Specialeafhandling:

*Exclusivity rebates and Article 102 TFEU: Towards an effects-based approach to the assessment of exclusivity rebates after the CJEU’s judgment in Intel?*

**Fagområde:** JURA

**Problemformulering:**

A forms-based approach and trichotomy of rebates in case law leads to inconsistent legal treatment of exclusivity rebates and price-based exclusionary conduct in the context of Article 102 TFEU. Does a shift towards an effects-based approach address this inconsistency and to what extent such approach is reflected on Intel II?

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Summary

Historically the EU Courts have adopted a forms-based approach to the assessment of rebates in the context of Article 102 TFEU that led to characterization of some categories of rebates such as quantity rebates as presumptively lawful and others such as exclusivity rebates as presumptively unlawful. Such approach has resulted not only in an inconsistent treatment of exclusivity rebates in relation to other rebates with analogous effects on the market but also in an inconsistent application of legal tests to price-based exclusionary conduct. This thesis will examine the shortcomings of the forms-based approach, it will argue in favour of the necessity of a shift towards an effects-based approach to the legal treatment of exclusivity rebates and explain how the above inconsistencies may be addressed through such shift. Subsequently, the thesis will attempt to articulate the above arguments on the contribution of the effects-based approach to consistency in a more practical context though a detailed analysis of the history of the Intel case until the recent judgment of the CJEU in Intel II. Firstly, it will be shown whether the Commission’s Decision on the Intel case endorsed an effects-based approach and to what extent the General Court adhered to a forms-based approach. Secondly, a critical analysis of the General Court’s findings will be provided in the light of AG Wahl’s criticism on Intel I. Finally, the thesis will elaborate upon the findings of the CJEU in Intel II and highlight their significance towards bringing clarity and consistency in the legal treatment of exclusivity rebates and price-based exclusionary conduct under Article 102 TFEU. Ultimately, the thesis will argue that the shift towards an effects-based approach to the legal treatment of exclusivity rebates contributes to a consistent assessment of exclusivity rebates and price-based exclusionary conduct in the context of Article 102 TFEU and that both such shift and contribution are clearly reflected in Intel II that marks the beginning of a new era in the assessment of exclusivity rebates in the context of Article 102 TFEU.
# List of Abbreviations

AAC: Average Avoidable Cost  
AEC: As Efficient Competitor  
AG: Advocate General  
AMD: Advanced Micro Devices  
ATC: Average Total Cost  
AVC: Average Variable Cost  
CAP: Customer Authorized Price  
CJEU: Court of Justice of the European Union  
CPU: Central Processing Unit  
DG: Directorate General  
EC: European Commission  
ECAP: Exception to Customer Authorized Price  
EMEA: Europe, the Middle East and Africa  
EU: European Union  
GC: General Court  
GEM: Government, Educational and Medical  
HLR: Hoffman La Roche  
HP: Hewlett Packard  
HPA: Hewlett Packard Agreement  
LCAP: Lump Sum Customer Authorized Price  
LRAIC: Long Run Average Incremental Cost
MDF: Market Development Funds

MSH: Media Saturn Holdings

OEM: Original Equipment Manufacturer

PC: Personal Computer

R&D: Research and Development

SMB: Small and Medium Business

TFEU: Treaty of the Functioning of the European Union
CHAPTER I

1. Introduction

Historically, the case law on abuse of dominance under Article 102 TFEU was taking into account two significant parameters: a) the determination of dominance and b) the assessment of the form or nature of the conduct. However, once dominance was established and the dominant undertaking’s conduct presented pre-determined characteristics, the EU Courts seemed disinclined to further assess the likely effects of the dominant undertaking’s conduct on the competitive process and consumer welfare towards a finding of an abuse. To the contrary, the EU Courts were more concerned with the form of the conduct which was rendering it in the absence of an objective justification unlawful. It has been argued that this disinclination on the part of the EU Courts might have had a chilling effect on competition by deterring procompetitive conduct. The aforementioned formalistic approach has been followed in case law on

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1 Article 102 of the Treaty on the Functioning of the European Union (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C-326, Volume 55, 26 October 2012)


3 Ibid


5 See for instance, Case C-311/84 Centre belged’études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) ECLI:EU:C:1985:394, para. 27

rebate schemes\(^7\) and resulted in an inconsistent legal treatment of rebates through characterization of certain type of rebates, namely exclusivity (or fidelity or loyalty) rebates, as presumptively abusive\(^8\) and application of different legal tests between exclusivity rebates and other pricing practices in the context of Article 102 TFEU.

Against this background, in 2009 in its Communication titled ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ (the “Guidance Paper”)\(^9\) the European Commission (EC or Commission) attempted to deviate from the abovementioned formalistic approach and adopt an economic approach\(^10\) to exclusionary conduct\(^11\) focusing primarily on the anticompetitive foreclosure effects the conduct of a dominant undertaking was likely to produce.\(^12\) Whereas the Commission’s modernized approach in its Guidance Paper was not entirely followed by the General Court (GC) in its judgment in Intel I,\(^13\) it is more reflected on the Court of Justice of the European Union’s (CJEU) recent judgment in Intel II\(^14\) which, as it will be argued, signalizes a spark of positive change in the assessment of exclusivity rebates under Article 102 TFEU.

In the course of this thesis, the primary types of rebates with their specific characteristics and their economic background consisting of anticompetitive effects and procompetitive justifications will be illustrated.

\(^7\)Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, ECLI:EU:C:1979:36 (‘HLR’), paras. 89-90

\(^8\)HLR, para. 90


\(^12\)Guidance Paper, paras. 5, 6, 20, 23 and 35-45

\(^13\)Case T-286/09, Intel Corp. v European Commission, ECLI:EU:T:2014:547 (‘Intel I’)

\(^14\)Case C-413/14 P, Intel Corp. v European Commission, ECLI:EU:C:2017:632 (‘Intel II’)
Furthermore, the legal treatment of rebates under Article 102 TFEU and in case law will be addressed and analysed. Subsequently, the thesis will elaborate on the problems devolving from the formalistic approach to the legal treatment of rebates, the reason why a shift to an effects-based approach might seem necessary and how this approach is reflected on the Commission’s enforcement priorities. The main part of the thesis will focus on the history of Intel case, from the Commission Decision\textsuperscript{15} and the judgment of the GC until the judgment of the CJEU on Intel II. Throughout this timeline, the main findings of the GC will be critically analysed in the light of Advocate General (AG) Wahls opinion\textsuperscript{16} and it will be further seen if and how the CJEU judgment on Intel II properly addresses some missing points of the GC, endorses an effects-based approach and thereby brings clarity and contributes to consistency in the antitrust treatment of exclusivity rebates and price-based exclusionary conduct in the context of Article 102 TFEU. Finally, important findings will be summed up and an answer to the research question will be provided.

1.1 Research Question

The thesis will provide an answer to the following question:

\textit{Does a shift from a forms-based approach towards an effects-based approach to the legal treatment of exclusivity rebates contribute to the consistent assessment of exclusivity rebates and price-based exclusionary conduct in the context of Article 102 TFEU and how is this reflected in the CJEU’s judgment on Intel II?}

1.2 Research Method

A doctrinal legal research method will be utilized in this thesis. The relevant legislation and case law of the GC and CJEU in regard to the legal


\textsuperscript{16}Opinion of AG Wahl in case C-413/14 P, Intel v Commission, EU:C:2016:788
treatment of rebate schemes will be identified and analyzed. Such analysis will be combined with robust academic literature reflecting upon the alleged anticompetitive effects of rebates and their procompetitive justifications, the current legal treatment of rebates and, in particular, exclusivity rebates under Article 102 TFEU and the shortcomings and criticisms of the current approach to the legal treatment of exclusivity rebates followed by the EU Courts. What is more, the modernization of the current approach in the light of EC’s Guidance Paper will be highlighted. Finally, it will be shown through a detailed examination of the Intel case until the recent landmark judgment of the CJEU on Intel II whether any future developments in the treatment of exclusivity rebates can be predicted.

2. Rebates: Preliminary remarks

2.1 Primary types of rebates

There are different types of rebate schemes that take various forms which may be determined by features such as the type of threshold (fidelity and target rebates or quantity and market share rebates), the scope of application (incremental and retroactive rebates) and the scope of products (single item and aggregated rebates).¹⁷

The simplest form of rebates is volume- or quantity-based rebates. In practical terms, those rebates reward a customer with a discount on the price of the product for purchasing a quantity of products that exceed a certain threshold.¹⁸

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Another form that is often observed is a scheme of sales target rebate. Such a scheme provides for discounts to be given to customers the purchases of who exceed a sales growth target in a certain period when compared to the amount of purchases made the previous year.\textsuperscript{19} Target rebates can be further distinguished on the basis of scope of application between retroactive or incremental,\textsuperscript{20} a distinction which is however applicable to all types of rebates. Retroactive target rebates are given to customers once their purchases exceed the target not only on the purchases made above the target but also on all purchases made (i.e if the target is 100 units and the customer buys 102 units, he will get the retroactive rebate on all the 102 units purchased). Incremental target rebates on the other hand are rebates given only on the purchases exceeding the target (i.e on the previous example the incremental rebate will be given only on the purchase of the 2 extra units purchased above the target). Furthermore, target rebates can be individualized to customers to which different target levels apply and/or different discounts are given or standardized where the same target and amount of rebate applies to all customers.\textsuperscript{21}

What is more, rebate schemes can be single item or aggregated (or multi-product or bundled).\textsuperscript{22} Single item rebates apply to the units of a single product purchased by a customer\textsuperscript{23} whereas aggregated rebates are given on aggregated purchases of products that belong in different product markets.\textsuperscript{24} The latter function in the same way as a tie (i.e between blidgets and widgets) in the sense that they make the discount on one product (the tied product) conditional upon the purchase of another product (the tying product) for which the customer does not depend on the supplier but is nevertheless obliged to buy in order to get the discount.

\textsuperscript{19} D. Ridyard, supra n. 18, p.289
\textsuperscript{21} Ibid
\textsuperscript{22} Ibid
\textsuperscript{23} D. Sama, supra n. 17, p.2
\textsuperscript{24} A. Jones and B. Sufrin, p. 455
Finally, a significant type of rebates is the loyalty (or fidelity or exclusivity) rebates. In general, the form of loyalty rebates can vary from market share discounts (when the threshold of purchases set by the supplier is defined by a percentage of the customer’s purchasing requirements) and discounts based on yearly change in sales to discounts conditional upon exclusivity. Loyalty rebates are given to a customer in return for exclusivity which means that the customer is given the rebate on the condition to buy all or almost all of its requirements of a product solely from one supplier. Some authors have further subdivided loyalty rebates between rebates given due to an exclusivity obligation and rebates given due to an exclusivity option. Exclusivity obligations are observed where for example A commits contractually to buying all or most of its product requirements from dominant firm B in return for a benefit whereas exclusivity options are observed where, if A buys all or most of its product requirements from B, A will receive a benefit (financial or non-financial). Whereas the exclusivity obligation is presumed to generate exclusivity since it can be enforced by the dominant undertaking, the exclusivity option does not since the customer has the option to refrain from getting the rebate by switching supplier.

2.2 Anticompetitive effects and procompetitive justifications

In competition law, rebates have been considered as refunds granted by undertakings to customers retrospectively as a reward for a particular form of purchasing behaviour. The term rebate has been used synonymously in competition law with the term discount which is

25 D. Spector ‘Loyalty Rebates: An assessment of competition law concerns and the rule of reason’ (2005), No. 514 CEPREMAP Working Papers (Docweb), p. 92. See also D. Sama, supra note 16, p.3
26 D. Spector, supra npte 24, p. 92
27 A. Jones and B. Sufrin, supra n. 20, p.455
28 Ibid
30 Ibid
31 Ibid.
32 A. Jones and B. Sufrin, supra n. 20, p.455
technically a deduction from a price list.\textsuperscript{33} In principle, the granting of rebates is a common business practice.\textsuperscript{34} Through competition on prices, undertakings strive daily not only to attract new customers but also keep the existing ones loyal to them. This behavior results predominantly in better prices for customers while at the same time creates incentives for more innovative products in the market that better ensure consumers’ welfare. The latter happens because undertakings that cannot outcompete their rivals by offering lower prices or more attractive rebate schemes are forced to either offer more innovative products and make their customers willing to pay even a higher price for a better product or exit the market.

However, despite the fact that rebate and discount schemes are common business practices, they can be structured in a way that generates anti-competitive effects and significantly forecloses the market, especially, when they are offered by dominant undertakings with substantial market power over a certain part of the customer’s demand.\textsuperscript{35} Competitors may be precluded from demand-related efficiencies such as economies of scale and network effects due to the grant of exclusionary rebates.\textsuperscript{36} Yet such effects can be counterbalanced by procompetitive justifications and efficiency gains.

In particular, the retroactive application of a rebate can create switching costs.\textsuperscript{37} The longer the reference period during which the rebate applies, the higher the switching costs and, thus, the more probable the foreclosure effects.\textsuperscript{38} For instance, a loyalty retroactive rebate given in the form of lump-sum payments can be designed in a way that prevents a customer to switch supplier and a new supplier to enter the market by concentrating the entire value of purchases on the decision to buy

\begin{flushleft}
\textsuperscript{33} A. Jones and B. Sufrin, supra n. 20, p.455
\textsuperscript{34} Ibid
\textsuperscript{36} R. Nazinini,’The foundations of European Union Competition Law: The Objectives and Principles of Article 102’, (Oxford Scholarship Online: January 2012), p.239
\textsuperscript{38} Ibid
\end{flushleft}
marginal units. In practical terms, such retroactive rebate scheme could provide that, if a customer buys above 100 purchasing units (threshold), he will get a 10% discount on all units purchased below and above the threshold. In such case, a dominant undertaking would have an incentive and indeed the possibility to decrease the price of the last purchasing unit before the threshold is reached to a very low or even negative level thereby making the rebate produce a ‘suction effect’ by attracting the customer to buy incremental units in order to benefit from the retroactive rebate on all units purchased. From a demand point of view, the structure of such scheme would make a customer that has purchased 99 units unwilling to shift his demand for the last unit to a new supplier because by doing so he would sacrifice the 10% discount on all units purchased below and above the threshold. From a supply point of view, it would be particularly difficult for a new supplier with small market share to match that very low or even negative price of the last unit and additionally compensate the customer for the loss of the rebate on the units purchased both below and above the threshold. Therefore, such rebate scheme constitutes a clear barrier for a new market entrant, in particular, when it is offered by a dominant undertaking with a great reputation and full line of products.

Economically speaking rebates are a form of price discrimination as they allow for charging of different prices for different units of a customer’s demand. Hans Zenger alleges that a rebate granted for purchase of units above a certain threshold could be interpreted as a surcharge on purchases below that threshold and, thus, he argues that it has been suggested by some authors that rebates tend to lead to higher rather than

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41 G. Faella, supra n.35, p.377-378
42 C. Erutku, p. 479
lower prices. In addition, the uncertainty on the grant of a rebate until the end of the reference period prevents customers from comparing between competing offers. Besides the aforementioned exploitative effects, rebates may cause exclusionary effects and force competitors to leave the market. A loyalty rebate can create incentives for exclusivity in relationships with distributors and thus result in lessening in-store interbrand competition. Moreover, foreclosure effects are likely to be generated because rebates are capable of tying customers by discouraging them from switching their demand to an otherwise more efficient supplier than the dominant undertaking. An example where price discrimination is apparent and a tying effect is triggered is the case of aggregated or multi-product or bundled rebates. A bundled rebate can be seen as a price discrimination between the customers who comply with the bundling condition and those who do not. As Einer Elhauge observes when the unbundled price of the product for which an undertaking has market power is higher than the "but-for" price and a substantial market share is foreclosed, then the bundled rebate has the same anti-competitive foreclosure effects as tying.

However, against that background of observations and concerns, Hans Zenger claims that rebates constitute competition on the merits. Predominantly, dominant undertakings grant rebates in order to compete on prices legitimately and realize various efficiencies. Discounts and rebates have been considered by the EC as ‘instruments of healthy and legitimate price competition’. Unlike uniform pricing where undertakings...

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45 G. Faella, supra n. 35, p.380
46 Ibid
47 A. Jones and B. Sufrin, supra n. 20, p.455
48 E. Elhauge, p. 402
49 But-for price is the price that would have been charged "but-for" the bundling
50 E. Elhauge, p. 403
51 H. Zenger, supra n. 43, p. 720
52 D. Gerardin, supra n. 17, p. 3
compete only for ‘marginal customers’, rebates seen as a form of price discrimination may intensify competition by allowing undertakings to compete for all customers - or 'to extract consumer surplus more efficiently than uniform pricing'\textsuperscript{54} including those with strong brand loyalty to another competitor.\textsuperscript{55} Furthermore, efficient pricing such as charging of higher prices to certain customer segments with low demand elasticity and vice versa\textsuperscript{56} may lead to long term incentives for investments in R&D with sufficient returns for the undertakings.\textsuperscript{57} Hence, the exploitative effects and the impact on consumer welfare in case of price discrimination, including granting of rebates, highly depend on the features of consumer demand.\textsuperscript{58}

In the case of bundling strategies such as offering of bundled rebates, those rebates boost competition by enabling dominant undertakings to offer better products in a more cost effective way\textsuperscript{59} but they may also soften it by marginalizing competitors and forcing them to leave the market. In the latter case however the foreclosure effect cannot be confirmed without an analysis of the market circumstances and of the likelihood that new entrants and existing competitors are indeed excluded to the detriment of final consumers.\textsuperscript{60} In the light of the previous observations, Penelope Papandropoulos\textsuperscript{61} suggests that price discrimination has non-strategic justifications and thus it should not be subject to a per se ban, it does not have exclusionary purposes as such.


\textsuperscript{56} Id, footnotes 12 and 13. This way of pricing is using Ramsey principles. Ramsey pricing minimizes the welfare loss implied by pricing above marginal costs.

\textsuperscript{57} P. Papandropoulos, p.36

\textsuperscript{58} Ibid

\textsuperscript{59} Ibid

\textsuperscript{60} Id, p.37

\textsuperscript{61}Dr. Penelope Papandropoulos is Member of the Chief Competition Economist’s team in the European Commission – Directorate General for Competition
and, since it does not cause in itself an exclusionary effect, its alleged foreclosure effect when it forms part of an exclusionary pricing strategy should be shown through an effects-based approach of the pricing strategy without considering it as a separate offense.

3. Rebates under Article 102 TFEU

3.1 Assessment of rebates under Article 102 TFEU

Article 102 TFEU provides that:

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature

\footnote{See to that effect D. Spector, ‘The Strategic Uses of Price Discrimination’, supra n. 54, p.187-205}

\footnote{P. Papandropoulos, supra n. 55, p. 36}
or according to commercial usage, have no connection with the subject of such contracts.

In order an abuse to be established under Article 102 TFEU, four requirements have to be met cumulatively: 1) The abuse shall be caused by an undertaking, 2) this undertaking must be in a dominant position, 3) the dominant position must be held within the internal market or a substantial part of it and 4) the abuse shall affect trade between Member States.

In EU competition law, the mere holding of a dominant position in the market is not illegal as such but ‘the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’. 64

Whereas Article 101 TFEU focuses on the prohibition of agreements that are incompatible with the internal market 65, Article 102 TFEU is concerned with undertakings which hold a dominant position in the market. Therefore, the first significant step towards the finding of an abuse is the establishment of dominance. 66 This step includes first the definition of the relevant market 67 and subsequently the estimation of the market share of the undertaking concerned within that relevant market. 68 Nevertheless, defining the relevant market is arguably a very daunting task. 69

In order to assess whether a rebate scheme offered by a dominant undertaking infringes Article 102 TFEU, both a definition of the relevant market and identification of market power as a first step are required.

64 Case C-322/81, Nederlandsche Banden-Industrie-Michelin v Commission, 1983, ECLI:EU:C:1983:313 (‘Michelin I’), para. 57
65 Article 101 of the Treaty of the Functioning of the European Union
67 Id, para 32
68 A. Jones and B. Sufrin, supra n.20, p. 304
69 Id, p. 304
However, Article 102 TFEU does not provide a detailed workable definition of dominance or abuse\textsuperscript{70} that enables undertakings to realize whether their conduct is prima facie abusive but rather refers to a non-exhaustive list of conduct that is generally presumed unlawful.\textsuperscript{71} Yet, such definitions can be found in case law of the CJEU.

In \textit{United Brands}\textsuperscript{72} the CJEU defined dominance as:

\textquoteleft(…) a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.\textsuperscript{73}

\textit{In Hoffman La Roche} the CJEU further added to the above definition noting that:

\textquoteleft An undertaking which has a very large market share and holds it for some time (…) is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.\textsuperscript{74}

As regards the concept of abuse, in \textit{HLR} the CJEU established that:

\textquoteleft The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and


\textsuperscript{71} E. Arrezo, p.24

\textsuperscript{72} Case C-27/76 United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECLI:EC:C:1978:22

\textsuperscript{73} Id, para. 65

\textsuperscript{74} HLR, supra n. 7, para. 41
which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’.  

In accordance with the above definition of abuse by the CJEU, a second step towards finding of an abuse under Article 102 TFEU that equally applies in the case of rebates schemes offered by dominant undertakings is the examination of the capability of the conduct to foreclose competitors. According to the Commission, this capability can be established not only through an examination of the nature and form of the conduct but also through an examination of anti-competitive foreclosure effects in the specific market context.

The Commission is of the opinion that the anticompetitive foreclosure effects of the conduct shall be established not only through an analysis of the nature and form of the conduct but also through a detailed examination of various circumstances such as market coverage, selective foreclosure of customers, existence of network effects and economies of scale and scope and degree of dominance. In the case of rebates, which the Commission clearly places in the category of price-based exclusionary conduct, besides and in addition to the above assessment of the form and nature of the conduct and various circumstances, an “as efficient” competitor analysis by mean of an AEC test, as it will be seen in detail in sections below, is required.

Finally, the fact that an abuse of dominant position has been found, does not mean that the dominant undertaking is left with no further options. Despite the fact that Article 102 TFEU does not contain a provision akin to Article 101 (3) under which a dominant undertaking could justify its*

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75 HLR, supra n.7, para. 89
77 Ibid
78 United Brands, supra n. 72, para. 76
79 Discussion Paper, supra n. 76, para. 73
conduct on the grounds of efficiencies generated by the impugned conduct, the case law has developed the concept of objective justification and efficiencies in Article 102 TFEU related cases under which a dominant undertaking may rebut the presumption of abuse and thus escape the application of Article 102 TFEU.\textsuperscript{80} The Commission has identified two possible objective justifications:\textsuperscript{81} a) a dominant undertaking can justify its behaviour by claiming that its conduct was necessary in the light of factors external to the dominant undertaking and the parties involved (‘objective necessity defence’)\textsuperscript{82} or b) that its conduct was a response to a competitive offer in order to minimize loss (‘meeting competition defence’).\textsuperscript{83} In addition to those objective justifications, a dominant undertaking can defend itself on the basis of efficiency gains by alleging that the efficiencies generated by its conduct outweigh its likely anti-

\textsuperscript{80} Discussion Paper, supra n. 76, para. 77
\textsuperscript{81} Id, para. 78
\textsuperscript{82} Ibid. A. Jones and B. Sufrin, p. 386-387. According to case law necessity means that the conduct of the undertaking must be necessary to protect legitimate public interest objectives such as health and safety of consumers, necessary on the basis of external factors and proportionate. To that effect see Case C-311/84 Telemarketing, supra n. 5, para. 27 and Commission Decision on Case COMP/39.525 TelekomunikacjaPolska, 22 June 2011, para. 874 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39525/39525_1916_7.pdf
\textsuperscript{83} The ‘meeting competition defence’ has been used as an objective justification from dominant undertakings in pricing cases where the prices imposed by a dominant undertaking are predatory and/or can exclude equally efficient competitors. This defence is an aspect of the ‘protecting legitimate commercial interests’ defence and attempts to justify the pricing policy of a dominant undertaking as a reaction to competition in a proportionate and reasonable way. However, the reliance upon the meeting competition defence is debatable and has been criticized in case law related to predatory pricing and margin squeeze. This case law has shown on one hand that defending own economic and commercial interests in order to meet competition may be legitimate but on the other hand there is no absolute right for a dominant undertaking to align its prices with those of its competitors and that leveraging and abusing an upstream dominance may not be legitimized by a meeting competition defence. See Alison Jones and Brenda Sufrin p. 392 and 411. See also COMP/38.784 Wanadoo Espana v. Telefonica, 4 July 2007, para. 638 and Case C-202/07 P, France Telecom SA v. CommissionECLI:EU:C:2009:214, para. 47 affirming Case T-340/03, France Telecom SA v. CommissionECLI:EU:T:2007:22, para. 178. See further in regard to protection of legitimate commercial interests defence Case C-27/76 United Brands v. Commission, supra n.72, para. 189, Case T-65/89, BPB Industries and British Gypsum, ECLI:EU:T:1993:31 para.69, Case T-83/91, Tetra Pak International SA v Commission ECLI:EU:T:1994:246, para. 147, Joined Cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge Transports SA and Dafra-Lines A/S v Commission ECLI:EU:C:2000:132,para. 107 and Case T-228/97 Irish Sugar v Commission ECLI:EU:T:1999:246, para 112
competitive effects and harm to consumers.\textsuperscript{84} The efficiency defence has been accepted by the Commission and the European Courts alike. For instance, the CJEU in \textit{PostDanmark I}\textsuperscript{85} set the conditions for acceptance of efficiency gains as part of the dominant undertaking’s defense. These conditions which are identical to the ones described in paragraph 30 of the Commission’s Guidance Paper are as follows:

- the efficiency gains likely to result from the impugned conduct shall counteract any likely negative effects on competition and consumer welfare in the affected markets,
- the efficiency gains have been, or are likely to be, brought about as a result of that conduct,
- the impugned conduct is necessary for the achievement of those gains in efficiency and
- the impugned conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.\textsuperscript{86}

The above objective justifications and efficiency defence can be used in the case of rebate schemes.

\textbf{3.2 Trichotomy of rebates in case law}

As we noted above rebates have been classified in academic literature into various categories and sub-categories. For the purpose of assessing rebates schemes under Article 102 TFEU, the European Courts have distinguished between two main categories, namely loyalty rebates and quantity rebates.\textsuperscript{87} However, under this section the focus will be on the

\textsuperscript{84}Discussion paper, supra n.76, para. 79  
\textsuperscript{85}Case C-209/10, \textit{Post Danmark A/S v konkurrencerådet}, ECLI:EU:C:2012:172, (‘Post Danmark I’)  
\textsuperscript{86} Id, 42. However, it is debatable under Post Danmark I whether efficiency is a separate defence from the objective necessity when the latter is synonymous to an objective justification. See to that effect E. Rousseva and M.Marquis, ‘\textit{Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU}’ Journal of European Competition Law & Practice, 2013, Vol. 4(1), p.49  
\textsuperscript{87} HLR, supra n. 7, para. 90
triple classification of rebates initially promulgated in *Intel I*. In case law the classification of rebates has been decisive for their assessment under Art. 102 TFEU in the sense that rebates and discount systems can be deemed in the absence of an objective justification abusive or not depending on the category they fall within. However, it will be seen under the analysis in Chapter II that the opposite view might also hold true and that such classification might be immaterial.

The first category rebates have been classified into is quantity rebates. According to the CJEU in *HLR*, quantity rebates are ‘rebates exclusively linked with the volume of purchases from the producer concerned’. This category of rebates does not generate foreclosure effects but rather reflects gains in efficiency and economies of scale. The reason for that lies in the fact that increased quantities lower the costs for the supplier who in turn passes on this cost reduction to the customer in the form of a reduced price paid for the product supplied. As the GC notes in *Michelin II*, the inherent characteristic of quantity rebates to result in proportionally higher average price reductions for customers that purchase higher volumes than others does not render such system discriminatory. The GC in *Michelin II* indicates that insofar as a quantity rebate system is based on an economically justified countervailing advantage and does not preclude customers from switching suppliers it is deemed compatible with Article 102 TFEU. The GC further suggests that

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88 Intel I, supra n. 13, paras.75-78  
89 Opinion of AG Kokott Case C-23/14 – *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, para.29  
92 Intel I, para. 75  
93 *Michelin II*, para. 58  
94 *Id*, para. 59. See also Case T-219/99, *British Airways v Commission*, supra n. 91, para. 247
a finding of abuse under Article 102 TFEU by means of granting a quantity rebate necessitates an examination of all the circumstances of the case.\textsuperscript{95} In particular, the GC examines ‘the criteria and rules governing the grant of the discount’ and investigates ‘whether, in providing an advantage not based on any economic service justifying it, the discount tends 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’.\textsuperscript{96} Consequently, quantity rebates are considered as presumptively lawful.

The second category consists of exclusivity rebates. Exclusivity rebates can be also found in case law under the terms fidelity, loyalty or exclusivity rebates. Exclusivity rebates are given to customers by dominant undertakings in return for exclusivity.\textsuperscript{97} As the CJEU states in HLR, fidelity rebates are ‘
discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position’\textsuperscript{98} It is important to note that, unlike the Commission which considers exclusivity rebates as a form of price-based exclusionary conduct,\textsuperscript{99} the CJEU in HLR treated exclusivity rebates as exclusivity agreements not only explicitly under paragraph 89 but also implicitly under paragraph 90 by stating that under exceptional circumstances such as that of Article 101 (3) TFEU fidelity rebates can be permissible.\textsuperscript{100} Such treatment is more clearly confirmed in Michelin I where the CJEU equates loyalty rebates to exclusive dealing agreements.\textsuperscript{101} The CJEU in HLR adopted a strict formalistic approach and found this type of rebates ‘incompatible with the

\textsuperscript{95} Michelin II, supra n. 90, para. 60
\textsuperscript{96} Ibid.
\textsuperscript{97} A. Jones and B. Sufrin, supra n. 20, p. 455
\textsuperscript{98} HLR, supra n, 7,para. 89. See also Michelin I, supra n.64, para. 72, Case T-228/97, Irish Sugar v Commission, para. 194, Michelin II, supra n.90, para. 56, Case C-95/04 P British Airways v Commission, supra n.90 para. 62, Tomra I, para. 14, Tomra II, supra note 90, para. 14, Intel I, para. 76, Post Danmark II, supra n. 90, para. 27
\textsuperscript{99} DG Comp Discussion Paper, supra n.76, para. 73
\textsuperscript{100} HLR, supra n.7, paras. 89-90
\textsuperscript{101} Michelin I, supra n.64, para. 72

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objective of undistorted competition within the common market" when granted by dominant undertakings. It premised its allegation on the fact that exclusivity rebates constitute a financial advantage that is not based on an economic transaction and create discrimination contrary to Article 102(c) TFEU because 'the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply." The CJEU in *HLR*, being determined to emphasize the inherent illegality of exclusivity rebates, indicated that exclusivity rebates 'are designed to remove or restrict the purchaser’s freedom to choose his sources of supply and to deny other producers access to the market." However, the CJEU in *HLR* did not make any explicit reference to a requirement for examination of all the circumstances of the case towards a finding that exclusivity rebates are abusive under Article 102 TFEU as we saw above was the case with quantity rebates. However, such requirement in the case of exclusivity agreements and loyalty rebates can be found in *Tomra I* and *Tomra II* respectively. The same requirement for an examination of all the circumstances of the case is applicable in general to pricing practices considered under Article 102 TFEU. Nonetheless, the GC in *Intel I* ascertains that 'a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case'.

The third category consists of the so called 'fidelity or loyalty-building' rebates or, according to *Intel I*, 'rebates falling within the third

102 *HLR*, supra n.7, para. 90
103 Ibid. See also *Intel I*, supra n.13, para.77
104 *HLR*, supra n.7, para. 90. See also Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission*, supra n. 83, para. 120
105 *Tomra I*, supra n.90, para. 215
106 *Tomra II*, supra n.90, paras. 71-72.
108 *Intel*, supra n.13, para.143
The concept of fidelity-building rebates has been developed in EU case law and has been considered to have analogous effects to exclusivity rebates. This category of rebates was initially observed in *Michelin I*, albeit no explicit reference to the term ‘loyalty or fidelity-building’ was made thereunder. Michelin offered to its customers a scheme of individualized sales target rebates. Those rebates were not quantity rebates. As the CJEU asserted in *Michelin I*, the rebate scheme that Michelin offered to its customers ‘*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***’. Michelin’s rebates were also not exclusivity rebates linked to an exclusive purchasing requirement neither according to the facts of the case nor according to the findings of the CJEU which held that ‘*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 judgement of 13 February 1979 in Hoffmann-La Roche***’. The distinction between fidelity and quantity rebates on the basis of their form made by the CJEU in *HLR* did not seem helpful in Michelin’s case. Therefore, in paragraph 73 in *Michelin I* the CJEU made reference to the necessity for an examination of all the circumstances of the case and investigation of various factors, as in the case of quantity rebates, towards establishment of an abuse under Article 102 TFEU. This requirement was also confirmed in *Post Danmark II*. Nevertheless, even if the CJEU in *Michelin I* departed from the strict formalistic approach of *HLR* by emphasizing the assessment of fidelity-building rebate in the

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109 Intel I, supra n.13, para. 78  
110 A. Jones and B. Sufrin, supra n. 20 p.455  
111 The term ‘fidelity-building’ was observed for first time in Case T-219/99, *British Airways v Commission*, supra n.91, para. 20  
112 Michelin I, supra n.64, p. 3741 and p. 72  
113 Id, p.3474  
114 Michelin I, supra n.64, para. 72  
115 Id, p. 3474  
116 Id, para. 72 and p. 3483  
117 Id, para. 73  
118 *Post Danmark II*, supra n.90, para. 29
light of all circumstances of the case, it underscored the anticompetitive ‘inherent effect’ of a discount system that applies in a long reference period and in that way it seems that the CJEU recurred as HLR to presumptions of abusiveness on the basis of form. In addition, the GC in British Airways, a case concerning retroactive fidelity-building reward schemes,\textsuperscript{119} did not seem to distance itself from Michelin I. The GC did neither require a concrete anticompetitive effect generated by British Airways’ s reward schemes to be demonstrated by the Commission\textsuperscript{120} nor an actual exclusionary effect on competitors to be established towards a finding of abuse of dominance under Article 102 TFEU.\textsuperscript{121}

It should be noted that before Intel I, a clear explicit distinction between exclusivity and fidelity-building rebates had not been made by the European Courts. In Intel I the GC expressly distinguished between fidelity rebates within the meaning of HLR, which named exclusivity rebates, and rebates ‘falling within the third category’.\textsuperscript{122} The GC in Intel defined the latter as ‘rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect.’\textsuperscript{123} The GC observed that these rebates can be sales target rebates in the sense that they are contingent upon the attainment of individual sales objectives.\textsuperscript{124} The GC maintained that unlike exclusivity rebates the third category does not create an obligation to the customer for exclusive purchasing by a dominant undertaking and the extent to which they can constitute an abuse is dependent upon the examination of all the circumstances of the case. Such circumstances relate to criteria and rules governing the granting of the rebate and the capability of the rebate to remove or restrict customers’ freedom in choosing suppliers, to foreclose the market and to strengthen the dominant position of the undertaking.\textsuperscript{125}

\textsuperscript{119} Case T-219/99, British Airways v Commission, supra n.91 para. 240
\textsuperscript{120} Id, para. 293.
\textsuperscript{121} Case T-219/99, British Airways v Commission, para. 297
\textsuperscript{122} Intel I, supra n.13, para. 78
\textsuperscript{123} Ibid
\textsuperscript{124} Ibid
\textsuperscript{125} Intel I, supra n.13, para. 78
For the GC in *Intel I* the necessity for an examination of all the circumstances of the case towards a finding of an abuse seems to be a decisive criterion in distinguishing between exclusivity rebates and the rebates of the third category.

It is perceived that for the EU Courts the classification and subsequent assessment of rebates on the basis of their form rather than their actual foreclosure effects on the market is of great relevance for the legal tests they apply when assessing rebates. Whereas certain types of rebates schemes will be classified as quantity and possibly escape the application of Art 102 TFEU, others such as fidelity-building or ‘rebates falling within the third category’ will necessitate a thorough examination of all circumstances of the case in their specific market context and others such as exclusivity rebates, in the absence of an objective justification, will be presumed unlawful by the European Courts. That being said, one cannot disregard the fact that such categorization lead to inconsistency in the legal treatment of exclusivity rebates in comparison to other categories of rebates and of rebates to other pricing practices mainly in regard to the requirement for examination of all the circumstances of the case towards the establishment of a foreclosure effect that will trigger the application of Article 102 TFEU.

4. Formalistic versus effects-based approach: A necessary shift?

4.1 General remarks

A considerable impediment to the application of Article 102 TFEU in a way that protects the process of competition and serves consumer welfare rather than merely protecting inefficient competitors, is the difficulty in expressing those objectives by means of administrable rules.\(^\text{126}\) Such

difficulty has led the EU Courts and the Commission to apply Art. 102 TFEU in a too formalistic manner by considering certain practices as unlawful per se and failing to demonstrate their effects in the specific market context.\textsuperscript{127}

This forms-based approach has its routes in ordoliberalism as this has been refined and instilled with more neoliberal ideas over time.\textsuperscript{128} Ordoliberal thought emanates from the so called ‘Freiburg School’ of ordoliberalism.\textsuperscript{129} ‘Freiburg School’, composed both by lawyers and economists, advocated the idea of a competitive economic system based on protection of the individual economic freedom of the market participants by endorsing a strict legal framework and conferring to the state the power to protect the competitive process.\textsuperscript{130} A main criticism to this ordoliberal system is that it disregards sound economic analysis based on empirical economic evidence or micro-economic theory and leaves less or no room for consumer welfare and economic efficiency considerations.\textsuperscript{131}

As opposed to ‘Freiburg School’, ‘Chicago School’ of thought developed in the U.S espoused a different more ‘consumer welfare-friendly’ approach that takes serious account into economic efficiency aspects.\textsuperscript{132}

\textsuperscript{127} R. Whish and D. Bailey, supra n. 126, p.209
\textsuperscript{130} M. Mackenrodt et al, supra n. 129, p.12
\textsuperscript{132} M. Mackenrodt et al, supra n. 129, p.12
School’ has influenced and contributed to anti-trust policy in the U.S by making it strictly more economic and less favorable to the idea that government intervention can correct the markets rather than the markets can do themselves.\textsuperscript{133} An effects-based approach to Article 102 TFEU seems to be closer to Chicago School given that consumer welfare is the main parameter considered in the assessment of the effects of allegedly exclusionary conduct. Nevertheless, critics of ‘Chicago School’ contend that not only it is difficult to define consumer welfare – although the concept of dynamic efficiencies has been added to this effort\textsuperscript{134} - but it is even more difficult to measure the welfare effects of a practice by means of operational administrable rules.\textsuperscript{135}

4.2 Shortcomings of the forms-based approach

The adoption of the formalistic approach results in creation of categories of conduct such as predatory pricing, fidelity rebates, tying or discrimination under which Article 102 TFEU cases are assessed and managed.\textsuperscript{136} It has been argued that such approach is problematic because a conduct can have characteristics observed in more than one of the abovementioned categories and thus a classification would not be helpful towards a finding of an abuse under Article 102 TFEU.\textsuperscript{137} For instance, implicit discrimination and tying can be realized through granting of bundled or individualized rebates and predatory pricing can take the form of individualized rebates destined for a competitor’s prospective customers.\textsuperscript{138} Because the simultaneous implementation of such practices by a dominant undertaking can serve the same purpose, the utilization of an approach based on forms rather than effects would lead to an inconsistent treatment of those practices by applying different,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134}The degree on dynamic efficiency is measured by the extent to which a market delivers innovation and technological progress and it is argued by many economists that dynamic efficiency contributes the most to consumer welfare. See to that effect. A. Jones and B. Sufrin, p. 8-9
\item \textsuperscript{135} M. Mackenrodt et al, supra n. 129, p.13
\item \textsuperscript{136} J. Gual, M. Hellwig et al, supra n. 10, p. 5
\item \textsuperscript{137} Ibid
\item \textsuperscript{138} Ibid
\end{itemize}
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more or less lenient, standards.\textsuperscript{139} As a result of such inconsistency, exclusion of competitors may be facilitated and exploitation of customers through the adoption of alternative exclusionary practices by dominant undertakings that entail higher prices may be observed.\textsuperscript{140}

In accordance with the forms-based approach, when a certain conduct of an undertaking is examined under Article 102 TFEU, its actual effects and its market impact are immaterial but what really matters is the features of its form which render it by nature abusive.\textsuperscript{141} This means that the anticompetitive foreclosure effects of the conduct are presumed rather than examined within the specific market context. However, a forms-based approach can be analogous to “\textit{banning the sale of ferrari cars, because it is highly probable that drivers will not respect the speed limits}’.\textsuperscript{142} On one hand, this formalistic approach creates some degree of legal certainty in the application of Article 102 TFEU and requires less administrative costs but, on the other hand, it fails to explain whether a certain conduct has indeed anti-competitive effects on the market before condemning it as abusive.\textsuperscript{143} It can be argued that the above failure is connected with the failure to solve the problem of ‘false positives and false negatives.\textsuperscript{144} According to Whish and Bailey, this problem emerges when a competition authority incorrectly concludes that either a pro-competitive conduct is abusive (false positives or Type I errors) or an anti-competitive conduct is not abusive (false negatives or Type II errors). Due to this problem, there is a risk that dominant undertakings stop being innovative

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\textsuperscript{139} Id, p.6
\textsuperscript{140} Ibid
\textsuperscript{141} N. Petit \textit{‘From Formalism to Effects? – The Commission’s Communication on Enforcement Priorities in Applying Article 82 EC’}, p.2 available at \textit{http://ssrn.com/abstract=1476082}
\textsuperscript{142} A. Heimler \textit{‘Pricing Below Cost and Loyalty Discounts: Are They Restrictive and If so When?’} (September 2004), p. 17 available at \textit{https://ssrn.com/abstract=634723} in N. Petit \textit{‘From Formalism to Effects? – The Commission’s Communication on Enforcement Priorities in Applying Article 82 EC’}
\textsuperscript{143} R. Whish and D. Bailey, supra n. 126, p.210
\textsuperscript{144} Id, p. 209 and 203. See also footnote 166 in p. 203 where R. Whish and D. Bailey suggest that the use of the terms false positives and false negatives is more recommended than the use of the expressions ‘Type I errors’ and ‘Type II errors’ in economic literature due to the tendency to confuse which error is of which type (sometimes referred as ‘Type III error’).
and recoursing to pro-competitive conduct.\textsuperscript{145} This risk in turn results in diminished competition in the market, dynamic inefficiencies and mal-served consumer welfare all triggered, paradoxically, by the application of an Article 102 that is supposed to strengthen competition, protect the competitive process and result in increased consumer welfare.\textsuperscript{146}

In order to avoid the above problem which can ultimately lead to the above paradox, a shift to an effects-based analysis of conduct falling within the scope of Article 102 TFEU within its specific market context is indispensable.

\textbf{4.3 Effects-based approach in case law on price-based exclusionary conduct: What about exclusivity rebates?}

Whilst a shift to an effects-based approach especially by means of an ‘as efficient competitor analysis’ has been endorsed by the Commission under its Guidance Paper in the assessment of price-based exclusionary conduct under Article 102 TFEU as we will notice in the sections below, the EU Courts still have not taken a clear stance towards it and, therefore, an inconsistent approach is currently observed on price based exclusionary conduct and, particularly, in regard to exclusivity rebates when they are assessed under Article 102 TFEU.

For instance, in \textit{Deutsche Telekom v Commission}\textsuperscript{147}, a case concerning a margin squeeze, the CJEU clearly rejected a per se rule in the assessment of pricing practices and, in particular, margin squeeze and required the demonstration of an anti-competitive effect towards the finding of an abuse.\textsuperscript{148} In paragraph 177 the CJEU suggested that ‘\textit{Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing...}'

\textsuperscript{145}N. Petit, supra n.141
\textsuperscript{146}R. Wish and D. Bailey, supra n. 126, p. 203
\textsuperscript{147}C-280/08 P, Deutsche Telekom v Commission, supra n. 107
\textsuperscript{148}C-280/08 P, Deutsche Telekom v Commission, supra n. 107, para. 250
practices which have an exclusionary effect on its equally efficient actual or potential competitors.\textsuperscript{149}

In another case related to margin squeeze, \textit{TeliaSonera}\textsuperscript{150}, the CJEU put emphasis on the effects of the conduct by claiming that ‘\textit{in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market}’\textsuperscript{151} and that ‘\textit{in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice.}’\textsuperscript{152} In addition to that, the CJEU highlighted several times throughout the judgment and considered the impact of the impugned conduct only to competitors who were at least as efficient as TeliaSonera.\textsuperscript{153}

Finally, in \textit{PostDanmark I}\textsuperscript{154}, a case regarding selectively low prices, the CJEU not only stressed the importance of examining all the circumstances of the case and assessing specific effects of the pricing practice on the market in order to determine whether a dominant undertaking has abused its dominant position\textsuperscript{155} but also underscored the magnitude of an as efficient competitor analysis\textsuperscript{156}.

However, in the case law on exclusivity rebates a shift towards an effects-based approach has not been observed.

In 1979 the CJEU in \textit{HLR} following the formalistic approach had established in paragraph 89 that:

\begin{quote}
\textit{‘An undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements}\end{quote}

\textsuperscript{149} Id, para. 177  
\textsuperscript{150} Case C-52/09 – Konkurrencesverket v TeliaSonera Sverige AB, supra n. 107  
\textsuperscript{151} Id, para. 64  
\textsuperscript{152} Id, para. 66  
\textsuperscript{153} Id, paras. 31-33, 39-40, 43, 63 – 65, 67, 70 and 73  
\textsuperscript{154} Case C-209/10, \textit{Post Danmark A/S v Konkurrencerådet}, supra n.85  
\textsuperscript{155} Id, para. 26  
\textsuperscript{156} Id, paras. 21-22, 35 and 38
exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate'. 157

‘The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position.’

35 year later, the General Court in Intel I still steps away from an effects-based approach 158 by stating that ‘exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition’ 159 and, therefore, ‘an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect’ 160 is not necessary and the AEC test as part of the analysis of those circumstances is not an essential tool to demonstrate the potential anticompetitive effects of exclusivity rebates. 161

It is conceivable, that the above statements of the GC in Intel I are inconsistent with the approach of the European Courts in the case of other price-based exclusionary conduct. Nonetheless, under Chapter II it will be shown how the shift towards an effects-based approach to the analysis of exclusivity rebates under Article 102 TFEU is observed and reflected in the current judgment of the CJEU in Intel II 162.

157 HLR, supra n. 7, para. 89
159 Intel I, supra n. 13, para. 85
160 Id, para. 80
161 Id, para. 146
162 Intel II supra n. 14
4.4 Effects-based approach and the Guidance Paper on Article 102 TFEU

The Guidance Paper is based on the preceding DG Competition’s discussion paper on the application of Article 82 EC to exclusionary abuses and represents the Commission’s effort to establish a rigorous economic approach focusing on anticompetitive effects in the analysis of exclusionary conduct under Article 102 EC. The Guidance Paper as a soft law instrument does not provide indication on how to enforce the law but rather identifies priorities under Article 102 TFEU. Notwithstanding its non-binding character, by setting clear priorities the Guidance Paper provides greater clarity in the way the Commission pursues and assesses Article 102 TFEU cases and helps undertakings to predict the likelihood of their behaviour to fall or not within the ambit of Article 102 and, thus, trigger the EC’s intervention.164

The Guidance Paper describes the EC’s generic approach against exclusionary conduct addressing both how the EC will come to the conclusion of existence of dominance and of the degree of market power as well as whether an allegedly abusive conduct is likely to lead to anti-competitive foreclosure.166 The EC will not condemn an allegedly abusive conduct merely on the grounds that it has taken a certain form but it will examine it on the basis of a detailed assessment of cogent and convincing evidence.167 The EC will evaluate whether the impugned conduct is likely to create anti-competitive foreclosure effects in the light of various circumstances such as position of the dominant undertaking in the market, position of competitors, conditions of the relevant market, extent of allegedly abusive conduct, position of customers and suppliers, possible evidence of actual foreclosure and evidence of any exclusionary conduct.168 In addition to those circumstances and when the EC deals specifically with price-based exclusionary conduct, an as efficient

163 DG Comp Discussion Paper, supra n. 76
164 Guidance Paper, supra n. 9, para. 3
165 Id, para. 9
166 Id, para. 20
167 Ibid
168 Commission Decision, supra n. 15, para. 20
competitor analysis by means of an AEC test will take place. Both the examination of relevant circumstances and the AEC test are applicable in the evaluation of conditional rebates, which the EC places in the category of price-based exclusionary conduct.\footnote{Id, para. 41 and 44} Contrary to this effects-based approach adopted by the EC in the Guidance Paper, the GC in Intel I, as it will be seen under Chapter II, considers the examination of the above circumstances and assessment of the effects of exclusivity rebates unnecessary in the case of exclusivity rebates due to their abusive nature and the undertaking’s dominant position and additionally disregards the relevance of AEC test as part of those circumstances.\footnote{Intel I, supra n. 13, paras 143, 89 and 146} This fact reveals the diverging attitude between the Commission and the EU Courts in the assessment of both exclusivity rebates and price-based exclusionary conduct under Article 102 TFEU.

4.4.1 AEC test as part of an effects-based analysis of price-based exclusionary conduct

The AEC test is an economic test applied by the EC in order to determine whether the conduct of a dominant undertaking is capable of excluding from the market a competitor that is at least as efficient as the dominant undertaking. In particular, the standard AEC test applicable to predatory pricing cases examines 'whether a hypothetical competitor as efficient as the dominant undertaking, that is having the same cost structure as the dominant undertaking, is profitable when competing for all of a buyer’s purchases and offering the same retail price as the dominant firm.'\footnote{E. De Gellinck ‘The As-Efficient-Competitor-Test: Necessary or sufficient to establish an abuse of a dominant position?, Journal of European Competition Law & Practice, 2016, Vol. 7(8), p. 546} In the affirmative, allegedly exclusionary conduct may escape the application of Article 102 TFEU in the absence of anticompetitive effects and may not be considered abusive.\footnote{R. Nazinni ‘The as efficient competitor test’ in R. Nazinni ‘The foundations of European Union Competition Law: The Objectives and Principles of Article 102’, (Oxford Scholarship Online: January 2012), p.223} The AEC test has been endorsed by the
European Courts mainly in predatory pricing\textsuperscript{173} and margin squeeze\textsuperscript{174} cases.\textsuperscript{175} However, such judicial endorsement is questionable in the case of exclusivity rebates\textsuperscript{176}. The Guidance Paper clearly applies the AEC test in the case of conditional rebates which places in the category of price-based exclusionary conduct.\textsuperscript{177}

In the context of price-based exclusionary conduct, the Guidance Paper under paragraph 23 explicitly states that the EC will intervene only where the conduct concerned has already been or is capable of restricting competition from competitors as efficient as the dominant undertaking. Yet, this does not necessarily mean that less efficient competitors will stay out of the scope for the Commission’s assessment. As paragraph 24 points out, in the absence of an abusive practice a less efficient competitor may in certain circumstances exert competitive constraints and benefit from demand related advantages, such as network and learning effects, which will tend to enhance its efficiency.\textsuperscript{178} When applying the AEC test, the Commission utilises reliable economic data relating to cost and sale prices and, particularly, examines whether the dominant undertaking is engaging in below-cost pricing.\textsuperscript{179} These data can be either information on costs of the dominant undertaking itself or cost data of as-efficient-competitors.\textsuperscript{180}

4.4.1.1 How the AEC test functions

When the Commission applies the AEC test, it makes use of two main cost benchmarks the AEC test relies upon, that is average avoidable cost (AAC)
or average variable cost (AVC) and long-run average incremental cost (LRAIC) or average total cost (ATC).\footnote{181}

In the context of predatory pricing, if a dominant undertaking prices its output below its AAC, it means that it incurs a loss that it could have been avoided by not producing that output.\footnote{182} In that case it suffices for the Commission to presume that this price is predatory and the company aims at excluding a targeted competitor by sacrificing short term profits.\footnote{183} Yet, this presumption can be rebutted by an objective justification and efficiencies.\footnote{184} However, a finding of predation is more complicated when an undertaking’s pricing is above AAC but below ATC. Under the hypothesis that LRAIC and ATC is the same, when a dominant undertaking recourses to such pricing strategy it may not be able to cover its total cost through sales, but it may still be able to cover its variable costs and a part of its fixed costs.\footnote{185} Therefore, above AAC and below ATC predation cannot be presumed\footnote{186} and extra proof of predatory intent and existence of a predatory strategy\footnote{187} is necessary.\footnote{188} In order to establish abuse of dominance through such pricing practice, the Court in AKZO required that

\footnote{181} \textbf{Average avoidable cost} is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided. \textbf{Long-run average incremental cost} is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. Guidance Paper, para. 26, footnote 2

\footnote{182} Discussion Paper, supra n. 76, para. 109

\footnote{183} Ibid

\footnote{184} Ibid

\footnote{185} Id, para 111

\footnote{186} Id, para 112. The elements that may prove the existence of a predatory strategy are direct evidence of intent, evidence that the pricing only makes commercial sense as part of a predatory strategy, the actual or likely exclusion of the prey, whether certain customers are selectively targeted, whether the dominant company actually incurred specific costs in order for instance to expand capacity, the scale, duration and continuity of the low pricing, the concurrent application of other exclusionary practices, the possibility of the dominant company to off-set its losses with profits earned on other sales and its possibility to recoup the losses in the future through (a return to) high prices.

\footnote{187} Discussion Paper, supra n. 76, para. 111

\footnote{188} Ibid
such pricing strategy is part of a dominant firm’s plan to eliminate a competitor.\textsuperscript{189}

In the context of conditional rebates, the Commission is mainly concerned with the extent to which an equally efficient competitor is capable or not of expanding or entering the market as a result of the dominant undertaking’s rebate system. In this context, the EC will try to calculate the effective price which the competitor has to match in order to compensate the customer for the loss of the conditional rebate if the customer would switch part of his demand (the ‘relevant range’) away from the dominant undertaking. This effective price will not be the dominant undertaking’s average price, but the normal price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time.\textsuperscript{190} The Commission indicates that as long as the effective price remains consistently above the LRAIC of the dominant undertaking, the rebate is ‘normally’ not capable of causing anticompetitive foreclosure and, thus, allows an as-efficient-competitor to compete profitably notwithstanding the rebate.\textsuperscript{191} However, if the effective price is below the AAC of the dominant undertaking, in principle, the conditional rebate can lead to foreclosure of equally efficient competitors.\textsuperscript{192} As in the case of predatory pricing, the application of the AEC test becomes a daunting task for the EC when the effective price is above the AAC and below LRAIC. In such case the Commission will take into account additional factors such as whether the rebate is retroactive or incremental\textsuperscript{193}. Furthermore, a key element for the application of the AEC test by the Commission on rebate schemes is the estimation of the contestable share of demand. The contestable portion of customer demand is the portion of a customer’s requirements which can realistically be switched to a competitor of the undertaking in a dominant position in any given period.\textsuperscript{194} However, in some instances this portion is difficult to calculate because what is perceived as contestable share in an ex post

\textsuperscript{189} AKZO, supra n. 173, para. 71
\textsuperscript{190} Guidance Paper, supra n. 76, para. 41
\textsuperscript{191} Id, para. 43
\textsuperscript{192} Id, para. 44
\textsuperscript{193} A. Jones and B. Sufrin, supra note 20, p. 477
\textsuperscript{194} Michelin I, supra. n. 64, para. 92
investigation by a competition authority might be different from the contestable share estimated in an ex ante self-assessment that a dominant firm conducted before the adoption of the rebate scheme. A significant shortcoming of the Guidance Paper is that it does not provide any detailed explanation on how to calculate the contestable share in practice and in that regard it renders dominant undertakings incapable of determining with a reasonable degree of certainty the legality of their conduct. Finally, in its assessment the Commission will consider the existence of realistic and effective counterstrategies available to rivals in order to compete against the price schedule of the dominant undertaking. In the absence of such counterstrategies, the analysis of which has been considered by some authors fundamental for the determination of the contestable share, the Commission will conclude that an equally efficient competitor is likely to be foreclosed from the market as a result of the conditional rebate.

4.4.1.2 AEC test: A necessary tool to establish abuse of dominance through granting of exclusivity rebates?

In Intel I and PostDanmark II the European Courts took the AEC test into account but ultimately argued against its relevance for the assessment of exclusivity rebates.

In Intel I, not only the Commission found the AEC test as ‘one possible way of examining whether exclusivity rebates are capable or likely to cause anticompetitive foreclosure’ but also the GC considered the AEC test irrelevant for the assessment of exclusivity rebates. In particular, the Court stressed that it would not be necessary for the Commission to

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197 Guidance Paper, supra n. 9, para. 44 and 45
198 L. Kjobe, supra n. 196, p.477
199 Guidance Paper, supra. n. 9, para. 44
200 Commission Decision, supra. n.15, para. 1002
demonstrate the potential anti-competitive effects of the exclusivity rebates by means of an AEC test, even if it was necessary to show those effects by assessing the circumstances of the case.\textsuperscript{201} Further, the GC underlined that the AEC test fails to show whether the access to the market has been made more difficult for competitors.\textsuperscript{202} Even in case of a positive result from the application of the test, which means that an as-efficient- competitor is able to cover its AAC and access the market albeit the existence of the rebate, the possibility of foreclosure effects is not ruled out.\textsuperscript{203} The GC based this argument on the premise that foreclosure effects occur not only where access to the market is made impossible for competitors but also more difficult.\textsuperscript{204} In its concluding paragraph on the assessment of the AEC test, the Court explicitly stated that even a positive AEC test could not rule out the potential foreclosure effect which is inherent in exclusivity rebates.\textsuperscript{205} Even if Intel was the first rebates case where the GC considered the AEC test, its argumentation and the deliberate use of the word ‘inherent’ reveals the disinclination of the Court to deviate from the formalistic approach on exclusivity rebates that was well-established in \textit{HLR}.

In \textit{PostDanmarkII} the CJEU stated that the invoicing of prices below cost prices (‘negative prices’) is not a condition for finding that a retroactive rebate is abusive and thus puts the reliance upon the AEC test into question.\textsuperscript{206} The CJEU was of the opinion that the AEC test must be regarded as ‘one tool among others’\textsuperscript{207} and underlined that there is no legal obligation to base the finding of an abuse always on the AEC test.\textsuperscript{208} To further support its opinion, the CJEU argued that the high degree of dominance consisting of very large market shares and especially the existence of a statutory monopoly makes the emergence of an as-

\textsuperscript{201} Intel I, supra. n. 13, para. 146
\textsuperscript{202} Id., para. 150.
\textsuperscript{203} Idem
\textsuperscript{204} Id, para 149. See also PostDanmark II, supra. n. 90, paras. 31 and 42
\textsuperscript{205} Intel I, para. 151
\textsuperscript{206} PostDanmark II, supra. n. 90 para 56
\textsuperscript{207} Id, para.61
\textsuperscript{208} Id, para. 57
efficient-competitor practically impossible.\textsuperscript{209} It further found that even a less efficient competitor might contribute to intensifying competition in a market with high barriers and economies of scale.\textsuperscript{210} In the light of the above, the CJEU eventually considered the application of the AEC test unnecessary and irrelevant for the assessment of rebates.\textsuperscript{211} Nevertheless, the statement of the CJEU in paragraph 58 that ‘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’ can be seen as a recognition by the CJEU that the AEC test is still a possible way to establish antitrust liability under Article 102 TFEU.\textsuperscript{212}

From an economic point of view, it has been suggested that the AEC test is neither necessary nor sufficient to establish anticompetitive effects of retroactive rebates.\textsuperscript{213} However, it can be seen as a powerful tool in minimizing the risk of making errors when reliable data is available.\textsuperscript{214} Even if there is no requirement to prove intent or consumer harm when rebates are examined under the AEC test,\textsuperscript{215} a dynamic application of the AEC would be consistent with the purposes of Article 102 TFEU only if there is a requirement for proof of actual effects.\textsuperscript{216} Seen under this prism, it can be said that the application or not of the AEC in the case of price-based exclusionary conduct including rebates is a clear reflection of the adoption or not of an effects-based approach in the examination of such conduct under Article 102 TFEU. Whereas the Commission welcomes such approach by recognizing the importance of the examination of the AEC test in the case of conditional rebates, the case law on rebates until and including PostDanmark II adheres to the form-based approach.

\textsuperscript{209} PostDanmark II, supra. n. 90 Id, para. 59
\textsuperscript{210} Id, para. 60
\textsuperscript{211} Id, para. 59 and 62
\textsuperscript{213} E. De Ghellinck, supra n. 171, p.548
\textsuperscript{214} Ibid
\textsuperscript{215} R. Nazinni, supra n. 172, p.255
\textsuperscript{216} Ibid
CHAPTER II

5. The ‘Intel case’ and the framework it entails for the assessment of exclusivity rebates under Article 102 TFEU

5.1 Commission’s Decision in Intel: In favour or against an effects-based analysis of exclusivity rebates?

5.1.1. Background

On 13 May 2009, the EC concluding its investigation found that Intel Corporation from October 2002 until December 2007 abused its dominant position in the worldwide market for x86 Central Processing Units (CPUs)\(^{217}\). In particular, the EC found that Intel held a market share around 80%\(^{218}\) and thus it was in a dominant position\(^{219}\) which abused by the following means: Firstly, Intel granted fidelity rebates\(^{220}\) to four Original Equipment Manufacturers (OEMs) (DELL, HP, Lenovo and NEC) on the condition to purchase all or almost all of their x86 CPUs from Intel\(^{221}\). Secondly, Intel was accused of making direct payments to the largest PC retailer in Europe, Media Saturn Holdings (MSH), in exchange of selling exclusively computers with Intel x86 CPUs\(^{222}\) and direct payments to HP, Acer and Lenovo for delaying, cancelling or in some other way restricting the marketing of products equipped with CPUs offered by Intel’s sole competitor Advanced Micro Devices Inc. (AMD) (the latter actions were characterized by the Commission as ‘naked restrictions’)\(^{223}\). Consequently,

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\(^{218}\) Commission Decision, para. 852

\(^{219}\) Id, para. 912

\(^{220}\) For the specific description of the rebates granted by Intel see Commission Decision, supra. n. 9, paras. 175-181

\(^{221}\) Commission Decision, supra. n. 15, paras. 926 and 1001

\(^{222}\) Commission Decision, supra. n. 15, paras. 926 and 1001

\(^{223}\) Id, paras. paras. 1641 and 1678. See also Intel I, supra n. 13, para. 198
the EC imposed the highest fine ever imposed on a single company at the time which was 1.06 billion EUR.\textsuperscript{224}

5.1.1 Form of Intel’s rebates, conditionality and their effects

According to the Commission Decision Intel provides pricing support in the form of rebates to its OEM’s.\textsuperscript{225} In principle, Intel has a Customer Authorized Price (CAP) at which it sells the majority of its CPUs and from which – given the existence of competitive offers–OEMs attempt to negotiate discounts.\textsuperscript{226} Intel’s pricing support either affects directly the CPU price or relates to some type of marketing activity\textsuperscript{227} and Intel’s rebates are divided into two broad categories accordingly.\textsuperscript{228} The first category of rebates consists of discounts from the CAP that are called ‘contra revenue discounts’\textsuperscript{229} (including ECAPs\textsuperscript{230}, LCAPs\textsuperscript{231} and rebates related to adoption of new technology).\textsuperscript{232} The second category consists of advertising and marketing programmes, also known as ‘marketing programme discounts’\textsuperscript{233} (including ‘Marketing Contribution Agreements’, ‘Intel Inside Program’ and ‘Distributor Programs’).\textsuperscript{234} In addition, Intel has arrangements with indirect customers such as PC retailers.\textsuperscript{235} Those arrangements can take the form of either indirect marketing contributions

\textsuperscript{224} Id, para. 1803. See also CJEU PRESS RELEASE No 90/17, supra. n. 217
\textsuperscript{225} Id, para. 176
\textsuperscript{226} Commission Decision, para. 175
\textsuperscript{227} Id, paras. 176 and 177
\textsuperscript{228} Ibid.
\textsuperscript{229} Id, para. 176. For accounting purposes, Intel tracks these discounts as “contra revenue,” meaning a reduction in the net cash received for the sale of products
\textsuperscript{230} Exception to Customer Authorized Price
\textsuperscript{231} Lump Sum Customer Authorized Price
\textsuperscript{232} Id, para. 177
\textsuperscript{233} Commission Decision, para. 178
\textsuperscript{234} Ibid. Marketing Contribution Agreements are agreements under which “OEMs and retailers are given market development funds ("MDF") for use in advertising and promoting Intel microprocessor-based computers. Intel Inside Program is 'a trademark licensing and cooperative marketing program that reimburses OEMs for expenditures in promoting the Intel brand. Distributor Programs are programs through which Intel ‘offers customers of its distributors membership in several programs ... Among the benefits are advanced warranty support, technical information, and training.
\textsuperscript{235} Commission Decision, supra. n. 15, para. 179
for advertisement campaigns under the ‘Intel Inside Program’ or direct contributions/payments through individually negotiated funding agreements (‘contribution agreements’).\(^{236}\)

In the case of Dell, Intel granted ‘a discount on its CPUs and chipsets on a meeting competition basis’ (‘Dell Meet Comp Program’)\(^ {237}\) on the condition that Dell sources its x86 CPU requirements exclusively from Intel.\(^ {238}\)

In the case of HP, Intel granted rebates under the so called ‘HPA1’ and ‘HPA2’ agreements\(^ {239}\) on the condition that HP purchases at least 95% of its requirements for corporate desktop PCs from Intel, and made payments on the condition that HP i) directs its AMD-based corporate desktop PCs to Small and Medium Business (SMB) and Government, Educational and Medical (GEM) customers rather than to mainstream (or ‘enterprise’) business customers, ii) prevents its channel partners from stocking AMD corporate desktops and iii) delays the launch of AMD-based corporate desktop in the EMEA region for six months.\(^ {240}\)

As regards NEC, Intel made an agreement with NEC (the so called ‘Santa Clara Agreement’) which provides for a market share realignment plan.\(^ {241}\) The plan envisaged that Intel will grant various rebates to NEC on the condition that NEC will realign its worldwide market share of Intel X86 CPUs in its client PCs by increasing it up to 80%.\(^ {242}\)

In addition, Intel made the ECAP funding/payments to Acer conditional upon Acer delaying the launch of its AMD-based notebooks\(^ {243}\) and by virtue of a Memorandum of Understanding Intel agreed with Lenovo to provide rebate funding for the financial year 2007 in quarterly amounts on the condition, albeit unwritten, that Lenovo would cancel its AMD-based

\(^{236}\) Id, paras. 179 and 181
\(^{237}\) Id, para. 188
\(^{238}\) Id, para. 218
\(^{239}\) HP Alliance Agreements are agreements and their extensions thereof under which Intel was granting meeting competition discounts to HP for its commercial desktop business. See Commission Decision para. 342
\(^{240}\) Id, paras. 348, 413 and 1001
\(^{241}\) Commission Decision, para. 455
\(^{242}\) Id, paras. 456, 459 and 460
\(^{243}\) Commission Decision, supra. n. 15, para. 450
notebook ongoing and planned projects.\textsuperscript{244} Those payments together with the aforementioned payments to HP relating to restriction of commercialization of AMD-based products were overall characterized by the Commission as ‘naked restrictions’.\textsuperscript{245} 

Finally, Intel made direct payments to an indirect customer, namely MSH, in part on the condition to sell exclusively Intel-based PCs.\textsuperscript{246} Given that those payments generated similar effects with loyalty rebates, they were characterized and assessed by the Commission as such.\textsuperscript{247} 

The Commission Decision concludes that the rebates granted by Intel to the four OEMs (Dell, HP, NEC and Lenovo) and the direct payments made by Intel to MSH (PC retailer) were de facto conditional on purchasing all (Dell and Lenovo) or almost all (HP and NEC) of their x86 CPU requirements from Intel and selling exclusively Intel-based PCs respectively.\textsuperscript{248} The Decision explicitly characterizes both the rebates and the payments as fidelity rebates that fulfil the conditions of relevant case-law\textsuperscript{249} that finds fidelity rebates as quasi-per se abusive and states that those fidelity rebates not only restricted the above OEMs and MSH to freely choose their source of supply but also prevented other competitors from supplying the above OEMs and MSH.\textsuperscript{250} 

5.1.2 Application of the AEC test on Intel’s rebates by the Commission and its findings

In paragraph 1002 the EC recognizes the AEC test as ‘one possible way of examining whether exclusivity rebates are capable or likely to cause anticompetitive foreclosure’.\textsuperscript{251} The Commission Decision defines the AEC test as a hypothetical exercise that examines whether an as efficient competitor as Intel would be able to (and not if he actually did) enter the market for x86 CPUs without incurring losses given the existence of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{244} Id, para. 983
\item\textsuperscript{245} Id, 1641
\item\textsuperscript{246} Id, para. 992
\item\textsuperscript{247} Id, para. 1001
\item\textsuperscript{248} Id, para. 926 and 101
\item\textsuperscript{249} Id, para. 950
\item\textsuperscript{250} Commission Decision, paras. 950, 972, 981, 989 and 1001
\item\textsuperscript{251} Commission Decision, supra. n. 15, para. 1002
\end{enumerate}
\end{footnotesize}
rebates such the ones granted by Intel. Relevan criterion for the application of the test is – in view of the level of the rebate - the effective price which an as efficient competitor as Intel would have to offer in order to compensate the OEMs and MSH for the loss of Intel’s rebates. In principle, if such price is below a viable measure of cost, then the rebate is capable of foreclosing an as efficient competitor. As the EC claims the fact that AMD was or not actually foreclosed from the market is irrelevant for the as efficient competitor analysis.

According to the Commission Decision the as efficient competitor analysis is conducted by the Commission on the basis of relevant parameters such as 'de facto conditions for the rebates applied by the dominant undertaking, contestable share, reference period and cost measure.' The EC finds that the contestable share of the OEMs and MSH’s demand is relatively low and the reference period within which the contestable share of the OEMs’ supplies is examined is mostly one year. Furthermore, the EC is of the opinion that if the price that a competitor of Intel has to offer to compensate for the loss of Intel’s rebate does not allow him to cover at least the total cost of producing its output (or more specifically if this price is below its AAC) this means that he incurs losses and will be foreclosed from the market.

In the case of Dell, Lenovo and HP the EC concludes that even an as efficient competitor would have been prevented from supplying Dell’s and Lenovo’s notebook x86 CPU requirements and HP’s corporate desktop requirements respectively. As regards NEC, EC states that an as efficient competitor would have to offer prices below viable costs to compensate for the loss of the rebate and gain access to the market share covered by the ‘Santa Clara agreement.’ Finally, the EC finds that due to Intel payments to MSH an as efficient competitor would have been

252 Id, para. 1003
253 Ibid.
254 Id, para. 1006
255 Id, para. 1004
256 Id, 1154
257 Id, paras. 1012 and 1035.
258 Commission Decision, paras. 1036 and 1037
259 Commission Decision, supra. n. 15, paras, 1281, 1507 and 1406
260 Id, para. 1456
prevented from entering the relevant part of the market.\textsuperscript{261} Therefore, the Commission after applying the AEC test individually in the case of Intel’s direct and indirect customers comes to the general finding that an as efficient competitor would have to sell below its AAC to effectively compete with Intel and thus Intel’s conditional offers and compensation payments were capable of having or likely to have foreclosure effects.\textsuperscript{262}

5.1.3 Commission Decision’s endorsement of effects-based approach

It has been argued by some authors that the Commission Decision on Intel relied substantively on a per se approach against conditional rebates which emanates from formalistic law of the Community Courts.\textsuperscript{263} They claim that the Commission Decision deviates from the adoption of an effects-based approach taken in its Guidance Paper.\textsuperscript{264} However, such argument does not hold entirely true. Whilst the EC makes reference to a long line of consistent case law which finds fidelity rebates as quasi-per se abusive,\textsuperscript{265} it nevertheless concludes that the fidelity rebates granted by Intel were capable of causing or likely to cause anti-competitive foreclosure which in turn is likely to lead to consumer harm.\textsuperscript{266} The Commission reaches that conclusion not only on the basis of qualitative and quantitative evidence but also on the results of a detailed as efficient competitor analysis.\textsuperscript{267} Although the Commission claims that the AEC test is not a necessary or absolute test but ‘one way of examining the capability to harm competition in Intel case’,\textsuperscript{268} it nevertheless does apply the AEC test. Yet, the Commission expresses some reservations regarding the exclusive dependency on the AEC test when it comes to the

\begin{footnotesize}
\begin{enumerate}
\item Id, para. 1573
\item Id, para. 1574
\item Ibid.
\item Commission Decision, para. 920
\item Id, para. 925
\item Commission Decision, supra. n. 15, para.925
\item Id, para. 1155
\end{enumerate}
\end{footnotesize}
examination of the effects of rebates. In concrete, it suggests that the AEC test is based on conservative assumptions regarding the rebate that the OEMs would lose if they switch part of their demand to Intel’s competitors and additionally it disregards factors that could aggravate the effects of rebates on competition. What is more, the EC notes that the exit of a competitor from or entry into the market may be facilitated or prevented respectively even if the effective price is above a viable cost measure. As far as the Decision’s consistency with the Guidance Paper is concerned, the EC reiterates what it had already stated in the Guidance Paper that ‘the Guidance Paper is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance. The EC makes clear that the Guidance Paper sets priorities in regard to the cases that the EC will handle in the future and it does not apply to proceedings that have already been initiated before it was published. Having said that, the EC ascertains that its Decision is in line with those priorities.

Whilst the EC referred to the case law that finds rebates abusive on the basis of their nature, at the same time it applied the AEC test individually in Intel’s direct and indirect customers examining in detail the relevant facts and issues of the case that led it to the conclusion that Intel abused its dominant position. It can be inferred from the above observations that the Commission Decision is not based on the quasi-per se approach reflected in established case law but on the contrary it demonstrates the ability of the EC to fairly combine established law with an effect-based analysis.

269 Commission Decision, supra n. 15, para.1155
270 Ibid. Such factor could be a possible reallocation of lost rebates by Intel to OEM competitors. See footnote 1474 in the Commission Decision.
271 Ibid.
272 Commission Decision, para 916 and Guidance Paper, Section II, para. 3
273 Commission Decision, para 916
274 Ibid.
5.2 Intel’s action against Commission’s Decision and the judgement of the General Court

5.2.1. Introduction

Intel brought an action for annulment of EC’s decision. On 12 June 2014 the GC upheld EC’s decision in its entirety and dismissed Intel’s action by characterizing rebates granted by Intel as quasi-per se abusive.\textsuperscript{276} This section will illustrate the grounds of appeal made by Intel against the Commission Decision and the corresponding findings of the Court both relating to the effects-based approach in the assessment of exclusivity rebates in Intel’s case. More specifically, this section will touch upon the GC’s reasoning on the necessity of examining all the circumstances of the case when dealing with exclusivity rebates in order to reach a conclusion on abuse of dominance. It will further be shown whether the actual foreclosure effects of exclusivity rebates offered by Intel and the examination of the as-efficient-competitor test were found relevant for the GC in reaching its conclusion that Intel abused its dominant position by granting the exclusivity rebates in question. Subsequently, a critical analysis of the GC’s arguments related to the above points of law will be provided.

5.2.2. Grounds of appeal by Intel

5.2.2.1. Examination of all the circumstances of the case

Intel contests the Commission Decision in regard to the legal characterization of Intel’s rebates and payments.\textsuperscript{277} Intel claims that the Commission was arbitrarily led to the conclusion that the rebates granted under the terms of its agreements were contrary to Article 102TFEU, that the Commission wrongly applied the same test for legal characterization of rebates also to payments granted to MSH and that it wrongly created a new type of abuse, that is naked restrictions, falling under Art. 102

\textsuperscript{276} Intel I, supra n.13, para. 85
\textsuperscript{277} Intel I, supra n.13, para. 70
TFEU.278 As regards its rebates and payments, Intel bases the above claim on the fact that the Commission was required to carry out an analysis of all surrounding circumstances of Intel’s rebates and payments in order to show that they were actually capable of foreclosing competitors and, thus, harming consumers.279 In the opinion of the claimant such analysis is required for the establishment of an at least potential foreclosure effect.280 To support its argument on the necessity of examination of all the circumstances of the case, Intel makes reference to Michelin I281 and British Airways282 and the requirement of the Court in those cases for an examination of all the circumstances of the case by the Court when dealing with rebates. In the same vein, the applicant challenges the relevance of the distinction between exclusivity rebates and rebates in connection to the requirement for examination of all the circumstances of the cases. It does so by making reference to Tomra283 where the Court in two consecutive paragraphs referred to granting of loyalty rebates as means of a dominant undertaking to abuse its dominant position and the necessity of examining all the circumstances of the case in that regard.

Furthermore, to justify the absence of abuse, Intel claims that its rebates were given without any formal or binding exclusivity attached284 and that the Commission failed to consider their low level,285 their short duration and the short notice of termination of the supply contracts under which Intel’s rebates were granted286. In addition, Intel makes reference to the particularly small part of the x86 CPU market that its rebates covered (between 0,2 and 2% per year)287 and the fact that its exclusivity conditions covered only an insignificant amount of certain OEMs x86 CPU requirements (e.g in the case of HP the exclusivity condition covered 95% of HP’s corporate desktop requirements which corresponded only to 28%
of HP’s total x86 CPU requirements.)\textsuperscript{288} Finally, Intel denies the possibility of abuse by alleging that its rebates constituted a response to requests and countervailing buying power which the customers used as a leverage in order to obtain larger rebates.\textsuperscript{289}

5.2.2.2. Actual foreclosure effects of exclusivity rebates

Intel contends that the Commission did neither prove any actual anticompetitive effects in the applicant’s practices as it was required to do so nor established any causal link between the practices and actual effects on the market.\textsuperscript{290} In an effort to prove the absence of actual foreclosure effects of its rebates, Intel claims that its customers bought exclusively from it merely for business reasons and regardless of the existence of rebates.\textsuperscript{291}

5.2.2.3. The AEC test

Intel argues that the AEC test is decisive for the establishment of a foreclosure effect triggered by the rebates and it is the only evidence presented by the Commission in order to demonstrate the capability of Intel’s rebates to foreclose competition.\textsuperscript{292} However, Intel believes that the Commission’s legal assessment failed to show such foreclosure capability assuming that the AEC test was not part of the Commission’s legal analysis or else part of the analysis of the circumstances under which Intel’s rebates were granted.\textsuperscript{293} In addition, Intel claims that the way that the AEC test was applied was erroneous and that, should the test had been applied in a proper way, Intel’s rebates would have not been able to cause anti-competitive foreclosure.\textsuperscript{294}

\begin{flushright}
\textsuperscript{288} Intel I, supra n. 13, para. 126 \\
\textsuperscript{289} Id, paras. 139 and 138 \\
\textsuperscript{290} Id, para. 102 \\
\textsuperscript{291} Id, paras. 104 and 106 \\
\textsuperscript{292} Id, para 140 \\
\textsuperscript{293} Id, supra n. 13, para. 140 \\
\textsuperscript{294} Ibid
\end{flushright}
5.2.3 The General Court’s findings

5.2.3.1 Unnecessary to examine all the circumstances of the case

As regards the granting of rebates to four OEMs, the GC clearly states that those rebates constitute exclusivity rebates within the meaning of fidelity rebates in *Hoffman La Roche*. Without deviating from the approach of presumptive abusiveness of exclusivity rebates previously established in *HLR*, the GC maintains that in the absence of an objective justification, an exclusivity rebate is abusive irrespective of ‘an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect’. Applying the same test for legal characterization in the case of payments granted to MSH, the GC states that the above analysis is also unnecessary in the case of the payments granted to MSH for which a mere demonstration of the grant of a financial incentive subject to an exclusivity condition is sufficient. In the light of this formalistic approach, the GC rejects Intel’s argument that the Commission is required to conduct an analysis of the circumstances of the case in order to establish at least a potential foreclosure effect on two grounds: 1) such an analysis is required only in the case of rebates with a fidelity building effect (third category) and not exclusivity rebates and 2) the requirement for such analysis has been found in case law dealing with pricing practices such as margin squeeze or low price practices.

As regards the first ground, the GC contends that, unlike the ‘third category of rebates’ that have a fidelity building effect and necessitate an analysis of all the circumstances of the case, exclusivity rebates are ‘by their very nature capable of restricting competition’. According to the

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295 Intel I, supra n. 13, paras. 76 and 79. See also *HLR*, supra n. 7 para. 90
296 Intel I, para. 80
297 Id, para. 171
298 Id, paras. 78 and 84
299 Case C-280/08 *P Deutsche Telekom V Commission*, supra n. 107, para. 175 and Case C-52/09, Konkurrensverket v TeliaSonera Sverige AB, supra n. 107, para. 28
300 *Post Danmark I*, supra n. 85, para. 26
301 Intel I, supra n. 13, paras. 96-99
302 Id, paras. 84 and 85
GC, such rebates are inherently capable of tying customers and foreclosing competitors through granting of 'a financial advantage designed to prevent customers from obtaining their supplies from competing producers'. The GC finds Intel’s reference to Michelin I, British Airways and Tomra irrelevant for exclusivity rebates due to the fact that these cases deal with rebates falling within the third category of rebates. Therefore, an analysis of the circumstances of the case is not required in order to demonstrate the foreclosure effects of exclusivity rebates owing to the fact that exclusivity rebates are nor quantity rebates nor falling under the third category and, thus, are quasi-per se abusive.

In respect of the second ground, the GC expressly states that exclusivity rebates do not relate to pricing practices. For that reason, the GC does not consider Intel’s reference to margin squeeze and low price practices as relevant for the legal characterization of Intel’s exclusivity rebates. To justify this allegation, the GC claims that AMD’s complaint was not based on the exact amount of rebates and thus prices but rather on the fact that they were conditional on exclusive or quasi-exclusive supply. The GC is of the opinion that the exclusive supply incentive triggered by the grant of exclusivity rebates renders them unlawful per se and in that respect differentiates them from pricing practices where the level of price is not unlawful in itself. Hence, an analysis of the circumstances of the case is redundant on the additional ground that exclusivity rebates are not pricing practices.

5.2.3.2 No requirement for analysis of actual effects of rebates

The GC finds it unnecessary to examine the effects of exclusivity conditions on the market in their specific context when and because they are offered by a dominant undertaking. It bases its reasoning on the

303 Id, para.86 & 87
304 Id, paras. 96 and 97
305 Id, para. 99
306 Supra notes 278, 279 and 295
307 Intel I, supra n. 13, para. 99
308 Ibid
309 Intel I, supra n. 13, para. 99
310 Id, para. 89
special responsibility that a dominant undertaking has not to impair genuine undistorted competition and on the fact that exclusive supply conditions on a substantial part of purchases ‘constitute an unacceptable obstacle to access to the market’.

Along this line of reasoning, the GC notes that the demand-side substitutability of the products offered by Intel is particularly low, if non-existent at all, which makes Intel an unavoidable trading partner as a result. It states that the grant of an exclusivity rebate enables an unavoidable trading partner to ‘use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor’. The GC alleges that in such case an analysis of the actual effects of rebates on competition is not required. As the GC further explains, exclusivity rebates make the customer unwilling to switch to a competitor of the unavoidable trading partner in regard to the contestable share of demand. This in turn means that if a competitor wants to gain access to the market and induce customers, he has to offer not only more attractive conditions on the contestable share of demand but also compensation for the loss of the exclusivity rebate covering both the contestable and non-contestable portion of the customer’s requirements.

5.2.3.3 Irrelevance of the AEC test

The GC touches upon Intel’s arguments related to the AEC test. Once more, the GC starts with the premise that exclusivity rebates are illegal regardless of an examination of the circumstances of the case. It asserts that even if an examination of the circumstances of the case was necessary to prove the anti-competitive effects of exclusivity rebates, the AEC test would still not be an essential tool to demonstrate those effects. The GC underlines that while the AEC test shows whether the

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311 Id, para. 89-90
312 Id, para. 91
313 Id, para. 93
314 Id, para. 103
315 Id, para. 92 & 93
316 Intel I, supra n. 13, para. 143
317 Id, para. 146
access to the market has been impossible for a competitor of the dominant undertaking, it fails to prove whether the access has been made more difficult.\textsuperscript{318} For the GC the mere existence of the loyalty mechanism which makes itself access of ‘as efficient competitors’ to the market more difficult but not necessarily economically impossible\textsuperscript{319} suffices for the establishment of a potential anti-competitive effect.\textsuperscript{320} It is the condition of exclusivity or quasi-exclusivity that makes the rebate abusive\textsuperscript{321} and this is the reason why the application of the AEC test to Intel’s rebates is irrelevant for the Court but relevant in the case of \textit{TeliaSonera, Deutsche Telekom} (margin squeeze) and \textit{PostDanmark I} (predatory pricing) where it was impossible to assess whether a price was abusive without a price and cost analysis.\textsuperscript{322} Finally, given that the Court in \textit{Tomra}\textsuperscript{323} found the AEC test irrelevant for the third category of rebates, the Court in Intel contends that the AEC test a fortiori is not relevant in the case of exclusivity rebate either.\textsuperscript{324} Consequently, the GC concludes that it is not necessary to take into account whether the Commission carried out or carried out properly the test.\textsuperscript{325} It indicates that such conclusion is not undermined by the fact that the Commission’s Guidance Paper predated the Commission’s Decision and thus should be applicable.\textsuperscript{326} According to the GC the Commission’s Decision was not required to be in line with the Guidance Paper\textsuperscript{327} given that the Commission’s action had already reached an advanced stage by the time when the Guidance Paper was published.\textsuperscript{328}

\textsuperscript{318} Intel I, supra n. 13, para. 150
\textsuperscript{319} A. Fatih Özkan, ‘The Intel judgment: the Commission threw the first stone but the EU courts will throw the last?,European Competition Journal, May 2015 Vol.11(1), p.75
\textsuperscript{320} Id, para. 145. See also A. Fatih Özkan, p.75
\textsuperscript{321} A. Fatih Özkan, p.76
\textsuperscript{322} Intel I, supra n. 13, para. 152
\textsuperscript{323} Tomra II, supra n. 90, para. 73
\textsuperscript{324} Intel I, para. 153
\textsuperscript{325} Id, para. 151
\textsuperscript{326} Intel I, supra n. 13, para. 154-156
\textsuperscript{327} Guidance Paper, supra n. 9
\textsuperscript{328} Intel I, paras. 155 & 156
5.3 A critical analysis of Intel’s findings

5.3.1 Is an analysis of all circumstances of the case necessary when examining exclusivity rebates?

It seems essential to present AG Wahl’s observations regarding the necessity of considering all the circumstances of the case when determining whether a dominant undertaking has abused its position by means of granting exclusivity rebates. Those observations complemented by further comments show that the GC insufficiently substantiates its finding that Intel’s rebates are abusive and consequently rejects Intel’s relevant arguments.

5.3.2 Towards a proper interpretation of HLR and subsequent case law on rebates: Did the GC miss a point?

In paragraph 66 of his opinion on Intel I AG Wahl observes that in HLR the CJEU came to the conclusion that fidelity rebates granted by HLR were unlawful indeed after a ‘thorough analysis of, inter alia, the conditions surrounding the grant of the rebates and the market coverage thereof’. Even if the CJEU in HLR did not explicitly state that an analysis of the circumstances is required when examining fidelity rebates, it nevertheless did conduct a detailed analysis of several circumstances (i.e. conditions for the grant of the rebates, the market coverage thereof and the duration of the rebate arrangements) relating to the legal and economic context under which the fidelity rebates were granted in order to substantiate their unlawfulness. Unlike the CJEU in HLR, the GC in Intel I comes to the same conclusion of unlawfulness disregarding the necessity of the aforementioned analysis which, as AG Wahl’s opinion shows, is inherent in

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329 AG Wahl’s opinion, supra n. 16
330 Id, para.66
331 AG Wahl’s opinion, supra n. 16, paras. 66 and 83. See also HLR, para 92 et seq. Against AG Wahl’s observation, it has been argued by that the CJEU in HLR conducted an analysis of several circumstance not towards finding abuse of dominance triggered by HLR’s rebates but rather towards establishing that HLR’s rebates were fidelity and not quantity rebates. See M. Friend, ‘LOYALTY REBATES AND ABUSE OF DOMINANCE’ The Cambridge Law Journal, March 2018, Vol.77(1), p.27 available at https://doi.org/10.1017/S0008197318000193
HLR and subsequent case law on rebates.\textsuperscript{332} An interesting point made by Nicolas Petit in that regard is that the translation of paragraph 90 of the French version of HLR shows that fidelity rebates ‘tend to deprive the purchaser of or restrict possible sources of supply,’’ whereas the official English version erroneously states that fidelity rebates ‘are designed to deprive the purchaser of or restrict his possible choices of sources’\textsuperscript{333} Admittedly, this slight yet significant difference could be interpreted as intention of the CJEU in HLR not to consider fidelity rebates ‘by their very nature’ abusive as the GC in Intel I does.\textsuperscript{334} The AG indicates that the decision on Intel I is one of the very few cases ‘where the Court’s statement in Hoffmann-La Roche has been applied verbatim, without examining the circumstances of the case, before concluding that an undertaking has abused its dominant position’.\textsuperscript{335} As AG Wahl asserts, coming to a conclusion of abuse of dominance caused by rebates without examining relevant circumstances under which those rebates were granted constitutes an error in law.\textsuperscript{336} Even in the case of presumptively unlawful practices, the Court has consistently examined the legal and economic context of the impugned conduct which according to the AG is essential.\textsuperscript{337} More importantly, apart from HLR, the case law on rebate schemes has consistently and explicitly considered the circumstances of the case as important means to determine whether the grant of rebates amounts to an abuse of a dominant position.\textsuperscript{338} Therefore, a requirement for examination of the legal and economic context of the impugned conduct rather a ‘verbatim application of a statement’ by the GC would be

\textsuperscript{332} N. Petit, *Advocate general’s opinion in intel v commission: Eight points of common sense for consideration by the CJEU*, p. 3 available at https://www.ssrn.com/abstract=2875422

\textsuperscript{333} HLR, supra n. 7, para. 90

\textsuperscript{334} Intel I, supra n. 13, para. 85

\textsuperscript{335} AG Wahl’s opinion, para. 70

\textsuperscript{336} Id, para. 106

\textsuperscript{337} Id, paras. 73 and 79

\textsuperscript{338} AG Wahl’s opinion, supra n. 16, para. 76. See supra n. 107. See also Tomra I, supra n. 90, para. 215.
a consistent interpretation of case law that shows how an abuse of a dominant position in case of loyalty rebates is established.\textsuperscript{339}

5.3.3 Does the trichotomy of rebates provide more clarity in and is it relevant for the assessment of exclusivity rebates?

As regards Intel’s reference to relevant case law on rebates such as \textit{British Airways, Michelin I} and \textit{Tomra}\textsuperscript{340}, the GC found those cases irrelevant as dealing with rebates belonging to the third category of rebates. The common denominator and statement of principle of the Court in those cases was that the circumstances of the case towards a finding of abuse of dominance have to be examined in case of discount or rebate systems.\textsuperscript{341} In those cases the Court did not further distinguish specifically which kind of rebate or discount systems the above requirement applies to. Especially in \textit{Tomra}\textsuperscript{342} (a case dealing with individualised retroactive rebates) the Court made explicit reference to the applicability of the above requirement in the case of loyalty rebates. However, the GC in \textit{Intel I} deviates from that principle by trichotomizing those systems of discounts. One could argue that the GC in \textit{Intel I} sheds light and clarifies the previous case law in regard to which kind of rebates the requirement for an examination of all the circumstances shall apply to by establishing a three-fold categorization of rebates but such argument is rather questionable. According to AG Wahl the GC in \textit{Intel I} creates a ‘super category’ of rebates or a sub-category of loyalty rebates for which an analysis of the circumstances of the case is not required due to their form.\textsuperscript{343} In the opinion of AG Wahl ‘there is no separate category of exclusivity rebates’\textsuperscript{344} for which the above analysis is not required. AG Wahl suggests that there are two categories of rebates, namely volume-based rebates which are presumptively lawful and loyalty rebates which


\textsuperscript{340}See supra notes 64, 90 and 107

\textsuperscript{341}Ibid

\textsuperscript{342}Tomra I, supra n. 90, para.215

\textsuperscript{343} AG Wahl opinion, supra n. 16, para.84

\textsuperscript{344} Id, para. 198
are presumptively unlawful\textsuperscript{345} and similar to the restrictions by object under Article 101 TFEU that necessitate an examination of their legal and economic context.\textsuperscript{346} Furthermore, the Opinion notes that another ‘categorization error’\textsuperscript{347} that the GC in \textit{Intel I} is led to is the inclusion of both exclusivity options and exclusivity obligations\textsuperscript{348} under the category of exclusivity rebates.\textsuperscript{349} Unlike to what some commentators support,\textsuperscript{350} it cannot be clearly inferred from the judgment in \textit{Post Danmark II}\textsuperscript{351} that the trichotomy of rebates expressly established in \textit{Intel I} is also confirmed by the CJEU in \textit{Post Danmark II}. While the Court in \textit{Post Danmark II} maintained the forms-based triple classification of rebates, it nevertheless distinguished between exclusivity obligations ‘or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark’ and exclusivity options and other financial incentives for which an examination of all circumstances is required.\textsuperscript{352} Hence, the CJEU in \textit{Post Danmark II} did not clearly confirmed the trichotomy but rather limited the scope of exclusivity rebates presumed unlawful.\textsuperscript{353} Therefore, it remains unclear which categorization system for rebates is the most reasonable and must be followed by the European Courts in the assessment of rebates including exclusivity rebates under Article 102 TFEU.\textsuperscript{354} Besides this lack of clarity, in general, the relevance of the trichotomy of rebates has found opponents from within the Court. For instance, in her opinion in

\textsuperscript{345} AG Wahl opinion, supra n. 16, para. 81
\textsuperscript{346} Id, para. 82. However, some authors observe that examination of the legal and economic context of the conduct such as complex market analysis is avoided in case of by object restrictions under Article 101 TFEU but still some assessment of the relevant market is required. See A. Jones ‘Distinguishing Legitimate Price Competition from Unlawful Exclusionary Behaviour: Reconciling and Rationalising the Case-Law’ (March 23, 2015). S. Pais (ed), Competition Law Challenges in the Next Decade (2016), 123. Available at SSRN: \url{https://ssrn.com/abstract=2614413}
\textsuperscript{347} N. Petit, supra n. 332, p.4, p.4
\textsuperscript{348} Ibid. See also N. Petit, supra note 141, p.14
\textsuperscript{349} Ibid
\textsuperscript{351}Post Danmark II,
\textsuperscript{352} Id, para. 28. See also N. Petit, supra n. 332, p.5
\textsuperscript{354} N.Petit, supra n. 332, p. 5
Post Danmark II AG Kokkott believes that the trichotomy of rebates is ‘ultimately immaterial’ in the assessment of a rebate within the ambit of Article 102 TFEU. What matters for AG Kokkott is the capability of a rebate to produce on the relevant market an exclusionary effect that is not economically justified. This exclusionary effect means that a rebate is capable of removing or restricting buyers freedom to choose their sources of supply, it forecloses the market for other competitors and it strengthens even more the dominant position of position of an undertaking. This is clearly a proposal for an effects-based approach to rebates.

5.3.4 Exclusivity rebates: Pricing or non-pricing practices?

Another questionable statement on which the GC bases its reasoning that an examination of all the circumstances of the cases is not necessary, is that exclusivity rebates do not relate to pricing practices. However, as AG Wahls observes the GC not only itself finds Intel’s rebates to be abusive on account of price but also comes in contradiction with the Commission which considers loyalty rebates together with margin squeeze and predatory pricing as different types of price-based exclusion. For instance, in PostDanmark I the CJEU by reference to AKZO v Commission (case relating to predatory pricing) suggests that prices below average variable costs are presumptively unlawful whereas pricing above average total costs is presumptively lawful. Pricing in-between the previously mentioned benchmarks is unlawful insofar as it is part of a strategy to eliminate competitors. By categorizing exclusivity rebates as non-pricing practices, the GC in Intel I automatically accepts that the above benchmarks are not applicable in the case of exclusivity rebates. Such arbitrary categorization by the GC is not in conformity with case law

355 Ibid.
356 AG Kokkot’s opinion, supra n. 89, para. 29.
357 Intel I, supra n. 13, para.99
358 AG Wahl’s opinion, supra n. 16, para. 102. See also Intel I, para. 93
359 AG Wahl’s opinion, para. 102. See also Discussion Paper, supra n.76, para. 73
360 PostDanmark I, supra n. 85, para. 27
361 AKZO case, supra n. 173
362 Id, para. 71
363 Id, para. 72
applicable to abusive pricing practices\textsuperscript{364}, constitutes a clear departure from the well-established taxonomy for exclusionary conduct and leads to inconsistency in the application of legal tests to price-based exclusionary conduct.\textsuperscript{365} To make matters worse, by dismissing the relevance of case law regarding pricing practices in the case of Intel’s exclusivity rebates, the GC creates legal uncertainty to dominant undertakings and misguides competition authorities as to the correct way of enforcing competition law.\textsuperscript{366} It has been argued that the opinion of AG Wahl on the other hand brings coherence\textsuperscript{367} by aligning the case law on loyalty rebates with the case law applicable to other forms of pricing conduct\textsuperscript{368} in the sense that price-related conduct needs to be assessed in the light of all circumstances of the case.\textsuperscript{369}

5.3.5 Does the GC contradict itself? Some final remarks

It can be observed that the GC to some extent contradicts itself in regard to its findings. Indeed it seems quite contradictory on the part of the GC that it finds Intel’s exclusivity rebates abusive without analyzing the capability of the rebates to restrict competition on the basis of an analysis of the circumstances of the case\textsuperscript{370} while at the same assesses in detail Intel’s arguments related to various circumstances of the case\textsuperscript{371} and highlights the need for analysis of those circumstances in order to assess the capability of Intel’s rebates to restrict competition.\textsuperscript{372} Furthermore, whilst the GC contends that the grant of an exclusivity rebate constitutes an abuse of dominant position in the absence of an objective justification for granting it,\textsuperscript{373} it nevertheless assumes its unlawfulness on the basis of its form.\textsuperscript{374} However, as AG Wahl points out an assumption of unlawfulness by virtue of form cannot be rebutted by an objective pro-

\textsuperscript{364}Cases Deutsche Telekom, TeliaSonera and PostDanmark I, supra n. 85 and 107
\textsuperscript{365}AG Wahl’s opinion, para. 103
\textsuperscript{366}Ibid.
\textsuperscript{367}Ibid. See also D. Geradin, supra n. 339, p.8
\textsuperscript{368}Cases Deutsche Telekom, TeliaSonera and PostDanmark I, supra n. 85 and 107
\textsuperscript{369}D. Geradin, supra n. 339, p.8
\textsuperscript{370}Intel I, supra n. 13, paras 84 and 85
\textsuperscript{371}Id, paras. 107 et seq. See also AG Wahl’s opinion, supra n. 16 para. 107
\textsuperscript{372}Id, paras. 176 and 197.
\textsuperscript{373}Id, para. 81
\textsuperscript{374}Id, paras. 85 and 77
competitive justification.\textsuperscript{375} Such conclusion though presupposes that \textit{Intel I} introduces a per se illegality rule as regards exclusivity rebates. In the view of Richard Wish and David Bailey, however, \textit{Intel I} does not impose a per se rule owing to the possibility that the GC reserves for dominant undertakings to provide evidence in order to objectively justify the granting of their rebates.\textsuperscript{376} For Richard Wish the characterization of Intel’s rebates as by their very nature abusive is a rule with form but not a determinative one\textsuperscript{377} because it reverses the evidential burden of proof and allows Intel to adduce evidence of the objective justification, which it did not.\textsuperscript{378} According to the author the above reversal is also observed under Article 101 TFEU where an undertaking can come up with an efficiency defence under Art. 101(3) TFEU\textsuperscript{379}. And seen from that perspective in view of some authors both Art. 101 and Art. 102 TFEU adopt similar approaches to object cases.\textsuperscript{380}

5.3.6 Preliminary conclusion on the necessity of examining all the circumstances of the case

In view of AG Wahl’s observations, it could be argued that the GC in \textit{Intel I} by merely reiterating a statement of principle made by the CJEU in \textit{HLR} but without placing and assessing it within the legal and economic context of Intel’s specific case and contrary to what had been previous consistent practice in case law on loyalty rebates, to Commission’s view and case law on pricing practices and might even to some extent to itself, fails to provide a convincing explanation on why an examination of all surrounding circumstances under which Intel’s exclusivity rebates were granted was not necessary for those rebates to be found abusive under Article 102 TFEU.

\textsuperscript{375} AG Wahl’s opinion, paras. 86-87
\textsuperscript{376} R. Whish and D. Bailey, supra n. 126, p.773
\textsuperscript{378} Ibid. See also \textit{Intel I}, paras. 94 and 173
\textsuperscript{379} R. Wish, supra n. 377, p.2
\textsuperscript{380} A. Jones, supra n. 346, p. 130
5.3.7 Is an effects-based analysis of exclusivity rebates relevant towards a finding of abuse of dominance?

In paragraph 89 the GC admits that exclusivity conditions have in principle pro-competitive effects while at the same time it neglects to consider those beneficial effects when exclusivity conditions are offered by a dominant undertaking.\textsuperscript{381} Richard Whish\textsuperscript{382} referring to Delimitis v Henninger Brau\textsuperscript{383} suggests that exclusivity agreements under Article 101 TFEU do not have as ‘their object’ the restriction of competition but when such exclusivity is offered by an undertaking in a dominant position or as he prefers to call an undertaking ‘\textit{with substantial market power}’ then a stricter standard should be applicable. It could be argued that such positions may blur the boundaries between ‘non-blamable’ restriction of competition as a natural result of competition on the merits and ‘blamable’ abuse of dominance. In PostDanmark I the GC distinguished between pro-competitive and anti-competitive exclusionary conduct by maintaining that ‘\textit{not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation}’.\textsuperscript{384} In the context of Article 101 (1) TFEU, the fact that exclusivity agreements are not by object restrictive means that the Commission will have to assess and prove their effects\textsuperscript{385} on the market in their specific context by means of a legal and economic

\begin{footnotesize}
\begin{enumerate}
\item Intel I, para. 89
\item R. Whish, supra n. 377, p.2
\item Case C-234/89, Stergios Delimitis v HenningerBräu AGECLI:EU:C:1991:91 paras. 21-22
\item Case C-56/65 Société Technique Minière v. Maschinenbau Ulm, ECLI:EU:C:1966:38, p. 248. In this case the CJEU emphasizes the importance of the effects of an agreement rather than its legal nature by stating: ‘\textit{In order to be prohibited as being incompatible with the common market under Article 85(1) of the treaty, an agreement between undertakings must fulfil certain conditions depending less on the legal nature of the agreement than on its effects on ‘trade between member states ‘ and its effects on ‘competition ‘. Thus as Article 85(1) is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature.’}
\end{enumerate}
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Theoretically at least, it can be shown that by ‘object’ restrictions can escape the application of Article 101 TFEU in the light of circumstances related to their legal and economic context. A significant problem is that legal requirement for adoption of such analytical approach in the context of Article 102 TFEU is missing which in turn results in considering certain type of behavior such as loyalty rebates as per se abusive without a requirement for analysis of their effects merely because they are offered by a dominant undertaking. It is important that the approach followed in Article 101 TFEU is consistent with the once followed under Article 102 TFEU not only because the same conduct of an undertaking can be examined under both provisions (i.e single branding/exclusive purchasing obligations) but also because the effects of the conduct under both provisions are similar and different treatment would be unjustified and trigger undesirable bias in the undertaking’s conduct. Notwithstanding the special responsibility that dominant undertakings have not to impair genuine undistorted competition, if all competitive conduct such as granting of exclusivity rebates with pro-competitive effects by a dominant undertaking is forbidden, then the holding of a dominant position should be considered unlawful. Therefore, as AG Wahl correctly points out the effects of loyalty rebates according to economic literature are context-dependent which implies that a legal and economic analysis of the market context and all the

386 Case C-234/89, Stergios Delimitis, supra n. 383. See also Intel I, para. 89
387 Joint Cases C-403/08, Football Association Premier League Ltd and Others v QC Leisure and Case C-429/08, Karen Murphy v Media Protection Services Ltd (C-429/08)ECLI:EU:C:2011:631, paras. 140 and 143. See also Case C-67/13 P Groupement des Cartes Bancaires v European Commission, EU:C:2014:2204, para. 69
390 Michelin I, supra n. 64, para. 57
391 N. Petit, supra n. 332, p.9
circumstances of the case in order anti-competitive effects to be proved is necessary. The requirement for such analysis in case of rebate schemes was observed in Tomra where - albeit a case regarding individualized retroactive rebates falling within the third category according to the trichotomy in Intel the CJEU did not make a clear distinction between exclusivity rebates and rebates with a fidelity-building effect and was later confirmed in PostDanmark II, a judgment which did not clearly endorsed the trichotomy of rebates established in Intel. In his opinion AG Wahl suggests that the potential difference between the rebates of Tomra and HLR which is more a difference of degree rather than kind does not change the fact that an effects-based analysis on the basis of the examination of the market context and the circumstances of the case is relevant for the finding of abuse of dominance.

5.3.8 Why the AEC test in Intel’s case should have been considered by the GC

The unwillingness of the GC to take into account the AEC test cannot be justified by its flawed argument that such test fails to prove whether the access to the market has been made not only impossible but also more difficult for an as-efficient competitor for two reasons.

Firstly, if that is the case, the GC should have assessed or order the Commission to access by means other than the AEC test whether Intel’s exclusivity rebates made access to the market indeed more difficult and thus had an exclusionary effect on competition. Such assessment would have required and been based on the examination of an alternative test as part of the examination of all the circumstances of the case or just

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393 Tomra II, supra n. 90, paras. 70 and 71
394 Intel I, supra n. 13, paras. 78 and 97
395 PostDanmark II, supra n. 90, para. 68
396 AG Wahl’s Opinion, supra n. 16, paras. 99 and 100
397 P. Greenlee and D. Reitman, ‘Distinguishing Competitive and Exclusionary Uses of Loyalty Discounts’, The Antitrust Bulletin, 2006 Vol. 50(3), p. 460-461. The authors examine various tests such as predatory pricing tests, exclusionary bundling test in the case of bundled loyalty rebates but, nevertheless, they note that it is difficult to be shown through those tests if there are consumer welfare gains and thus an overall evaluation of whether the rebate schemes are anti-competitive will still be required. Further tests that can be found in academic
merely in the examination of additional or different circumstances of the case than those that it did examine. The GC, however, neither examined any alternative test through which it proves anti-competitive foreclosure nor found necessary to examine all the circumstances under which Intel’s rebates were granted on the grounds that exclusivity rebates are quasi-per se abusive. According to AG Wahl, the circumstances that the GC nonetheless did assess such as market coverage, duration of supply contracts and amount of rebates could have shown that a foreclosure effect is theoretically possible but in no case confirmed. Therefore, the consideration of the AEC test by the GC was indispensable for the finding of an anti-competitive foreclosure effect.

Secondly, a positive AEC test could have shown that an as-efficient competitor as Intel could be allowed to sell its products at a price which would allow him to cover its costs and thus the potential anti-competitive foreclosure effects of Intel’s exclusivity rebates would be significantly diminished. Despite the fact that the result of the application of the AEC test to Intel’s rebates was negative and proved anti-competitive foreclosure, the applicant’s arguments that challenge such results should have been examined by the GC. Contrary to what Wills Wouter claims and as Nicolas Petit plausibly underscores, the AEC test is not merely a prioritization test but a clearly legal standard that forms part of the assessment of all the circumstances of the case. The CJEU in literature are tests based on a price analysis such as the rising rivals’ costs test and profit sacrifice test and tests based on comparison such as balancing test, test of proportionality and compatibility test. However, again those tests fail to ultimately increase consumer welfare and they frequently create type I and II errors. Yet, it has been suggested that the so called ‘non-economic sense’ test and especially its advance version ‘the enhanced non-economic sense’ test is the best-suited to assess non-pricing strategies and create less type I and II errors. See to that effect T. Schrepel, ‘The ’Enhanced No Economic Sense Test’: Experimenting With Predatory Innovation’, NYU Journal of Intellectual Property and Entertainment Law, Forthcoming, February 2018, p.1 available at SSRN: https://ssrn.com/abstract=3115949

398 AG Wahl’s opinion, supra n. 16, paras. 169 and 172

PostDanmark II corroborates this allegation by holding in paragraph 61 that ‘the as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme’. As the CJEU in Post Danmark II maintains, albeit not a legal obligation, the possibility of the Court to recourse to the AEC test when assessing the compatibility of rebates schemes with Article 102 may not be excluded. However, it must not be disregarded that the AEC test was not the only possible test that could be used as a legal standard in Intel’s case. Many authors for instance have suggested the use of the ‘no economic sense’ test in case of non-pricing exclusionary practices. Nevertheless, neither the Commission nor the GC made use of an alternative test to show the anti-competitive foreclosure effects caused by Intel’s rebates.

Without considering the AEC test or making use of any alternative test as part of the circumstances of case, the alleged anti-competitive effects of the impugned conduct of Intel can only be assumed but not confirmed by the GC. As AG Wahl reasonably concludes ‘the AEC test, precisely because that test was carried out by the Commission in the decision at issue, cannot be ignored’ in the case of Intel.

5.4 The decision of the CJEU on Intel’s appeal and the reflections of the effects-based approach on CJEU’s judgment: A spark of change in competition law on exclusivity rebates?

5.4.1 Introduction

It has been argued that the CJEU judgement on Intel case sheds significant light on the great debate on whether enforcement of EU competition law by the EU Courts, the Commission and national

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400 Post Danmark II, supra n. 90, para. 61  
401 Id, para. 57 and 58  
402 T. Schrepel, supra n. 397  
403 AG Wahl’s opinion, supra n. 16, para. 172
competition authorities should be based on effects deriving from the examination of both the legal and economic context of an allegedly abusive conduct or on presumptions of anti-competitive foreclosure.\textsuperscript{404}

Under this section it will be seen whether \textit{Intel II} provides an answer to this question by examining whether the CJEU through its findings distances or not itself from the approach on exclusivity rebates taken in \textit{HLR} and \textit{Intel I} and to what extent \textit{Intel II} brings more clarity and and contributes to consistency in the assessment of exclusivity rebates and price-based exclusionary conduct under Article 102 TFEU.

5.4.2 Summary of the CJEU’s judgment

Intel appealed the GC’s judgement on various grounds among which was the failure of the GC to examine Intel’s rebates in the light of all the relevant circumstances. This ground is divided by the CJEU in three parts. The first part regards Intel’s conviction that exclusivity rebates may be capable of restricting competition and thus abusive only after an examination of all the relevant circumstances.\textsuperscript{405} The second part of Intel’s ground of appeal is related to the failure of the GC to assess the likelihood of a restriction of competition.\textsuperscript{406} And the last part of Intel’s argumentation is linked to the insufficiency of the GC’s analysis of high relevant circumstances such as the consideration of the AEC test in order to reach its conclusion on the capability of Intel’s rebates to restrict competition.\textsuperscript{407}

Considering Intel’s arguments, the CJEU this time holds that fidelity rebates do not automatically infringe Article 102 of TFEU but in its assessment the EC has to show that a specific rebate scheme is capable of restricting competition. This means that the EC has to examine all the circumstances under which a rebate scheme is structured and applied in


\textsuperscript{405} Intel II, supra n. 14, para. 109

\textsuperscript{406} Id, para. 113

\textsuperscript{407} Intel II, supra n. 14, paras. 114 and 115
the market and additionally apply the as-efficient-competitor (AEC) test. The CJEU expressly states that the application of the AEC test by the EC obliges the GC to examine respective arguments brought by the applicant that challenge its validity. In addition, the CJEU implicitly recognizes exclusivity rebates as pricing practices and as such subject to same standards and test of restriction of competition as all pricing practices. On this basis, the CJEU without considering further the other parts of the ground of appeal related to the examination of the relevant circumstances, sets asides the GCs judgment due to failure of the GC to examine the EC’s analysis of the AEC test and Intel’s respective arguments and, therefore, refers the case back to the GC urging it to examine the factual and economic evidence brought by Intel, namely the AEC test, in the light of CJEU’s judgment on appeal.

5.4.3 General approach of the CJEU to conduct under Article 102 TFEU

Interestingly, the CJEU citing PostDanmark I enunciates that the objective of Article 102 TFEU is neither to condemn an undertaking for holding a dominant position in a market nor to maintain less efficient competitors in it. The CJEU finds that not every exclusionary effect harms the competitive process given that the very existence of competition on the merits automatically results in the exclusion of competitors from the market that fail to bring better prices, greater quality, more choices and innovation in it. Arguably, the placement of those statements in the beginning of the CJEU’s assessment of Intel’s arguments predisposes the reader to expect a more effects-based analysis of the content of those arguments in the subsequent paragraphs. Admittedly, the CJEU draws a clear line between mere foreclosure of competitors and anti-competitive foreclosure in the same way as it did in

\[408\] A. Komninos et al, supra note 404
\[409\] Intel II, paras. 147 and 149
\[410\] PostDanmark I, supra n. 85, para. 21
\[411\] Intel II, para. 133
\[412\] Intel II, supra n. 14, paras. 133 and 134
Post Danmark I.\textsuperscript{413} For the CJEU the former is the result of the existence of healthy competition on the merits that brings to the market cheaper and innovative products as well as a wider choice of good and services for the consumer.\textsuperscript{414} Undoubtedly, such an approach by the CJEU not only favours innovators irrespective of how dominant they are and condemns less efficient rivals but more importantly makes dominant undertakings feel more confident about offering more competitive rebates schemes and their promise to continue offering products that better serve consumer welfare. As an initial general note, it can be inferred from the above statements that the CJEU makes itself clear about its approach to the application and interpretation of Article 102 TFEU. The CJEU articulates the clear takeaways from Post Danmark I reaffirming that a dominant undertaking may compete on the merits and challenging the notion that the competition cannot be further eliminated through protection of inefficient competitors once dominance is established.\textsuperscript{415} Admittedly, the CJEU seems to be more interested in the effects of exclusionary conduct on consumers’ welfare than in the adherence to forms and protection of inefficient competitors in the market.

5.4.4 Requirement for examination of the context when supporting evidence is provided

Whilst the CJEU makes reference to case law that finds exclusivity rebates unlawful \textit{per se}, it nevertheless highlights the need for clarification in such case law where a dominant undertaking comes forward with supporting evidence, during the administrative procedure, that leads to the conclusion that its practice is not capable of producing the alleged foreclosure effects.\textsuperscript{416} In such case, the CJEU underlines the duty of the Commission not only to analyze the dominant position of the undertaking

\begin{footnotesize}
\textsuperscript{413}Post Danmark I, supra n. 85, para. 22. See also R. Whish and D. Bailey, supra n. 209, p.219
\textsuperscript{414} Intel II, supra n. 14, para. 134
\textsuperscript{416} Intel II, supra n. 14, paras. 138-139
\end{footnotesize}
on the relevant market and the share of the market covered by the challenged practice and take into account all the circumstances of the case (i.e. conditions and arrangements for granting of rebates, their amount and duration) but also examine the possible existence of a strategy by the dominant player to exclude as efficient competitors.\footnote{Intel II, supra n. 14, para. 139} Such approach is fully in line with the EC’s approach to exclusionary conduct in the Guidance Paper which examines effects on the basis of cogent and convincing evidence in the light of various circumstances.\footnote{Guidance Paper, supra n. 9, para. 20} It further notes that the above analysis is relevant for the finding of a possible objective justification and efficiency gains under Article 102 TFEU that render the impugned conduct lawful and benefit consumers respectively.\footnote{Intel II, para. 140.} The requirement especially for considering the share of the market covered by the challenged practice is diametrically opposed to the - according to some commentators - shocking or surrealistic view\footnote{D. Geradin, ‘Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche’ (March 28, 2015). Forthcoming in 11 (2015) Journal of Competition Law & Economics; George Mason Law & Economics Research Paper No. 15-15, p. 23 available at SSRN: \url{https://ssrn.com/abstract=2586584} . See also N. Petit, ‘The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases’ (December 12, 2017). European Law Review, October 2018 Forthcoming., p. 11 available at SSRN: \url{https://ssrn.com/abstract=3086402}} taken in \textit{Intel I} that Article 102 TFEU is infringed even if the foreclosure by the dominant undertaking regards only a minimal share of demand.\footnote{Intel I, supra n. 13, para. 116} It would not be an exaggeration to say that the judgment in the above regard seems favorable to dominant undertakings in that, provided adequate supporting evidence adduced by a dominant undertaking during the administrative procedure, the burden of proof is shifted onto the Commission to show capability of the impugned conduct to foreclose.\footnote{M. Friend, supra n. 331, p.28} Yet, the CJEU does not make any reference on the kind of supporting evidence that would have a chance to rebut a presumption of quasi-per se illegality. It is conceivable that the above finding is a clear step back from the quasi-per se illegality rule established in \textit{HLR} and further followed in \textit{Intel I} which treated exclusivity rebates that could not be justified as
abusive without the need of examination of the circumstances of the case.\textsuperscript{423} The CJEU’s judgment endorses an effects-based approach to the assessment of exclusivity rebates in that it enables dominant undertakings to have their exclusivity rebates reviewed on the basis of factual and economic evidence irrespective of their form.\textsuperscript{424} In this way it brings clarity in the assessment of exclusivity rebates under Article 102 TFEU and even more importantly encourages the consistent evaluation of conduct\textsuperscript{425} that can fall within the scope of both Article 101 and 102 TFEU through an assessment of effects in the light of all the circumstances of the case.

5.4.5 Trichotomy of rebates: Are Intel I and HLR overruled?

As we had seen above AG Wahl made clear in his opinion that there is no separate category of loyalty rebates for which an examination of the circumstances of the case is not necessary towards a finding of an abuse under Article 102 TFEU\textsuperscript{426} and that the CJEU in HLR did examine several circumstances of the rebates at issue. However, the CJEU in Intel II abstains from entering into a discussion on whether in HLR the circumstances had been actually examined or further elaborating on the trichotomy of rebates initially promulgated in Intel I.\textsuperscript{427} The CJEU neither explicitly rejects AG Wahl’s opinion on the existence of two categories of rebates instead of three\textsuperscript{428} or Intel’s trichotomy of rebates nor endorses the trichotomy made in PostDanmark II where the CJEU distinguished between exclusivity obligations and exclusivity options.\textsuperscript{429} The latter distinction was reflected in the Commission’s Guidance Paper but rather differently under the words ‘exclusive dealing’ and ‘conditional rebates’\textsuperscript{430} both assessed as one category under an effects-based analysis contrary to

\textsuperscript{423} J. S. Venit, supra n. 415, p. 197
\textsuperscript{424} Ibid. See also
\textsuperscript{426} AG Wahl’s opinion, supra n. 16, para.198
\textsuperscript{427}J. S. Venit, supra n. 415, p. 197

\textsuperscript{428}M. Friend, supra n. 331, p. 27-28
\textsuperscript{429} Post Danmark II, supra n. 90, para. 27
\textsuperscript{430} Guidance Paper, supra n. 9, para. 32 et sec
Intel I. The CJEU in Intel II confines itself by merely stating that 'case law must be further clarified' but in any case accepts an effects-based analysis in the light of all the circumstances of the case when the defendant brings supporting evidence.

Therefore, even if the CJEU does not expressly overrule HLR and Intel I, it nevertheless makes clear that an examination of the circumstances of the case is necessary regardless of categorization on the basis of forms. In that sense, it has been argued that the CJEU espouses an approach, albeit not explicitly, akin to the one taken in Commission’s Guidance Paper that focuses on effects rather than forms.

5.4.6 Recognition of an obligation to consider applicant’s arguments regarding the validity of the AEC test

Another clear reflection of the effects-based approach on the CJEUs judgment on Intel can be found in paragraphs 142-144. The CJEU explicitly states that if the Commission has conducted a detailed analysis of the AEC test in order to examine the foreclosure capability of Intel’s rebates, the GC is obliged to consider the applicant's arguments that call the validity of the findings of such analysis into question. Indeed the Commission found that in order for an as efficient competitor to match Intel’s conditional offers, he had to recourse to unviable level of pricing such as offering prices and making compensation payments that are below its AAC and lead to a net price below its AAC respectively. On the basis of the AEC test, which nevertheless according to the Commission was not indispensable for the infringement of Article 102 TFEU, the Commission concluded that Intel’s rebate scheme had anti-competitive foreclosure effects and it was thus abusive. The GC in Intel I, however, came to the same conclusion by considering the AEC test irrelevant and without examining Intel’s arguments on the validity of the AEC test.

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431 Intel II, supra n.14, para. 140
432 N. Petit, supra n. 420, p. 16-17
433 Intel II, supra n. 14, para. 142 in conjunction with para. 144
434 Commission Decision, supra n. 15, para. 1574
435 Id, para. 1155
436 Id, para. 1575
applied in the specific context of Intel’s rebates.\textsuperscript{437} In that regard \textit{Intel II} does not only overrule \textit{Intel I} but also constitutes a clear departure from or clarification of \textsuperscript{438}the case law in \textit{PostDanmark II} where the CJEU found that the AEC test was not suitable for the finding of an abuse of dominance in case of a rebate scheme\textsuperscript{439} but only a tool among others.\textsuperscript{440} The CJEU’s requirement in \textit{Intel II} for examination of the AEC test by the GC is also fully in line with AG Wahl’s criticism to \textit{Intel I} that the GC should not have ignored the AEC test precisely because that test was carried out by the Commission.\textsuperscript{441} It can be argued that CJEU’s requirement of consideration of the AEC test by the GC, when the validity of such test is brought forward by the applicant as a decisive legal argument challenging the abusiveness of a rebate scheme, constitutes a clear requirement for examination of exclusivity rebates caught under Art. 102 TFEU on the basis of their effects and not their form.

5.4.7 Implicit recognition of exclusivity rebates as pricing practices

A final particularly remarkable point in CJEU’s judgement is that the CJEU implicitly considers exclusivity rebates as pricing practices. As we saw above the GC found in \textit{Intel I} that the reliance of the applicant on \textit{Post Danmark I} was erroneous on the grounds that \textit{Post Danmark I} was a case clearly related to pricing practices and, in particular, abuse by means of selectively low prices whereas in \textit{Intel I} the abuse lied ‘on the fact that the grant of those rebates was conditional on exclusive or quasi-exclusive supply’.\textsuperscript{442} On this basis, the GC in \textit{Intel I} rejected the applicant’s argument that \textit{Post Danmark I} dealt with loyalty rebates comparable to those of Intel and thus ‘in order to determine whether the undertaking in

\textsuperscript{437} \textit{Intel I}, supra n. 13, paras. 146 and 151
\textsuperscript{439} \textit{PostDanmark II}, supra n. 90, para. 57
\textsuperscript{440} Id, para. 61
\textsuperscript{441} AG Wahl’s opinion, supra n. 16, para. 172
\textsuperscript{442} \textit{Intel I}, supra n. 13, paras. 99 and 100
a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances ...

However, in paragraph 136 of Intel II – a case dealing with exclusivity rebates – the CJEU states that 'Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself'. The use of the same phrase is found under paragraph 25 of Post Danmark I.

Furthermore, the CJEU holds that the capability of exclusivity arrangements to restrict competition requires, inter alia, an assessment of possible 'existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking’. The same reference to an existence of a strategy to eliminate competitors as a prerequisite of the unlawfulness or not of a pricing practice can be found in AKZO. Even if the aforementioned similarities in the language used in Post Danmark I and AKZO are not comparable to explicit statements, they nevertheless show the intention of CJEU in Intel II to place rebates under pricing practices and as such subject to the same requirements for price and cost analysis and examination of all the circumstances of the case in the framework of an effect based analysis leading to the conclusion on whether rebates are abusive or not. Such implicit recognition of rebates as pricing practices, not only strongly endorses an effects-based approach to the examination of exclusivity rebates under Article 102 TFEU but also contributes to consistency in the application of legal tests to price-based exclusionary conduct.

5.4.8 Conclusion

Arguably, the CJEU in Intel II brings a spark of positive change and reason in the proper interpretation and application of Article 102 TFEU to exclusivity rebates and significantly reinforces the Commission’s enforcement priorities set in its 2011 Guidance Paper. In the light of the above reflections, it can be concluded that Intel II marks the beginning of

443 Intel I, supra n. 13, para. 100 and 98
444 Intel II, supra n. 14, para. 136
445 Post Danmark I, supra n. 85, para. 25
446 A. Komninos et al., supra n. 404, p.3
a new era, the "post-Intel II era”, in the assessment of exclusivity rebates in the context of Article 102 TFEU. The post-Intel II era will require the analysis of the actual and potential effects of exclusivity rebates by means of an examination by the Commission, the national authorities and the European Courts of the specific legal and economic market context in which those rebates operate towards a finding of an abuse of dominant position. In addition to that, this era will be characterized by a uniform interpretation and application of Article 102 TFEU and Article 101 TFEU in exclusionary conduct. Furthermore, the effects-based approach on rebates endorsed by the CJEU in Intel II paves the way for the introduction of a de minimis threshold in Article 102 TFEU cases\textsuperscript{447} - which the CJEU in Post Danmark II clearly rejected\textsuperscript{448} - on the basis of which only conduct with an appreciable effect should fall under the radar of the Commission, the national competition authorities and the Courts. Such an appreciability threshold can be established after an examination of all the circumstances of the case and the correct application of the AEC test or else an effects-based analysis of conduct falling within the scope of Article 102 TFEU.\textsuperscript{449}

### 6. Conclusion

Rebates are common business practices and have been considered as competition on the merits and ‘instruments of healthy and legitimate price competition’. However, when offered by dominant undertakings with substantial market power over a certain part of the customer’s demand, rebates may significantly preclude competitors from demand-related efficiencies such as economies of scale and network effects. Yet, such effects can be counterbalanced by procompetitive justifications and efficiency gains. In any case an effects-based analysis is necessary.

The trichotomy and subsequent assessment of rebates on the basis of their form leads to inconsistency in the legal treatment of exclusivity

\textsuperscript{447} R. Whish and D. Bailey, supra n.209, p. 773 and 212
\textsuperscript{448} Post Danmark II, supra n. 90, paras. 73 and 74
\textsuperscript{449} See, to that effect, Guidance Paper, supra n. 9, paras. 20, 37-39 and 46
rebates in relation to other categories of rebates and exclusivity rebates in relation to other pricing practices mainly in regard to the requirement for examination of all the circumstances of the case towards the establishment of a foreclosure effect that will trigger the application of Article 102 TFEU.

The forms-based approach seems problematic when a dominant undertaking’s conduct such as the granting of rebates presents characteristics observed in more than one categories of price practices. When simultaneous implementation of such pricing practices serve the same purpose, the utilization of an approach based on the form of the conduct rather than its effects on the market leads to inconsistent treatment of price-based exclusionary conduct by applying different, less or more lenient, standards. Such inconsistency may generate exclusionary and exploitative effects.

Whereas a forms-based approach creates legal certainty and less administrative costs, it aggravates Type I and II errors. As a result, dominant undertakings may stop being innovative and may be prevented from recoursing to procompetitive conduct. Ultimately, diminished competition in the market, dynamic inefficiencies and mal-served consumer welfare may be observed.

The EC in its Guidance Paper adopted an effects-based approach in the assessment of exclusionary conduct with horizontal effects under Article 102 TFEU. The EC evaluates whether an allegedly exclusionary conduct is likely to produce anti-competitive foreclosure effects on the basis of cogent and convincing evidence and in the light of the examination of various circumstances surrounding the impugned conduct. In addition to the examination of various circumstances, the EC conducts an as efficient competitor analysis by applying the AEC test when the EC is dealing with price-based exclusionary conduct. Both tests, namely examination of various circumstances and the application of AEC test will be applied by the EC in the case of exclusivity rebates which the EC places in the category of price-based exclusionary conduct.
The AEC test is neither necessary nor sufficient to establish anticompetitive effects of rebates. However, it can be seen as a powerful tool in minimizing the risk of making errors when reliable data is available. A dynamic application of the AEC would be consistent with the purposes of Article 102 TFEU only if there is a requirement for proof of actual effects.

The Commission Decision is not based on the quasi-per se approach to the assessment of exclusivity rebates reflected in established case law but on the contrary it demonstrates the ability of the EC to fairly combine established law with an effect-based analysis.

*Intel* I fails to provide a convincing explanation on why an examination of all surrounding circumstances under which Intel’s exclusivity rebates were granted was not necessary for those rebates to be found abusive under Article 102 TFEU.

AG Wahl suggests that an effects-based analysis on the basis of the examination of the market context and the circumstances of the case on Intel’s rebates is relevant for the finding of abuse of dominance and that without considering the AEC test or making use of any alternative test as part of the circumstances of case, the alleged anti-competitive effects of Intel’s rebates can only be assumed but not confirmed by the GC.

The CJEU in *Intel II* seems to be more interested in the effects of exclusionary conduct on consumers’ welfare than in the adherence to forms and protection of inefficient competitors in the market. The CJEU endorses an effects-based approach and brings clarity and contributes to consistency in the legal treatment of exclusivity rebates in relation to other categories of rebates and price-based exclusionary conduct in the following ways:

a) the CJEU makes clear that the EC is required to examine all the relevant circumstances surrounding the granting of exclusivity rebates when the dominant undertaking comes forward with supporting evidence during the administrative procedure

b) the CJEU is concerned only with exclusion of as efficient competitors as the dominant undertaking and requires an examination of the dominant
undertaking’s arguments related to the AEC test by the GC when the validity of such test is brought forward by the applicant as a decisive legal argument challenging the abusiveness of a rebate scheme.

c) the CJEU implicitly recognizes rebates as pricing practices and as such subject to the same requirements for price and cost analysis and examination of all the circumstances of the case in the framework of an effects-based analysis leading to the conclusion on whether rebates are abusive or not.

The CJEU in Intel II further contributes to a uniform interpretation and application of Article 102 TFEU and Article 101 TFEU in exclusionary conduct and may pave the way for the introduction of a *de minimis* threshold in Article 102 TFEU cases.

In the light of the above conclusions, it can be argued that the shift from a formalistic approach towards an effects-based approach to the legal treatment of exclusivity rebates contributes to the consistent assessment of rebates and price-based exclusionary conduct in the context of Article 102 TFEU and that both such shift and contribution are clearly reflected in *Intel II* that marks the beginning of a new era in the assessment of exclusivity rebates and exclusionary conduct in general under Article 102 TFEU.
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