

Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU

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I. Introduction

Upon receipt of the preliminary reference in *Post Danmark*,¹ a window of opportunity opened up for the European Court of Justice (ECJ), and the Court—sitting in its Grand Chamber formation—could have clung to the hallowed paragraphs of the past but it chose instead to experiment with newer lines of thinking. This choice potentially marks a critical juncture in abuse of dominance law, and it might signal a new partnership between the ECJ and the European Commission whereby these two institutions bring about, in their interpretations of the Treaty and in the Commission's policy initiatives, a bolder, more enlightened analysis of unilateral pricing practices by dominant firms, an analysis guided ultimately by consumer's interest (ie, their interests in terms of price, choice, quality, or innovation). A fundamental jurisprudential shift is by no means a foregone conclusion, and we would not be surprised to see judgments occasionally expressing more traditional habits of mind. Nevertheless, we expect that pockets of resistance in abuse of dominance law are destined ultimately to erode and give way to a more transversal and coherent set of analytical rules to govern unilateral conduct in the European Union, with cascading consequences for the application of abuse

Key Points

- The ECJ's judgment in *Post Danmark A/S v Konkurrencerådet* seems to herald new rigour in the application of Article 102 TFEU to exclusionary pricing practices by dominant firms.
- The judgment clarifies that the core criterion by which to judge exclusionary conduct under Article 102 is its actual or likely effect on competition, and thereby on consumers.
- The judgment also signals a decision on the part of the ECJ to embrace fundamental concepts advocated in the Commission's Guidance Paper on exclusionary conduct under Article 102, and in doing so contributes to enhanced legal certainty.

of dominance law in the EU Member States. No competition law system will ever attain perfection, but we expect that the developments we report here will contribute to more finely tuned antitrust enforcement that enhances legal certainty by setting law and policy on a more convergent path.²

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1 Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, judgment of the Court of Justice (Grand Chamber) of 27 March 2012, not yet reported.

2 Attempts to chart a new course for abuse of dominance law in Europe have occasionally been met with scepticism due to a perception (unlike in distribution policy or merger control) that reform efforts had strayed beyond the confines of a rigid jurisprudence. Given this perceived dissonance between older jurisprudence and evolving enforcement policy, the question of how the ECJ would receive the framework and principles described in the Commission's 'Guidance on enforcement

priorities in applying Article 82 EC to exclusionary conduct' has drawn the attention of many, particularly since a positive reception would promote greater legal certainty. See, eg, Ariel Ezrachi, 'The Commission's Guidance on Article 82 EC and the Effects Based Approach—Legal and Practical Challenges', in Ariel Ezrachi (ed.), *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing, 2009), ch. 3, 51–65, especially pp. 60–1 (also pointing to another potential dissonance, this one among national courts if some draw from the Guidance Paper and others do not); Giorgio Monti, 'Article 82 EC: What Future for the Effects-Based Approach?', (2010) 1 *Journal of European Competition Law and Practice* 2, 8. The risk of enduring uncertainty may be exacerbated in the area of Article 102 since the tendency to resolve abuse cases via commitment decisions leaves the ECJ with reduced scope to control the way the Commission handles its cases under that provision. See, eg, Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing, 2010) (point raised in several chapters); Damien Gerard, 'Breaking the EU Antitrust Enforcement Deadlock: Re-Empowering the Courts?', (2011) 36 *European Law Review* 457. This underscores the relative importance of

We begin this article with a summary of the underlying facts, skipping minute details since *Post Danmark* has already been reported and will be familiar to many readers.³ We then consider the impact of the judgment on EU predatory pricing law, on the law of above-cost selective discounting, and on price discrimination. We then devote particular attention to the judgment's broader implications regarding: the concepts of abuse and the objectives of Article 102; the ideas of competition 'on the merits' and a dominant firm's 'special responsibility'; the role of actual effects; the appropriate breadth of application of the 'as efficient competitor' test; and the nature and structure of efficiency arguments in abuse of dominance cases.

II. *Post Danmark*: background facts

In 2003–2004, Post Danmark held a dominant position (somewhat doubtful on the facts, but this was not an issue before the ECJ), within the meaning of Article 102 TFEU, on the fully liberalised market for the distribution of unaddressed mail (ie, brochures, newspapers, etc.) in Denmark.⁴ At the same time, Post Danmark was a legal monopolist in the market for the delivery of addressed letters and parcels not exceeding a certain weight. A universal service obligation required the company to provide those services across Denmark. In order to fulfil its obligations, Post Danmark had a nationwide distribution network, which simultaneously enabled the company to operate on the liberalised market for unaddressed mail.⁵

In the unaddressed mail sector Post Danmark's main challenger was Forbruger-Kontakt (FK). Until 2004, three of FK's major customers were the supermarkets SuperBest, Spar, and Coop. But in late 2003 Post Danmark wooed the three supermarkets away from FK by offering them rates lower than those it charged to its traditional customers. The offer made by Post Danmark to Coop allowed Post Danmark to cover its average incremental costs of delivery but not its total costs.

Having lost customers to Post Danmark, FK complained to the Danish competition authority, the Konkurrencerådet, alleging that Post Danmark had

abused its dominant position through, *inter alia*, the application of targeted price discounts including the below-ATC price in the case of Coop. The Konkurrencerådet found that Post Danmark's pricing practices were indeed abusive within the meaning of Article 102 TFEU, although it also found that the prices charged to Coop could not be characterised as 'predatory' because it was not established that Post Danmark had intended to eliminate competition in the sense of *Akzo v Commission*.⁶

An appeal against the decision of the Konkurrencerådet ultimately made its way to the Danish Supreme Court (the Højesteret), which sought advice from the Court of Justice. As summarised by the ECJ at paragraph 19, the Højesteret wanted to know:

the circumstances . . . in which a policy, pursued by a dominant undertaking, of charging low prices to certain former customers of a competitor must be considered to amount to an exclusionary abuse, contrary to Article [102], and, in particular, whether the finding of such an abuse may be based on the mere fact that the price charged to a single customer by the dominant undertaking is lower than the average total costs attributed to the business activity concerned, but higher than the total incremental costs pertaining to the latter.

III. Implications for the assessment of below-cost pricing: completing the *Akzo* test

In this section we consider how the ECJ's approach in *Post Danmark* can be integrated into predatory pricing law under Article 102. After providing a background discussion on past jurisprudence and relevant cost benchmarks (Section A), we suggest that *Post Danmark* has not expanded the *Akzo* test to maximise the scope for intervention but has rather completed *Akzo*'s framework for the assessment of prices falling below average total cost (Section B). We then consider the extent to which the methodology used in *Post Danmark* is in line with the Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the 'Guidance Paper') (Section C).⁷

preliminary reference cases that present the Court with opportunities to supervise the Commission's activities and policies indirectly.

3 See already Stefano Barazza, 'Post Danmark: The CJEU calls for an effect-based assessment of pricing policies', *Journal of European Competition Law and Policy* (advance access June 2012, doi: 10.1093/jeclap/lps034).

4 The facts of the case are presented in paras 3 to 17 of the ECJ's judgment.

5 The Member States have now *de jure* liberalised the delivery of addressed mail. Sixteen Member States had to do so by December of 2010 and eleven must do so by December 2012. See Directive 2008/6/EC of 20 February 2008 amending Directive 97/67/EC, [2008] OJ L52/3.

6 See Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 72.

7 [2009] OJ C45/7.

A. Relevance of the referred question

More than twenty years ago, in the seminal *Akzo case*,⁸ the ECJ established a two-test rule for the assessment of predatory pricing conduct under Article 102. According to the first test, reminiscent of the standard proposed by Areeda and Turner,⁹ pricing below average variable cost (AVC) is presumptively abusive because ‘a dominant undertaking has no interest in applying such prices except that of eliminating a competitor so as to enable it to subsequently raise its prices by taking advantage of its monopolist position.’¹⁰ The second test is tailored for prices below average total cost (ATC) but above AVC; they are considered abusive only if it is shown that they are part of a plan for eliminating a competitor. The explanation given by the Court in *Akzo* was that ‘such practices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.’¹¹

Akzo’s two predatory pricing tests were reaffirmed in *Tetra Pak II*¹² and *France Télécom*,¹³ which also clarified that ‘a plan to eliminate competition’ and ‘intent to eliminate a competitor’ have the same meaning.¹⁴ The common element of the two *Akzo* tests is that they both build on a cost benchmark rule and either presume intent (in the first test) or require proof of it (in the second test).¹⁵

In *Post Danmark*, it was found in the national proceedings that the behaviour of the incumbent undertaking was not caught by the classical predatory pricing test. First, the lowest price charged by Post Danmark to Coop’s customers was above its average incremental cost. As explained by the referring court, the average incremental costs were considered to be those costs that would disappear in the short or medium term (three to five years) if Post Danmark were to abandon the distribution of unaddressed mail.¹⁶ It follows that these costs included not only the variable cost for the

service in question but also (part of) the necessary fixed costs. Accordingly, the cost benchmark in this case exceeded the lower cost benchmark of the first *Akzo* test (AVC), and exclusionary intent thus could not be presumed. Secondly, although Post Danmark’s prices were below ATC, the second *Akzo* test could not apply because it was not possible in the main proceedings to establish that Post Danmark had the intention to exclude a competitor.

In those circumstances, the national proceedings arguably could have been concluded in favour of Post Danmark even without a referral. However, such a solution might have seemed problematic. First of all, in the Guidance Paper the Commission—although following the rationale of the *Akzo* test—suggests alternative cost benchmarks for assessing predation. Moreover, the Commission’s analysis focuses on proof of anticompetitive effects, whereas proof of intent is not considered mandatory. Since the Guidance Paper commits no one but the Commission to apply this methodology and has no binding effect on national courts, the Højesteret might have wanted reassurance from the ECJ as to the correct approach to be taken in this case. Furthermore, there may well have been some doubt regarding whether the *Akzo* judgment provided exhaustive guidance in relation to exclusionary pricing below average total cost, and whether, if no intent could be established, an acquittal would be inevitable.

In order to understand *Post Danmark*’s implications for the enforcement of Article 102 against below-cost pricing practices, it is necessary to elucidate how the judgment affects or adds to the traditional predatory pricing test; and to what extent the approach adopted by the ECJ is aligned with, and thus validates, the approach of the Commission in its Guidance Paper.

B. An expansion of the *Akzo* test?

In predatory pricing scenarios, a price–cost comparison is crucial, and the ECJ immediately noted that the

⁸ *Akzo* (n 6).

⁹ In an influential article published in 1975, Philip Areeda and Donald Turner proposed a cost-based test for the assessment of predatory pricing which takes as a basis the defendant’s marginal production costs. The logic of the test is that pricing at marginal cost is the profit maximising condition in competitive markets, while pricing below marginal cost implies profit sacrifice, and hence predation. Although they maintained that marginal cost pricing was the economically sound division between acceptable price competition and below-cost predation, they acknowledged the administrative difficulties of ascertaining marginal costs, and opted for a rule based on average variable cost as the best surrogate. See Areeda and Turner, ‘Predatory Pricing and Related Practices Under Section 2 of the Sherman Act’, (1975) 88 Harvard Law Review 697.

¹⁰ *Akzo* (n 6), para. 71.

¹¹ *Ibid.*, para. 72.

¹² Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, on appeal: Case C-333/94 P *Tetra Pak International SA v Commission* (‘*Tetra Pak II*’) [1996] ECR I-5951.

¹³ Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107, on appeal: Case C-202/07 P *France Télécom SA v Commission* [2009] ECR I-2369.

¹⁴ See Case T-340/03 *France Télécom* (n 13), para. 197 and Case T-83/91 *Tetra Pak* (n 12), para. 151.

¹⁵ Case T-340/03 *France Télécom* (n 13), paras 130, 197. See also the Opinion of Advocate General Colomer in *Tetra Pak II* (n 120, para. 74). In EU law, ‘recoupment’ is not a necessary condition of predatory pricing, although if recoupment is established it may support the finding of a plan to eliminate competitors and may be relied on to refute economic justifications for pricing below AVC.

¹⁶ Para. 31 of the judgment.

question submitted by the Højesteret did not refer to the concept of ‘variable costs’ found in *Akzo* (and its progeny) as a lower threshold but referred, rather, to ‘incremental costs.’ This latter concept had not been used in the jurisprudence on predation, but it is certainly familiar from the margin squeeze cases that the Union Courts have decided.¹⁷ Moreover, as both the Danish court and Advocate General Mengozzi noted, the concept had already been used by the Commission to assess predatory pricing in *Deutsche Post*.¹⁸ In that case, the German postal incumbent had abused its dominant position by using revenues from its profitable letter-post monopoly to finance a strategy of below-cost selling in the liberalised commercial parcel market. The Commission found that the revenues generated in the latter market did not cover the service-specific incremental costs and therefore constituted predatory pricing. Incremental costs were defined as variable and fixed costs arising solely from the provision of the service in question—which depend on the quantity supplied and which would disappear if the service were discontinued.

Using incremental cost as a benchmark is appropriate in particular where an industry is characterised with high fixed costs and very low variable costs. In such an industry, the AVC benchmark may become meaningless and, if relied on, could result in erroneous acquittals.¹⁹ In addition, in his Opinion, Advocate General Mengozzi gave reasons as to why incremental costs can be a preferable benchmark in the assessment of the pricing strategy of a dominant undertaking entrusted with a task of general economic interest (eg, universal service).²⁰

In *Post Danmark*, the ECJ noted that, in the underlying national proceedings, the Danish competition authority had included in its definition of incremental costs not only those fixed and variable costs attributable solely to the activity of distributing unaddressed mail but also elements described as ‘common variable costs’, ‘75% of the attributable common costs

of logistical capacity’, and ‘25% of non-attributable common costs’.²¹ This approach to calculating incremental cost is puzzling, as incremental costs by definition do not include any portion of common costs. From the judgment it is also difficult to understand the rationale for defining average total cost as incremental cost, to which was added only an estimate of the common costs connected to activities *other than* the universal service obligation but not those connected to the universal service obligation.²² However, since in preliminary rulings the ECJ in principle only gives guidance on the interpretation of the Treaty without ruling on the facts of the case, it did not comment on the correctness of the method used for calculating costs, and simply concluded that, ‘[i]n the specific circumstances of the case in the main proceedings, it must be considered that such a method of attribution would seem to seek to identify the great bulk of the costs attributable to the activity of distributing unaddressed mail.’²³

The ECJ observed that the price charged by Post Danmark to Coop did not cover its total costs. In this particular case (and in view of the particular method of calculation), this meant that the price did not cover the common costs deriving from activities other than the universal service (as it appears that the common costs shared with the universal service were already included, rightly or wrongly, in the incremental costs).

The ECJ then concluded that, ‘to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.’²⁴ However, since the price was below the thus-calculated average total cost, the ECJ did not exclude the possibility that such a price might constitute an abuse if the national court could establish that it produced anticompetitive effects, that is, actual or likely exclusionary effect to the

17 Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477, on appeal: C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-9555; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527.

18 Case COMP/35.141—*Deutsche Post AG*, [2001] OJ L125/27.

19 See Notice on the Application of the competition rules to Access Agreements [1998] OJ C265/2, paras 113–114.

20 At paras 34–35 of the Opinion, Mengozzi states: ‘A comparison of prices with the variable costs of a dominant undertaking entrusted with a task of general economic interest (public service or universal service) proves to be inappropriate. On the one hand, it could entail an overestimate of losses because the undertaking’s task of general economic interest entails higher costs than those of its competitors for the part of its business operations accounted for in the market open to competition. Conversely, to take the variable costs of the dominant

undertaking as the only criterion could also lead to an overestimate of its costs if it operates with high fixed costs (for example, the costs of utilisation of its network) and small variable costs. In those circumstances, it appears appropriate to take into account a different cost criterion, namely incremental costs, which take account of the fixed costs and variable costs of the specific operations in the market which is open to competition.’ This argument can validly apply to any multiproduct firm which has common costs, ie, costs that cannot be allocated to any single product.

21 Para. 33 of the judgment.

22 Para. 31 of the judgment.

23 Para. 34 of the judgment (emphasis added).

24 Para. 38 of the judgment.

detriment of competition and therefore to consumers' interests.²⁵

Does this ruling alter the classical predatory pricing test? In our view, nothing in the ruling suggests that the *Akzo* two-test framework has been superseded. In *Post Danmark*, the ECJ only considered the circumstances in which below-cost pricing may be abusive even if the conditions for finding predatory pricing as envisaged in *Akzo* are not satisfied.²⁶

We believe that the important message of the judgment is that pricing above average incremental costs is generally not capable of excluding equally efficient competitors and that such a pricing practice, as a general rule would be outside the scope of Article 102. Although in this particular case, the incremental cost was the lower benchmark (the higher being average total cost), the ECJ did not hold that the incremental cost benchmark replaces average variable cost in the *Akzo* test and that pricing below it would be presumed abusive.²⁷ In our view, such an interpretation would be inappropriate because it would make the incremental cost benchmark a very rigid threshold, below which an abuse is presumed and above which equally efficient competitors can as a general rule compete.

In addition, from the ruling it follows that, contrary to the general rule, in certain circumstances pricing above incremental cost but below ATC can become abusive if there are actual or likely anticompetitive effects that harm competition and consumers. As we don't find indications that the approach in *Akzo* has been overruled, we believe that, where the price is between ATC and average incremental cost, an abuse can be established if intent is shown. Proof of adverse effects becomes an alternative to the condition of intent. We note that the judgment does not expressly deal with the question of whether an anticompetitive foreclosure effect can substitute for intent where the pricing is between average total costs and average variable costs (since AVC was not a relevant benchmark in this case). In our view, since the ECJ suggests that

anticompetitive effects may be used as an alternative to intent where the price falls between ATC and 'incremental cost', there is no reason why the same rule should not apply if the price is even lower than average incremental cost (ie, as low as AVC). It would make no economic sense, nor would it be good for competition, if prices as low as AVC—if actual or likely negative effects are shown—could not be sanctioned simply because there is no evidence of exclusionary intent. We therefore consider that, although the ECJ did not say so explicitly in its judgment, on a proper construction *Post Danmark* implies that proof of effects can be adduced as a substitute for proof of intent in the scenario envisaged in *Akzo* where a dominant firm's price is between AVC and ATC.

To that extent, *Post Danmark* extends the grounds for intervention against below-cost pricing, effectively completing a framework which *Akzo* had left unfinished. However, such an expansion is more apparent than real. This is because the factors that are relevant for establishing exclusionary intent will often also be relevant for establishing anticompetitive effects. For instance, continuity, duration and scale of the incurred losses,²⁸ or targeting of particularly important customers,²⁹ which have been regarded in the jurisprudence as factors pointing to eliminatory intent, may also be relevant for establishing anticompetitive effects. Moreover, the Union Courts have held that proof of intent requires 'a whole series of important and convergent factors'³⁰ to be established, but a similar requirement applies with regard to proving effects.³¹ In this regard, it is important that in *Post Danmark* the ECJ implicitly distanced itself from one particular aspect of *Akzo*—specifically, the suggestion that the mere selectivity of the price reduction could be an indication of intent.³² In stating that a mere selective price reduction does not make pricing below ATC abusive, the ECJ also makes clear that intent cannot be elicited from such behaviour alone. In view of the above, adding the requirement of proof of anticompetitive effects does not necessarily

25 Para. 39–40.

26 Unlike the Advocate General, who considered that exclusionary intent must be established if a price is to be qualified as predatory (see paras 30–40 of his Opinion), the ECJ did not expressly take a position on this point. Apart from the fact that imposing such a condition would diverge from the practice in various jurisdictions (see ICN Report on Predatory pricing, 7th Annual ICN Conference, Kyoto, April 2008, <<http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf>>), it would be unwise to make intent a decisive factor, as the core of the inquiry should be whether a temporary application of particularly low prices induces the exit of competitors, deters entry or disciplines rivals into accepting a small market share with a view to improving the predator's long-run profitability.

27 The Advocate General seems to take the position, relying primarily on the *Deutsche Post* decision, that average incremental cost is a surrogate

for average variable cost and that, as a consequence, pricing below LRAIC would constitute an abuse. See paras 38–39 of the Opinion.

28 See *Tetra Pak II* (n 120), para. 151.

29 See *AKZO* (n 6), paras 110 and 114.

30 *Tetra Pak II* (n 12), paras 151 and 190.

31 The Court's gradual turn to an effects-based approach is marked by an increasing demand for the assessment of all the circumstances in which the examined conduct takes place. See *Post Danmark*, para. 26; Case C-280/08 P *Deutsche Telekom* (n 17), para. 175; Case C-549/10 P *Tomra and Others v Commission*, judgment of 19 April 2012, not yet reported, para. 43.

32 For a critical analysis of this aspect of *Akzo*, see para. 64 of the Advocate General's Opinion.

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make the predatory pricing test harsher for dominant undertakings. There would undoubtedly be a difference between a test based on intent and a test based on effects if intent could be inferred only from internal documents (ie, from direct evidence).³³ For proof of an effect, documentary evidence alone would not be sufficient unless it is further shown that the strategy is likely to be successful.³⁴ However, it is submitted that in EU competition law practice, direct evidence of intent normally will not by itself suffice, as in practice ‘converging factors’, ie, corroborative evidence, is also examined. Although in *France Télécom* some statements of the Union Courts suggested that documents originating from managers of the company could suffice to prove intent,³⁵ in its decisional practice (and in *France Télécom* itself) the Commission has always used internal documents as one among a variety of factors indicating intent. Even if we assume that the Courts give particular weight to direct evidence, this does not change our conclusion that adding anticompetitive effects as an alternative to the intent-based test does not necessarily relax the original predatory pricing test and leave more scope for intervention.

On the contrary, as proving likely effects calls for an in-depth analysis of the evidence, the ECJ’s emphasis on effects is likely to reduce enforcement errors—both false acquittals and false convictions. One may therefore expect that the adoption of an effects-based standard as an alternative approach will have a positive spillover effect on the intent-based predatory pricing test and possibly lead to convergence between the two approaches, to the point where internal documents are used to support the conclusion of likely anticompetitive foreclosure effects. Such an interpretation could possibly find support in the suggestion made by the ECJ in *Tomra* that ‘*the existence of any anti-competitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused*’, and the Commission is under no obligation to establish the existence of such intent in order to show that Article 102 applies.³⁶

C. Is the test in *Post Danmark* aligned with the Commission’s Guidance Paper?

For the purpose of deciding whether the ECJ’s approach is aligned with the Commission’s Guidance Paper, it is useful to first outline the approach to predatory pricing in the Paper.

In line with *Akzo*, the Commission relies on two cost benchmarks. The lower benchmark is average avoidable cost (AAC), which reflects the average incremental costs incurred in the period under examination. Pricing below AAC is a clear indication that the undertaking is sacrificing profit and hence that an equally efficient competitor will be unable to compete. Since profit sacrifice cannot be excluded when the price is above AAC, the Commission suggests, as an upper cost benchmark, average long-run incremental cost (LRAIC), which represents the average of all the (variable and fixed) costs that an undertaking incurs to produce a particular product. LRAIC is the same as ATC in the case of single product undertakings, but it is below ATC in a case of multiproduct undertakings with economies of scope.³⁷ Where the price is above AAC but below LRAIC, the Commission examines additional factors indicating whether the practice will lead to the actual or likely foreclosure of equally efficient competitors. Where prices are above LRAIC, competitors as efficient as the dominant undertaking will normally be able to compete, and thus no intervention would be warranted. However, if a multiproduct undertaking has economies of scope and if its common costs are significant,³⁸ those common costs will be taken into account when assessing whether the conduct might foreclose an equally efficient competitor.³⁹ The reason for the preference for ATC in such scenarios is that, in the case of significant common costs, if the dominant undertaking releases one of its products from the burden of the common costs (thereby burdening another of its products), an equally efficient single product rival will have difficulties competing with the incumbent. A similar position was expressed by the Advocate General.⁴⁰

33 On proving intent through direct and indirect evidence in various jurisdictions, see ICN Report on Predatory pricing (n 26).

34 As para. 20 of the Guidance Paper points out, direct evidence may be helpful in interpreting the dominant undertaking’s conduct.

35 Case T-340/03 *France Télécom* (n 13), paras 199–215; on appeal, Case C-202/07 P *France Télécom*, para. 98.

36 See *Tomra* (n 31), paras 19–21 (emphasis added). The ECJ made this clarification in the context of its assessment of rebates and exclusive dealing. However, the statement appears to be of a broader nature, and we believe that the Court intended to provide guidance on the relevance of intent in the assessment of exclusionary abuses generally.

37 Guidance Paper, footnote 19. Similarly, see ICN Unilateral Conduct Working Group (ICN UCWG), ‘Predatory Pricing Analysis’ (April 2012), <<http://www.internationalcompetitionnetwork.org/uploads/2011-2012/icn%20ucwg%20predatory%20pricing%20chapter%204-2-to%20sg.pdf>>, para. 58.

38 Any costs that could have been avoided by not producing a particular product or range are not considered to be common costs.

39 Guidance Paper, footnote 18.

40 See paras 111–112 of his Opinion.

625 Comparing the approach in the Guidance Paper
with the judgment in *Post Danmark*, it appears that the
ECJ and the Commission are in agreement on a
number of issues: pricing above LRAIC is in general
not capable of excluding equally efficient competitors;⁴¹
630 where there are significant common costs, as in the
present case, ATC is still the more appropriate cost
benchmark; and in the latter scenario, proof of antic-
ompetitive effects is relevant.

635 Putting aside the unusual method of calculating in-
cremental and total costs in the national proceedings,
one difference appears to be that, according to the
Commission, showing that equally efficient competitors
can be foreclosed is part of showing an anticompetitive
foreclosure effect to the detriment of consumers. In
640 other words, if the conduct is not capable of excluding
equally efficient competitors, establishing an anticom-
petitive foreclosure effect is unlikely. On the other
hand, the ECJ's formulation in paragraphs 38 and 39 of
the judgment appears to suggest that proof of effects
645 might become necessary even if on the basis of the
cost–price comparison it can be concluded that an
equally efficient competitor can compete. In our view,
such an interpretation is difficult to reconcile with the
rest of the judgment, and as we endeavour to show
below (in Section VI.A), it is not the purpose of Article
650 102 to protect less efficient competitors. In such cir-
cumstances, considering effects after it has already been
concluded that equally efficient competitors would be
able to compete is a futile exercise. We therefore
655 suspect that the ECJ intended, first of all, to give
general instructions by saying that a price above
average incremental cost is in most situations unobjec-
tionable, since as a general rule equally efficient rivals
can compete against such a price; but the Court also
660 wanted to indicate that, where there is uncertainty as
to whether there are other important relevant common
costs, ATC becomes a significant cost measure. And in
order to establish that equally efficient competitors
could be excluded in such circumstances, anticompeti-
665 tive effects should be established. Such an interpre-
tation seems possible in the light of the operative part
of the judgment, which indicates that likely negative
effects must be established in order to ascertain
whether the practice is detrimental to competition and
670 consumers. We therefore conclude that an evaluation

of effects, as meant by the ECJ in this context, does not
supplement a price–cost analysis which has already
indicated that equally efficient competitors would be
680 excluded; rather, the effects of the practice need to be
established for the purpose of drawing a conclusion
that the pricing in question (above LRAIC but below
ATC) can lead to foreclosure of equally efficient com-
petitors. If this interpretation is correct, we may con-
685 clude that, with its judgment in *Post Danmark*, the ECJ
indirectly validates the Commission's approach to
predatory pricing as set out in the Guidance Paper.

IV. Selective above-cost pricing

690 In addition to ruling on selective below-cost pricing,
the Court of Justice in a tantalising obiter dictum
expressed its view regarding the legality of selective
above-cost pricing. The Court stated that the prices
offered by Post Danmark to Spar and SuperBest (al-
695 though they were lower than the prices Post Danmark
offered to its regular customers) exceeded Post
Danmark's average total cost and that, '*in those cir-
cumstances, it cannot be concluded that such prices have
anticompetitive effects*'.⁴²

700 The question that leaps to mind when reading this
statement is whether the Court meant that selective
above-cost pricing is as a sweeping principle unobjec-
tionable, or whether the Court meant to confine its
remark to the particular circumstances of the case. If
705 the first proposition is correct, one would have to con-
clude that *Compagnie maritime belge* and *Irish Sugar*—
cases in which above-cost price cuts were found
abusive in rather exceptional circumstances—are no
longer good law. The second proposition, on the other
710 hand, implies that the Court was offering no comment
as to the rulings in those earlier cases because, in light
of their distinguishable facts, they had no bearing on
Post Danmark.

715 Advocate General Mengozzi expressed support for
the latter proposition. After an in-depth analysis of
Compagnie maritime belge and *Irish Sugar*, he con-
cluded that these judgments were only '*marginally rele-
vant*' to the instant case.⁴³ The principal distinguishing
720 factors seemed to be the 'superdominant' market posi-
tions of the incumbents in those earlier cases; the in-
tention to drive out competitors, evidenced not just by

41 In *Post Danmark*, the incremental costs were said to be those costs
destined to disappear in the short or medium term (three to five years)
but it was not specified whether these costs were short- or long-run
incremental costs. However, the absence of qualification does not
necessarily affect the argument made above. Even if the ECJ meant that
675 short-run incremental costs are not capable of excluding equally efficient

competitors, the same can be said *per argumentum a fortiori* for pricing
above LRAIC.

42 Para. 36.

43 See para. 94 of the Advocate General's Opinion in *Post Danmark*.

the price cuts but by internal documents; and the fact that in these earlier cases the selective discounts formed part of a series of other abusive practices.⁴⁴ In light of those considerations, the Advocate General concluded that, where the unusual features of *Compagnie maritime belge* or *Irish Sugar* are absent, as in the instant case, it is appropriate to revert to the approach in *Akzo*, where the ECJ took the dominant firm's own average total costs (ATC) into account as a benchmark for the assessment of whether the price was predatory or not.⁴⁵ The Advocate General then quickly disposed of scenarios of above-ATC pricing, recommending a bright-line rule of legality (outside the special circumstances in the above cases) due to the fact that above-ATC pricing will rarely if ever cause an equally efficient rival to exit the market.⁴⁶

However, the ECJ did not refer to *Compagnie maritime belge* or *Irish Sugar*. One could argue that the Court agreed that these cases were of marginal relevance and thus did not feel the need even to mention them (though one might have expected at least a reference to the Advocate General's Opinion). From a different point of view, it could be argued that, in view of the in-depth analysis of the Advocate General, the Court's silence may not be an insignificant omission, and that its intention was to indicate, more absolutely, that selective above-cost pricing cannot be an abuse irrespective of the additional factual circumstances surrounding it. On this reading, *Post Danmark* tacitly overrules *Compagnie maritime belge* and *Irish Sugar*.

One should not too lightly draw major conclusions from a terse obiter dictum, especially since the controversy surrounding the economic wisdom of prohibiting selective above-cost pricing has never been resolved (to our satisfaction, at any rate). On the one hand, some commentators point out that a legal rule limiting the liability of dominant firms to below-cost pricing may be underinclusive.⁴⁷ Selective above-cost price cutting can arguably have the *ex ante* effect of deterring new entry by firms that would require time to acquire a

level of efficiency similar to that of the incumbent. Such scenarios would entail negative consequences for long-term consumer welfare.⁴⁸

Similarly, although in the Guidance Paper the Commission adheres to the principle that intervention against low prices is warranted where they threaten an equally efficient competitor, it does not exclude that in some rare circumstances it may be necessary to protect a less efficient competitor who would be able to exercise a constraint on the dominant undertaking and contribute dynamically to effective competition.⁴⁹ This is usually the case where the dominant undertaking enjoys economies of scale but a new entrant has the potential to become equally efficient in the absence of an abusive practice which prevents it from gaining demand-related advantages, such as network and learning effects. In addition, the concept of deliberate sacrifice, which is central to the assessment of predatory pricing practices, is broad enough to include not only situations where the dominant undertaking incurs losses (as a result of below-cost pricing) but also where it forgoes profits,⁵⁰ thereby leaving room for intervention even against above-cost pricing if it would lead to anticompetitive foreclosure effects to the detriment of consumers.

On the other hand, other commentators have opposed intervention against above-cost pricing. For example, Einer Elhauge has forcefully argued, on various grounds, that the certainty of low prices in the near term overwhelms the uncertain prospects of inefficient new entrants creating welfare gains in the future, particularly given the risk that in the meantime they will cause a general decline in productive efficiency.⁵¹ From this perspective, and taking account of administrability problems as well, Elhauge has put a serious question mark over the desirability of a rule restricting selective above-cost price cuts—even if some of his assumptions are contestable, such as his sanguine view that efficient and rational capital markets can be counted on to fund new entry of temporarily inefficient

44 See *ibid.*, paras 86–94. Some of these factors have been identified by various authors. See, eg, John Temple Lang and Robert O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC', (2002) 26 *Fordham International Law Journal* 83, 134–41.

45 See para. 95 of the Opinion.

46 See *ibid.*, paras 97–98.

47 See, eg, Jonathan Baker, 'Predatory Pricing after *Brooke Group*: An Economic Perspective', (1994) 62 *Antitrust Law Journal* 585, 591.

48 See, eg, Aaron Edlin, 'Stopping Above—Cost Predatory Pricing', (2002) 111 *Yale Law Journal* 941; John Kirkwood, 'Controlling above-cost predation: an alternative to *Weyerhaeuser* and *Brooke Group*', (2008) 53 *Antitrust Bulletin* 369. Critics acknowledge that inefficient competitors may exert positive effects on prices. See, eg, RBB Economics, 'Selective Price Cuts and Fidelity Rebates', OFT Economic discussion paper, OFT804 (July 2005), <http://www.oft.gov.uk/shared_of/reports/

[comp_policy/oft804.pdf](#)>, pp. 77–8. Cf. also ICN UCWG, 'Predatory Pricing Analysis' (n 37), paras 23, 31, 69–70, and 127 (mildly sceptical of the wisdom of pursuing above-cost predation).

49 Para. 24 of the Guidance Paper. See also ICN UCWG, *ibid.*, para. 36 (abstaining from overt normative comment).

50 Para. 63 of the Guidance Paper.

51 Einer Elhauge, 'Why Above-Cost Price Cuts to Drive Out Entrants are not Predatory—and the Implications for Defining Costs and Market Power', (2003) 112 *Yale Law Journal* 681. In general agreement with Elhauge's conclusions, and discussing relevant EU case law, see Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006), pp. 274–83; RBB Economics (n 48), pp. 79–82 (discussing theoretical, practical and remedial problems arising from intervention against exclusionary conduct involving above-cost pricing and concluding that such intervention is on balance undesirable).

rivals if they seem apt to develop into efficient players in the future.

While many observers (including us) agree that selective above-cost price cuts may occasionally be harmful, there is no consensus in the literature as to whether antitrust law should embrace rules against above-cost pricing. Nor does there seem to be a consensus, among those favouring such rules, on what their content should be or how they can be administered. It is also doubtful whether the existence of such rules would overall be beneficial for consumers. For instance, although a rule against selective above-cost pricing may prevent consumer harm in certain situations, it may also create a general disincentive to compete on price and/or lead to artificial price umbrellas.⁵² Furthermore, legal uncertainty is an inherent drawback of rules not pegged to relevant cost benchmarks. Finally, it is not clear that the administrative costs occasioned by such rules are justifiable in view of the stylised circumstances in which harm from above-cost price cuts may arise.⁵³

In light of the above, we would not argue on the basis of an obiter dictum that the ECJ entirely closed the door for intervention against selective above-cost price cuts. But we do conclude that the ECJ has at least significantly limited the scope for such intervention. The mere statement that selective price cuts alone cannot have an anticompetitive foreclosure effect (backed up with the later statement that price discrimination is not in itself abusive)⁵⁴ circumscribes the range of exceptional circumstances which have been relied on to render selective price cuts abusive. For instance, it seems unlikely that documents recording intent to exclude or threats to do so would permit a finding that selective price cuts are abusive, as mischievous motives cannot change the nature or welfare effects of a practice incapable of having anticompetitive effects. If a practice cannot in principle have an anticompetitive effect, it cannot have an anticompetitive

object either.⁵⁵ Similarly, it is also difficult to imagine that a practice that does not produce anticompetitive effects could become abusive if undertaken along with other prohibited practices. The only factor highlighted in older jurisprudence of potential relevance for the effects of above-cost price cuts is market power verging on monopoly (superdominance). But even in this scenario we are doubtful that the maintenance of a rule that may inhibit aggressive above-cost price competition is on balance justified.

V. Implications for price discrimination

Another notable clarification provided in *Post Danmark*, also linked to the discussion in the previous section, is that price discrimination cannot of itself constitute an exclusionary abuse under Article 102.⁵⁶ This ruling has subtle but important practical implications. First, by clarifying that price discrimination is not as such abusive, the ECJ precludes any attempt to establish an abuse solely on the ground that a dominant undertaking offers better prices to its own downstream subsidiary to the disadvantage of downstream rivals. Thus, for instance, the ‘as efficient competitor’ test in the case law on margin squeeze practices cannot be circumvented by recourse to an alternative approach based on discriminatory treatment. Secondly, in the past, on several occasions the General Court ruled that granting border rebates or withdrawing rebates from customers who also import competing products constitute abusive discrimination under Article 102.⁵⁷ For instance, in *BPB Industries* the General Court held that a ‘criterion which results in the provision of equivalent services on unequal terms, is in itself anti-competitive by reason of the discriminatory purpose which it pursues and the exclusionary effect which may result from it.’⁵⁸ But in the light of *Post Danmark*, the General Court’s position must be reassessed. It now appears that any

52 See the examples discussed in O’Donoghue and Padilla (n 51), pp. 277–8 (drawing on Elhauge (n 51)).

53 This may also partly explain why the US Supreme Court stays far away from line-drawing, explaining that the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and thus represents competition on the merits, or is beyond the practical ability of a tribunal to control without courting intolerable risks of chilling legitimate price cutting. See *Brooke Group*, 509 U.S. at 223. See also the opinion written by then-Circuit Judge Breyer in *Barry Wright Corp. v ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (above-cost price cuts are generally desirable, especially in concentrated industries; distinguishing good price cuts from bad is difficult; such cuts normally injure only less efficient competitors; and a liability rule encourages private litigation claims and may chill desirable price competition).

54 See the discussion in section V below.

55 It is settled case law that there is no need to ascertain the effects of a practice where its anticompetitive object is established. The reason is

that practices having an anticompetitive object are considered to be by their nature injurious to competition (Case C-209/07 *BIDS* [2008] ECR I-8637, para. 17) or to have sufficiently deleterious effects on competition (Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, para. 8) or to have at least the potential to produce a negative impact on competition (Case C-8/08, *T-Mobile Netherlands and others* [2009] ECR I-4529 para. 31). From this it follows that, if a practice cannot produce (even potentially) negative effects—as the ECJ in *Post Danmark* seems to suggest with regard to selective price cutting above ATC—it cannot have an anticompetitive object either. This is true even if the dominant undertaking concerned has adopted such a practice with the hope that it will exclude rivals.

56 See para. 31 of the judgment.

57 Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969; Case T-65/89 *BPB Industries and British Gypsum Ltd v Commission* [1993] ECR II-39.

58 T-65/89 *BPB Industries v Commission*, *ibid.*, para. 94.

allegation of abuse based on price differentiation must be evaluated only under the principles set out in the ECJ's judgment. Specifically, such a claim must be assessed taking into account the relationship between the prices and costs of the defendant and/or the effects of the practice.

Secondly, in our view the ECJ indirectly revisits the application of Article 102(c), the traditional legal basis for challenging discriminatory practices. In several past cases, the Union Courts suggested that discrimination is inherent in fidelity/loyalty-inducing rebates and, having found that the rebate schemes in question excluded competition contrary to Article 102(b), they also applied Article 102(c) to punish the dominant undertaking concerned for distorting competition between its customers ('secondary line' price discrimination).⁵⁹ In these cases, Article 102(c) has been applied formalistically, with little effects-based analysis.⁶⁰ In our view, although in *Post Danmark* the ECJ was not seized with a question related to secondary line price discrimination,⁶¹ its statement that discrimination is not in itself exclusionary elevates the evidential burden for establishing an infringement under Article 102(c). It appears that considerations of fair treatment or equality would not suffice to justify a prohibition. On the other hand, as argued elsewhere, if Article 102(c) is applied with a vigorous effects-based assessment, it is doubtful that it could be applied in addition to Article 102(b) because scenarios in which the same pricing conduct simultaneously forecloses both the upstream market (where the dominant undertaking operates) and the downstream market (where its customers compete) appear highly improbable.⁶²

VI. Wider implications for exclusionary conduct under Article 102

The value of the judgment in *Post Danmark* goes well beyond the guidance that the ECJ gave the national court in the concrete case. In its reasoning, the ECJ modernised the definition of an exclusionary abuse and

clarified some fundamental concepts underpinning the application of Article 102. More than it has done for many years, the ECJ seems to be stepping forward with bolder statements that reflect, and will be reflected by, the evolving landscape of unilateral conduct control in the EU. In doing so, the ECJ is also giving recognition to the Commission's efforts in the last several years to achieve a more judicious application of Article 102, bringing its interpretation of this provision increasingly into line with the effects-based approach that has already been affirmed in the areas of Article 101 and in merger control.

We address these themes in this last and lengthiest part of the article. The discussion is organised as follows. We begin by considering what *Post Danmark* has to say about fundamental principles (Sections A and B), and we discuss the close attention the Court gave to the actual effects of *Post Danmark*'s price offers (Section C). We then turn to a wider reflection of how the Court's approach could and should be relevant for other areas of exclusionary conduct (Section D). Before concluding the article we also discuss the Court's adoption of a structured framework for evaluating efficiency claims in Article 102 cases (Section E).

A. The objectives of Article 102, the role of consumer harm and the meaning of 'competition on the merits'

In *Post Danmark*, the ECJ began by reaffirming that Article 102 'covers not only practices that directly cause harm to consumers but also practices that cause consumer harm through their impact on competition'.⁶³ Although the Court already said this 40 years ago in *Continental Can*,⁶⁴ the reminder that the prohibition of exclusionary abuse aims ultimately to prevent consumer harm is encouraging after an accumulation of jurisprudence which overlooked the relationship between harm to competitors and harm to competition. The ECJ gave new impetus to this old principle by stating, more directly and expressly than ever before, that Article 102 does not seek to ensure that

59 See Joined Cases 40/73 to 48/73 etc. *Coöperatieve Vereniging Suiker Unie UA v Commission* [1975] ECR 1663; Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461; Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, on appeal: Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331. However, the Courts disentangled discrimination from exclusionary effects in Case 322/81 *Michelin NV v Commission* [1983] ECR 3461, para. 90 and in Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, para. 65.

60 In *British Airways*, Advocate General Kokott even noted that the arguments with respect to the last condition of Article 102(c) ('placing trading partners at a competitive disadvantage') were 'extraordinarily scanty'. Para. 126 of her Opinion.

61 The issue of secondary price discrimination had already been decided in the course of the national proceedings. See para. 14 of the judgment.

62 For a more detailed discussion on price discrimination and the application of Article 102(c), see Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing, 2010), pp. 215–17.

63 Para. 20 of the judgment (emphasis added).

64 In *Continental Can*, the Court held that Article 102 applies not only to practices which directly harm consumers by exploiting them, but also to those detrimental to them through their impact on an 'effective competition structure'. See Case 6/72 *Europemballage Corporation v Commission* [1973] ECR 215, para. 26.

competitors less efficient than the dominant undertaking should remain in the market⁶⁵ and that ‘*not every exclusionary effect is necessarily detrimental to competition*’.⁶⁶ Moreover, the ECJ added new wording to the venerable definition of abuse elaborated in *Hoffmann-La Roche*⁶⁷ which again underlines that a central aim of Article 102 is to protect competition in order to prevent consumer harm. After 40 years of repeating the same definition word for word, the ECJ now states that Article 102 ‘*applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition*’.⁶⁸ This new emphasis makes clear that a proper assessment of the conduct’s impact on competition cannot depend on the narrow question of whether the degree of competition is reduced (or that it would have increased faster but for the contested behaviour); rather, the assessment must consider how the reduction (or the artificial non-growth) of competition harms consumers. The same interpretation follows from the operative part of the judgment, where the ECJ held that, in order to evaluate anticompetitive effects it is necessary to consider whether the pricing practice produces actual or likely exclusionary effects ‘*to the detriment of competition and, thereby, of consumers’ interests*’.⁶⁹

In the same vein, the ECJ provided another useful clarification, attempting for the first time to give content to the notoriously slippery term ‘competition on the merits’:

*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.*⁷⁰

65 *Post Danmark*, para. 21.

66 *Ibid.*, para. 22.

67 *Hoffmann-La Roche* (n 59), para. 91. This definition was repeated in *Akzo*, to which the ECJ referred in para. 24 of *Post Danmark*.

68 *Post Danmark*, para. 24 (emphasis added).

69 We do not venture to predict whether the ECJ will retain its attachment to protecting competition ‘as such’. However, we do see some tension, at least on the margins, between the ECJ’s emphasis in certain judgments on the maintenance of a competitive market structure and the approach taken by the Grand Chamber in *Post Danmark*. Given the Court’s forceful affirmation of the need for a consumer-regarding behavioural standard under Article 102, we think that concerns relating to market structure in future abuse of dominance cases will have to be linked to actual or likely consumer harm.

70 *Post Danmark*, para. 22.

The Court thus, having framed exclusionary conduct control as a form of consumer harm control, provides a criterion by which that control should be exercised. Specifically, consumer interests can be protected by ensuring effective competition between efficient competitors.

There is a striking similarity between: the ECJ’s interpretation of the objectives of Article 102 and of the idea of ‘competition on the merits’; and the Commission’s interpretations in the Guidance Paper.⁷¹ We take this to mean that the ECJ approves of the Commission’s commitment to focus on those types of conduct that are most harmful to consumers and that the Commission’s interventions should be aimed at ensuring that consumers benefit from the efficiency, productivity, and drive to innovate which result from effective competition between undertakings. By the same token, the judgment ratifies the principle that, while foreclosure can certainly be harmful to consumers, it need not be. Since consumer harm is not an inevitable consequence of competitor exclusion, it should be held analytically distinct.⁷² Furthermore, and crucially, as a result of the judgment in *Post Danmark*, this basis for the application of Article 102 in exclusionary conduct cases is not merely a criterion determining the enforcement priorities of the Commission; it is binding law.

B. The relevance of the ‘special responsibility’ of dominant firms

The sometimes infamous concept of special responsibility, formulated for the first time in *Michelin*⁷³ and often invoked thereafter, has remained ambiguous and has caused significant confusion. The core idea is that dominant undertakings—even where they achieved dominance on the basis of superior skill, technology, etc.—may not have the discretion to carry out certain kinds of conduct that non-dominant firms acting unilaterally would be free to pursue. This in itself is merely

71 Compare para. 22 of the judgment, quoted above in the main text, with para. 6 of the Guidance Paper, which states: ‘*The emphasis of the Commission’s enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.*’

72 This theme appears repeatedly in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008).

73 *Michelin I* (n 59), para. 57 (in the context of a discussion not of abuse but of market definition).

a way of understanding the textbook principle that in EU law dominance is perfectly legal but it may not be abused.⁷⁴ Applying a customary gloss, the reason for holding dominant firms to a higher behavioural standard is that, in the presence of dominance, the degree of competition in the relevant market is assumed to be already weakened, and therefore any further interference with ‘undistorted competition’ is likely to eliminate or undermine the degree of rivalry that remains, whereas it is precisely in that scenario (so the thinking goes) that the preservation of residual competitive pressure becomes an overriding imperative.⁷⁵ In practice, the concept of ‘special responsibility’ seems to have become an epithet, sometimes trotted out as a substitute for more searching analysis to justify the abrupt condemnation of a dominant undertaking’s conduct. Traditionally, if the Courts invoked a dominant firm’s special responsibility in their reasoning, one could not expect anything other than a finding of abuse.⁷⁶ This is problematic because the more intensely the doctrine applies, the narrower the margin between the existence of and the abuse of dominance; the preservation of that margin is required by the foundations and structure of Article 102.

However, in *Post Danmark*, apparently for the first time, the ECJ refers to a ‘special responsibility’ without finding or recommending the finding of an abuse. This may indicate the ECJ’s attempt to read this concept in a ‘modern’ light. The clarification that the purpose of Article 102 is not to ensure that inefficient undertakings should remain in the market may be relevant in this regard. One can conclude by implication that the special responsibility does not entail an obligation on dominant undertakings to avoid aggressive pricing simply because it would be liable to exclude less efficient competitors. But what is left of the special responsibility concept? The answer may lie in the Court’s remark that if a dominant position is the legacy of legal monopoly in a now-liberalised field, this should be taken into account when assessing allegedly abusive conduct.⁷⁷ This seems

consistent with the general point that the ‘scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances... which show that competition has been weakened’.⁷⁸ Regrettably, however, the ECJ did not provide explicit guidance as to how this factor (ie, a prior endowment of exclusive rights) is to be weighed.

On one reading, the Court may be limiting the special responsibility concept to particular circumstances, such as where a dominant position is not achieved through superior performance but was rather granted by fiat (or by possible analogy, where it was achieved by anticompetitive means outside the scope of Article 102). This proposition may be supported by the statement that it is in ‘no way the purpose of Article [102] to prevent an undertaking from acquiring, on its own merits, the dominant position on a market’.⁷⁹ In isolation, this remark might make little sense, as Article 102 does not prohibit the acquisition, willful or otherwise, of dominant market power. But it does make sense in conjunction with the statement that, if dominance originates in a legal monopoly, this is a pertinent factor. In the latter case (or perhaps where dominance was acquired through anticompetitive means), the alleged abuse may be subject to closer scrutiny.

Such an interpretation would not be inconsistent with propositions made in the Guidance Paper. In relation to refusal to deal and margin squeeze, the Paper suggests that, where the upstream market position of the dominant firm was developed under the protection of special or exclusive rights or financed by state resources, there are good reasons to deviate from the standard test for refusal to deal, which normally requires proof that the refused input must be indispensable to operate downstream.⁸⁰ As dominance upstream has not been acquired through competition on the merits, there is no need for the special protection provided by the ‘indispensability’ condition because an obligation to supply will not diminish the dominant firm’s incentives to invest.⁸¹ A second

74 As certain commentators have therefore noted, ‘special responsibility’ when properly construed is not a legal doctrine that is constitutive of ‘abuse’; it is a descriptive term that calls attention to the obvious fact that dominant firms are subject to limitations imposed by Article 102. See, eg, Renato Nazzini, *The Foundations of European Union Competition Law: The Objectives and Principles of Article 102* (Oxford University Press, 2011) 174–6. Unfortunately, the term has taken on a life of its own in the popular imagination and occasionally has fuelled interpretations that attribute to ‘special responsibility’ autonomous and ill-defined substantive content.

75 *Hoffmann-La Roche* (n 59), para. 120.

76 Rousseva (n 62), p. 72; Alison Jones and Brenda Sufrin, *EU Competition Law* (4th edn Oxford University Press, 2011) 366.

77 See *Post Danmark*, para. 23. The irony of the Court’s position in *Post Danmark* is that, in *Michelin*, the Court’s point was that the source of dominance (alleged by Michelin to be efficiency) was irrelevant for the purposes of Article 102. This point now seems to have been overruled.

78 See Case C-395/96 P *Compagnie maritime belge transports SA and others v Commission* [2000] ECR I-1365, para. 114. Similarly, see *Tetra Pak II* (n 12), para. 25.

79 *Post Danmark*, para. 21 (emphasis added).

80 See Guidance Paper, para. 82.

81 See *ibid.*

scenario in which the origin of dominance may be relevant involves conduct in newly liberalised sectors where an incumbent enjoys advantages received through state resources, such as infrastructure, an established customer base or network effects. These advantages make it more difficult for new entrants to become as efficient as the dominant undertaking, and may thus have adverse consequences for the interests of consumers.⁸² The advantages themselves would not be contrary to Article 102 but again they might justify stricter scrutiny of the impugned conduct.

Another possible explanation for the Court's statement that the origin of dominance should be taken into account (which is not incompatible with the interpretation described above) could be that the Court envisaged a link between a firm's special responsibility and its degree of market power.⁸³ Former legal monopolists usually hold a substantial market share and may enjoy a range of other advantages, while new entrants may be weak. Such advantages may have to be taken into account when assessing the degree of dominance and its impact on the conduct's effects. This interpretation is supported by the Court's statement in *TeliaSonera* (repeated in *Tomra*) that the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the relevant conduct.⁸⁴ Since the Court envisages Article 102 as a provision designed to prevent negative effects on competition and consumers, and since the degree of dominance has an impact on those effects, the likelihood of establishing negative effects may depend at least in part on the degree of a firm's market power. On this view, it follows that—the stronger the dominant position, the greater the likelihood that a practice will cause harm to consumers and therefore the greater the responsibility of the undertaking not to allow its conduct to cause such harm.

In view of the brevity of the Court's reference to special responsibility in *Post Danmark*, the tentative interpretations suggested above remain to be tested. Whatever the ramifications, it seems that the ECJ may be seeking to curb this traditionally broad notion.

82 See *ibid.*, para. 24.

83 Cf. *Compagnie maritime belge* (n 78), para. 114.

84 *TeliaSonera* (n 17), para. 81; *Tomra* (n 31), para. 39. See also Guidance Paper, para. 20 ('[T]he stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure').

85 See *Post Danmark*, paras 38–40.

86 *Ibid.*, para. 39.

87 On the other hand, it appears from para. 40 that the ECJ genuinely did not intend to predetermine the national court's conclusions with regard to a *prima facie* finding of abuse.

C. Reflections on the role of actual effects

Although the ECJ left it up to the national court to decide whether actual or likely exclusionary effects could be established,⁸⁵ it did not conceal a degree of scepticism about the likelihood of finding such effects in the present case. The ECJ pointed out that FK (Post Danmark's main competitor) had managed not only to stay in the market and maintain its distribution network (despite the volume of sales it had lost to Post Danmark) but also to win back major customers (Coop and Spar) a few years after losing them.⁸⁶ The ECJ did not seem to believe that the contested pricing behaviour had really affected competition in a manner contrary to Article 102.⁸⁷

The Court's comment to the national court about FK's ability to withstand Post Danmark's aggressive pricing may suggest that, when the contested behaviour fails to cause actual negative effects, that is, where competitors stay in the market and/or relatively quickly recapture customers from the dominant undertaking, it may be difficult to demonstrate how the conduct has anticompetitive effects and constitutes an abuse.⁸⁸

However, one should be careful not to overstretch the Court's proposition. It is important to distinguish *Post Danmark* from other scenarios where—even in the absence of actual anticompetitive effects or in the event of expansion of competitors—Article 102 may still apply.

First, the Court's scepticism concerning the likelihood of finding abusive conduct in the present case should not be interpreted as implying that actual effects must always be proved. In *Post Danmark*, the effects of the alleged abuse had already materialised (since FK had already lost a large volume of sales), but the Court seemed unconvinced that competition had been significantly compromised. That scenario should be distinguished from others where the alleged conduct has been implemented but has *not yet* produced effects. If an authority had to wait for unilateral conduct to distort competition in actual fact before intervening, Article 102 would in large measure be deprived of its effectiveness, contrary to the objectives of the Treaty.⁸⁹

88 The Court's emphasis on the relevance of actual effects is here again congruent with the position taken in the Guidance Paper (specifically, para. 20).

89 See paras 68–83 and 125 of Advocate General Kokott's Opinion in *British Airways* (n 59). See also Luc Peepkorn and Ekaterina Rousseva, 'Article 102 TFEU: Exclusive Dealing and Rebates', (2011) 2 *Journal of European Competition Law and Practice* 36; ICN UCWG, 'Predatory Pricing Analysis' (n 37), para. 120.

A further observation is that the facts in *Post Danmark* (where there was no intent to exclude) differ from cases where anticompetitive foreclosure and abuse have been established despite the incidence of new entry or the growth of rivals' market shares.⁹⁰ The reasoning in those cases was that the anticompetitive object and anticompetitive effect are sometimes indistinguishable, and if it is shown that the object of the conduct is to limit competition, then the conduct would be liable to have such an effect.⁹¹ *Post Danmark* also clearly differs from cases where the ECJ has held that, if a dominant firm actually implements a practice whose object is to oust a competitor, the fact that the desired result is not achieved does not preclude the application of Article 102.⁹² Although we have doubts about whether these cases concerned behaviour that was anticompetitive by object, we share the view that, as a matter of principle, if a practice is anticompetitive by object, the apparent absence of actual negative effects on the basis of rivals' entry or expansion should not preclude a *prima facie* finding of abuse. Under Article 101(1), if a practice is anticompetitive by object, negative effects are presumed and can only be justified, if at all, under Article 101(3).⁹³ By analogy, practices that are anticompetitive by object under Article 102 can be justified only on the basis of substantiated efficiency claims or objective justification.⁹⁴ *Post Danmark* clearly did not fall within this 'object' category of conduct.

The second scenario in which new entry or the growth of competitors has not prevented the finding of an abuse concerns conduct on recently liberalised markets.⁹⁵ In such markets, the (slow) growth of competition does not necessarily mean that competition is not distorted relative to the hypothetical absence of the exclusionary behaviour. The rationale appears to be that the incumbent still benefits from distortive advantages deriving from its former legal monopoly. For instance, in *Deutsche Telekom*,⁹⁶ although the price-cost

test indicated that Deutsche Telekom could not cover its long-run incremental cost for its retail services, competitors could still slowly grow. The ECJ pointed out that the small market shares that competitors had acquired in the retail market since liberalisation constituted evidence of the artificially stunted growth of competition in those markets.⁹⁷ *Post Danmark* is also different from this scenario, first because the price-cost test indicated that *Post Danmark* was recovering its incremental costs, and secondly because, on the facts, competition in the market had already had some time to develop; the usual concerns in newly liberalised sectors arguably did not apply. The unaddressed mail market in Denmark had been opened to competition in the prior decade and, given the significant competitive position of its rival FK, the evidence of *Post Danmark's* dominance was not unambiguous.

D. Lingering questions: how universal should the 'as efficient competitor' test be?

As argued above, the *Post Danmark* judgment affirms that a central purpose of Article 102 is to protect consumers—and that the way to do this is to ensure that dominant firms do not behave in a manner that excludes equally efficient competitors. We also saw that the Court instructed the national court to carry out this task by applying an 'as efficient competitor' (or 'AEC') test based on a cost–price comparison and an effects-based analysis. An important remaining question is whether the judgment implies that the AEC test should apply to *all* allegedly exclusionary pricing practices by a dominant firm.

As a preliminary point we recall that the AEC test is a hypothetical exercise in the sense that it attempts to analyse whether a competitor as efficient as the dominant undertaking but without the same broad sales base would be foreclosed from entering or expanding as a result of the contested pricing practice.⁹⁸ The benefits

90 Para. 20 of the Guidance Paper suggests that a slowdown in the decline of the market share of the dominant undertaking may also be an indication of actual foreclosure.

91 See *Michelin II* (n 59), para. 241. See also *France Télécom* (n 12), para. 195.

92 *Compagnie maritime belge* (n 78), para. 149; *Irish Sugar* (n 57), para. 191.

93 This point can be seen in various judgments. See, eg, Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342. Of course, if the scope of the 'object' category, and hence the scope of the presumption, is drawn meticulously so that it is neither underinclusive nor overinclusive, such a presumption of adverse effects can be procedurally rational and efficient. Cf., eg, Jones and Sufrin, *EU Competition Law* (n 76), p. 216.

94 This is the line suggested by the Commission in para. 22 of the Guidance Paper, where it notes that there may be circumstances where it is unnecessary for the Commission to carry out a detailed assessment

before concluding that the conduct in question is likely to result in consumer harm, and that if it appears that the conduct can only raise obstacles to competition and creates no efficiencies, its anticompetitive effect may be inferred.

95 See, eg, *Deutsche Telekom* (n 17). Similarly, in Case IV/D-2/34.780—*Virgin/British Airways*, the concern was that the loyalty discounts granted by the dominant undertaking counteracted the effect of market liberalisation by maintaining the dominant airline's market share at its old levels and by penalising travel agents that diverted some of their customers to relatively new competitors. In this regard, see Commission Press Release IP/99/504 of 14 July 1999.

96 *Deutsche Telekom* (n 17).

97 *Ibid.*, para. 257.

98 See Commission Decision of 13 May 2009 in Case COMP/37.990—*Intel*, para. 1004. An appeal of the decision is pending before the General Court. See Case T-286/09 *Intel Corp. v Commission*, not yet decided.

of the AEC test reside in its consumer-regarding logic, and in the legal certainty it provides insofar as it is pinned down to the cost of the dominant undertaking.⁹⁹ What matters is whether, as a result of the pricing practice in question, the dominant undertaking sells all or part of its production at a price below its costs. It may be that a competitor is in reality significantly more efficient than the dominant undertaking in the sense that its products were produced much more cheaply, and/or if the value of its products exceed those of the dominant undertaking. In that case, the seemingly exclusionary practice may not result in actual exclusion. But this would not suffice to remove the practice from the scope of Article 102 if it is shown that the dominant undertaking's price failed to match its own costs. In such scenarios, the pricing strategy could be still harmful to consumers if it is shown that it had the effect of slowing down the growth of competitors and their ability to exercise effective constraints on the dominant firm.

Coming to the issue of the appropriate breadth of the application of the AEC test, there are several arguments supporting a more general application beyond the specific context of *Post Danmark*. The first argument can be elicited from the language used by the ECJ in its judgment. When giving its answer to the Højesteret, the Court used language which at least seems to indicate that it was contemplating pricing practices in general. As the Court explained:

... Article [102] prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors **considered to be as efficient as it is itself** and strengthening its dominant position by using methods other than those that are part of competition on the merits.¹⁰⁰

This sentence may at least arguably be construed as meaning that the prohibition of exclusionary pricing practices requires a consideration of their effects on equally efficient competitors. By using the words 'among other things', the Court did not intend to limit the 'as efficient' criterion to only some pricing abuses but not others. We read those words as a reference to non price-based conduct, which by its nature is not amenable to that criterion. We make this point because

99 See Case T-336/07 *Telefónica SA and Telefónica de España SA v Commission*, judgment of the General Court of 29 March 2012, not yet reported; *Deutsche Telekom* (n 17).

100 *Post Danmark*, para. 25 (emphasis added).

101 *Ibid.*

102 See also para. 57 of Advocate General Mengozzi's Opinion ('[W]hile the special responsibility of the dominant undertaking has led the Court to state that not all competition by means of price may be regarded as

proponents of a form-based approach might be tempted to interpret this phrase as limiting the implications of the judgment. Such an interpretation seems to be excluded by the explanation immediately following the sentence quoted above. Borrowing language from *Akzo*, the Court stated: 'in that light, not all competition by means of price may be regarded as legitimate'.¹⁰¹ The inference to be drawn from this latter remark is that, in the eyes of the Court, it is generally legitimate for dominant firms to adopt low pricing practices, and the AEC criterion is the most appropriate tool for identifying which low-price strategies may be harmful to competition and consumers.¹⁰²

In addition, the conclusion that the Court intended to link the broader category of allegedly exclusionary pricing practices to the AEC criterion seems consistent with the Court's reference to other case law pertaining to rather different forms of pricing behaviour, such as *Deutsche Telekom*, *Akzo*, and *France Télécom*; it is also consistent with the Court's observation in *Post Danmark* that, 'in order to assess the lawfulness of a low-price policy practised by a dominant undertaking, the Court has made use of criteria based on comparisons of the prices concerned and certain costs incurred by the dominant undertaking, as well as on the latter's strategy'.¹⁰³ Indeed, the jurisprudence of the EU Courts has already embraced the AEC criterion for predatory pricing and margin squeeze.¹⁰⁴ And in *Post Danmark* the Court also recommended the application of the test to selective below-cost pricing which, in the absence of exclusionary intent, could not fit the *Akzo* predatory pricing scenario.

But there remains a commercially important low-pricing practice in relation to which the AEC test has not yet been embraced by the Union Courts, that is, rebate schemes. The application of the test in the context of rebates was suggested by the Commission for the first time in its Guidance Paper and was used notably in the 2009 *Intel* decision.¹⁰⁵ In this decision, the Commission explained that it was not bound by the case law to carry out an 'as efficient competitor' analysis; but it nevertheless voluntarily showed that this analysis confirmed its conclusion that there was an infringement and consumer harm. In the forthcoming *Intel* judgment, the General Court (and later possibly

legitimate, that statement means that such competition is generally authorised, or even recommended, subject to exceptions. Competition by price being generally beneficial, it is not, as a matter of principle, to be prohibited for undertakings with a dominant position on a given market.) (footnote omitted).

103 *Post Danmark*, para. 28.

104 See *Deutsche Telekom* (n 17); *Telefónica* (n 99); *TeliaSonera* (n 17).

105 Cited above (n 98).

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the ECJ) may uphold the Commission's decision on the basis of the case law on rebates, but it may also give indications as to whether it is ready in the future to move away from the traditional jurisprudence.

Until then, however, the status quo is destined to remain unstable. This instability is most evident when the approach embodied in *Post Danmark* is placed side by side with the ECJ's most recent judgment on rebates, *Tomra v Commission*.¹⁰⁶

Tomra was decided by the Third Chamber of the Court, a five-judge panel, and was handed down only a few weeks after the judgment of the Grand Chamber in *Post Danmark*. Two judges participated in both cases.

Whereas in *Post Danmark* the Court had emphasised the AEC criterion, in *Tomra* the ECJ held that the General Court did not commit an error by failing to examine the arguments based on the relationship between *Tomra*'s prices and its costs. Nor did the General Court err by not requiring the Commission to take account of whether the prices charged were lower than the dominant undertaking's long-run average incremental costs. The *Tomra* judgments had already drawn criticism for their inconsistency with the case law on single branding under Articles 101 and 102;¹⁰⁷ the apparent dissonance between *Tomra* and *Post Danmark* with regard to the AEC element is in part due to the absence of any acknowledgement in *Tomra* of the Grand Chamber's judgment in *Post Danmark*. A rebate scheme is certainly a type of low pricing practice and it differs from selective low pricing (and from predatory pricing in general) only in that the low pricing has an effect not on the entire demand of a particular customer, but only as regards that part of the demand for which the customer is willing to switch to an alternative supplier. Although the fact that the discount affects only a part of a customer's demand makes the analysis methodologically complex, it remains unclear why, in assessing rebates—in contrast to the assessment of other forms of selectively low pricing—the question of whether the practice is likely to exclude an equally efficient competitor should be irrelevant.

106 Cited above (n 31).

107 See Graciela Miralles, 'Tomra: Exclusive Dealing and Rebates in the Light (and Shadows) of Dominance—Case T-155/06, *Tomra Systems ASA and Others v. European Commission*', (2011) 2 *European Journal of Risk Regulation* 129 (comparing the General Court's *Tomra* judgment with *Van den Bergh Foods*); Nicolas Petit, 'The Future of the Court of Justice in EU Competition Law: New Role and Responsibilities', <<http://ssrn.com/abstract=2060831>> or <<http://dx.doi.org/10.2139/ssrn.2060831>>, p. 11 (comparing the ECJ's *Tomra* judgment with *Delimitis*).

108 Although the Commission was not legally obliged to carry out an effects-based analysis at the time of the adoption of its decision, it

An almost unavoidable question is thus how to reconcile *Tomra* with *Post Danmark*. In our view, there are two possible interpretations of *Tomra* which allow for a consistent (or at least non-contradictory) reading with *Post Danmark*. The first possibility is that, in *Tomra*, the ECJ held that the AEC test was unnecessary only in this particular case, in view of the fact that the Commission itself at the time of its decision did not apply an AEC test, and that neither the Commission's guidelines nor its practice, nor the jurisprudence on rebates required such analysis at the material time (ie, 2006). The General Court and the ECJ could not simply quash a decision which fully complied with the existing jurisprudence and did even more than the case law required by establishing, in addition, the likely anti-competitive effects of the rebate schemes in question.¹⁰⁸ In this regard, the ECJ explained, in paragraph 81 of *Tomra*, that the Commission's 2009 Guidance Paper (which advocates the application of the AEC test to rebates) could have no relevance for the assessment of an infringement decision taken in 2006.¹⁰⁹ Observers will no doubt ponder the *a contrario* reading of this paragraph, which at a minimum leaves the door open for applying the AEC to cases investigated and decided after the adoption of the Guidance Paper.

The second possible interpretation is that in *Tomra* the ECJ did not rule against the principle that the assessment of rebates should be such as to ensure that the practice constitutes competition on the merits and therefore does not exclude equally efficient competitors; but it simply did not accept that price–cost analysis could be the only way to guarantee this outcome. In this light, it may be that the Court is suggesting that there could be market-related circumstances leading to the conclusion that the practice is likely to exclude equally efficient competitors only on the basis of qualitative evidence without carrying out the price–cost analysis inherent to the AEC test, which in the case of rebates may appear technically and administratively more difficult to execute. Such an interpretation may seem odd from an economic point of view but may be justified for practical reasons, provided that a range of market-specific factors or features characterising the

supplemented its reasoning with an assessment of the likely and actual effects of *Tomra*'s practices. See Commission Decision of 29 March 2006, COMP/E-1/38.113—*Prokent-Tomra*, paras 331–346.

109 See also para. 37 of the Opinion of Advocate General Mazák in *Tomra* ('[T]hat communication, issued in 2009, cannot have any bearing on the assessment of the present appeal. How the Commission intends to make adjustments to the future implementation of its competition policy in relation to Article 102 TFEU is irrelevant. Indeed, any new emphasis in the application of that provision is potentially relevant only to future decisions adopted by the Commission...').

behaviour allows the conclusion that competitors as efficient as the dominant undertaking will be unable to compete, as apparently was the case in *Tomra*.¹¹⁰ To ensure coherence with the judgment in *Post Danmark*, if such an alternative test is to be maintained it should be tailored to ensure that rebate schemes, like other low pricing practices, are proscribed only where they endanger competition ‘on the merits’. It would also be helpful if more explicit reasons were given as to why rebate schemes, although they are a form of pricing practice, do not necessarily have to be analysed under a test involving price–cost comparison. Otherwise, the law governing pricing practices under Article 102 will continue to be plagued by fragmentation and an ambiguous commitment to effective competition and consumer interests.

We are therefore inclined to believe that the Courts’ adherence to the traditional method of assessing rebates will be subject either to a chipping away or to a more dramatic reversal. However, if the Courts should instead choose to hold (retroactive) rebate schemes apart from the overall trend of an effects-based analysis for reasons of administrability or legal certainty, consistency in the law may be put at risk and may conceivably lead to backsliding in other areas. Suffice it to mention that, if fidelity rebate schemes are subject to a form-based approach under Article 102, it would be difficult to maintain the effects-based approach already affirmed for single branding under Article 101. If it is not applied to single branding, it would likewise be difficult to justify its application to tying and bundling practices. As a more general point, if a practice is subject to an effects-based analysis under Article 101, the mere fact of dominance cannot change the nature of the practice and render it abusive by object or by its nature under Article 102. Dominance can at most only accentuate the effect of these practices, as the ECJ already stated in *TeliaSonera*, *Tomra*, and *Telefónica*. We therefore do not expect that the Union Courts would adopt an approach which would jeopardise the achievements already made in applying an effects-based analysis in other areas of

competition law, or which would upset the trend toward improved coherence between law and policy.

E. Efficiency claims under Article 102

Post Danmark is also significant because it clarifies the requirements for efficiency claims under Article 102. Since there is no provision within Article 102 that is similar to Article 101(3), there was for some time a temptation to use the concept of objective justification as a means to accommodate efficiency arguments in Article 102 cases. The concept of objective justification is meant to exonerate *prima facie* abusive conduct on the ground of objective factors beyond the control of the dominant undertaking. The justification is subject to the principle of proportionality. Although often referred to in the case law, and though it is presented as a ‘positive’ element of the test for refusal to deal, the concept has not been fully elucidated, partly because cases turning on objective justification have been sparse.

After hesitating,¹¹¹ the Courts endorsed the idea of allowing for efficiency arguments under Article 102. First in *British Airways*¹¹² and *Michelin II*,¹¹³ then in *Microsoft*¹¹⁴ and in *TeliaSonera*,¹¹⁵ the Courts expressly recognised that an exclusionary effect arising from unilateral conduct that is harmful for competition may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.¹¹⁶ These judgments indicated that the defence will fail if the exclusionary effect bears no relation to the advantages for the market and the consumer, or if it goes beyond what is necessary in order to attain those advantages. They therefore suggested that, although not identical to Article 101(3), the requisite elements of an efficiency ‘defence’ resemble the conditions contained in that provision. What was missing was the last condition of Article 101(3), that is, the proviso that effective competition must not be eliminated. It was not clear what the legal basis for efficiency claims under Article 102 was, nor whether it was a form of objective

¹¹⁰ Although *Tomra* contains statements which may suggest that the ECJ adheres to a form-based approach (see, eg, para. 42 of the judgment, where the ECJ echoes the General Court in stating that ‘customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it’—emphasis added), the Court did approve of a number of points of inquiry undertaken by the Commission which were aimed at establishing the effects of *Tomra*’s pricing practices. See paras 41, 44, 75, and 78–79. See also Peepkorn and Rousseva (n 89). However, we must acknowledge a lingering tension, and some of the orthodox language used by the Court in *Tomra* remains ambiguous.

¹¹¹ Certain judgments had suggested that there was no room for an efficiency defence. See Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line AB and others v Commission* [2003] ECR II-3275; *France Télécom* (n 13).

¹¹² *British Airways* (n 59), para. 86.

¹¹³ *Michelin II* (n 59), para. 98.

¹¹⁴ Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, paras 1114 et seq.

¹¹⁵ Cited above (n 17).

¹¹⁶ *Ibid.* para. 76.

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justification.¹¹⁷ The lack of clarity was also due to the fact that the Courts, when addressing efficiency gains, took to using another enigmatic term, ‘objective economic justification’.¹¹⁸

In its Guidance Paper, the Commission suggested that an efficiency defence is distinct from the concept of objective (necessity) justification. It proposed that the efficiency claims under Article 102 should mirror all the conditions under Article 101(3). As submitted elsewhere, this was a logical (and arguably the only possible) solution for incorporating efficiency arguments under Article 102.¹¹⁹ The case law had made it clear that efficiency gains are taken into account as a counterweight to the negative effects, and that the related restrictions must be proportionate, which is in essence the same as the first three conditions under Article 101(3). Secondly, the Union Courts have consistently held that Articles 101 and 102 may apply either alternatively or concurrently in cases involving contractual practices and where a party is dominant.¹²⁰ The consistent application of Articles 101 and 102 requires that, whichever of the two provisions is enforced, the result should be the same. It seems to follow that if, under both provisions, it is anticompetitive foreclosure (leading to consumer harm) that is the relevant anticompetitive concern (which is now affirmed in *Post Danmark* for exclusionary behaviour under Article 102), the conditions for justification could not be different. For instance, it would make little sense to have a consumer pass-on a requirement under Article 101 without having one under Article 102. Such a discrepancy would render Article 102 more lenient than Article 101.

In *Post Danmark*, the ECJ did not hesitate to endorse the idea of an efficiency defence modelled on Article 101(3). The ‘teleological’ construction of an ‘exemption’ under ‘Article 102(3)’, if we may abuse those terms a little, promotes consistency in the application of Articles 101 and 102 and congruent results regardless of which of the two provisions is applied in cases involving contractual practices. Secondly, in paragraph 42 of its judgment, the ECJ made it clear that the efficiency defence is distinct from the objective necessity justification by noting that a dominant undertaking

may demonstrate ‘either that its conduct is objectively necessary’, ‘or...by advantages in terms of efficiency.’ This is a welcome clarification, as efficiency claims and claims of objective (necessity) justification are different in nature, purpose, and operation.¹²¹ For instance, objective justification requires a determination of whether competition law concerns can be suppressed for the sake of other relevant considerations or public policy concerns, whereas efficiency claims require an assessment that hinges on what is best for competition and consumers. In addition, the distinction between objective justification and the efficiency defence aligns the approaches under Article 101 and 102. Under Article 101 a distinction is drawn between public policy considerations and objective factors which remove practices from the scope of Article 101(1) (eg, *Wouters*¹²²) while efficiency gains are analysed under Article 101(3).¹²³ Logically, a similar approach will now be followed under Article 102.

Finally, the Court in *Post Danmark* seems to provide an important solution to another controversial question related to efficiency claims: the matter of who bears the burden of proving the defence. As Article 2 of Regulation 1/2003¹²⁴ makes reference to the burden of proving benefits only in relation to Article 101 and is silent as regards possible benefits under Article 102, it has been unclear who should prove such benefits if they become a relevant consideration for the application of the provision. In the *Microsoft* case the General Court made it clear that the evidential burden of proof is to be borne by the dominant undertaking, but it left some leeway as regards the legal burden.¹²⁵

In *Post Danmark*, the Court clarified that it is for the dominant undertaking to prove that the conditions of the defence are fulfilled, including the condition that the efficiencies must counteract any actual or likely negative effects on competition. In our view, this effectively means that the legal burden of proof is on the dominant undertaking. This is also the only sensible solution, given that the substance of the efficiency defence under Article 102 is the same as the justification under Article 101(3).¹²⁶

117 In *Microsoft*, for example (n 114), the General Court discussed efficiency justifications under the heading of objective justification.

118 *British Airways* (n 59), para. 87; *Michelin II* (n 59), para. 107.

119 See Rouseva (n 62), pp. 380–5.

120 *Hoffmann-La Roche* (n 59), para. 116; *Compagnie maritime belge* (n 78), paras 33–34; *BPB Industries* (n 57); Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, para. 159.

121 For more detailed discussion of these differences, see Rouseva (n 62), pp. 380–1.

122 Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

123 See Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/97, paras 23 and 33.

124 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, [2003] OJ L1/1.

125 Paras 688 and 1114.

126 For a more detailed discussion of the issue of burden of proof, see Ekaterina Rouseva, ‘Reflections on the relevance and proof of efficiency

VII. The end

1875 With *Post Danmark* the Court of Justice has begun
writing a new chapter in the epic tale of unilateral
conduct control in European Union law. A subtly dif-
ferent vernacular may be seen in this chapter, and at
1880 least one illuminating message that seems to emerge is
that the core criterion against which to judge unilateral
conduct in cases of alleged exclusionary abuse under
Article 102 is the actual or likely effect of the conduct
on competition and thereby on consumers.

1885 By making the defence of consumer interests the
central aim of Article 102 and by endowing the term
'competition on the merits' with meaningful content,
Post Danmark is apt to send reverberations in many
directions. First of all, the judgment may imply some
limits to the reach of the abuse of dominance concept,
1890 such as in the area of selective above-cost discounts, or
price discrimination. And the Court may be reining in
the unruly notion of a dominant firm's 'special respon-
sibility', which may now be redeployed as a guidepost
where dominance arises not from skill or foresight but
1895 from the largesse of the State. Furthermore, as we
submit in this article, the Court's new emphasis on
consumer harm and its ringing endorsement of the
'as efficient competitor' test, will or at least should
have spillover effects in adjacent fields of abuse of

1925 dominance law. Increasing coherence in the treatment
of exclusionary conduct under Article 102 may likewise
result in greater coherence within the larger system of
the EU competition rules. The Court's desire for
system coherence is arguably reflected in its clarifica-
1930 tion that even the exclusion of equally efficient rivals
might be justified if the familiar four conditions are
shown to be satisfied.

1935 Finally and relatedly, we observe an encouraging con-
vergence between the state of the law on exclusionary
abuse and the policy position adopted by the European
Commission. This is not to suggest that all details of the
Commission's Guidance Paper have been or will be
approved by the Court,¹²⁷ or that the Guidance Paper is
a permanent and exhaustive source of criteria by which
1940 to assess exclusionary behaviour.¹²⁸ But there is now a
remarkable congruence between law and policy on prin-
ciples of great conceptual and practical significance.
This is a welcome turn of events partly because this con-
vergence is oriented toward a normatively commendable
1945 direction and partly because its by-products are: better
conditions for the uniform application of the law across
the European Union, and a reduction of legal uncer-
tainty and its private and social costs.

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defences in modern EU antitrust law' in Jacques Bourgeois and Denis
Waelbroeck (eds) *Ten Years of the Effects-Based Approach in EU
Competition Law: State of Play and Perspectives*, GCLC Annual
Conference Series, Bruylant, 2012 (forthcoming).

127 See, eg, *TeliaSonera* (n 17) (opting not to incorporate an
indispensability filter when analysing margin squeeze).

128 See Monti (n 2), p. 11 (stressing the importance of the Commission's
1975 decisional practice as an essential source of guidance, and describing the
Guidance Paper not as a final exit but a point of entry).