Notes on Object, Effect and Rule of Reason

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October 2021 [Version 3]

The PCA has been influenced by US and EU jurisprudences and borrows from both frameworks. The Philippine Competition Act (PCA) has the term "per se" from the US jurisprudence, "object" and "effect". While "rule of reason", is not in the Philippine Act, it is the alternate framework to "per se", and its juxtaposition to the EU's effects gives the impression that the *rule of reason* is just the EU framework of antitrust *effects* spelled differently.

In this note, I discuss the *per se* versus *rule of reason* dichotomy for the US, and the *object* and *effects* distinction in the EU. After comparing the parallel concepts across jurisdictions, I find that "per se" and "object" are becoming similar, but "rule of reason" and "effects" are not the same for multiple reasons, both from the legal tests applied, the legal burdens and the burden shifting throughout the process. At the end, I discuss applications in the Philippine context.

The US Concepts of "Per Se" and "Rule of Reason"

Shifting *Per Se*

The *per se* framework stipulates that the conduct has self-evident harms on the market which may not be overcome with efficiencies or justifications. The Sherman Act does not contain the concepts of *Per Se* or *Rule of Reason*. These came about through jurisprudence, and the first case to have used the concept was *Trans-Missouri Freight* (1897)[1], and it was formally used in US courts in *Trenton Potterie*s (1927)[2]. The years has seen a narrowing of the scope of the *per se* framework. When previously, market division and vertical restraints of various sorts were once considered per se illegal, they have all since morphed into a *rule of reason*, as altered by various US Supreme Court cases.[3] The notion of a *quick look* was born in the Ninth Circuits' *California Dental's (1999)*[4] analysis of price advertising by the association. A quick look is a structured version of rule of reason, which applies when a presumption of negative effects is appropriate. The Ninth Circuit rejected the FTC's *Per Se*

*I would like to thank my collaborators within the Economics Office on the Abuse of Dominance Working Paper Series and Vertical Restraints Working Paper for their work, which helped me understand the seminal cases in the US and EU jurisdictions. I am also benefitted by conversations with competition enforcers from the MAO, CEO and Legal Divisions about Philippines' practice of burden shifting and case prioritization. Of course, all errors herein are mine.

[1] 166 US 290 (1897).

[2] United States v. Trenton Potteries, 273 U.S. 392 (1927)

[3] The vertical restraints case Continental TV v. GTE Sylvania Ince (1977) 433 US 36 (1977) was the first to change vertical restraints on intra-brand market division.

[4] Cal. Dental. Ass'n v. F.T.C. 526 U.S. 756, 769–70 (1999)

approach and instead applied a quick look analysis; a mode of analysis affirmed by the Supreme Court.[5] In the Supreme Court's analysis, there are no longer any bright lines between *Per Se* or Rule of Reason, however, it said that there should be a "sliding scale" where "the quality of proof required should vary by the circumstances". However, post-*California Dental*, the US Supreme Court has not tried to further refine the concept. Meanwhile, the FTC and DOJ continue to use it. In *Mass. Board of Registration in Optometry (1988)*, the FTC has used the notion of "inherently suspect" conduct.

The *BMI* (1979) case in an example where horizontal price fixing, as a component in a joint licensing agreement, was ruled with the consideration of efficiency justifications and was judged not violative of the Sherman Act.[6] Kimmel (2016) argues that *BMI* was anticipated by an earlier *Socony-Vaccum* (1946). The *NCAA v. Alston* (2021) case is a recent example where an efficiency concern is sufficiently important that it prompts a move to the *rule of reason* (quick look).[7] Our conclusion here is that the *per se* framework may tilt toward the *rule of reason* when the court is convinced there is a procompetitive explanation for the conduct, whatever the conduct may be. This flexibility implies a sequential decision process at the court level. First, they decide to use either a *per se* or rule of reason framework. To help them decide, they look at plausible procompetitive justifications, which if it exists by the court's standard, shifts the case to a rule of reason. [8] The implications for the PCA are interesting, as *per se* is becoming more similar to the EU's object framework. An interesting question for the PCC is if it should hew closer to the US practice where it would treat a *per se* case s without a consideration of procompetitive justifications – as it was normally the case – and allow the courts to make the determination on a case-by-case basis of whether a rule of reason would be used. Alternately, the PCC might on its own determine that any given horizontal price fixing case would merit incorporate efficiency justifications.

Four Step Rule of Reason

The other broad framework is the rule of reason. Generally speaking, the rule of reason formally incorporates evidence of both anti and procompetitive effects as part of the analysis.[9] The rule of reason is a framework consisting of a sequence of shifting steps of burdens of proof. The first step is where the plaintiff or agency has the burden of proving anti-competitive effects. Hovencamp (2018) argues that US courts (mostly) currently believe that the Rule of reason requires a showing of negative effects on prices, output, or quality by the conduct, or find of market power strong enough to have a strong presumption of effects on price, output, or quality within a well-defined relevant market.[10] However, there are other decisions that argue that market power alone is not dispositive. Hovencamp cites *Top Markets* (1998):[11]

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[5] The US SC in this instance reversed the Ninth Disctrict Court's decision which found the association liable.

[6] Broadcast Music Inc. v. Columbia Broadcasting System Inc., 441 U.S. 1 (1979). Another example concerning horizontal price fixing are: Nat'l Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) (upholding a uniform interchange fee set by an association of credit-card-issuing banks); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (necessity of rule of reason to horizontal price fixing necessary to support the "amateurism" of the product).

[7] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. ALSTON ET AL. 594 U. S. (2021))

[8] See Newman, J. "Procompetitive Justifications in Antitrust Law" 94 Indiana Law Journal 501 (2019) for more. Procompetitive justifications plays a key role in the rule of reason framework as well.

[9] In this note, I will defer discussing the notion of a quick look, or truncated rule of reason. This falls under the general rule of reason, and my discussion on rule of reason would apply to quick look, except for the necessity of establishing effects. The quick look methodology is established at the Supreme court, starting with a footnote in Texaco Inc. v. Dagher, 547 U.S. 1, 3, 8 (2006), with it being first used in NCAA v. Board of Regents of University of Oklahoma 468 U.S. 85 (1984). This reflects the observation that per se rules can be adjusted given a procompetitive claim believed by the court.

[10] Hovencamp (2018) The Rule of Reason, pg 102

[11] Tops Markets, 142 F.3d, par 90

> *Even assuming this market share data implies that Quality [the defendant] possessed market power, Tops still would fail to satisfy its burden under the adverse-effect requirement. Market power, while necessary to show adverse-effect indirectly, alone is insufficient. A plaintiff seeking to use market power as a proxy for adverse effect must show market power, plus some other ground for believing that the challenged behavior could harm competition in the market. . .*

Hovencamp further argues that the burden of rule of reason requires high market shares in a relevant market, and some evidence that "purports to measure actual anticompetitive effects".[12] An empirical review of antitrust cases was conducted by Carrier (2009) which surveyed 215 cases between 1999 and 2009 involving *rule of reason* where the courts found proof of anticompetitive effecting wanting. Half of the sample had the court criticize a lack of "actual" anticompetitive effects. About thirty percent (30%) of the 215 cases had the court criticize the lack of proof of market power. This step is the most crucial for plaintiffs and the vast majority (221 of the 222) of cases ultimately lost under the rule of reason.

Once an anticompetitive effect has been accepted by the court, the burden shifts to the defendants, who must show a procompetitive justification for the conduct. The types of procompetitive justification varies widely by conduct, and some examples include free riding, entering new markets, and reductions in costs. A crucial element is that the justification is directly related to the anticompetitive conduct. The defendant does not need to show that the proffered justifications fully outweigh the plaintiff's harms, as that happens in subsequent steps.[13]

Once a court accepts the procompetitive justification, the burden shifts again (the third step) to the plaintiffs who must show that there is a less restrictive way to achieve the same goals. Typically, the suggested alternative should be "virtually as effective … without significantly increased cost".[14] When the alternative is found not as effective, or is costly, there must be a balancing test, which leads one to move on to the formal fourth step of the rule of reason.[15] If the plaintiffs convince the court that there is a less restrictive way to achieve those efficiencies, then that should be the end of the rule of reason framework.

The fourth step is the balancing step, which is the last resort if there are mixed effect effects stemming from the conduct. Carrier's empirical study in 2009 establishes that balancing is quite rare, at only 5 of the 221 rule of reason cases between 1999 and 2009, even though the notion of balancing plays an outsized role in the public's imagination about modern antitrust.[16] Balancing is quite rare in practice. It turns out that the Supreme Court has never actually conducted a balancing exercise, while regularly extolling the practice in theory.[17] In *FTC v. Indiana Federation of Dentists*, the supreme court said that, the facts in that case are such that the rule of reason is "not a matter of great difficulty", which is not balancing, but an instance where the court rejected of the defendant's proffered justification.[18] Hovencamp suggests that balancing can only be done with a common unit, such as prices or output. Without a common unit, he concludes that balancing becomes an "arbitrary exercise in soft ideology".[19]

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[12] Hovencamp (2018) The Rule of Reason, pg 98
[13] Ibid, p114
[14] County of Tuolumne v. Sonora Community Hospital 236 F.3d 1148 (9th Cir. 2001)
[15] C. Scott Hemphill, Less Restrictive Alternatives in Antitrust Law, 116 COLUM. L. REV. 927, 941 (2016)
[16] While rare in Sherman Act enforcement cases, it is not rare in Merger Cases.
[17] H. Hovencamp (2016) "Antitrust Balancing" NYU Journal of Law and Business Vol 12 No.2 pp369-384
[18] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986)
[19] Hovencamp (2016) Op. cit. pg 374, and uses the *Actavis* case as an example of this type of balancing. In *Actavis*, the court was seeking balance between patents and competition concerns -- FTC v. Actavis, Inc., 133 S. Ct. 2223, 2231 (2013)

A troubling pattern of late is how district courts have been changing these long established frameworks.[20] The Ninth Circuit, in *NCAA v. O'Bannon*, dismisses the plaintiff's less restrictive alternative, skipped the balancing step.[21] In the *NCAA Grant-in-Aid Cap (Alston)*, the defendants relied on the O'Bannon ruling to argue that the without a less restrictive alternative proffered, "should end the court's inquiry, as there is no fourth step".[22] The Supreme Court recently ruled on *Alston*, by citing its *Ohio v. Amex* decision, that the court observes a three step process.[23] *Amex* is about the anti-steering provisions in Amex's credit card products. Anti-steering prohibits merchants from discouraging customers from using American Express and avoiding a transaction fee. The three-part analysis it articulated omitted balancing. From *Alston*:

> *As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." …. Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." Ibid. If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."*

The court cited three sources for its rule of reason framework in *Amex;* curiously each explicitly includes balancing in their analyses.[24] The Second Circuit District Court in *Amex* argues that the balancing is now in the first step, where now the plaintiff should show "net harm" to both cardholders and merchants in this two-sided market.[25] This entails the agency should quantify both harms and efficiencies earlier on in the process, making balancing necessary in all cases. This is against the logic of rule of reason which seeks to limit balancing only when absolute needed, in the final step of the process.

Why is this important? As Carrier (2019) notes, this is against past judicial practice and against the principles of rule of reason. I illustrate in Figure 1 below a schematic for the rule of reason, and how the recent decisions may have altered it. From the point of view of the Philippines' Commission, I note that the US's rule of reason is in flux and is now (with the seeming erasure of the balancing step by the US Supreme Court) even more titled towards defendants. Even under the description by the Second Circuit, requiring balancing early on would put an even larger burden on plaintiffs. This is on top of the evidentiary requirements of the standard rule of reason which is much heavier than that of its EU counterpart. I will discuss the EU Framework next.

[20] M. Carrier (2019) The Four Step Rule of Reason Antitrust Vol 33 No. 2, pg 50-55

[21] 802 F.3d at 1052, 1057

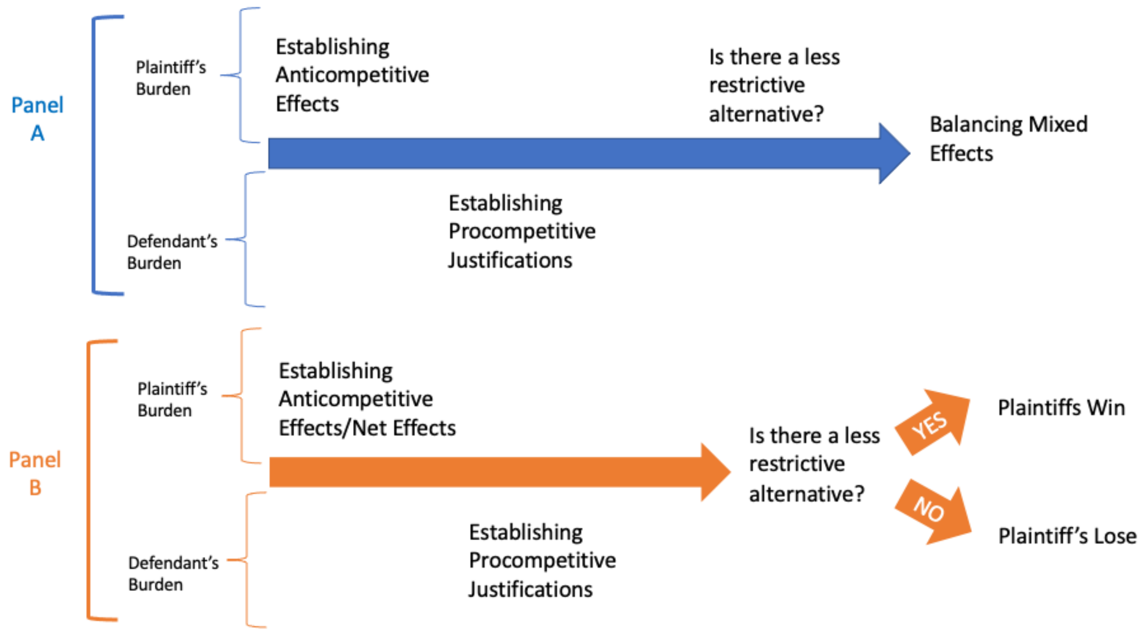
[22] In re NCAA Grant-in-Aid Cap Antitrust Litig., No. 4:14-md-02541-CW (N.D. Cal. Nov. 10, 2018)

[23] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. ALSTON ET AL. 594 U. S. (2021); Ohio v. American Express Co., 585 U. S. (2018)

[24] These were Capital Imaging Associates v. Mohawk Valley Medical Associates 996 F.2d 537, 543 (2d Cir. 1993); 1 VON KALINOWSKI, supra note 23, § 12.02[1].; and 7 AREEDA & HOVENKAMP, supra note 23, ¶ 1502, at 398–99 (4th ed. 2017)

[25] United States v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016), which on cert. became Ohio v. American Express (2018)

Figure 1: Schematic on Rule of Reason



NOTE: PANEL A DISCUSSES THE STANDARD RULE OF REASON, WHILE PANEL B DISCUSSES WHAT THE RULE OF REASON MAY BECOME

EU Framework of Object and Effect

What is "by Object"?

The EU framework is either *Object* or *Effect*, which is written explicitly in Art 101(1), and has been adopted for Art 102. In the 1990s, there was a move to incorporate effects analysis in EU competition law and move away from purely form-based enforcement. These resulted in reforms such as the guidelines such as the EU *de minimis* notice annex, the Guidelines on Vertical Agreements and the Guidelines on Abuse of Dominance for exclusionary abuses. These documents attempted to clarify the increasing role of *effects* and maintain the use of "object" cases which is present in extensive jurisprudence.[26] Broadly speaking, if what is under consideration are horizontal agreements, "by object" conduct include price fixing, output limitation and market sharing. For vertical agreements, "by object" conduct includes minimum price fixing, certain types of market allocation and selective distribution schemes.

The phrase "broadly speaking" is accurate here because there are conditions surrounding each determination of object cases, found in their respective guidelines and notices from the EU Commission. Once it is determined by the Commission that it is *by object*, the anticompetitive conduct possesses a rebuttable presumption of anticompetitive effects, and is considered unlikely to fulfill the efficiency conditions of Art 101(3).[27] Thus, the fact that it is only a presumption sees "object" as closer to the US's "quick look" standard and not the per se. In the context of Art 101, Witt (2018) argues that modern enforcement relies on an *object* approach because enforcers prefer to bring

[26] For these lists and procedural guidelines, see: EU de minimis notice annex (2014), EU Guidelines on Vertical Restraints (2010), EU Guidelines for the Application of Art 81(3) (2004), EU Guidelines for the Application of Art 82 to abuse exclusionary conduct by dominant undertakings (2009)
[27] Joined Cases 56 & 58/64, Consten and Grundig

cases which may be classified as by object.[28] Defendants can strive to rebut this presumption of effects and introduce efficiency defenses. If the courts agree, then the case becomes an *effects* case.

In court cases, *object* restrictions are determined by examining the text and objectives of the agreement and actual conduct to determine if a case falls into any of the specified conduct that calls for an object treatment.[29] While these analyses can be fairly detailed, what defines *object* is the lack of an investigation on the effects on the market. The rebuttal of the presumption can be accomplished by the defendants if they can prove that there is no possibility of negative effects, if the conduct is necessary to some procompetitive effect, or if other factors (say regulation or structural features of the market in question) are responsible for the hypothesized negative effects.

For the Philippines, what might be instructive is how the EU crafts "new" object cases, that is conduct or agreements without legal precedent that it believes should be presumed to have anti-competitive effects. A good example would be the *Lundbeck* and *Fetanyl* cases. [30] Both are "pay for delay" type cases, where patent holders would pay manufacturers to delay entry into generics markets. Initially, the Commission would conduct extensive to create the narrative of the likely harm of a "pay for delay" case to incentives to compete.[31] To establish an object case in these new object cases, both had to determine : (1) the parties were at least potential competitors, (2) the generic undertaking (potential competitor) agreed to limit its efforts to enter the market, and (3) the agreement transferred value to the competitor which substantially reduced the incentives to enter the generics market, (4) the value transferred was based on the foregone profit the generic undertaking in the counterfactual of entry, (5) the originator could have obtained the limitations on entry through enforcement of its process patents; (6) the obligations on the generic undertaking in the agreement went beyond the rights granted to holders of process patents; (7) the agreement contained a commitment from the originator to refrain from infringement proceedings after the generics entered the market post-agreement. As can be seen from this enumeration, the economic analysis may be extensive, but the lack of effects is still there.

One of the rare Art 101 cases with an *effects* component is the *Groupement des cartes bancaires* case.[32] This case concerns the imposition of fees by an association of bank undertakings. The association (*Groupment de cartes bancaires*) argues that fees where necessary to incentive acquiring new merchants into the network. The EU Commission held that it was by object, but added extensive analyses on its market effects, probably due to the proffered efficiency arguments. The ECJ ultimately rejected this object categorization, but in the subsequent remand to the GC, the GC found that the commission submitted sufficient proof of anticompetitive effects. The only EU Commission decision which relied on effects is *Visa,* and was upheld by the General Court.[33] The EU Commission had found that there were potential effects of the refusal to allow Morgan Stanley to be a member of Visa Europe and enter the European market.[34]

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[28] Anne Witt (2018) THE ENFORCEMENT OF ARTICLE 101 TFEU – WHAT HAS HAPPENED TO THE EFFECTS ANALYSIS? 55(2) Common Market Law Review.

[29] An example is Commission decision on Telefónica/Portugal Telecom - AT.39839 (2013), which the commission interpreted as market allocation

[30] Lundbeck - AT.39226; Fentanyl - AT.39685.

[31] There was an appeal to the ECJ for Lundbeck, and in March 2021, the ECJ rejected it and imposed fines of Euro 150 M. This establishes that this type of case is now by-object In the US, the Actavis case, also pay-for-delay, is under a rule of reason

[32] EU Commission findings: COMP/D1/38606 in 2007; Case T-491/07, Cartes bancaires v. Commission; the ECJ: Case C-67/13 P, Groupement des cartes bancaires; the second GC decision: Case T-491/07 RENV, Groupement des cartes bancaires v. Commission, EU:T:2016:379)

[33] Morgan Stanley/Visa International and Visa Europe (COMP/D1/37860); GC: Case T-461/07, Visa Europe and Visa International v. Commission

[34] While the commission used the phrase "potential effects", the GC's decision to uphold uses "effects". See the next section for the general frameworks on effects in the EU.

For Art 102, the Guidelines on exclusionary conduct state that intervention will occur if there are likely anticompetitive effects, and describes factors that can be used to build that case.[35] However, depending on the specifics of the case, the burden of the evidence may not be heavy if it is clear that it limits the incentives to compete and there are no clear efficiencies.[36] Scholars have identified this as paralleling Art 101, as *object* conduct.[37] In particular, tying, loyalty inducing discounts, and pricing below average variable costs (or average incremental costs), have a presumption of negative effects. Margin Squeeze and standardized rebates would normally require evidence of likely negative effects. The General Court in *Michellin* II argued that 'if it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect'.[38] The Court took the well-established concept from Article 101(1) and applied it to Art 102.

The notion of Effects

EU Competition law is interested in anticompetitive effects manifested in the loss of the incentive to compete, or a loss of rivalry in the marketplace. This can happen when collusion among erstwhile competitors are happening; or when a source of competitive pressure is weakened; or when dominance is significant through the sheer exploitation of market power through higher selling prices, lower buying prices, price discrimination and other similar practices.

In the US, these mechanisms have been linked directly to consumer harm as the legal standard. However, the EU Court has consistently held, that the EU competition law system is concerned not only with the protection of consumers, but also with the 'structure of the market' and therefore with 'competition as such'. Hence, these effects from the EU perspective is different conceptually, although, as we will see in the next section on establishing effects, a retrospective or prospective analysis of a conduct would look at prices, output and quality as well, in so far as those variables relate to those three mechanism identified.

Conduct or agreements which are not considered *by object* would normally be evaluated under an effects framework. Typically, these might have strong efficiency considerations. For these activities, one needs to examine on a case-by-case basis, the underlying legal and economic context. What is important to note is that EU courts are concerned with actual or potential effects. These effects should be compared to a counterfactual, which is the situation prevailing in "the absence of the [practice or transaction]in dispute".[39] Therefore, there should be a clear link between the conduct and its effects vis-à-vis the counterfactual.[40] As an example, in foreclosure cases, the foreclosure of an "as efficient" competitor makes sure that the conduct has the potential to negatively affect competition.[41] In the usual effects analysis, the threshold is "likely", or "in all likelihood". Likely is described as "more likely than not", and is more than merely "capable" of having these effects.[42] In some classes of conduct – refusal to deal -- , the evidentiary threshold has been described as near certainty. In these cases, the required input is indispensable, and a withdrawal of access would result in the reduction of "all competition" on the relevant market.[43]

[35] EU Guidelines on Exclusionary Conduct (2009), par20
[36] Ibid, par 21
[37] Pablo Colomo Anticompetitive Effects in EU Competition Law Forthcoming in (2021) 17 Journal of Competition Law & Economics
[38] Case T-203/01, Manufacture française des pneumatiques Michelin v Commission ('Michelin II')
[39] Société Technique Minière Case 56/65
[40] See Post Danmark II , Case C-382/12 P *MasterCard Inc. and Others v Commission*
[41] The EU Guidance allows the possibility that a non as efficient competitor is an important constraint to the dominant firm. In these cases, the effects analysis should account for this.
[42] Colomo (2021), page 45
[43] Bronner

Another important concept here is the distinction between actual and potential effects, and EU courts are open to both. If the conduct happened in the past, then the court can entertain actual effects. In cases where potential effects where used, and subsequent developments do not bear out the potential effect, the decision would stand because the court can only assess evidence available at the time.[44] These effects can be retrospective. This is the case in *Post Danmark I,* when low prices did not fall below average variable cost, a retrospective analysis of the market was conducted and it was noted that the rival did not exit, and was able to win customers back.

Part of the evaluation of effects is objective necessity – is the conduct in question necessary for some pro-competitive aim. Objective necessity is often described as the "ancillary restraints doctrine" in agreements. Under the doctrine, the question is whether the agreement would have been concluded in the absence of the anticompetitive clauses. This suggests that there is a net balancing occurring at this juncture. That would be incorrect. This is merely an effects screen: if the conduct is necessary – indispensable – for a good market outcome, then there is highly unlikely to be effects. This is different from the concept of objective justifications, which are the subject of Art 101(3), and will come into play later. The question in Art 101(3) is whether the procompetitive outcomes are proportionate to the anticompetitive effects.

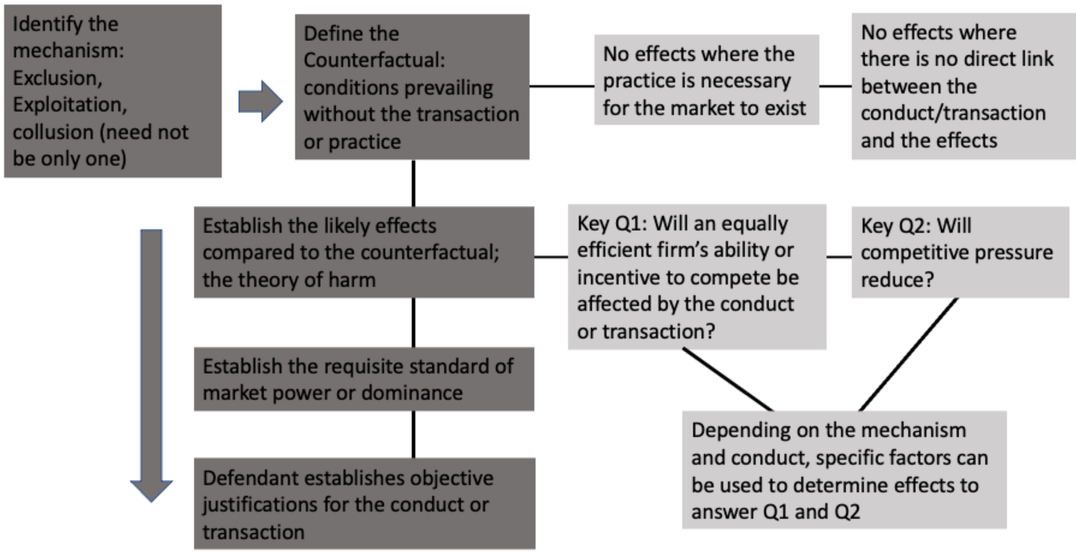
The concept of appreciability is also important in the *effects* framework. Only appreciable effects are caught in Art 101 and 102. Appreciability is market power, and a key question is the extent of dominance required. There are factors that can be used to determine sufficiency, but it seems that from a legal perspective it is largely a binary decision, even though market power exists in a continuum.

As mentioned earlier, anticompetitive effects exist where a practice (or transaction) harms the ability and/or incentive to compete of firms that are *as efficient* as the firm(s) involved in (or benefitting from) it, through the mechanism identified earlier. The jurisprudence has identified specific factors to look at for different types of anticompetitive effects and conduct.[45]

[44] This is specifically addressed in Case T-201/04 *Microsoft Corp v Commission*

[45] Each conduct has some specific issues as well, which can be seen from an examination of case law.

Figure 2: Effects Framework, EU



Source: Colomo (2021)

Figure 2 includes an analysis of exploitative conduct, such as Price Discrimination. The *MEO* judgment, citing British Airways (2004)[46], tells us that "there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others'." Hence, it is the customer's ability and incentive to compete which is the key issue, and is fundamentally no different from that of other types of conduct. *From MEO:*[47]

> *"When it carries out the specific examination referred to in paragraph 28 above, the competition authority or the competent national court is required to take into account all the circumstances of the case submitted to it. It is open to such an authority or court to assess, in that context, the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors (see, by analogy, judgment of 6 September 2017, Intel v Commission, C-413/14 P, EU:C:2017:632, paragraph 139 and the case-law cited)."*

In particular, it is cited by AG Wahl in this case that it is necessary to show that " it is necessary to examine whether the price discrimination at issue is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured."[48] This should be a market-wide effect, not limited to the firms experience a disadvantage in price.[49]

As for unfair prices, they seems to exist in a somewhat different framework, only tangentially related to the distortion of competition, except under the notion that excessive and unfair pricing under existing legal tests stemming from *United Brands* in the context of Art 102 are themselves a distortion

[46] C-95/04 P British Airways plc v Commission
[47] C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, , par 31
[48] AG Wahl's opinion in MEO, par 91.
[49] Ibid. par 98

of competition. From the decision in Aspen (2021), the focus is directly on consumer welfare. However, if anything, intervention against unfair prices are sometimes seen as possibly distorting competition. Thus intervention in this case derives from high entry barriers which cannot be effectively lowered, no regulatory option. Intervention would be proscribed in cases where dominance and high entry barriers are primarily due to past investments.[50]

Regulation 1/2003 contains the principles on the application of Art 101 and 102.[51] Establishing anticompetitive effects, either by object or effect, is the task of the agency or the plaintiffs. Objective Justifications refer to Art 101(3), which normally would apply to agreements, but would also apply to Art 102.[52] Regulation 1/2003 Article 2 specifies that these defenses would be the burden of the defendants. There are four prongs to the efficiency justification defense for Art 101 and 102, as replicated in Table 1.[53] Scholars have written that while there are differences, the principle that defendants can justify their conduct or agreements based on these factors are broadly aligned.[54]

Table 1: Objective Justifications in EU Competition Law

Art 101(3)	Art 102 (from the Guidance Paper)	Mergers (from OJ 2004/C 31/03) Guidelines on the Assessment of Horizontal Mergers [in Part VII]
contribute to improving the production or distribution of goods or to promoting technical or economic progress	improving the production or distribution of goods or to promoting technical or economic progress,	Benefit Consumers, such as from cost reductions without a loss of output, new products, improved products, and the benefit is passed to consumers
allowing consumers a fair share of the resulting benefits	the conduct is indispensable to the realisation of those efficiencies	Merger specificity – direct consequence of the merger, no less anticompetitive alternative to achieving the efficiency.
do not impose restrictions which are not indispensable to the attainment of these objectives	the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets	Efficiencies must be verifiable, and substantial enough to outweigh the merger's harm to consumers
do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned	the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition	

There is some indeterminacy in the EU system. While the framework for anticompetitive effects is clear, beyond the existence of these factors specific to each type of conduct there is little guidance on how to construct a test for effects for anything less than the presence of all of these factors. Case law

[50] Mossa and de Streel (2007) "Excessive Pricing in Competition Law: Never say Never?" in Sweedish Competition Authority "The Pros and Cons of High Prices" 14, 39 (2007). See also a survey article by Liyang Hou (2011) "Excessive Prices within EU Competition Law" European Competition Journal Vol. 7, 1.

[51] Then Art 81 and 82., Regulation 1/2003: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

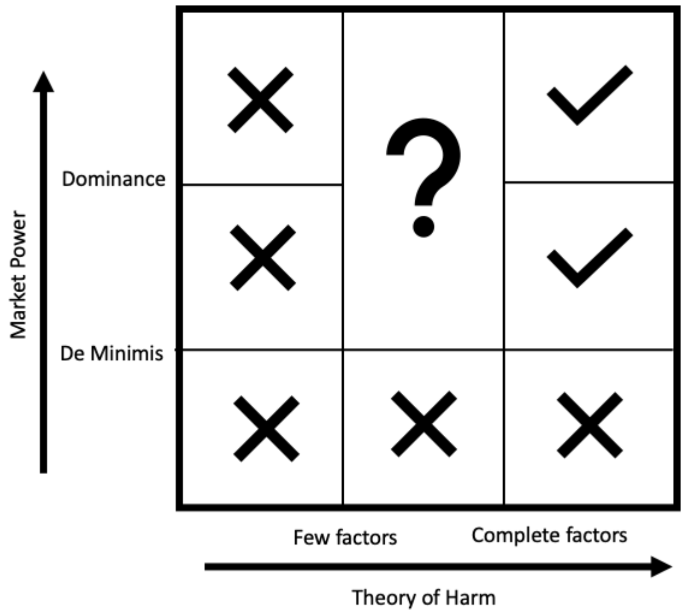
[52] The opportunity to defend conduct using objective justifications has been present in the EU jurisprudence, confirmed in Case C-209/10 Post Danmark [2012], and has been summarized for Art 102 offenses in the EU Guidance Paper on Enforcement Priorities in applying Art 82, par 30.

[53] These formulations are not exactly the same, but scholars have noted that they are to be interpreted similarly.

[54] In particular, the "consumer welfare" in Art 102 and "fair share" in Art 101 are interpreted similarly.

is clearest when the factors for effects are clear on one end of the spectrum, and when they are implausible on the other end of the spectrum. Similarly, the threshold for market power is also not clear, especially for intermediate levels. As an example in a merger case, the GC in *CK Telecoms*[55] laid out conditions to establish unilateral effects, *absent dominance*, in the context of EU merger control. The GC held that the Commission would need to show that the transaction reduces the incentives to compete of all firms on the relevant market and an increase in attendant market power. In addition to market shares, an increase in market power can be established firms' closeness of competition or rivals' ability to expand capacity in response to a deterioration of the conditions of competition. I illustrate these grey areas of competition law below, and it is perhaps this indeterminacy creates risk aversion from an enforcement point of view which causes them to select by-object cases disproportionately.

Figure 3: Areas of Indeterminacy in EU Competition Law



The indeterminacy is perhaps best highlighted by conflicting lines in the case law. Colomo (2016) argues that It is submitted that, where there are two conflicting lines of case law, it is sensible to choose the interpretation of Article 102 TFEU that best captures the lessons of experience and economic analysis, as per the guidance in *Cartes Bancares*.[56] He argues that conflicts between older cases like Hoffmann-La Roche (on exclusive dealing) and Tetra Pak II (on tying) and newer cases such as Delimitis (on exclusive dealing) and Tetra Laval (on tying) reflect conflicting views about the practices grounded on "a more accurate understanding of the instances in which they are likely to have anticompetitive effects and of the reasons why firms (including dominant firms) resort to them." This "learning over time" argument is common to both the US and EU jurisprudences, and is part of the flexibility of competition law.

Summary of the Differences

If the Philippines will adopt either framework, it would be imperative to understand each.

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[55] Case T-399/16 *CK Telecoms UK Investments Ltd v Commission*
[56] Op cit. n. 29

This comparison exercise is useful in so far as to understand how *rule of reason/per se* vs *effects/object* works in the jurisdictions that have developed the concepts. This section will summarize the points of commonality and differences between the two.

Given developments in US Jurisprudence on the shrinking scope of *per se,* it is immediately apparent that *object* is the appropriate inter-jurisdictional comparison. In the Philippines, *per se* is baked into the law, but its interpretation will mirror that of its origin country. To a certain extent, object and per se are fairly similar. Both would have a presumption of negative consumer welfare effects, but in many cases, the presumption can be overturned if there is evidence of no negative welfare effects, or if there is an objective necessity associated with it.

In the general case where the *rule of reason* or *effects* are relevant, the theories of harm are different when evidence of effects is required. The US is concerned about a large increase or maintenance of market power that would negatively affect consumer welfare. A focus on consumer welfare places a premium on actual prices, output, and quality. It is only if these are not possible, then other indictors of harm through market power measurement are used. The EU is concerned with abuse of market power which will likely lead to a disincentive to compete. The EU is interested in actual effects, potential effects, and direct evidence which sheds light on firm's incentives to compete.

There are differences regarding the burden of efficiency justifications. In the US, the defendants are responsible for explaining an efficiency directly related to the conduct. Once an efficiency is accepted, the plaintiffs would have to prove there is a less restrictive alternative. Recent supreme court decisions have cast doubt over this traditional interpretation of rule of reason, which makes the framework tilt more towards defendants. In the EU, defendants have a higher burden on their efficiency claims, based on Art 101(3).

The two systems feature different burden shifting. Both start with the plaintiffs having the burden of showing anticompetitive effects, and defendants proving efficiency justifications. However, the burden on showing a less restrictive alternative falls to the plaintiffs in the US, while this is the defendant's burden in the EU.

The gap between the two jurisdictions in their legal frameworks is least in merger review. In both the EU and US both effects are prospective, more focused on price and output. Both unilateral incentives to compete and effects on consumer welfare would converge on these market variables.[57] Both accept "merger-specific" efficiencies, which means that the merger is necessary to make these efficiencies occur.[58] Both would be more likely to end up in balancing through the introduction of structural or behavioral remedies.

The Philippines is in a different situation than the two leading lights of competition policy. Unlike the US and the EU, the Philippines' Commission is a quasijudicial body and most of the burden shifting is expected to occur within the processes of the processes themselves before the Philippine judiciary will get to weigh in. From the Philippines' experiences so far, there seems to be a focus on including efficiency considerations from the start, based on a reading of PCA's Section 26. Interestingly, Section 26 is an outline of the balancing discussed here, but not burden shifting; hence a reading that efficiency concerns are not the sole responsibility of the defendants. I would push back against this reading. First, while balance shifting is not explicitly indicated here, Section 21 for mergers indicates clearly that the burden should mainly be with the defendants, and in the interest of aligning the different types of competition law infringements under a common framework, such a burden should also be mainly placed on defends for other competition enforcement cases. Second, I would argue that Section 26 is about balancing along, and the burden shifting process can be a separate decision made by the commission after a careful consideration of best practices.

[57] The US Clayton Act in Section 7 prohibits mergers that "substantially lessen competition", a phrase which is not present in the EU treaty, but whose spirit is reflected in the concepts of *object* and *effect*.
[58] OECD (2012)

Third, I would suggest that a well elucidated set of prioritizations by the Commission would be a natural way to incorporate efficiencies into the investigation. As explained in the text, the EU system incorporates efficiency concerns as part of a screen for cases to take up. The EU system can be summarized as setting priority is be based on (1) clearest case for anti-competitive effects, (2) the strongest anti-competitive effects, and (3) how least likely that efficiency considerations are operative. In a sense, although indirectly, such an approach is adopted in the US. From Carrier (2009), during this phase in US enforcement, the fact that courts do not do much balancing can be due to the fact that there is no need to because the cases that have reach the federal bench are selected to be the clearest, the strongest cases, or the cases with the weakest efficiency justifications. Such a prioritization will ultimately make balancing much easier for the Commission as well.

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