

REBATES AND ARTICLE 102 TFEU: THE EUROPEAN COMMISSION'S DUTY TO APPLY THE GUIDANCE PAPER

Nicolas Petit*

Abstract: This paper shows that the European Union (EU) courts case-law and the general principles of EU law place the European Commission (“Commission”) under a duty to apply the Guidance Communication on Enforcement Priorities (“Guidance Paper”) in abuse of dominance cases started after its adoption. This duty includes the obligation to test Article 102 TFEU cases under the As Efficient Competitor (“AEC”) framework, as set out in the 2009 Guidance Paper. The judgments handed down by the Union courts in Intel v Commission and Post Danmark II do not alter in any way the Commission’s “self-binding” duty to apply the Guidance Paper. If the Commission wishes to depart from the AEC framework, it must officially withdraw its Guidance Paper.

I. OVERVIEW

The judgments handed down by the General Court (“GC”) in *Intel v Commission*¹ and the Court of Justice of the European Union (“CJEU”) in *Post Danmark II*² have brought to the fore an important question for the antitrust policy of the European Commission (“the Commission”) under Article 102 of the Treaty on the Functioning of the European Union (“TFEU”): can the Commission apply the As-Efficient Competitor (“AEC”) test in enforcement proceedings brought against rebates – and in particular loyalty rebates – granted by dominant firms, in line with the principles enshrined in its 2009 Guidance Communication on Enforcement Priorities in Applying Article 102 TFEU (“Guidance Paper”)?³

This question arises because in *Intel v Commission* and *Post Danmark II*, the EU Courts affirm from the side-lines a standard of antitrust liability that is manifestly different from the substantive provisions of the Guidance Paper on loyalty rebates. In *Intel v Commission*, a case initiated prior to the adoption of the Guidance Paper, the GC held that loyalty rebates ought to be scrutinised under a modified *per se* prohibition rule.⁴ In *Post Danmark II*, a case about standardised rebates, the CJEU suggests *obiter dictum* that loyalty rebates given in exchange for an obligation or a promise of exclusivity tend to limit access to competitors and thus “*amount[t] to an abuse*” without the need for further consideration.⁵

* Professor, School of Law of the University of Liege (ULg) and Liege Competition and Innovation Institute (“LCII”). Nicolas.petit@ulg.ac.be. The author is grateful to I. HERRERA ANCHUSTEGUI, P. IBANEZ, J. MARCOS, P. MARSDEN, L. PEEPERKORN, E. ROUSSEVA, O. STEFAN and R. WHISH for their helpful comments. All errors and mistakes remain mine.

¹ Case T-286/09, *Intel Corp. v European Commission* [2014] ECLI:EU:T:2014:547.

² Case C-23/14, *Post Danmark A/S v Konkurrenceradet* [2015] ECLI:EU:C:2015:651.

³ Guidance Communication on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *OJ C 45 2009*, pp 7–20 (“Guidance Paper”). For a comprehensive description of the Guidance Paper and of the AEC test, see N. PETIT, “From Formalism to Effects? The Commission’s Communication on Enforcement Priorities in Applying Article 82 EC”, (2002) 32 *World Competition*, 485.

⁴ N. Petit, “Intel, leveraging rebates and the goals of Article 102 TFEU”, *European Competition Journal*, Volume 11, Issue 1, 2015, 26-68.

⁵ Case C-23/14, *supra* at paragraphs 27 and 28.

In essence, both judgments embrace the “*inhospitality tradition*” of antitrust, described by Judge Easterbrook in 1984 in his article, *The Limits of Antitrust*.⁶ The inhospitality tradition means that a type of business conduct is viewed with suspicion by courts and agencies, unless the defendant offers a convincing economic justification.⁷ The references in *Intel v Commission* and *Post Danmark II* to the strict standard of liability set by the CJEU in *Hoffmann La Roche* and *Michelin I*⁸ underline the influence of the inhospitality tradition in positive EU competition case-law.⁹ Paragraph 71 of *Intel v Commission* states explicitly that “*that type of rebate constitutes an abuse of a dominant position if there is no objective justification for granting it*”.¹⁰

With its Guidance Paper, the Commission departs from the inhospitality tradition in relation to loyalty rebates. The Guidance Paper explains that in matters concerning “*price-based exclusionary conduct*”, a category that seems to include loyalty rebates, the Commission “*will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking*” (AEC test).¹¹ It adds that “*In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing*”.¹²

After *Intel v Commission*, some Commission officials commented on the judgment and its possible incompatibility with the Guidance Paper’s AEC test for loyalty rebates.¹³ In an article, the Hearing Officer Wouter Wils suggested that the GC in *Intel v Commission* had considered the AEC test irrelevant.¹⁴ Wils eventually “*commended*” the Court for this. Luc Peepkorn, a principal expert with the Commission noted the existence of an inconsistency, and found the judgment “*wrong*” from a normative standpoint.¹⁵

⁶ Frank H. Easterbrook, “Limits of Antitrust”, 63 *Texas Law Review* 1 (1984).

⁷ For a similar analysis, see P. Ibanez “Post Danmark II, or the Quest for Administrability and Coherence in Article 102 TFEU” (July 27, 2015). LSE Legal Studies Working Paper No. 15/2015. Available at SSRN: <http://ssrn.com/abstract=2636407> or <http://dx.doi.org/10.2139/ssrn.2636407>.

⁸ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 paragraph 90, referred to in *Intel v Commission*, *supra* at paragraph 81. Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* (*Michelin I*) [1983] ECR 3461 paragraph 71, referred to in *Post Danmark II supra* at paragraph 27.

⁹ By “*positive*” I mean the existing, man-made law currently in force and positively affirmed by the law makers through cases or legislation, as opposed to the prospective or normative law (law that one believes should exist) or the natural law that pre-exists by nature or reason.

¹⁰ Case T-286/09, *supra* at paragraph 81.

¹¹ Guidance Paper, *supra* at paragraph 23.

¹² *Id.* at paragraph 25.

¹³ W. P.J. Wils, “The Judgment of the EU General Court in Intel and the So- Called ‘More Economic Approach’ to Abuse of Dominance” *World Competition: Law and Economics Review*, Vol. 37, No. 4, 2014, and contrast with L. 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”, *Concurrences* No 1-2015 – Doctrines.

¹⁴ W. Wils, *supra* text accompanying note 34 : “*The fact that the General Court in the Intel judgment confirmed the established case-law, and thus considered the as-efficient-competitor test irrelevant, has been a major disappointment for those who had hoped that the EU Courts would change their case-law and adopt the test set out in the Priorities Paper as a new test for assessing the legality of exclusionary conduct under Article 102 TFEU*”.

¹⁵ L. Peepkorn, *supra* at paragraph 7: “*the GC rules that a price-cost test in general and the “as efficient competitor test” (AEC test) in particular are not only not necessary for the assessment of conditional rebates*

What those comments do not address, however, are the concrete and necessary consequences of *Intel v Commission* and *Post Danmark II* for the applicability of the Guidance Paper's AEC test in loyalty rebates cases investigated by the Commission. It is this specific issue that we now address. We conclude that *Intel v Commission* and *Post Danmark II* do not alter the obligation of the Commission to apply in full its own Guidance Paper, including the AEC, test, in loyalty rebates cases.

II. INTEL V COMMISSION'S UNIMPORTANCE FOR THE POSITIVE APPLICABILITY OF THE AEC TEST IN LOYALTY REBATES CASES BEFORE THE COMMISSION

Some of the early literature on *Intel v Commission* airs the idea that after the judgment, the AEC test should no longer be applied by the Commission to loyalty rebates cases.¹⁶ That claim relies on a mistaken premise. That premise is that the AEC test was the standard of liability applicable to the proceedings commenced by the Commission against Intel's loyalty rebates.¹⁷

From a positive law standpoint, but only from this standpoint, this premise is specious because it disregards the legal nature of Article 263 TFEU annulment proceedings before the GC. The most important thing to understand is that actions for annulment are time-specific, unlike perhaps other judicial proceedings such as Article 267 TFEU preliminary references before the CJEU. Under Article 263 TFEU, the GC reviews the legality of the Commission's decision against the background of the law applicable at the time of the proceedings. One thus cannot read anything about the Guidance Paper in *Intel v Commission*, which concerns a case commenced in the early 2000s, well before the Commission announced, in 2009, an official change to its enforcement policy of Article 102 TFEU.

(whether exclusivity or other rebates), as the GC considers it sufficient to demonstrate the existence of a loyalty mechanism to establish a potential anticompetitive effect (§ 145), but would also be erroneous as “an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult” (§ 150)”. On the basis of economic and legal arguments, Peeperkorn invites the CJEU to affirm the relevance of the AEC test in loyalty rebates cases, in line with the philosophy of *Post Danmark I*. Readers with an antitrust background will recognise here the enduring, though not unprecedented, disagreement between the Commission's Legal Service (LS) on the one hand, and the Chief Economist Team and Policy Units of the Directorate General for Competition (COMP) on the other. As is well-known, antitrust agencies are social organisations that contain groups with distinct agendas. A commonly heard rumour in the Brussels antitrust community is that the LS would have given instruction to its officials to avoid any reference to the Guidance Paper in documents subject to disclosure.

¹⁶ For instance, P. Nihoul, “The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?”, *Journal of European Competition Law & Practice* (2014) 5 (8): 521-530: “[T]he ‘as-efficient-competitor’ test, which seeks to determine whether a competitor must sell at a loss to match rebates provided by the dominant firm, is considered useless by the GC in the rebate context. It purports to measure a reality that does not have to be demonstrated for the prohibition to apply”.

¹⁷ This position seems to correspond to that carefully implied by Wils, who suggests that the AEC test has been on the cards since the mid-2000s: “This *Priorities Paper* was the end-product of a review process announced by the then Competition Commissioner, Neelie Kroes, in a speech in New York in 2005, and was presented as a ‘more economic’ and ‘effects-based’ approach to Article 102 TFEU”. W. Wils, *supra* text accompanying notes 18 to 20. Additionally, Wils offers support for this contention by quoting early commentators who had perceived the *Intel* case as a “test case” for this new approach.

This was the position adopted by the Commission in its *Intel* decision.¹⁸ As the Commission had made clear, the Guidance Paper could “*not apply to proceedings that had already been initiated before it was published*”.¹⁹ And this approach was all the more imperious, explained the Commission, because the Guidance Paper had been published only after Intel “*had been given the opportunity to make its views known*” regarding several documents conveying the Commission’s objections, including to the formal Statement of Objections.²⁰

Interestingly, *Intel v Commission* confirms this idea. It recognises that the “*Article 82 Guidance was not applicable in the present case*”.²¹ Before this, the CJEU had reached the exact same conclusion in *Tomra v Commission*, where it noted that the Guidance Paper had “*no relevance to the legal assessment of a decision, such as the contested decision, which was adopted in 2006*”.²²

In the scholarly literature, some commentators of the case-law seem to be of the same opinion. Professor Whish, for example, disputes that *Intel* is an “*implied rejection*” of the Guidance Paper, because it was initiated before the adoption of the Guidance Paper.²³

In reality, the only potentially sound basis to argue that the Guidance Paper was retroactively applicable to the *Intel* proceedings would be to rely on the time overlap between the publication of the Guidance Paper on 24 February 2009 and adoption of the *Intel* decision on 13 May 2009.²⁴ This position corresponds to that of Wils, who stresses that:

“*The Commission adopted its decision in the Intel case shortly after it had published, at the end of 2008/beginning of 2009, its Guidance on its enforcement priorities in applying Article 102 TFEU to exclusionary abusive conduct.*”²⁵

If this argument were to be followed, however, this would mean that the Commission could – within its margin of discretion – change its interpretation of the law applicable in competition proceedings weeks before the adoption of an infringement decision and after a hearing had taken place, as was the case in *Intel* – in whatever way it sees fit. This would allow the Commission to *de facto* negate the defendant’s right to a fair trial, which is fundamentally at odds with the rights of defence and to good administration enshrined in the EU Treaties and protected in administrative proceedings before the Commission.²⁶

¹⁸ See Commission Decision of 13 May 2009, Case COMP/37.990 *Intel* COMP/C-3/37.990, paragraph §916. Wils recognises this but notes that the Commission included in its analysis a “*150 pages long as efficient competitor analysis*”.

¹⁹ *Id.*

²⁰ *Id.*

²¹ GC, *Intel v Commission*, *supra* at paragraph 158.

²² CJEU, C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] ECLI:EU:C:2012:22, paragraph 81.

²³ R. Whish, “*Intel v Commission: Keep Calm and Carry On!*” (2014) *Journal of European Competition Law & Practice*, p. 2: “*Both Tomra and Intel were initiated before the adoption of the Guidance, and so it is irrelevant to the selection of those cases for investigation*”.

²⁴ Wils discretely seems to be alluding to this possibility in footnote 18, where he stresses that “*While the publication of the Priorities Paper in the Official Journal took place only on 24 February 2009, the Commission had already published the Priorities Paper on its website on 3 December 2008*”.

²⁵ W. Wils, *supra* text accompanying notes 18 to 20.

²⁶ And this would make EU competition proceedings look like Franz Kafka’s trial.

Moreover, this would be a temerarious claim to make on legal grounds. The case-law of the CJEU has consistently ruled that “*the principle of legal certainty precludes a Community act from taking effect as from date prior to its publication*”.²⁷ To be sure, the Court has accepted exceptional derogations to the non-retroactive application of EU law. In the same line of case-law, the Court systematically adds that “*it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected*”.²⁸ In the present case, however, there are doubts that Intel could entertain legitimate expectations vis-a-vis the application of the Guidance Paper AEC test. It is not us who say this, it is AG Kokott who had been confronted with a similar argument in *British Airways*. At the time, the CJEU magistrate rebuffed the claim, noting that: “*it is immaterial how the Commission intends to define its competition policy with regard to Article [102 TFEU] for the future*”.²⁹

And whilst in *Hoechst v Commission*, the General Court contemplated the possibility of retroactive application by analogy of a Notice to situations that commenced before its publication, it noted that this can only be the case in situations “*which were not governed by any other legal rule*”.³⁰ Given the amount of clear case-law precedents governing the issue of loyalty rebates, this did not seem to be the situation that prevailed in the *Intel* case.

With this, the bottom line is that *Intel v Commission* is immaterial in terms of the positive applicability of the AEC test to loyalty rebates cases investigated by the Commission.

III. POST DANMARK II AND THE OPTIONAL APPLICATION OF AN AEC TEST IN LOYALTY REBATES CASES UNDER ARTICLE 102 TFEU

A similar problem seems to beset the relevance of *Post Danmark II*. The case before the referring court concerned alleged abuses committed in 2007 and 2008, which pre-dated the Guidance Paper. By applying the above logic, the judgment would not be of any interest as regards the positive applicability of the AEC test. Moreover, the questions referred by the national court to the CJEU were essentially seeking an interpretation of the Treaty rule found

²⁷ CJEU, 98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 69, paragraph 20; CJEU, C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17. In several competition cases concerning draft notices, the Court held that the Commission was under no obligation to apply the upcoming policy on cooperation with the Commission – a draft was available – in ongoing proceedings before official publication of the final version of the notice on immunity from fines and reduction of fines in cartel cases. . GC, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon v. Commission* [2004] ECR II-1181, para. 273. GC, T-62/02 *Union Pigments v. Commission* [2005] ECR II-05057, para. 140; CJEU, Joined Cases C-65/02 and C-73/02 *ThyssenKrupp v. Commission* [2005] ECR I-06773, para. 59; GC, T-322/01 *Roquette Frères v. Commission* [2006] ECR II-3137, para. 224.

²⁸ *Id.*

²⁹ See Opinion of AG Kokott, C 95/04 *British Airways v Commission*, [2007] ECR I-233, paragraph 28. In *British Airways v Commission*, an applicant in review proceedings had sought to rely on the foreseeable adoption of the Guidance Paper to benefit from certain of its provisions.

³⁰ GC, T-410/03 *Hoechst v. Commission* [2008] ECR II-881, para. 507.

in Article 102 TFEU,³¹ and not of the applicability of the Guidance Paper which seemed only to be mentioned in passing.³²

The problems with this analysis are twofold. First, it is settled case-law that in proceedings under Article 267 TFEU “*the interpretation which [...] the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force* (emphasis added).³³ Accordingly, the *Post Danmark II* findings on the relevance of the AEC test for loyalty rebates under Article 102 TFEU must be deemed to pre-exist to the Guidance Paper, and therefore can have a possible impact on the applicability of the Guidance Paper in general and on its AEC test in particular. Second, the Court is the sole EU institution with definitive authority to interpret the Treaty provisions, and in particular Article 102 TFEU. The Commission is thus bound by the CJEU’s pronouncements under Article 267 TFEU when it defines its enforcement policy in ‘soft law’ instruments.

With this, it can be considered that unlike the first instance *Intel v Commission* judgment of the General Court, the *Post Danmark II* judgment does impact the Guidance Paper. But what sort of impact does it have? This issue, which is not a positive law issue but instead a substantive one, consists in determining whether the standard of antitrust liability affirmed in *Post Danmark II* contradicts or differs from the one affirmed in the Guidance Paper’s section on loyalty rebates, with the result that the Commission should revise or rescind its Communication in relation to loyalty rebates. This risk is not unprecedented. In *Expedia Inc.*, the CJEU affirmed *obiter dictum* that restrictions by object were presumed to appreciably affect competition,³⁴ discarding the laxer principle affirmed in the Commission’s 2001 De Minimis Notice (and its own earlier case-law).³⁵ Following the judgment, the Commission had no other choice but to revise its De Minimis Notice in order to remove the conflict with the substantive principle subsequently established by the *Expedia Inc.* court.³⁶

The answer to the question before us therefore hinges on determining whether *Post Danmark II* embraces a standard of antitrust liability for loyalty rebates that refutes the Guidance Paper’s AEC test. Fortunately, the Court addresses this question. After having explained that the AEC test is not a compulsory method to make a finding of Article 102 TFEU liability,³⁷

³¹Case C-23/14, *supra* at paragraph 20. They talked of the “*relevance, if any, [of] the dominant undertaking’s prices and costs [in] the evaluation pursuant to Article 102 TFEU*” of the rebate scheme and of the “*relevance of an as efficient competitor test*” under Article 102 TFEU.

³² In the fourth subparagraph of Question 1.

³³ CJEU, C-2/06, *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, [2008] ECR. I-411. 239, paragraph 35; see also CJEU, 61/79 *Denkavit Italiana*, [1980] ECR 1205, paragraph 16.

³⁴ CJEU, C-226/11, *Expedia, Inc. v. Autorité de la concurrence and Others* [2012] ECR 0000, paragraph 36

³⁵ CJEU, C-5/69, *Franz Völk v. S.P.R.L. Ets J. Vervaecke* [1969] ECR I-00295.

³⁶ As recognised by the Commission, see MEMO 25 June 2014, “Antitrust: Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on “by object” restrictions of competition”. Some scholars convincingly argue that the principle affirmed by the Court was nothing novel. See S. King, “How appreciable is object? The de minimis doctrine and Case C-226/11 *Expedia Inc v Autorité de la concurrence*”, *European Competition Journal*, Volume 11, Issue 1, 2015. More generally, see G. Bushell and M. Healy, “Expedia: The de minimis Notice and ‘by object’ Restrictions”, *Journal of European Competition Law & Practice* (2013), doi: 10.1093/jeclap/lpt011.

³⁷ Case C-23/14, *supra* at paragraph 57: “*it is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test*”. After having recalled at

the Court moves on to embrace the proposition that the AEC test nonetheless remains a possible option to establish antitrust liability under Article 102 TFEU.³⁸ It is, says the Court, “one tool amongst others”.³⁹

Some might object that the Court’s statements concern rebates other than loyalty rebates, which would remain subject to the inhospitality tradition pursuant to paragraph 27 of the judgment.⁴⁰ It may additionally be argued that the rebates in the main proceedings were not individualised loyalty rebates, but standardised ones. Both arguments fail for a simple reason: the precedent selected and cited on two occasions by the Court to contend that the AEC test is an option and not an obligation is *Tomra v Commission*, which is a well-known loyalty rebate case. Moreover, the wording of paragraph 27 is not inconsistent with the optionality of an AEC test. To the contrary, an AEC test allows to verify whether the rebates under consideration are indeed loyalty (or exclusivity) rebates “which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, [and] amounts to an abuse” within the meaning of paragraph 27.⁴¹ And this question of exclusivity, which precedes in the analysis the distinct question of whether the rebates can give rise to anticompetitive exclusion, cannot be answered in the abstract⁴² and can be adequately addressed with an AEC test.⁴³

IV. THE EU COURTS’ CASE-LAW AND THE COMMISSION’S DUTY TO APPLY THE GUIDANCE PAPER AEC TEST IN LOYALTY REBATES CASES

CJEU precedent recognises that ‘soft law’ instruments adopted by the Commission have “self-binding effects” which limit its discretion in the day-to-day enforcement of the antitrust prohibitions.⁴⁴ In a book, Oana Stefan has tracked the cases where the EU courts held that the

paragraph 52 that the Guidance paper is not binding on national courts and agencies: “*administrative practice followed by the Commission is not binding on national competition authorities and courts*”. What this implies is well-known from European lawyers. In *Pfleiderer* and *Expedia*, the Court had already held that Commission notices were “*not binding on Member States*”. Case C-360/09, *Pfleiderer* [2011] ECR I-5161, paragraph 21; Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*, paragraph 29.

³⁸ Case C-23/14, *supra* at paragraph 58: “*that conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC*”.

³⁹ Case C-23/14, *supra* at paragraph 61.

⁴⁰ Case C-23/14, *supra* at paragraph 27.

⁴¹ C-549/10 P, *supra* note ____.

⁴² The Court itself explicitly recognizes this, when it distinguishes between formal loyalty rebates where there is an “*obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies*” and which can be subject to the inhospitality tradition under paragraph 27 and *de facto* loyalty rebates, for which an exclusivity effect cannot be presumed. See Case C-23/14, *supra* at paragraph 28. For *de facto* loyalty rebates, an assessment of “*all the circumstances*” is requested. See Case C-23/14, *supra* at paragraph 29. I am grateful to Vincent Verouden who brought this important point to my attention.

⁴³ As is well known indeed, if a dominant firm A tells X that it will get a rebate of 100€ if it purchases exclusively from it, it cannot be assumed that X will procure solely from A. It depends on whether alternative suppliers (B, C, D, etc.) can too give a 100€ rebate. Similarly, if A tells X that it will get a rebate of 0,5€ per unit above 80% of its requirements; of 1€ per unit above 90%; and of 1,5€ per unit if it buys 100%, it cannot be conjectured that X will concentrate all or most of its purchases with A (or procure with B, C, D, etc.).

⁴⁴ For a complete review and use of the expression, see O. Stefan, *Soft Law in Court – Competition Law, State Aid and the Court of Justice of The European Union*, Kluwer, 2013, in particular Chapter 6; N. Petit and M. Rato, “From Hard to Soft Enforcement of EC Competition Law - A Bestiary of Sunshine Enforcement

Commission was bound by ‘soft law’ instruments. They cover substantive, punitive and procedural instruments as diverse as the Communication on Market Definition,⁴⁵ the Notice on turnover calculation in merger cases,⁴⁶ the Notice on procedural alignment,⁴⁷ and the Guidelines on Fines,⁴⁸ amongst others. Against this background, there should be little hesitation that the Commission is bound by the Guidance Paper in general, and thus also by the AEC test outlined at paragraphs 23 to 27 and 37 to 39 of the Guidance Paper.

Notwithstanding this, doubts have been cast in relation to the binding nature on the Commission of the Guidance Paper’s AEC test. The main argument against the binding effect of the Guidance Paper is built on a two steps logic, which must be disentangled. At its heart, the argument is based on the text of the Guidance Paper, which states that it formulates enforcement “*priorities*”,⁴⁹ whilst at the same time disclaiming that it “*is not intended to constitute a statement of the law*”.⁵⁰ In his *Intel* paper, Wils explains that:

“The Priorities Paper clearly states that it is not meant to provide a test for assessing whether or not exclusionary conduct violates Article 102 TFEU (legality test), but only a test to be used by the Commission to determine, in the context of its priority setting, whether or not a case would be a priority case (prioritisation test)”.⁵¹

In turn, the argument – which is often implicit in form – seems to be that even if the Commission makes use of its broad discretion to publish precise guidance on its prioritisation policy, it must remain on a case by case basis able to depart from its own guidance. Wils, in a 2011 paper on prioritisation in competition enforcement, came close to this proposition, suggesting that the Commission could freely depart from the Guidance Paper in each case subject to its scrutiny:

“Because the Commission cannot regard as excluded in principle from its purview certain situations which come under its task of enforcing Articles 101 and 102 TFEU, such guidance must not be treated as rules to be applied automatically, but must allow consideration of the merits of each case”.⁵²

This intellectual construct fails, however, for two self-evident, and related, reasons.

First, it must be recalled that a general principle of EU (and of international) law is that the denomination of an act is not decisive with regard to the determination of its legal effects. As

Instruments”, in C. Gheur and N. Petit (Eds.), *Alternative Enforcement Techniques in EC Competition Law*, Bruylant (2008).

⁴⁵ GC, T-210/01, *General Electric Company v Commission*, [2005] ECR II-5575.

⁴⁶ GC, T-417/05, R *Endesa v Commission* [2005] ECR II-18.

⁴⁷ GC, T-374/00, *Verband der freien Rohrwerke and others v Commission* [2003] E.C.R. II-2275.

⁴⁸ O. Stefan, *supra* note ___ and the case law cited.

⁴⁹ As suggested in its title and at paragraph 2.

⁵⁰ As expressed at paragraph 3.

⁵¹ Wils, text accompanying notes 26 and 27. The author hammers the point on several occasions: “*the Priorities Paper itself clearly states that the test set out in it is not intended to constitute a statement of the law (legality test), but is merely to be used for prioritisation purposes (prioritisation test)*”. See also at notes 125 and 141.

⁵² W. P. J. Wils, “Discretion and Prioritisation in Public Antitrust Enforcement”, *World Competition*, Volume 34, No. 3, September 2011.

is well known, “*the choice of form cannot alter the nature of a measure*”,⁵³ and this applies equally to ‘soft law’ instruments.⁵⁴ The various disclaimers and prioritisation language used in the Guidance Paper cannot be a pretext to dispense with an inquiry into its content, which is a prerequisite to understand its effects.⁵⁵ As noted by Scott:

“As disclaimers increasingly included in the text of guidance suggest these measures are non-binding and operate without prejudice to the interpretative autonomy and authority of the European Court. However, non-binding should not be equated with an absence of (legal) effects and careful, contextual analysis is required to assess and evaluate their nature and extent”.⁵⁶

Second, ‘soft law’ instruments adopted by the EU institutions do not – and cannot possibly – prescribe rules of “*law*” with general binding effects, as this would violate Article 288 TFEU (and the procedures for the adoption of secondary legislation).⁵⁷ Recalling that the Guidance Paper is not a statement of the law and arguing that it does not convey a “*test of legality*” is thus pushing an open door.⁵⁸ And this moot point obscures a somewhat more important point on the nature of ‘soft law’ instruments, which was first vindicated in the competition field in the *Dansk Rørindustri* case. Here, the Court explained, in relation to Commission Guidelines, that “*although those measures 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 in an individual case* (emphasis added)”.⁵⁹ As Stefan notes, this principle is nothing new and originates from the case-law dealing with staff regulations.⁶⁰ Its underlying rationale includes the principles of equal treatment, legitimate expectations, and estoppel.⁶¹

⁵³ CJEU, 147/83, *Binderer v Commission* [1985] ECR 257 at paragraph 11. See also, in international law, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports 1994, p. 6.

⁵⁴ CJEU, 322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407.

⁵⁵ See, in the sense of this argument, P. Nihoul, “The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?”, *Journal of European Competition Law & Practice* (2014) 5 (8): 521-530: “*But one should not be naïve. A realistic interpretation would be to consider that, through the Guidance paper, the Commission was willing to bring European competition policy closer to economic theories currently dominating the debates in the USA*”.

⁵⁶ J. Scott, “In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law” (2011) *Common Market Law Review* 48, 329 (noting again: “*while it is accurate to claim that guidance may never detract from or narrow the scope of a binding provision laid down in law, its existence may operate to shape the Commission’s approach to the enforcement of EU law. The underlying legal obligation remains unchanged, but the perception and practice of one of the primary agents of enforcement may be altered in profound and consequential ways*”). The author in turn laments that the Union courts refuse to consider such guidance to be judicially contestable, despite their practical effects on the administration and third parties. Guidance thus eschews judicial review on grounds of inadmissibility.

⁵⁷ The Commission Guidelines do not (and cannot) prescribe legal rules, but describe what the Commission believes the legal rules are.

⁵⁸ True that the point may not be that obvious, given that the Guidance Paper appears on the Commission website under a heading “*Legislation in force*”, see <http://ec.europa.eu/competition/antitrust/art82/> consulted on 10 November 2015.

⁵⁹ 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* [2005] ECR I-5425, paragraph 209.

⁶⁰ O. Stefan, *supra* note ____ p. 139.

⁶¹ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *supra* note ____, paragraph 211: “*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*

There is no compelling reason – and, to our knowledge, no such reason has been advanced – to consider that the Guidance Paper AEC test does not articulate a classic “*rule of practice*” which fetters the margin of discretion enjoyed by the Commission.⁶² To the contrary, the Press Release adopted on the day of initial publication of the Guidance Paper expressly embraced the language of a “*rule of practice*”, noting that “*The Commission will fully apply the approach set out above to future cases*”.⁶³

Even more importantly, the fact that the Guidance Paper concerns prioritisation issues is irrelevant in this assessment. If the Commission affirms a given rule of practice in relation to priority setting, then it willingly narrows the range of tools available to it to select a case – the very tools that the Court talked about in its ruling in *Post Danmark II* (“*tool amongst others*”).⁶⁴ The upshot of this is that the Commission should be deemed, in positive law, to be under a duty to apply the chosen Guidance Paper AEC tool prior to deciding whether or not to pursue a pricing abuse.

Granted, some flexibility exists. In *Dansk Rørindustri* and subsequent case-law, the Court acknowledged that the binding effect of rules of practice on the Commission is not absolute, and it tolerated a certain margin of discretion. The Commission may exceptionally depart from a rule of practice, but it is bound to give reasons and the Court will verify if they are justified and supported by sufficient legal reasoning,⁶⁵ and if those reasons are in line with legitimate expectations, equal treatment, foreseeability and legal certainty.⁶⁶ In the Guidance Paper, the Commission has, for instance, reserved the possibility to depart from the AEC test if there is proof that “*a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure*”.⁶⁷ In addition, in *Post Danmark II*, the CJEU explained that Commission recourse to the AEC test was of “*no relevance*” in legacy markets where the dominant firm has a “*very large market share*” and “*structural advantages*” conferred, inter

cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations”.

⁶² Case C-23/14, Opinion of Advocate General Kokott under *Post Danmark II*, *supra* note ____, paragraph 59 which employs the expression “*as a rule*” seems to support this interpretation. She writes that “*the Commission undertook to carry out, as a rule, an AEC test in connection with price-based exclusionary conduct*”.

⁶³ Commission Press Release, IP/08/1877, Brussels, 3rd December 2008, Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings.

⁶⁴ All the more so given that the Guidance Paper does not enshrine priority *targets* (e.g. practice or sector) but merely acts as a prioritisation device.

⁶⁵ O. Stefan, *supra* note ____ p. 187. Note also that if the Commission wants to amend the AEC test, it cannot do this by individual decisions, *see* p. 173.

⁶⁶ Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *supra* note ____. See also, C-226/11, *supra* note ____ paragraph 28 in relation to the De Minimis Notice which is quite comparable to the Guidance Paper in that it describes, to some extent, non-priority cases (“*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, in particular the principles of equal treatment and the protection of legitimate expectations*”).

⁶⁷ Guidance Paper, *supra* at paragraph 24. This hypothesis has been confirmed by the CJEU in *Post Danmark II*, *see* Case C-23/14, *supra* at paragraph 60.

alia, by a “*statutory monopoly*”.⁶⁸ Outside of those circumstances, the Commission is bound to apply the Guidance Paper’s AEC test.

We certainly acknowledge that the implication that the Commission can, in principle, not avoid applying an AEC test in loyalty rebates cases may be liable to consume a large amount of resources at early stages of certain proceedings.⁶⁹ But this is the inescapable consequence of the combination of the abovementioned case-law with the prioritisation language contained in the Guidance Paper. Recognising that the AEC test is a standard of antitrust liability, instead of a prioritisation test, would have likely proven more efficient from a resource standpoint, because the resource intensive AEC test would only be applied to a subset of cases which have been deemed to merit further antitrust scrutiny, and not to all the cases that reach the docket of the competition agency.

Moreover, we note rather ironically that if the reading of the Guidance Paper AEC test as a prioritisation instrument is right, then it makes it immune to any future pronouncement that the EU courts may make on the legality test that applies to loyalty rebates.⁷⁰ In particular, it can be argued that even if the CJEU was ever to affirm a stricter test of liability in the forthcoming *Intel* appeal, this would not, and could not, have any possible effect on the applicability and validity of the AEC prioritisation test.⁷¹

V. CONCLUSION

In positive law, the Guidance Paper AEC test remains unscathed by *Intel v Commission* and *Post Danmark II*. Instead, *Post Danmark II* has confirmed that the Guidance Paper AEC’s test is a valid option in loyalty rebates cases dealt with by the Commission. In other words, this means that the Commission can set for itself stricter standards than those found in the Article 102 TFEU case-law.⁷² Moreover, this finding, coupled with the traditional case-law

⁶⁸ See Case C-23/14, *supra* at paragraph 59. Note that this does not seem confined to loyalty rebates. That idea had already appeared before in Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-00527, §45.

⁶⁹ Because in some cases, the calculations necessary to apply the AEC test are rather simple. See L. Peepkorn, *supra* ____.

⁷⁰ Some scholars have made the point that the Guidance Paper in fact enshrines “*substantive guidelines*”. And given that the substantive tests of liability herein affirmed go beyond the case-law, the Commission would be under the obligation to withdraw the Guidance Paper. See L. Lovdahl Gormsen, “Why the European Commission’s enforcement priorities on article 82 EC should be withdrawn”, (2010) 31(2) *The European Competition Law Review*, 45-55: “As it stands, the Commission is acting outside its remit by going beyond the law set by the Community Courts by means of soft law. Thus, it is respectfully suggested that the Commission withdraws the Guidance Paper”. See *contra*, N. Petit, “From formalism to effects ...” *supra* ____.

⁷¹ In proceedings before the EU Commission, of course.

⁷² In the latest edition of their book, Whish and Bailey note that an interesting question is what the legal position would be if the Commission were to refuse to consider a complaint about conduct that clearly infringes Article 102 TFEU according to the case law of the EU courts on the basis that it does not comply with the Guidance Paper. See R. Whish and D. Bailey, *Competition Law*, 2015, Oxford University Press, p.187 footnote 17. In our opinion, the Commission can perfectly do this, much as it can decide to shelve complaints related to vertical restraints, and prefer to focus on hardcore horizontal cartels. All the more so in a world where there is a wealth of national venues to bring competition cases, and where remedies for such obvious cases will be easily administered by national agencies and courts without much error risks. In addition, the Commission’s focus on the cases with the greatest potential of anticompetitive foreclosure and consumer harm does not imply any violation of the case law, because any suspicion of abuse under the sophisticated detailed effects-based analysis would, a fortiori, imply a similar suspicion of abuse under a summary forms-based approach. See N. Petit, *supra* ____.

on the self-binding effect of soft law instruments, implies that the Commission is, in positive law, under a duty to apply the AEC test to all price-based abuses, including loyalty rebates cases, opened since the adoption of this document. More generally, the same self-binding effect should apply to the other “*rules of practice*” found in the Guidance Paper, such as the requirement to establish anticompetitive foreclosure and consumer harm in all exclusionary conduct cases.⁷³ With all this, if the Commission wants to keep the ability to discretionarily depart from those rules of practice, its sole exit option is a bold (and complex) one: officially withdrawing its Guidance Paper. What does not kill you makes you stronger...

*

* *

⁷³ Guidance Paper, *supra* at paragraph 19 and following.