Finding the appropriate legal test in EU competition law

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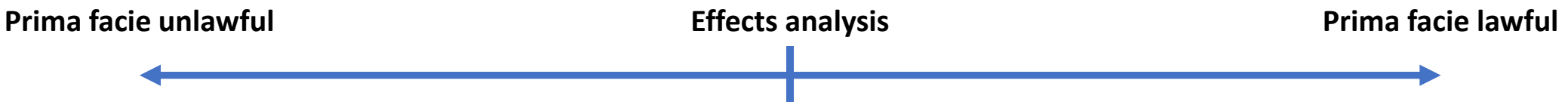
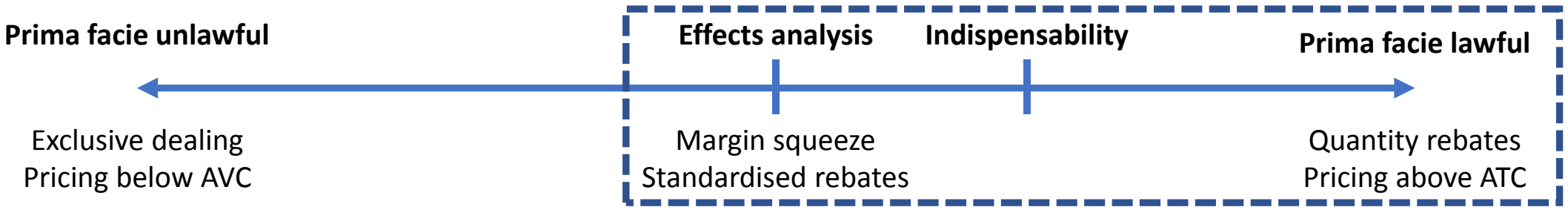
1st Ithaca Competition Summit, 23-24 August 2018

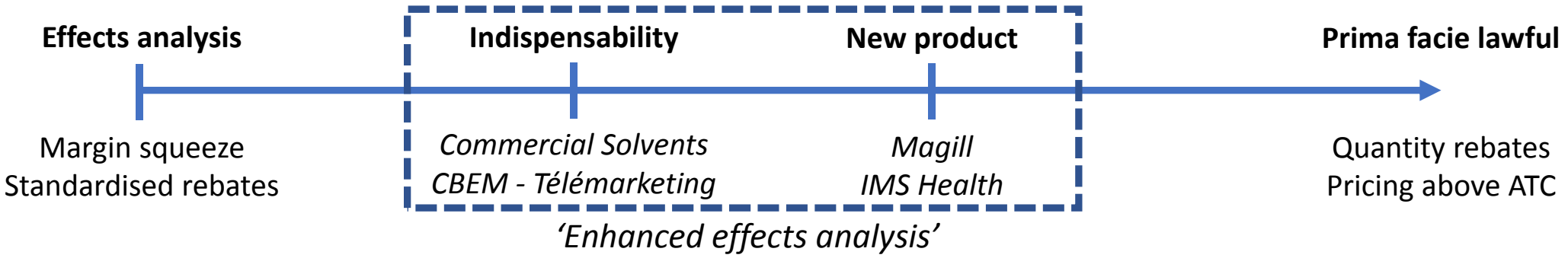
The spectrum of legal tests



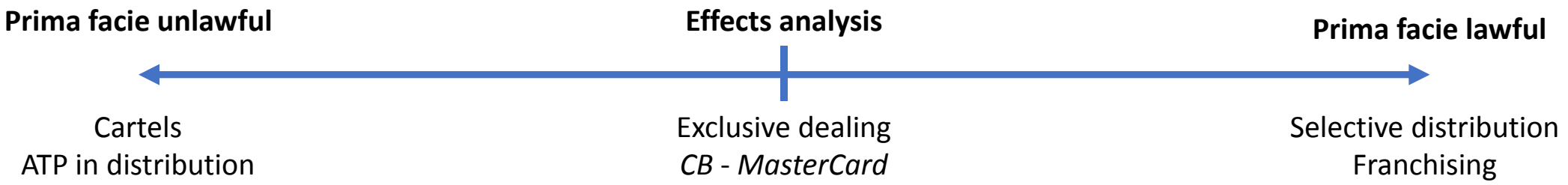
The spectrum of legal tests: Article 102 TFEU



The spectrum of legal tests: Article 102 TFEU



The spectrum of legal tests: Article 101 TFEU



The quest for the appropriate legal test

- **What?** The point of the paper is twofold:
  - Explain why practices are placed at one point or other of the spectrum:
    - Why are some practices prima facie lawful/unlawful?
    - When is an enhanced effects analysis (e.g. indispensability) required?
  - Show why and how the presumptions enshrined in *Intel* and *Murphy* operate in practice
    - Why are some practices deemed (in)capable of restricting competition?
    - What does the rebuttal of the presumption involve in practice?

The quest for the appropriate legal test

- **Why?** The paper could contribute to ongoing debates in three ways:
  - The definition of the legal test is a crucial step to ensure that the law is clear and predictable
  - The definition of the legal test cannot simply be a matter of arbitrary labelling ('words are magical'):
    - The legal test should not depend on how a practice is labelled, but on the nature of the practice in its economic and legal context
    - Arbitrary labelling of practices could lead to inconsistency in the system (like practices would not be treated alike)
  - There is not a clear precedent for some recent practices (or perhaps more than one precedent seems relevant)

The quest for the appropriate legal test

Is a pay-for-delay agreement prima facie unlawful when the underlying patent is presumptively valid?

Under what conditions is a vertically-integrated dominant firm required to deal with rivals on non-discriminatory terms and conditions?

Under what conditions is it unlawful for a dominant firm to attach a non-compete obligation to the licensing of its technology?

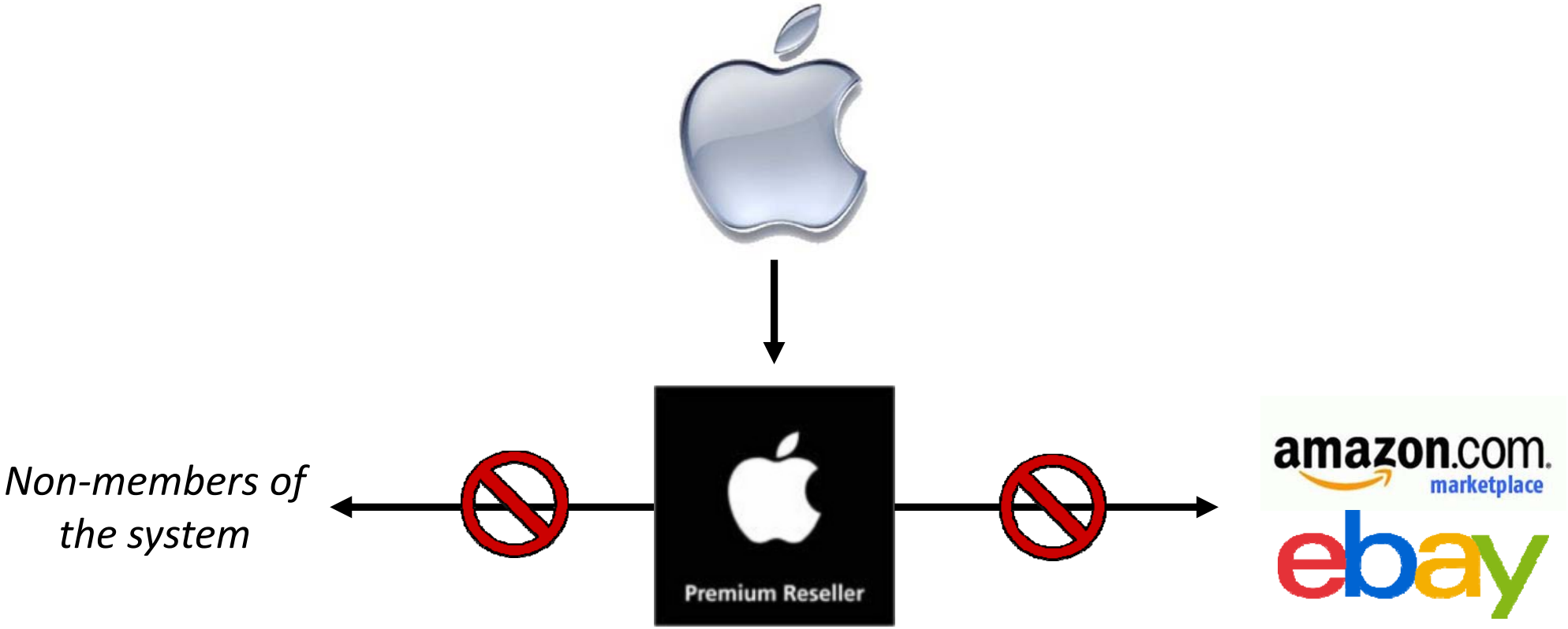
Prima facie unlawfulness

- Practices are considered to be prima facie unlawful where:
  - They are deemed not to serve any plausible purpose other than the restriction of competition (i.e. the object is anticompetitive)
  - They are deemed capable of having restrictive effects on competition (effects are presumed and need not be established case-by-case)

Prima facie lawfulness

- Practices are deemed prima facie lawful where they are deemed incapable of having restrictive effects on competition. Why?
  - **Counterfactual**: the practice does not restrict competition that would have existed in its absence (e.g. franchising, selective distribution)
  - **Attributability**: any effects on the market are attributable to the superior efficiency of the firm (e.g. pricing above ATC)

Prima facie lawfulness



Prima facie lawfulness

‘133. In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market […].

134. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation […]’.

Case C-413/14 P, *Intel v Commission*

Prima facie lawfulness

Firms may raise arguments relating to the counterfactual and/or attributability across the board, even concerning practices that are prima facie unlawful (e.g. *Intel* and *Murphy*)

Prima facie lawfulness

‘143. Also, FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object’.

Joined Cases C-403/08 and C-429/08, *Murphy*

Effects analysis

- When are practices subject to an **enhanced effects analysis**, as opposed to an effects analysis (e.g. *Bronner* vs *TeliaSonera*)?
  - The remedy in enhanced effects cases leads to proactive enforcement (obligation to do), as opposed to reactive enforcement (obligation not to do)
    - It may be, for instance, an obligation to start licensing an intellectual property right, or an obligation to deal on regulated terms and conditions (e.g. *Bronner* and *Magill*)
    - It may also relate to the decision of whether to vertically integrate or to resort to third parties (e.g. *Commercial Solvents* and *CBEM – Télémarketing*)
  - The enhanced effects analysis seems to apply where intervention questions the core of a firm's business strategy (how a firms makes its products)

Effects analysis

- Why are practices subject to an enhanced effects analysis, as opposed to an effects analysis?
  - Counterfactual: it cannot be taken for granted that the practice restricts competition that would otherwise have existed (ex ante incentives)
  - The very difficulty of crafting proactive remedies
  - Unintended consequences of altering firm's business strategies (see e.g. AG Jacobs in *Bronner*)