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The legality of rebates under Post Danmark II

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Preface

This thesis marks the culmination of my two years in Lund. It started out as an interesting new experience and ended up being, thus far, the two most important years of my life. For that I have to thank Lund University for providing me with the chance to find a field of interest that now forms an integral part of who I am. In particular I would like to thank Xavier Grussot for all the effort he has put in to make the European Business Law programme what it is today. I would like to thank Justin Pierce for setting up a comprehensive competition law course and Julian Nowag, who upheld the high standards and expectations I had with the advanced competition law course. I would also like to thank Julian Nowag as the supervisor of my thesis, and as someone who ended up doubling as a career advisor. Without him, this thesis would not be what it is today.

I would like to thank my parents for sticking with me through all these years and for being the perfect representation of the SuperEgo in Freud's tripartite self. As well as my girlfriend who supported me despite my random ramblings and laughter when reading competition law cases. I would also like to thank my sisters for keeping me going through their "do or die" attitude. I would like to thank my friends and colleagues (you most likely know who you are) for keeping me entertained. And lastly a word of thanks goes out to Samuel the Bold for reminding me to take occasional brakes so I wouldn't lose my mind.

Summary

The aim of the thesis is to assess the status of rebates under Article 102 TFEU after the *Post Danmark II* judgement. To that end, the thesis will firstly outline the case law as well as the approach taken by the EU Commission regarding the legality of rebates prior to *Post Danmark II*. In the analysis, the thesis argues that *Post Danmark II* shows signs of redefining the past case law in favour of a more ‘effects based’ approach regarding rebates. This change is most notable regarding loyalty-inducing rebates, since, according to *Post Danmark II*, it is no longer sufficient to show that a loyalty-inducing rebates is capable of an anti-competitive effect, rather this effect has to be more likely than not. While the thesis argues that this does not carry over to the assessment of loyalty rebates, the Court nevertheless does not exclude this possibility. Furthermore, the Court of Justice is showing signs of redefining the categories of rebates, most notably by narrowing the scope of quantity rebates. This change, however, is likely to have a detrimental effect on the possibility of a successful objective justification, since by reducing the factors which give grounds to the presumption of legality for quantity rebates, the Court is also, indirectly, limiting the factors which might be used to justify the potentially anti-competitive conduct. Overall, the thesis will argue that *Post Danmark II* signifies a way for a more economically sound approach towards the treatment of rebates under Article 102 TFEU.

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Introduction

Background

In European Union (hereinafter EU) Competition law, the legal treatment of rebates has been subject to a form-based approach. It is an approach where the conduct itself is deemed to be anti-competitive, thereby removing the need to establish effects on the market. There have been a number of critics who have questioned the form-based approach taken by the Court of Justice of the European Union (hereinafter ECJ) by arguing for a more effects based approach.¹ This is so because without having to establish effects on the market, the form based approach can prohibit price based competition due to the characteristics of the conduct alone, thus neglecting potential efficiencies that the conduct can generate.

The above mentioned controversy lies in the fact that, in general, price based competition is considered good for the consumers, since it results in lower prices.² Furthermore, price based competition is considered to incentivise innovation, thus constituting a further benefit for consumers by virtue of a potentially wider selection of products in the future.³

On the flip side, the pricing policy of a dominant undertaking is also capable of excluding competitors through, eg predatory pricing or exclusivity agreements.⁴ However from the perspective of an undertaking, it is exceedingly difficult to identify where the line between legitimate competition on the merits and exclusionary conduct lies.

¹ Alison Jones and Brenda Sufrin, *EU Competition Law - Text, Cases and Materials*, Fifth Edition, Oxford University Press, 2014, p 454, see also eg, Luc Peepkorn, 'Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates' (2014) *Concurrences Review*, No 1-2015, pp. 43-63

² Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, p 7-20. para 23

³ Jonathan B. Baker, 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation' (2007), *Antitrust Law Journal* Vol 74, pp. 575-602, p 576

⁴ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 90

Method and Materials

In order to assess the impact of *Post Danmark II* on the legal treatment of rebates, the thesis will take a legal dogmatic approach, relying on the previous case law of the ECJ and the General Court of the European Union (hereinafter General Court), as well as academic literature addressing it. The thesis will cover recent game theoretic economic papers with regard to the economic rationale behind exclusivity and target rebates. Lastly, in order to outline the Commission's approach towards the treatment of rebates, the thesis will rely on the Commission's Guidance Paper on Article 102 TFEU (hereinafter Guidance Paper)⁵ as well as the academic literature covering it.

Purpose

On 6th of October 2015, the ECJ decided the *Post Danmark II* case.⁶ This decision was the latest addition by the ECJ regarding the legal treatment of rebates. The purpose of the thesis is to assess the impact of the *Post Danmark II* case on the legal treatment of rebates in general, as well as the legal treatment of loyalty inducing rebates in particular. The thesis will critically analyse whether the *Post Danmark II* judgement is consistent with the ECJ's previous case law as well as whether there are indications of a shift in the approach by the ECJ in favour of a more economic approach as often associated with the Commission's Guidance Paper.

Outline

The first part the thesis will outline the earlier case law by the ECJ and General Court (hereinafter Courts) as well as the approach and rational taken by the EU Commission (hereinafter Commission) as it relates to establishing dominance under Article 102 TFEU⁷. With respect to the legality of rebate schemes, the definition of dominance is of vital importance, since it is not possible for a rebate to amount to an abuse when used by a non-dominant undertaking.

⁵ Guidance Paper (n 2)

⁶ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651 (*Post Danmark II*)

⁷ Treaty on the Functioning of the European Union

In part two, the thesis will analyse the case law by the Courts with regards to rebates. The thesis will first give a brief introduction to the definition of abuse under Article 102 TFEU and subsequently analyse the case law regarding rebates in particular.

The thesis will also outline the approach towards rebates under the Guidance Paper.⁸ In legal literature, the effects based approach has been equated to a more economic approach towards rebates.⁹ Based on that, the thesis will consider recent developments in economic literature regarding the potential effects of rebates schemes on competition. Through the economic literature, the thesis will be able to provide for a more detailed rationale behind the effects based approach, consequently enabling a better understanding of the ECJ's reasoning in *Post Danmark II*.

Lastly, the thesis will compare the approaches taken by the ECJ and the Guidance Paper, indicating the factors distinguishing the two. In order to highlight the benefits of a form based approach, the thesis will briefly address a paper by Wouter Wils,¹⁰ in order to ascertain whether the form based approach used by the Courts has economic backing and thus should be preferred to the effects based approach as advocated by the Commission in its Guidance Paper.

In the third part, the thesis will critically analyse the impact of the *Post Danmark II* judgement in light of the factors outlined in the sections above. In particular, the thesis will analyse the ECJ's approach towards rebates, arguing that it is moving towards an effects based approach. To that end the, thesis will identify the objective factors illustrating a possible change in the approach taken by the ECJ.

⁸ Guidance Paper (n 2)

⁹ Nicolas Petit, 'Intel, Leveraging Rebates and the Goals of Article 102 TFEU' (2015), University of Liege – School of Law, <<http://ssrn.com/abstract=2567628>> accessed 26.04.2016, p 13

¹⁰ Wouter Wils, 'The Judgement of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance', (2014), World Competition: Law and Economics Review Vol 37, No. 4 pp. 405-434, <<http://ssrn.com/abstract=2498407>>, accessed 26.04.2016

In the last part, the thesis will summarise the outcome of the analysis in part three along with concluding remarks regarding the *Post Danmark II* case, as well as issues that should be addressed in future judgements, such as the Intel appeal.¹¹

¹¹ Case C-413/14 P – *Intel* (Case pending)

1.0 Assessment of dominance under 102 TFEU

1.1 Assessment of dominance in the case law of the Courts

According to Article 102 TFEU, conduct by an undertaking can only infringe EU Competition law if the undertaking in question is deemed to occupy a dominant position. Consequently, in the assessment of the legality of a rebate scheme, the assessment of dominance is the first step.

According to the case law of the ECJ, establishing dominance is a two-step test, consisting of defining the relevant market and subsequently identifying market power.¹² Due to the delimitation of this paper, the focus of this section is not on the definition of the relevant market but it must be noted that, due to the amplitude of factor to consider, defining the relevant market is notoriously difficult.¹³ Furthermore, since market power has to be established in relation to a relevant market,¹⁴ mistakes done in defining the relevant market can easily have detrimental effect when establishing dominance.

It is relatively easy to establish dominance in a relevant market with a single undertaking with 100% market share. However, such situations, in the absence of a statutory monopoly, are rare and mostly occur in situations where due to the minimum efficiency scale, there can only be one efficient undertaking.¹⁵

The ECJ first defined dominance in *United Brands*, and held that:

“The dominant position referred to in [Article 102 TFEU] relates to a position of strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an

¹² Case C-52/07 – *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, ECLI:EU:C:2008:703, para 19

¹³ Jones and Sufrin (2014) (n 1), p 304

¹⁴ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 21

¹⁵ Jones and Sufrin (2014) (n 1), p 335, ie, situations where only one undertaking can operate efficiently on the market

appreciable extent independently of its competitors, customers and ultimately of its consumers.”¹⁶

The ECJ further added that a dominant position is, in general based on a combination of several factors, which are not necessarily conclusive on their own.¹⁷ This statement was complemented by the ECJ in *Hoffmann-la Roche*, where it held that:

“An undertaking which has a very large market share and holds it for some time, (...) is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position”.¹⁸

According to the wording used by the ECJ, dominance is described as a position of economic strength, which, due to the undertakings ability to prevent effective competition from being maintained, allows it to behave independently of its competitors. This freedom of action is in turn provided by the undertakings status as an unavoidable trading partner, by virtue of its very large market share.

This illustrates that during the establishment of dominance, the definition of the relevant market is of vital importance. That is so because with a narrow market definition, a finding of high market share is more likely and vice versa.¹⁹ Furthermore, according to the line of case law set by *Hoffmann-La Roche*, an undertaking can be in position of dominance by virtue of its market share alone. Thus, there is a presumption of dominance with a very high market share, which, in EU competition law, is defined as 50%.²⁰

¹⁶ Case C-27/76 – *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECLI:EC:C:1978:22, para 65

¹⁷ *ibid*, para 66

¹⁸ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 41

¹⁹ See, e.g. Case, C-53/92, *P Hilti AG v Commission of the European Communities*, ECLI:EU:C:1994:77

²⁰ Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, ECLI:EU:C:1991:286, p 60

This presumption of dominance in EU competition law has been strongly criticised, since market share by itself tells us nothing about potential competition,²¹ eg, whether the high market share was transitory as often found in high-tech markets.²² The aforementioned criticism is especially pronounced in the *New Economy*, where high market share is often the result of a combination between innovation and a winner takes all market. In such a market, the market share of the dominant undertaking can quickly change when it fails to innovate.²³ This indicates that despite a high market share, the undertaking is still subject to considerable economic pressure by potential competition, thus preventing it from behaving independently of its competitors.

A wrongly characterised market can in turn have negative effects on competition within the EU internal market. For example, an undertaking with 50% market share in a fragmented market, can be assumed dominant by virtue of its market share alone, thus no analysis of the actual market dynamics is necessary. The presence of the dominant undertaking, in the example above, is now equated with a weak market structure due to it being an unavoidable trading partner.²⁴ This prevents the allegedly dominant undertaking from certain types of behaviour as a result of the *special responsibility* obligation it now holds, since it has to avoid further damage to a relevant market where competition is weak.²⁵ Therefore, through the presumption of dominance at 50% market share, one can find that competition in the market is weak, without showing proof to that end. This in turn limits potential competition on the EU internal market.

²¹ To that end see eg, William J. Baumol, John C. Panzar and Robert D. Willing, '*Contestable Markets: An Uprising in the Theory of Industry Structure*' (1982), *The American Economic Review* Vol. 73, No. 3. pp. 491-496, p 492

²² Jones and Sufrin (2014) (n 1), 335

²³ *Challenges for Competition Policy in a Digitalised Economy*, Directorate-General for Internal Policies (2015), p 25, <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU\(2015\)542235_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU(2015)542235_EN.pdf)> accessed 26.04.2016.

²⁴ Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* ECLI:EU:C:1983:313, para 70

²⁵ *ibid*, p 57

However, as shown in the wording by the ECJ in *Hoffmann-La Roche*, the presumption of dominance requires very high market share to be held for “*some time*”.²⁶ Consequently, the likelihood of the scenario where the aforementioned example can happen is lessened. On the other hand, since it is not clear from the case law of the ECJ how long the allegedly dominant undertaking has to hold its very high market share,²⁷ considerable uncertainty and potential for error is still present.

1.2 Commission`s approach to establishing dominance

According to the Guidance paper, the Commission follows the same definition of dominance as set by the ECJ in *United Brands* and *Hoffmann-la Roche*.²⁸ The Guidance Paper notes that dominance is usually based on a number of factors, which, on their own, are not necessarily conclusive.²⁹ Furthermore, the Commission notes that it will not come to a final conclusion until examining all the factors which may be sufficient to constrain the behaviour of the undertaking, thus preventing it from having the freedom of action characteristic to a dominant undertaking. Since none of the factors, eg market share, are conclusive on their own, the Guidance Paper does not refer to the presumption of dominance cited in the case law of the ECJ.³⁰

Furthermore, the Guidance Paper leaves open the possibility that a dominant undertaking is not an unavoidable trading partner.³¹ While this is indeed a possibility, its effect remains questionable, since, as shown above, the definition of dominance is itself based on the undertaking being an unavoidable trading partner. However, the Guidance Paper does not presume that the undertaking is dominant by virtue of its market share, rather the Commission has to establish that the undertaking in question is in fact an unavoidable trading partner. Thus

²⁶ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 15 (emphasis added)

²⁷ Jones and Sufrin (2014) (n 1), p 339

²⁸ *United Brands* (n 16), *Hoffmann-La Roche* (n 18)

²⁹ Guidance Paper (n 2) para. 10

³⁰ Richard Whish and David Baley, *Competition Law*, Seventh Edition, Oxford University Press, 2012. p 183

³¹ *ibid*, p 36

it cannot conclude that an undertaking occupies a dominant position without the analysis of the particular market dynamics. Based on the above, the approach proposed by the Commission in its Guidance Paper does not suffer from the aspects that were criticized with regard to the approach taken by the ECJ.

On the other hand, the downside to the approach by the Commission, are the larger enforcement costs and the believed decrease in legal certainty.³² However, despite the increased enforcement costs and legal uncertainty, the Commission has consistently applied its approach in practise. An example being *Microsoft*, where despite the undertaking having over 90% market share,³³ the Commission still looked at entry barriers, in particular the network effects of contracts, in order to establish dominance.³⁴ This suggests that the approach of the Commission is based on the prevailing view that over enforcement of competition law can potentially be more dangerous than under enforcement, thus outweighing the required increase in enforcement costs.³⁵

³² Arndt Christiansen and Wolfgang Kerber, 'Competition Policy with optimally differentiated rules instead of "per se rules vs rule of reason"' (2006), *Journal of Competition Law and Economics* Vol 2, Issue (2), pp 215-244, p 216

³³ Case COMP/C-3/37.792 – *Microsoft* (2008), para 431

³⁴ Case COMP/C-3/37.792 – *Microsoft* (2008), para 420, see also Case COMP/C-3/37.990 – *Intel* (2009), para 853

³⁵ See also Jones and Sufrin (2014) (n 1), p 58 regarding over and under enforcement

2.0 Definition of abuse and the treatment of rebates under Article 102 TFEU

2.1 Abuse under Article 102 TFEU

Before addressing the approach of the Courts with regard to rebates, it is necessary to briefly outline the definition of abuse. Article 102 TFEU stipulates that: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market (...)”.³⁶ Based on the wording of Article 102 TFEU, a finding of dominance alone is not sufficient for an undertaking to fall within Article 102 TFEU, rather it is the abuse of that dominant position that damages the EU internal market. Consequently, it is necessary to identify the specific anti-competitive conduct that constitutes abuse under Article 102 TFEU.

While Article 102 TFEU itself contains a number of examples, the case law of the ECJ has undermined their importance, almost rendering them redundant. Firstly, in *Continental Can*, the ECJ concluded that the list under Article 102 TFEU “(...) merely gives examples, not an exhaustive enumeration of the sort of abusive practices which it prohibits”.³⁷ The importance of identifying a specific example under Article 102 TFEU was further reduced in *Microsoft*, wherein the General Court noted that the Commission was right to apply Article 102 TFEU in its entirety, rather than having to identify a specific subparagraph, such as Article 102 (c) TFEU.³⁸

Nevertheless, according to the examples under Article 102 TFEU, abuses are, in general, divided into exploitative and exclusionary abuses, with discrimination forming a third category of abuse. The categories however, are not mutually exclusive, that is to say eg that an exploitative abuse can also be exclusionary. Moreover, some legal scholars argue that an

³⁶ Article 102 in the Treaty on the Functioning of the European Union.

³⁷ Case C-6/72 – *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, ECLI:EU:C:1973:22, para 26.

³⁸ Case T-201/04 – *Microsoft v Commission*, ECLI:EU:T:2007:289, para 861. See also Bo Vesterdorf, ‘Theories of self-preferencing and duty to deal - two sides of the same coin?’ (2015), *Competition Law & Policy Debate* Vol 1, Issue 1, pp. 4-9. in reference to the category of abuse with regard to Case COMP/C-3/39.740 – *Google Search* (ongoing)

exploitative abuse is almost always exclusionary, since exploiting a customer is likely to result in its exclusion from the market.³⁹ Thus, the line between the categories of abuses is blurry.⁴⁰ Nevertheless this blurriness has not put an end to the categories.⁴¹ As the focus of this thesis is on the legality of rebate schemes, a closer look will be taken with regard to exclusionary abuses.

The definition of an exclusionary abuse was first set in *Hoffmann-La Roche*, according to which:

“Abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”⁴²

This definition was revised by the ECJ in *Post Danmark I*, emphasising that the degree of competition is weakened “*to the detriment of consumers*”⁴³ thereby, outlining the focus of Competition law on consumer welfare.⁴⁴ However, the reference to consumers was absent in both *Tomra*⁴⁵ and *AstraZeneca*⁴⁶, decided later on the same year.

As stated above, Article 102 TFEU does not prohibit the possession of a dominant position, however dominant firms do have a “*special responsibility*” to not let their conduct impede

³⁹ See eg, Michal S Gal, ‘*Abuse of Dominance – Exploitative Abuses*’ (2013), Handbook on European Competition Law, Chapter 9, pp 385-422, p 2

⁴⁰ Jones and Sufrin (2014) (n 1), p 372

⁴¹ See eg, Case COMP/38.636 – *Rambus* (2009), for the use of exploitative abuse, as well as the Guidance Paper (n 2) on Article 102 TFEU for exclusionary abuses

⁴² Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 91

⁴³ Case C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 24 (emphasis added)

⁴⁴ Jones and Sufrin (2014) (n 1), p 372

⁴⁵ Case C-549/10 – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 17 (emphasis added)

⁴⁶ Case C-457/10 P – *AstraZeneca AB and AstraZeneca plc v European Commission*, ECLI:EU:C:2012:770, para 74

competition on a market that is already weak due to their presence.⁴⁷ Consequently, some conduct is prohibited for a dominant undertaking, as it would further damage the already weakened competitive structure.

With regard to the *special responsibility*, the ECJ in *Post Danmark I* emphasised the fact that the undertaking had obtained its dominant position through a legal monopoly.⁴⁸ Based on the connection made in *Post Danmark I*, it stands to reason that the economic freedom of an undertaking that owes its dominant position to a legal monopoly is restricted further by the special responsibility than it otherwise would. A similar approach was taken with regard to undertakings with a market share approaching a monopoly. In particular, the Advocate General (hereinafter AG) in *Compagnia Maritime Belge*, argued that those undertakings have a “particularly onerous” responsibility not to harm competition.⁴⁹ However, in *TeliaSonera* the ECJ denied any connection between the degree of market power and the likelihood of a dominant undertakings conduct resulting in a finding of abuse under Article 102 TFEU.⁵⁰

2.2 Rebates in the case law of the Courts

2.2.1 Loyalty rebates

To understand the *Post Danmark II* judgement, it is necessary to outline the reasoning behind the form based and effects based approaches. This section of the thesis will outline the case law of the Courts regarding rebates until the adoption of the *Post Danmark II* judgement.

⁴⁷ Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 57 (emphasis added)

⁴⁸ Case C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, p 23.

⁴⁹ Opinion of AG Fennelly in joined Cases C-395/96 P and C-396/96 P – *Compagnia Maritime Belge Transports and Others v Commission*, ECLI:EU:C:1998:518, para 137

⁵⁰ Case C-52/09 – *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2010:483, para 80

The case law of the ECJ treats rebates under exclusivity agreements.⁵¹ An exclusivity agreement is in essence an obligation by which the purchaser has to obtain all or almost all of its supply from the dominant undertaking in order to fulfil the conditions of the agreement. Through the exclusivity agreement the dominant undertaking is likely to foreclose part of the market from its competitors and thereby exclude them from the market.⁵²

The approach taken by the Courts with regard to exclusivity agreements can be described as *form based*. That is so because the case law considers the very presence of an exclusivity agreement by a dominant undertaking to be anti-competitive.⁵³

According to paragraph 89 of *Hoffman-La Roche*,⁵⁴ the ECJ does not differentiate between how exclusivity is achieved, rather it is the very fact that the conduct is *capable* of incentivising exclusivity, which brings about the anti-competitive result. Neither does the case law regarding exclusivity make a distinction between an exclusivity obligation, ie an obligation to reach the threshold for the rebate, and an exclusivity option, where there is no obligation to reach the threshold, thus the supplier can switch to other suppliers.⁵⁵ What matters is that the conduct is capable of inducing the purchaser to obtain all or almost all of their demand from the dominant undertaking. The ECJ has consistently upheld this approach, most recently in *Tomra*,⁵⁶ where it deemed it unnecessary to ascertain whether there were actual negative effects on competition, as long as a *de facto* exclusivity obligation was identified.

⁵¹ Case – C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 89

⁵² Gal (2013) (n 39), p 2

⁵³ See eg Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36 para 90, Case T-65/89 – *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities*, ECLI:EU:T:1993:31 para 120

⁵⁴ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, p 89

⁵⁵ See eg Case C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 70, Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 71

⁵⁶ Case C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 79

Furthermore, in *Tomra*,⁵⁷ the ECJ also confirmed that there is no difference in the numerical quantity bought, as long as the undertaking in question is obliged to obtain all or almost all of its demand from the dominant undertaking. Thereby indicating that the numerical quantity covered by the rebate scheme does not have an effect on the appreciability of the conduct.

With regard to rebates, the case law of the Courts has identified three categories of rebates: (i) loyalty rebates; (ii) quantity rebates; and (iii) loyalty-inducing rebates.⁵⁸ Loyalty rebates are defined as rebates that are given in exchange for the purchasers' obligation to obtain either all or almost all⁵⁹ of their demand from the dominant undertaking.⁶⁰ In *Hoffman-La Roche*, the rationale of the ECJ was that loyalty rebates are "(...) designed to deprive the purchaser of or restrict his possible choice of sources of supply and to deny other producers access to the market".⁶¹

It follows that the rationale of the ECJ towards loyalty rebates is that they are not based on economic justification, since they are designed with an anti-competitive goal in mind.⁶² In academic literature a differing interpretation is also presented, according to which the ECJ looked at the probabilistic effects standard, rather than an intent based interpretation.⁶³ The rationale being that the use of loyalty rebates is likely to result in abusive conduct. Since neither approach requires effects to be established on the market, no distinction has to be made here for the purpose of this thesis. With regard to the analysis of *Post Danmark II*, the thesis will use the intent based approach.

⁵⁷ *ibid*, para 70

⁵⁸ Case T-286/09 – *Intel Corp. v European Commission*, ECLI:EU:T:2014:547, paras 75-78

⁵⁹ This is considered to be more than 80% by analogy to the vertical regulation, see eg Jones and Sufrin (2014) (n 1), p 455

⁶⁰ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, p 89

⁶¹ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 90, see also Pablo C. Ibáñez, 'Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' (2014), LSE Law, Society and Economy Working Papers, 29/2014, p 19

⁶² Pablo C. Ibáñez (n 61) p 19

⁶³ See eg Nicolas Petit (2015) (n 9), p 9

2.2.2 *Quantity rebates*

When compared with loyalty rebates, quantity rebates are held to benefit from the presumption of legality under Article 102 TFEU.⁶⁴ The presumption of legality stems from the understanding that discounts based on quantities reflect efficiency gains from the economies of scale achieved by the undertaking.⁶⁵ In *Hoffmann-La Roche*, the ECJ held that quantity rebates are rebates that are solely linked to the volume of goods purchased.⁶⁶ Based on that, it was understood that standardised volume based rebates should benefit from the presumption of legality under Article 102 TFEU.⁶⁷ The General Court in *Michelin II*, however, restricted this, by focusing on a potential foreclosure effect, thus the standardised rebate scheme used by Michelin, was deemed to be anti-competitive.⁶⁸

In comparison to standardised volume based rebates, the illegality of individualised quantity rebates is more intuitive, since the ECJ considers that they are less likely to reflect direct cost savings made through economies of scale. Therefore, it came as no surprise that in *Tomra*, the ECJ found that individual rebates infringe Article 102 TFEU.⁶⁹

In both of the aforementioned cases the focus of the analysis was on the loyalty inducing effect of the rebate instead of whether the rebate was standardised or individualised and could therefore benefit from the presumption of legality. Thus according to the case law following *Hoffman-La Roche*, rather than being defined by objective positive characteristics, the potential

⁶⁴ See, eg, Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 71.

⁶⁵ Case C-95/04 – *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166, para 83

⁶⁶ *ibid*, see also Joined Cases C-40-48, 50, 54-56, 111, 113, 114-73 – *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities*, ECLI:EU:C:1975:174, para 518

⁶⁷ Pablo I. Colomo, ‘*Post Danmark II, or the Quest for Administrability and Coherence in Article 102 TEFU*’ (2015), LSE Law, Society and Economy Working Papers, 15/2015, p 11

⁶⁸ Case T-203/01 – *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, ECLI:EU:T:2003:250, para 60

⁶⁹ Case – C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 75

legality of a quantity rebate is dependent on the whether or not the rebate in question had a loyalty inducing effect.⁷⁰ This conclusion leads to a negative definition of a quantity rebates, ie if it is not a loyalty-inducing rebate, it must be a quantity rebate.

The General Court in *Michelin II*, stated that it was particularly the relatively long reference period (one year) that played a part in the foreclosure effect.⁷¹ The General Court also indicated that a volume based rebate scheme with a reference period less than three months would in contrast benefit from the presumption of legality.⁷² Thus, the question of whether a rebates scheme can benefit from a presumption of legality under Article 102 TFEU depends on whether a loyalty inducing effect, which is based on a long reference period of more than three months, can be identified.

However, it is difficult to envision a rebate that is not intended to bind customers to the supplier and therefore would lack a loyalty inducing effect. Furthermore, limiting a rebate to three months would likely require the parties to renegotiate the contract quarterly and consequently lose out on a potential efficiency increase due to the transaction costs. As such it is understandable why in legal literature, the presumption of legality for quantity rebates has been criticized for being “*meaningless in practise*“.⁷³

2.2.3 Loyalty inducing rebates

Loyalty inducing rebates are described as falling within the grey area between quantity and loyalty rebates. Taking into account the lack of clarity regarding as what amounts to a quantity rebate, it is inherently problematic to define the exact limits of loyalty-inducing rebates.

⁷⁰ Pablo I. Colomo (2015) (n 67), p 3

⁷¹ Case T-203/01 – *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, ECLI:EU:T:2003:250, para 81

⁷² *ibid*, para 85

⁷³ Pablo, I. Colomo (2015) (n 67), p 13 (emphasis added)

Defining loyalty-inducing rebates, the ECJ in *Michelin I*, firstly distinguished the loyalty-inducing rebates used by Michelin from loyalty rebates and concluded that, as the rebate used could not be classified as either quantity rebate or a clear loyalty rebate, regard was to be had to “*all the circumstances*”.⁷⁴

The reference to *all the circumstances* in *Michelin I*, would indicate that by differentiating the rebate scheme from loyalty rebates, the ECJ required a more dynamic approach. In particular, an approach, that had regard to the market conditions and the criteria at which the rebate is given, requiring effects to be established on the market. However, despite this the ECJ still followed its form based approach with regard to loyalty inducing rebates. In its reasoning, the ECJ essentially repeated the same theory of harm first envisaged in *Hoffman-la Roche*⁷⁵ and subsequently verified, whether the rebate in question was *capable* of having a loyalty inducing effect. Consequently, no actual effects needed to be established on the market as it was sufficient to establish that the loyalty inducing rebate had the capability to foreclose the market.⁷⁶

It follows that in practise, the test applied by the ECJ in *Michelin I* did not require consideration of *all the circumstances* of the case, since it merely analysed the conditions of the rebate, to verify whether the rebate was capable of a loyalty inducing effect. This caused it to fall under the same *form based* treatment as applies to loyalty rebates.

The ECJ has consistently applied the aforementioned test, with a more controversial application being in *British Airways*,⁷⁷ where British Airways was deemed dominant with a 39.7% market share. The ECJ concluded that through the use of retroactive rebates, British Airways was excluding competitors. The ECJ did not require the Commission to assess the effects on the market despite that factually, British Airways had been losing market share to the same

⁷⁴ Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 73 (emphasis edded)

⁷⁵ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 90

⁷⁶ Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, paras 81-85

⁷⁷ Case C-95/04 – *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166.

competitors it was supposedly excluding.⁷⁸ The rational being, that it would have lost market share quicker, were it not for the rebates.⁷⁹ Yet the ECJ concluded that there was no need to establish the effects of the conduct on the market. It is the authors' opinion however that if there was an error in the assessment of British Airways, it was an error in the market definition rather than showing the exclusionary effect on the market. However, a requirement to establish the effect on the market would have provided for a subsequent verification of whether the market dynamics used for the assessment of the relevant market were accurate.

2.2.4 Objective justification

In *British Airways*, when compared to *Michelin I*, the ECJ was willing to accept objective justification by relying on the judgement of the General Court in *Michelin II*.⁸⁰ In theory, objective justification is taken as the equivalent of Article 101 (3) TFEU. That is to say, that it is an efficiency defence to see whether the anti-competitive effect on the market is necessary in order to achieve efficiencies that outweigh the anti-competitive effect.⁸¹

In the case law of the ECJ, it is unclear what exactly would constitute sufficient objective justification.⁸² This is so because at the time of writing this thesis (March, 2016), no undertaking has escaped the application of Article 102 TFEU based on efficiencies generated.⁸³ It would stand to reason that this is partially caused by the reasoning of the ECJ in *Hoffman-La Roche*, since in the infamous para 90, the ECJ noted, in essence, that exclusivity agreements can only

⁷⁸ *ibid*, para 98

⁷⁹ Case T-219/99 – *British Airways plc v Commission of the European Communities*, ECLI:EU:T:2003:343, para 298

⁸⁰ Case T-203/01 – *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, ECLI:EU:T:2003:250, para 109

⁸¹ Case, C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 41

⁸² More on this see Luc Gyselen, 'Rebates: Competition on the Merits or Exclusionary Parctice' (2003), European University Institute, < http://ec.europa.eu/competition/speeches/text/sp2003_017_en.pdf >, accessed 26.04.2016, p 10

⁸³ Jones and Sufrin (2014) (n 1). p 390

be intended to exclude competitors and as such lack objective justification, barring “exceptional circumstances”.⁸⁴

The situation is blurred further by the fact that economies of scale are likely to rise firstly at the production level,⁸⁵ and subsequently at different points for each individual customer due to a variety of different factors such as transportation costs, consequently requiring individualised target rebates. Those, however were indicated to be abusive in *Tomra*.⁸⁶ Although the basis for the reasoning of the ECJ was once again the loyalty inducing effect rather than the individualised nature of it.

Lastly however, the lack of clarity as to what amount to an objective justification, lies in the fact that a successful objective justification requires a proportionality test, wherein the anti-competitive conduct is outweighed by the efficiencies generated.⁸⁷ Without the need to establish effects on the market, an undertaking has no way of knowing what effects its conduct has to outweigh.⁸⁸

⁸⁴ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 90. The exceptional circumstances are likely to mean factors not tied to the undertaking, such as a shortage of oil in the world as seen in Case 77/77 – *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, ECLI:EU:C:1978:141

⁸⁵ Luc Gyselen (2003) (n 82), p 50

⁸⁶ Case C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221. para 75

⁸⁷ Case C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 41

⁸⁸ To that end, see also presentation by Nicolas Petit, ‘*Article 102 and the “Test Debate”*’, Liege Competition & Innovation Institute, University of Liege IBC Conference, 29 April 2015

<[https://orbi.ulg.ac.be/bitstream/2268/182227/1/Article%20102%20TFEU%20and%20the%20Test%20Debate%20-%20N%20PETIT%20\(29%2004%2015\).pdf](https://orbi.ulg.ac.be/bitstream/2268/182227/1/Article%20102%20TFEU%20and%20the%20Test%20Debate%20-%20N%20PETIT%20(29%2004%2015).pdf)> accessed 26.04.2016

2.3 Rebates in an effects based approach

2.3.1 Loyalty rebates

In its Guidance Paper, the Commission treats the three categories of rebates defined by the ECJ under conditional rebates.⁸⁹ Hence the Commission does not follow the categorization of rebates into loyalty, loyalty-inducing and quantity rebates, rather its focus is on whether the rebate creates a foreclosure effect on the market. The Commission takes a case by case approach assessing the factors relevant to the case itself.⁹⁰ Thus, the Guidance Paper is fitting to illustrate an effects based approach towards rebates. This section will also outline the economic rationale as it relates to the approach taken by the Guidance Paper in order to provide a better analysis of *Post Danmark II*. Lastly, for the sake of consistency, this section will follow the naming scheme of the ECJ regarding the categories of rebates.

Like the ECJ, the Commission does not differentiate between *pure* exclusivity obligations, ie a situation where the purchaser has to buy all of its supply from the dominant undertaking, from a situation where the purchaser is allowed to obtain a small amount from a rival to the dominant undertaking.⁹¹ This approach is due to a widely held belief that target rebates are simply a weaker form of exclusivity agreements.⁹² The belief, however, can be problematic, since according to a paper by G. Calzolari and V. Denicolò, exclusivity agreements, that is to say non-linear pricing based on pure exclusivity and target rebates, are subject to different economic considerations.⁹³ In this context, target rebates are defined as an obligation where the rebate is tied to a quantity target, irrespective of whether it is eg 90% or 40% of the demand. Pure exclusivity meaning that the purchaser has to obtain all of its demand from the dominant undertaking.

⁸⁹ Guidance Paper (n 2), para 37

⁹⁰ *ibid*, para 37-45

⁹¹ *ibid*

⁹² G. Calzolari and V. Denicolò, '*Competition with exclusive contracts and market-share discounts*' (2013), *The American Economic Review* Vol 103 Issue 6, pp 2384-2411, p 4

⁹³ *ibid*, p 4

According to the economic literature, pure exclusivity obligations in general, can intensify competition between firms by lowering prices and thereby increasing buyers' surplus and consequently total welfare.⁹⁴ Furthermore, they provide for an efficient risk-sharing method and thereby increase efficiency.⁹⁵ Another notable benefit of competition based on pure exclusivity agreements is that the exclusion of a less efficient competitor only occurs if it is the efficient outcome.⁹⁶

With regard to target rebates, the aforementioned economic literature concludes that, when compared to the pro-competitive results of pure exclusivity agreements, target rebates may result in higher prices. That is so because target rebates allow for the taxation of another's product, while still exhibiting the same pro-competitive effects as exclusivity agreements.⁹⁷ With regard to the taxation of a competitor's product, a distinction needs to be made between high and low demand buyers. Low demand buyers having a smaller demand on product variety when compared to high demand buyers. Thus, taxing of a competitor's product may benefit low demand buyers, but damage high demand buyers.⁹⁸

The reduction of price, both for exclusivity and target rebates, is due to the ability of the undertaking to share risk with its purchaser, thus allowing for intensified competition. However, this outcome assumes that none of the competing parties is an unavoidable trading partner in possession of a *must-stock* item, that is to say that competition based on exclusivity agreements is possible for both, the dominant and non-dominant undertaking and furthermore, it assumes that both competitors are equally efficient ie there is no differentiation based on economies of scale.⁹⁹

That is so because competition based on exclusivity is likely to reduce the prices to marginal cost, which in turn means that a less efficient competitor can no longer profitably stay on the

⁹⁴ *ibid*, p 19

⁹⁵ M. Dolmans and Thomas Graf, '*Dealing with Intel Intelligently delineating the scope and limits of the Court's ruling*' (2015), *Competition Law & Policy Debate*, Vol 1, Issue 1. pp. 76-85, p 85

⁹⁶ Calzolari and Denicolò (2013) (n 92), p 28

⁹⁷ *ibid*, p 23

⁹⁸ *ibid*

⁹⁹ *ibid*

market, even in a situation, where there would otherwise have been potential demand for its product due to the consumer side demand for product variety.¹⁰⁰

Keeping in mind, that a common feature of dominant firms is that they are often unavoidable trading partners,¹⁰¹ the lack of distinction made by the ECJ and Commission, with regard to pure exclusivity or a target rebate covering almost all of the purchaser's demand, is unlikely to have a substantial practical effect with regards to an analysis under Article 102 TFEU. This is so since an unavoidable trading partner covering almost all of the market is unlikely to fulfil the conditions necessary for the pro-competitive effects deriving from exclusivity and target rebates. Neither can this motion be dismissed, since as shown in section 1.1 of the thesis, the finding of dominance has itself been subject to criticism, due to the ever changing market dynamics and rapidly expanding competitive pressure from neighbouring markets. This difference further highlights the problems with assuming dominance and consequently weak competition in the market as shown in section 1.1 of the thesis. To reflect this, the Guidance paper does not presume that the dominant undertaking is an unavoidable trading partner, rather its priority is on situations where the dominant undertaking *is* an unavoidable trading partner for all or most of the customers on the market.¹⁰²

2.3.2 *Loyalty-inducing rebates*

With regards to rebates that do not fall within loyalty rebates, as defined by the case law of the ECJ, the Commission takes a case by case approach. In its approach, the Commission will verify whether, in the specific market context of the case, the customer can switch its demand from the dominant undertaking to its competitor with regards to the contestable share.¹⁰³ The contestable share meaning the part of the market for which the dominant undertaking is not an

¹⁰⁰ *ibid*, p 28

¹⁰¹ Text to (n 19), see also Philippe Choné and Laurent Linnemer, 'Nonlinear Pricing and Exclusion: II. Must-Stock Products' (2014), CESIFO Working Paper No. 4874, July 2014, p 3 <<http://ssrn.com/abstract=2469742>> accessed 26.04.2016,

¹⁰² Guidance Paper (n 2), para 36

¹⁰³ Guidance Paper (n 2), para 39

unavoidable trading partner. Thus, depending on the market conditions, there is little difference between the analysis of target rebates covering eg 90% or 40% of a customer's demand. What matters is whether the rebates used by the dominant undertaking restrict competition as regards to the contestable share.

2.3.3 Quantity rebates

As regards to quantity rebates, the Guidance Paper considers that if the price is above long-run average incremental cost (LRAIC) of the dominant undertaking, the rebates used are unlikely to foreclose competitors. However, regarding rebates, the Commission calculates the LRAIC based on the relevant range. Mean that with regard to eg retroactive rebates,¹⁰⁴ the average cost is usually calculated with reference to the last unit sold in order to meet the threshold. This makes it difficult for a retroactive rebate to be above LRAIC for the relevant range. Neither is this a forgone conclusion, since in the event that retroactive rebates create the leveraging effect on only a part of the non-contestable portion of the demand, the purchaser is free to substitute part of its demand on the contestable portion of the market over to a competitor without losing the rebate from the dominant undertaking.¹⁰⁵ Thus, despite the dominant undertaking employing a retroactive rebate, no market foreclosure takes place.

A rebate is also unlikely to benefit from the presumption of legality if the Commission finds that the undertaking is sacrificing profits for the relevant range, that is to say, the price of the dominant undertaking is below average avoidable cost (AAC) for the relevant range.¹⁰⁶

Lastly, the Commission notes that it will consider whether the rebate in question is standardised or individualised, indicating that a standardised rebate is more likely to be transaction-related, since individualised rebates can be set at a threshold making it difficult for the consumer to switch suppliers. That is to say, situations where the individualised rebate is set not based on

¹⁰⁴ A rebate where the discount is calculated retroactively, in comparison to incremental rebates where the discount is not calculated retroactively

¹⁰⁵ Calzolari and Denicolò (2013) (n 92), p 30, see also Dolmans and Graf (2015) (n 104), p 82

¹⁰⁶ Guidance Paper (n 2), para 44

savings from economies of scale, but rather calculated based on the purchaser's estimated demand.¹⁰⁷ Consequently, with regards to quantity rebates, other than incremental rebates,¹⁰⁸ there is no clear form based factors that qualify the rebate to benefit from the presumption of legality under Article 102 TFEU.

2.3.4 Objective justification

The Guidance Paper does not refer to objective justification as such, rather the Commission will examine the claims put forward by the dominant undertaking in arguing that its conduct is justified.¹⁰⁹

In its essence, the test conducted under the Guidance Paper is similar to the approach taken by the Courts as seen in section 2.2.4, in that the Commission will conduct a proportionality test in order to verify whether the efficiencies that result from the allegedly anti-competitive conduct are sufficient to outweigh the potential anti-competitive conduct.¹¹⁰

One notable difference between the approach in the Guidance Paper and the case law is a higher burden of proof required by the wording of the Guidance Paper. According to the Guidance Paper, the efficiencies generated must 'guarantee' that no net harm is likely to arise.¹¹¹ In comparison, the wording used by the Court only requires that the conduct is 'likely' to counteract the potential anti-competitive effect.¹¹²

¹⁰⁷ *ibid*, para. 45

¹⁰⁸ See Case COMP/39.451 – *Velux* (2009), regarding incremental rebates that were concluded to fall outside of Article 102 TFEU.

¹⁰⁹ Guidance Paper (n 2), para 28

¹¹⁰ Guidance Paper (n 2), para 30

¹¹¹ *ibid*

¹¹² Case C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 42, see also Jones and Sufrin (2014) (n 1), p 391

However, taken into account that despite the lower burden of proof no undertaking has successfully escaped the application of Article 102 TFEU based on efficiencies,¹¹³ it is unlikely that this difference in wording would have an effect in practice.

2.4 Discussion on the benefits of the form and effects based approach

In order to ascertain whether the possible change in the treatment of rebates under Article 102 TFEU, stemming from *Post Danmark II*,¹¹⁴ is for the better, it is necessary to outline and compare the benefits brought by the form and effects based approach.

As mentioned before, the Courts' form based approach has been subject to harsh criticism.¹¹⁵ A notable exception to this is a paper by Wouter Wils in defence of the General Court in *Intel*.¹¹⁶

Wils argues that the *form based* approach used by the Courts thus far, is based on sound economic logic.¹¹⁷ In particular, that the form based approach is merely a result of human thinking, since human language uses categories. What matters is that the categories used are economically and legally sound. Wils concludes that the categorization used in its case law of the Courts is sound, since it is easily recognisable for the undertakings and their customers. Furthermore, as the case law provides for objective justification, the form based approach by the Court cannot be characterised as a *per se* approach, since it offers the possibility of objective justification.¹¹⁸ Lastly, Wils points out that the academic writers influencing the judgement in *Hoffmann-La Roche* ought to have had economic thoughts.¹¹⁹

Indeed, it is the undertakings themselves that need to be able to assess whether their conduct falls within Article 102 TFEU or not. It would follow that the benefit of a *form based* approach is one of legal certainty, providing for a clear, foreseeable and administrable test for the

¹¹³ Jones and Sufrin (2014) (n 1), p 390

¹¹⁴ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651

¹¹⁵ See eg Luc Peeperkorn (2014) (n 1), also Jones and Sufrin (2014) (n 1) p 454

¹¹⁶ Wouter Wils (2014) (n 10), Case T-286/09 – *Intel Corp. v European Commission*, ECLI:EU:T:2014:547

¹¹⁷ *ibid*, p 21

¹¹⁸ Wouter Wils (2014) (n 10), p 20

¹¹⁹ *ibid*, p 9

undertakings and their legal advisors, whilst still providing for an economic assessment through the objective justification allowed by the Courts.¹²⁰ Furthermore, as it is firstly for the undertaking and its legal advisors to assess the legality of the undertakings conduct under Article 102 TFEU, factors such as enforcement costs and degree of legal uncertainty should indeed be taken into account.¹²¹ However, as to the conclusion by Wils regarding objective justification,¹²² as shown in section 2.2.4, it is questionable if it is truly capable of providing for an economic assessment.

Wils further argues that exclusivity constitutes a distinct source of harm to the competitive process,¹²³ a statement that is preceded by the General Court in *Intel* with regards to undertakings in a dominant position.¹²⁴ According to Wils, the inherent harm with exclusivity agreements comes from the fact that exclusivity provides for a penalty rather than a discount or rebate. As such a dominant undertaking may sell an item for 100 without an exclusivity agreement, but through an increase in market power resulting from the exclusivity agreement, the dominant undertaking may be able to charge a price of 130 normally, with the price down to 110 due to the rebate,¹²⁵ effectively resulting in an increase in prices.

The logic used by Wils, regarding exclusivity being a penalty rather than a discount, seems to rely on the fact that the dominant undertaking has already increased its market power through the exclusivity obligation. That is to say that the potential anti-competitive effect of the rebate scheme has already taken place. Therefore, the logic states that – in the event that the exclusivity agreements result in market foreclosure, thus resulting in a higher market share for the dominant undertaking, exclusivity agreements can constitute a penalty rather than a reduction in price for the customer. Consequently, the economic rationale as to when exclusivity agreements cause

¹²⁰ *ibid* p 20, the same conclusion is shared by AG Kokott in Case C-109/10 P – *Solvay SA v European Commission*, ECLI:EU:C:2011:256, para 80

¹²¹ Wouter Wils (2014) (n 10), p 26

¹²² Text to (n 118)

¹²³ *ibid*, p 21

¹²⁴ Case T-286/09 – *Intel Corp. v European Commission*, ECLI:EU:T:2014:547. Para 77

¹²⁵ Wouter Wils (2014) (n 10), p 22. See also Nicholas Economides, ‘*Tying, Bundling and Loyalty/Requirement Rebates*’ (2011), New York University – Leonard N. Stern School of Business – Department of Economics <<http://ssrn.com/abstract=1730354>>, accessed 26.04.2016, page 18

competitive harm in the first place, resulting in an increase of market power, is unaddressed. It follows that the economic reasoning as to the form based approach towards rebates remains unclear.

Moreover, it is questionable if the economic assessment used at the time of *Hoffmann-La Roche* remains applicable.¹²⁶ The economic rationale behind the categorization used in *Hoffmann-La Roche* may have been sound at the time of the decision,¹²⁷ however that may no longer be the case. That is so because competition law is a uniquely positioned law that needs to exhibit dynamic properties allowing it to correspond to the ever-changing economic and social environment.¹²⁸ As such, while the concept of categories may work well from a legal certainty point of view, their content, so as to take into consideration a wide range of values, requires revision.

In contrast, it follows more clearly that the Commission's effects based approach to treat rebates under an umbrella term reflects a sound economic approach when it comes to non-linear pricing. From a game theoretic point of view, the test to be conducted in order to find anti-competitive conduct on the market, largely reflects the economic effects that the specific categories of rebates have on competition within the relevant market. Notably, unlike with a form based approach, the market share of the dominant undertaking serves as an indication, holding meaning only in context of the particular market dynamics.¹²⁹ It follows, that the objective factors relevant when assessing whether a specific rebate scheme has anti-competitive effects on the market, regard must be had for the conditions on the relevant market eg the position of the dominant undertaking, the extent of the allegedly abusive conduct and the market position of the customers.

In conclusion it follows, that the *form based* approach taken by the ECJ in its case law is capable of reducing competition rather than incentivising it. Thus, it makes little sense to presume a rebate illegal simply because it can be classified as a loyalty rebate. Even more so, because a

¹²⁶ Wouter Wils (2014) (n 10), p 20

¹²⁷ cf text to (n 119)

¹²⁸ For more see eg A. Ezrachi, '*Sponge*' (2015), The University of Oxford Centre for Competition Law and Policy Working Paper CCLP, July 2015 <<http://ssrn.com/abstract=2572028>> accessed 26.04.2016

¹²⁹ Guidance Paper (n 2), para 13

loyalty rebate provides for a better risk-sharing mechanism than would a quantity target rebate calculated at 90% of the customer's demand.¹³⁰

Lastly, the aim of competition law, in general, is to increase benefits to society through welfare gain.¹³¹ To that end, Competition law is tasked with minimizing efficiency loss. It follows, that an approach by which part of the pro-competitive conduct is potentially disregarded cannot be considered as an efficient approach. Moreover, the approach, as presented by the Guidance paper, still provides for much the same legal certainty, since the reasoning still uses categories, albeit modernized and corresponding to the current economic reality. Admittedly, despite of the use of categories, the legal test under the Commissions approach to verify whether an undertaking is likely to infringe Article 102 TFEU has higher requirements.¹³² That is to say that legal advisors are required to be aware and understand the specific market conditions in order to verify whether a particular rebate falls under Article 102 TFEU. Thus the higher requirements constitute a potential loss of efficiency due to the need for in-depth market analysis.

¹³⁰ D. Geradin, 'Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche' (2015), George Mason University School of Law; Tilburg Law & Economics Centre (TILEC), p 22 <<http://ssrn.com/abstract=2586584>> accessed 26.04.2016

¹³¹ Jones and Sufrin (2014) (n 1), p 4

¹³² *ibid*, p 29

3.0 Analysis of Post Danmark II

3.1 Facts of the case

Post Danmark II was a preliminary reference decided on October 6th, 2015 and was, at the time of writing this thesis, the latest addition to the case law of the ECJ regarding the legality of rebates. In this section, the thesis will outline the facts of the case followed by a critical analysis of the case itself, with a focus on the legal treatment of rebates.

The thesis will address each type of rebate individually based on the classification used by the ECJ.¹³³ Subsequently, the thesis will analyse the approach of the ECJ regarding the as-efficient-competitor test and as it relates to the assessment of rebates. Lastly the thesis will analyse the impact of *Post Danmark II* on objective justification as well as whether the ECJ was right to confirm the lack of a *de minimis* threshold with regard to Article 102 TFEU. The analysis will consider both, the judgement of the ECJ and the Opinion of AG Kokott.¹³⁴

Post Danmark was the Danish statutory monopoly for the distribution of letters and direct advertising up to 50 grams. As such, roughly 70% of the market was covered by the statutory monopoly. In 2003, Post Danmark set up a rebate scheme, which contained a standardised rebate scale of rates ranging from 6% to 16%, depending on the amount of mailings sent.

At the beginning of the year, customers concluded agreements with Post Danmark in which they estimated their mailings for the following year. At the end of the year, those estimates were adjusted with retroactive effect from the beginning of the same year, based on the quantity of items of mail actually sent. The rebate scheme covered the mail sector where Post Danmark had a statutory monopoly as well as the part market that was open for competition.

For 25 of Post Danmark's largest customers, covering approximately half of the volume of transactions, up to one third of the demand from direct advertising mail not covered by the monopoly, could be transferred to a competitor without any adverse effects on the scale of

¹³³ Case T-286/09 – *Intel Corp. v European Commission*, ECLI:EU:T:2014:547. paras 75-78

¹³⁴ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651 and Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343

rebates.¹³⁵ The judgment further noted that the rebate rate had the highest benefit for average size customers, since the mailings sent via Post Danmark by the large customers far exceeded standardized rebate needed to achieve a 16% discount.¹³⁶

The rebate in question was explained to be: (a) standardised, in that the same thresholds applied to all customers; (b) conditional, since adjustments were made to the rebate at the end of the reference period; and (c) retroactive, in the sense that if the threshold initially set was exceeded, the more favourable rebate was applied for all mailings sent during the reference period.

In 2009, the Konkurrencerådet (Danish national competition authority) found that Post Danmark had abused its dominant position on the market for the distribution of bulk mail since the rebate scheme had the effect of foreclosing the market. Moreover, the Konkurrencerådet found that Post Danmark had held over 95% of the market with 70% of it being covered by the statutory monopoly. Thus, only 30% of the market was open for competition. The 2009 decision by the Konkurrencerådet was confirmed in 2010 by the Konkurrenceankenævnet (Competition Appeals Tribunal).

Upon appeal to the Sø- og Handelsretten (Maritime and Commercial Court), the court asked the ECJ for a preliminary reference. In its reference, the Danish court asked in essence:

- (1) to clarify the criteria to be applied in order to determine whether a rebate scheme has an exclusionary effect on the market;
- (2) to clarify the relevance attached to the as-efficient-competitor test; and
- (3) whether the effect of a rebate scheme has to be probable and appreciable in order to fall within Article 102 TFEU.¹³⁷

¹³⁵ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 36

¹³⁶ *ibid*, para 9

¹³⁷ *ibid*, paras 21, 51 and 63

3.2 Analysis of Post Danmark II

3.2.1 Quantity rebates

As regards to quantity rebates, the thesis will focus on whether the decision clarifies as to what type factors qualify for a quantity rebate and thus, for the presumption of legality under Article 102 TFEU.

In *Post Danmark II*, the ECJ first reiterates that quantity discounts are solely linked to the volume of purchases from the manufacturer and that they benefit from the presumption of legality under Article 102 TFEU.¹³⁸ Thus, the ECJ confirmed the existence of the presumption of legality with regard to quantity rebates. However, in paragraph 28, the ECJ distinguished itself from the past case law, noting that for a rebate scheme to be classified as a quantity rebate, it needed to correspond to specific cost savings made by the supplier for each individual order.¹³⁹

In contrast to the above, while the earlier case law of the ECJ tied the definition of quantity rebates to the volume of purchases, it did not require the cost savings to be related to individual orders.¹⁴⁰ Thus the ECJ, in essence, narrowed the definition of quantity rebates.

Indeed, as explained above in section 2.2.2 of the thesis, cost savings for customers are likely to rise at different quantities due to eg, varying transportation costs. However, the requirement for quantity rebates to be based on cost savings stemming from individual orders seems to indicate that standardised rebates can no longer fall within the definition of quantity rebates and thus benefit from the presumption of legality under Article 102 TFEU.

Furthermore, standardised rebates are generally taken as reflecting cost savings from economies of scale on the production side.¹⁴¹ Thus, as standardised rebates no longer fit the criteria of

¹³⁸ *ibid*, para 27

¹³⁹ *ibid*, para 28

¹⁴⁰ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 90

¹⁴¹ Case C-95/04 – *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166, para 83

quantity rebates, this new definition indicates that the ECJ no longer accepts cost savings that stem from the economies of scale on the production side.

Considering, that according to the Guidance Paper, individualised rebates are more likely to be construed as anti-competitive,¹⁴² a dominant undertaking is unlikely to pass on any potential savings to the purchaser due to the fear that they might be construed as a loyalty rebate. This scenario is even more probable, since individualised rebates, unlike standardised rebates, can be deemed discriminatory, an aspect the ECJ explicitly verified in *Post Danmark II*.¹⁴³

Taken into account costs that are associated with individual transactions,¹⁴⁴ even if undertakings were willing to pass on the cost savings, doing so would give grounds to individual transaction costs, resulting in a reduction of efficiency. As such, while the inclusion of economies of scale resulting from individualised rebates can reflect economic reality, it may still result in a loss of efficiency when used exclusively. It therefore follows, that with regards to quantity rebates, an alternative approach allowing standardised rebates to benefit from the presumption of legality might be more preferable.

A novel perspective to the aforementioned classification comes from AG Kokott.¹⁴⁵ According to her Opinion, the categorization used previously by the ECJ, in particular for quantity and loyalty rebates is “ultimately immaterial”, since the decisive factor is whether the rebate scheme in question produces an exclusionary effect, which is not economically justified.¹⁴⁶ It stands to reason that by the aforementioned statement AG Kokott is, in essence, arguing against the categories as set out in the previous case law of the ECJ and instead suggests the use of the effects based approach as suggested in the Guidance Paper.¹⁴⁷

However, the approach taken by Kokott is driven by, whether the rebate scheme in question is capable of producing a foreclosure effect on the market, without having regard to any particular

¹⁴² Guidance Paper (n 2)

¹⁴³ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 38

¹⁴⁴ Wouter Wils (2014) (n 10), p 26

¹⁴⁵ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 38

¹⁴⁶ *ibid*, para 29

¹⁴⁷ Guidance Paper (n 2)

categories of rebates. Thus, the exact definition of quantity rebates remains unclear and consequently this approach continues to uphold the weakness for which the classification of quantity rebates is criticized for being meaningless in practise.¹⁴⁸

When comparing the opinion of AG Kokott and the effects of the *Post Danmark II* ruling, it stands to reason, that to a certain extent the ECJ has agreed with the approach taken by the AG. As shown above, the AG's approach and the wording of the ECJ both have the effect of restricting the scope of quantity rebates, thus restricting the list of potential rebate schemes that may benefit from the presumption of legality under Article 102 TFEU.

While it is not clear if the ECJ is moving towards an effects based approach, the change in wording does indicate that the ECJ is redefining quantity rebates. The new definition itself, however, benefits an effects based approach, since the narrow definition considerably restricts the definition of a quantity rebate, thus opening up a larger section of practices to be evaluated under loyalty-inducing rebates, which, as will be shown below, are treated under an effects based approach.

To conclude as regards to quantity rebates, the *Post Danmark II* case clarified that for a quantity rebate to benefit from the presumption of legality under Article 102 TFEU, it needs to be individualised, that is to say, based on the volume of an individual order with the discount itself reflecting the cost savings made. Thus from a practical point of view, it is questionable if a standardised rebate scheme is at all capable of fulfilling the aforementioned criteria.

From the perspective of an undertaking, the approach of the ECJ in *Post Danmark II* towards quantity rebates remains problematic. This is even more so, because individualised discount schemes are liable to give grounds for a claim of discrimination, thus legal advisors are likely to err on the side of caution and advise against giving discounts.¹⁴⁹

With regard to the presumption of legality for quantity rebates, the decision did not clarify the legal environment, which in turn, means that the uncertainty continues to disincentives potential

¹⁴⁸ Pablo, I. Colomo (2015) (n 73), p 13

¹⁴⁹ John T. Lang and Robert O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC' (2002), Fordham International Law Journal, Vol. 26, Issue 1, pp. 83-162, p 85

price based competition, resulting in the potential loss in welfare and innovation to the detriment of the consumer. However, by narrowing the scope of quantity rebates, the ECJ is opening up a larger area of rebates to be subject to an effects based approach. As regards the definition of quantity rebates, it remains to be seen whether in the future, quantity rebates rather than loyalty-inducing rebates, will be defined by a negative definition, ie a rebate that is neither a loyalty nor loyalty-inducing rebate.

3.2.2 Loyalty rebates

In paragraph 27 of the *Post Danmark II* judgement, the ECJ approaches loyalty rebates by reiterating their harmful effect on the market. In particular the ECJ outlines that loyalty rebates tend “(...) to prevent [customers] from obtaining all or most of their requirements from competing manufacturers (...)”¹⁵⁰. According to the previous case law,¹⁵¹ the focus of the analysis was on identifying the obligation of the purchaser to obtain all or almost all of their supply from the dominant undertaking, with the effect of this obligation, ie to prevent a purchaser from obtaining its supply from competitors of the dominant undertaking being assumed by virtue of its design.¹⁵²

When comparing the two approaches, it can be argued that the focus of the assessment of loyalty rebates has shifted from the identification of an obligation to obtain all or almost all of its supply from the dominant undertaking, to whether the competitors of the dominant undertakings could potentially match the offer of the dominant undertaking, if the purchaser would obtain all or almost all of its supply from the competitors to the dominant undertaking. Notably, this shift in focus aligns with the wording of the Guidance Paper.¹⁵³ As such, rather than to identify the obligation to obtain its supply from the dominant undertaking, the assessment would require to verify the market conditions in order to show the likely effect of the loyalty rebate.

¹⁵⁰ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 27

¹⁵¹ eg Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, p 90

¹⁵² *ibid*

¹⁵³ Guidance Paper (n 2), para 39

Consequently, it would stand to reason that it is no longer sufficient to simply establish the existence of a rebate that is conditional on the purchaser obtaining all or almost all of its supply from the dominant undertaking. The question is if a shift in demand is possible ie if the dominant undertaking is an unavoidable trading partner for all or almost all of the demand and whether the discount offered by the dominant undertaking can be matched by a competitor.

However, the aforementioned conclusion is still questionable. Firstly, since in *Tomra*, the logic followed by the General Court was similar, yet there was no need to establish effects on the market.¹⁵⁴ Furthermore, the conclusion is put under question by the *Post Danmark II* judgement itself. Notably, in paragraph 28, the ECJ distinguished the rebates from loyalty rebates, concluding that they were not “coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark (...)”.¹⁵⁵ It would follow, that it is still possible to identify loyalty rebates by verifying whether there is an obligation on the purchaser to obtain its supply from the dominant undertaking, without the need to establish actual effects.

Regarding the change in wording, according to which the undertaking is obliged to “(...) obtain all or a given proportion of their supplies (...)”,¹⁵⁶ the judgement does not clarify this aspect, since it was decided in relation to loyalty-inducing rebate. Nevertheless, the change in wording could indicate, as with quantity rebates, a potential attempt to redefine the category of loyalty rebates.

The main argument pointing against a change in the approach by the ECJ comes from the fact that, as seen in eg *British Airways*, a dominant undertaking can be deemed to be an unavoidable trading partner by virtue of its market share alone.¹⁵⁷ Thus, it is unlikely that a dominant undertaking can escape infringing Article 102 TFEU based on the fact that despite having very high market share, it is factually not an unavoidable trading partner and consequently, does not

¹⁵⁴ Case T-155/06 – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:T:2010:370, para 219, the ECJ did not question this aspect in the appeal.

¹⁵⁵ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 28

¹⁵⁶ *ibid* (emphasis added)

¹⁵⁷ Case C-95/04 – *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166, para 75

have the special obligation to maintain competition on the market. The assumption that a dominant undertaking is an unavoidable trading partner does not seem to have been changed in *Post Danmark II*, since in paragraph 40 the ECJ cites *British Airways* repeating the wording therein.¹⁵⁸ It stands to reason that it is sufficient to identify an obligation whereby the purchaser has to obtain all or almost all of their supplies from the dominant undertaking, since due to the dominant undertaking's presence as an unavoidable trading partner, it cannot be substituted with regards to the entire demand.

The aforementioned situation illustrates the problem inherent in the presumption of dominance and the status of an unavoidable trading partner. As shown in section 1.1 of the thesis, the ECJ in *Hoffman-La Roche* concluded, that due to the very high market share, Hoffman-La Roche was an unavoidable trading partner and due to that, had the freedom of action characteristic of a dominant undertaking.¹⁵⁹ As such, the status of an unavoidable trading partner formed the basis for establishing its dominant position.

However, through the presumption of dominance at 50% market share, the ECJ is essentially able to reverse that logic, consequently limiting the need for market analysis necessary to conclude that the dominant undertaking is an unavoidable trading partner. Through the special responsibility doctrine stipulated in *Michelin I*¹⁶⁰ and the assumption of the presence of an unavoidable trading partner, potential pro-competitive competition based on exclusivity and target rebates is prevented, resulting in a decrease in efficiency to the detriment of consumers. This approach is in sharp contrast with the approach taken and consistently applied by the Commission.¹⁶¹

Thus it raises the question, whether, in the future, the ECJ will stop equating dominance with the presence of an unavoidable trading partner and consequently, with weak competition. Such an approach would align with the wording of paragraph 36 of the Guidance Paper, since the

¹⁵⁸ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 40

¹⁵⁹ Case C-85/76 – *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 90

¹⁶⁰ Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 57

¹⁶¹ Text to (n 33)

Commission does not explicitly assume that the dominant undertaking is an unavoidable trading partner.¹⁶²

Regarding the definition of what constitutes a loyalty rebate, no direct clarification can be found in the Opinion of the AG. Rather than define whether the rebate in question constitutes a loyalty rebate, the AG merely concludes that it is “ultimately immaterial” to distinguish the form of a rebate, arguing that what ultimately matters is whether it has an exclusionary effect on the market.¹⁶³ A similar idea is shared by the Commission as shown in section 2.3.1 of the thesis. The notion of abandoning the rebate categories was however not followed by the ECJ.

Lastly, a rather important distinction is made by the ECJ in paragraph 28, in that the ECJ connects loyalty rebates with “(...) an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark (...)“, thereby making a distinction between exclusivity obligations and exclusivity options.¹⁶⁴ A loyalty option meaning an option which activates upon a purchaser reaching the agreed upon threshold, however the purchaser has no obligation to actually meet that threshold. In contrast an exclusivity obligation is considered as a condition that the purchaser has to fulfil, thus preventing alternative sourcing from a competitor.¹⁶⁵ While the above mentioned differentiation still rests on the potentially problematic assumption that target rebates are simply a weaker form of exclusivity rebates,¹⁶⁶ the separation of exclusivity obligations and options allows for a more specific approach as regards to loyalty rebates.

To conclude regarding loyalty rebates, the ECJ in *Post Danmark II* indicated a move towards a more open approach, with the focus changing from verifying whether the conduct in question is likely to help maintain the market share of the dominant undertaking, to verifying whether individual customers are able to substitute the dominant undertaking for its competitors with regard to almost all of its demand. This change in approach requires a market assessment which

¹⁶² Guidance Paper (n 2), para 36

¹⁶³ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 29

¹⁶⁴ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 28

¹⁶⁵ For distinction between exclusivity obligation and options see Nicolas Petit (2015) (n 9), p 14

¹⁶⁶ Text to (n 92)

takes into account, at the very least, the conditions of the rebates from the dominant undertaking, the efficiency of the competitors of the dominant undertaking and lastly whether the dominant undertaking is an unavoidable trading partner with regards to a substantial part of the market and customers.

The new wording, albeit somewhat uncertain, shifts the aim with regard to the proof needed to establish a foreclosure effect by a loyalty rebate towards a requirement to establish a likely exclusionary effects on the market by the rebate in question. As mentioned above, this conclusion is however dependant on whether the ECJ continues uphold the presumption of dominance and consequently, that the dominant undertaking is an unavoidable trading partner without having to show market effects to that end. Without a change in the above mentioned presumption, it is unlikely that the wording will have a practical effect in the approach taken by the ECJ towards loyalty rebates.

Lastly, the distinction between exclusivity obligations and exclusivity options can be taken as an indication that the ECJ, as with quantity rebates, is trying to narrow the definition of loyalty rebates, thus opening up a larger area of law to be assessed under loyalty-inducing rebates. However, since *Post Danmark II* did not explicitly deal with loyalty rebates, the extent of this change could be clarified in future decisions.¹⁶⁷

3.2.3 Loyalty-inducing rebates

With regards to loyalty inducing rebates, the ECJ started by citing the definition of loyalty inducing rebates in *British Airways* and *Tomra*,¹⁶⁸ stating that, it is necessary “(...) to consider *all circumstances*, particularly the criteria and rules governing the grant of the rebate (...)”.¹⁶⁹ The ECJ further pointed out the need to consider the market position of the dominant supplier

¹⁶⁷ eg Case C-413/14 P – Intel (Pending)

¹⁶⁸ Case C-95/04 – *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166, para 67 and Case C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 71

¹⁶⁹ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 29 (emphasis added)

and the conditions prevailing on the relevant market,¹⁷⁰ in particular, it pointed out the need to consider the retroactive nature, the length of the reference period and lastly, that in case a customer did not meet the quantities agreed upon, it would need to reimburse Post Danmark.¹⁷¹

As such the ECJ reiterated the considerations made in *Michelin I* and *British Airways* regarding the reference period and retroactivity.¹⁷² Notably, the terms “fidelity-building” or “loyalty-building”, present in both the aforementioned rulings and in the opinion of the AG Kokott in this case, are missing in the *Post Danmark II* ruling itself, indicating that the ECJ is showing a shift towards the language used by the Guidance Paper.¹⁷³

In the analysis the ECJ referred to the opinion of AG Kokott and assessed the actual strength of the rebate on the contestable share of the market.¹⁷⁴ In particular analysing: the amount of trade that could be transferred from Post Danmark without an adverse effect on the rebates received;¹⁷⁵ the fact that the market was highly regulated and thus had considerable entry barriers;¹⁷⁶ and lastly the fact that when a rebate scheme covered a large proportion of the customers on the market.¹⁷⁷

With regard to the rebate covering a large proportion of the customers on the market, the ECJ concluded that the fact that the rebate applied to a large proportion of the market was indicative of the extent of the conduct and practise and its effect on the market, yet was not in itself evidence of abusive conduct.¹⁷⁸ To that end, the ECJ referred to *Suiker Unie*, wherein it had stated that “ [t]here is no need to ascertain the number of contracts which have this clause and

¹⁷⁰ *ibid*, para 30

¹⁷¹ *ibid*, para 32

¹⁷² Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, Case C-95/04 – *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166

¹⁷³ *ibid*, Guidance Paper (n 2)

¹⁷⁴ Case C-23/14 – *Post Danmark A/S v Konkurrenserådet*, ECLI:EU:C:2015:651, para 35

¹⁷⁵ *ibid*, para 36

¹⁷⁶ *ibid*, para 39

¹⁷⁷ *ibid*, para 43

¹⁷⁸ Case C-23/14 – *Post Danmark A/S v Konkurrenserådet*, ECLI:EU:C:2015:651, p 44-46

the number which do not”¹⁷⁹. The statement in *Suiker Unie* would rather serve to indicate that the extent of the market coverage is irrelevant for the assessment of abuse. The ECJ nevertheless concludes in paragraph 46 that the extent of the market coverage was a useful indication. This line of logic has been criticised as confusing.¹⁸⁰ Through the wording in paragraph 46, the ECJ seems to have shown that the assessment of the market coverage has an indicative roll when it comes to the likelihood of exclusionary effect resulting from the loyalty-inducing rebates.

The key here is the very possibility of using market coverage in assessing the likelihood of the anticompetitive conduct, since according to the case law following *Michelin I*, it was sufficient to establish that the rebate was *capable* of an exclusionary effect and as such there was no need to assess the extent of the allegedly anti-competitive practise.¹⁸¹

Based on the consideration by the ECJ of the extent of the practise, it stands to reason that in order to find abuse within the meaning of Article 102 TFEU, it is no longer sufficient to verify that a rebate scheme is *capable*, rather it has to be *likely*, to result in an anti-competitive exclusionary effect. This, in essence, establishes the burden of proof present in civil law, ie on the balance of probabilities.¹⁸² This line of logic finds support from the ECJ in paragraph 65, stating that: “(...) the anti-competitive effect of a particular practise must not be purely hypothetical”.¹⁸³

Assuming that the ECJ followed the reasoning of the AG,¹⁸⁴ it stands to reason that the likelihood of the exclusionary conduct is proportional to the severity of its anti-competitive

¹⁷⁹ Joined cases C-40-48, 50, 54-56, 111, 113, 114-73 – *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities*, ECLI:EU:C:1975:174, para 511

¹⁸⁰ James S. Venit, ‘*Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning*’ (2016) *Journal of European Competition Law & Practice*, Vol 7, Issue 3, pp 165-179, p 173

¹⁸¹ See, eg Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 104 and Case C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 68

¹⁸² Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 93

¹⁸³ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 65

¹⁸⁴ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet.*, ECLI:EU:C:2015:343, para 54

conduct, for which the extent of the market coverage is a useful indication. Thus, it is confusing why the ECJ nevertheless states that there is no need to establish the extent of the market coverage.¹⁸⁵ Moreover so, because the logic conflicts with the statement of the ECJ in paragraph 67: “It follows that only dominant undertakings whose conduct is likely to have an anti-competitive effect on the market fall within the scope of Article [102 TFEU]”.¹⁸⁶

One possible explanation may come from the overall approach taken by AG Kokott and the fact that *Suiker Unie* was decided in relation to a loyalty rebate, rather than a loyalty-inducing rebate. As explained with regard to loyalty rebates above, the AG considered the categories “ultimately immaterial”¹⁸⁷. That is to say that the AG assessed the rebate purely in light of its exclusionary effect.

It stands to reason, that with a higher severity, that is to say that if the rebate covers a large part of the contestable demand on the market, as would a loyalty rebate, it is not necessary to assess the exact market coverage of the rebate and consequently, it is sufficient that the rebate is *capable* of an anti-competitive exclusionary effect, since it is inherently severe. The same reasoning would apply if only one customer was bound by a loyalty rebate, since due to the special responsibility doctrine applying on the dominant undertaking, any small exclusionary effect would be severe due to the already weakened competition.¹⁸⁸

It follows, that rather than to require a proof of likelihood for all categories of rebates, it is sufficient to show that rebates falling within the loyalty rebate category are capable of an anti-competitive exclusionary effect, while the requirement to show probable effects would only be applicable for loyalty-inducing rebates. A good indication for the latter being the number of customers and the extent of the contestable demand covered by the rebate.¹⁸⁹

Most interesting is the inclusion of the consideration of the regulatory aspect. This seems to refer to the wording used in the *Post Danmark I* case, with regard to the special responsibility

¹⁸⁵ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 45

¹⁸⁶ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 67

¹⁸⁷ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 29

¹⁸⁸ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 72

¹⁸⁹ AG Opinion in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 54

doctrine.¹⁹⁰ It could be argued, that under *Post Danmark II*, establishing exclusionary behaviour under the test for loyalty inducing rebates differs depending on the characteristics of the market. It would stand to reason that highly regulated markets are therefore subject to a stricter treatment, when compared to non-regulated markets.

Considering that in *Post Danmark II*, the statutory monopoly was referred to in context of structural advantages conferred, it is likely that rather than a stricter test, the statutory monopoly, as was the case with the market coverage, is a factor indicating the likelihood of the anti-competitive exclusionary conduct. In particular pointing towards an unnaturally large market share. This conclusion also aligns with the wording used in *TeliaSonera* with regard to very large market shares, in that the degree of market strength signifies the extent of the effect of the conduct concerned.¹⁹¹ However, if the reasoning above is true, in order to avoid confusion, the ECJ could have simply referred to the unnaturally high market share. Thus the above reached conclusion, while plausible, is still uncertain.

To conclude, according to *Post Danmark II*, it is no longer sufficient to establish that a rebate scheme in question is *capable* of producing an anti-competitive exclusionary effect, rather that effect has to be likely. The likelihood is tied to the potential effects on the market. Possible indications to the likelihood of the anti-competitive exclusionary effect are the extent of customers and contestable share covered as well as the fact that the undertaking in question obtained its dominance through a statutory monopoly, thus pointing towards a large market share.

Lastly, it remains to be seen whether the requirement for the exclusionary conduct to be likely was stated regarding both loyalty and loyalty-inducing rebates, or whether, as suggested by the thesis, the effect is limited to the latter.

¹⁹⁰ Case, C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 23

¹⁹¹ Case C-52/09 – *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2010:483, para 81

3.2.4 The as-efficient-competitor test

The last question asked by the Danish court was with regard to the application of the as-efficient-competitor (hereinafter AEC) test. The previous case law of the ECJ regarding price-based exclusionary conduct, such as margin squeeze, and predatory pricing has put heavy emphasis on the as AEC test.¹⁹² The ECJ has gone as far as to imply that it is not the purpose of Article 102 TFEU to protect competitors less efficient than the dominant undertaking.¹⁹³ Consequently, according to the previous case law of the ECJ, it would stand to reason that for the purpose of applying Article 102 TFEU, the AEC test is vital.

In comparison, the ECJ in *Post Danmark II* differentiated rebate schemes from predatory pricing and margin squeeze, concluding, that there is no obligation to apply the AEC test as regards to rebate schemes.¹⁹⁴ Thus reaching the conclusion that the AEC test is a “tool amongst others”.¹⁹⁵

The rationale for the lack of an obligation to apply an AEC test is that in certain market conditions, it is not possible for a competitor to exist that is as efficient as the dominant undertaking.¹⁹⁶ That may be so because of specific market characteristics, eg a market where only one undertaking can operate efficiently¹⁹⁷ or because the efficiency of the dominant undertaking is due to the cost savings specifically attributable to its dominant position.¹⁹⁸

This aligns with the approach taken by the Guidance Paper which, while emphasising the presence of an AEC test with regard to price-based exclusionary conduct, takes a dynamic approach and recognises competitive constraints by less efficient competitors.¹⁹⁹ Moreover, as

¹⁹² See eg, Case C-52/09 – *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2010:483, para 31, Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, ECLI:EU:C:1991:286, para 72

¹⁹³ Case, C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 21

¹⁹⁴ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:651, para 57

¹⁹⁵ *ibid*, para 61

¹⁹⁶ *ibid*, para 59

¹⁹⁷ Whish and Baley (2012) (n 30), p 10

¹⁹⁸ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 71

¹⁹⁹ Guidance Paper (n 2), para 23-24

explained in regard to the market effect of non-linear pricing, it is clear that in certain scenarios, the exclusion of less efficient competitors would bring forth a decrease in welfare. In particular, competition using exclusive contracts is likely to lead to the foreclosure of a less efficient competitor despite there being demand for its product.²⁰⁰

Thus, if Article 102 TFEU had required the application of an AEC test with regard to all price-based exclusionary conducts, it would have led to a decrease in welfare. As such, the lack of the obligation to apply an AEC test is welcomed.

A further point was made by the AG, in that the AEC test requires expensive economic analysis, which, in case the exclusionary effect can be established without the AEC, would in essence, be a disproportionate use of resources.²⁰¹ While in her Opinion, the AG referred to the disproportionate use of resources for the Courts and the Competition authorities, the costs of the parties themselves cannot be ignored. Indeed, one of the goals for the high fines used in competition law is to be preventative, in that it is a message to the market to monitor its own behaviour.²⁰² Not only is the price/cost analysis that forms the basis for the AEC test open to different interpretations,²⁰³ it also requires the availability of trustworthy data.²⁰⁴ Thus, it is questionable how a dominant undertaking is capable of correctly monitoring its conduct through the application of an AEC test, considering that it is unable to access the price/cost data of its competitors.²⁰⁵

In the light of the effects based approach covered in section 2.3 of the thesis, the approach of the ECJ in treating the AEC test as “one tool amongst others” for the purpose of finding abuse within the meaning of Article 102 TFEU, exemplifies a clear direction towards a more effects

²⁰⁰ Calzolari and Denicolò (2013) (n 92), p 28

²⁰¹ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 64

²⁰² Case C-550/07 – *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* ECLI:EU:C:2010:512, para 79

²⁰³ Opinion of AG Kokott in Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 66

²⁰⁴ Guidance Paper (n 2), para 25

²⁰⁵ See Case C-286/13 P - *Dole Food and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184, with regard the sharing of price setting factors as a restriction by object under Article 101 TFEU

based approach. Moreover, being able to select amongst a selection of tools allows for the Courts and Competition authorities to take account of the specific market dynamics and through that, the approach taken by the ECJ is less likely to result in a decrease in efficiency.

3.2.5 Defence and exemption under 102

3.2.5.1 Objective justification

In paragraph 49 of *Post Danmark II*, the ECJ referred to the possibility for objective justification. As shown in section 2.2.4 of the thesis, while theoretically objective justification prevents an outcome which disregards economic reality, it has until now remained unclear as to what would actually constitute sufficient justification. In the light of *Post Danmark II*, the thesis will argue that while an indication to the line of reasoning to be made is tied to the likelihood of the anti-competitive foreclosure, the possibility to escape the application of Article 102 TFEU based on objective justification remains low.

In its essence the objective justification is an efficiency argument, that is to say the economic benefits brought about by the allegedly anti-competitive conduct must outweigh the potential foreclosure effect.²⁰⁶ Until now, it has been unclear what exact effects the objective justification has to outweigh, since without a proper market analysis and access to the Commissions files, the dominant undertaking is forced to argue efficiencies without knowing the exact anti-competitive effect it needs to overcome.²⁰⁷

According to *Post Danmark II*, in particular, the Opinion of the AG, which the ECJ seems to have followed, the likelihood of the anti-competitive effect is connected to the severity, ie extent of the market coverage of the anti-competitive conduct. It would follow, that the efficiency gain should be proportional to the severity and thus the likelihood of the effect on the market, which the Commission has to establish. The effect itself is likely to be established on competition

²⁰⁶ Case C-209/10 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para 41

²⁰⁷ More on that see Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P, *Aalborg Portland A7S and Others V. Commission*, ECLI:EU:C:2004:6, para 68 and Nicolas Petit (2015) (n 88)

itself as well as on consumers, since the ECJ in *Post Danmark II* re-emphasised consumer welfare as an aim of competition law.²⁰⁸

While the author believes that the approach towards loyalty rebates is still a form based one, ie without the need to establish actual effects on the market, the approach towards loyalty-inducing rebates requires likelihood of an anti-competitive effect. It stands to reason that it is possible that an undertaking can escape the application of Article 102 TFEU with regard to loyalty inducing rebates, since it no longer has to argue efficiencies in the dark. Based on that, it would be much easier to accept the premise that the objective justification, provided for in the case law of the ECJ, is capable of a more economic approach as argued by Wouter Wils and AG Kokott.²⁰⁹

However, as noted above with regard to quantity rebates,²¹⁰ the ECJ indicated that the cost savings, that is to say the efficiencies, must result from the individual transactions. It follows that the ECJ, in essence, is taking a narrow view on what could constitute an objective justification, ie the ECJ seems to infer that it does not accept efficiency inherent from the economies of scale at the production level. Thus, it is questionable how in practise an efficiency defence might succeed, since the dominant undertaking cannot use all of the efficiencies generated as an argument in its defence.

While an effects based market assessment by the Commission would give a dominant undertaking a better understanding of the exclusionary effects that the efficiencies generated have to outweigh, it is nevertheless restricted in its argumentation. Thus the likelihood of escaping Article 102 TFEU, due to a successful objective justification, remains low.

²⁰⁸ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 69

²⁰⁹ Wouter Wils (2014) (n 10), p 20 and Opinion of AG Kokott in Case C-109/10 P – *Solvay SA v European Commission*, ECLI:EU:C:2011:256, para 80

²¹⁰ Text to (n 140-141)

3.2.5.2 Appreciability

In *Post Danmark II*, the ECJ concluded, that” (...) anti-competitive practise is, by its very nature, liable to give rise to not insignificant restrictions of competition (...)”.²¹¹ As such, the wording and rationale of the ECJ is similar to the view taken in *Expedia*²¹² and *Tomra*.²¹³

As shown above, regarding loyalty-inducing rebates, in *Post Danmark II* the ECJ made it clear, that it is no longer sufficient to show that a rebate is capable of an anti-competitive exclusionary effect, rather such effect on the market has to be likely.²¹⁴ Furthermore, as shown above, the likelihood of the anti-competitive effect is related to the severity of the actual effect on the market.²¹⁵ Thus, not just any conduct that is capable of producing an anti-competitive effect can fall within Article 102 TFEU.

It follows that with regard to loyalty-inducing rebates, the assessment of an appreciable effect is inherent in the finding of abuse, and there is no need for a separate *de minimis* threshold. Consequently, with respect to loyalty-inducing rebates, the refusal by the ECJ to set a threshold is expected and furthermore, consistent with its previous case law.

The aforementioned conclusion is however less clear regarding conduct that still falls within a form-based approach. The ECJ connects the lack of a *de minimis* threshold to the special responsibility obligation.²¹⁶ Indeed, if the dominant undertaking is an unavoidable trading partner, there is sound economic reasoning backing the lack of a *de minimis* rule. With the presence of a *must-stock* item, the non-dominant competitor is essentially excluded from being able to form exclusivity agreements and consequently, is unable to compete on equal terms with the dominant undertaking.²¹⁷ The same holds true for where the dominant undertaking has

²¹¹ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 73

²¹² Case C-226/11 – *Expedia Inc. v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795, para 37

²¹³ Case C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 70

²¹⁴ Text to (n 182)

²¹⁵ Text to (n 184)

²¹⁶ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 72

²¹⁷ Calzolari and Denicolò (2013) (n 92), p 28

significant market coverage through the cumulative effect of a network of contracts,²¹⁸ since, as with loyalty-inducing rebates, there is inherently an appreciable effect on the market.

However, there is some concern about the rationale for the lack of a *de minimis* threshold in situations where dominance, and thus a weak market, has been assumed by virtue of a very high market share. That is so because in case the dominant undertaking is not an unavoidable trading partner, it does not inherently follow that there is a weak market wherein the dominant undertaking should have a special obligation. Thus the argument for the lack of a *de minimis* threshold, due to the special responsibility doctrine, falls apart.

It is nevertheless difficult to criticise the conclusion by the ECJ. That is so because the problematic aspect is due to the weaknesses inherent in establishing dominance and it is not the task of a *de minimis* threshold to act as a bandage. It cannot be denied that in the presence of an unavoidable trading partner, and thus in a weak market, any anti-competitive practice is indeed likely to have inherently not insignificant effect on competition.²¹⁹

A further argument could be made by relying on the aspect that the conclusion of the ECJ was based on the requirement that effect of rebate scheme is “*probable*”²²⁰. That is to say that, as with loyalty inducing rebates, the assessment of appreciable effect is already included in the finding of abuse. However, the author believes this to be unlikely, since loyalty rebates are likely to be concluded as inherently probable to have an appreciable effect.²²¹

Considering the above, it can be argued that, as the assessment of appreciable effect is already inherent with regard to loyalty inducing rebates, the lack of a *de minimis* threshold is stated primarily with regards to loyalty rebates and exclusive dealing. While the reasoning used by the ECJ is itself unconvincing, the conclusion is nevertheless sound and as such welcomed.

²¹⁸ See eg, Case C-234/89 – *Stergios Delimitis v Henninger Bräu AG. delimits*, ECLI:EU:C:1991:91, para 21

²¹⁹ Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para 73

²²⁰ *ibid*, para 74 (emphasis added)

²²¹ Text to (n 188)

4.0 Concluding thoughts

The aim of the thesis was to analyse the effects of the *Post Danmark II* judgement with regards to the legality of rebates under Article 102 TFEU. The thesis analysed whether the ECJ is showing signs of abandoning its form based approach in favour of a more effects based assessment, as argued by the Commissions Guidance Paper.

As follows from the thesis, the *Post Danmark II* judgement outlines a clear step forward towards a more economically sound, effects base approach, as regards the legality of rebate schemes by a dominant undertaking. While the judgement itself is at times contradictory, it nevertheless outlines new aspects to be taken into account by the Competition Authorities and Courts in assessing the legality of rebates as well as abuses in general.

In particular, with regard to loyalty-inducing rebates, the *Post Danmark II* judgement clarifies that the approach set by *Michelin I* and *British Airways* has come to an end. That is so because it is no longer sufficient to show that a loyalty inducing rebate is capable of an exclusionary effect, rather this effect has to be likely. Furthermore, the Competition Authorities and Courts can select from a number of different factors in assessing the likelihood of the anti-competitive effect, thus requiring consideration of specific market dynamics.

Furthermore, the ECJ indicated that factors which may form the basis in assessing the likelihood of the anti-competitive exclusionary conduct, might include the extent of the market covered by the rebate scheme, as well as whether the dominant undertaking owes its position to a prior legal monopoly. However, the exact intent behind the reference to the statutory monopoly remains unclear.

The aforementioned conclusion is less straightforward with regard to loyalty rebates, since due to the combination of several aspects that are characteristic to EU Competition law, such as the special responsibility doctrine²²² and the presumption of dominance at 50% market share,²²³ it

²²² Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI:EU:C:1983:313, para 57

²²³ Case C-62/86 – *AKZO Chemie BV v Commission of the European Communities*, ECLI:EU:C:1991:286, para 60

is still possible to conclude that a loyalty rebate is inherently likely to produce an anti-competitive exclusionary effect. Nevertheless, the ECJ is indicating a change in approach with regard to loyalty rebates. While the extent of the change is uncertain, the hope remains, that, as with loyalty inducing rebates, the change will be towards a more effects based approach. To that end, the distinction made between loyalty obligations and options can act as the basis for a future development in the case law of the ECJ.

With regard to quantity rebates, and in particular the presumption of legality applying to them, the *Post Danmark II* judgement did not clarify the legal environment. The requirement for quantity rebates to be limited to the cost savings from individual orders limits the discounts and thus price based competition available for dominant undertakings. Furthermore, this carries over to the possibility of objective justification under Article 102 TFEU. That is so because the unwillingness of the ECJ to accept efficiencies stemming from standardised rebates, ie efficiencies resulting from the production side, further limits the possible arguments available to dominant undertakings.

Nevertheless, a narrow definition for quantity rebates favours the effects based approach advocated in the Guidance Paper, since it opens up a larger section of rebates to be analysed under loyalty-inducing rebates and thus under an effects based approach.

With regard to the as-efficient-competitor test, the *Post Danmark II* confirmed it as a tool amongst others. This is a welcome confirmation, since the special responsibility on dominant undertakings requires them to be able to monitor themselves in order to ensure that their conduct does not impede competition. As was shown in the thesis, it is difficult for a dominant undertaking to be able to assess whether its competitors are as efficient as itself without having reliable data to that end. This also reflects the economic reality, that there can still be demand for the products of a less-efficient-competitor. Thus excluding such competitors would have the effect of reducing product variety to the detriment of the consumer.

Lastly, the ECJ confirmed that there is no *de minimis* threshold for Article 102 TFEU. This was expected, since such a conclusion was already indicated in *Tomra*.²²⁴ Furthermore, as shown in

²²⁴ C-549/10 P – *Tomra Systems ASA and Others v European Commission*, ECLI:EU:C:2012:221, para 70

the thesis, the assessment of appreciable effect is already inherent in the finding of abuse under Article 102 TFEU, thus it would make no economic sense to assess appreciable effect again.

However, the assessment of *Post Danmark II* also outlined the problems inherent in equating undertakings, which are assumed dominant due to their market share, with a weak market structure in the relevant market. In particular, the thesis showed that equating high market share with the status of an unavoidable trading partner can prevent an effects based approach to loyalty rebates. Thus, the fact that through the presumption of dominance at 50% market share, one is able to establish dominance, and consequently, that the dominant undertaking is an unavoidable trading partner, continues to pose a problem for a fully effects based assessment for EU Competition law.

In addition to quantity rebates, the judgement also showed indications, albeit uncertain, of redefining the categories for quantity, loyalty and consequently loyalty-inducing rebates. However, unlike with quantity rebates, no clear conclusion could be drawn with regard to loyalty and loyalty-inducing rebates. Consequently, it remains for the ECJ to address such aspects in the future, with the upcoming Intel appeal being a potential candidate.²²⁵

To conclude, the *Post Danmark II* judgement is likely to be remembered as a landmark ruling with regard to abuse and in particular the legality of rebate schemes for Article 102 TFEU.

²²⁵ Case C-413/14 P – Intel (Pending)

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