Ten years of effects-based approach in EU competition law
State of play and perspectives

GCLC Annual Conference Series

Edited by
Jacques Bourgeois
Denis Waelbroeck
**TABLE OF CONTENTS**

FOREWORD (by J. BOURGEOIS and D. WAELEBOECK) .................. 13

A. THE EFFECTS BASED APPROACH - HISTORY AND STATE OF PLAY

PART ONE

THE EFFECTS-BASED APPROACH UNDER ARTICLE 101 TFEU AND ITS PARADOXES: MODERNISATION AT WAR WITH ITSELF?  
by DAMIEN GERARD

I. The advent of the effects-based approach .............................................. 18  
   A. The Effects-based Approach as the Substantive Dimension of Modernization .......... 20  
   B. The Progressive Formulation of the Effects-based Approach .............................. 22  
   C. The Ambition of the Effects-based Approach .............................................. 29

II. The paradoxes of the effects-based approach .................................... 31  
   A. Paradox #1: Drop in enforcement activity, beyond cartels. .......................... 32  
   B. Paradox #2: The Increase in Enforcement and Justification Costs. ................. 33  
   C. Paradox #3: The Reliance on Abstract Categories and Guidance ....................... 35  
   D. Paradox #4: The EU Court of Justice Turns Conservative .............................. 36  
   E. Paradox #5: Effects-based Approach and Object Restrictions .......................... 38

PART TWO

THE EFFECTS-BASED APPROACH UNDER ARTICLE 102 TFEU: HISTORY AND STATE OF PLAY  
by WILLIAM ALLAN

Introduction .............................................. 43  
   A. The elements of an effects-based approach .............................................. 44  
   B. The challenges to adoption of an effects-based approach .............................. 46  
      1. Institutional issues ........................................................................ 46
# TABLE OF CONTENTS

2. Policy issues .......................................................... 50

C. Development of an effects-based approach in EU law .......... 54
   1. The development and application
      of the precautionary principle .................................. 54
   2. The Commission's review ....................................... 56

D. The Commission's Guidance on its Enforcement
   Priorities ....................................................................... 57
   1. Legal status of the Guidance ...................................... 57
   2. Substantive content of the Guidance ......................... 59
      a) Overall structure ................................................. 60
      b) General approach: market power .......................... 66
      c) General approach: anti-competitive foreclosure ....... 67
      d) General approach: objective justification ............. 72

E. Application of the Enforcement Priorities
   to Specific Practices .................................................. 73
   1. Single branding ....................................................... 73
      i. Competitive harm ............................................... 75
      ii. Efficiency justification ...................................... 82
   2. Predation .............................................................. 82
      i. Operational criteria for prices between AAC
         and LRAIC .......................................................... 83
      ii. Recoupment ....................................................... 83
      iii. The "meeting competition defence" ................. 84
   3. Tying and mixed bundling ...................................... 84
   4. Refusal to supply and margin squeeze ...................... 86

F. Exploitative Abuses ..................................................... 87

Conclusion ........................................................................ 89

---

**PART THREE**

**THE EFFECTS BASED APPROACH IN EU MERGER CONTROL**

by ENRIQUE GONZÁLEZ DÍAZ

Introduction ................................................................. 97

A. The merger regulation .................................................. 98

B. The reform of european merger control .......................... 99

C. The new merger regulation
   and the effects-based approach toolkit .......................... 107
   1. The new merger regulation ..................................... 107
   2. The Commission's Merger Guidelines ...................... 108
# TABLE OF CONTENTS

3. The creation of the Chief Economist in DG Competition ................................................. 110

D. The siec in practice: some examples of the effects based approach ........................................ 111
   1. Horizontal mergers ........................................................................................................... 111
   2. Vertical mergers .............................................................................................................. 116

E. The use of economic evidence in merger analysis ............................................................ 119
   1. The Institutional Setting of EU merger control ................................................................. 119
      a) The so-called “prosecutorial bias” .............................................................................. 120
      b) An adversarial or an inquisitorial system? ................................................................. 121
      c) A comparison with the US merger control system ...................................................... 122
   2. Economic Analysis and economic evidence ..................................................................... 123
      a) The “intrinsic” problems of modern industrial economics ............................................ 124
      b) The “intrinsic” problems of using economic tools .................................................... 126
      c) Economic evidence: is it comparable to other sources of evidence? ......................... 129

Conclusion .......................................................................................................................... 130

B. STRIKING THE BALANCE RIGHT - ANTI COMPETITIVE EFFECTS AND OBJECT UNDER ARTICLE 101 AND 102 TFEU

## PART ONE

THE SCOPE OF OBJECT VS. EFFECT UNDER ARTICLE 101 TFEU

by DENIS WAELBROECK and DONALD SLATER

Introduction ......................................................................................................................... 131

A. Historical context ........................................................................................................... 132

B. Restriction "by effect" .................................................................................................... 138

C. Restrictions “by object” ................................................................................................. 140
   1. Status quo ...................................................................................................................... 141
   2. Restrictions by object are restrictions that are “easily identifiable” ............................ 143
      a) A preliminary remark: subjective intent is not the test .............................................. 143
      b) Easily identifiable restrictions: three conditions .................................................. 144
      c) Restriction by object: a “parasitic” concept? ......................................................... 145
   3. Contextual analysis used in the identification of restrictions “by object” ...................... 146
TABLE OF CONTENTS

| a) How far can the contextual analysis of a restriction by object go? | 146 |
| b) What is the purpose of the summary contextual analysis? | 148 |
| c) What elements may bring into doubt the qualification of "restriction by object"? | 150 |
| 4. Need to have a restrictive approach of the category | 151 |
| D. Some thoughts on predictability, standard of proof, presumption of innocence and criminal penalties | 152 |
| 1. Predictability | 152 |
| 2. Presumption of innocence and standard of proof | 155 |
| E. Closing remarks | 157 |

PART TWO

BALANCING OBJECT AND EFFECT ANALYSIS IN IDENTIFYING ABUSES OF A DOMINANT POSITION UNDER ARTICLE 102 TFEU

by ARJEN MEIJ and TRISTAN BAUMÉ

Introduction | 159
A. Definition of exclusionary abuse | 162
  1. Objective concept of abuse | 163
  2. Competition on the merits | 164
    a) Consumer welfare | 165
    b) Dominant position: use or abuse? | 166
  3. Effect of restricting competition | 167
B. The application of an "object or effect" test under Article 102 TFEU | 170
  1. Object or effect under Article 101 TFEU | 170
  2. Object or effect in assessing exclusionary abuses under Article 102 TFEU | 171
    a) Practices manifestly outside competition on the merits | 171
    b) The uneasy line between competition on the merits and competition by improper means | 173
    i. Margin squeeze | 174
    ii. Tying and bundling | 175
    iii. Predatory pricing | 175
    iv. Conditional rebates | 175
    v. Refusal to deal in an essential facility case | 176
    vi. Meeting competition | 176
  3. Balancing object and effect | 178
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Object of excluding competitors and effect on consumer welfare</td>
</tr>
<tr>
<td>b) Analysis of restrictive effects; a focus on consumer welfare</td>
</tr>
<tr>
<td>Conclusion</td>
</tr>
</tbody>
</table>

C. THE ANALYTICAL FRAMEWORK: THEORIES OF HARM, EVIDENCE, CAUSALITY AND DEFENCES (ARTICLES 101 AND 102 TFEU AND MERGER CONTROL)

PART ONE
THEORIES OF HARM IN EUROPEAN COMPETITION LAW: A PROGRESS REPORT
by HANS ZENGER and MIKE WALKER

Introduction ................................................................. 185

A. Theories of harm in ec merger control ......................... 186

1. Without a Map: Merger Analysis Absent
   Logically Coherent Theory of Harm ................................. 186
   a) Guinness/Grand Metropolitan ................................. 187
   b) Airtours/First Choice ........................................... 187

2. Theories of Harm in Recent Commission Case Practice . 189
   a) TomTom/Tele Atlas .............................................. 189
   b) ABF/GBI ............................................................. 191

3. Efficiency Offences in Conglomerate Mergers: A Remaining Concern? ............................................. 192
   a) Coca-Cola .......................................................... 192
   b) Intel/McAfee ...................................................... 193

B. Theories of harm under article 101 TFEU ................. 195

1. The Object/Effect Dichotomy ........................................ 195

2. The Extended Use of the Object Category ................... 196
   a) Restrictions of parallel trade ............................... 196
   b) Resale price maintenance ...................................... 198
   c) Payment card multi-lateral card interchange fees .... 199

3. Dealing With Non-Cartel Restrictions of Competition ... 200

C. Theories of harm under article 102 TFEU ................... 202

1. The Ordoliberal Legacy .............................................. 202

2. Per Se Illegality: Enforcement Without Theory of Harm . 203
   i. Michelin II ...................................................... 204
   ii. Hilti ............................................................ 205

3. Intel and The Guidance Paper on Exclusionary Conduct 206
### TABLE OF CONTENTS

**i. Intel** ................................................................. 207  
Consequence .................................................................. 209

---

**PART TWO**

**THE COUNTERFACTUAL METHOD IN EU COMPETITION LAW: THE CORNERSTONE OF THE EFFECTS-BASED APPROACH**  
by DAMIEN GERADIN and IANIS GIRGENSON  

Introduction ................................................................................................................. 211  
**A. Ex ante** counterfactual: alternative future ........................................................... 213  
1. The Counterfactual in EU Merger Control ............................................................... 213  
   a) The Failing Firm Defence .................................................................................... 214  
   b) Towards a Dynamic Counterfactual in EU Merger Control ............................ 216  
2. The Counterfactual in Self-Assessment under Article 101 TFEU .................................................. 217  
   a) Article 101 TFEU involves two distinct counterfactuals ................................. 218  
   b) The Counterfactual under Article 101(1) TFEU .............................................. 219  
   c) The Dynamic Counterfactual in *Ex Ante* Self-Assessment.......................... 221  
   d) The Counterfactual under Article 101(3) TFEU .............................................. 222  
**B. Ex post** counterfactual: alternative past ............................................................... 223  
1. Quantification of Harm in Actions for Damages ....................................................... 224  
   a) The Role of Counterfactual in the Quantification of Antitrust Damages .......... 224  
   b) The Commission's Draft Guidance Paper on the Quantification of Damages .... 225  
2. The *Ex Post* Counterfactual in Article 101 TFEU Cases ............................................. 227  
3. The Counterfactual in Article 102 TFEU Cases ......................................................... 229  
   a) The Emergence of the Effects-Based Approach under Article 102 TFEU ........ 230  
   b) The Counterfactual in the Article 102 Guidance Paper .................................. 231  
   c) The Counterfactual in Recent Article 102 Decisional Practice ...................... 232  
   d) The Counterfactual Used as a Defence by Dominant Firms ......................... 234  
Consequence ................................................................................................................. 237
# TABLE OF CONTENTS

## PART THREE

**REFLECTIONS ON THE RELEVANCE AND PROOF OF EFFICIENCY DEFENCES IN MODERN EU ANTITRUST LAW**

by EKATERINA ROUSSEVA

<table>
<thead>
<tr>
<th>A. Efficiency gains and the objective of the competition rules</th>
<th>242</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. The impact of the limitation of the scopes of Articles 101 (1) and 102 on how frequently cases turn on an efficiency defence</td>
<td>246</td>
</tr>
<tr>
<td>1. Effects-based analysis under Article 101 (1)</td>
<td>246</td>
</tr>
<tr>
<td>2. Effects-based analysis in the establishment of anticompetitive foreclosure under Article 102</td>
<td>247</td>
</tr>
<tr>
<td>3. Efficiency considerations without an explicit balancing exercise</td>
<td>248</td>
</tr>
<tr>
<td>a) Efficiency considerations under Article 101 outside the scope of the third paragraph</td>
<td>249</td>
</tr>
<tr>
<td>i. Genuine agency agreement and qualitative selection distribution systems</td>
<td>249</td>
</tr>
<tr>
<td>ii. A reminder of the rationale for the ancillary restraints</td>
<td>251</td>
</tr>
<tr>
<td>iii. Restrictions necessary for entry or development of new markets</td>
<td>252</td>
</tr>
<tr>
<td>4. Efficiency considerations in the analysis of Article 102 outside the efficiency defence</td>
<td>253</td>
</tr>
<tr>
<td>i. Efficiencies as a Basis for Legality of Quantity Rebates Linked Exclusively to the Volume of Purchase</td>
<td>254</td>
</tr>
<tr>
<td>ii. Restrictions imposed by dominant associations to ensure beneficial economic activity</td>
<td>254</td>
</tr>
<tr>
<td>iii. Predatory pricing</td>
<td>255</td>
</tr>
<tr>
<td>iv. Excessive prices</td>
<td>255</td>
</tr>
<tr>
<td>v. Refusals to deal</td>
<td>257</td>
</tr>
<tr>
<td>C. Procedural reasons for less resort to efficiency defences and for the relative importance of more subtle efficiency considerations</td>
<td>259</td>
</tr>
<tr>
<td>1. Commitment decisions</td>
<td>260</td>
</tr>
<tr>
<td>2. Discretion to prioritise and not to investigate</td>
<td>264</td>
</tr>
<tr>
<td>3. Block exemptions</td>
<td>264</td>
</tr>
<tr>
<td>D. Efficiency Defences</td>
<td>265</td>
</tr>
<tr>
<td>1. Efficiency defence under Article 101(3)</td>
<td>265</td>
</tr>
</tbody>
</table>
D. PRACTICAL IMPLICATIONS OF THE EFFECTS BASED APPROACH

MANAGING CASES UNDER THE EFFECTS-BASED APPROACH: THE EXPERIENCE OF THE FRENCH COMPETITION AUTHORITY
by ANNE PERROT

A. Managing unilateral conduct cases under the effects-based approach .......................... 293
  1. Bundling on the pay-TV market ................................................................. 295
     a) The case ...................................................................................... 295
     b) The analysis of the Conseil de la concurrence ................................... 296
     c) Alleged predation .......................................................................... 297
        i. The case ................................................................................... 297
        ii. The analysis of the Conseil de la concurrence ............................. 298
  2. Discrimination ......................................................................................... 299
     a) The case ...................................................................................... 299
     b) The analysis of the Autorités .............................................................. 299

B. Effects-based approach and the assessment of the competitive damage ......................... 300

Conclusion ........................................................................................................... 301