sup> A theoretical possibility to advance efficiency claims subject to strict conditions is not an adequate counterweight to a limited analysis of the economic effects of unilateral conduct. In the past, individual and block exemptions under Article 85(3) EC were used to correct the distortions caused by an excessively broad interpretation of the notion of restriction of competition under Article 85(1) EC. The efficiency defence introduced by the Guidance and EU case law cannot play the same role under Article 102.

## 8. Conclusion

The role of efficiencies in current antitrust practice is far from satisfactory. The distinction between the finding of anticompetitive foreclosure and the subsequent assessment of possible efficiencies is in many cases artificial. Furthermore, the strict conditions identified by the Commission and the EU Courts do not leave much scope for efficiency arguments in abuse cases. The efficiency defence is more a theoretical possibility than a real option.

Reliance on the efficiency defence, as currently structured under EU law, cannot reduce the risk of erroneous condemnations inherent in a form-based approach. Possible counterbalancing efficiencies should be analysed within an integrated assessment of the effects of the practice, rather than postponed to the last stage of the analysis, as a defence subject to strict requirements. Furthermore, efficiency arguments may play a significant role in antitrust enforcement only within the framework of an effects-based approach, which has not yet been fully adopted in EU and national decision practice and case law. A broad and form-based interpretation of the concept of abuse, coupled with a theoretical possibility to justify efficiency-enhancing practices, is undoubtedly a step back in the transition towards the long-awaited effects-based approach.

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<sup>80</sup> Case T-286/09 *Intel v Commission* ECLI:EU:T:2014:547, para. 150.

<sup>81</sup> Case C-23/14 *Post Danmark v Konkurrencerådet* ECLI:EU:C:2015:651, paras. 59-62.

<sup>82</sup> See R. Whish, "Intel v Commission: Keep Calm and Carry on!", 6(1) *Journal of European Competition Law & Practice* 1 (2015).

<sup>83</sup> See B. Sher, "Keep Calm—Yes; Carry on—No! A Response to Whish on Intel", 6(4) *Journal of European Competition Law & Practice* 219 (2015).