



Post Danmark II, or the Quest for
Administrability and Coherence in Article 102
TFEU

Pablo Ibáñez Colomo

LSE Law, Society and Economy Working Papers 15/2015
London School of Economics and Political Science
Law Department

This paper can be downloaded without charge from LSE Law, Society and Economy Working Papers at: www.lse.ac.uk/collections/law/wps/wps.htm and the Social Sciences Research Network electronic library at: <http://ssrn.com/abstract=2636407>

© Pablo Ibáñez Colomo. Users may download and/or print one copy to facilitate their private study or for non-commercial research. Users may not engage in further distribution of this material or use it for any profit-making activities or any other form of commercial gain.

Post Danmark II, or the Quest for Administrability and coherence in Article 102 TFEU

Pablo Ibáñez Colomo^{*}

Abstract: The legal status of quantity rebates under Article 102 TFEU is unclear. In *Post Danmark II*, the ECJ has been asked to provide a substantive test to establish whether this practice amounts to an abuse of a dominant position. As the case law stands, two possible approaches can be followed. Quantity rebates can be assessed in accordance with the framework sketched by the Court in *Michelin I*, or they can be subject to the principles applying to other price-based strategies such as ‘margin squeeze’ abuses and selective price cuts. There are compelling reasons to follow the latter approach. The criteria set out in *Michelin I* were conceived for target rebates, which – unlike quantity-based schemes – are not presumptively compatible with Article 102 TFEU. In addition, the said criteria are not administrable, in the sense that they do not make it possible to define in advance whether a given rebate scheme is lawful or unlawful. In practice, and in contradiction with the logic underlying *Michelin I*, it is sufficient for a competition authority or a claimant to identify some ‘loyalty-inducing’ features to establish an abuse. As such, they are not suitable for their application in disputes before national courts, or by national competition authorities.

^{*} Department of Law, London School of Economics and Political Science. E-mail: P.Ibanez-Colomo@lse.ac.uk. I am grateful to Andriani Kalintiri, John Temple Lang and Denis Waelbroeck for their comments on a previous version of this article.

1. INTRODUCTION

Fleshing out Article 102 TFEU is a challenging task. The broad and vague notions on which it is based only become meaningful when applied to concrete factual scenarios. As a consequence, the boundaries between abusive and lawful conduct can only be expected to be defined (and refined) by means of incremental decision-making. It is not always easy to infer clear principles from the case law of the Court of Justice (hereinafter, the ‘ECJ’ or the ‘Court’) and the administrative practice of the European Commission (hereinafter, the ‘Commission’). To begin with, precedents are not always – or not necessarily – reliable indicators of the likely outcome of subsequent cases. As the *Microsoft* case shows, the boundaries defined in a particular ruling do not necessarily exhaust the instances in which a given line of conduct may be found to be abusive.¹ Secondly, the case law and administrative practice do not always provide (whether implicitly or explicitly) an administrable legal test that can be readily applied to similar scenarios. Indeed, the principles set in the case law are sometimes so broad, and the outcome of individual precedents so fact-specific, that they cannot be easily relied upon to establish whether a given practice amounts to a violation of Article 102 TFEU. This is true, for instance, of the so-called ‘loyalty-inducing’ rebates, on which this piece focuses.

In January 2014, the Sø- og Handelsret (a specialised Danish court) submitted a preliminary reference before the ECJ. The case (hereinafter, ‘*Post Danmark II*’²), still pending at the time of the completion of this piece, concerns the status under Article 102 TFEU of a system of quantity rebates implemented by the incumbent postal operator in the Scandinavian country. As the opinion delivered in May 2015 by Advocate General Kokott³ shows, the ECJ is confronted with two lines of case law that are not immediately obvious to reconcile with one another. In *Hoffmann-La Roche*, the Court laid down a principle whereby quantity rebates are presumptively legal under Article 102 TFEU, and this insofar as they are only conditional on the volume supplied by the dominant firm.⁴ In *Michelin II*, the General Court (hereinafter, the ‘GC’) held that such schemes may violate Article 102 TFEU where they are ‘loyalty-inducing’.⁵ In other words, it concluded that they can be abusive when they have effects that are deemed equivalent to a

¹ Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, in particular para 647, where the GC explains that the so-called ‘new product’ condition ‘cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article [102(b) TFEU]. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development’.

² Case C-23/14, *Post Danmark A/S v Konkurrencerådet* (‘*Post Danmark II*’), pending.

³ *Post Danmark II* (n 2), Opinion of AG Kokott.

⁴ Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para 90.

⁵ Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission* (‘*Michelin II*’) [2003] ECR II-407, paras 58-60.

rebate scheme that is formally conditional upon exclusivity (or to an outright exclusivity obligation).⁶ Because Michelin chose not to appeal the GC ruling, the Court has never clarified whether this is the appropriate analytical framework to evaluate the compatibility of quantity rebates with Article 102 TFEU.

In *Post Danmark II* the ECJ faces an additional, arguably more important, challenge. Irrespective of the position it takes in relation to the abovementioned question, the Court was asked to lay down a legal test that would make it possible to establish whether the behaviour amounts to an abuse of a dominant position. In this regard, it becomes quickly apparent that the case law on rebate schemes does not provide a complete set of administrable guidelines that can be readily applied in disputes at the national level. The principles underlying the relevant rulings are indeed genuinely difficult to translate into an operational legal test. It is true that, in accordance with *Hoffmann-La Roche*, exclusive dealing and loyalty rebates are subject to a prima facie prohibition. This rule – leaving aside the question of whether it is appropriate⁷ – has at least the virtue of being easy to administer.⁸ On the other hand, *Hoffmann-La Roche* did not clarify whether, and in what circumstances, quantity rebates may be contrary to Article 102 TFEU. The same can be said of the principle pursuant to which ‘loyalty-inducing’ rebates are prohibited as abusive. The latter line of case law emerged in a very peculiar factual scenario from which it is virtually impossible to infer a practicable rule or standard capable of being administered across the board. In *Michelin I*,⁹ to which the origins of this case law can be traced, the Court identified several factors – including the length of the reference period, the features of the scheme and the uncertainty to which it gave rise – leading to the conclusion that the scheme at stake in that dispute was ‘loyalty-inducing’. In subsequent cases,¹⁰ EU courts never identified any proxies allowing stakeholders to define in advance the instances in which rebates that are not formally conditional upon exclusivity are likely to be found to have equivalent effects.

Post Danmark II provides a unique opportunity to clarify these two key questions. It is also valuable in that it reveals much about the current state of

⁶ Ibid, para 60, where the Court explained that ‘[i]n determining whether a quantity rebate system is abusive, it will therefore be necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's 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’.

⁷ It has been explained elsewhere why it is not appropriate to prohibit exclusive dealing absent an objective justification. See Pablo Ibáñez Colomo, ‘Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy’ Law Society and Economy Working Paper Series WPS 29-2014 December 2014.

⁸ See in this sense *Hoffmann-La Roche* (n 4), para 90, where the Court lays down an unconditional prohibition for this practices.

⁹ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* (*Michelin I*) [1983] ECR 3461.

¹⁰ See in particular *Michelin II* (n 5) as well as Case C-95/04 P, *British Airways plc v Commission* [2007] ECR I-2331 and Case T-219/99, *British Airways plc v Commission* [2003] ECR 5917.

Article 102 TFEU case law and the peculiar way in which it has evolved. The procedural background against which the notion of abuse has been interpreted explains why the legal status of quantity rebates remains unclear and why no operational legal test can be inferred from the relevant rulings. Rebate cases have reached EU courts in the context of annulment actions brought against decisions adopted by the Commission. As a result, the absence of administrable guidelines to assess the practice – or the need for them – has never been a particularly pressing issue, as it would have been had private disputes dominated over the public enforcement of Article 102 TFEU. For the same reason, individual cases have been examined in relative isolation from one another. It would seem that, in the context of annulment proceedings, the emphasis tends to be placed more in the scrutiny of the analysis carried out by the Commission and less in the definition a set of clear criteria against which the lawfulness of similar practices can be assessed in subsequent cases.

This paper makes two main claims. First, it explains why a legal test for quantity rebates needs to be crafted in a manner that is consistent with the presumption of legality laid down in *Hoffmann-La Roche*. Extending the case law applying to ‘loyalty-inducing’ rebates to such volume-based schemes – which is what the GC did in *Michelin II* – is difficult to reconcile with this presumption and ignores the very specific context in which *Michelin I* was decided. Secondly, this piece shows that any legal test fleshing out the principle set out in *Hoffmann-La Roche* should be consistent with the logic underlying cases addressing similar practices. It is submitted, in particular, that a legal test should be crafted in a way that is compatible with the ruling in *Post Danmark I*, where the Court examined the status of selective price cuts under Article 102 TFEU.

2. POST DANMARK II BETWEEN TWO LINES OF CASE LAW

Two different lines of case law are potentially relevant in *Post Danmark II*. Quantity rebates can be seen as hybrid practices in the sense that they share features both with price-based conduct (such as predatory pricing and ‘margin squeeze’ abuses) and with practices like exclusive dealing. Like the former, they can have exclusionary effects if rivals are unable to match the prices charged by the dominant supplier. Like the latter, they typically arise in contexts where access to outlets is a concern. The case law has evolved in very different directions for each of these two broad categories of practices. It seems clear from the most recent case law that price-based conduct is only abusive if it is shown to have (or to be likely to have) the effect of foreclosing equally efficient rivals. Exclusive dealing (the same is true of measures having an equivalent effect) is prohibited by its very nature, and thus without it being necessary to carry out an analysis of its impact on the ability and incentive of rivals to compete. In *Michelin II*, the GC took the view

that quantity rebates are comparable in their nature and potential effects to exclusive dealing, as did AG Kokott in her opinion in *Post Danmark II*. At the time of writing, however, the issue has not yet been addressed by the Court. The two potential approaches, and their underlying logic, are examined in turn in the remainder of this section.

2.1. POST DANMARK II AND THE DIFFERENT CATEGORIES OF REBATES

Over the years, EU courts have identified different categories of rebate schemes. These were neatly presented by the GC in *Intel*.¹¹ This judgment identified, first, quantity rebates, which concern those ‘linked solely to the volume of purchases made from an undertaking occupying a dominant position’.¹² As mentioned in the introduction, these rebate schemes are in principle compatible with Article 102 TFEU.¹³ Secondly, the GC referred to the so-called ‘fidelity rebates’ (or ‘loyalty rebates’),¹⁴ which is a category that encompasses those schemes ‘conditional on the customer’s obtaining all or most of its requirements from the undertaking in a dominant position’.¹⁵ Unless the dominant firm is in a position to put forward an objective justification, these rebates are prohibited as abusive irrespective of their actual or likely effects.¹⁶

Finally, the GC defined a residual category for those rebate schemes that are neither formally conditional upon exclusivity nor solely based on volume.¹⁷ This category comprises, in particular, the so-called target rebates, that is, those conditional upon the distributor meeting an individualised sales objective. EU courts examined systems of that nature in cases like *Michelin I*¹⁸ and *British Airways*.¹⁹ The question of whether target rebate schemes are abusive depends, at least in theory, on an analysis of ‘all the circumstances’, and in particular ‘the criteria and rules governing the grant of the rebate’.²⁰ The factors that EU courts

¹¹ Case T-286/09, *Intel Corp v European Commission* [2014] (GC, 12 June 2014).

¹² *Ibid*, para 75.

¹³ See in this sense *Hoffmann-La Roche* (n 4), para 90, and *Michelin II* (n 5), para 58, where the GC explains that ‘[q]uantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC [...]. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff [...]. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position’.

¹⁴ The two expressions have been used interchangeably in the case law. While *Hoffmann-La Roche* referred to ‘fidelity rebates’, *Michelin II* referred to (for instance, in para 56 of the ruling), to ‘loyalty rebates’. The latter will be used hereinafter.

¹⁵ *Intel* (n 11), para 76.

¹⁶ *Ibid*, paras 84-94. See also Case C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] EU:C:2012:221.

¹⁷ *Intel* (n 11), para 78.

¹⁸ *Michelin I* (n 9), para 72.

¹⁹ Case T-219/99, *British Airways* (n 10), paras 270-300.

²⁰ See in particular *Michelin I* (n 9), para 73.

have deemed relevant in this regard include (i) the reference period that is considered for the award of the rebate and (ii) whether it is granted over the whole of the units purchased from the supplier (a retroactive rebate) or over the units that exceed the threshold (an incremental rebate). The uncertainty generated by the rebate (that is, the inability of customers to tell in advance its exact amount) is, it would seem, another key factor.²¹ It is clear from the case law that retroactive rebates are more likely to be found abusive than incremental ones, and this insofar as they have a relatively greater impact on customers' incentives to buy from the dominant supplier.²² The same can be said of schemes granted over a 'relatively long reference period'.²³

The rebate scheme at stake in *Post Danmark II* falls under the first category identified by the GC in *Intel*. The same conditions, which were made publicly available, applied to all customers.²⁴ A 6% rebate was granted for orders exceeding 30,000 letters over a period of one year. There were eight additional steps in the scheme, with a maximum rebate of 16% for orders exceeding 2,000,000 letters per year.²⁵ The Danish court pointed out that, in addition to the rebates being granted over a one-year period, they were retroactive. As such, they were not fundamentally different from one of the schemes examined by the GC in *Michelin II*.²⁶ In that case, the GC reviewed a decision in which the Commission found, inter alia, that the quantity rebates applied by the tyre manufacturer were abusive and this insofar as they were (i) unfair; (ii) loyalty-inducing and had (iii) a market-partitioning effect.²⁷

2.2. QUANTITY REBATES AS 'LOYALTY-INDUCING' SCHEMES

According to the position taken by the GC in *Michelin II*, the lawfulness of quantity rebates is to be established in light of the principles set out in *Michelin I* for the assessment of target-based schemes. In her opinion in *Post Danmark II*, AG Kokott expressed a similar view. From her perspective, formal categories are

²¹ Ibid, para 83. For an in-depth analysis, see Luc Gyselen, 'Rebates – Competition on the Merits or Exclusionary Practice?' in Claus-Dieter Ehlermann, Isabela Atanasiu (eds), *European Competition Law Annual 2003 What is an Abuse of a Dominant Position?* (Hart 2006).

²² See in this sense *Michelin II* (n 5), para 85: 'If a discount is granted for purchases made during a reference period, the loyalty-inducing effect is less significant where the additional discount applies only to the quantities exceeding a certain threshold than where the discount applies to total turnover achieved during the reference period. In the latter case, the saving which may be made by reaching a higher scale applies to total turnover achieved whereas, in the former case, it applies only to the additional amount purchased'.

²³ *Michelin I* (n 9), para 81.

²⁴ *Post Danmark II* (n 2), Opinion of AG Kokott, para 10.

²⁵ For an analysis of the rebate scheme in this case, see Luc Peepkorn, 'Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates' (2015) *Concurrences* 43.

²⁶ For a description of the rebate scheme, see *Michelin II* (n 5), paras 67-79.

²⁷ Ibid, paras 50-52.

‘ultimately immaterial’ to determine whether a given scheme is abusive. What would matter, instead, is whether the contentious rebates have an (i) ‘exclusionary effect’ that (ii) is not economically justified.²⁸ These two conditions have been consistently referred to in the case law, and were relied upon by the ECJ in *British Airways*.²⁹ It is appropriate to elaborate on them to understand their underlying meaning. In particular, references to the ‘exclusionary effect’ of the rebate scheme have proved to be a permanent source of confusion.

The idea, well-entrenched, that some rebate schemes are not economically justified can be traced back to *Hoffmann-La Roche*. The fundamental reason why the Court held in that judgment that loyalty rebates are abusive by their very nature has to do with the fact that exclusivity obligations were not considered to be ‘based on an economic transaction which justifies [the] burden or benefit’ imposed on the customer of the dominant supplier.³⁰ The ruling is indeed based on the idea that such schemes have no plausible explanation other than the exclusion of rivals. The presumption that loyalty rebates serve an anticompetitive purpose and that they lack an economic justification is essential to make sense of subsequent case law and administrative practice. A close look at Commission decisions up to, and including, *Michelin II* shows, in fact, that intervention was deemed justified in cases where the authority understood that rebates were intended to reward loyalty, as opposed to pass on the cost savings made by the dominant firm. In *British Airways*, for instance, the Commission took the view that the contentious rebates were ‘clearly related to loyalty rather than efficiencies’ and thus abusive by their very nature.³¹

The importance attached to the presumption of anticompetitive intent in the case law is useful to understand what the Court means when it refers to the ‘exclusionary effects’ of ‘loyalty-inducing’ rebates. The analysis of effects in this context amounts in essence to establishing whether the scheme under consideration works in practice like one formally conditional upon exclusivity. In *Michelin I*, the Court was primarily concerned about the fact that the rebate scheme encouraged customers to increase the amount ordered from the dominant firm. Such an outcome resulted from the combined effects of the individualised targets (which are typically set based on the expected demand from the customer), the relatively long reference period (and thus the relative importance of the rebate received), the relatively strong position of the dominant supplier and, finally, the uncertainty about the exact amount of the rebate.³² These are the criteria that the GC deemed relevant, in *Michelin II*, when assessing the lawfulness of quantity rebates. It dismissed the action brought by the applicant and was satisfied with the

²⁸ *Post Danmark II* (n 2), Opinion of AG Kokott, para 29.

²⁹ Case C-95/04 P, *British Airways plc* (n 10), para 67. See also *Intel* (n 11), para 78.

³⁰ *Hoffmann-La Roche* (n 4), para 90.

³¹ *Virgin v British Airways* (IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, para 102.

³² See in this sense Case C-95/04 P, *British Airways plc* (n 10), para 63.

evidence showing, in particular, that the scheme in question was retroactive, that it was granted over a period of one year and that it showed a variation in the rates granted to the higher and the lower steps.³³

2.3. QUALITY REBATES AS PRICE-BASED EXCLUSIONARY CONDUCT

The preliminary reference submitted by the Danish Supreme Court in *Post Danmark I*³⁴ has clarified much about the legal status of price-based exclusionary conduct under Article 102 TFEU. In that case, the Court considered whether a dominant firm is entitled to engage in selective price cutting to attract the customers of a rival. It concluded that such a practice is not abusive in and of itself. Thus, it would only be contrary to Article 102 TFEU if it can be shown to be predatory within the meaning of *AKZO*³⁵ (which would be the case if the practice amounted to pricing below average variable costs³⁶ or a comparable measure³⁷) or if it has an exclusionary effect.³⁸ In this regard, the Court pointed out that dominant firms are entitled to compete on the merits, and that only practices having the (actual or likely) effect of excluding equally efficient competitors justify action under Article 102 TFEU.³⁹ It is also clear from the judgment that exclusionary effects are unlikely to arise where the dominant firm does not charge below-cost prices. Equally efficient rivals are in principle able to match prices that cover the dominant firm's own costs.⁴⁰

Post Danmark I is in line with previous case law on 'margin squeeze' abuses. In *Deutsche Telekom* and *TeliaSonera*, the Court clarified that this practice is only abusive if it has an anticompetitive effect. In other words, it would not be sufficient for a competition authority or a claimant to show that the spread between the wholesale and the retail prices charged by the dominant upstream supplier would be insufficient to cover the costs of a downstream firm. It would in

³³ *Michelin II* (n 5), para 95.

³⁴ Case C-209/10, *Post Danmark A/S v Konkurrencerådet* ('*Post Danmark I*') [2012] EU:C:2012:172.

³⁵ Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, paras 71-72.

³⁶ *Ibid*, para 71. In para 72, the Court took the view that pricing below average total cost but above average variable cost are abusive if they are 'determined as part of a plan for eliminating a competitor'. In *Post Danmark I* (n 34), the competition authority did not provide evidence that the contentious practice was a manifestation of an exclusionary strategy. See paras 13 and 17 of the ruling.

³⁷ In the decision at the origin of the *Post Danmark I* ruling, the Danish competition authority considered the average incremental costs in lieu of average variable costs. This measure is often considered appropriate in industries with high fixed costs, of which the postal sector is an example. For an analysis of the question, see Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart 2013) 293 et seq.

³⁸ *Post Danmark I* (n 34), paras 38-39.

³⁹ *Ibid*, para 22.

⁴⁰ *Ibid*, para 38, where the Court explains that 'to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term'.

addition be necessary to establish the exclusionary impact of the ‘margin squeeze’ in light of the features of the market.⁴¹ An anticompetitive effect resulting in the foreclosure of equally efficient competitors could be established, for instance, where there is evidence showing that the wholesale inputs supplied by the dominant firm are indispensable to compete on the relevant downstream market.⁴²

There are powerful reasons to establish the abusive nature of quantity rebates in accordance with the same principles. Schemes based on volume alone do not impose any requirements as to the amounts to be acquired by the customer. Accordingly, their exclusionary effect can be expected to result from the level of prices charged by the dominant supplier, as is true of predatory pricing, selective price cuts and ‘margin squeeze’ abuses. Against this background, it could be argued that quantity rebate schemes should only be deemed contrary to Article 102 TFEU where they amount to pricing below an appropriate cost measure. In line with *Post Danmark I*, one could safely presume that equally efficient rivals are able match the above-cost rebates charged by the dominant supplier. An approach based on prices and costs is advocated by some Commission officials⁴³ and by the authority itself in its Guidance. In that document, the Commission explains that it prioritises cases where there is evidence showing that the rebate scheme under consideration would harm the ability and incentive to compete of equally efficient rivals (the so-called ‘as efficient competitor’ test).⁴⁴

The applicability of this analytical framework to quantity rebates was considered by AG Kokott in her opinion in *Post Danmark II*. The Danish court asked for clarification concerning the relevance of the ‘as efficient competitor’ test when establishing the abusive nature of standardised schemes. AG Kokott took the view that the case law cannot be understood as requiring the application of the said test. Moreover, she expressed misgivings about its usefulness in rebate cases. First, she pointed to the difficult implementation in practice of substantive standards based on prices and costs, and in particular to the fact that they are resource-intensive and that the data gathered for the analysis can be interpreted in more than one way.⁴⁵ In addition, AG Kokott considered that the ‘as efficient competitor’ test can be too reductionist, in the sense that it may fail to capture the actual operation of the contentious scheme and thus would not consider the different ways in which it could display its anticompetitive effects.⁴⁶

⁴¹ Case C-280/08 P, *Deutsche Telekom AG v Commission* [2010] ECR I-9555, paras 250-251; and Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, para 61.

⁴² See for instance *Deutsche Telekom* (n 41), para 255.

⁴³ See in particular Peepkorn (n 25) and Mel Marquis and Ekaterina Rousseva, ‘Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU’ (2013) *Journal of European Competition Law & Practice* 32.

⁴⁴ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, paras 37-45.

⁴⁵ *Post Danmark II* (n 2), Opinion of AG Kokott, para 66.

⁴⁶ *Post Danmark II* (n 2), Opinion of AG Kokott, para 68.

3. TOWARDS COHERENCE AND ADMINISTRABILITY

The principles set out in *Michelin I* and *British Airways* do not seem appropriate for the assessment of quantity rebates under Article 102 TFEU. An approach based on such principles would be difficult to reconcile with the presumption set in *Hoffmann-La Roche*, pursuant to which volume-based schemes are deemed to pursue a legitimate objective in that they reflect the cost savings made by the dominant firm. It is submitted, in addition, that legal tests should be coherent with the analytical framework to which comparable practices are subject. They should also be administrable. This is the second fundamental reason why the case law developed in the context of target rebate cases does not seem appropriate. The criteria relied upon in *Michelin I* and *British Airways* are not operational, in the sense that they do not make it possible to tell in advance whether a given scheme is likely to be found to be ‘loyalty-inducing’. It would seem, in light of the case law (and *Post Danmark II* further confirms this view), that it would be sufficient for an authority or a claimant to identify some ‘loyalty-inducing’ features in a rebate scheme to establish a violation of Article 102 TFEU.

3.1. THE QUEST FOR COHERENCE AND THE LEGAL STATUS OF QUANTITY REBATES

(i) *Quantity Rebates are Presumptively Lawful under Article 102 TFEU*

In *Hoffmann-La Roche*, the Court held that quantity rebates are – at the very least – presumptively lawful. Any legal test applying to these practices should be consistent with this principle. This means, in practice, that volume-based schemes should only be deemed abusive by their very nature if the party bearing the burden of proving an infringement of Article 102 TFEU is in a position to rebut this presumption and to show that they are not economically justified. It would be necessary, in other words, to establish that the purpose of the contentious scheme is not to spread fixed costs over a larger number of units but to foreclose competition by denying access to outlets. There are several reasons why the case law applying to target rebates is inconsistent with this presumption, and as such should not be relied upon to assess the lawfulness of volume-based schemes under Article 102 TFEU. As pointed out above, the *Michelin I* line of case law consists of ascertaining whether the rebates (i) have an ‘exclusionary effect’ that (ii) is not economically justified. Accordingly, this case law seems appropriate only in instances where the two conditions are fulfilled. Extending this framework to scenarios in which only one of them is (or can be) established would distort its nature and would, in addition, ignore the context in which it developed.

Applying the principles sketched in *Michelin I* to quantity rebates would indeed amount to stretching that line of case law beyond the limits of its logic. Suffice it to point out in this regard that, as mentioned above, the Court essentially considered in that case whether the individualised targets under consideration had

the effect of securing the loyalty of customers by inducing them to increase their orders from the dominant supplier. In other words, the Court sought to establish whether the rebates at stake in the case were comparable in their design and operation to loyalty rebates (which, as the case law stands, are prohibited absent an objective justification) and thus whether they were abusive by their very nature. It is difficult to claim that this case law is applicable to standardised schemes the terms of which are publicly available. While it is plausible that individualised targets are specifically designed to foreclose rivals' access to outlets, it seems far more challenging to make the same claim in relation to standardised schemes purely based on volume, such as the one at stake in *Post Danmark II* (or *Michelin II*). For the *Michelin I* line of case law to apply to the latter, it would be necessary for an authority or a claimant to provide cogent and convincing evidence showing, at the very least, that the only plausible purpose of the contentious rebates is to drive rivals out of the market.

In the same vein, a close analysis of *Michelin I* reveals that some of the factors that the Court considered in that case have been taken out of their original context in subsequent judgments, in particular in *Michelin II*. For instance, the statement whereby rebates granted over a relatively long reference period have the effect of increasing pressure on the customer can only be properly understood if one considers that the Court was examining the lawfulness of target rebates, which had been held to be in a grey area between presumptively lawful and presumptively unlawful schemes. The same can be said of the retroactive nature of the rebates. It does not follow logically that these two factors can be transposed as such to volume-based schemes, which, unlike loyalty and target rebates are presumed to have an economic justification. The Court itself made it clear in *Michelin I* that the target rebates at stake in the case were not comparable to schemes merely based on quantity.⁴⁷ Against this background, it is not surprising that the *Michelin II* decision met with controversy when adopted in 2001. Luc Gyselen, Head of Unit at the Commission at the time, did not dispute the principle that quantity rebates can have exclusionary effects and that they can as such be abusive under Article 102 TFEU. On the other hand, he noted the case law did not provide clear support for the expansion, without qualification, of the *Michelin I* line of case law to volume-based schemes. He made it clear that he would have preferred if the Commission had spelled out the reasons why it considered that the two categories (target and quantity rebates) should be assessed in accordance with the same

⁴⁷ *Michelin I* (n 9), para 72, where the Court observed that the rebate scheme in the case 'does not amount to a mere quantity discount linked solely to the volume of goods purchased since the progressive scale of the previous year's turnover indicates only the limits within which the system applies. [...] On the other hand the system in question did not require dealers to enter into any exclusive dealing agreements or to obtain a specific proportion of their supplies from Michelin NV, and that this point distinguishes it from loyalty rebates of the type which the Court had to consider in its judgment of 13 February 1979 in *Hoffmann-La Roche*'.

principles.⁴⁸ The GC ruling in *Michelin II* endorsed the analysis of the Commission and did not provide the rationale for its conclusion in this regard.⁴⁹

The mechanical extension of the *Michelin I* case law has had the effect of reversing the burden of proof regarding the nature and purpose of quantity rebates. Precisely because these schemes are presumed to be economically justified, it would not be for the dominant supplier to establish and quantify the efficiency gains that result from them, but for the authority or the claimant to show that they are not consistent with a cost saving rationale. In *Michelin II*, this presumption was not taken into consideration in the analysis. Thus, once the Commission reached the conclusion that the quantity rebates under consideration had a ‘loyalty-inducing’ effect, the burden of proof was reversed and the dominant firm was required to provide an objective justification for the scheme.⁵⁰ In other words, the absence of an economic justification was not established by the Commission, as required by *Hoffmann-La Roche*, but was inferred from the ‘loyalty-inducing’ effect. The two conditions set in *Michelin I* were, in other words, conflated into a single step. The resulting distortion of the case law rendered the presumption of legality meaningless in practice.

(ii) *Quantity Rebates and Price-Based Exclusionary Conduct*

It has been explained above that the selective price cuts at stake in *Post Danmark I* are in many ways comparable to quantity rebates. Both practices aim at expanding output. In the case of selective price cuts, this objective is achieved by offering more advantageous contractual conditions to new customers than those offered to existing ones. If anything, this practice is inherently more suspicious than quantity rebates. The latter is presumed to reflect the cost savings made by the firm but may have the indirect consequence of inducing customers to buy more from the dominant supplier. Selective price cuts, on the other hand, are expressly aimed at attracting customers away from a rival. Against this background, it would be reasonable to establish the legality of the two practices in accordance with the same principles.

As pointed out by AG Mengozzi in his opinion in *Post Danmark I*, several third parties in the proceedings, including the Commission and the Danish government (there is a decision adopted by the Danish competition authority at the origin of the case), argued that selective price cuts should be subject to the principles against which the legality of ‘loyalty-inducing’ rebate schemes is currently assessed. More precisely, these parties argued that selective price cuts should be prohibited as abusive unless the dominant firm is in a position to provide an economic justification for the different prices applied to new and

⁴⁸ See Gyselen (n 21).

⁴⁹ *Michelin II* (n 5), paras 48-60.

⁵⁰ *Ibid*, para 107.

existing customers.⁵¹ Such price differential was difficult to justify in the specific context of the case, as the ostensible purpose of the pricing strategy was to expand the customer base of the postal operator at the expense of its rivals.⁵² As explained above, however, the Court did not follow this approach and chose one consistent with *AKZO* instead.

For reasons of coherence, it is difficult to think of a convincing reason why the same broad approach should not extend to *Post Danmark II* and, more generally, to quantity rebate schemes. Thus, a legal test applying to this practice should be consistent with the idea that quantity rebates are not contrary to Article 102 TFEU by their very nature (or by object). As already pointed out, *Post Danmark I* was valuable in that it hinted at the emergence of a set of principles common to all price-based exclusionary conduct. By clarifying in that ruling that selective price cuts are to be assessed in the same way as predatory pricing claims, the Court confirmed that above cost pricing is a legitimate form of competition on the merits. Moreover, and in line with the case law on ‘margin squeeze’ abuses, it confirmed that only the exclusion of equally efficient competitors is an issue of concern.

The reasons why AG Kokott rejected the ‘as efficient competitor’ test in the context of quantity rebates (and thus the relevance of the principles common to price-based exclusionary conduct) are not, it is submitted, particularly convincing. This is so, first and foremost, because her analysis does little more than revisit a set of arguments brought by the Commission (and rejected by the Court) in *AKZO*. The authority argued in that case that costs should not be deemed a decisive criterion when assessing the lawfulness of predatory pricing. According to this view, it would be necessary to carry out a more holistic analysis that would take into consideration the broader context of the practice. This approach is not without merits. As argued by AG Kokott, it is probably the case that only an analysis of ‘all the circumstances’ surrounding the operation of a rebate scheme makes it possible to get a full picture of its likely effects on competition. However, the Court did not follow the Commission, and it is therefore difficult to see why these arguments would be relevant in relation to quantity rebates. The reasons why the holistic test favoured by the authority was rejected in *AKZO* seem straightforward. The accuracy of a legal framework is only one of the factors at play when establishing the lawfulness of a practice. It is widely accepted that the

⁵¹ *Post Danmark I* (n 34), Opinion of AG Mengozzi, para 52: ‘[...] FK, the Danish and Italian Governments, the EFTA Surveillance Authority and, to a certain extent, the Commission, take the opposite view, particularly after the clarification of its position made by the latter at the hearing. In broad outline, those interested parties submit that, irrespective of costs, selective pricing by a dominant undertaking in relation to customers of its only genuine competitor leads, or may very likely lead, to the exclusion of the latter if such pricing is not justified on economic grounds, particularly economies of scale. That is said to be the situation in the main proceedings’.

⁵² *Ibid*, para 19. It is explained in the opinion that the appeals court in the case concluded that *Post Danmark* had applied ‘a different pricing policy to its own existing customers and FK’s former customers, without being able to justify those differences on cost-related grounds’.

enforcement of Articles 101 and 102 TFEU inevitably has to be, in addition, administrable and predictable. This is also the reason why it is submitted that the test proposed by AG Kokott in *Post Danmark II* should not be endorsed.

3.2. ADMINISTRABILITY AND THE ‘LOYALTY-INDUCING’ NATURE OF REBATE SCHEMES

(i) *The Impossible Administrability of the Criteria Defined in Michelin I*

While far from perfect, the test set out by the Court in *AKZO* provides a valuable example of the features of an administrable legal test. First of all, the rationale underpinning the different elements of the test is clear. Indeed, *AKZO* prohibits as abusive pricing strategies that serve no purpose other than the exclusion of competition and that are at least capable of foreclosing equally efficient rivals. In particular, pricing below average variable cost is presumed to be abusive insofar as it is in principle an irrational strategy for a firm to follow.⁵³ Secondly, the boundaries between conduct that is allowed and that is prohibited are clearly defined. As a corollary, and as confirmed in *Post Danmark I*, a dominant firm is in principle in safe ground if its prices remain above cost, as equally efficient competitors would in principle be able to match such a strategy.

The criteria identified by the Court in *Michelin I*, and endorsed by AG Kokott in *Post Danmark II*, fail to provide the basis for an administrable legal test. The rationale on which these criteria are based are, to begin with, nebulous. It is indeed difficult to understand what it means in practice that a rebate scheme has ‘loyalty-inducing’ effects. In a sense, it borders on the tautological and would as such be over-inclusive by definition. Any rebate scheme, irrespective of its nature and operation has, at least to some extent, a ‘loyalty-inducing’ effect. The very purpose of any system of discounts is to induce customers to buy more from the dominant firm. A reading of *Michelin I* gives the impression that the test was not intended to be given such a broad meaning. It seems that it was originally crafted to capture, as mentioned above, rebates having an equivalent effect to exclusive dealing obligations. If so, it made sense in the narrow factual scenario in which it originated, but lost its meaning when relied upon in other contexts (as *Michelin II*, in particular, shows). If a legal test runs the risk of being distorted or stretched beyond recognition when applied in subsequent cases, it seems clear that it is not an administrable one.

The test devised in *Michelin I* does not meet the second criterion defined above. It is very difficult to tell in advance when a rebate scheme is lawful or

⁵³ *AKZO* (n 35), para 71, where the Court explains that ‘dominant undertaking has no interest in applying [prices below average variable costs] except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced’.

unlawful. It seems clear from the case law that some features of rebate schemes have the effect of inducing customer loyalty. These features include, as already explained, the length of the reference period and the retroactivity of the rebate. There are other factors, however, that point to the opposite conclusion. For instance, the Court has several times emphasised the importance of the uncertainty generated by some rebate schemes and its impact on customers' incentives and purchasing behaviour. Accordingly, it would be reasonable to assume that 'loyalty-inducing' effects are less likely where the customer has a clear idea, at the beginning of the reference period, of the likely amount of the rebate. Similarly, standardised rebates are less likely to be 'loyalty-inducing' than schemes based on individualised targets.

The difficulty with the current case law – and this is true irrespective of the nature of the rebate – is that it is not possible to know how the assessment of 'all the circumstances' operates in practice. In particular, it is not obvious to understand how the features discussed above are balanced to establish whether a given scheme, in a concrete factual scenario, has on the whole a 'loyalty-inducing' effect. An analysis of the case law, and in particular of *Michelin II* and *British Airways*, suggests that it is sufficient for an authority or a claimant to identify some factors pointing to the 'loyalty-inducing' nature of the rebate to establish a violation of Article 102 TFEU. *Post Danmark II* provides additional evidence in this regard. In her opinion, AG Kokott strongly suggested that the scheme at stake in the case is abusive, and this in light of its retroactive nature and of the relatively long (one-year) reference period.⁵⁴ These (at least potentially) 'loyalty-inducing' features, together with the strong position enjoyed by Post Danmark on the relevant market, were deemed sufficient to establish a breach of Article 102 TFEU. They were not balanced against other factors suggesting that the scheme was on the whole neutral or pro-competitive. Interestingly, it is explained in the opinion that Post Danmark's customers knew, at the beginning of each year, the likely amount of the rebate they would receive.⁵⁵ As a result, there was no uncertainty in this regard and the incentive to use of the services of the incumbent was therefore not as strong as in other cases like *Michelin I*. However, this feature was not mentioned or discussed by AG Kokott, nor did she consider whether, or in what circumstances, the transparency of the scheme would be enough to temperate the 'loyalty-inducing' impact of the abovementioned features. In this sense, it is difficult to say that 'all the circumstances' surrounding the standardised system were considered in the opinion.⁵⁶

⁵⁴ *Post Danmark II* (n 2), Opinion of AG Kokott, paras 36–38.

⁵⁵ *Post Danmark II* (n 2), Opinion of AG Kokott, para 12.

⁵⁶ Another factor that played an important role in *Michelin II* was the risk of making losses that customers faced if they did not accept to purchase more from the dominant supplier. Nowhere is it suggested in AG Kokott's opinion that this was the case in *Post Danmark II*, and this circumstance is not considered either in the analysis of the abusive nature of the rebate scheme.

One of the consequences of the impossible administrability of the test is that the range of conduct that is prohibited absent an objective justification has expanded over time. A key lesson to draw from *Post Danmark II*, already hinted at in *Michelin II*, is that retroactive rebates granted over a period of one year are, for all practical purposes, *prima facie* abusive under Article 102 TFEU. This is not what *Michelin I* intended, but it looks like the inevitable consequence of the evolution of the case law. Similarly, it seems difficult to dispute that, for all practical purposes (that is, irrespective of what the Court formally held in *Michelin I*), target rebates are prohibited by their very nature alongside exclusive dealing and loyalty rebates. This is in fact what AG Kokott claims in her opinion.⁵⁷ Again, it seems uncontroversial to state that, where the legal test departs from the principles on which it is based in practice, it is not an appropriate one.

(ii) *The Relevance of the ‘As Efficient Competitor’ Test*

It has been mentioned above that AG Kokott dismissed the relevance of the ‘as efficient competitor’ test on grounds that it is difficult to administer. Her arguments – relating primarily to the resources consumed by its application and to the difficulty of interpreting the data – highlight some of the difficulties that come with the implementation of cost-based analyses. However, they do not address the key question that should determine the convenience of relying upon one legal test or another. Legal tests applying to practices that have ambivalent effects on competition typically require complex assessments. Accordingly, it is likely that they are difficult to administer in practice. The real question should be whether a given test is more accurate and easier to administer than an alternative one. In this regard, it appears that, in spite of their inevitable flaws, cost-based tests that seek to establish the ability of an equally efficient competitor to match the prices of the dominant firm are clearly superior to one that revolves around the ‘loyalty-inducing’ nature of a rebate scheme.

Because they lack a clear meaning, the factors identified by the Court in *Michelin I* can be interpreted in many different ways. For instance, it is not obvious to discern when, and in accordance to what criteria, a reference period can be said to be long enough to induce loyalty. Moreover, it is difficult to see how other features of the scheme (for instance, the fact that it is volume-based, or the fact that it is transparent) influence the analysis and the outcome of a case. More importantly, the experience acquired over the years reveals that the ‘loyalty-inducing’ features identified in the case law do not provide reliable indications about the likely impact of a given scheme on competition. They are not, in other words, accurate proxies in this regard. Much of the controversy around *Michelin II* and *British Airways* is explained by the fact that the contentious rebates did not

⁵⁷ *Post Danmark II* (n 2), Opinion of AG Kokott, para 28.

have any exclusionary effects, in the sense that they did not have an observable impact on other firms' ability and incentive to compete. In the two cases, the market share of the dominant firm declined, and the market share of its rivals increased, during the relevant period.⁵⁸ Thus, claiming that a rebate scheme is 'loyalty-inducing' is not particularly meaningful.

4. CONCLUSION

The reference in *Post Danmark II* is a good reminder that coherence and administrability will always be a challenge when interpreting and enforcing Article 102 TFEU. Because the law evolves on an incremental, case-by-case, basis, it is not easy to ensure that like practices are examined in accordance with the same principles and underlying logic. The unclear legal status of quantity rebates exemplifies the sort of frictions that might arise between individual rulings. This paper also shows that incoherence sometimes results from the expansion of some lines of case law beyond the limits of their logic. In particular, the principles set by the Court in *Michelin I* were conceived to apply to rebates falling somewhere between loyalty schemes (presumptively unlawful) and quantity-based ones (presumptively lawful). The subsequent application of this case law to the latter category in cases like *Michelin II* undermined the logic underpinning *Hoffmann-La Roche*.

Because the case law has evolved in the context of annulment actions against Commission decisions, the importance of defining a set of administrable criteria has not been given the attention it deserves. *Post Danmark II*, which reached the Court in the context of a preliminary reference, makes it apparent that the indicators identified in *Michelin I* are not practicable ones. It is not possible to infer from this case law how the different features of a specific scheme are to be balanced against one another to determine whether, on the whole, it is 'loyalty-inducing'. The inevitable consequence of the impossibility to administer the legal test sketched in *Michelin I* is that the range of prohibited conduct is actually broader than what the case law formally suggests. AG Kokott's opinion in *Post Danmark II* shows, in line with *Michelin II*, that retroactive rebate schemes granted over a period of one year are, for all practical purposes, prohibited absent an objective justification. The same can be said of target rebates. This situation would arguably be unproblematic – or at least less problematic – if enforcement were led by the Commission, which has the expertise and the ability to prioritise cases where anticompetitive effects are more likely. At a time where private enforcement is being encouraged (and acquiring progressively more importance) in the EU,

⁵⁸ See in this sense *Michelin* (Case COMP/E-2/36.041/PO) Commission Decision 2002/405/EC [2002] OJ L143/1, paras 332-343 and *Virgin v British Airways* (n 31), para 107

legal tests should be carefully crafted to preserve legal certainty and to ensure that they can be applied across the board.

Two principles should guide the definition of an administrable legal test for quantity rebates. Such a test should be, first, consistent with the presumption of legality set in *Hoffmann-La Roche*. In addition, it should reflect the idea whereby pricing strategies implemented by dominant firms are not abusive by their very nature. They are only abusive where they are likely to exclude equally efficient competitors. This principle is not the expression of a temporary fad that is alien to the case law. The ‘as efficient competitor’ test is at the heart of *AKZO*, where the Court – rejecting the position defended by the Commission in the case – endorsed a framework based on prices and costs. Subsequent rulings like *Post Danmark I* and *TeliaSonera* have further confirmed its prominent status as a guiding principle for the assessment of price-based practices.

Against this background, it is possible to envisage two instances in which quantity rebates could be deemed abusive. A first instance is one in which the scheme is not a credible source of efficiency gains and can therefore be deemed anticompetitive by its very nature. In particular, if the rebate amounts in practice to predatory pricing within the meaning of *AKZO*, one can safely presume that it is driven by exclusionary purposes. Pricing above average variable costs (or another appropriate cost measure), on the other hand, cannot be said to have an anticompetitive object. In principle (that is, absent direct evidence of exclusionary intent), it is a legitimate form of competition on the merits. In addition, it cannot be assumed to have a negative impact on rivalry. As noted by the Court in *Post Danmark I*, an equally efficient competitor is, as a rule, able to match prices that are not predatory without jeopardising its long-term viability.⁵⁹ Thus, and in line with the same judgment, it would be necessary for an authority or a claimant to provide cogent and convincing evidence of why non-predatory quantity rebates are likely to drive equally efficient rivals out of the market in the specific context of a particular case.

⁵⁹ *Post Danmark I* (n 34), para 38.