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The Guidance Paper – Legal Nature and Adjudicative Impact

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Contents

Glossary

AVC	Average avoidable costs
AG	Advocate General
CFI	Court of First Instance (now General Court)
GC	General Court (formerly Court of First Instance)
DG	Directorate-General
DG Comp	European Commission's competition Directorate-General
EAGCP	Economic Advisory Group on Competition Policy
Commission	European Commission
CJEU	Court of Justice of the European Union
ECMR	European Commission's Merger Regulation
ECR	European Court Reports
ed/eds	editor/s
edn	edition
EEC	Equally-efficient competitor (or as-efficient competitor)
EU	European Union
LRAIC	Long-run average incremental costs
NCA	National Competition Agency
NRA	National Regulatory Agency
nyr	not yet reported
OJ	Official Journal of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Article 102 of the Treaty of the Functioning of the European Union ('TFEU') prohibits undertakings from abusing their dominant position. Naturally, such a loose wording allows for different interpretations. Article 102 TFEU had been, along with the prohibition of anti-competitive agreements and mergers, interpreted in a rather formalistic manner since its coming into existence. Gradually, the European Commission ('Commission') attempted to change this by advocating a legal analysis more informed by the insights of modern economics. With this in mind, the Commission undertook, starting in 2003, a review of its policy on Article 102 TFEU. This led in February 2009 to the issuance of a 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'[1] ('Guidance Paper' or 'Commission's Guidance'). In the course of the review, the Chief Economist of DG Comp commissioned a report from the Economic Advisory Group on Competition Policy, which was published in July 2005 ('EAGCP report').[2] Subsequently, in December 2005, the DG Comp Staff published a Discussion Paper on the application of Article 102 TFEU on exclusionary abuses,[3] initiating a consultation process with stakeholders on the modernisation of Article 102 TFEU.

In essence, the Guidance Paper was criticised for two reasons. First, it was alleged that the content of the Guidance Paper is in several respects inconsistent with the case law of the European judiciary, particularly that of the Court of Justice of the European Union ('CJEU' or 'the Court'), which renders the issuance of the Guidance Paper unlawful.[4] Second, scholars challenged the Guidance Paper on substantive terms. The first main strand of criticism in that respect is lack of legal certainty owing to either the multitude of exceptions and caveats to the Guidance Paper's general legal tests or the impossibility of obtaining the information necessary to apply the legal tests in the first place.[5] As a consequence, the dominant firm is not able to self-assess the legality of its conduct. The second main criticism related to substance claims that certain concepts, tests or principles of the Guidance Paper are inconsistent with economic theory or with the goals of EU competition law.[6]

1 Commission Communication – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7.

2 Report by the EAGCP, An economic approach to Article 82, published in July 2005.

3 DG Comp, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary Abuses, published in December 2005.

4 See *infra 3.2.1*, particularly at fn. 102-105 for references.

5 See *infra 3.2.4*, particularly at fn. 165 for references.

6 See, *inter alia*, *infra 3.2.3.1*, particularly at fn. 153. The matter is dealt with at numerous places within the case studies *supra 5*.

As a result of the critique, scholars have questioned the Guidance Paper's capacity to influence the case law of the European judicature. This thesis aims to elucidate this capacity from two angles. First, by assessing to what extent the Guidance Paper is capable of, directly or indirectly, legally binding the Commission and, as a result of this, the European judiciary. In that context we will analyse whether under EU law the Commission was legally entitled to adopt the Guidance Paper (Chapter 3). Second, the relevant case law of the CJEU will be analysed to find out if and to what extend the Court has adopted the contents of the Guidance Paper (Chapter 5).

The above-described two-step approach is adopted because we ultimately want to measure the impact that the Commission's Guidance has had and potentially could have on the subjects of the law. The Guidance Paper's capacity to influence the CJEU's case law is strongest if the Guidance Paper must be adhered to by the CJEU as a matter of law. The Guidance Paper contains enforcement priorities, a denomination the Commission had not previously employed in what is commonly referred to as soft law. Soft law can preliminarily be defined as instruments whose content is related to the law but which, as opposed to legal acts, lack binding force.[7] Understanding the legal value of soft law is necessary in assessing the Guidance Paper's capacity to influence the CJEU's case law. An analysis of whether the adoption of the Guidance Paper violated European law is undertaken thereupon, as it is likely that, if in violation, the Commission's Guidance will have only limited capacity to have a bearing on the judiciary. Moreover, understanding the legal value of enforcement priorities can be beneficial to understanding the Court's approach *vis-à-vis* the Guidance Paper. As we will see *infra,* enforcement priorities by their nature are inapt for conversion into rules of law. All this is expounded in Chapter 3.

Thereafter, Chapter 4 provides an overview of the so-called effects-based approach, i.e. a legal analysis consistent with economic theory. The hallmarks of this approach as well as main concepts stipulated in the Guidance Paper will be set out and explained in order to facilitate the understanding of the case studies.

Chapter 5 presents a selection of CJEU judgments delivered after the adoption of the Guidance Paper. The goal of these case studies is to assess whether and to what extent the Guidance Paper has had an influence on the CJEU's decision making. Following the analysis of the individual cases a sub-chapter will conclude the findings, assess the evolution of the Court's approach *vis-à-vis* the Guidance Paper in scale and scope, present possible explanations and speculate as to what the future might bring.

Chapter 6 concludes.

[7] See *infra 3.1.1*, particularly at fn. 19 and accompanying text.

2 Methodology

The primary research method applied in this thesis is doctrinal legal analysis[8] understood as a methodology grounded on 'an amalgam of applied logic, rhetoric, economics and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions ...'[9] Doctrinal legal analysis underpins the analysis conducted in Chapter 3, 4 and 5. Chapter 5 employs doctrinal legal analysis where as part of the case analysis it is established what legal consequences result from a certain set of facts according to either the framework set out in the Guidance Paper or the case law (prior or after the adoption of the Guidance Paper).

The case analysis contains cases exclusively decided by the CJEU due to their relevance for the decision-making practice of the General Court ('GC'), the CJEU being the final appeal instance to the GC's judgment, even absent a rule of judicial precedent. Furthermore, constraints of time and space necessitate a selection of cases. The primary selection criterion to filter the CJEU judgments to be analysed is determined by the scope of the Guidance Paper. The judgment has to contain findings related to (1) substantive legal questions (2) of abuse of dominance pursuant to Article 102 TFEU (3) leading to an exclusionary abuse. This excludes cases dealing solely with procedural matters[10] or with exploitative abuses, which the Guidance Paper does not deal with.[11] With respect to the remaining cases the criterion of minor relevance of effects was applied. Accordingly, a case concerned only to an unsubstantial extend with anti-competitive effects of a firm's conduct on the market are not subjected to an analysis.[12] This lead to the exclusion of *AstraZeneca v Commission*,[13] a case concerned with misleading information *vis-à-vis* national patent authorities. As the imputed conduct took place outside of the market as such (towards the authorities), the judgment is more concerned with the effects on the behaviour of patent authorities than effects on the market.[14] In addition, a low legal standard for a finding of anti-competitive effects can arguably be explained by the preceding submission of misleading information, rendering it difficult to draw general conclusions therefrom.

8 P. Chynoweth, 'Chapter 3 Legal research', in A. Knight & L. Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell 2008).

9 R. Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 University of Toronto Law Journal 333, 345.

10 Case C-109/10 P *Solvay SA v Commission* [2011] ECR II-02839.

11 Guidance Paper [n 1], para. 7.

12 The following case did not meet this threshold: Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* [2012] nyr.

13 Case C-457/10 P *AstraZeneca v Commission* [2012] nyr.

14 See *ibid.*, paras. 105-112.

The presentation of the cases' facts and the Court's findings is tailored for the needs of the analysis and does not purport to constitute a comprehensive representation of either. From the outset, the analysis is divided into legal issues. The analysis of the cases is undertaken according to the following non-exhaustive list of criteria, subject to modifications to account for the particularities of each case: (1) changes in the case law, (2) degree of convergence between changed case law and content of Guidance Paper, (3) absent this, the degree of convergence between changed case law and a more economics-informed analysis not provided for in the Guidance Paper, (4) inferences regarding causal link, (5) adjustments to account for the specifics of the facts, and (6) evolution of the Court's approach.

This framework assesses changes in the case law not only through the lens of the Commission's Guidance, but rather, where appropriate, from the perspective of the academic movement advocating the injection of more economics into the legal framework of Article 102 TFEU at large. This broader view is at times taken for the following reasons. First, the Guidance Paper represents only one expression of this scholarly movement. It is occasionally difficult to draw a line between an idea embodied in the Commission's Guidance and one that is firmly grounded in scholarship in support of more economics, albeit not, at least implicitly, laid down in the Guidance Paper. Second, the Guidance Paper is, at least pursuant to its purported purpose, designed to guide the enforcement instead of proposing a reformed legal framework. Nevertheless, for the purpose of this comparison, in the case studies the Commission's Guidance is applied as if it constituted the legal framework, as opposed to mere enforcement priorities. This method is prone to distort some of the contents set out in the Guidance Paper, and, more generally, is likely not to always be representative of the Commission's views. Third, convergence between the case law and the more-economics approach might have been influenced by the Guidance Paper in that it initiated a debate over a change of the orthodox case law but ultimately fell short of adopting the Guidance Paper's contents, but it approximated it nevertheless. Furthermore, this can be seen as a precursor to the subsequent adoption of the Guidance Paper's contents in later cases.

Methods of empirical social science research are applied when inferences as to a causal link between the adoption of the Guidance Paper and a change in the Court's case law subsequent thereto are drawn.[15] Causality is established by qualitative parameters. Among those are the degree of convergence/divergence between the content of the Guidance Paper and the changed case law (adoption of general principles, adoption of novel legal concepts, word-by-word adoptions), the degree of specificity of the Guidance Paper's content (a general principle, a detailed and complete

[15] As explained in L. Epstein & A. D. Martin, 'Quantitative Approaches To Empirical Legal Research' (2010) (http://epstein.usc.edu/research/elsquant.pdf, accessed 2/11/13).

legal test, a legal definition), the degree of divergence between the previous and the new case law (the more substantial the change the more likely it is caused by a factor as substantial as the Guidance Paper), the time-span during which the old case law had remained in essence unaltered[16] and likely external factors (new findings in economic research or new OECD Recommendations and Best Practices on Competition Law and Policy).[17] Causal inferences are drawn on the premise that the adoption of the Guidance Paper was an event of high salience and that the Court's judges in general familiarise themselves with its contents and ponder the legal consequences of its application on the case at stake prior to drafting a judgment. Due to the difficulty in drawing reliable causal inferences this thesis relies on general patterns in the CJEU's judgments to establish causation. Put differently, although it might be doubtful that a single change in the case law can be attributed to the Commission's Guidance, a continuous and repetitive string of changes is apt to draw the general conclusion that the Guidance Paper matters.

In sum, the case analysis is designed to avoid a mechanical comparison and, while focusing on the Guidance Paper, aims at catching the greater lines of development in the CJEU's case law. Noticeably, the analysis does in principle comprises neither an analysis of the merits of the Guidance Paper's propositions nor of the case law as it stood before or after the Guidance Paper's issuance. Naturally, such purist analytical perspective is difficult to uphold and the reader will experience that exception is made for the sake of comprehensibility and clarity of argument.

[16] A longer time-span is indicative of a high quality of the case law, which makes it unlikely that it is overruled for unsubstantial reasons and shortly after the adoption of the Commission's Guidance.

[17] Likely external factors may rebut or weaken the probability of causation between the Guidance Paper and the change in case law.

3 The Guidance Paper – a soft law instrument

This chapter first lays out what legal value has been attributed by the EU judiciary (predominantly by the CJEU) to soft law in the field of EU competition law (*infra 3.1*). Outside the scope of this section are other, non-legal effects of soft law, such as its creation of a sense of obligation for certain actors, such as the courts.[18] Second, this chapter engages into the question whether the Commission was legally permitted to issue the Guidance Paper (*infra 3.2*).

3.1 The legal value of soft law in EU competition law

The following account confines itself to the characterization and classification of what is commonly and quite inaccurately (as we will see *infra*) referred to as soft *law* in the field of EU competition law issued by the Commission, taking a more general perspective only if necessary. Hence, references to soft law and case law relate to EU competition law.[19]

3.1.1 Definition and classification of soft law

Soft law in EU competition law is here defined as a generic term for documents issued by the Commission, commenting on how it intends to generally interpret, apply and enforce the (hard) law in its decisions.[20] This is of a particularly high value in the area of EU competition law due to the broad margin of discretion enjoyed by the Commission as a result of its duty to pursue a general policy in competition matters.[21] Noticeably, the EU judiciary (i.e. the law interpreted by the EU courts) does not concern itself with the question of what soft law is. The definition of soft law proposed here cannot be found in the case law (i.e. in the law). However, the provision of a definition bears heuristic value in that it offers a generic term describing the category of instruments this thesis is concerned with. In turn, we will show that soft law is neither law nor a legal notion in EU competition law. The EU judiciary does not only deny soft law the status of law, but in addition

[18] We contend that the dichotomy between law and non-law and legal and non-legal effects is of crucial importance since it is what judges and, as a consequence, practitioners apply in their day-to-day work. This dichotomy is reflected in the case law, as we will see *infra*.

[19] Notwithstanding this caveat, many findings can equally be applied to soft law in EU law in general.

[20] This is one of many possible definitions of soft law in EU competition law. L. Senden proposes the following definition for soft law in EU law: 'Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have indirect legal effects, and that are directed at and may have practical effects' in 'Soft law in European Community law' (Wolf Legal Publishers 2003), 104. *Ibid.* the reader is introduced to other scholarly definitions of soft law and the respective references. The definition of soft law proposed here differs from L Senden's in that it does not hinge on potential legal effects but rather on their intended complementary role to existing EU law. Moreover, the proposed definition is confined to documents published by the Commission.

[21] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* (*Dansk Rørindustri)* [2005] ECR I-5425, paras. 170-172.

does not define soft law as such. This is consistent, as definitions are provided in order to specify what is the law and to find out what is meant by the law (i.e. what does a notion in the law mean), not, however, for phenomena lacking this normative link.

Soft law does constitute neither primary nor secondary EU law and is thus not part of the EU legal order.[22,23] Primary EU law is formed by the EU founding Treaties, with the various annexes, appendices and protocols attached to them, and later additions and amendments.[24] Numerous legal principles flow from the Treaties, which will be of importance at a later point. Secondary EU law is law adopted by the EU institutions based on a competence in EU primary law. Regulations, directives and decisions are legal acts constituting secondary EU law pursuant to Article 288 TFEU. However, this list is not exhaustive. Article 288 TFEU stipulates that these instruments have binding force. Binding force means that they produce general (*erga-omnes* effect) and external legal effects in and of themselves (it is inherent to them), without intermediation of any other law, and are to be applied by the EU judiciary.[25] Primary EU law further stipulates that secondary EU law be adopted in accordance with specific procedures set out in the Treaties and must have a legal basis in primary EU law.[26]

Soft law in EU competition law does not fulfil either of these conditions. First, the Treaties do not accord legally binding force to soft law. Second, it is not adopted as an act of secondary EU law pursuant to Article 288 TFEU. Third, it is not adopted in accordance with specific procedures laid down in the Treaties (in fact, the Commission chooses its own proceedings which are lacking the legitimacy and accountability safeguards of the EU legislative procedure).[27] Fourth, it does not have a legal basis in primary EU law. Thus, soft law in EU competition law does not constitute law in the context of the EU legal order.[28]

Consequently, and stated for clarification only, it is neither a source of law, nor part of the legal framework,[29] nor a legal instrument, nor does it hold a place in the hierarchy of norms/sources of

22 P. Behrens, 'Abschied vom more economic approach?' in Bechthold and others (eds), *Recht, Ordnung und Wettbewerb – Festschrift für Wernhard Möschel zum 70. Geburtstag* (Nomos Baden-Baden 2011), 2; L. Senden [n 20], 273-275.

23 Leaving international law, including general principles of law, for the sake of simplicity aside.

24 L. Senden [n 20], 34-38.

25 O. Stefan, *Soft Law in Court Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International 2013), 4. This definition is consistent with the definition established in case law.

26 O. Stefan [n 25], 11; L. Senden, *Soft Law in European Community Law* (Hart Pub. 2004) 45, 233.

27 O. Stefan [n 25], 234.

28 L. Senden [n 20], 55. This is not to say that it does not qualify as law in other fields and for different purposes, e.g. sociology or political science. Under the definition advanced by the EU judiciary, however, it does not. For a different take on soft law see F. Beveridge & S. Nott, 'A hard look at soft law', in P. Craig & C. Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International London, 1998), 288-292.

29 This is critical of the wording used by the CJEU in *Dansk Rørindustri* [n 21], para. 207-211, implying that the legal effects soft law is capable of producing make it part of the legal framework.

law, as these terms relate exclusively to law.[30] The term soft *law* is thus misleading, but will nevertheless be used in this thesis as a result of its common use. The judiciary is to be praised for having hardly ever employed the term soft law, instead using 'rules of practise'[31] or 'rules of conduct of general application'.[32] It should be noted that Article 288 TFEU mentions recommendations and opinions which, along with instruments such as guidelines, communications and notices, are typical expressions of what is commonly referred to as soft law.

3.1.2 Legal effects of soft law

Soft law, albeit not having binding force, has been accorded legal effects/value in the case law. These legal effects are brought into existence only through the intermediary of general principles of law, which are themselves part of primary EU law.[33] The case law at first dealt only with internal measures:[34]

> 'The Court has consistently held that internal directives or measures of an internal nature such as the procedural arrangements laid down by the Commission may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart without giving reasons which led it to do so, since otherwise the principle of equality of treatment would be infringed.'[35]

The duty to give reasons was considered a procedural arrangement to enable the applicant to assess whether or not the principle of equal treatment had been breached. In *Dansk Rørindustri,* the CJEU found that this principle applies *a fortiori* also to external measures, the Guidelines on the method of setting fines in the case in question.[36] The Court continued:

> 'In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in

30 This is critical of the use of terminology employed by O. Stefan, who suggests that these terms entail soft law instruments throughout her work, see to that effect [n 25], 120-129, 142, notably on p. 139: '[..] the rules of law/rules of practice distinction should be understood as a hard law/soft law distinction and not as a distinction between legal instruments and instruments with no legal value'.

31 Case C-171/00 P *Libéros* v *Commission* [2002] ECR I-451, para. 35.

32 *Dansk Rørindustri* [n 21], para. 211.

33 *Dansk Rørindustri* [n 21], para. 211; O. Stefan, [n 25], § 8, pp. 201-227; L. Senden [n 20], 263 et seq.

34 This is comparable to the treatment of 'Verwaltungsvorschriften' in German administrative law, which are accorded the effect of binding the authority's discretion, see F. Schoch, J. Schneider & W. Bier, *Kommentar zur Verwaltungsgerichtsordnung'* (24th supp, C.H. Beck 2012), § 114 para. 22, 63-65.

35 Joined cases 80 to 83/81 and 182 to 185/82 *Robert Adam and others v Commission* [1984] ECR 3411, para. 22; Joined cases 181/86 to 184/86 *Sergio Del Plato and others v Commission of the European Communities* [1987] ECR 4991, para. 10; Case C-171/00 P *Libéros v Commission* [2002] ECR I-451, para. 35; *Dansk Rørindustri* [n 21], para. 209.

36 Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 of the ECSC Treaty, OJ 1998 C 9/3.

> breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.'[37]

The CJEU furthermore held that '[h]aving particular regard to their legal effects and to their general application [..] such rules of conduct come, in principle, within the principle of "law" for the purposes of Article 7(1) of the ECHR' but then found that the change in the Guidelines was reasonably foreseeable at the time when the infringements concerned were committed and did therefore not breach the principle of non-retroactivity.[38,39]

Two inferences can be drawn. First, the legal effect the Court is concerned with is the effect of binding the Commission and, consequently, the judiciary. Where the Commission is endowed with discretion, the Courts are precluded from substituting their own judgment for that of the Commission on the question of law at stake.[40] Second, it is the breach of a principle of EU law owing to the (non-) application of a certain soft law instrument in a specific decision that is condemned.[41,42] The Court recognizes the particular effects on the expectations of concerned parties that arise from the publishing of the instrument at issue. Evidently, the publishing may cause extra implications compared to administrative rules of practise which may not come to the notice of the concerned

37 *Dansk Rørindustri* [n 21], para. 211; reiterated in Case C-3/06 P *Group Danone v. Commission* [2007] ECR I-8935, para. 23, in Case C-520/09 P *Arkema SA v Commission* [2011] ECR I-08901, para. 88 and in Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others ('Expedia')* [2012] nyr, para. 28.

38 *Dansk Rørindustri* [n 21], paras. 224-232.

39 O. Stefan argues that the application of the principle of non-retroactivity shows '[..] that such instruments follow the general regime of legal regulation and is thus different to mere administrative practice or policy', [n 25], 131-132. However, this is doubtful since the CJEU does frequently stress the difference between hard law and rules of conduct and has explicitly based its legal test on case law concerning internal administrative measures. The Court upheld the CFI's finding that non-retroactivity is a general principle of EU law applicable when fines are imposed. It found that, while the Guidelines are not the legal basis for the contested Decision, their relevance in the light of the principle of non-retroactivity, being capable of binding the EC and thereby ensuring legal certainty, justified an isolated assessment of the Guidelines, *Dansk Rørindustri* [n 21], paras. 213-214.

40 P. Craig, *EU Administrative Law* (OUP, 2006), 435, see the whole chapter 13 for a detailed overview on discretion in EU law.

41 This finding is of such imminence to the CJEU that it in Case C-410/09 *Polska Telefonica Cyfrowa* [2011] ECR-3853 rephrased the referring court's question whether or not guidelines by the Commission addressed to NRA's in the electronic communications sector, the adoption of which is envisaged by Article 16(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002 L 108/33, and of which pursuant to that provision NRA's 'should take the utmost account of the guidelines', can be *applicable* to individuals into whether or not a provision of the Act of Accession precludes an NRA of a Member State from *referring* to the 2002 Guidelines in a decision by which that NRA imposes certain regulatory obligations on an operator of electronic communications services (paras. 21-22). Consequently, the CJEU did not, strictly speaking, deal with the question in how far legal effects can be inferred from soft law instruments, but rather if the referring court could, on a more formal/procedural level, lawfully refer to them in its decision.

42 Here again a parallel to the treatment of 'Verwaltungsvorschriften' in German administrative law can be drawn, see F. Schoch, J. Schneider & W. Bier [n 34], § 114 paras. 22, 63-65.

party. It therefore comes as no surprise that the CJEU mentions legitimate expectations beside the principle of equal treatment (which is part of older case law on administrative rules).[43]

However, the Commission can absolve itself from its rules of conduct provided it states compelling reasons for so doing consistent with the invoked general principle of law.[44] The Court appears to perform an implicit balancing act, usually between the effectiveness of EU competition law and the general principle of law invoked. In *Dansk Rørindustri* the CJEU found the Commission's discretion in setting fines to be crucial in answering the question of whether the expectations are legitimate or if a retroactively adopted soft law instrument was reasonably foreseeable. As a consequence of the Commission's duty to pursue a general policy in competition matters mentioned *supra 3.1.1*, a change in the assessment of a legal question is more foreseeable the higher the relevance thereof for the purpose of pursuing an effective competition policy.[45] With other words, a change of the Guidelines on fines leading, in principle, to their increase, is regularly reasonable foreseeable, for 'the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.'[46] The rationale for this is the need to counteract a weakening of the deterrent effect if firms are able to compare the profits deriving from the infringement against the fine.[47] Implicitly, the CJEU held that the principles of equal treatment and legitimate expectations do not outweigh the principle of effective competition law enforcement.

It is important to note that the legal effect/value mediated by legal principles is decidedly different from the legal force of law. The courts are bound by the law, whereas soft law does not, by itself, have such effect. This divide upholds the institutional balance in the EU. What is more, the mechanism employed by the CJEU to accord legal effects to soft law is not arbitrary, but based on the rule of law as a result of the mediation through general principles of law. The fear that the CJEU

43 As is clear from the wording employed by the CJEU other general principles of law might also lead to the self-binding effect on the Commission. O. Stefan elaborates on such other principles, [n 25], 201-227.

44 This possibility is part of the case law on internal administrative practises cited in fn. 35 and was explicitly read into the *Dansk Rørindustri* test in *Arkema SA v Commission* [n 37], para. 88; see also O. Stefan, 'Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst' (2013) CPI Antitrust Chronicle July No. 1 (http://ssrn.com/abstract=2294541, accessed 28/11/13), 3 and P. Craig [n 40], 639-641.

45 *Dansk Rørindustri* [n 21], paras. 224-232.

46 Joined cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, para. 109; Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, para. 81; *Dansk Rørindustri* [n 21], para. 169.

47 Joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR-01825, paras. 105-109. This case was relied upon in *Dansk Rørindustri* [n 21], particularly in paras. 260, 292.

might promote 'backdoor legislation'[48] is therefore, in principle, not higher than in any application of legal principles, which are by their very nature vague and rely on courts to clarify their scope.[49]

3.1.3 Soft law and the role of discretion

By linking the breach of general principles of law to the exercise of the institution's discretion that published the soft law instrument, the CJEU has effectively confined the possible scope of legal effects, for bringing about the legal effect of having one's discretion bound, presupposes the existence of discretion. Hence, the Court assesses, at least implicitly, if the Commission is granted discretion by the EU competition law rules.[50] Evidently, the binding effect can only reach as far as discretion is granted. Discretion therefore plays a seminal role. Thus, the question whether or not the law recognises legal effects of soft law revolves around the question of whether the Commission enjoys discretion, and not around some definition nor scholarly image of soft law.

Further, it appears that the Commission, in contrast to the addressees, cannot derive any legal effects, i.e. rights, from its soft law instruments. Either the Commission remains an unbound margin of discretion or it is bound by virtue of a general principle of law.[51] Soft law instruments are not capable of increasing the Commission's margin of discretion. The margin of discretion is set out by the legal framework[52] and can solely be changed through the legal procedure set out in the Treaties by adopting secondary EU law. Hence, the Commission cannot impose new obligations on undertakings in its soft law, since this constitutes an act intended to have legal effects of its own,

48 O. Stefan [n 25], 193. Further, as O. Stefan points out, the CJEU does not transform soft law into hard law by way of 'judicial transformation', *ibid.*, 192-193, apparent by the distinction between rules of conduct and rules of law upheld by the CJEU, see to that effect *ibid.*, 137-139.

49 For a general account on the divide between legal rules and legal principles and its consequences see R. Dworkin, 'Is Law a System of Rules?' (1967) Chicago Law Review.

50 It is thus skewed to claim that '[c]hecking the conformity of soft law to hard law is the consequence of the hierarchical relationship between the two types of norms', O. Stefan [n 25], 143, and misleading to refer in the same section to safeguards 'important in order to guarantee that the institution issuing such instruments does not exceed the limits of its discretion', *ibid.*, 148.

51 The Commission's discretion is limited (bound) in two directions. First, as laid out in *Dansk Rørindustri* [n 21], second, the Commission can be compelled to pursue certain cases as a result of acting in the public interest, presumably grave violations of EU competition law most adversarial to the fulfilment of its goals. The GC implicitly acknowledged this in Case T-24/90 *Automec Srl v Commission ('Automec')* [1992] ECR II-2223, para. 71-85, by finding that the Commission is only permitted to refrain from pursuing a case as a result of applying a legitimate priority criterion. We will look into this in more detail *infra 3.2.*

52 Which does not include soft law contrary to some scholarly assertions, see *supra* at fn. 30.

requiring a legal basis and adherence to the legal procedure.[53] Furthermore, the discretion granted is subject to the interpretation of the relevant provision by the EU judiciary.[54]

It should be noted that the question whether or not the Commission, or any other institution, is legally permitted to publish soft law on issues beyond the scope of its discretion, is distinct to the question what legal effects soft law instruments potentially yield. Legal effects, as shown, require discretion. But soft law instruments can be issued for other reasons. We will look into this *infra 3.2*.

3.1.4 Addendum: Classifying the legal value of soft law

Before our attention turns to the question of the legal value of the Commission's soft law on the Member States we will take a look at the proposal by the learned L. Senden for classifying the legal mechanisms to attain the result of binding the EU courts. An addendum is the appropriate form for such analysis. The classification is meant to represent an analytical effort to clarify the legal framework as laid down in the case law by the EU judiciary. Yet, this exceeds a mere doctrinal presentation of the case law, and thus is made the subject of an addendum. Criticism on L. Senden's taxonomy is subject to the caveat that it purports to apply to soft law in EU law in general, whereas this thesis is concerned with the legal value of soft law in EU competition law only.

She considers a Community act to carry legal effect (singular) if it is capable of changing a person's legal right and obligation.[55] Under this umbrella term, according to her, fall acts having legally binding force (either inherently or incidentally) as well as indirect legal effects (plural).[56] This taxonomy is subject to the following criticism from a doctrinal perspective (which she purports to adopt).

The umbrella term 'legal effect', as defined by L. Senden, is of limited heuristic value. Under L. Senden's definition legal effects are bestowed on (virtually) all soft law instruments by meeting the capability-test. Yet, how is such a broad test helpful in classifying soft law instruments? The courts are concerned with whether they are bound by the rules of conduct in a soft law instrument. To reflect this concern, we propose the term 'binding effect', which we define as a rule which binds the EU judiciary in a given case. It is insufficient to merely establish an act's capability of changing a person's rights and obligations. Moreover, a soft law act might give rise to legal effects other than the effect of being bound. For instance, a soft law instrument might be relevant for the interpretation

53 Case C-325/91 *French Republic v Commission* [1993] ECR I-03283, para. 23, arriving at the same conclusion albeit with a somewhat different (blurry) line of argument.

54 Case T-330/01 *Akzo Nobel v. Commission* [2006] ECR II-3389, para. 119. The binding force of CJEU judgments interpreting EU law has been, by the latest, established in Case C-453/00 *Kühne & Heitz v Productschap voor Pluimvee en Eieren* [2004] ECR I-837, paras. 21-27.

55 L. Senden [n 20], 268, 270.

56 *Ibid.*, 264-270.

of a legal act and thus indirectly play a role in the recognition of a legal obligation. In that case it would be capable of changing a person's rights or obligations. This is, however, different from the binding effect flowing from the law.

The ways in which the binding effect can be brought about are twofold. First, in a direct way, a rule can be inherently binding (binding force). Second, in an indirect way, a binding effect can be bestowed upon a rule (laid down in a soft law instrument, an agreement, a letter, an oral statement, etc.) by virtue of the law. The notion of rule is here understood in its broadest meaning and not limited to general-abstract rules. As indicated, this taxonomy accounts not only for soft law instruments, but for any 'rule' upon which the law endows a binding effect. It therefore separates the taxonomy from the 'soft law cosmos'. Again, this mirrors the limited significance of an instrument as soft law within the legal framework.

It is submitted that L. Senden's taxonomy is misleading in another respect. She differentiates between inherent and incidental legally binding force. The latter category can be based either on substance or on agreement.[57] In contrast, the taxonomy advanced here does without the category of 'incidental legally binding force' because it is contended that such a category fails to correctly reflect the legal mechanism whereby the binding effect is brought into existence.

'Incidental legally binding force on the basis of substance' is, in essence (leaving aside the theoretical problem of 'lawful hard law in the clothing of soft law'), bestowed upon unlawful legal acts (i.e. legal acts that are intended to be inherently legally binding and which have come into existence in or contain a violation of EU law)[58] that are not void *ab initio* but voidable in an action for annulment, and hence under European law are presumed to have the intended legal effects until and unless they are withdrawn or annulled.[59] Yet, how are the presumed legal effects not held to be inherent to the legal act but incidental instead? The binding force is presumed as an exception to the rule that unlawful legal acts are invalid and devoid of legally binding force for the sake of legal certainty. This presumption cannot, however, change the nature of the legal mechanism whereby legal value is attached to the legal act. Rather, the presumption squarely rests on the fundaments of binding force, which are the competences held by the legislative, the procedural safeguards and available legal remedies with respect to legal acts.

L. Senden foresees acts having 'incidental legally binding force on the basis of agreement'.[60] She points to inter-institutional agreements and agreements in the area of EU state aid law. It seems to us

57 *Ibid.*, 275 et seq.
58 *Ibid.*, 265.
59 *Ibid.*, 275-295, 307.
60 *Ibid.*, 295 et seq.

that such agreements are only binding by virtue of EU law (for they require explicit provision for agreed acts in primary or secondary EC law and existence of a specific duty of cooperation)[61]. Hence, it is EU law that confers a binding effect on these agreements. They are thus not inherently legally binding. Since they are only legally binding by virtue of EU law, the legal mechanism is similar to legal effects of soft law instruments brought about by the mediation of legal principles. In both cases for the binding effect to kick in EU law must be called upon. The principle of doctrinal consistency suggests that both cases are placed in the same doctrinal category, i.e. acts that by virtue of EU law give rise to a binding effect, rendering incidental legally binding force on the basis of agreement a futile category. L. Senden's classification labels acts as carrying binding force which according to the case law lack such force.

3.1.5 Soft law and Member States[62]

In general, soft law is not binding on Member States, be it NCAs or national courts. As concerns national courts, this is the consequence of the finding that European courts are not bound by soft law as it does not constitute EU law. National courts are only bound by EU law.[63] The same in principle applies to NCAs, as has been held by the CJEU in *Pfleiderer*[64] and has recently been confirmed in *Expedia.*[65] However, regarding NCAs this picture is incomplete as we will see *infra*.

3.1.5.1 The CJEU's case law

In *Pfleiderer* the CJEU came to this conclusion with regard the Commission Notice on immunity from fines and reduction of fines in cartel cases ('Leniency Notice')[66] and the Notice on cooperation within the Network of Competition Authorities ('Cooperation Notice')[67] by confining itself to the finding 'that those notices are not binding on the Member States' without further elaboration. The Court further pointed out that the Commission's Leniency Notice relates only to leniency programmes implemented by the Commission itself.[68] It held it was for the national courts to balance the interest of third parties seeking to obtain damages in access to the files related to the leniency

61 *Ibid.*, 296.

62 This section applies to EU competition law addressed to undertakings only, excluding state aid law, as the legal assessment appears to be different to some degree, see O. Stefan, [n 25], §6.03 at pp. 174-177.

63 *Kühne & Heitz v Productschap voor Pluimvee en Eieren* [n 54], paras. 21-27.

64 Case C-360/09 *Pfleiderer AG v Bundeskartellamt ('Pfleiderer')* [2011] ECR I-05161, paras. 21-23.

65 *Expedia* [n 37], paras. 24-31.

66 Commission Notice on immunity from fines and reduction of fines in cartel cases ('Leniency Notice'), OJ 2006 C 298/17.

67 Commission Notice on cooperation within the Network of Competition Authorities ('Cooperation Notice'), OJ 2004 C 101/03.

68 *Pfleiderer* [n 64], paras. 21-23.

procedure against the potential deterring effect of such access on cartel members to applying for leniency on a case-by-case basis. The Court added that national courts had the duty to ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 and 102 TFEU.[69]

In *Expedia* the Commission's *de minimis* Notice[70] specifying the meaning of an appreciable restriction of competition within the meaning of Article 101 TFEU was held to be *not intended* to be binding on national authorities, but to give them guidance on how to apply Article 101 TFEU. According to the CJEU, this follows from the wording of the Notice, stipulating its non-binding nature for both national courts and authorities and the intention to give them guidance on how to apply Article 101 TFEU. Additionally, it states that it aims at clarifying how the Commission intends to apply this norm, thereby potentially binding the Commission's discretion in accordance with *Dansk Rørindustri.*[71] Moreover, the notice was published in the 'C' series of the *Official Journal of the European Union* which, by contrast with the 'L' series of the Official Journal, is not intended for the publication of legally binding measures. Finally, the notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them.[72]

On substance, *Expedia* suggests that for the Notice to be binding on national courts and authorities, the Commission's intention, as expressed in the soft law instrument, might be of relevance. This appears to relate to inherent binding force, which soft law instruments do not possess, precluding them from directly (of themselves) binding EU courts, let alone national courts. As shown *supra 3.1.2*, it is the authority's discretion that is bound and the judiciary as a matter of law is obliged to take account of this. Courts are bound by law not by administrative rules of practice. With respect to national competition authorities, such a finding is difficult to reconcile with the test employed in *Pfleiderer* which does not rely on any form of intent to reject any binding effect on Member States. However, intent, as expressed in the soft law instrument, has a role to play in the assessment of whether or not a legal principle binds the Commission's discretion. Additionally, the Court also relies on the lack of Member States' consent to abide by the notice and the publishing in the 'C' series of the Official Journal. In effect, the CJEU appears to ground its finding of the Notice

69 *Pfleiderer* [n. 64], paras. 24-31; the CJEU reiterated its substantial findings and implicitly upheld its approach to the Leniency Notice in Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] nyr.

70 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community ('*de minimis*-Notice'), OJ 2001 C 368/13, 13.

71 *Expedia* [n 37], paras. 24-30.

72 The non-authentic English version of *Expedia* [n 37] contains an incorrect translation of para. 28: '[..] by the *de minimis* notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law [..]'.

not being binding on a melange of subjective and objective factors, which seem, after *Pfleiderer*, unnecessary for concluding that soft law does not have binding force.

On reflection, however, the CJEU's test in *Expedia* appears to be consistent with orthodox EU legal doctrine in that a soft law instrument, intending to bind NCAs and national courts may be unlawful, but will be presumed lawful until and unless it has been declared void.[73] For that presumption to be engaged it is immaterial whether the Commission can lawfully adopt soft law instruments binding the Member States courts and NCAs in and of themselves. Thus, the CJEU merely and correctly assessed whether the requirements for the presumption were met. The act must be intended to have legal effects capable of affecting the interests of its addressee. For that it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. It is in principle immaterial what form the act bears and whether formal requirements were met.[74] On the facts, the CJEU concluded the *de minimis* Notice was not intended to be binding. If the Court had found otherwise, the next step would have been to assess whether it is void. Acts tainted by particularly serious illegality are deemed to be non-existent/void, e.g. manifest and grave procedural errors.[75] This reading of *Expedia* explains the difference between the legal test applied therein and the one in *Pfleiderer* and is consistent with EU law. Presumably, the Opinion of AG Kokott in *Expedia*,[76] containing exactly such an analysis, incited the Court to follow suit. The Opinion in *Pfleiderer*, delivered by AG Mazák, did not undertake a similar analysis and merely stated the Leniency Notice is non-binding.[77] In terms of doctrinal consistency, the CJEU's embracement in *Expedia* of the test suggested by AG Kokott is to be saluted.

In her Opinion, AG Kokott also argues that, despite soft law not being binding on Member States, national courts and authorities are obliged to take due account of it. Deviation from the Notice, according to AG Kokott, can be had if a case-specific analysis shows evidence, other than the market shares of the undertakings concerned, suggesting that the effect on competition is appreciable. She bases her assertion on the Member States' duty of sincere cooperation pursuant to Article 4(3) TEU, arguing that the 'Commission's leading role, firmly anchored in the system of Regulation No 1/2003, in framing European competition policy would be undermined if the Member States simply ignored the a competition policy notice issued by the Commission.[78,79] The CJEU rejected a Member States'

73 More on this legal presumption *supra* fn. **Error! Bookmark not defined.**.

74 Case C-322/09 *P - NDSHT v Commission* [2010] ECR I-11911, paras. 45-48; Case C-362/08 P *Internationaler Hilfsfonds v Commission* [2010] ECR I-00669, paras. 51-52.

75 P. Craig [n 40], 267-269.

76 Opinion of AG Kokott in *Expedia* [n 37], paras. 26-34.

77 Opinion of AG Mazák in *Pfleiderer* [n 64], para. 26.

78 Opinion of AG Kokott in *Expedia* [n 37], paras. 38-43.

obligation to take account of the thresholds in the notice, consequently of soft law in principle, without concerning itself with the AG's line of argument.[80]

An in-depth analysis of these legal questions goes beyond the scope of this thesis. Suffice to say that the CJEU's judgments are clear in their findings and doctrinally convincing in their argumentation. The next chapter engages the question of what role legal effects can play in binding NCAs.

3.1.5.2 Thoughts on *Expedia* and legal effects

An analysis of *Expedia* suggests that the Court was concerned with whether or not soft law is binding in relation to the Member States as regards *binding force*.[81] However, as regards *legal effects* brought about by mediation of general principles of law, an unequivocal statement by the CJEU appears to be outstanding as of yet.[82] While it is submitted that the rejection of binding force of soft law instruments is consequential, it seems to be worthy of analysis whether soft law issued by the Commission is capable of having the legal effect of binding the NCAs' discretion mediated by general principles of law, similar to the soft law's binding effect on the exercise of the Commission's discretion.

The departing point is that EU law confers the same degree of discretion on NCAs as on the Commission where NCAs apply EU competition law. As is well known, NCAs in their application of EU competition law have to adhere to EU general principles of law.[83] The key question is then whether and to what extent soft law issued by the Commission is capable of binding the NCAs' discretion by mediation of those principles.[84] *Dansk Rørindustri* established the rule that the institution publishing the soft law instrument imposes a limit on the exercise of its discretion.[85] A couple of legal issues arise: Are NCAs permitted to delegate the exercise of their discretion to the

79 Critical of AG Kokott's Opinion in Expedia [n 37] is S. Graells, 'This is not (well, yes) binding, but (maybe) you can disregard it. AG Kokott on soft law and EU competition policy' (2012) blog post of 29/09/2012 (http://howtocrackanut.blogspot.fr/2012/09/this-is-notwell-yes-binding-but-maybe.html, accessed 20/07/2013).

80 *Expedia* [n 37], para. 31.

81 See to this effect *Expedia* [n 37], paras. 29-30 and *Pfleiderer* [n 64], para. 21.

82 In *Expedia* [n 37] the Court does only deal with general legal principles of EU law in para. 32. While mentioning the principles of legitimate expectations and legal certainty, the Court just seems to refute the applicant's invocation of these rights by stating they cannot, as such, be infringed, having regard to the wording of paragraph 4 of the Notice, which states it is not binding on Member States. Thus, it appears as though the Court did not assess the possibility of legal effects but only binding force. This view is shared by O. Stefan [n 44], 5.

83 Member States, their judiciary and administration, have to adhere to general principles of EU law in areas governed by EU law as a result of the supremacy of EU law, see P. Craig & G. de Burca, *EU Law Text, Cases and Materials* (5th edn, OUP 2011), 519.

84 Henceforth we will concentrate on the principle of legitimate expectations due to its high illustrative capacity, what is not to say that other general principles of law may not generate the same effect.

85 *Dansk Rørindustri* [n 21], para. 211.

Commission? Is there a legal means whereby the Commission can substitute the NCAs' exercise of discretion by its own? After all, the NCAs are only allowed to apply EU competition law by virtue of Article 5 Regulation 1/2003.[86] Does the cooperation within the Network of competition authorities, particularly the Cooperation Notice, provide a mechanism whereby NCAs have committed themselves to apply the Commission's soft law?[87] In any event, the Cooperation Notice as it stands now does not contain such a mechanism.

However, in absence of such legal mechanisms, the perspective shifts to softer expressions of NCAs binding their discretion. One might argue that the multi-level setting of EU competition law enforcement following Regulation 1/2003, foreseeing numerous forms of interaction and cooperation between the national and the European level[88] and having as one of its express objectives the harmonious application of EU competition law by NCAs and the Commission,[89] as well as the organisation and cooperation by competition authorities within the European Competition Network, gives rise to an administrative enforcement network[90] so closely intertwined cooperating that, depending on the circumstances of the cooperation pertaining to the subject matter in question, NCAs have implicitly bound their discretion by agreeing to apply a soft law instrument by the Commission. Consequently, the mechanism contained in *Dansk Rørindustri* comes into action and binds the exercise of the NCA's discretion through the mediation of general principles of law.[91] National courts would have to apply the general principles of law and thus recognize the binding effect.

It is submitted that this could only be recognised by the Court in exceptional cases. In *Expedia* the CJEU points in its assessment of whether the *de minimis* Notice is binding that NCAs have not acknowledged the principles set out in it and not declared they will abide by them, contrary to the Cooperation Notice.[92] By implication, if the NCAs do so, their discretion is bound. It is reasonable to assume that if they do less, i.e. intensifying cooperation, but without such acknowledgments, their discretion remains unbound. Moreover, by rejecting AG Kokott's proposal based on the principle of sincere cooperation the Court has arguably made clear that it opposes contestable legal constructions.

86 Regulation 1/2003/EC of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2004 L 1/1.

87 A. Jones & B. Sufrin generally remark that the signed statement acknowledging the principles set out in the Notice and agreeing to abide by the principles gives companies a legitimate expectation that the principles set out in the Notice will be adhered to, *EU Competition Law Text, Cases, and Materials* (4th edn, OUP 2011), 1153.

88 See chapter IV on 'Cooperation' of Regulation 1/2003 [n 86].

89 To this effect, Regulation 1/2003 [n 86] recital 17 and Cooperation Notice [n 67], para. 3.

90 To this effect, Regulation 1/2003 [n 86] recital 15.

91 In addition to binding the Commission's discretion, but there may be cases where only the NCA's discretion is bound.

92 *Expedia* [n 37], para. 26.

An approach predicated on an uncertain degree of ever closer cooperation is based on shaky grounds and will share the fate of the approach proposed by AG Kokott. From an analytical angle, the mentioned finding proves the CJEU carried out an enquiry into binding force and legal effects in keeping with the legal framework of legal effects of soft law as developed *supra 3.1.1* and *3.1.2.*

In EU state aid law the CJEU's case law on the legal effects of the Commission's soft law reflects on some of the questions raised here. The CJEU has held that '[t]he Guidelines are thus one element of that obligation of regular, periodic cooperation from which neither the Commission nor a Member State can release itself', which is encapsulated 'in Article 93(1) of the Treaty, under which the Commission, in cooperation with the Member States, is to keep under constant review the systems of aid existing in those States.' In addition, the German Government took part in the procedure for the adoption of the Guidelines and approved them, with the result that they bind the Commission and the *German Government.*[93,94] Nevertheless, the different legal framework and the approval of the Guidelines distinguish the case from *Expedia.*

In conclusion, effect to the Commission's soft law on NCAs is barred by a double dichotomy between, on the one hand, law and non-law (*Expedia* has not softened the CJEU's stance thereto, *supra 3.1.5.1*) and, on the other hand, the Commission's discretion and the NCAs discretion. While the former dichotomy relates to binding force, which the Commission's soft law lacks, the latter dichotomy relates to legal effects, which cannot be brought into existence in relation to NCAs and national courts since the Commission can only bind its own discretion via the issuance of soft law instruments. The Court has therefore, for now, shut the door for integrationist and to some degree supranational solutions. It has upheld a formalistic legal stance, as embodied in the two dichotomies just mentioned, and rejected legal tests based on the Member States' duty of sincere cooperation and the cooperation within the European Competition Network.

It is upon the EU political decision makers to adopt the necessary legislation or the NCAs to commit. AG Kokott's approach resembles the requirement in Articles 15(3) and 16(3) of the framework directive for electronic communications networks and services,[95] requiring the NRA's to 'tak[e] the utmost account of the recommendation and the guidelines'. A similar obligation could be

[93] However, the case law on State Aid soft law does, at first glance, not appear to rely on the mediation of general principles of law. It has in common with the approach set out here that it only binds the administration, the *German Government*, not the Member States. The scope of this thesis excludes deeper analysis.

[94] Case C-288/96 *Germany v. Commission* [2000] ECR I-8237, paras. 64-64; see also O. Stefan [n 25], §6.03 at pp. 174-177 and §7.02 at pp. 188-191.

[95] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002 L 108/33; see also fn. 41.

added to Regulation 1/2003.[96] The Commission has embarked on a different path with respect to *Pfleiderer* and its Leniency Notice[97] by proposing a directive obliging the Member States to bring their national legislation in line with the Commission's standpoint, i.e. strengthening the leniency procedure by protecting predominantly the interests of applicants thereof,[98] upon which adoption the Leniency Notice will be nugatory. Finally, a provision could be inserted into Regulation 1/2003 binding the NCAs' discretion by soft law instruments issued by the Commission.

3.2 Classification and legal effects of the Guidance Paper

3.2.1 Paving the way

Supra0, we have already pointed to the difference between the legal effects of soft law and whether an institution, the Commission, is authorized to adopt it at all.[99] This chapter engages the latter question of whether the Commission had the competence to adopt the Guidance Paper. In order to so, first a general classification of soft law rules in EU competition law is developed. Thereafter, this classification will be applied to the Guidance Paper.[100]

The Guidance Paper is a soft law instrument pursuant to the definition stated *supra 3.1.1*. According to its title it ought to give 'Guidance on the Commission's enforcement priorities'. It is explicitly intended to set out the analytical framework whereby the Commission determines whether it pursues a given case and to support undertakings in assessing whether their behaviour is likely to result in intervention by the Commission.[101] The denomination as enforcement priorities has been met with astonishment, as it presents a novelty,[102] and criticism, as to the Commission's motivation therefor.[103] To a large degree the criticism concerning the soft law nature of the Guidance Paper pertains to the question *if* the Commission was legally authorized, i.e. did it have the competence, to issue the Guidance Paper. L. L. Gormsen argues that 'enforcement priorities' explain where the

96 Regulation 1/2003 [n 86].

97 See *supra* [n 66].

98 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, see Articles 6 and 7 thereof concerning access to the file and leniency application-related documents.

99 A comprehensive analysis of this question is provided by L. Senden [n 20], 315-341.

100 For a more general classification of soft law instruments in EU law in general, the reader is referred to the work of L. Senden [n 20], particularly pp. 115-259.

101 Guidance Paper [n 1], para. 2.

102 D. Geradin, 'Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?' (2010) SSRN (http://ssrn.com/abstract=1569502, accessed 22/07/13), 12-13.

103 L. L. Gormsen, 'Why the European Commission's enforcement priorities on article 82 EC should be withdrawn' (2010) European Competition Law Review 45.

Commission will focus its resources, whereas the previously employed 'guidelines' offer an interpretation of the law and are therefore substantial in nature. According to this view, the Guidance Paper contains, in effect, guidelines inconsistent with the case law, whereby the Commission attempts to create new law and thus oversteps its remit.[104] P. Akman strongly opines the Guidance Paper does not prioritise anything and casts doubt on the legitimacy and legality of some of the novel suggestions advanced in the Guidance Paper. She nonetheless grants the Commission the right to publish the Guidance Paper, finding support for the consumer welfare standard advocated therein in the case law and arguing that the relation between soft law and the case law is not always straightforward.[105]

Is the proposed distinction between substantial and enforcement guidelines warranted and what are its legal consequences? In order to answer these questions, the legal basis for rules of practice and the scope thereof need to be developed. As a result of this exercise, different categories of rules of practise evolve. These categories are not to be applied to soft law instruments as a whole, e.g. the Guidance Paper, the *de-minimis* notice, etc.[106] Instead, each rule of practice in a soft law instrument needs to be assessed independently of the others. Thus, the categories are meant to be applied to single rules of practice, with the result that a soft law instrument can comprise a multiplicity of rules of practise falling into different categories, each of which is based on a different legal basis and exhibits a different scope of competence.[107] Naturally, the context has a role to play in that analysis and a framework for interpretation is presented *supra 3.2.2.4.* In addition, the classification devotes particular attention to the seminal role of discretion in the creation of legal effects pursuant to *Dansk Rørindustri*, which links to the eminent question whether the EU judiciary can be bound by the rules of practice in the Guidance Paper.

An important addition with respect to the condition of discretion is in order. The CJEU has consistently held that the Commission enjoys a margin of assessment/discretion with regard to the appraisal of complex economic questions ('marginal review').[108] Such appraisals are subject to a

104 L. L. Gormsen [n 103], 46; M. A. Gravengaard & N. Kjaersgaard, 'The EU Commission guidance on exclusionary abuse of dominance – and its consequences in practise' (2010) European Competition Law Review 285.

105 P. Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) The Modern Law Review 605, 609-611 and 624-628.

106 Subsequently the term soft law instrument will be employed when reference is made to a set of rules of practice encapsulated in one document (see examples in text). Conversely, reference to guidelines of a certain kind (e.g. enforcement guidelines) designates a set of rules of practice falling into the same category.

107 Where we speak of guidelines, reference is made. Conversely, reference is not made to a soft law instrument as a whole denominated as a certain kind of guidelines, e.g. enforcement guidelines.

108 An account of the historical development of this case law and the scope of marginal review is given by N. Forwood, "The Commission's 'More Economic Approach' – Implications for the role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review", in C.-D. Ehlermann & M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial review in Competition Cases* (Hart pub. 2011).

strict procedural review (evidence factually accurate, reliable, complete and consistent) and less rigorous review predicated on manifest error as regards the conclusion drawn by the Commission.[109] Furthermore, where the Commission enjoys discretion or is subject to limited judicial review it is contended the principle of legal certainty[110] bestows upon the Commission the competence to adopt corresponding soft law. This has, at least implicitly, been acknowledged by the Court, for it appears to have never questioned the Commission's competence to publish a soft law instrument in EU competition law.[111]

This table summarizes the outcome of the classification exercise and is meant to guide the reader through the following sub-chapter:

	Legal basis	**Capacity to bind discretion**	**Legal boundaries**
Enforcement guidelines	Competition policy, discretion	Possible, but unlikely	Legitimacy of priority criterion
Interpretative guidelines	Competition policy	No discretion, hence no	Merely interpretations of case law, including reasonable extrapolations
Decisional guidelines	Discretion conferred by law	Likely	Must stay within margin of discretion
Prosecutorial guidelines	Competition policy, discretion	No, would frustrate purpose of discretion	Case must be caught by primary EU law

3.2.2 Classification of soft law

3.2.2.1 Enforcement guidelines

An enforcement guideline is based on the Commission's enforcement discretion[112] as laid out in the CFI's *Automec* ruling. Enforcement guidelines are either a single rule of practice, or a set thereof, which narrows the scope of the law (thus covering only a subset of the sets of facts meeting the conditions of the law in its current interpretation)[113] by applying a legitimate priority criterion in order to focus the Commission's scarce resources.[114] Setting priorities in accordance with the public

[109] Case C-272/09 P *KME v Commission* [2011] nyr, para. 94; Case C-12/03 P, *Commission v Tetra Laval BV ('Tetra Leval')* [2005] ECR I-987. See also the comprehensive analysis of this matter by P. Craig [n 40], 467 et seq.

[110] L. Senden [n 20], 153.

[111] See *Dansk Rørindustri* [n 21]; *Group Danone v. Commission* [n 37].

[112] The CFI in *Automec* [n 51] does not use the term 'discretion', even though the Commission employed it numerously in its submission. The Commission can choose a legitimate general competition policy and set priorities to fulfil its 'supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition' (*ibid.*, para. 77). In setting the priority criterion the Commission enjoys a degree of discretion. We will refer to it as 'enforcement discretion'.

[113] For clarification: references to 'law' relate to the law as it is currently interpreted by the CJEU.

[114] The 'Community interest' was held to be a legitimate priority criterion, *Automec* [n 51], paras. 84-85.

interest is 'an inherent feature of administrative activity'.[115] In principle, the Commission is obliged to investigate all cases and, provided there are sufficient grounds, enforce the law by adopting a decision, unless they fail to meet the conditions of a legitimate priority criterion.[116]

It has been argued an enforcement guideline is incapable of creating the legal effect of binding Commission's discretion.[117] The opposite is put forward here.[118] As a matter of extension, the *Dansk Rørindustri* test[119] applies not only to legal discretion (i.e. discretion relating to the application of the law as compared to its enforcement) but also to enforcement discretion. As a consequence, the Commission cannot exercise its enforcement discretion in an arbitrary manner,[120] but is obliged to adhere to general principles of law. Enforcement must not, for instance, unjustifiably discriminate between firms.[121] Consistent with *Dansk Rørindustri*, unequal treatment or frustration of legitimate expectations can be outweighed by overriding public interests, such as the effectiveness of EU competition law (*supra 3.1.2*).

Concerning enforcement priorities two situations have to be considered: First, the Commission may bind itself to pursue cases meeting the priority criterion. Second, the Commission may bind itself not to pursue cases failing to meet the priority criterion. The first case is easy to resolve. Save for exceptional circumstances the Commission has to step in. A different picture evolves with respect to the second case. In balancing general principles of law with the effectiveness of EU competition law it is critical to realize that prioritising certain cases over others does not preclude the Commission from pursuing other cases. If this were otherwise, the effectiveness of EU competition law would suffer considerably because violations of EU competition law not caught by the priority criterion would be effectively exempted.[122] A weakened deterrent effect sufficed to allow exceptions

115 *Automec* [n 51], para. 77.

116 Case T-99/04 *AC-Treuhand AG v Commission ('Treuhand')* [2008] ECR II-01501, para. 163. The CFI implicitly acknowledged this as early as in *Automec* [n 51], 71-85. See also fn. 51 and, with respect to judicial review of political choices, fn. 141.

117 A. Ezrachi, 'The European Commission Guidance on Article 82 EC – The Way in which Institutional Realitites Limit the Potential' (2009) SSRN (http://ssrn.com/abstract=1463854, accessed: 8/8/2013), 10, he fails to see that the CFI's judgment in *Treuhand* [n 116] deals with (arguably interpretative) guidelines clashing with the case law. This does not allow for the conclusion that legitimate expectations cannot be inferred from (enforcement) guidelines complying with the case law.

118 Sharing this view is L. L. Gormsen [n 103], 50.

119 *Dansk Rørindustri* [n 21] is concerned with legal discretion, not with enforcement discretion.

120 W. P. J. Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) SSRN (http://ssrn.com/abstract=1759207, accessed: 7/12/13), 31.

121 Opposing view: M. Kellerbauer, 'The Commission's new enforcement priorities in applying article 82 EC to dominant companies' exclusionary conduct: a shift towards a more economic approach' (2010) European Competition Law Review 175, 185.

122 This is one of the most common misconceptions of the implications of enforcement priorities. However, some scholars have spelled it out accurately, *inter alia* J. T. Lang: '[..] by definition a description of enforcement priorities does not describe "safe harbours", but the opposite', 'Article 82 EC – The problems and the solution' (2009) SSRN (http://ssrn.com/abstract=1467747, accessed: 8/8/2013), 3. Clear and precise: W. P. J. Wils [n 120], 9-10. Deserving

from the Guidelines on the method of setting fines (*supra 3.1.2*) and *a fortiori* suffices as regards enforcement guidelines.[123] In the same vein, the CFI ruled in *Ufex* that the Commission's enforcement discretion is limited in that it cannot by setting enforcement priorities exclude 'in principle from its purview certain situations which come under the task entrusted to it by the Treaty'. Instead, it is required 'to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are', taking particularly duration and extent of the alleged infringements into account.[124]

Enforcement guidelines must be set within the boundaries of the law. By definition, they are a subset of the facts caught by the law. The Commission is obliged to enforce the law, and its remit does not go beyond it. This is supported in *Automec*, stating that the Commission's remit includes 'setting priorities within the limits prescribed by the law'.[125] Accordingly, AG Kokott stated in her Opinion in *Solvay v Commission* regarding the Guidance Paper that 'even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by the Treaties as interpreted by the Court of Justice.'[126]

3.2.2.2 Interpretative and decisional guidelines

From the outset two situations have to be distinguished. First, the Commission may either be granted a margin of discretion by the law or be only subjected to limited judicial review by the EU judiciary.[127] Second, neither of the above applies. In the first case a guideline is not merely interpretative but decisional ('decisional guidelines').[128] As a result of *Dansk Rørindustri,*[129] the Commission's soft law is capable of binding the Commission (by analogy the same applies in cases of limited judicial review, e.g. complex economic assessments)[130]. In this case the soft law is not merely interpretative, but rather decisional.

In the second case the guideline is merely interpretative ('interpretative guidelines'). Absent discretion and limited judicial review, such a guideline cannot bind the Commission nor, indirectly, the judiciary. It offers an interpretation of the case law, by arguing a certain set of facts falls within

of credit is furthermore M. Kellerbauer [n 121], 185. A. Ezrachi comes to the same conclusion after a detour, [n 117], 11.

123 The effectiveness of EU competition law is less endangered if, as a result of the enforcement guidelines, the NCAs obtain competence to enforce EU competition law. This is the case concerning the *de minimis*-notice.

124 Case C-119/97 P *Ufex and others v Commission ('Ufex')* [1999] ECR I-1341, paras. 88-93.

125 To that effect, see *Automec* [n 51], para. 77.

126 Opinion of AG Kokott in Case C-109/10 P *Solvay v Commission* [2011], para. 21.

127 We framed this 'legal discretion' and thereby distinguished it from the 'enforcement discretion' referred to *supra.*

128 L. Senden [n 20], 149 et seq.

129 *Dansk Rørindustri* [n 21], para. 211.

130 See P. Craig [n 40], 467-470.

the case law. This may entail extrapolations of the case law. Consequently, the Commission's authorization to publish interpretative guidelines cannot be based on a conferral of discretion. Their contribution to improving legal certainty for firms is restricted as such guidelines cannot bind the Commission's discretion. Closer analysis may reveal that some soft law instruments qualify as enforcement guidelines, e.g. the *de minimis*-notice is arguably based on the priority criterion of Community interest.[131] Commentators have argued that the Treaties establishing the EU, in particular Article 4(3) TEU and Article 17(1) TEU, confer on the Commission the power and the duty to explain CJEU judgments and their implications for governments and private parties.[132] Such a line of reasoning is strengthened by the Commission's discretion in setting priorities, its entrustment with an extensive and general supervisory and regulatory task in the public interest in the field of competition as well as its responsibility for the implementation and orientation of EU competition policy.[133] With this comes a remarkable expertise in EU competition law and knowledge of the markets, enabling the Commission to provide insightful interpretations of the case law to the benefit of concerned firms. Firms will normally have no problem identifying interpretative guidelines as what they are, not least because such guidelines unambiguously state they do not constitute a statement of the law.[134] In sum, there are convincing grounds for authorizing the Commission to publish interpretative guidelines. It does not, however, authorize the Commission to publish guidelines contradicting the law.[135]

3.2.2.3 Guidelines going beyond the case law

A critical question is whether the Commission can issue an interpretative guideline clashing with the case law. In turn some pointers will be provided.

[131] On can also argue the Commission is subject to limited judicial review in its assessment of appreciability. L. Senden [n 20], 152-154 considers the notice to constitute a decisional guideline as a result of the Commissions 'implementing powers' concerning EU competition law. We content in order to exercise its implementing powers the Commission must make use of enforcement guidelines. In any event, an assessment requires due account of the different legal consequences resulting from the different nature of the underlying discretion. As we have explicated *supra*, the European courts differentiate between legal and enforcement discretion and there are legal consequences stemming from this difference. For instance, enforcement guidelines are subject to the caveat that the Commission cannot, in principle, exclude the enforcement of EU competition law not meeting the priority criterion (or criteria, as the may be). Further, enforcement guidelines are less likely to give rise to legal effects.

[132] F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 33. Similar: L. Senden [n 20], 334-340, who bases the Commission's competence on the implied-powers doctrine and comes to the same result as proposed here, albeit not focusing on EU competition law.

[133] P. Akman [n 105], 623.

[134] As to the obligations weighing upon the Commission in that regard: W. P. J. Wils [n 120], 19.

[135] Admittedly, the line between an interpretation of the law and a statement clashing with the law can be very thin. This is already true for statutory and constitutional interpretation and even more so for the interpretation of legal rules derived from court judgments due to the fact that judgments are, in principle, not meant to set up a general legal rule but to solve the case at hand. The parallel to the process of extracting the *ratio decidendi* in (common law) legal systems relying on the doctrine of *stare decisis* is obvious.

P. Akman has addressed the issue of whether the case law is the right benchmark for determining the legality of guidelines. She points out the difference between law and case law and argues guidelines have to conform to the law, yet not to the case law as the courts are not set by precedent and can reverse their previous judgments.[136] But how does one differentiate between the law as it is and the case law in view of the high degree of abstraction of the EU competition law rules? One commentator has based his finding of the case law as the decisive criterion on the monopoly of interpretation of European law, entrusted to the European judiciary by Article 19 TEU and Article 267 TFEU.[137] Hence, there are good reasons to set the case law as the legal standard.[138] This is supported by the CFI's holding in *Treuhand*, whereby the Commission is 'required to ensure the application of the principles laid down in Article 81 EC and to investigate [..] all cases of suspected infringement of those principles, as interpreted by the Community judicature.'[139]

Furthermore, it appears prudent to allow the Commission, in its capacity as a policy-maker, to publish its proposals for the reform of the law (primary, secondary and case law). Concerning case law, the Commission aims at a reinterpretation of EU law by the European courts, while taking due account of the EU institutional balance. According to the definition of soft law proposed *supra*, such proposals fall outside of it as they do not relate to what the Commission purports to do. Naturally, they would transgress the boundaries of the case law.[140]

As a result of the Commission's role as a policy maker and enforcer in the field of competition law, it is prudent to grant it a measure of prosecutorial discretion allowing it to decide cases in contradiction to established case law based on a different interpretation of primary EU law.[141] It should be within its remit to work towards a change of the case law in light of changing legal and scientific (predominantly in economic theory) circumstances by bringing cases clashing with the case law. This can thus be seen as a legitimate effort to convince the courts to change their stance. These

136 P. Akman [n 105], 626-627. The reader is referred thereto for a discussion of the different views and further references.

137 O. A. Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 European Law Journal 753, 764.

138 W. P. J. Wils [n 120], 18-19.

139 *Treuhand* [n 116], para. 163.

140 L. Senden [n 20], 165 et seq speaks of steering instruments, i.e. legal and/or political instruments the primary objective of which is to steer or guide action not necessarily linked to the existing legal framework in, as opposed to legislative instruments, a legally non-binding way, see p. 168. She comes to a less favourable assessment of steering instruments than advanced here (pp. 214-216, 319-324). This can, at least partially, be explained by her focus on soft law in EU law in general, whereas we restrict our view to soft law in EU competition law issued by the Commission, in which the Commission has its capacity as a policy-maker on its side.

141 This marks the difference to enforcement priorities, which do not contest the interpretation of the law. With respect to judicial review where the Treaties have conferred political responsibilities on EU institutions, the CJEU has already ruled in the context of the Common Agricultural Policy that the review for legality is confined to manifest inappropriateness having regard to the objective which the competent institution is seeking to pursue, Case C-331/88 *R v Minister for Agriculture, fisheries and food, ex p Fedesa* [1990] ECR I-4023.

cases are distinguishable from those where different facts call for a different legal assessment consistent with established case law. If one agrees with granting the Commission prosecutorial discretion of the kind outlined above, it is prudent to allow the Commission the right to publish the interpretation of primary law it intends to apply to future cases. Evidently, this improves legal certainty for firms, as conduct which, at present, is not held by the judiciary to violate EU competition law (and thus expand the scope of it) might lead to a Commission decision. However, this prosecutorial discretion is limited. While primary EU law is the ultimate, and rather vague, limit, there exists a considerable grey area between the established case law and primary EU law. This thesis will not delve into this matter any deeper, suffice it to say that constraints on the Commission should be drawn taking due account of institutional trust between the actors involved in the enforcement of EU competition law.

Two more question merit attention. First, what form should statements containing an interpretation of primary law clashing with the case law take? Should the Commission be obliged to make explicit that its interpretation of primary law runs counter to the case law? Is the Commission permitted to mingle different categories of guidelines into one soft law instrument? Is it upon the firms to figure this out on their own, being aware of the legal nature of soft law instruments? Second, can the exercise of such prosecutorial discretion be bound by the issuance of such statements? This question is less relevant for firms where the clashing interpretation promoted by the Commission widens the scope of EU competition law. In contrast, it rises to prominence where the clashing interpretation narrows the scope of EU competition law defined by established case law. The answer is negative. Deciding otherwise would enable the Commission to trump the judiciary by binding the exercise of its prosecutorial discretion and thus legally preventing itself from bringing a case. This stands in stark opposition to the purpose of granting prosecutorial discretion, which is exactly to allow the Commission to decide a case contrary to case law so as to enable the judiciary to change its interpretation.[142]

Guidelines based on the prosecutorial discretion are different from interpretative guidelines. The latter offer an interpretation of the EU competition law as it stands according to case law. The former aim at overcoming the case law or, less assertively, to provide the judiciary with an opportunity to review its interpretation. Moreover, the former do not constitute enforcement guidelines, which do not work towards a reinterpretation of primary EU law by the judiciary but merely prioritise certain sets of facts for enforcement.

[142] This prompts a restrictive reading of *Dansk Rørindustri* [n 21] in that discretion can only be bound if this does not run counter to the purpose of the grant of discretion.

3.2.2.4 The methodology for interpreting soft law

As developed *supra**Error! Reference source not found.***, a soft law instrument can contain rules of conduct falling into different categories. Since the soft law instrument as a whole constitutes the context of each single rule therein, account must be taken of the instrument in its entirety for a correct classification of single rules of conduct. In principle, the process of classification is to be conducted in keeping with the principles of statutory interpretation. This section gives some pointers.

What effectively matters in classifying is how an informed addressee can reasonably understand content and purpose of the soft law instrument. This requires an interpretation of the rule(s) of conduct contained in the soft law instrument in full, appraising the soft law instrument as a whole, its recognisable objective and purpose presumably pursued by the Commission and taking due account of the process and circumstances of its coming into existence. Naturally, the denomination of a soft law instrument can only be a starting point. Where a guiding principle concerned with the effective enforcement of the law is identifiable and permeates the analytical framework, this supports a classification as enforcement guidelines. Where a detailed analysis of the case law is offered, the rule is likely to qualify as an interpretative guideline. 'Guidelines on the application of Article 81(3) TEC' speak for the latter, as the application of the law is distinct from its enforcement in that it is closely related to interpretation. Where the Commission enjoys discretion, and maps out to a high degree of detail and concreteness the approach it intends to adopt a decisional guideline might reveal itself. Even more indicative are references to discretion in the soft law instrument. If the Commission offers an interpretation in contradiction with the case law, this points to a statement concerning the exercise of prosecutorial discretion.

Establishing whether the Commission's exercise of discretion is bound requires a distinct assessment as a result of the interplay with general principles of law. As set out above, the classification of rules of practice provides a framework for assessing this question. First, to bind the exercise of the Commission's discretion the rule must be sufficiently concrete. Second, the Commission is free to exercise its discretion within the boundaries set by the law. The binding effect arises as a result of the soft law instrument mapping out the rules of practice the Commission will apply generally (links to principle of equal treatment) in future cases (links to problem of legitimate expectations). In that respect the Commission's cognizable intention plays a role. Therefore, it is difficult to infer the legal effect of having its discretion bound from a soft law instrument explicitly and unambiguously stating its non-binding nature, i.e. the soft law instrument does not purport to lay

down rules the Commission will apply in the future.[143] Authoritative language illustrates the Commission's intention to bind its discretion, setting out mere guiding principles does not. Similar considerations come into play where legal effects mediated by the general principle of legitimate expectations are to be established. [144] An informed addressee can only reasonably expect something if the rule of practice is framed in definite terms and purports to set out the Commission's future practice.

3.2.3 Cursory classification of the Guidance Paper

Applying these standards to the Guidance Paper, its contents qualify predominantly as enforcement guidelines. Legal effects are unlikely to follow therefrom. Some rules of practice in the Guidance Paper contradict the case law. These rules of practice are not meant to be binding and are therefore unlikely to give rise to legitimate expectations. However, it is, as a matter of judicial practise, unlikely that European courts will enter into a detailed assessment of single rules of conduct in the Guidance Paper in order to find out if they raised legitimate expectations, given the clearly discernible intention of the Commission to provide non-binding guidance in form of enforcement guidelines, let alone an analysis of whether or not the Commission was entitled to publish the Guidance Paper (as a whole or parts thereof).

3.2.3.1 Enforcement guidelines[145]

The Commission's Guidance is titled enforcement priorities and 'is not intended to constitute a statement of the law'.[146] The latter refers to binding force. The Guidance Paper is intended by the Commission to be generally applied to future cases within its scope of application and thus may give rise to binding effects on the exercise of the Commission's discretion. The Guidance paper unambiguously states its policy objective as types of conduct that are most harmful to consumers.[147] This focus constitutes a legitimate priority criterion,[148] in view of the reference to consumers in Articles 101(3) and 102 (b) TFEU. Furthermore, the effect of likely consumer harm must be the

[143] This does not relate to the lack of binding force, which is self-evident and only mentioned by the Commission for clarification.

[144] We confine ourselves to a cursory analysis of legal effects brought about by the legal principle of legitimate expectations since its implications can be assessed to a large degree purely by analysing the soft law instrument.

[145] This part anticipates findings developed *infra* in chapters 4 and 5.

[146] Guidance Paper [n 1], para. 2.

[147] Guidance Paper [n 1], para. 5. For a definition of consumer harm see para. 5 and para. 19 in conjunction with para. 11.

[148] M. Kellerbauer [n 121], 184. Unsure about this is A. C. Witt, 'The Commission's guidance paper on abusive exclusionary conduct – more radical than it appears?' (2010) European Law Review 214, 232.

result of a finding of an anti-competitive effect. This narrows the sets of facts the Commission will focus its resources on.[149]

The Guidance Paper lays out a 'General approach to exclusionary conduct' consisting of four parts. [150] The first part explicates how to assess dominance. This part is rather interpretative of the case law as it is. It certainly does not entail authoritative language, so that legal effects are unlikely. The second part set out how to assess 'Foreclosure leading to consumer harm'. It elucidates the condition of consumer harm resulting from a finding of likely or actual anti-competitive effects. This standard is considerably stricter than the one applied in the case law. The third part applies to 'Price-based exclusionary conduct'. It describes the equally efficient competitor test, which narrows the set of facts to be enforced compared to the case law as it stood at the time of the Guidance Paper's adoption. The same is true for the cost/price benchmarks proposed in this section, as they are more lenient than those prevailing in the case law in 2009. The fourth part on 'Objective necessity and efficiencies' introduces an efficiency-defence unknown to the case law at the time of adoption, thus narrowing the sets of facts to be enforced.

The subsequent section deals with specific forms of abuse. It does, however, not deal with all the different categories of unilateral conduct as developed in the case law, but provides a more detailed assessment of certain practices, thereby illustrating how to apply the principles set out in the general part. By this, the Commission explains in broad terms how the priority criterion applies to different sets of facts. Some of the case law categories are grouped together according to their effects: 'exclusive dealing' groups exclusive purchasing practices and conditional rebates, 'tying and bundling' groups bundling in all its different forms, and refusals to supply and margin squeeze are subject to the same framework of analysis.[151] Explicating how the effects-approach applies to the different case law categories is in line with setting enforcement priorities, as the concentration on effects is an integral part of establishing consumer harm.

The Guidance Paper's approach concerning rebates[152] was met with considerable scholarly criticism.[153] First, the framework of analysis limits the sets of facts subject to prioritised enforcement compared to the very broad test set out in the case law. Second, the criticism that firms would not be able to self-assess their behaviour because they lack information which is necessary to conduct the

149 Geradin [n 102], para. 19; M. Kellerbauer [n 121], 185.

150 Guidance Paper [n 1], paras. 9-31.

151 I. Lianos, 'Categorical Thinking in Competition Law and the "Effects-Based" Approach in Article 82 EC', in A. Ezrachi (ed.), *Article 82 EC – Reflections on its recent evolution* (Hart Pub. 2009), 19-49, 44-45.

152 Guidance Paper [n 1], paras. 37-46.

153 Final Report of the Centre for European Policy Studies under the chairmanship of Dr. John Temple Lang ('CEPS-Report'), 'Treatment of Exclusionary Abuses under Article 82 of the EC Treaty Comments on the European Commission's Guidance Paper', published on 10 September 2009, pp. 49 et seq.

test misses an important aspect. The Guidance Paper explains the test is only applicable to the extent the data are available and reliable.[154] However, this makes much sense for a test setting out what cases should be pursued since this requires an *ex-post* assessment. Conducting such an *ex-post* assessment the Commission has procedural means to acquire information which the dominant firm is likely not to have at the time of the imputed behaviour. This does not put the firms at a disadvantage, owing to the very strict legal test applied by the judiciary. Put differently, conduct caught by the case law might not be enforced by the Commission on account of the test set out in the Guidance Paper. While this does not contribute to legal certainty for the firms concerned, it does provide for an effective enforcement policy predicated on consumer harm. On a different note, this example illustrates that the Commission, at least with regard to rebates, meant what it said, i.e. the proposed test is indeed a test to prioritise cases and not a masked attempt to change the case law. It is unpersuasive to claim the Commission sets out a general legal test for rebates whose application depends on data, the general availability and reliability of which the Commission itself explicitly doubts even from an ex-post perspective.

Turning to the question of binding effect, one cannot fail to observe the non-committing language employed. D. Geradin counted the use of the word "generally" (eighteen times) and "in principle" (five times),[155] the word 'normally' is used thirteen times. These points need to be taken into consideration when analysing whether legitimate expectations can be derived from a rule of practise in the Guidance Paper. They speak against decisional guidelines, which are more committing and authoritative in language.

3.2.3.2 Interpretative/decisional guidelines & statements of prosecutorial discretion

The Guidance Paper contains parts more consistent with interpretative or decisional guidelines. It is possible to regard the part about cost/price benchmarks as guidelines of decisional nature, concretising the Commission's legal discretion in assessing complex economic questions.[156] However, the non-committing language used[157] and the fact that the proposed benchmarks can be traced back to the priority criterion militates against such an interpretation. We shall not decide this issue.

The section on predation contains a statement of prosecutorial discretion, in that a sacrifice can be assumed if an undertaking incurs an avoidable loss even where it does not price below average total

154 Guidance Paper [n 1], para. 41.

155 D. Geradin [n 102] in fn. 53 on p. 10.

156 Case C-7/95 P *JohnDeere v Commission* [1998] ECR I-3111, para. 34.

157 Guidance Paper [n 1], para. 26: 'The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC).'

costs or, under the cost benchmark introduced in the Guidance Paper, long-run average incremental cost. Predatory pricing has only been found an abuse where the dominant firm priced at least below average total costs.[158] This part does not interpret the case law, as it is clearly in breach thereof, for the same reasons it is not an enforcement priority and the Commission is not granted any discretion in that respect. The test on the assessment of conditional rebates and the equally efficient competitor test are consistent with enforcement priorities.[159] In effect they narrow down the sets of facts subject to prioritised enforcement. For that it is sufficient if the net result is one of narrowed scope. Hence, exceptions to the equally efficient competitor test are immaterial because the net effect would be zero only if they always applied, which is clearly not the case.

3.2.3.3 Interim conclusion

In light of the above discussion it is contended that claims that the Guidance Paper contains substantial guidelines in disguise of enforcement priorities are, in such generalisation, misguided.[160] The same is true for the contention the Guidance Paper categorically states the Commission will not investigate parts of Article 102 TFEU, which it is not permitted to do according to the CFI (see *supra 3.2.2.1*).[161,162] Nowhere in the Guidance Paper is it indicated that the Commission will refrain from undertaking a case-by-case analysis of each case allegedly violating EU competition law, as demanded by the CFI. Hence, the Commission's competence to adopt the Guidance Paper based on the category of enforcement guidelines is affirmed by the foregoing analysis.

Binding effects are unlikely to result from the Guidance Paper. The often criticized gap between the case law and the framework set out in the Guidance Paper call into question their being capable

158 J. T. Lang [n 122], 17-18. We will analyse the case law on predatory pricing in detail *infra.*

159 Opposing view: J. T. Lang [n 122], 29.

160 P. Akman [n 105], 609-611 opines the Commission would have dealt with exploitative abuses if the Guidance Paper had to do with harm to consumers. This argumentation is unpersuasive. The EC is entitled to concentrate on exclusionary abuses, all the more as, according to the Guidance Paper, *likely* consumer harm suffices. Moreover, while it is true that the passage on consumer harm leaves much to be desired in the Guidance Paper (see *infra 4.2*), this does not mean that the Commission does not seriously intend to prioritize cases most likely to cause consumer harm. Unconvincing enforcement guidelines do not call their nature into question. P. Akman's criticism might also be a result of hers initially misunderstanding the notion of 'anti-competitive foreclosure', see fn. 203. L. L. Gormsen [n 103], 47-50 fails to explain why consumer harm does not qualify as a legitimate priority criterion. Ultimately, she does not substantiate her claim the Guidance Paper constitutes substantive guidelines as opposed to enforcement priorities. A. C. Witt claims, in essence, the Guidance Paper 'in fact reads very much like a restatement of the law', 'merging its own explanations with well-known passages of key Court rulings', [148], 232. As pointed out *supra*, we contend that large parts of the Guidance Paper are devoted to expound the implications of the priority criterion. The view taken here is shared by R. Whish & D. Bailey, *Competition Law* (7th ed, Oxford 2012), 176-177, who expressly reject the view that the Guidance Paper fails to establish priorities.

161 *Ufex* [n 124], para. 93.

162 A. Ezrachi [n 117], 9. Ultimately, he arrives to the correct conclusion that undertakings should not assume that the priorities as outlined in the document imply lack of intervention as such, p. 11, since the Commission's discretion does not cover excluding certain sets of facts from enforcement *per se*.

of binding the Commission's discretion. As indicated *supra 3.2.2.1*, the greater the divide between the enforcement guidelines and the case law, the more suffers the effectiveness of EU competition law. Hence, addressees will have a hard time to argue they expected the Commission not to pursue cases falling out of the remit of the Guidance Paper.

From a more practical perspective, it appears unlikely that the courts will engage into an in-depth analysis of both the Commission's competence to adopt the Guidance Paper and binding effects deriving therefrom. The apparent lack of legal discretion, the clear pronunciation of enforcement priorities and the general use of non-committing language demonstrate the Commission's clear intention not to be bound by anything in the Guidance Paper. In view of the complexity of the subject it is likely that the judiciary will reject any binding effect with one broad sweeping phrase. What is more, the EU courts are wary of the implication of accepting a binding effect on the Commission. Indirectly, this also binds the EU courts and curtails their scope of judicial review.

3.2.4 The Guidance Paper – what is it worth?

Having established the Commission's competence to adopt the Guidance Paper and the unlikelihood of binding effects stemming therefrom, what value does it hold in practice? D. Geradin asserts the Guidance Paper would be entirely meaningless in case the Commission continues to intervene under the old formalistic case law of the CJEU.[163] However, it is the nature of enforcement guidelines that they, first, do not exclude the enforcement of cases not caught by the priority criterion and, second, do not call the case law into question. The relevant question is therefore to what extent the Commission pursues cases not caught by the analytical framework set out in the Guidance Paper. Enforcement priorities are of little value if they are not applied most of the time. AG Mazák in his Opinion in TeliaSonera contends that by setting out the approach which the Commission proposes to follow, the Guidance Paper certainly helps to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty and concludes that although they cannot bind the Court, they may form a useful point of reference.[164] This is a tenable.

Shifting the view from dominant firms to competitors, another aspect comes into view. The Guidance Paper signals to competitors whether they can rely on the Commission to step in or whether they have to consider private enforcement. Focusing exclusively on legal certainty for dominant firms as the goal of soft law instruments[165] is therefore erroneous. Moreover, as shown, legal certainty is not the only goal of soft law. The Commission is obliged to develop a general

163 D. Geradin [n 102], 12.

164 Opinion of AG Mazák in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB ('TeliaSonera')* [2011] ECR I-00527, in fn. 21.

165 A. C. Witt [n 148], 233-234, D. Geradin [n 102], 7 et seq.

competition policy. Setting priorities is an essential part thereof (see *supra 3.2.2.1*). Publishing these priorities contributes to the overall transparency of DG Comp's work.

Another point of controversy has been the Commission's reasoning in its decisions. In a number of decisions the Commission has based its reasoning on the formalistic case law of the EU courts and stating explicitly that under the case law effects must not be proved. Notwithstanding that, the Commission went on to conduct, subsidiarily and without prejudice to the case law, a separate detailed economic analysis, pointing to the actual or likely effects and consumer harm.[166] This has been commented on as the Commission not adhering to its own soft law. This criticism misses the point. Being predominantly enforcement guidelines, they do not prompt the Commission to adopt decisions contrary to the case law. The additional economic analysis serves to show why the case has been prioritized.

All this is not meant to imply the Commission does not pursue the aim of eventually changing the legal framework[167] and inducing firms to comply with the propositions of the Guidance Paper.[168] It merely aims to show that the Guidance Paper respects the case law and complied with the institutional boundaries in its adoption.

3.2.5 The Guidance Paper and the Member States

The Guidance Paper does neither bind the Member States' judiciary nor the NCAs. Following *Expedia* the Guidance Paper does not have binding force. It does not contain any reference to Member States' courts or NCAs as it is a document explicitly stipulating to be solely intended to apply to the Commission. Neither does it bind the NCAs' discretion. NCAs have not agreed to the Guidance Paper. In practice, NCAs and national courts are only likely to fully align their decisions to the Guidance Paper if the European courts adopt propositions set out therein.[169] This is without prejudice to the fact that NCAs might find inspiration therein if they decide to prioritise cases.[170]

3.3 Summary

Soft law in EU competition law is a complex subject. Owing to the outstanding role of the Commission not only as an enforcer but also policy maker in that field its soft law instruments spur a lot of interest, and, for the same reason, ambiguity. This hybrid role of the Commission has not

166 M. Kellerbauer [n 121], 177-183.

167 A. C. Witt [n 148], 224 and 231 even predicted that in practice the Commisison will only decide cases meeting the conditions set out in the Guidance Paper.

168 A. C. Witt [n 148], 233.

169 M. Kellerbauer [n 121], 186.

170 A. Jones & B. Sufrin [n 87], 279; R. Whish & D. Bailey, *Competition Law* (7th ed, Oxford 2012), 177. For general remarks on the NCAs right to prioritise see W. P. J. Wils [n 120], 22-25.

incited the EU judiciary to deviate from the dichotomy between law and non-law, i.e. hard law and soft law. EU courts are unlikely to loosen their legalistic grip on that subject, thereby continuing to limit the legal effects of soft law.

Soft law does not have binding force, i.e. an *erga omnes* binding effect of itself on account of the procedure of its adoption. The only exception is unlawful soft law which is presumed to have that effect unless and until declared void by the EU judiciary as can be seen in *Expedia*.[171] In that respect, *Expedia* applies equally to the EU courts as it does to national courts and NCAs. Soft law can give rise to a binding effect. The underlying legal mechanism binds the Commission's exercise of discretion as a result of the application of general principles of EU law, such as legitimate expectations and equal treatment. This legal mechanism demonstrates that, legally speaking, the real question with regard to soft law in EU competition law concerns the conferral of discretion upon the Commission and the subsequent anticipated exercise of this discretion in 'soft law'. Only where such discretion exists is soft law capable of binding the Commission. Apart from this, it does not concern the EU judiciary what soft law is, might be or should be.

Lacking (presumed) binding force, national courts and authorities are not bound by the Commission's soft law. The Commission's soft law can have a binding effect on NCAs where the latter have agreed to be bound by it. In that case, the NCAs' discretion is bound in accordance with the same legal mechanism that is capable of binding the Commission's discretion.

The Guidance Paper's adoption fell within the Commission's competences. It contains predominantly enforcement guidelines based on the legitimate priority criterion abusive conduct most harmful for consumers. A binding effect on the Commission's discretion in prioritising cases is unlikely to result therefrom because firms are to be deterred from violating EU competition law even where such violations are not an enforcement priority.

[171] Unless it is void, see *supra 3.1.5.1*. It is likely that the EU courts declare it void to preserve their capacity to decide the cases in accordance with the interpretation favoured by them.

4 Overview of the effects-based approach to Article 102 TFEU

This chapter first provides an overview of the main features of the so-called effects-based approach to Article 102 TFEU. This will not go beyond to what is necessary for the understanding of the analysis of the case analysis *supra* chapter 5. Second, the general analytical framework for the assessment of effects set out in the Guidance Paper will be presented.[172]

4.1 The effects-based approach and consumer harm

The more economics- or effects-based approach aspires to align the legal framework of Article 102 TFEU with empirical findings and the subsequent evolution of economic theory. Historically it can be traced to US antitrust law, which as early as in the 1970s was influenced by economics, and subsequently changed the legal framework.[173] This development hit EU competition law and policy at the end of the 1990s, impacting the legal framework of Article 101 TFEU and the European Merger Control Regulation ('ECMR'), before it affected Article 102 TFEU.[174] This approach has been supplemented by the adoption of consumer harm as the legal standard of harm by the Commission.[175] Consumer harm can be measured quantitatively, i.e. a reduction in consumer surplus (welfare) or qualitatively, i.e. a reduction in consumer choice and innovation.[176] Alternatives to consumer harm are a quantitative total welfare or producer welfare standard, or, qualitatively, harm to competition (as an institution or the structure), to competitors or a combination of both.[177]

Article 102 TFEU has been said to be least receptive to the influence of the effects-based approach on account of case law traditionally relying on categorical forms of abuses building upon the structure-conduct-performance paradigm.[178] Further, the wording of Article 102 TFEU does not refer to effects, in contrast to Article 101 (3) TFEU and the ECMR.[179,180]

[172] This will not entail a critical assessment of the Guidance Paper. For this the reader is referred to CEPS-Report [n 153].

[173] With the rising of the so-called Chicago School of thought, G. Monti, *EC Competition Law* (Cambridge 2007), 63-68.

[174] G. Monti [n 173], 79 et seq; James S. Venit, 'Article 82: The Last Frontier-Fighting Fire With Fire?' (2005) Forham International Law Journal 1157.

[175] R. O'Donoghue & A. J. Padilla, *The Law and Economics of Article 82 EC* (Hart Pub. 2006), 221-225. For an insightful discussion of whether the adoption of a consumer welfare standard clashes with the case law of the EU courts the reader is referred to P. Akman [n 105], 627-628.

[176] I. Lianos, 'The price/non price exclusionary abuses dichotomy: A critical appraisal' (2009) Concurrences (http://ssrn.com/abstract=1398943, accessed 3/11/2013), paras. 5-7.

[177] P. Akman, '"Consumer Welfare" and Article 82EC: Practice and Rhetoric' (2009) 32 World Competition 71, 73.

[178] J. T. Lang provides an extensive list of reasons for reform, [n 122], 4-5. See also R. O'Donoghue & A. J. Padilla [n 175], 19-20 and G. Monti [n 173], 57-63.

[179] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('ECMR'), OJ 2004 L 24/1.

An approach based on economics brings the legal rules in line with economic theory, requires the showing of actual or likely effects on the market of a firm's behaviour and sets a standard of proof consistent therewith. Where actual effects resulting from the firm's behaviour have not yet materialised, a finding of likely effects is subject to empirical findings allowing for reasonable assumptions regarding (more or less) likely effects. This method ensures that a case is supported by a plausible theory of (consumer) harm consistent with economic theory,[181] i.e. one that is based on real market conditions rather than legalistic presumptions.[182] For this an appraisal of, *inter alia*, the current and future market characteristics (e.g. minimum efficient scale stemming from economies of scale, entry barriers), the competitive structure (e.g. number of competitors and their respective market power) and the incentive and ability of the dominant firm to engage in anti-competitive conduct. This may call for a factual analysis covering not only the period until the impugned conduct took place but also the period subsequent thereto wherein the conduct's effects potentially materialise. Without question, the enforcement costs (taking the form of information costs) incurred through such an investigation can be high.[183] On the bright side, an effects-based approach is said to reduce enforcement-errors (predominantly over-enforcement).[184]

By contrast, the traditional approach concentrates on the form of the conduct (e.g. below costs pricing, bundled sale of products) and the market characteristics at the time of the conduct. Its future effects were presumed or based on a theory of harm not thoroughly founded in economic theory. Undoubtedly, a form-based approach need not necessarily be inconsistent with economic theory. Forms, i.e. definitions, are the basis of legal rules, that is to say the law cannot do without forms. Having said this, forms can take insufficient account of their likely effects on the market. For instance, where conduct causing similar effects is subject to different legal standards, firms will choose the form which allows it to lawfully achieve the desired anti-competitive effects (form-shopping).[185] Furthermore, forms are easily defined too broadly, thereby preventing pro-competitive and efficient conduct. There is a trade-off between the legal assessment of conduct irrevocably embodied in a given form and the flexibility in appraising the effects conferred on the judiciary. A strict form-based approach does not require any economic assessment by the judge, because this assessment is already, by way of presumption, encapsulated in the legal form. An effects-based

180 Recitals 16, 25 and 29 of the ECMR [n 179] refer to the effects on competition.

181 I. Lianos [n 151], 20-21.

182 J. Kallaugher, 'Rebates Revisited(again) – The Continuing Article 82 Debate' (https://www.coleurope.eu/content/gclc/.../Paper%20Kallauger.doc, accessed 2/11/2013), 5.

183 I. Lianos [n 151], 21.

184 N. Petit, 'From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC' (2009) SSRN (http://ssrn.com/abstract=1476082, accessed 8/8/2013), 486.

185 Report by EAGCP [n 2], 6; I. Lianos [n 151], 20.

approach, by contrast, relies to a larger degree on courts to undertake an appraisal of the available empirical data in order to identify the impact of the practice on the market in a given case,[186] requires the establishment of a plausible counterfactual which is supported by the facts[187] and thus curbs the presumption of anti-competitive effects.[188]

Hence, a given legal approach is situated on a spectrum ranging, one the one side, from rigid and ill-aligned forms presuming anti-competitive effects inconsistent with legal theory to an unconstrained and complete enquiry by the judge and expert witnesses into the actual or likely anti-competitive effects of a given practice on the market on the other.[189] Between those extreme poles is room for a multitude of legal designs. The presumed effect embodied in a legal form can be well founded on empirical findings of economic theory and might be rebutted by the defendant, thereby shifting the burden of proof.[190] Furthermore, effects can be subject to a case-by-case appraisal by a court, but the threshold is set as low as potential or possible in contrast to likely or actual effects.[191] In that regard one must be wary of the standard of proof, i.e. what evidence has to be produced to meet the legal standard. While possible effects are a low standard on paper, the case law might paint a more nuanced picture. Naturally, this goes both ways, a high legal standard in the books might in practice be met by unconvincing evidence. The effects-based approach envisaged by the Commission relies on likely or actual effects. Likely effects must be based on reasonable assumptions consistent with economic theory.[192] Actual effects are more persuasive and are to be given more weight the longer the conduct has already been going on.[193] Relevant effects are, for instance, increasing prices, decreasing quality or output, actual competitors leaving the market or potential competitors not entering or an increase in market shares of the dominant firm at the expense of its competitors.

It comes as no surprise that one of the most pronounced critiques directed at an effects-based approach warns of a lack of legal certainty, the degree of which differs depending on the point of the spectrum just mentioned.[194] In view of the arguably punitive character of fines imposed under EU

186 M. Motta, 'The European Commission's Guidance Communication on article 82' (2009) European Competition Law Review 593, 597-598; M. Kellerbauer [n 121], 176-177.

187 N. Petit [184], 496-497.

188 One might see a parallel to when US antitrust law overcame the Pre-Chicago antitrust case law which was more informed by intuition about whether practices are objectionable or not as opposed to empirical economic theory, see R. O'Donoghue/A. J. Padilla [n 178], 179.

189 M. Kellerbauer [n 121], 176-177; I. Lianos [n 151], 49.

190 If such a presumption should be adopted is a question of weighing enforcement costs against error costs. In principle similar: I. Lianos [n 151], 30-37. N. Forwood [108], 4-10 gives examples of early indications of the Court's attributing legal relevance to an economic assessment.

191 R. O'Donoghue & A. J. Padilla [n 178], 220.

192 R. O'Donoghue & A. J. Padilla [n 178], 220.

193 *Ibid*., 221; Discussion Paper [n 3], para. 55.

194 N. Forwood [108], 3-4.

competition law, an effects-based approach to Article 102 TFEU should ensure that the rights and obligations stemming from the legal framework are sufficiently clear for firms concerned.[195] This standard must be met by any (re-)categorisation along specific economic theories of harm,[196] e.g. raising rivals' cost, predation, leveraging, a two-sided market situation, maintaining a monopoly strategy.[197]

4.2 Effects and consumer harm in the Guidance Paper

The Guidance Paper is only concerned with exclusionary abuses, not with exploitative abuses.[198] Exclusion of competitors, actual or potential, is achieved by raising their prices. This, in turn, can be achieved by conduct having the effect of foreclosing the market. It is thus the anti-competitive effect of foreclosure that is relevant in cases of alleged exclusionary abuse. Consumer harm is inflicted indirectly, by way of foreclosure, whereas in exploitative abuses the consumer is directly harmed by an increase in price, a reduction in output, quality or innovation.[199] With respect to exclusionary abuses the Guidance Paper states that the Commission will normally intervene where 'the allegedly abusive conduct is likely to lead to anti-competitive foreclosure' 'whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers'.[200]

The Guidance Paper defines 'anti-competitive foreclosure' as foreclosure leading to consumer harm.[201] Foreclosure, in turn, is anti-competitive if it likely puts the dominant firm in a position to profitably increase prices to the detriment of consumers. This situation is further described as 'likely consumer harm', for the identification of which quantitative and, where possible and appropriate, qualitative evidence needs to be adduced. The Commission further clarifies that consumers are not only end-consumers.[202] The term anti-competitive foreclosure therefore embraces both foreclosure of competitors and harm to consumer in a novel, yet unequivocal way[203]. Both likely and actual anti-competitive foreclosure is caught by the Guidance Paper.[204]

195 I. Lianos [n 151], 36-37; N. Forwood [108], 14-15.

196 M. Motta [n 186], 595-596.

197 I. Lianos [n 151], 21; N. Petit [184], 495-497.

198 Guidance Paper [n 1], para. 7.

199 S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010), 230; R. Whish & D. Bailey, *Competition Law* (7th ed, Oxford 2012), 201-202.

200 Guidance Paper [n 1], para. 19-20.

201 *Ibid.*, title of section B, prior to para. 19. In view of this, while it is not spelled out beyond any reasonable doubt, it is quite clear that causation between foreclosure and consumer harm must be proved, contrary to what N. Petit asserts, [n 184], 492-493.

202 *Ibid.*, para. 19 and respective footnotes.

203 P. Akman [n 105], 614 had initially argued the Guidance Paper's test is ambiguous. In a later publication she shares the view taken here: P. Akman [n 177], 79-80.

204 Indicated in paras. 20 (6th limb), 37 of Guidance Paper [n 1]; N. Petit [n 184], 493.

One can observe a degree of convergence between exclusionary and exploitative abuses. It has been contended that it must be possible to infer consumer harm based on an examination of the reasonably likely consequences for consumers of the dominant firm's actions,[205] implying the necessity to establish a theory of consumer harm that allows for a finding of an 'inferential soundness' between the specific practice and potential consumer detriment without, however, requiring empirical evidence of consumer harm.[206] Depending on how low the standard for a finding of consumer detriment is set, it will, to a higher or lesser extent, approximate the exploitative element. Hence, the dichotomy between exploitative versus exclusionary abuses has become questionable,[207] the prevailing difference being that the former requires a finding of actual consumer harm.[208]

Ultimately, what matters most is in how far the Commission will base its decisions on a consistent theory of consumer harm and what standard of proof backing up this theory it deems necessary. The Guidance Paper requires cogent and convincing evidence in that respect,[209] yet fails to elaborate on the type of evidence relevant for meeting this standard of proof.[210] Further, specific criteria for the assessment of likely consumer harm are not stated. Only criteria for the assessment of both the question of foreclosure and consumer harm are stipulated, which are, however, not suited to assess the effect on consumers.[211] If the Commission applies this framework a finding of consumer harm might follow, more or less automatically, from a finding of a foreclosure effect.[212]

The restriction on conduct that is at least likely to harm consumers brings with it that unless there is consumer harm, there is no relevant harm to the structure or process of competition,[213] rendering it insufficient to find negative effects on the structure of competition, which was the line of reasoning of the CJEU in abuse cases prior to the issuance of the Guidance Paper.[214] The so-called economic freedom paradigm shares this fate, as restrictions on the economic freedom of competitors are

205 R. O'Donoghue & A. J. Padilla [n 178], 222-224.
206 I. Lianos [n 151], 44.
207 P. Akman [n 177], 81.
208 I. Lianos [n 151], 44; P. Akman [n 177], 88.
209 Guidance Paper [n 1], para. 20.
210 P. Akman [n 203], 615; J. T. Lang [n 122], 7; N. Petit [n 184].
211 CEPS-Report [n 153], 27-28; A. Gutermuth, 'Article 82 Guidance: A Closer Look at the Analytical Framework and the Paper's Likely Impact on European Enforcement Practice' (2009) Global Competition Policy Magazine February No 1 (http://www.arnoldporter.com/resources/documents/Gutermuth-Feb-09_1_.pdf, accessed: 01/08/13), 4; J. T. Lang [n 122], 12; N. Petit [n 184], 492-493, 496; M. Kellerbauer [n 121], 183.
212 A. Gutermuth [n 211], 5; P. Akman [n 177], 80; N. Petit [n 184], 492.
213 R. O'Donoghue & A. J. Padilla [n 178], 221-222.
214 Case 6/72 Europeemballage and Continental Can v Commission ('Continental Can') [1973] ECR 215, para. 26.

relevant only if they are likely to lead to consumer harm.[215] In spite of that, at some point the absence of a sufficient number of effective competitors, or other distortions to the competitive structure, is likely to lead to consumer harm in the long run.[216]

[215] L. L. Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) European Competition Journal 329.

[216] R. O'Donoghue & A. J. Padilla [n 178], 222.

5 The Guidance Paper in the CJEUs case law

This chapter analyses the cases handed down by the CJEU following the issuance of the Guidance Paper dealing with abuse of dominance. For each case, its history is presented as well as the CJEU's main findings. Thereafter, each judgment is subjected to analysis with respect to the impact of the Guidance Paper.

Sub-chapter *5.6* sums up the findings and attempts to generalise them.

5.1 Wanadoo

5.1.1 History of the case

At the time of the Commission's investigations, Wanadoo Interactive SA ('WIN') was part of France Télécom SA, the appellant in Wanadoo, and offered Internet access services including ADSL services in France. The Commission decision of 16 July 2003[217] found, in Article 1, that from March 2001 to October 2002 '[WIN] infringed Article 82 [EC] by charging for its eXtense and Wanadoo ADSL services predatory prices that did not enable it to cover its variable costs until August 2001 or to cover its full costs from August 2001 onwards, as part of a plan to pre-empt the market in high-speed internet access during a key phase in its development'. Article 2 ordered WIN to bring the infringement to an end and Article 4 imposed a fine of EUR 10.35 million on WIN. On 2 October 2003, WIN brought an action before the CFI seeking the annulment of the Commission's decision. On 1 September 2004 WIN merged with France Télécom SA, resulting in the latter succeeding to WIN's rights. The action was dismissed by judgment of the CFI of 30 January 2007.[218] France Télécom SA brought an appeal on 10 April 2007 asking the CJEU to set aside the judgment of the CFI. The CJEU gave its judgment ('*Wanadoo*') on 2 April 2009,[219] dismissing the appeal as a whole.

5.1.2 The CJEUs main findings

With respect to the argument that the Commission had miscalculated the rate of recovery of costs the CJEU found the ground of appeals inadmissible.[220] WIN had argued that the adjusted costs method of calculation applied by the Commission was flawed. The Commission's method treated the costs of customer acquisition as variable (non-recurrent) costs and spread them over the average contract lifespan of 48 months. The Commission then made a separate assessment for four subsequent periods

[217] Commission Decision in Case COMP/38.233-Wanadoo Interactive.
[218] Case T-340/03 *France Télécom v Commission* [2007] ECR II-107.
[219] Case C-202/07 P *France Télécom v Commission ('Wanadoo')* [2009] ECR I-2369.
[220] *Wanadoo* [n 219], paras. 69-73.

between January 2001 and October 2002 of adjusted variable costs and adjusted full costs, in accordance with the traditional test for predatory pricing that differentiates depending on whether or not the behaviour of the dominant firm forms part of a plan to eliminate competitors. WIN alleged that the Commission's method was static and disregarded the variations in costs over the course of the 48-month (progressive decrease in variable recurrent costs) period concerned. Instead, the discounted net value of the subscribers should have been calculated over the full 48-month period. The CFI found that the Commission's method of calculation was beyond reproach, albeit not necessarily the only one living up to the legal standard. Further, the Commission was entitled to not consider revenue and costs applicable later than October 2002, as they had occurred only after the infringement and could thus not be relevant for the purposes of assessing the rate of recovery of costs during the period.[221] As the Guidance Paper is silent on this highly relevant matter and the CJEU rejected the plea as inadmissible, this will not be included in the analysis.

With respect to the test of predation, the CJEU followed the case law established in *AKZO v Commission*[222] and *Tetra Pak International SA v Commission*[223] with regard to both elements, below cost pricing and no requirement to show (likely, potential, possible) recoupment.[224] This aspect will be subject of analysis *infra*.

The CJEU did not, as a matter of substance, deal with the so-called meeting competition defence, according to which an undertaking has the right to align its prices on those of its competitors. It merely upheld the CFI's finding that a right to align one's prices on those charged by one's competitors does only exist as long as the costs of the service in question are recovered, in other words, as long as the firm does not engage in abusive predatory pricing. This finding results form the dismissal of the appellant's ground as inadmissible as concerns substance[225] and unfounded as concerns a failure to state reasons.[226] However, the CJEU, in dismissing the alleged failure to state reasons, clarified the CFI's statements by interpreting them to the effect that abusive predatory pricing limits the scope of the meeting competition defence and cannot itself justify abusive predatory pricing.[227] As this is arguably dealt with in the Guidance Paper under the overhead 'Objective necessity and efficiencies' this will be subject to an analysis.

221 *France Télécom v Commission* [n 218], paras. 129 et seq.
222 Case C-62/68 *AKZO v Commission ('AKZO')* [1991] ECR I-3359.
223 Case C-333/94 P Tetra Pak International SA v Commission ('Tetra Pak II') [1996] ECR I-5951.
224 *Wanadoo* [n 219], paras. 103-114.
225 *Wanadoo* [n 219], paras. 53-61.
226 *Wanadoo* [n 219], paras. 41-49.
227 There has been some confusion as to this finding of the CFI between the EC on the one hand, and the appellant and AG Mazák on the other. The CJEU has resolved this issue as presented here. We will look into this *infra*.

5.1.3 Legal analysis

5.1.3.1 Legal test for predatory behaviour

The CJEU has clarified the test for predatory behaviour. Prior case law concerning predatory pricing suggested that pricing below average variable costs invariably leads to a finding of predatory pricing, because 'a dominant undertaking has no interest in applying such prices except that of eliminating competitors'[228] and 'there is no conceivable economic purpose other than the elimination of a competitor'.[229] In *Wanadoo* the CJEU takes a more cautious and lenient stance. Pricing below average variable costs is only considered '*prima facie*' abusive, to the extent as the dominant undertaking 'is *presumed* to pursue no other economic objective save that of eliminating its competitors'[230]. This is reinforced two paragraphs later, where it is held that prices lower than average variable costs may be explained by 'economic justifications other than the elimination of a competitor'[231]. Thereby the CJEU also clarified that pricing below both average variable and average total costs requires eliminatory intent, which is only presumed in the former case.

Allowing for economic justifications for pricing below average variable costs conforms with the Guidance Paper's stipulation that pricing below average avoidable costs will in most cases (thus not invariably) be viewed as a sacrifice by the Commission.[232] Moreover, the Guidance Paper considers pricing predatory if the dominant undertaking incurred a loss that could have been avoided. For the purpose of such a finding, economically rational and practicable alternatives are to be considered.[233] This might well serve as the yardstick for establishing an economic objective other than the elimination of competitors.

5.1.3.2 Requirement of possible recoupment

Undoubtedly, the CJEU's brisk rejection of the requirement of possible recoupment is the finding in *Wanadoo* that has garnered most attention. One commentator referred to AG Mazák's Opinion, in which he firmly advocates such a requirement, as 'the chronicle of a failed Chicagoan revolution'.[234]

Loyal to the forms-based economic freedom paradigm, the Court argues that even the lack of any possibility of recoupment of losses does not prevent the undertaking concerned from reinforcing its

228 *AKZO* [n 222], para. 71.
229 *Tetra Pak II* [n 223], para. 41.
230 *Wanadoo* [n 219], para. 109 (emphasis added).
231 *Wanadoo* [n 219], para. 111.
232 Guidance Paper [n 1], para. 64.
233 *Ibid*., para. 65.
234 A. Alemanno & M. Ramondino, 'The CJEU France Télécom/Wanadoo judgment: To recoup or not to recoup? That was the question for a predatory price finding under Article 82 EC' (2009) 6 European Law Reporter 202, 204.

dominant position, particularly following the withdrawal from the market of competitors. Further, customers subsequently suffer as a result of the limitation of the choices available to them. The Court, dealing with the question of a recoupment requirement, is preoccupied with the protection of 'the competitive structure of the market, and thus competition as such (as an institution)', as AG Kokott put it eloquently in *British Airways v Commission*[235]. The CJEU restates a passage from *Continental Can,*[236] whereby Article 102 TFEU also refers to practices that are detrimental to consumers indirectly 'through their impact on an effective competition structure'.[237] In short, the CJEU did not appraise the effects of the conduct in question.[238] The formalistic approach is all the more striking on account of the fact that WIN was losing market share during the period in which it was found to be pricing predatorily.[239,240] The disregard for the conduct's effects, on customers and consumers, stands in marked contrast to the effects-based approach advanced in the Guidance Paper.[241]

More specifically, the CJEU did not follow the Guidance Paper's proposal to utilise the cost/price benchmarks merely as the starting point of the legal test, i.e. the assessment of sacrifice. Following that, the facts must support a finding of anti-competitive foreclosure, i.e. the (likely) foreclosure of equally efficient competitors and subsequent (likely) consumer harm. With respect to the former the Guidance Paper pays attention to the part of the market foreclosed.[242] Consumer harm can be assumed if the undertaking is likely to be in a position to benefit from the sacrifice, i.e. if it can reasonably expect its market power after the predatory conduct to be greater than before.[243] This serves as an indirect check that there is a rationale for predatory pricing.[244]

Broadly speaking, dispensing with the condition of possible recoupment is questionable against the backdrop of modern economic theory.[245] In terms of designing a legal rule, a number of arguments counsel against a recoupment condition, such as difficulties in assessing a firm's future capability to recoup with anything approximating accuracy or anti-competitive effects predicated on

235 Opinion of AG Kokott in Case C-95/04 P *British Airways v Commission* [2007] ECR I- 2331, para. 69.
236 *Continental Can* [n 214], para. 26.
237 *Wanadoo* [n 219], para. 105.
238 A. Jones and B. Sufrin [n 87], 403.
239 The CJEU found the ground of appeal to that effect to be inadmissible, see *Wanadoo* [n 219], paras. 83-87.
240 A. Emch & G. K. Leonard, 'Predatory Pricing after linkLine and Wanadoo' (2009) Global Competition Policy Magazine May No 1 (http://ssrn.com/abstract=1412727, accessed 11/09/13).
241 Guidance Paper [n 1], paras. 5-7.
242 Guidance Paper [n 1], para. 20.
243 Guidance Paper [n 1], para. 70.
244 M. Motta [n 186], 597.
245 S. Bishop & M. Walker [n 199], 308-310.

signalling and reputation-building, possibly across markets, which may arise absent recoupment.[246] Hence, dispensing with recoupment is not *per se* contrary to a more-economics approach. In addition, the divide between the Guidance Paper and the case law is not stark. The Guidance Paper takes a soft stance to recoupment, requiring the reasonable prospect of greater market power following the pricing practice that can be demonstrated by assessing the likely foreclosure effect of the conduct.[247]

5.1.3.3 Meeting competition defence

The Commission acknowledges the meeting competition defence in its Discussion Paper as one of two forms of objective justification and lays out a framework for its assessment.[248] It comes as a surprise that the Guidance Paper not only does not mention the meeting competition defence, but, by stipulating an exhaustive set of justifications, appears to have abandoned it altogether. Justification under the Guidance Paper can be had if the conduct is objectively necessary, which is the other form of objective justification mentioned in the Discussion Paper, or by producing efficiencies (also mentioned in Discussion Paper). It has been put forward that the meeting competition defence fits badly into the efficiency defence doctrine as it does not require advantages to consumers and therefore the Commission may be trying to 'silently kill' it.[249]

However, this shall not concern us for what is of legal authority is the case law. As has been indicated *supra 5.1.2*, the CJEU has not decided on the question whether or not such a right to align prices exists. The CFI concluded that WIN's behaviour, aligning its prices where the costs of the service would not be recovered, cannot be justified by having recourse to a right to alignment. This conclusion was inferred by the CFI from the following finding:

> 'Even if alignment of prices by a dominant undertaking on those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position.'[250]

The Court based this reasoning explicitly on *United Brands v Commission*:

> '[..] that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right

246 R. O''Donoghue & A. J. Padilla [n 175], 255-256.
247 Guidance Paper [n 1], para. 71.
248 Discussion Paper [n 3], paras. 78, 81-83.
249 M.A. Gravengaard & N. Kjaersgaard [n 104], 291.
250 *France Télécom* [n 218], para. 187.

> to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.'[251]

However, the CFI did not explicitly assess whether the alignment by WIN was also aimed at strengthening and abusing its dominant position. This prompted the appellant to appeal the CFI's judgment on the ground that it had failed to state adequate reasons in not specifying whether WIN had, in the specific case, the intention of strengthening its dominant position or abusing it.[252] AG Mazák proposed this complaint should be upheld, for the CFI 'manifestly' did not appraise whether the facts of the case fulfilled the formulated legal test.[253] The CJEU rejected this ground of appeal. It claimed the CFI's test rejects 'any absolute right to align its prices on those of its competitors in order to justify its conduct where that conduct constitutes and abuse of its dominant position' and that the CFI ascertained whether WIN's conduct was abusive, referring to the paragraphs in which the CFI established WIN's abusive predatory pricing.[254]

This interpretation appears to be correct. Nonetheless, the CFI's judgment lacks clarity in that regard and should have made clearer that the intention to strengthen and abuse WIN's dominant position was inferred from its abusive behaviour under legal scrutiny. Furthermore, the CJEU refers to WIN's abusive conduct, whereas the CFI required intent of such conduct. This dissonance can be aided by reference to the CJEU's finding in *Wanadoo* that both predation tests are founded on eliminatory intent.

The CJEU went on to find the appellant's allegation that the CFI infringed Article 82 EC [Article 102 TFEU] by denying WIN the right to align its prices in good faith on those of its competitors to be inadmissible in accordance with Article 58 of the Stature of the Court of Justice and Article 112(1)(c) of the Rules of Procedure,[255] thereby following AG Mazák's Opinion.[256]

Thus, and contrary to what has been voiced in legal scholarship[257], the CJEU has not decided upon the existence of a meeting competition defence in *Wanadoo* and has therefore, strictly adhering to the principle of *non ultra petita* and consequently refraining from an *obiter dictum*, not decided on the CFI's *per se* exclusion of such a defence in predatory pricing cases.[258] It merely held that the CFI

[251] Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 189. The Commission also based its concept of a meeting competition defence on this judgment, even though it set out a very different legal framework for its assessment, see fn. 248.

[252] *Wanadoo* [n 219], para. 39.

[253] Opinion of AG Mazák in *Wanadoo* [n 219], para. 49.

[254] *Wanadoo* [n 219], para. 48.

[255] *Wanadoo* [n 219], paras. 53-57.

[256] Opinion of AG Mazák, [n 253], para. 83.

[257] See A. Jones & B. Sufrin, [n 87], 399; A. Alemanno & M. Ramondino, [n 234], 209. R. Whish & D. Bailey [199], 745.

[258] Same opinion: M.A. Gravengaard & N. Kjaersgaard [n 104], at the end of fn. 38.

met its obligation to provide a statement of reasons for its legal test for excluding a right to alignment and applied it correctly. The Court was precluded from any reasoning beyond that by finding the ground of appeal related to substance inadmissible. Hence, it did not deal with the substantive legality of the measure at issue.

Moreover, the CJEU seems to have paved the way for economic justifications within the legal test of predatory pricing by holding that prices lower than average variable costs may be explained by an 'economic justification'[259]. As set out *supra*, the presumption of eliminatory intent can be rebutted by submitting an 'economic objective' for pricing below average variable costs.[260]. While this is not what the Commission envisages in its Guidance Paper by setting up a narrow and detailed legal framework for assessing efficiencies[261] or by focussing on the effects of the behaviour, it points into the direction of a legal assessment of predatory pricing more in line with economic reality.

5.1.3.4 Summary

The CJEU did not explicitly refer to the Guidance Paper and did neither explicitly nor implicitly apply specific concepts, tests or principles set out therein. This is not very surprising, for *Wanadoo* was handed down a mere two months after the issuance of the Guidance Paper. However, the judgment entails aspects that appear, to a smaller or larger extent, to be approximating the more economics-based approach underlying the Guidance Paper.

The CJEU indicated that it is moving away from a *per se* prohibition of pricing below average variable costs. In that regard the CJEU is open to an economic justification other than eliminating competitors for such pricing practices. With respect to recoupment the CJEU did not concede any ground. Interpretations put forward resonating *Tetra Pak II's* finding that recoupment was not required 'in the circumstances of the present case'[262] have been rebuffed.

Concerning the meeting-competition defence the jury is still out. It is, however, likely that the CJEU follows the CFI on substance, for if the Court had disagreed with the CFI, it would arguably have found a way to put this into the judgment. If that proves true, the Guidance Paper and the case law converge in that regard.

259 *Wanadoo* [n 219], para. 111. See *supra 5.1.3.1* for details.
260 *Wanadoo* [n 219], para. 109.
261 Guidance Paper [n 1], paras. 30-31.
262 *Tetra Pak II* [n 223], para. 44.

5.2 Deutsche Telekom

5.2.1 History of the case

Deutsche Telekom AG ('DT') is the incumbent telecommunications operator in Germany. It owns and operates the German fixed telephone network and prior to full liberalisation of the telecommunications markets in 1996 enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. DT offers access to its local networks (consisting of local loops) to other telecommunications operators ('wholesale access') and to subscribers ('end-user access'). Wholesale access charges have been regulated by the competent German regulatory authority ('RegTP'). The CFI and the CJEU assumed that DT was unable to influence the charge for wholesale access. End-user access charges were also regulated by RegTP, but DT was able to apply to RegTP for authorisation to alter the prices up until a price cap previously determined by RegTP.

The Commission decision of 21 May 2003[263] found, in Article 1, that '[DT] has since 1998 infringed Article 82(a) of the EC Treaty by charging its competitors and [its] end-users unfair monthly and one-off charges for access to the local loop, thus significantly impeding competition on the market for access to the local network'. This was based on the finding of an inappropriate spread between wholesale access charges and end-user access charges. The spread was found inappropriate either because DT's wholesale charges to its competitors on the retail level were higher than DT's retail charges to end-users (negative spread) or because the spread, albeit positive, was insufficient to cover the product-specific costs incurred by DT in providing its own access services to end-users on the retail market, so that a competitor who is as efficient as DT is prevented from entering into competition with DT for the provision of end-user access services (so-called 'abusive margin squeeze').[264] The Commission held that DT could have applied to RegTP for higher retail charges to prevent the margin squeeze. Under Article 3 the Commission imposed a fine of EUR 12.6 million on DT. DT's action seeking annulment was dismissed by judgment of the CFI of 10 April 2008.[265] DT brought an appeal brought on 23 June 2008 asking the CJEU to set aside the judgment of the CFI. The CJEU delivered its judgment ('*Deutsche Telekom*') on 14 October 2010,[266] dismissing the appeal as a whole.

263 Commission Decision in Case COMP/C-1/37.451, 37.578, 37.579-Deutsche Telekom AG.
264 *Ibid.*, para. 187.
265 Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477.
266 Case C-280/08 P Deutsche Telekom AG v Commission ('Deutsche Telekom') [2010] ECR I-09555.

5.2.2 The CJEUs main findings

The CJEU starts off by pointing out that DT does not challenge in principle the proposition that a pricing practice adopted by a dominant undertaking which results in a margin squeeze of its competitors who are at least as efficient as itself is to be regarded as unfair in the light of Article 102 TFEU.[267] The Court rejected DT's complaint the margin squeeze was not attributable to it, finding DT's scope to alter the retail prices sufficient. The fact that DT was encouraged by the intervention of RegTP to maintain the pricing practises, thereby potentially itself infringing EU competition law, could not absolve DT from its responsibility under Article 102 TFEU.[268]

Moreover, the Court pointed out that an abusive margin squeeze is exclusively based on the spread between the wholesale and the retail price, irrespective of the legality of those prices by themselves and the extent of the spread between them.[269] The CJEU further upheld the CFI's sole reliance on the costs of DT in determining whether DT's margin squeeze has an exclusionary effect on its equally efficient actual or potential competitors, having reference to *AKZO*.[270,271]

According to the CJEU, the fact that DT was required under the test applied in the CFI's judgment to increase its retail prices for end-user access services to the detriment of consumers in order to avoid the margin squeeze did not call this test into question. The margin squeeze was capable of having an exclusionary effect, thereby threatening to further reduce the degree of competition on the market and ultimately has the effect that consumers suffer detriment as a result of the choices available to them, whereas a short-term price increase creates the prospect of a long-term reduction of retail prices as a result of competition exerted by competitors at least as efficient as DT in that market.[272]

Moreover, the Commission and the CFI were entitled to consider the existence of a margin squeeze in relation to access services alone, leaving aside the possibility of cross-subsidisation with profits from call services, since they constitute separate markets and wholesale access services are indispensable for competitors at least as efficient as DT to enter into efficient competition on the retail market with an undertaking which, as in the case of DT, has a dominant position largely as a result of the legal monopoly it enjoyed before the liberalisation of the telecommunications sector. Such an undertaking should not be able to impose on all its equally efficient competitors a competitive disadvantage by means of its pricing practices on that retail market. The CJEU found

267 *Ibid*., paras. 31-32, 43.
268 *Ibid*., paras. 80-84, 91.
269 *Ibid*., paras. 167-168.
270 *Akzo* [n 222].
271 *Deutsche Telekom* [n 266], paras. 196-203.
272 *Ibid*., paras. 177-183.

that a competitive disadvantage on the retail market for end-user access services is necessarily reflected in the markets for other telecommunications services and thus approved the CFI's test for equality of opportunity with regard to this market only.[273]

The CJEU backed the CFI, holding the Commission is required to demonstrate an anti-competitive effect as regards the possible barriers which DT's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market. Such an exclusionary effect was then inferred by the CJEU from the indispensability of wholesale access services for competitors to effectively penetrate the retail markets, for they incur losses on the end-user access market. Again, potential cross-subsidisation was found irrelevant, for the reasons mentioned *supra.* [274]

5.2.3 Legal analysis

5.2.3.1 As-efficient-competitor test

The so-called as-efficient-competitor test (or equally-efficient competitor test, hereinafter 'EEC-test') has, in the context of EU competition law, occasionally been referred to in the case law. Most prominently, the concept underpins the *AKZO* test.[275]As a general concept it was first developed by the Commission in the Guidance Paper.[276] Therein the Commission endorses the EEC-test as a precondition for prioritising a case of alleged priced-based exclusion.[277] However, the test is not a sufficient condition for a finding of an abuse, but integrated into the general assessment of anti-competitive foreclosure.[278]

In *Deutsche Telekom* the CJEU held:

> 'It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential

[273] *Ibid.*, paras. 230-245, particularly 234-235 and 240.

[274] *Ibid.*, paras. 250-259.

[275] *AKZO* [n 222], para. 72: '[..] prices below average total costs [..] can drive from the market undertakings which are perhaps as efficient as the dominant undertakings but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.'

[276] For an historic account of the test in US and EU competition law, see M. Mandorff & J. Sahl, 'The Role of the "Equally efficient Competitor" in the Asessment of Abuse of Dominance' (2013) Konkurrensverket Working Paper Series in Law and Economics No 1 (http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/WorkingPaper/working_paper_2013-1.pdf, accessed: 14/8/13), 3-8.

[277] The Guidance Paper has been criticized for allowing exceptions of unclear scope. An analysis of the merits of such criticism exceeds the scope of this thesis. The reader is referred to D. Ridyard, 'The Commission's article 82 guidelines: some reflections on the economic issues' (2009) European Competition Law Review 230, 233-234; CEPS-Report [n 153], 30-32; A. C. Witt [n 148], 228-229. More positive with respect to the exceptions set out in the Guidance Paper is N. Petit [n 184], 491.

[278] Guidance Paper [n 1], paras. 23-27.

> competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors [..] thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate.'[279]

What is more, the CJEU made this statement not in applying the law to the facts, but in expounding the general legal test for an exclusionary pricing abuse under Article 102 TFEU. This can be read as the CJEU's endorsement of the Guidance Paper's proposition of generally applying the EEC-test for exclusionary pricing abuses.[280] In elevating the EEC-test to general applicability, the CJEU goes beyond the statement in *AKZO*, to which reference is made,[281] whereby prices above average variable costs but below average total costs are abusive if they form part of an exclusionary plan, since such prices could eliminate a competitor 'perhaps as efficient as the dominant undertaking'.[282] Moreover, the Court employs the EEC-test to give colour to the concept of 'competition on the merits', a concept called upon to distinguish legitimate from illegitimate behaviour of a dominant undertaking.[283]

The EEC- test requires a more detailed analysis than before, for it necessitates an enquiry into the dominant firm's costs in order to assess whether a hypothetically equally efficient competitor is likely to be harmed by the conduct.[284] In effect, it therefore narrows down the scope of the concept of an exclusionary abuse, acting as a filter against effects on less efficient competitors.[285] On top, the test is applicable across the different established categories (*forms*) of exclusionary pricing abuses, hence sitting well with the more economics approach.[286] As the as-efficient-competitor test has also been discussed in later cases, we will return to it *infra*.

5.2.3.2 Legal test for margin squeeze

The Guidance Paper discusses a margin squeeze as a constructive refusal to deal, thereby collapsing two forms of abuses with the result that a margin squeeze presupposes a duty to deal.[287] Such a duty only exists under the narrow conditions established in the case law. This is reflected in the Guidance

279 *Deutsche Telekom* [n 266], para. 177 (references omitted).
280 M. Mandorff & J. Sahl [n 276], 9-10.
281 *Deutsche Telekom* [n 266], paras. 177, 198-199.
282 *AKZO* [n 222], para. 72; see also M. Mandorff & J. Sahl [n 276], 7.
283 M. Mandorff & J. Sahl [n 276], 10.
284 L. L. Gormsen, 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?' (2013) World Competition 223, 234.
285 I. Lianos [n 176], para. 15.
286 M. Mandorff & J. Sahl [n 276], 18. Note that the EEC test does not necessarily entail an approach more focussed on effects. It does not matter for the test whether effects are merely presumed or subject to an assessment of the facts, see L. L. Gormsen [n 284], 225, 244.
287 For a critical account see CEPS-Report [n 153], 75-88.

Paper, which requires the fulfilment of three conditions: first, the product or service is objectively necessary to compete effectively on the downstream market, second, the refusal is likely to lead to the elimination of effective competition on the downstream market and, third, the refusal is likely to lead to consumer harm.[288]

The CJEU did not explicitly underpin its judgment with such a three-pronged test. The single steps of such a test are, however, reflected in the judgment, albeit in different contexts and to different degrees. DT did not challenge the CFI's findings of the existence of a stand-alone abuse of margin squeeze concerned solely with the spread between the wholesale and retail access price[289], nor did DT contest the indispensability of the local loop on the fixed network owned by DT for competitors seeking to compete on the retail market[290]. Hence, the CJEU assumed the indispensability and the existence of a stand-alone abuse.[291] Arguably, the CJEU conducted an analysis into the likeliness of the elimination of effective competition (*infra 5.2.3.3*) as well as an analysis of possible consumer harm (*infra 5.2.3.4*).

Notwithstanding that, the Guidance Paper's three-pronged test embodying the general enforcement standard of showing likely anti-competitive foreclosure is subject to the caveat that it may be left unapplied in cases in which imposing a duty to supply is manifestly not capable of having negative effects on the owner's or operator's incentives to invest and innovate upstream. It explicitly states this could be the case where the upstream market position has been developed under the protection of special or exclusive rights or has been financed by state resources.[292] On the facts of *Deutsche Telekom* the truncated assessment envisaged in the Guidance Paper should be applicable and arguably the CJEU based its judgment to a certain extent on the historical reason for DT's dominant position. To this effect, the Court held, in the context of whether or not equality of opportunity constitutes a legitimate legal test, that an undertaking in a dominant position 'largely as a result of the legal monopoly it enjoyed before the liberalisation of the telecommunications sector [..] should not be able [..] to impose on all its equally efficient competitors a competitive disadvantage such as to prevent or restrict their access to that market or the growth of their activities on it'.[293]

In that context it bears mention that the legal test of 'equality of opportunity' is not a test intrinsic to competition law, but finds its basis in state measures putting firms on an equal footing and is

288 Guidance Paper [n 1], paras. 80-88.

289 *Deutsche Telekom* [n 266], para. 31.

290 *Deutsche Telekom* [n 266], para. 231.

291 The CJEU nevertheless left no doubt that it approved of the assumption of a stand-alone abuse, see only *Deutsche Telekom* [n 266], para. 183: '[..] the General Court correctly held [..] that that margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC'.

292 Guidance Paper [n 1], para. 82.

293 *Deutsche Telekom* [n 266], para. 234.

therefore, in essence, of regulatory nature. Arguably, this test is applicable exactly due to DT's past as a national monopolist.[294] The CFI had recourse to the principle of 'equality of opportunity' to justify the existence of a margin squeeze in relation to access services alone, not taking account of telephone call charges. Telephone call charges and access services, on a different view, form a 'cluster' from the point of view of the end-user and need to be subjected to an aggregate analysis.[295] The CJEU confirmed the CFI's ruling on the facts of *Deutsche Telekom*, rejecting the latter view.[296]

This is to say that absent the regulatory background, the CJEU might have taken account of other services to end-users in calculating the margin squeeze.[297] Arguably, applying the very strict and regulatory 'equality of opportunity' test served as a compensation measure for DT's unwarranted competitive advantages obtained from its position as the former national incumbent. Taking account of other services guarantees that the exclusionary effect is sufficient (appreciable), which may be missing or negligible where the price of the wholesale product or service is merely a small proportion of the competitor's retail product's production costs and, as a result, gives rise to only a small exclusionary effect and masks other reasons for the competitor's unprofitability.[298] This leads over to the issue of exclusionary effects.

5.2.3.3 Need exclusionary effects be proved?

The CJEU upheld the CFI's finding that, aside demonstrating the pricing practice leading to a margin squeeze, it is necessary to demonstrate anti-competitive effects stemming therefrom. This finding is based on the orthodox definition of abuse in case law.[299] According to the CJEU the anti-competitive effect 'relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market' and must be capable of making market entry more difficult or impossible for actual or potential competitors.[300] Elaborating on this, the Court points out that a pricing practice not having any effect on the competitive situation of competitors does not make their

294 This was not spelled out by the CFI. However, the reference to Case C-462/99 *Connect Austria* [2003] ECR I-5197 in para. 198 made this clear. The CJEU reiterated this reference and clarified the connection to the basis of DT's dominant position in para. 234.

295 *Deutsche Telekom v Commission* [n 265], paras. 195-203.

296 *Deutsche Telekom* [n 266], paras. 230-236.

297 On the other hand there is the risk of another 'feedback effect' stemming from the regulatory nature of the margin squeeze concept on the competition law concept, as pointed out by H. Auf'mkolk, albeit not with respect to the issue at hand, 'From Regulatory Tool to Competition Law Rule: The Case of Margin Squeeze as a Blueprint for the Transition from Regulation to Competition?' (2012) Journal of European Competition Law & Practice, 149-162.

298 CEPS-Report [n 153], 81-84; G. A. Hay & K. McMahon, 'The diverging approach to price squeezes in the United States and Europe' (2012) Journal of Competition Law & Economics 1, 16-17.

299 See *Deutsche Telekom* [n 266], para. 174 for further reference.

300 *Deutsche Telekom* [n 266], paras. 252 and 177 in conjunction with 253 makes this clear.

market penetration any more difficult and is therefore not exclusionary. Given such an effect, it does not matter if the dominant firm trying to drive competitors from the relevant market does not ultimately achieve this aim.[301]

Applying the law to the facts, the Court assumed, without further analysis, the existence of an exclusionary effect, stipulating that the wholesale access services are indispensable to DT's competitors for an effective penetration of the retail markets and that the margin squeeze 'in principle, hinders the growth of competition in the retail market'.[302]

Two things must be noted. First, contrary to the effects-based approach, the CJEU is content with presumed/theoretical effects, i.e. an effect capable of rendering market penetration more difficult. Whether this is in fact so, is not relevant. An analysis of whether or not the exclusionary effect is appreciable or sufficient was not undertaken. The state of competition on the market did not have to be taken into consideration.[303] While the CJEU struck down the Commission's argument that a finding of a margin squeeze does not require a separate demonstration of an exclusionary effect, the theoretical effect eventually found sufficient by the CJEU approximates the Commission's assertion as well as the Guidance Paper. The Guidance Paper considers a refusal to supply 'generally liable to eliminate, immediately or over time, effective competition in the downstream market' where the input is indispensable.[304] Only in what appears to be an *obiter dictum* the CJEU took notice of the small market shares acquired by DT's competitors since the market liberalisation and considered them to be proof of actual exclusionary effects.[305]

Second, the CJEU refers to earlier paragraphs concerning DT's complaint that call and other telecommunications services were not taken into account in calculating the margin squeeze. As demonstrated *supra 5.2.3.2,* the Court rejected this complaint based on the principle of equality of opportunity, which in turn was founded on DT's background as the national telecommunications incumbent.[306] This opens the door for the assumption the lenient legal standard as to the effects analysis as may be due to the unwarranted competitive advantages derived by DT from its former exclusive rights.[307,308]

301 *Deutsche Telekom* [n 266], para. 254.

302 *Deutsche Telekom* [n 266], para. 255 with references to paras. 231, 233-236.

303 Notwithstanding that, L. L. Gormsen opines *Deutsche Telekom* marks a step towards a more effects-based approach since the CJEU at least did not simply rely on the purpose to exclude competitors for a finding of an abuse, [n 284], 239.

304 Guidance Paper [n 1], para. 85.

305 The CJEU initiates the paragraph with '[i]n addition', *Deutsche Telekom* [n 266], para. 257.

306 G. A. Hay & K. McMahon [n 298], 17-18.

307 This suspicion is shared by E. Rousseva & M. Marquis, ‚Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU' (2012) Journal of European Competition Law & Practice 32-50, lines 1387.

5.2.3.4 Consumer harm

The Guidance Paper states the Commission will examine whether the likely negative consequences of the refusal to supply for consumers outweigh over time the negative consequences of imposing an obligation to supply, e.g. where foreclosure prevents competitors from bringing innovative goods or services or where follow-on innovation is likely to be stifled.[309] *Deutsche Telekom* contains an appraisal of likely consumer harm, holding that

> '[b]y further reducing the degree of competition existing on a market [..] the margin squeeze also has the effect that consumers suffer detriment as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market.'[310]

However, the CJEU did not undertake a specific analysis of consumer harm, but mentioned it in the context of its rejecting DT's argument that it would have to increase its retail prices to an excessive level to the detriment of its own end-users in order to avoid the margin squeeze.

The Court's analysis is abstract and theoretical and seems to consider consumer harm as an automatic consequence of a margin squeeze. This is in keeping with the Guidance Paper, which, as pointed out *supra 4.2,* does not expound how to detect likely consumer harm.

5.2.3.5 Summary

The CJEU did not explicitly refer to the Guidance Paper. Nevertheless, it appears to have adopted the Guidance Paper's EEC-test for exclusionary pricing abuses. Moreover, the three-pronged test for an abusive margin squeeze set out in the Commission's Guidance is reflected in *Deutsche Telekom* in that the test's elements are dealt with therein, albeit not in the way envisaged by the Commission. Consumer harm, in the Court's assessment, is called upon in rejecting an argument levelled against the general test for margin squeeze, rather than constituting a standalone condition that is capable of making a difference. The CJEU opposed calls to dispense with a finding of effects, which is very much in keeping with the spirit of the Guidance Paper as a whole and, in particular, the test for margin squeeze set out therein.

It is, however, very difficult to extrapolate the findings in *Deutsche Telekom,* for it is permeated by the formalistic legal standard of equality of opportunity employed by the CJEU seemingly as a counterweight to advantages accruing to DT on account of its former legal monopoly.

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308 Noticeably, the CFI did not refer in any way to equality of opportunity for the assumption of an exclusionary effect, *Deutsche Telekom v Commission* [n 265], paras. 233-244.

309 Guidance Paper [n 1], paras. 86-87.

310 *Deutsche Telekom* [n 266], para. 182 (references omitted).

5.3 TeliaSonera

5.3.1 History of the case

The Swedish Stockholms tingsrätt ('Stockholm District Court') made a reference for a preliminary ruling by decision of 30 January 2009 in proceedings between the Konkurrensverket (the Swedish competition authority) and TeliaSonera Sverige AB ('TeliaSonera').

TeliaSonera has been the Swedish fixed telephone network operator, used to hold respective exclusive rights and has been the owner of a local metallic access network including the local loop, connecting almost all Swedish households. TeliaSonera offered access to the local loop to other operators in two ways. First, it offered unbundled access in accordance with EU law. Second, it offered to operators an ADSL product intended for wholesale users without being legally obliged to do so, enabling the operators concerned to supply their broadband connection services to end users. Concurrently, TeliaSonera offered broadband connection services directly to end users.

The Swedish competition authority brought an action before the referring court alleging TeliaSonera had between 2000 and 2003 abused its dominant position by applying a pricing policy under which the spread between the sale prices of ADSL products intended for wholesale users and the sale prices of services offered to end users was not sufficient to cover the costs which TeliaSonera itself incurred in order to distribute those services to the end users.

The questions referred concern, in essence, clarification as to the conditions for a finding of an abusive margin squeeze.

The CJEU delivered the judgment ('*TeliaSonera*') on 17 February 2011.[311]

5.3.2 The CJEUs main findings

The CJEU confirms the existence of a stand-alone exclusionary abuse of margin squeeze resulting from a price spread either negative or insufficient to cover the specific costs of the input service with respect to which the margin squeeze is alleged, so that that spread does not allow a competitor as efficient as the dominant undertaking to compete for the supply of those services to end users.[312]

Further, the CJEU elaborated on the EEC-test stating that account should be taken primarily of the prices and costs of the dominant undertaking in assessing the lawfulness of its pricing policy. In exceptional cases, the costs and prices of competitors may be relevant, e.g. where the dominant undertaking's cost structure cannot be precisely identified for objective reasons or where the

311 Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB ('TeliaSonera') [2011] ECR I-00527.

312 *TeliaSonera* [n 311], paras. 31-32.

particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.[313]

A regulatory obligation to supply ADSL input services to downstream retailers is not necessary to commit the abuse of margin squeeze. The CJEU made moreover clear that a margin squeeze does not presuppose the satisfaction of the refusal to deal conditions as set out in *Bronner*[314].[315]

Additionally, anti-competitive effects resulting from the margin squeeze must be shown in form of possible barriers to the growth of competitors at least as efficient as itself on the retail market by making it more difficult or impossible for them to enter onto the markets concerned. Such a finding must take into consideration all the specific circumstances of a case. Where the wholesale product is indispensable for the downstream competitors' business the at least potentially anti-competitive effect of a margin squeeze is probable. Absent indispensability the practice may nevertheless be capable of having anti-competitive effects. If the margin is negative an effect which is at least potentially exclusionary is probable because downstream competitors would be compelled to sell at a loss. Where the margin remains positive proving anti-competitive effects the effect might be shown by reason, for example, of reduced profitability making trade more difficult for downstream competitors.[316] The degree of the dominant undertaking's (wholesale) market strength might be relevant in that regard.[317] Further, as a result of the close links between wholesale and retail market, dominance is only required on the former.[318]

Finally, the CJEU stated the conditions of competition on the dominated wholesale market and the costs of establishment and investment of the undertaking which has a dominant position in the wholesale market must be taken into consideration as part of the analysis of the undertaking's costs.[319]

5.3.3 Legal analysis

5.3.3.1 No (regulatory) obligation to supply required

The CJEUs found it immaterial whether the dominant undertaking is under an obligation to supply, no matter if such an obligation derives from regulation or general competition law (refusal to

313 *Ibid.*, paras. 45-46.
314 Case C-7/97 *Bronner* [1998] ECR I-7791.
315 *TeliaSonera* [n 311], paras. 47-59, particularly 58.
316 *Ibid.*, paras. 60-74.
317 *Ibid.*, para. 81.
318 *Ibid.*, paras. 83-89.
319 *Ibid.*, para. 110.

supply). Put differently, even if the dominant undertaking is under no such obligation, it can be liable of committing a margin squeeze, downgrading indispensability to a mere indicator for anti-competitive effects. Thus, a firm can lawfully refrain from supplying a retailer operating downstream because the product is dispensable, but once it has agreed to supply its pricing of the input product might abusively squeeze a competitor's margin. This has been criticised for being at odds with economic theory, as a margin squeeze 'operates in effect as a refusal to deal and implies that the same framework of analysis and the general concerns about the incentives of dominant undertakings to invest should apply'.[320] In effect, it incentivises firms not subject to an obligation to supply not to deal in the first place and as a result diminish total welfare.[321] Legally it broadens the scope of Article 102 TFEU by interpreting a margin squeeze as a formalistic abuse dissolved from its underlying cause, thereby dispensing with the strict requirements for an abusive refusal to deal or predatory pricing.[322]

The CJEU's approach stands in stark contrast to the Guidance Paper, which collapses the legal tests of margin squeeze and refusal to supply.[323] A margin squeeze is thus a constructive refusal to supply, representing abuses sharing the underlying economic rationale, rendering them to some degree substitutable from the perspective of the perpetrator. Consequently, for both, a showing of indispensability is necessary according to the Guidance Paper. As shown *supra 5.2.3.2*, only if the necessary balancing of incentives had already been made is provision for dispensation with this requirement made in the Commission's Guidance. A regulatory obligation to supply meets that condition. A general abdication of the condition of indispensability is not foreseen in the Guidance Paper.

5.3.3.2 Cutting ties to regulatory background

Notably, by dispensing with a (regulatory) duty to supply, the CJEU cut off a link to the origin of the dominant position in exclusive rights formerly granted to the incumbent. As has been shown *supra 5.2.3.2*, in *Deutsche Telekom* the CJEU repeatedly referred to DT's former position as the national incumbent enjoying exclusive rights. While TeliaSonera shares this regulatory background with DT, the CJEU removed references to and inferences from the origin of the dominant position from the margin squeeze's legal test. This is most striking in the CJEU's rejection of an (regulatory) obligation to supply as a prerequisite, but is also evidenced by the recognition of costs of

320 Opinion of AG Mazak in *TeliaSonera* [n 311], para. 16.
321 G. A. Hay & K. McMahon [n 298], 28.
322 See H. Auf'molk [n 297], 9-12; G. A. Hay & K. McMahon [n 298], 26.
323 Guidance Paper [n 1], para. 80.

establishment and investment incurred by the undertaking in achieving the dominant position. The Court held such costs are to be taken into consideration as part of the analysis of that undertaking's costs. In *Deutsche Telekom* the CJEU did not make provision for such costs and did not need to since DT did not acquire its dominant position by its own virtue. As the same applies to TeliaSonera, it is plausible to read this as a refinement of the margin squeeze test by the CJEU in preparation of applying it outside of formerly monopolised wholesale markets. The recognition of such costs is to be welcomed, as they are also taken account of in *Bronner*[324] and should, *a fortiori*, also apply to dispensable wholesale products. The drawback of this is that it rattles the foundations of the margin squeeze test by enquiring into the wholesale costs of the dominant firm. The CJEU seems to prescribe accounting for the wholesale investment and establishment costs by way of adding them to the dominant firm's retail costs. While this leaves the test unchanged on surface, it still requires an enquiry into the wholesale costs.

However, in laying out that it is generally not relevant for the assessment that the markets concerned feature new technology, the CJEU finds the competitive structure of the local loop access market to be 'still highly influenced by the former monopolistic structure', points to dangers of exploitation of that dominant position in neighbouring markets and concludes that accordingly a derogation from the application of Article 102 TFEU cannot be tolerated.[325] One is inclined to believe that it is still not immaterial how the dominant wholesale market position came into existence. This conclusion is strengthened by another finding. The orthodox interpretation of Article 102 TFEU does only lead to condemning the abuse of a dominant position, not the attainment nor mere holding of such a position.[326] Pursuant to *TeliaSonera*, 'Article 102 does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market [..].' [327] Taken literally, Article 102 TFEU enables the Commission to break up dominant positions that were gained in an unmeritous manner. In its later judgment *Post Danmark* (*infra 5.35.4*), the CJEU, a little more carefully but nevertheless similarly spirited, claims it is not the purpose of Article 102 TFEU to prevent firms from acquiring, on their own merits, a dominant position on a market.[328] Ultimately, this supplement to the orthodox interpretation of Article 102 TFEU was immaterial for the outcome of the case. Yet it is indicative of the CJEU's general stance towards dominant positions that are the legacy of a legal monopoly, such as TeliaSonera's. It signals the CJEU's intention to add impetus to

324 *Bronner* [n 314].
325 *TeliaSonera* [n 311], para. 109.
326 A. Jones & B. Sufrin [n 87], 358.
327 *TeliaSonera* [n 311], para. 24.
328 Case C-209/10 Post Danmark A/S v Konkurrencerådet ('Post Danmark') [2012] nyr, para. 21.

its general legal standards under Article 102 TFEU and, arguably, the CJEU's willingness to subject former legal monopolists to closer scrutiny under Article 102 TFEU.

5.3.3.3 Embracing a reasonably efficient competitor standard?

In *TeliaSonera* the CJEU confirms the general applicability of the EEC-test. However, the Court also points to cases where the costs and prices of competitors may be relevant. First, the Court adopts the Guidance Paper's proposition to consider the costs of a non-integrated competitor downstream when it is, for instance, not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations.[329] Second, and more interestingly, the CJEU mentions market conditions of competition dictating deviation from the EEC-test where the level of the dominant undertaking's costs are specifically attributable to the competitively advantageous situation in which its dominant position places it.[330] The vague language employed decreases legal certainty. One scholar views this as protecting reasonably albeit not equally efficient competitors.[331] He considers economies of scale and scope enjoyed by the dominant firm as a result of vertical integration might lead to an adjustment of the EEC-test.[332]

The Guidance Paper foresees disapplication of the EEC-test where 'a less efficient competitor' may also exert a constraint on the dominant undertaking, for instance where the competitor 'in the absence of an abusive practice' may benefit from demand-related advantages that will improve its efficiency, such as network and learning effects.[333] It appears rushed to equate this without further thought as a general recognition of a reasonably efficient competitor standard by the Guidance Paper on two grounds. First, the link to the absence of an abusive practice rather suggests awareness of the Commission of constellations where the higher efficiency of the dominant firm is, at least in part, a result of the abusive practice. For instance, economies of scale resulting from higher sales due to an abusive pricing practice, e.g. predatory pricing, are to be considered. This scenario is analogous to the infamous cellophane fallacy in that the efficiencies (the prices), that are meant to constitute a standard for the purpose of establishing whether an abuse exists, are in fact already tainted as a result of the dominant firm's behaviour and tend to lead to an assessment favourable to the dominant

329 Compare *TeliaSonera* [n 311], para. 45 to Guidance Paper [n 1], fn. at para. 79.

330 The third instance mentioned by the CJEU (productions costs already written off so that access to infrastructure no longer represents a cost for the dominant undertaking) does not pose similar controversy, see. H. Auf'molk [n 297], 15.

331 H. Auf'molk [n 297], 13.

332 H. Auf'molk [n 297], 15.

333 Guidance Paper [n 1], para. 24.

firm.[334] Here, the efficiencies are the result of abusive conduct, in the cellophane fallacy the prices from which to start the SSNIP-test were already supra-competitive.[335] Second, it appears possible to draw a line between economies of scale stemming from superior efficiency, e.g. superior production facilities, unique brand recognition etc., and those stemming exclusively from a high market share.[336]

The second type of economies of scale is less worthy of legal protection since another firm enjoying the dominant firm's market share would also achieve them. In the latter case, the competitor would fail the EEC-test, albeit it is as efficient as the dominant firm. Admittedly, the Guidance Paper is not entirely clear on that matter, but the interpretation forwarded here is well within the wording of the pertinent paragraph in the Guidance Paper.[337] The use of the notion 'a less efficient competitor' on that reading does not refer to a competitor who is truly inferior in terms of efficiency, but to a competitor who failed the EEC-test. In fact, the competitor is as efficient as the dominant firm, but the EEC-test is faulty in that it does not properly take account of it. In view of the foregoing the use of the term reasonably efficient or not yet as efficient competitor[338] and the accompanying critique might not be wholly justified.[339]

The CJEU's carve-out with respect to costs attributable to the competitively advantageous situation in which its dominant position places the dominant firm can be (narrowly) read in the light of the foregoing. In any way, both the CJEU and the Guidance Paper foresee adjustments to the EEC-test, which will likely result in a high degree of convergence on that matter. The CJEU focusses on the dominant firm's competitive advantages while the Guidance Paper looks at demand-related advantages. Both appear to be different sides of the same coin.[340]

Therefore, the CJEU appears to have adopted the Guidance Paper's proposition. Similar to the Guidance Paper, the CJEU does not provide for a clear delineation of application of these concepts and hence fails to offer a safe harbour.[341]

334 Based on the Supreme Court's judgment *United States v E.I. du Pont de Nemours & Co (1956) 351 U.S. 377*. A detailed account is given in S. Bishop & M. Walker [n 199], 124-130.

335 Same view: J. T. Lang [n 122], fn. 26. However, he overlooks the reference to 'the absence of an abusive practice'.

336 J. T. Lang [n 122] seems to assert that to distinguish between such costs would be *per se* impossible, at fn. 26. He may or may not be right, conceptually it does make a difference. We fail to understand why, applying the criterion set out in the text, it would not be legally permissible to distinguish between advantages from which a dominant company could legitimately benefit and those from which it could not (*ibid.*).

337 Guidance Paper [n 1], para. 24.

338 J. T. Lang [n 122], 9-11.

339 Even if a reasonably efficient competitor test was set out in the Guidance Paper, there would be prudent arguments in its favor, see I. Lianos [n 176], paras. 15-23.

340 E. Rousseva & M. Marquis [n 307], lines. 790-795. Potential demand-related advantages depend on the degree of supply-side advantages.

341 H. Auf'molk [n 297], 15. See also CEPS-Report [n 153], 30-32.

5.3.3.4 Anti-competitive effects

In *TeliaSonera* the CJEU elaborates on the anti-competitive effects required for an abusive margin squeeze. The Court starts off by stating the effect does not necessarily have to be concrete and it suffices if it may potentially exclude competitors who are at least as efficient as the dominant undertaking.[342] It is consequential to employ the EEC-test also for the effects-analysis.[343] Where the product is indispensable the CJEU finds at least potentially anti-competitive effects to be probable. The Court mentions reduced profitability as a competitive disadvantage preventing or hindering market access or competitor's growth. In practice this low threshold might equal a presumption of anti-competitive effects if the product is indispensable.[344] The same applies where the product is dispensable and the spread is negative.[345] When it comes to dispensable products, the effects analysis is attributed more weight. Anti-competitive effects are not deemed to be probable and it has to be shown that it would be at least more difficult for the operators concerned to trade on the market, for example by demonstrating reduced profitability.

However, every margin squeeze either raises input prices or decreases the level of retail prices, thereby necessarily reducing rival's profitability and makes it therefore, be it only to a negligible extent, more difficult to trade on the market.[346] The smaller the sufficient anti-competitive effect is the less relevant is the effects analysis and the more formalistic as opposed to effects-based is the legal test for an abusive margin squeeze. In order to assess whether the margin squeeze forecloses competitors to an appreciable extent, account should be taken of the share the wholesale input costs constitute in the competitor's overall costs, whether the dominant firm's wholesale input is used in variable proportions by rivals[347] and whether the competitor could have substituted the input. Such a test appears to be more in line with the CJEU's stipulation that the effect must be capable of potentially excluding competitors. Moreover, a higher standard of anti-competitive effects would be consonant with the requirement of the likelihood of the elimination of all competition on the downstream market as concluded in *Bronner*.[348,349]

The Guidance Paper does not foresee margin squeezes where the input is dispensable. One can reasonably infer from the Guidance Paper a higher legal standard concerning effects if the product is

342 *Ibid.*, para. 64.
343 M. Mandorff & J. Sahl [n 276], 11.
344 See specifically *TeliaSonera* [n 311], para. 77 to this end.
345 N. Dunne, 'Margin Squeeze: Theory, Practice, Policy' (2011) Paper for EUSA Conference 2011 (http://www.euce.org/eusa/2011/papers/5a_dunne.pdf, accessed: 1/11/13), 16-17.
346 See to this effect: G. A. Hay & K. McMahon [n 298], 27.
347 CEPS-Report [n 153], 81-84.
348 *Bronner* [n 314], paras. 66-67.
349 G. A. Hay & K. McMahon [n 298], 27.

dispensable, since in case of an indispensable input it holds the margin squeeze to be generally liable to eliminate effective competition in the downstream market. Naturally, this is much less likely where the product is (to some degree) substitutable.

5.3.3.5 Consumer harm

TeliaSonera makes no mention of consumer harm with regard to effects. This renders it likely that the assessment of consumer harm in *Deutsche Telekom* was a product of circumstances (it was employed to rebut the argument that short-term price raises harm consumers).[350] Moreover, doing without an assessment of consumer harm is inconsistent with the Guidance Paper and, at least in theory, further lowers the legal standard for an abusive margin squeeze.

5.3.3.6 Efficiency defence

The Guidance Paper sets out a general efficiency defence justifying conduct leading to foreclosure of competition if the efficiencies are sufficient to guarantee that no net harm to consumers is likely to arise. The framework of reference is loosely aligned to the conditions for exemption under Article 101(3) TFEU. First, efficiencies (likely to be) realised as a result of the conduct, second, the conduct must be indispensable to the realisation of those efficiencies, third, the (likely) efficiencies outweigh any (likely) negative effects on competition and consumer welfare in the affected markets and, fourth, no elimination of effective competition. The burden of proof is on the defendant.[351]

Prior to the CJEU's judgment in *British Airways,* the case law concerning Article 102 TFEU was interpreted to not provide for an efficiency defence.[352] In *British Airways* the Court held that an undertaking is at liberty to demonstrate that its conduct producing an exclusionary effect is economically justified. For that it has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.[353]

In *TeliaSonera* the exact same test was set out.[354] Hence, the more refined and, at least with respect to consumer harm, stricter test set out in the Guidance Paper was not adopted.

350 R. S. Gohari, 'Margin Squeeze in the Telecommunications Sector: A More Economics-based Approach' (2012) 35 World Competition 205, 215.

351 Guidance Paper [n 1], paras. 30-31.

352 E. Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?' (2006) The Competition Law Review 27, 37 et seq.

353 Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, paras. 69 and 86.

354 *TeliaSonera* [n 311], paras. 75-76.

Notwithstanding that, *TeliaSonera* confirms the existence of an efficiency defence and thus, to some extent, the Court's approval of the more-economics approach.

5.3.3.7 Summary

In *TeliaSonera* the Court can be said to have adopted the exceptions to the EEC-test set out in the Commission's Guidance. Additionally, the CJEU embraced the idea of justifying conduct through efficiencies resulting from the imputed behaviour, albeit not to the extent envisaged in the Guidance Paper. Apart for this, *TeliaSonera* does not draw from it. On the contrary, condemning margin squeezes where the input is not indispensable is in stark contrast to it. At least, the CJEU was guided by economics when it required account must be taken of the dominant firm's costs of establishment and investment on the wholesale market, which mingles with the fundamentals of margin squeeze. This is consistent with the Guidance Paper.[355] Dispensing with consumer harm and a fairly low standard for anti-competitive effects clearly is not.

However, the same caveat as for *Deutsche Telekom* applies, i.e. the regulatory background, more specifically the unmeritous origin of TeliaSonera's dominant position, looms large, and therefore extrapolations are difficult to make. This is evidenced by direct reference to the high influence of the former monopolistic structure on the competitive structure of the market concerned and the supplement to the orthodox interpretation of Article 102 TFEU indicating the significance of whether or not the dominant position is the result of a firm's own merits.

5.4 Post Danmark

5.4.1 History of the case

The Højesteret (Danish Court) made a reference for a preliminary ruling by decision of 27 April 2010 in proceedings between the Konkurrencerådet (the Danish competition council) and Post Danmark A/S ('Post Danmark').

In Denmark, Post Danmark and Forbruger-Kontakt a-s ('Forbruger-Kontakt') are the two largest undertakings in the unaddressed mail sector (brochures, telephone directories, guides, local and regional newspapers etc.). The sector is entirely liberalised and at the material time Post Danmark enjoyed a legal monopoly in a substantial part of addressed mail and was subject to universal service obligations in that regard. For that purpose, Post Danmark had a network that covered the national

[355] The Guidance Paper's main concern with respect to refusal to deal and margin squeeze is preventing competitors from free-riding on the dominant firm's investments and consequent distortions of incentives, [n 1], paras. 75, 82, 84, 89.

territory in its entirety and that was also used for the distribution of unaddressed mail. Furthermore, it held a dominant position on the market for unaddressed mail.

In 2004, Post Danmark concluded contracts with three former customers of Forbruger-Kontakt. Twice the prices covered 'average total costs', once they failed to do so but did cover 'average incremental costs'. A considerable amount of costs is related both to the activities within the ambit of Post Danmark's universal service obligation and to its activity of distributing unaddressed mail ('common costs'). It could not be established that Post Danmark had intentionally sought to eliminate competition.

The Danish competition council held that Post Danmark had abused its dominant position on the Danish market for the distribution of unaddressed mail, practising a targeted policy of reductions designed to ensure its customers' loyalty by charging Forbruger-Kontakt's former customers rates different from those it charged its own pre-existing customers without being able to justify those significant differences in its rate and rebate conditions by considerations relating to its costs. Post Danmark appealed this decision before the referring court.

The questions referred concern, in essence, under what circumstances selectively low pricing by a dominant firm to a competitor's former customers amount to an exclusionary abuse and whether selective price reductions to a level lower than the undertaking's average total costs but higher than its average incremental costs constitute an exclusionary abuse if the level was not set for the purpose of driving out a competitor.

The CJEU's Grand Chamber gave the judgment ('*Post Danmark*') on 27 March 2012.[356]

5.4.2 The CJEUs main findings

The CJEU pointed out that not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive from the point of view of, among other things, price, choice, quality or innovation.[357]

Pricing practices are prohibited which have an exclusionary effect on competitors considered to be as efficient as itself and strengthening its dominant by using methods other than those that are part of competition on the merits. Price discrimination, that is charging different customers different prices for goods or services without a difference in costs, cannot of itself suggest there exists an exclusionary abuse.[358]

[356] Case C-209/10 Post Danmark A/S v Konkurrencerådet ('Post Danmark') [2012] nyr.
[357] *Post Danmark* [n 356], para. 22.
[358] *Ibid*, paras. 25, 30.

In its assessment of the price-cost structure, the CJEU concluded that the method of attribution used to establish 'average incremental costs' would seem to seek to identify the great bulk of the costs attributable to the activity of distributing unaddressed mail.[359] As regards the two contracts in which Post Danmark agreed to a price above average total costs, such prices cannot be considered to have anti-competitive effects.[360] As regards the price above average incremental costs but below average total costs charged to a single customer, this cannot be considered to amount to an exclusionary abuse. To the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.[361]

If the referring court nevertheless makes a finding of anti-competitive effects, the dominant undertaking is open to provide justification by demonstrating either that its conduct is objectively necessary or that the exclusionary effect produced may be counterbalanced by advantages in terms of efficiency that also benefit consumers. The latter requires (1) that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, (2) that those gains have been, or are likely to be, brought about as a result of that conduct, (3) that such conduct is necessary for the achievement of those gains in efficiency and (4) that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.[362]

5.4.3 Legal analysis

5.4.3.1 Predatory pricing and the relevant price-cost benchmark

5.4.3.1.1 CJEU's specific findings

The CJEU starts off by reiterating the price-cost benchmark set up in *AKZO*. The Danish competition authority did not apply the concept of variable costs, but used the concept of 'average incremental costs', which included not only those fixed and variable costs attributable solely to the activity of distributing unaddressed mail, but also elements described as 'common variable costs' ('75% of the attributable common costs of logistical capacity' and '25% of non-attributable common costs'). So

359 *Ibid*, para. 34.
360 *Ibid*, para. 36.
361 *Ibid*, paras. 37-38.
362 *Ibid*, paras. 41-42.

defined average incremental costs are higher than average variable costs, for they include a share of fixed and common costs.

'Average total costs' were defined as being 'average incremental costs to which were added a portion, determined by estimation, of Post Danmark's common costs connected to activities other than those covered by the universal service obligation'. Incremental costs are those destined to disappear within three to five years if Post Danmark were to give up its business activity of distributing unaddressed mail. Average total costs within the meaning of *AKZO* include all fixed costs of the service in questions including, strictly interpreted, all common costs in relation thereto (in case of multi-service undertakings). Thus, the average total costs concept applied by the Danish competition authority may omit parts of considerable common costs incurred in discharging its universal service obligation (costs which seem not to have been accounted for proportionately in average incremental costs).

Post Danmark priced without exception above average incremental costs. This, in the view of the CJEU, covers the great bulk of the costs attributable to the activity of distributing unaddressed mail and renders it possible, as a general rule, for a competitor as efficient as the dominant undertaking to compete with those prices without suffering losses that are unsustainable in the long term. However, the CJEU prescribed an enquiry into anti-competitive effects which might yield a different outcome.

It further held that pricing twice above average total costs, as defined by the Danish competition authority, but below average total costs in the stricter sense of *AKZO*, cannot be considered to produce any anti-competitive effects.

5.4.3.1.2 Analysis

First of all, the CJEU's approval of a measure of average incremental costs is economically sound in a case involving a commonality of fixed costs with a universal service obligation because average variable costs would not reflect the true costs incurred.[363]

Second, the CJEU accepted the average total cost benchmark used by the Danish competition authority, which is a measure of incremental costs (those disappearing within 3-5 years following the cessation of the activity) and adds only a share of the common costs deriving from activities other than the universal service (common costs shared with the universal service may to some degree have already been included in the average incremental costs),[364] as the turning point after which anti-competitive effects are immaterial. In doing so, the Court abandoned the average total cost

[363] D. Geradin, 'Looking back at a 2012 highlight: Post Danmark' (2013) Kluwer Competition Law Blog (http://kluwercompetitionlawblog.com/2013/01/07/looking-back-at-a-2012-highlight-post-danmark/, accessed: 21/11/13).

[364] E. Rousseva & M. Marquis [n 307], lines 390 et seq.

benchmark established in *AKZO*[365] as the turning point, it validated, broadly speaking, the proposition in the Commission's Guidance that pricing higher than a measure of incremental costs (average long run incremental costs, 'LRAIC') is in general not capable of excluding equally efficient competitors.[366]

Third, the Danish competition authority added a share of common costs to the average total costs and the Court accepted this in *Post Danmark*. This is consistent with the Guidance Paper. LRAIC are defined therein as the average of all the variable and fixed costs that a company incurs to produce a particular product, excluding true common costs.[367] In principle, the Guidance Paper foresees only pricing below LRAIC as capable of foreclosing as-efficient competitors.[368] However, the Guidance Paper explicitly provides for the consideration of significant common costs when assessing the ability to foreclose equally efficient competitors.[369] Such costs were highly relevant in *Post Danmark*.[370] Therefore, the Court's approach does not seem to clash with the Guidance Paper in so far as the latter would have advocated a cost benchmark similar to average total costs (as calculated by the Danish competition authority) in *Post Danmark* owing to the significant common costs involved.[371]

Fourth, the Court did not preclude the application of average avoidable cost as a cost benchmark. Average avoidable cost ('AAC'), i.e. costs that could have been avoided if the company had not produced a discrete amount of extra output, is the benchmark put forward in the Guidance Paper to refine and replace average variable costs as established in *AKZO*,[372] as the more flexible and economically sound benchmark, taking due account of variable and fixed costs.[373] The Court did not mention this benchmark, presumably due to the use of different cost benchmarks by the Danish competition authority. This does not amount to a rejection of AAC by the CJEU, as there is no indication that the CJEU meant to predetermine their value in subsequent cases. Likewise, the judgment does not imply that LRAIC are to replace average variable costs as the lower boundary of the *AKZO* test, as average variable costs were not a relevant benchmark in the case either. Concluding otherwise would be tantamount to not paying due attention to the idiosyncrasy of the

365 *AKZO* [n 222].
366 E. Rousseva & M. Marquis [n 307], lines 625 et seq.
367 Guidance Paper [n 1], para. 26 and attendant fn. 2.
368 Guidance Paper [n 1], para. 67.
369 Guidance Paper [n 1], fn. 2 at para. 26.
370 *Post Danmark* [n 356], para. 32.
371 Same view: E. Rousseva & M. Marquis [n 307], lines 625 et seq.
372 *AKZO* [n 222].
373 Guidance Paper [n 1], fn. 2 at para. 26.

cost benchmarks employed by the Danish competition authority. A *per se* prohibition therefore remains to be in place for pricing below average variable costs.[374]

Fifth, the pursuit of an anti-competitive strategy by the dominant firm is not a prerequisite for pricing between average incremental costs and average total costs to be condemned as abusive. The Court was barred from assuming such a strategy by the facts referred to it by the Danish court.[375] In setting out a test hinging not on any eliminatory strategy, *Post Danmark* either overrules *AKZO* in that respect by depriving such a strategy of legal value and exclusively relying on anti-competitive effects instead, or views an anti-competitive strategy and anti-competitive effects as alternative conditions,[376] or, most persuasively, provides an elaboration on the *AKZO*-test by introducing anti-competitive effects as the overarching condition and an anti-competitive strategy as one way of meeting it. On the last reading, an eliminatory strategy might be held to have the object of producing anti-competitive effects and could therefore presumably lead to anti-competitive effects.[377] This reading is also more in keeping with economic theory and the Guidance Paper. Predation under the Guidance Paper is subject to a showing of sacrifice and anti-competitive foreclosure resulting therefrom.[378] The CJEU's legal test for predation does not in general require such a two-pronged test. Under the *AKZO*-test, pricing between average variable and average total costs additionally required predatory/eliminatory intent. Replacing the latter condition with likely/actual anti-competitive effects would move the CJEU's test closer to the one advocated in the Commission's Guidance.

5.4.3.2 As-efficient competitor test

Once again, the CJEU applied the EEC-test. In contrast to its application in the cases discussed before, in *Post Danmark* the Court did not consider the EEC-test to be conclusive as to whether competitors would be able to compete with the dominant firm's prices ('as a general rule'). Even where competitors can compete with those prices, the Court foresees an additional effects-analysis. E. Rousseva and M. Marquis question what use a showing of anti-competitive effects can have subsequent to a finding that an equally-efficient competitor will be able to compete with the dominant firm other than protecting competitors less efficient than the dominant firm. They consider

374 E. Rousseva & M. Marquis [n 307], lines 431 et seq. However, *Wanadoo* [n 219] suggests that this prohibition is not *per se* but merely a presumption, see *supra 5.1.3.1*.

375 *Post Danmark* [n 356], para. 29.

376 Seemingly this is proposed by B. Lundqvist & G. S. Olykke, 'Post Danmark, now concluded by the Danish Supreme Court: clarification of the selective low pricing abuse and perhaps the embryo of a new test under article 102 TFEU?' (2013) 34 European Competition Law Review 484, 487.

377 E. Rousseva & M. Marquis [n 307], lines 441 et seq. They argue in favour of alternative conditions of effect or intent. We believe that the Court's lack of reference to intent in paras. 37-40 in *Post Danmark* [n 356] point to anti-competitive effects as the main criterion. Similar: L. L. Gormsen [n 284], 242.

378 Guidance Paper [n 1], paras. 63, 67 et seq. The Guidance Paper also speaks of whether 'the undertaking is likely to be in a position to benefit from the sacrifice' (para. 70).

uncertainty as to whether there are other important relevant common costs as a plausible explanation.[379]

Common costs not attributable to the activity in question are caught by average total costs, but this cost benchmark is an economically inaccurate proxy for only a proportionate share of common costs should be attributed to the respective activity. In *Post Danmark*, the CJEU did not engage into an assessment of the merits of the cost benchmarks used by the Danish competition authority. An unspecified share of the considerable shared common costs incurred through the universal service obligation may have been included in the average incremental cost benchmark. However, these costs were not accounted for in the average total cost benchmark. Hence, it is unclear to what extent the common costs have been taken into account. As long as common costs are not appropriately reflected in the definition of cost benchmark, the strict application of the EEC-test will be liable to Type II errors, where the dominant firm benefits from the under-attribution of common costs.[380,381] It is only if the dominant firm's cost structure is realistically reflected in the cost benchmark, that the EEC-test should be applied in a conclusive manner. Put differently, the EEC-test shifts the focus to the relevant cost benchmark. A test based on 'covering the great bulk of the costs attributable to the supply of the goods or services in question' does not necessarily reflect the dominant costs, resulting in the EEC-test possibly excluding competitors that are in fact as efficient as the dominant firm. The higher the common costs, the more severe the implications of a cost benchmark neglecting them. They were found to be significant in *Post Danmark*.[382] Thus, in the absence of an accurate cost benchmark, the CJEU was right to leave the door open for an additional enquiry into anti-competitive effects.

In *Post Danmark*, the necessity of adding a portion of common costs was justified on another ground. As a universal service provider, Post Danmark may have enjoyed economics of scale as a consequence of its legal monopoly in the reserved area. The higher efficiency may therefore stem from regulatory decisions rather than from efficiency 'on the merits'. This might well justify a disproportionately high allocation of common costs to the activity not governed by the universal service obligation.[383]

379 E. Rousseva & M. Marquis [n 307], lines 642 et seq.

380 This is the gist of the Opinion of AG Mengozzi in *Post Danmark* [n 356] at paras. 111-114. He proposes to check whether the earnings from the activity subject to the universal service obligation exceed its costs, in which case a cross-subsidisation of the market open to competition would occur.

381 Over-attribution or double-attribution would produce Type I errors. However, the dominant firm has an incentive to provide authorities and courts with the pertinent information to prevent this.

382 *Post Danmark* [n 356], para. 32.

383 See the discussion on this subject matter supra 5.3.3.3.

Furthermore, the CJEU had already decided the costs of competitors can be taken into account 'where costs are specifically attributable to the competitively advantageous situation in which its dominant position places [the dominant firm]' in *TeliaSonera* (see *supra* 5.3.3.3). The Guidance Paper also provides for the disapplication of the EEC-test under certain circumstances (see *supra* 5.3.3.3). In addition, it stipulates the taking account of the specifics of a regulatory environment.[384] Hence, the distortions of competition resulting from a universal service obligation can be accounted for under both the case law and the Guidance Paper.

The assessment of anti-competitive effects in addition to the as-efficient competitor test is consistent with the Guidance Paper, which views the EEC-test merely as an indicator for establishing anti-competitive foreclosure.[385] However, as pointed out *supra 5.3.3.3*, it is not quite clear when recourse to the prices of competitors will be made.

5.4.3.3 The role of the regulatory background revisited

The role to play of the regulatory background of the dominant position under Article 102 TFEU has been a recurrent theme throughout the case law under review in this thesis. *Post Danmark*, dealing with the former national postal market legal monopolist and current universal service provider, was likely to add to this theme. The CJEU held:

> 'According to equally settled case-law, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market. When the existence of a dominant position has its origins in a former legal monopoly, the fact has to be taken into account.'[386]

Operating under the assumption that the special responsibility refers to nothing more than the fact that Article 102 TFEU creates obligations for dominant undertaking exceeding those of non-dominant firms,[387] the quoted paragraph finally endows universal prominence on the relevance of the regulatory origin of the dominant position across the different forms of abuse. This comes a long way from the often patchy and ambiguous references in the previous case law and, one might hope, has the potential to contribute to a harmonised and transparent assessment of the relevance of this factor. By unveiling the underlying rationale for certain doctrinal decisions in cases involving former legal monopolists a third way between regulation and general competition law may evolve.[388] In terms of clarity and legal certainty this is most welcomed, not least by companies lacking a regulatory

384 Guidance Paper [n 1], para. 8.
385 Guidance Paper [n 1], paras. 24, 27.
386 *Post Danmark* [n 356], para. 23 (references omitted).
387 E. Rousseva & M. Marquis [n 307], lines 1120 et seq.
388 Which is not to say this is generally desirable. Having said this, from the perspective of the firm's concerned legal certainty on bad law is preferable to bad law which effect is corroborated by legal uncertainty.

background. Legal concepts of abuse convoluted by regulatory considerations as a result of their development in cases involving former legal monopolists are lacking in that regard. In terms of substance, awareness of the regulatory background might prevent feedback effects on general competition law from its application to former legal monopolists relying on regulatory considerations (or even full legal concepts designed to tackle the dominant position of firms whose dominant position is the legacy of exclusive rights), such as opening up protected markets.[389] Closer scrutiny of the behaviour of the former legal monopolist will be the likely result of the CJEU's statement.[390] However, the CJEU did not set out what factors will play a role in that assessment.

What matters most for our analysis is that the Guidance Paper paves the way to subject former monopolists to a different legal standard than other firms, lays out the rationale behind it and the where this plays a role in the legal analysis. A refusal to supply or margin squeeze can be abusive even where the promulgated three conditions are not met 'where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive right or has been financed by state resources.' The explicit rationale for this is that 'imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream ...' [391] Moreover, the Commission's Guidance is wary of cross-subsidisation using profits gained in the monopoly market to monopolise other markets.[392] In relation to this, account of constraints exerted by less efficient competitors will be taken, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which tend to enhance its efficiency.[393] Finally, the Commission undertakes to consider the specific facts and circumstances having a bearing on the competitive assessment, e.g. the specifics of a regulatory environment.[394] Hence, although the Guidance Paper does not entail a stipulation as express and general as the CJEU's in *Post Danmark* to take regard of the dominant position's origin, the Guidance Paper is imbued with the principle of a distinct legal treatment for former legal monopolists. It is not unlikely that the CJEU in future cases will resort to the concrete solutions advanced therein in fleshing out the abstract notion promulgated in *Post Danmark*.

389 H. Auf'mkolk [n 297], particularly pp. 6-7.
390 E. Rousseva & M. Marquis [n 307], lines 1210 et seq.
391 Guidance Paper [n 1], para. 82.
392 Guidance Paper [n 1], fn. 2 to para. 63.
393 Guidance Paper [n 1], para. 24. Also see the discussion *supra 5.3.3.3.*
394 Guidance Paper [n 1], para. 8. See in general on this issue E. Rousseva & M. Marquis [n 307], lines 1222 et seq.

5.4.3.4 Anti-competitive effects

Pricing between average incremental costs and average total costs, while as a general rule high enough to allow a competitor as efficient as the dominant undertaking to compete, may nevertheless give rise to anti-competitive effects rendering the practice abusive.

Such anti-competitive effects, which were for the referring court to be assessed, have to produce an actual or likely exclusionary effect.[395] This marks a break with prior case law, which required only a possible or potential anti-competitive effect.[396] In that respect, the Court pointed to the fact that Forbruger-Kontakt managed to maintain its distribution network despite losing the volume of mail related to the three customers involved and managed to win back two of the lost customers. It becomes clear that the Court is concerned with the concrete and ascertainable effects on the market in contrast to unappreciable, abstract and theoretical possibilities unrelated to real-world market mechanics and behaviour.[397]

Moreover, the CJEU attributes relevance to the fact that Post Danmark undercut average total costs only with respect to a single customer.[398] This strongly implies an interpretation of abusive predatory pricing that, to some degree, turns on the share of total market capacity being affected by below cost prices. As a consequence, pricing below (average total) costs is no longer *per se* abusive where the dominant firm can price discriminate (possibly subject to a showing of eliminatory intent, see *supra 5.4.3.1.2*), which it used to before, even when the price fell between average variable and total costs. The Court pointed to other relevant effects such as whether or not competitors were forced to shut down production facilities and were able to regain customers or market share in general.[399] By implication, the enquiry approximates a full-blown assessment of anti-competitive effects. *Post Danmark* concerns pricing above average variable costs (or AAC as propsed in the Commission's Guidance). Whether the foregoing applies to pricing below average variable costs cannot be ascertained with any degree of certainty.

An enquiry into the effects is exactly what the Guidance Paper generally envisages, and does so in cases of alleged predation as well.[400] The extent of the allegedly abusive conduct as concerns the number of total sales affected is explicitly mentioned in the general part on anti-competitive

395 *Post Danmark* [n 356], para. 44.
396 See *supra* 5.2.3.3 and 5.3.3.4.
397 E. Rousseva & M. Marquis [n 307], lines 1303 et seq; D. Geradin [n 363].
398 *Post Danmark* [n 356], paras. 37, 44.
399 *Ibid*., para. 39.
400 Guidance Paper [n 1], para. 20 concerning the general test, paras. 67-73 concerning the test for predation.

foreclosure.[401] Further, the marginalisation of actual competitors despite their remaining on the market is seen as an indicator.[402]

5.4.3.5 Competition on the merits

The CJEU elucidated the concept of competition on the merits. Adding to its orthodox statement[403] that Article 102 TFEU prohibits the dominant firm from strengthening its dominant firm by using methods other than those that are part of competition on the merits[404], it held:

> 'Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.'[405]

In *Wanadoo*, the CJEU had already made clear that the concept of competition on the merits means competition on the basis of quality.[406] *Post Danmark* presents a strong statement against the protection of competitors unable to achieve the efficiency standard set by the dominant firm. The Guidance Paper provides a strikingly similar passage, putting the emphasis on safeguarding the competitive process instead of competitors and ensuring that dominant firms do not exclude their competitors by other means than competing on the merits of the products or services they provide, which 'may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.'[407]

However, and contrary to one scholarly assertion,[408] competition on the merits does not constitute a standalone legal test for abuse, similar to the object-category under Article 101(1) TFEU. Rather, it informs the interpretation of Article 102 TFEU as a whole, offering a guidepost on the basis of efficiency for distinguishing between good and bad competition as well as between protection of competitors and protection of competition. This broad and abstract understanding is reflected in the CJEU's manifold use of the concept, be it as a benchmark to retrospectively assess the merits of a dominant position (see *supra 5.3.3.2*), as a means to establish efficiency as one of the goals of competition (see quote in *Post Danmark, supra 5.4.2*) and a conduit to further the Court's new conceptual interest in consumer welfare. The CJEU links the concept of competition on the merits

401 Guidance Paper [n 1], para. 20, 5th indent.
402 Guidance Paper [n 1], paras. 20, 6th indent, 69.
403 See *TeliaSonera* [n 311], para. 88; *Deutsche Telekom* [n 266], para. 177.
404 *Post Danmark* [n 356], para. 25.
405 *Ibid.*, para. 22 (references omitted).
406 *Wanadoo* [n 219], para. 106.
407 Guidance Paper [n 1], para. 6; E. Rousseva & M. Marquis [n 307], lines 1099 et seq.
408 B. Lundqvist & G. S. Olykke [n 376], 488-489.

first to efficiency and from there to the consumer's perspective: a competitor less efficient is less attractive to consumers. Put differently, a firm is efficient if it contributes to an increase in consumer welfare. In the quoted paragraph efficiency is given a meaning exceeding the notion of productive efficiency,[409] which is at the heart of the EEC-test. The CJEU apparently understands efficiency in a way comprising at least productive and dynamic efficiency[410] in economics. Dynamic efficiency is hard to measure and relates to long term firm performance, which contrasts the static and short term understanding of efficiency in the EEC-test. Interestingly, a similar conceptual ambiguities has already concerned us with respect to the notion of consumer harm (*supra 4.1*). In view of the link between efficiency and consumer welfare one might speculate whether the CJEU comprehends efficiency in an even broader sense.

Be that as it may, the EEC-test can be seen as a more concrete expression of the concept of competition on the merits, in so far as both are based on efficiency, but for the reasons stated *supra* the EEC-test certainly does not exhaust its meaning. The link to the consumers' point of view indicates the CJEU's willingness to enforce EU competition law in order to ultimately increase their benefits. As we will see in turn, the Court had more to say on that subject.

5.4.3.6 Consumer harm

The CJEU held:

> 'In that regard, it is also to be borne in mind that Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, *to the detriment of consumers*, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, *AKZO v Commission; France Télécom v Commission; Deutsche Telekom v Commission*).'[411]

Contrary to the cited judgments, the CJEU had never before held that the effect must be to the detriment of consumers. It supplemented the classic formula of Article 102 TFEU orthodoxy adopted in *Hoffmann-La Roche* that had been left untouched since 1979.[412]

Before *Post Danmark* the CJEU made reference to consumers by stating Article 102 TFEU refers to practices harmful to consumers either directly (i.e. by exploitative abuse), or, indirectly, through the impact of the abusive behaviour on an effective competition structure.[413] By linking consumer

409 M. Motta, *Competition Policy* (Cambridge 2004), 46 et seq.
410 M. Motta [n 409], 55 et seq.
411 *Post Danmark* [n 356], para. 24 (emphasis added, references partly omitted).
412 Case Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, para. 91.
413 *TeliaSonera* [n 311], para. 24; *Deutsche Telekom* [n 266], para. 176; *Wanadoo* [n 219], para. 10.

detriment to the condition of effect, the relevance of which has already been largely increased in value thanks to *Post Danmark* (*supra 5.4.3.4*), in a causal relationship, a finding of (potential, possible, likely, actual) consumer harm has been elevated to an indispensable step in enforcing Article 102 TFEU as a whole (not just concerning exclusionary abuses). A finding of anti-competitive effects which are not detrimental to consumers does no longer suffice to condemn conduct as abusive. Naturally, it is for subsequent adjudication to show if this is only lip service paid to consumer harm or if this condition will be strictly enforced. E. Rousseva and M. Marquis correctly concluded the Court has framed exclusionary conduct control as a form of consumer harm control, protecting consumer interests by ensuring effective competition between efficient competitors.[414]

Enforcing cases inflicting most harm on consumers is, besides a more effects-informed assessment, the predominant aim of the Guidance Paper. In order to single out such cases, the concept of anti-competitive foreclosure has been advanced by the Commission (see *supra 4.2*). It is in essence identical to the approach by the CJEU, in that it requires anti-competitive effects and an adverse impact on consumer welfare caused thereby.[415]

5.4.3.7 A fully-fledged efficiency defence

The Court held dominant undertakings are open to either demonstrate that their conduct is objectively necessary or that the exclusionary effect may be counterbalanced in terms of efficiency that also benefit consumers. It stipulated four conditions that must be met in order for the conduct to be justified by efficiency gains (see *supra* 5.4.2).

For the first time the Court spelled out an elaborated and exhaustive efficiency defence and kept it unambiguously distinct from the concept of objective justification.[416] In *British Airways* and *TeliaSonera* an efficiency defence was mentioned but not elaborated upon (see *supra 5.3.3.6*). Additionally, the Court put the legal burden of proof on the dominant firm[417] and held that it is immaterial whether or not efficiency was a criterion in the schedules of prices charged by Post Danmark as long as the efficiency gain actually exist (objective instead of subjective concept).

Post Danmark reflects the Commission's Guidance in that it distinguishes strictly between objective justification and efficiency defence, puts the burden of proof on the defendant,[418] and

414 E. Rousseva & M. Marquis [n 307], lines 1093 et seq.

415 E. Rousseva & M. Marquis [n 307], lines 1102 et seq.

416 In *British Airways* [n 353] at para. 87 the CJEU referred to the efficiency defence as 'objective economic justification' and the notion of 'economic justification' creeped into *TeliaSonera* [n 311] at para. 76 as well.

417 E. Rousseva & M. Marquis [n 307], lines 1840 et seq.

418 Guidance Paper [n 1], paras. 31 and 28.

almost word-by-word adopts the four-pronged legal test set out therein.[419] There is one difference: while under the Guidance Paper the efficiencies must *outweigh* the negative effects on competition and consumer welfare,[420] the Court just asks for *counteracting* efficiencies, thereby setting a lower threshold than the Commission. However, this difference is unlikely to have a bearing on the outcome of cases. The analysis of effects, likely effects even more so, is not a mathematical operation. The Commission margin of discretion in complex economic appraisals will likely pre-empt the question whether the efficiencies are sufficient for the defence to be successful. Notwithstanding that, the Guidance Paper's higher threshold signals an expression of condemnation of the conduct bringing about the exclusionary effect and is indicative of concerns as to Type II errors as a result of too broad an efficiency defence.

In *Tomra*, the next case under review, the Court referred to efficiencies that have to outweigh the anti-competitive effects on consumers.[421] The efficiency defence is also another expression of the Court's new focus on consumer harm in that efficiencies must counteract negative effects on competition and consumer welfare.

5.4.3.8 Price discrimination

The CJEU held (by way of an *obiter dictum*, as secondary-line price discrimination had already been dealt with on national level):[422]

> '"[P]rice discrimination", that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.'[423]

This has been read as a limit to a purely formalistic interpretation of Article 102(c) TFEU concerning 'pure discrimination' by the dominant firm *vis-à-vis* customers with whom it does not compete, with the consequence that such price discrimination cannot be successfully invoked as a circumvention device in cases where the exclusionary effect on competitors of the discriminating conduct cannot be proved.[424] The exclusion of rivals by such discrimination (in antitrust-economics referred to as primary-line injury) comes, strictly speaking, under Article 102(b) TFEU.[425] Consequently, price

419 'Indispensable' in the Guidance Paper becomes 'necessary', see Guidance Paper [n 1], para. 30, 2nd indent.

420 Guidance Paper [n 1], para. 30, 3rd indent.

421 Case C-549/10 P *Tomra and Others v Commission ('Tomra')* [2012] nyr, para. 75.

422 *Post Danmark* [n 356], paras. 8, 14, 15.

423 *Post Danmark* [n 356], para. 30.

424 D. Geradin [n 363]; E. Rousseva & M. Marquis [n 307], lines 898 et seq.

425 R. O''Donoghue & A. J. Padilla [n 175], pp. 202-206. The conditions of which can arguably be loosened in cases of super-dominance, when eliminatory intent can be established not from price discrimination but from other

discrimination cannot be used to circumvent the requirements for a margin squeeze, due to the character of this abuse as exclusionary to the detriment of rivals on the downstream market[426] (although this is not very important as a result of the low legal standard for a showing of exclusionary effects in margin squeeze cases as shown *supra 5.3.3.4*).

However, the Court did not set out the legal standard for primary-line price discrimination. It did not prescribe an assessment of anti-competitive effects but merely found different prices 'of itself' to be insufficient. *Post Danmark* can thus be considered a step towards a test similar to the one for anti-competitive foreclosure set out in the Guidance Paper, but does not yet reveal how big that step will eventually be.

5.4.3.9 Summary

Post Danmark is without doubt a landmark case with respect to the impact of the Guidance Paper on the adjudication of the CJEU. The recognition of consumer harm as the ultimate aim of Article 102 TFEU as a whole, the requirement of likely or actual instead of potential or possible effect and the transplantation of the efficiency defence as set out in the Guidance Paper into the legal framework for exclusionary abuses (probably for Article 102 TFEU in general) bear witness to this conclusion. But convergence can also be found on less incisive legal questions. The Court also showed appreciation for cost standards based on incremental costs, brought the test for predation closer to two-pronged test suggested in the Guidance Paper and arguably opened the door for an appraisal of foreclosure effects in relation to the customers concerned by the pricing practice on the market. In addition, the Court's refusal to allow price discrimination to sidestep the legal framework for exclusionary abuses resonates the more-economics approach. Making explicit provision for firms enjoying a dominant position on account of the ownership of exclusive rights in the past reflects the approach in the Commission's Guidance, which on several occasions deviates from the general framework to allow for an analysis tailored to the different economic circumstances.

circumstances and where pricing practices were conflated into a series of other pricing/non-pricing abuses, Opinion of AG Mengozzi in *Post Danmark* [n 356], paras. 90 et seq.

426 E. Rousseva & M. Marquis [n 307], lines 908 et seq.

5.5 Tomra

5.5.1 History of the case

Tomra[427] produces automatic recovery machines for empty beverage containers (reverse vending machines ('RVM')). RVMs are machines for the collection of used beverage containers which identify the container by reference to certain parameters, such as shape and/or bar codes, and calculate the amount of the deposit to be reimbursed to the customer.

The Commission Decision from 29 March 2006[428] found infringements of Article 82 EC and Article 54 EEA Agreement by implementing an exclusionary strategy aimed at preventing new operators gaining market entry, keeping competitors small by limiting their growth possibilities and weakening and eliminating competitors by way of acquisition or other methods. That strategy was implemented through the conclusion, between 1998 and 2002, of 49 agreements between Tomra and a certain number of supermarket chains in the national RVM markets in Germany, the Netherlands, Austria, Sweden and Norway. The strategy was ultimately directed at driving them out of the market so as to create a situation of virtual monopoly.

The contested Decision condemned exclusivity clauses requiring customers to purchase all or a significant part of their requirements from a dominant supplier and in their totality were capable of having, and in fact had, a market-distorting foreclosure effect as they were applied with respect to a substantial part of demand. The same effect was attributed to discounts for individualised quantities corresponding to the entire or almost entire demand, inducing the customer to purchase all or virtually all its requirements from a dominant undertaking, and to loyalty rebates, i.e. rebates conditional on customers purchasing all or most of their requirements from a dominant supplier.

Tomra aimed, particularly, at tying in their key customers and was found to have the market knowledge to realistically estimate each customer's approximate demand, enabling it to set up individualised rebate schemes creating strong incentives, particularly when they the advantage upon passing the threshold benefitted all purchases ('retroactive scheme').

The Decision points out that it is sufficient to show that the abusive conduct tends to restrict competition, i.e. that it is capable of having that effect, but found in addition that the Tomra's practices were also likely to lead to foreclosure, since Tomra's market share remained relatively

[427] Tomra Systems ASA is the parent company of the Tomra group. The distribution subsidiaries concerned by the present case are incorporated in Germany, the Netherlands, Austria, Sweden and Norway (the applicants are composed primarily of the subsidiaries and the parent company ('Tomra')).

[428] Commission Decision C (2006) 734 final ('the contested Decision') in Case COMP/E.-1/38-113/Prokent-Tomra).

stable while those of its competitors remained rather weak and unstable. Finally, a fine of EUR 24 million was imposed.

The GC dismissed Tomra's action for annulment of the contested Decision by judgment of 9 September 2010.[429] On 18 November 2010 Tomra brought an appeal to the CJEU asking to set aside the GC's judgment. The CJEU delivered its judgment on 19 April 2012 ('*Tomra*')[430], dismissing the appeal in its entirety.

5.5.2 The CJEUs main findings

The Court recalled abuse being an objective concept, the establishment of which must be based on a consideration of all the relevant facts surrounding the conduct, which includes an inquiry into the business strategy pursued by the firm under scrutiny and the motives underlying this strategy. Accordingly, the existence of any anti-competitive intent constitutes only one of the relevant facts, without being a prerequisite for a finding of an abuse.[431]

The CJEU pointed out that the degree of market strength can be relevant in the assessment of the conduct's effects.[432] The Court accepted the GC's approval of the Commission's reasoning that, by foreclosing a significant part of the market, Tomra had restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole.[433]

Thereafter, the Court reiterated word by word the following finding of the GC:

> 'In fact [..] the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.'[434]

429 Case T-155/06 *Tomra Systems and Others v Commission* [2010] ECR II-04361.

430 Case C-549/10 P Tomra and Others v Commission ('Tomra') [2012] nyr.

431 *Tomra* [n 430], paras. 16-24. Since the contested Decision 'concentrated primarily on Tomra's anti-competitive conduct' and 'relied not exclusively' on Tomra's intention, the GC was right to conclude that the existence of an intention to compete on the merits, even if it were established, could not prove the absence of abuse. The CJEU effectively and conveniently combined this (up to this point weak) finding with a finding of inadmissablity as regards Tomra's argument the GC misinterpreted a number of items of correspondence including Tomra, *ibid*., paras. 25-26.

432 Which did not play any role in the subsequent judgment, nor was the GC's judgment based on such a finding.

433 *Tomra* [n 430], paras. 37-41.

434 *Tomra* [n 430], para. 42. The same paragraph can be found in *Tomra Systems and Others v Commission* [n 429], para. 241.

The GC was therefore correct that a considerable proportion (two fifth) of total demand was foreclosed to competition. The Commission was not required to determine a precise threshold of foreclosure beyond which the practices amounted to an abuse.[435]

The CJEU approved the GC's finding that 'it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect.'[436] Loyalty rebates, i.e. discounts conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position, amount to an abuse. Material for this finding were the strong incentives stemming from retroactive rebate schemes, individualised thresholds and the frequent use of retroactive schemes for the largest customers of Tomra.[437] Prices below costs are not a prerequisite, what matters is the 'suction effect' from the customer's point of view, i.e. the very low effective price for the last units. The GC was thus correct in ruling 'that the loyalty mechanism was inherent in the supplier's ability to drive out its competitors by means of the suction to itself of the contestable part of demand.' Such a trading instrument renders an analysis of actual effects unnecessary.[438]

As an afterthought, the CJEU added the Guidance Paper 'has no relevance to the legal assessment of a decision, such as the contested Decision, which was adopted in 2006.'[439]

5.5.3 Legal analysis

5.5.3.1 Differing legal test for rebates

In *Tomra*, the Court started by reiterating its traditional case law on rebates.[440] Accordingly, any discount scheme that tends to remove or restrict the buyers' freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition automatically creates an anticompetitive effect.[441]

As a result, quantitative rebates, i.e. those are based on genuine cost savings and efficiencies, pass scrutiny under Article 102 TFEU. In contrast, so-called loyalty rebates are condemned abusive as

435 *Tomra* [n 430], paras. 43-46.
436 *Ibid*., para. 68.
437 *Ibid*., paras. 70-75.
438 *Ibid*., paras. 75-77.
439 *Ibid*., para. 81.
440 *Ibid*., para. 68-71.
441 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission ('Michelin I')* [1983] ECR 3461, para. 14.

these rebates are granted in exchange for customer loyalty and thus tend to prevent customers from obtaining all or most of their requirements from competitors.[442]

This orthodox case law is in blunt contrast to the Guidance Paper's approach. Therein the Commission imbeds the rebate test within the general test of anti-competitive foreclosure on rebates and refines it by calculating the contestable share of a given customer's demand, i.e. the part that a customer could realistically switch to a competitor (the more the dominant firm's product qualifies as a must stock item, the smaller it is), the relevant range, i.e. what part of the contestable share can be supplied by the competitor and the effective price over the relevant range of the dominant firm's products.[443] On the basis of these three parameters, the Guidance Paper basically applies its general cost/price benchmarks for pricing practices, i.e. an effective price above LRAIC normally allows an equally efficient competitor to compete profitably notwithstanding the rebate, an effective price below AAC is as a general rule capable of foreclosing even equally efficient competitors and between these benchmarks other factors are strongly to be considered.[444] In short, the Guidance Paper's test assesses the foreclosure effects stemming from the rebate scheme taking account of the whole market. Foreclosing a single customer is insufficient if the competitor can supply other customers without suffering any disadvantages, i.e. the minimum viable scale remains available to it.

As indicated *supra 3.2.3.1*, there is reason to believe that the test laid down in the Commission's Guidance is not meant to constitute a legal test on its own.

5.5.3.2 EEC-test and cost-price benchmarks

One consequence of relying on the orthodox case law in assessing the legality of Tomra's rebate schemes is that it does not necessitate a price/cost-test like the EEC-test. Hence, the CJEU struck down Tomra's plea that the GC had erred in law by not applying the EEC-test. The Court in no uncertain terms ruled that 'it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect'[445] and that 'the invoicing of "negative prices", in other words prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebates scheme [..] is abusive.'[446] It follows from the Commission Decision and the GC's judgment,[447] the reasoning of which the CJEU's findings are in

442 *Michelin I* [n 441], para. 72; *Tomra* [n 430], para. 70.
443 Guidance Paper [n 1], paras. 39-42.
444 Guidance Paper [n 1], paras. 43-44.
445 Which is a circular reasoning, as it presupposes what is the subject of the question, i.e. whether or not the conduct is abusive.
446 *Tomra* [n 430], paras. 68, 73.
447 *Tomra Systems and Others v Commission* [n 429], para. 267.

close alignment with,[448] that the negative prices referred to concern the last units before the rebate threshold, and not the average prices charged by Tomra. The application of the EEC-test is thus only in dispute for what is denoted as the relevant range in the Guidance Paper. The GC, upheld by the CJEU, conducted an analysis of the retroactive rebate scheme employed by Tomra, taking account of the particularly strong incentive to obtain supplies (almost) exclusively from Tomra due to the retroactive effect, the setting of individualised thresholds corresponding to the total requirements of each customer or close to this on the basis of the customer's estimated requirements and the fact that the retroactive rebates often applied to some of the largest customers of the Tomra group.[449] Additionally, the CJEU backed up the GC's reliance on the 'suction effect', i.e. the very low effective price for the last units which enabled Tomra 'to drive out its competitors by means of the suction to itself of the contestable part of demand.'[450]

Thus, the CJEU, albeit not applying the Guidance Paper's test, is wary of the same problem. Its not applying the EEC-test with respect to the relevant range is not tantamount to a step backwards from the EEC-test in general. More likely, it is the corollary of not adopting the test for retroactive rebates stipulated in the Guidance Paper, possibly on account of the objections raised *supra* 3.2.3.1, i.e. that dominant firms might not possess the data necessary to conduct the test. The CJEU instead applied a test based on the scheme's tendency to have an exclusionary effect by raising switching barriers, targeting customers' entire demands and aiming at locking in the largest customers in order to measure the suction effect caused on the dominant firm's uncontestable demand.[451] Evidently, the test put forward in the Guidance Paper is more suited to assess the accurate effects. Where firms lack the data to self-assess their behaviour, this test is at odds with the fundamental aim of legal certainty.

5.5.3.3 What effects are relevant?

As discussed *supra 5.5.3.1*, exclusionary effects do not play a role in the case law on rebates prior to *Tomra*.

Arguably though, the CJEU in *Tomra* departs from its old case law. However, first it affirmed the GC's legal standard for a finding of exclusionary effects, which is capability. This clashes with *Post Danmark*, in which likely or actual effects were required for an abuse. Next, the Court indicated that the foreclosure of any customer suffices by stating that competitors should be able to compete on the

448 *Tomra* [n 430], paras. 77-78.

449 *Tomra* [n 430], paras. 75; *Tomra Systems and Others v Commission* [n 429], paras. 260-266.

450 *Tomra* [n 430], paras. 78-79.

451 G. Bushell, 'Confusion remains: CJEU in Tomra repeats conflicting dicta on de minimis' (2012) Kluwer Competition Law Blog (http://kluwercompetitionlawblog.com/2012/04/20/confusion-remains-CJEU-in-tomra-repeats-conflicting-dicta-on-de-minimis/, accessed 7/11/13).

merits for the entire market and not just for a part of it, no matter if competitors can divert to supplying other customers. The traditional loyalty-test, as set out by the CJEU in *Tomra* requires merely the foreclosure of a customer. This boils down to the crucial legal question whether customer or market foreclosure is the requisite legal standard for exclusionary effects.[452] If the foregoing were taken literally, it would be immaterial whether or not the market is foreclosed. But this is difficult to reconcile with the CJEU's findings. Why would it be relevant whether the GC was obligated to determine a precise threshold of foreclosure of the market? Why would it matter that Tomra foreclosed a significant part (two fifths) of the market through its rebate schemes? Why would it be material that a prior analysis is necessary to establish the portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors?[453] And, most importantly, why would the CJEU state 'it was, in any event, in the present case proved to the requisite legal standard that the market had been closed to competition by the practices at issue'[454] (referring to the GC's finding that two fifth of the market were foreclosed) if there was no legal standard concerning foreclosure of the market as a whole?

Furthermore, in order to make sense of the CJEU's finding one has to take account of the judgment under appeal as the CJEU aligned its findings closely to those of the GC. The GC held that

> '.. it may be concluded from that line of cases, as the applicants indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article 82 EC, it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so.'[455]

Only with regard to Tomra's plea the Commission should have calculated the minimum viable scale in order to assess whether the non-contestable portion of the market (the tied in part) was sufficiently large to be capable of having an exclusionary effect *vis-à-vis* competitors did the GC hold that competitors should be able to compete on the merits for the entire market and not just for a part of it (the CJEU reiterated the paragraph word by word). Most likely, the GC tried, in an unfortunate manner, to reinforce its finding that foreclosure of a significant part of the market suffices, in view of the fact that, in principle, competition should not be confined to some contestable share. Hence, the GC did not mean to contradict its previous finding as to the relevance of an exclusionary effect on the market as a whole. This is supported by the subsequent statements, which only make sense

452 G. Bushell [451]; M. Mandorff & J. Sahl [n 276], 16-17.
453 *Tomra* [n 430], paras. 41, 43-45.
454 *Tomra* [n 430], para. 46.
455 *Tomra Systems and Others v Commission* [n 429], para. 215.

assuming exclusionary effects on the market play a role (the same applies to respective statement in *Tomra*). In addition, the GC held only an analysis of the circumstances of the case, such as the analysis carried out by the Commission in the contested Decision, may make it possible to establish whether the practices of an undertaking in a dominant position are capable of excluding competition (and so reiterated by the CJEU with the same implications). This indicates a limited standard of judicial review, presumably based on the doctrine of restricted judicial scrutiny in cases of complex economic appraisals undertaken by the Commission.

It is submitted that the foregoing is most prudently read as the CJEU's adoption of the GC's legal test for exclusionary effects.[456] The Court's close reliance on structure and wording of the GC's judgment counsels for this interpretation. Had the CJEU intended to reject a market effects test it would likely have done exactly that, with the side effect of a truncated legal analysis. Absent such an explicit rejection the CJEU's statements concerning the correctness of the GC's analysis of the exclusionary effects on the market can only with considerable difficulty be construed as *obiter dicta* supplementing an implicit rejection of any relevance of effects on the market inferred from a unfortunately drafted paragraph taken word-by-word from the GC's judgment.[457]

Such a reading has the following implications. First, the CJEU and GC adopted some half-baked middle course between fully taking account of effects on the market and disregarding them altogether. The exact spot of the test on this spectrum between these two extremes will be determined by the scrutiny as regards the effects analysis in subsequent case law. The GC explicitly noted the extent to which the Commission examined the effects[458] and pointed out why other factors advanced by the applicant were immaterial.[459] As shown *supra 5.4.3.4*, the CJEU already signalled the relevance of the degree of foreclosure of the market in *Post Danmark*. This bolsters the interpretation put forward here. Second, it is not quite clear what constitutes a significant part of the market.

456 For a different view on the basis of the here rejected interpretation of *Tomra* that attributes no relevance to effects on the market as a whole: N. Petit, 'The Future of the Court of Justice in EU Competition Law – New Role and Responsibilities' (2012) SSRN Working Paper (http://ssrn.com/abstract=2060831, accessed 8/11/13), 11; B. Lundqvist [n 376], 489; L. L. Gormsen [284], 243, 238; E. Rousseva & M. Marquis [n 307], lines 1570 et seq.

457 Along the same lines: M. Mandorff & J. Sahl [n 276], 17; G. Bushell [452] and the lone commentator on that blog entry.

458 *Tomra Systems and Others v Commission* [n 429], paras. 217-218: The Commission examined the structure of the relevant markets and the positions held by the applicants and their competitors on that market, concluded that the applicants had a very strong dominant position, examined each of the applicants' practices individually devoted long passages to the examination of the ability of those practices to distort competition in the circumstances of the case, looked at the applicants' practices in each relevant national market in conjunction with the size of the customers, the term of the agreements, the development of demand on the relevant market and the percentage of the tied part of demand, established that those practices were capable of impairing the emergence or growth of competition and concluded that there was an abuse where those practices tended to foreclose a significant part of demand.

459 *Ibid.*, paras. 220-224.

Foreclosing two fifth of the market was deemed sufficient.[460] A test predicated on foreclosure of a significant part of the market might strike a balance between settling for a finding of potential effects on the market and a full-scale economic analysis of the degree of foreclosure and the minimum viable scale of competitors. It allows the judiciary to stay on top of the legal evaluation by not (irretrievably) conceding too much ground to economics. Needless to say, a decrease in legal certainty is the corollary. Third, taking account of exclusionary effects on the market as a whole is a big step towards the test set out in the Guidance Paper. While it does not go as far as embracing the complex market share effect test proposed in the Guidance Paper, it certainly is leaping away from the traditional rebates test that leaves market effects wholly aside. In its general part on the assessment of foreclosure, the Guidance Paper holds that foreclosing a significant part of the relevant market is a factor generally relevant for the assessment.[461] Thus, both the GC and CJEU, although not embracing the special approach for conditional rebates, affirmed the general proposal offered in the Guidance Paper. Moreover, it brings the case law on rebates broadly in line with the assessment of vertical restraints, particularly exclusive dealing, following the case *Delimitis*.[462]

Ultimately, it is for future case law to prove the above reading correct or wrong.

5.5.3.4 The relationship between likely and actual effects

Having subjected the retroactive rebate scheme implemented by Tomra to an analysis whether it is capable of having an effect on competition, the Court ruled:

> 'When such a trading instrument exists, it is therefore unnecessary to undertake an analyse [sic] of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition [..].'[463]

The first part of this statement appears to refer to the specific scheme operated by Tomra, the second part refers to the legal framework of Article 102 TFEU as it applies to every case. However, this reading is contradictory, for if it is in general sufficient to demonstrate potential effects, why would the specific design of Tomra's scheme play a role? Thus, for the statement to make sense, the first part has to refer to retroactive rebate schemes in general, implying that there are other schemes or,

[460] A more in-depth analysis of this question is outside the scope of this thesis. However, the GC offered some indications. It approved the Commission's finding that Tomra 'restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole' and that foreclosure of a small part of the market might not suffice, see *Tomra Systems and Others v Commission* [n 429], paras. 240, 243.

[461] Guidance Paper [n 1], para. 20.

[462] Case C-234/89 *Stergious Delimitis v Henninger Bräu AG* [1991] ECR I-935; N. Petit [n 456], 11 (*arg. e contrario*); B. Lundqvist [n 376], 489.

[463] *Tomra* [n 430], para. 79.

more general, forms of conduct, which necessitate a finding of actual effects. This, however, conflicts with the principle that for a finding of violation of EU competition law harm does not need to have already occurred.[464] In consideration of this orthodoxy, it is difficult to grasp the meaning of the quoted paragraph. Arguably, the CJEU had cases in mind that are subject to antitrust scrutiny at a time where the anti-competitive effects on the markets are expected to have already materialised. This relates to the relevant time of assessment, which is the moment of the infringement decision by the Commission. If at that point in time likely effects can be established, the subsequent lack of actual effects do not have a bearing on the decision. In light of this, it is difficult to understand the CJEU's finding, as it indicates that there may be other forms of conduct for the assessment of which the absence of later effects play a role.

The relationship between likely and actual effects throws up another question, which is becoming more virulent now that the CJEU successively takes more notice of the conduct's real effects. In assessing this relationship the firm's right of equal treatment comes to the fore. On what grounds should subsequent actual effects have a bearing in one case but not in another? In the same vein, take the example of a firm being fined for operating a rebate scheme held to likely foreclose the market in an anti-competitive manner at a given point in time. However, two years later it is clear that the likely foreclosure effect has not materialised and would not in the time to come. With respect to another firm's conduct having likely effects, the Commission intended to take a more cautious approach. Two years later it is clear no actual effects have resulted from the conduct and the Commission abstains from any infringement decision. Save for the reason that the second case was not caught by a legitimate priority criterion, the fined firm's right to equal treatment is violated.

5.5.3.5 The relevance of the degree of market power

In *Tomra*, the CJEU mentioned the relevance of the degree of market power held by the dominant firm in the legal assessment. The significance thereof was acknowledged in *TeliaSonera* in reply to a question to this effect by the Danish court.[465] In *Tomra*, the CJEU brought this finding to more prominence by reiterating it in the context of the question what degree of market foreclosure is necessary for a finding of anti-competitive effects:

> '[..] Article 102 TFEU does not envisage any variation in form or degree in the concept of a dominant position. [..] None the less, the degree of market strength is, as a general rule, significant in relation to

[464] Joined cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 00223, para. 25; see also *Tomra Systems and Others v Commission* [n 429], paras. 289 and further references therein; J. Faull & A. Nikpay, *The EC Law of Competition* (Oxford 2007), 351.

[465] *TeliaSonera* [n 311], para. 81.

> the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.'[466]

Thereafter, the Court did not refer to the degree of market strength in its effects analysis. Despite this, it cannot be excluded that the degree of market power had a bearing on the finding that the GC had proved to the requisite legal standard that the market had been closed to competition by the practices at issue. Therefore, foreclosure of two fifths of the market might have been sufficient only in conjunction with the very high market shares held by Tomra, which has been labelled as super-dominance[467] (continuously exceeding 95 % on most markets). However, below the threshold of super-dominance, the role of the degree of market dominance was less clear. The departing point has been that competition is already weakened precisely as a result of the dominant firm, and that any further modification of the market structure could strengthen the market power of that firm.[468] In combination with a legal standard resting on potential effects there was hardly any need to take account of the degree of market strength.

This in recent case law progressively heralded interest in an effects-analysis deserving of its name is foreshadowed in the Commission's Guidance. It explains in its general section on how to establish anti-competitive foreclosure that the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure.[469]

5.5.3.6 Applicability of the Guidance Paper

As a response to the Tomra's invocation of the Guidance Paper to prove the need for a price-cost test the Court quickly dismissed it as having no relevance to the legal assessment of a decision which was adopted prior to its adoption. This was the stance taken by AG Mazák in his Opinion:

> 'However, that communication, issued in 2009, cannot have any bearing on the assessment of the present appeal. How the Commission intends to make adjustments to the future implementation of its competition policy in relation to Article 102 TFEU is irrelevant. Indeed, any new emphasis in the application of that provision is potentially relevant only to future decisions adopted by the Commission, but not to the legal assessment of a decision already taken in 2006.'[470]

466 *Tomra* [n 430], para. 39.

467 *TeliaSonera* [n 311], para. 81. Reference is made to the two cases illustrative of the relevance of market shares of such height: *Tetra Pak II* [n 223], para. 31 and Case C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, para. 119. Honorary mention: Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para. 186.

468 J. Faull & A. Nikpay [n 464], 351.

469 Guidance Paper [n 1], para. 20, 1st indent.

470 Opinion of AG Mazák in *Tomra* [n 430], para. 37. In support of his statement AG Mazák refers to the Opinion of AG Kokott in *Solvay v Commission* [n 126] with which he expressly concurs.

A contrario one might infer that the Guidance Paper can have a bearing on the legal assessment on decisions adopted after the issuance of the Guidance Paper. AG Kokott added in her Opinion in *Solvay v Commission* that 'even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by the Treaties as interpreted by the Court of Justice.'[471] The fact that the CJEU decided to comment on the relevance of the Commission's Guidance for the legal assessment implies that the Court does not exclude binding effects stemming therefrom. Following *Expedia* and with regard to binding force this cannot be excluded as the legality may be presumed. Furthermore, and as analysed *3.2*, legal effects (i.e. the binding effect on the Commission's exercise of its discretion) are unlikely but certainly not excluded to result from the Guidance Paper in conjunction with general principles of EU law. The exit chosen by the CJEU in *Tomra* rests on the principle of non-retroactivity and legal certainty,[472] principles applying with equal force to merely presumed legality and ensuing binding force as well as to the binding effect on the Commission's discretion (the discretion must be bound at the time of the decision).

5.5.3.7 Summary

Tomra has been subject to sharp criticism as it is considered a backslide into formalistic doctrinal thinking.[473] A careful analysis of the judgment reveals a slightly more differentiated picture.

Tomra, in contrast to *Post Danmark*, is not at all permeated by the same spirit of fundamental reform. Quite the contrary, the judgment has scrapped 'to the detriment of consumers' from the general definition of abuse[474] (see *supra 5.4.3.6*) and, at least linguistically, marks a return to the capability-standard for the effects-analysis (see *supra 5.4.3.4* and 5.5.3.3). The reader is left with the impression the Court was eager to uphold the Commission Decision as well as the GC's judgment. The whole judgment follows the line of argument employed by the GC in first instance. That is why to understand *Tomra* in its entirety it is very helpful to read it in conjunction with the GC's judgment, and, in order to fully comprehend the effects analysis, along with the Commission Decision. The capability-standard implies only limited significance of anti-competitive effects. This, however, can be misleading, where the effects in fact taken under consideration reveal a much more detailed analysis. We have alluded to this point *supra 4.1*. While a capability-standard on surface points to the sufficiency of *de-minimis* foreclosure, the reading advanced here interprets the Court's finding as requiring the foreclosure of a significant part of the market to satisfy the legal standard. While the

471 Opinion of AG Kokott in *Solvay v Commission* [n 126], para. 21.

472 E. Rousseva & M. Marquis [n 307], lines 1629 et seq.

473 N. Petit, 'Recent Article 102 TFEU Case-law' (2012) (http://chillingcompetition.com/2012/04/24/recent-article-102-tfeu-case-law/, accessed: 24/11/13).

474 *Tomra* [n 430], para. 17.

rejection of the EEC-test in assessing the retroactive rebate scheme denotes a continuation of the formalistic analysis of rebates, the assessment undertaken by the Commission, and upheld by the GC and CJEU, takes account of the transparency on the markets, allowing Tomra to set individualised thresholds approximating the customer's demands,[475] the targeting of key customers,[476] the suction effect stemming from the scheme's retroactive effect,[477] Tomra's high market share resulting in a high of uncontestable demand[478] and the overall share of market subject to foreclosure[479] to establish the loyalty-inducing effect of the schemes.

Furthermore, the Court does not appear to have turned its back on the EEC-test. It merely did not apply it in assessing the legality of a retroactive rebate scheme, more accurately in assessing the chances of Tomra's competitors to effectively compete with its prices within the relevant range. However, the effects analysis is guided by concepts inspired by economics lying at the heart of the test set out in the Guidance Paper.[480]

Another possible caveat is in order: Tomra was super-dominant or close thereto for a considerable time of the period under investigation. Considering the Court's seeming ambition to uphold the GC's judgment and assuming a concomitant hesitance to adjudicate on general questions of the law, it would not come as a surprise if this had a bearing on the case's outcome.[481] In view of all that, *Tomra* might not be such bad law after all.

475 Commission Decision *Tomra* [n 428], paras. 297-298.
476 *Ibid*., paras. 180, 240.
477 *Ibid*., paras. 321-323.
478 *Ibid*., paras. 159 et seq. See also Figure 12.
479 *Ibid*., para. 392.
480 G. Bushell [451].
481 For general remarks on a legal framework for rebates hinging on super-dominance independent of *Tomra:* J. Kallaugher [n 182], 8-9.

5.6 The development of the case law

A number of trends pervade the reviewed case law.

The legacy of the dominant position has impacted the legal analysis in *Deutsche Telekom, TeliaSonera* and *Post Danmark.*[482] In the last case, the CJEU in what can be regarded as the culmination of this development has ruled that account need generally be taken of the regulatory origin of the dominant position in establishing the special responsibility of the dominant firm. The corollary is consideration thereof across the different forms of abuse. To some extent, the CJEU in these cases was seemingly occupied with making provision for the unmerited advantages accruing to the dominant firm from its former ownership of exclusive rights. It is therefore not without difficulty to extrapolate the findings in these rulings.

Effects matter. In *Deutsche Telekom* and *TeliaSonera* the Court unequivocally held that effects must be shown where an abusive margin squeeze is alleged. *Post Danmark* and *Tomra* appear to have spurred an effects-analysis concerned no longer exclusively with the foreclosure of individual customers, but with market foreclosure, i.e. the outcome turns on whether rivals are foreclosed from the market as a whole and not from supplying an individual customer.

The EEC-test by now holds a firm place in the legal assessment of exclusionary abuses pursuant to Article 102 TFEU. It was employed in *Deutsche Telekom, TeliaSonera* and *Post Danmark*. In *Tomra,* the application of the EEC-test to the total sales made within each contractual relationship was not in dispute. The Court rejected the data-intensive legal test for retroactive rebates envisaged by the Guidance Paper and, consequently, did not apply the EEC-test to the relevant range. Hence, *Tomra* does not represent a setback of the general applicability of the EEC-test.

Post Danmark is beyond doubt a landmark case with respect to the adoption of the more-effects approach in general and the Guidance Paper's contents in particular. Being handed down by the CJEU's Grand Chamber reinforces this. It does not pose much difficulty to see *Wanadoo, Deutsche Telekom* and *TeliaSonera* as foreboding this judgment. Yet, *Tomra* is cut from a different cloth. *Supra 5.5.3.7* we have argued the judgment does not mark a backslide into formalistic legal analysis. A more fine-grained analysis revealed numerous elements reflective of the more economics approach or the Guidance Paper. Nevertheless, compared to *Post Danmark* the judgment in *Tomra* endorses these ideas to a lesser extent. This may be due to the legal subject matter or the particularities of the facts in *Tomra,* or a change of mind on the CJEU's part. In order to beware of wild speculation, the reader is kindly referred to the CJEU's future case law.

[482] *Wanadoo* is concerned with a subsidiary of France Telecom, also a former legal monopolist. However, there is no indication that this played a role in the judgment.

6 Conclusion

In keeping with this thesis' two tiered approach to assess the potential and actual impact of the Guidance Paper, the concluding remarks address each step in turn.

6.1 The Guidance Paper – A soft law instrument

The legal value of the Commission's Guidance is limited. It does not bind subjects of the law by way of legally binding force. The legal effect of binding the Commission's discretion and subsequently the EU judiciary is unlikely to arise from the Guidance Paper. On account of its likely significance for the Commission's decision making practise subjects of the law should view it as a useful point of reference, as suggested by AG Mazák in his Opinion in *TeliaSonera*.[483] The Guidance Paper can be expected to contribute to a transparent, foreseeable and consistent approach to the enforcement of Article 102 TFEU. In view of this key role of the Guidance Paper, the EU judiciary takes notice of it, reflects on its contents and may find inspiration in propositions therein in deciding future cases. This factual capability of the Commission's Guidance is borne out by our finding that the Commission was legally entitled to adopt the Guidance Paper. Put differently, the Guidance Paper's relevance as a point of reference for subjects of the law as well as the EU judiciary is not tainted by illegality.

It can be argued that this is exactly the scenario the Commission had in mind when issuing the Guidance Paper. It is designed as an instrument intended to organise its internal affairs (prioritising cases), while at the same time containing powerful propositions in form of enforcement priorities which are to a large extent easily convertible into legal rules, whose adoption was preceded by a broad public discussion on how Article 102 TFEU should be interpreted (as opposed to enforced). Through this, the Guidance Paper is well-positioned to be regarded as the authority on the interpretation of Article 102 TFEU. The Commission's role as the pivotal and single authority in EU competition policy and enforcement contributes to the Guidance Paper's significance, which goes far beyond that of simple priorities. The claim that the Commission issued the Guidance Paper as enforcement priorities in an attempt to drive its pro-effects agenda because the prevailing EU case law prevented the Commission from lawfully adopting interpretative guidelines cannot be refuted out of hand. It would thus be naïve to think, as G. Monti pointed out, the Commission did not publish the Guidance Paper in an attempt to at least also change the law.[484]

[483] Opinion of AG Mazák in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB ('TeliaSonera')* [2011] ECR I-00527, in fn. 21.

[484] G. Monti, 'Article 82 EC : what future for the effects-based approach?' (2010) Journal of European Competition Law & Practice, 5.

In our submission, a considerable share of the criticism directed at the Commission's Guidance relates, at times more implicitly than explicitly, to the rather covert and circumventive manner enforcement priorities are deployed to further the Commission's ambitions to change the case law. Yet, as we have tried to show, in so doing the Commission respected the law. Ultimately, the critique boils down to condemning the way the Commission attempts to influence the inter-institutional relationship between itself and the EU judiciary to its benefit. Such struggles for power between institutions are inherent to any multi-institutional organisation and, in the EU context, need not be addressed lest they create severe adverse repercussions to the institutional balance of powers between the actors concerned.[485] This is not the case. The stewardship bestowed upon the EU judiciary by Article 19(1) TEU concerning the observance of the law in the interpretation and application of the Treaties is not threatened by the Commission's endeavours to shift the institutional equilibrium in its favour. The Guidance Paper does not encroach upon the judicial prerogative to interpret the law autonomously and check the Commission's exercise of its competences for compliance with the law. It is fully upon the EU courts whether they validate the Guidance Paper's propositions by adopting them.

Therefore, not only was the issuance of the Guidance Paper within the Commission's remit but the (implicit) critique as to the Commissions recourse to enforcement priorities is beyond reproach as concerns the protection of the institutional balance of power.

6.2 The Guidance Paper in the CJEUs case law

Rating the degree of adoption of the Guidance Paper's contents is an inherently inaccurate and speculative exercise. In our submission, the analysis of the case law conducted *supra 5* attest to a significant degree of adoption. Hence, the Commission's Guidance adjudicative impact has been significant. To avoid rehearsing and diluting the findings of the case analyses and the trends in the case law described *supra 5.6*, this part of the conclusion takes a look at explanations for the degree of adoption other than those credited on the quality of Guidance Paper's propositions.

One issue that comes to mind is the principle of non-retroactivity. Legally speaking, this matter can be set aside in one sweep on account of the nature of the Guidance Paper. Retroactivity, whatever its exact legal prerequisites and consequences, is a concept applying to law. It does, however, not apply to a change in the interpretation of law which has not been subject to change.

[485] On institutional balance in the EU: P. Craig, 'Institutions, Power, and Institutional Balance', in P. Craig & G. D. Burca (eds), *The Evolution of EU Law* (2nd ed, Oxford 2011), 41 et seq.

Most importantly, it does not apply to the Commission's Guidance, for it does not constitute law.[486] Notwithstanding that, the CJEU has demonstrated in *Tomra* its wariness of the implications resulting from a drastic change in case law due to adopting the Guidance Paper's contents.[487] Aside from the hardships on subjects of the law, decisions adopted by the Commission lawfully taken under the old case law might be rendered unlawful owing to the application of the Guidance Paper. The latter effect arguably does not fall within the ambit of the principle of non-retroactivity, which is aimed at protecting subjects of the law and not the authority. Nevertheless, faced with that situation, the CJEU might not be inclined to quash a Commission Decision which, at the time of its adoption, complied with the case law. Where the CJEU is called upon by means of a preliminary reference pursuant to Article 267 TFEU, the outcome might be different. In that setting, the CJEU it not compelled to squash a Commission decision and as regards the decision of an NCA the abstract nature of this procedure usually leaves leeway to the national courts. Concurrently, the abstract nature is particularly apt for grand-scale upheavals of traditional strands of the case law. These aspects might explain some of the differences in the degree of adoption between *Post Danmark*, a preliminary reference, and *Tomra*, an action for annulment.

Another point relates to the institutional relationship between the Commission and the judiciary. *Supra 6.1* we have already indicated that the Guidance Paper can be regarded as a sly attempt by the Commission to incite a change in the case law. Being aware of the Guidance Paper's non-legal nature and the Commission's agenda, it would not be astonishing if the CJEU consciously tried to delay adoption. Even when the Commission publishes ideas for a reform of the case law in a transparent fashion, may it be tenable for the judiciary to delay adoption in order to demonstrate its autonomy and the non-binding nature of the Commission's suggestions. In view of the arguably circumventive manner with respect to the Guidance Paper the motivation to disperse any indication of undue deference might be even stronger. Conversely, if the CJEU considers the ideas set out in the Commission's Guidance to be 'good law', the degree of adoption might increase with the passage of time.

In three of the cases under review the CJEU was eager to pay credit to the former possession of exclusive rights of the firm under scrutiny. As we have alluded to *supra 5.6*, this circumstance makes it difficult to extrapolate the legal findings in these cases. The Guidance Paper's main concern is not with cases including former legal monopolists, although it does make provision for such cases, nor is

[486] This is correct notwithstanding *Dansk Rørindustri* [n 21], wherein the CJEU subjected the Guidelines on the method of setting fines to a test for violation of the principle of non-retroactivity. Compare with fn. 39 for details. The two soft law instruments can be distinguished on the grounds that the Guidelines on the method of setting fines give rise to legal effects, whereas the Guidance Paper is unlikely to do so.

[487] See *supra 5.5.3.6.*

it with cases focusing on utilities (including telecommunications). Considering that Wanadoo was a subsidiary of France Télécom SA, a former state monopolist, relyubg on utility infrastructure to provide its services and that the market in question was still highly concentrated, this only leaves *Tomra* as the 'standard' Article 102 TFEU case.[488] By implication, there remains genuine uncertainty as to the degree of adoption of the Commission's Guidance with respect to standard cases.

Finally, the tension between an effects-based approach and the principle of legal certainty has found resonance in the case law (see *supra 4.1* for general remarks). In *Wanadoo*, the CJEU rejected claims for a requirement of possible recoupment, presumably because such a condition would hamper legal certainty (see *supra 5.1.3.2*). In *Tomra*, foreclosure of a significant part of the market has been established as the benchmark for the effects-analysis (see *supra 5.5.3.3*). The Court did not follow through to a full effects analysis, i.e. does the foreclosure actually make market entry more difficult for the competitor. Foreclosing two fifths of the market was held to be sufficient. Installing a certain fixed threshold would contribute to legal certainty, on the expense of a proper economic analysis. Likewise, the rejection of the test for retroactive rebates in *Tomra* can be interpreted as a reinforcement of the principle of legal certainty (*supra 5.5.3.2* and *3.2.3.1*). From a slightly different angle, the principle of legal certainty can be linked to the degree of adoption of the Guidance Paper's contents in more general terms. Enforcement priorities are to be applied *ex post* by the competent authority, whilst legal rules must be operable from an *ex ante* perspective to conform to the principle of legal certainty. This hampers the degree of adoption where the *ex post*-test requires information unavailable *ex ante* and needs to be taken into account when evaluating the impact of the Guidance Paper.

In a way, and too beautifully so to let it slip as a concluding sentence, this example paradigmatically attests to how, in resolving the legal questions revolving around the Guidance Paper, as well as in assessing its impact, an analysis is in dire need of tracing the implications engendered by its nature as enforcement priorities and the tensions between the effects-based approach and the principle of legal certainty reverberating in EU competition law at large.

[488] Mind that Tomra was super-dominant, *supra 5.5.3.7.*

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