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The Intel Case: A Significant Step Towards A More Economic Approach in the Area of Fidelity Rebates

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Anno Accademico 2019/2020

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INTRODUZIONE

Gli sconti fidelizzanti possono essere definiti come riduzioni di prezzo garantite ai consumatori per premiare un certo comportamento d' acquisto o alla condizione che si acquisti dell'impresa un certo volume di prodotti durante il periodo di riferimento. La giurisprudenza consolidata si caratterizza per un approccio formalistico verso questa pratica, che è stato però recentemente messo in discussione nel caso Intel.
Hoffmann La-Roche è il primo caso significativo in materia. Questo riguarda un sistema di sconti offerti dall' impresa dominante alla condizione che il cliente si rifornisca esclusivamente presso di essa per la totalità o per una parte essenziale del suo fabbisogno. La Corte di Giustizia ha qualificato questo tipo di sconti come "sconti fedeltà" ed ha stabilito nei loro riguardi una presunzione di illegalità, sulla base della considerazione che questi, al pari di un accordo di esclusiva, mirano a limitare la possibilità dell'acquirente di scegliere le proprie fonti di approvvigionamento e a precludere l'accesso al mercato dei concorrenti. Gli sconti fedeltà vengono distinti dagli sconti quantitativi, che dipendono solo dal volume degli acquisti, e sono presuntivamente ritenuti leciti.
A differenza del precedente, il caso Michelin I riguarda un sistema di sconti che non si basa su una condizione di esclusiva, ma sul raggiungimento di obiettivi di vendita individuali. Perciò la Corte ha ritenuto di non poterli classificare né come sconti fedeltà né come sconti quantitativi ed ha introdotto una terza categoria di sconti, che, pur in assenza di un impegno di esclusiva, possono avere lo stesso effetto fidelizzante. In questo caso è necessario esaminare "tutte le circostanze" del caso, e, in particolare, "i criteri e le modalità della concessione dello sconto" per poter determinare se questo abbia potenziali effetti escludenti. Lo stesso test è stato applicato sugli sconti offerti da British Airways, sempre appartenenti alla terza categoria.
Anche il caso Tomra ha ad oggetto sconti di terzo tipo. Qui il Tribunale ha specificato che la valutazione di "tutte le circostanze" tiene conto, non solo delle caratteristiche formali della condotta, ma anche "del contesto nel quale tali accordi si inseriscono". Tuttavia, il Tribunale ha ribadito che non è richiesta alcuna analisi degli effetti della condotta, né che i prezzi siano al di sotto dei costi, per determinare la sua natura abusiva, ma è sufficiente dimostrare che questa "mira a restringere la concorrenza".
Infine, nel caso Post Danmark II la Corte di Giustizia ha superato la presunzione assoluta di legalità dei sistemi di sconti standardizzati, specificando che questi, pur essendo generalmente leciti, richiedano talvolta il vaglio di tutte le circostanze, tra le quali è stato incluso anche il contesto legale ed economico della condotta. Tuttavia, la Corte ha precisato che non vi è alcun obbligo di effettuare il test del concorrente altrettanto efficiente (AEC) per determinare se gli sconti integrino un abuso, ma il test costituisce solo uno dei diversi strumenti atti a tale scopo.
Questa giurisprudenza è stata criticata per aver adottato un approccio formalistico nel settore degli sconti fidelizzanti, in base al quale i loro potenziali effetti anticoncorrenziali non devono essere accertati, ma sono meramente desunti dalla forma della condotta.

Questo è valido non solo per quanto riguarda la categoria degli sconti fedeltà, ritenuti presuntivamente illeciti, ma anche rispetto agli sconti del terzo tipo. Infatti, l'esame delle circostanze del caso al quale sono sottoposti ha, in realtà, ad oggetto solo le caratteristiche formali della condotta, piuttosto che il suo impatto sulla struttura del mercato. Solo in Tomra e Post Danmark II sono stati presi in considerazione anche elementi relativi al contesto, ma il fatto che non sia stato ritenuto necessario il test AEC indica che le Corti Europee fossero ancora legate ad un approccio formalistico.
L'origine di questo approccio può essere identificata nell' ordoliberalismo, che mirava a garantire la libertà economica individuale tramite la tutela del processo concorrenziale. Questa attenzione alla protezione della concorrenza ha, con il tempo, portato a considerare abusive condotte che, pur non arrecando alcun danno ai consumatori, avessero tuttavia prodotto un cambiamento, anche insignificante, nella struttura del mercato, come, ad esempio, l'esclusione di un concorrente meno efficiente.
Al contrario, l'obiettivo ultimo del Diritto Antitrust non è la protezione del processo concorrenziale di per sé, ma a vantaggio dei consumatori. Perciò una pratica può essere considerata anticoncorrenziale solo quando comporta un danno per il benessere dei consumatori e ciò si verifica in caso di esclusione di concorrenti che siano efficienti almeno quanto l'impresa dominante.
Un approccio formalistico, che non consideri l'impatto della condotta sul benessere dei consumatori, rischia invece di tutelare i concorrenti meno efficienti, indebolendo la concorrenza sui prezzi; inoltre, gli sconti fidelizzanti possono avere sia effetti positivi che effetti negativi sulla concorrenza, in base alle circostanze del caso, perciò un approccio basato sulla forma può portare alla condanna di pratiche pro-concorrenziali e alla perdita di possibili efficienze. Infine, questo può condurre a una disparità di trattamento tra pratiche che, pur avendo forme diverse, perseguono lo stesso scopo.
Per questi motivi, molti autori hanno proposto, per gli sconti fidelizzanti, l'adozione di un approccio basato sugli effetti. Un passo importante è stato raggiunto con la pubblicazione del Guidance Paper nel 2008, il cui scopo era quello di fornire delle linee guida per l'applicazione di un'analisi effettuale alle pratiche escludenti.
Per comprendere meglio quando gli sconti fidelizzanti possano risultare anticoncorrenziali, bisogna far riferimento all' "effetto aspirazione", che consiste nel fatto che più il consumatore è vicino alla soglia necessaria per conseguire lo sconto, minore è il prezzo effettivo che egli deve sostenere per acquistare dall'impresa dominante le rimanenti forniture. Perciò gli incentivi a non cambiare fornitore sono massimi in prossimità della soglia, dove il prezzo effettivo è quasi sempre negativo, mentre sono minimi all'inizio del periodo.
Gli sconti fidelizzanti possono quindi avere effetti escludenti quando l'impresa dominante gode di un'"assured base", cioè di un volume di acquisti che è ragionevolmente certa di ottenere dal cliente. In questo caso il consumatore non potrà comparare l'offerta dell'impresa dominante con quella dei concorrenti a inizio periodo, ma solo dopo aver già comprato un numero significativo di unità dall'impresa dominante. Perciò, se nel momento in cui compie la decisione di acquisto il prezzo marginale si trova al di sotto dei costi, un concorrente altrettanto efficiente non sarà più capace di competere.
Nel Guidance Paper, la Commissione ha elaborato il "test del concorrente altrettanto efficiente" per stabilire se un sistema di sconti condizionati sia abusivo. L'esame

comincia con la determinazione della parte contendibile della domanda, cioè la parte di fabbisogno del cliente che "possa essere realisticamente trasferita ad un concorrente". Sulla parte contendibile viene calcolato il prezzo effettivo, cioè il prezzo che "dovrebbe offrire un rivale per compensare il cliente della perdita dello sconto condizionato" nel caso questo decida di cambiare fornitore. Il prezzo effettivo è ottenuto sottraendo lo sconto, calcolato sulla parte contendibile della domanda, al prezzo di catalogo. A questo punto il prezzo effettivo deve essere confrontato con gli opportuni parametri di costo, che sono attinti dalla struttura di costo dell'impresa dominante, in quanto il test deve verificare gli effetti escludenti su un ipotetico concorrente di pari efficienza rispetto all' impresa dominante. Il test AEC deve quindi essere integrato da altri elementi di prova, come la posizione dell'impresa dominante, confrontata con quella dei concorrenti, le condizioni sul mercato rilevante o la portata della condotta.
Tuttavia, il Guidance Paper è solo uno strumento di *soft law*, privo di effetti vincolanti sulle Corti, le quali sono libere di dargli attuazione o meno. A questo proposito, nel caso Intel l'approccio effettuale descritto nel Guidance Paper è stato parzialmente implementato, pur avendo lasciato diverse questioni aperte.
Intel è un produttore di unità centrali di elaborazione, che aveva offerto ai suoi principali clienti sconti basati su una condizione di esclusiva, i quali, secondo la Commissione, integravano un abuso di posizione dominante.
Queste pratiche sono state ricondotte alla categoria degli sconti fedeltà a cui è stata applicata la presunzione di illegalità stabilita dalla giurisprudenza consolidata. Infatti, la Commissione ha ritenuto che la condizione di esclusiva fosse sufficiente a provare la capacità degli sconti di restringere la concorrenza, e che non fosse necessario condurre un test AEC, in quanto questo rappresentava solo un possibile modo per dimostrare ciò. Nonostante avesse risolto il caso sulla base della giurisprudenza tradizionale, la Commissione ha svolto, *ad abundantiam*, un'analisi economica comprensiva anche di un test AEC, che ha confermato la natura abusiva degli sconti considerati.
Il caso è stato portato dinnanzi al Tribunale. Quest'ultimo, per prima cosa, ha ribadito la tradizionale distinzione tra le tre categorie di sconti, con la sola differenza che ha rinominato gli sconti di secondo tipo come "sconti di esclusiva". A questa categoria sono stati ricondotti gli sconti offerti da Intel, per i quali, quindi, non è stato ritenuto necessario un esame delle circostanze. Infatti, gli sconti di esclusiva possono essere considerati "per loro stessa natura atti a restringere la concorrenza", mentre un esame dei potenziali effetti preclusivi è necessario solo per la terza categoria di sconti. Inoltre, la natura abusiva è confermata dal fatto che Intel fosse un "partner commerciale irrinunciabile", posizione che gli consentiva di godere di una parte non contendibile della domanda, che poteva essere usata come leva per ridurre il prezzo da pagare sulla parte contendibile.
In secondo luogo, il Tribunale non ha preso in considerazione gli argomenti di Intel diretti a confutare la correttezza del test AEC svolto dalla Commissione. Ha infatti sottolineato che per gli sconti di esclusiva non è richiesta un'analisi delle circostanze, e, comunque, anche nel caso di sconti di secondo tipo, per i quali questa è necessaria, "non è indispensabile effettuare un test AEC".
Il Tribunale ha inoltre negato la rilevanza di diverse circostanze allegate da Intel, come la ridotta quota di mercato interessata dal comportamento contestato, l'assenza di

copertura di una parte significativa della domanda o il considerevole potere d'acquisto dei clienti.
L'approccio formalistico adottato dal Tribunale nel caso Intel ha rappresentato una delusione per i sostenitori di un approccio più moderno. Infatti, nonostante il Tribunale abbia menzionato l'effetto leva, che nel Guidance Paper costituisce la premessa di un'analisi basata sugli effetti, ha comunque negato che fosse necessario esaminare il contesto economico degli sconti e svolgere un test AEC, presumendo in maniera erronea che l'effetto leva comporti automaticamente un potenziale effetto preclusivo.
Il caso è stato poi portato dinnanzi alla Corte di Giustizia, la cui decisione è stata preceduta dall'opinione dell'Avvocato Generale Whal. Per prima cosa, questi ha affermato che la condanna degli sconti di esclusiva in quanto di per sé abusivi si basasse in realtà su un'interpretazione errata della giurisprudenza precedente, la quale, pur avendo in principio stabilito una presunzione di abusività, non ha mai, in concreto, prescisso dall'analisi delle circostanze del caso. Egli ha quindi proposto una nuova classificazione degli sconti fidelizzanti in due categorie: gli sconti quantità, presuntivamente legali; e un'unica categoria, comprensiva degli sconti di secondo e terzo tipo, per la quale è stabilita una presunzione di illegalità che deve essere comunque affiancata da un'analisi dello specifico contesto legale ed economico.
In tal caso, la "capacità" della condotta di restringere la concorrenza deve essere verificata "con tutta probabilità" e deve essere confermata tenuto conto di tutte le circostanze, tra le quali l'AG ha incluso anche alcuni fattori precedentemente ritenuti non importanti dal Tribunale, come la limitata copertura di mercato, o il test AEC. Inoltre, "in mancanza di tale conferma, deve essere effettuata un'analisi completa."
L'AG Whal, pur cercando di non discorstarsi formalmente dalla giurisprudenza consolidata, ha proposto, nella sostanza, un approccio più economicamente orientato. Tuttavia l'uso di alcune espressioni, come "presunzione di illegalità" o "capacità" di restringere la concorrenza, appare un tentativo forzato di preservare la continuità con il passato, pur volendosi riferire a concetti completamente nuovi.
Venendo alla decisione della Corte di Giustizia, questa si concentra sul primo motivo di appello, nel quale Intel lamentava che gli sconti fossero stati ritenuti di per sé abusivi senza un esame delle circostanze, e che il Tribunale non avesse preso in considerazione le allegazioni di Intel circa la correttezza del test AEC condotto dalla Commissione.
Innanzitutto, la Corte ha chiarito che un'impresa è libera di conquistare una posizione dominante grazie ai suoi meriti e che lo scopo dell'Art.102 non è quello di proteggere i concorrenti meno efficienti. Ha così confermato che l'obiettivo ultimo del Diritto Antitrust non è la protezione del processo concorrenziale di per sé, ma a vantaggio dei consumatori.
La Corte ha quindi confermato la presunzione di abusività degli sconti di esclusiva stabilita in Hoffmann La-Roche, ma ha introdotto la possibilità per l'impresa dominante di ribaltare la presunzione, semplicemente allegando elementi di prova che confutino la capacità della condotta di restringere la concorrenza. Ove ciò avvenga, la Commissione è tenuta a intraprendere un'analisi della capacità di preclusione sulla base delle circostanze del caso.
La decisione indica quindi, al paragrafo 139, una lista di circostanze che, in questo caso, devono essere prese in considerazione: l'ampiezza della posizione dominante, il tasso di

copertura del mercato, le condizioni e le modalità di concessione degli sconti, la loro durata e il loro importo, l'eventuale esistenza di una strategia diretta ad escludere i concorrenti.
È stato rilevato che la Corte ha fatto riferimento alla "capacità di preclusione" come standard da provare per identificare un abuso, ma senza specificarne la portata. Questo ha generato confusione circa il livello di prova richiesto alla Commissione, che sembra variare da caso a caso, considerando anche che la lista di circostanze prevista non è esaustiva, e che non è specificata l'importanza di ciascun fattore o la loro gerarchia interna.
Vi è anche incertezza rispetto al livello di prova richiesto all'impresa dominante per poter ribaltare la presunzione. Questo ha un'importanza determinante in quanto, se non è sufficientemente alto, allora in quasi tutti i casi si perverrà all'esame delle circostanze. Perciò è possibile che la Commissione conduca fin dal principio un'analisi delle circostanze, senza contare esclusivamente sulla presunzione e, di conseguenza, che la tradizionale distinzione tra sconti di secondo e terzo tipo venga meno.
Riguardo all'allegazione in merito al test AEC, la Corte di Giustizia ha concluso che "il test AEC ha rivestito un'importanza reale" nella valutazione, da parte della Commissione, della capacità escludente degli sconti, e che quindi il Tribunale era "tenuto ad esaminare tutti gli argomenti di Intel formulati relativamente a tale test". Per questa ragione, la decisone del Tribunale è stata annullata, e la causa è stata rinviata.
Questa parte del giudizio è piuttosto controversa. Infatti, da una parte, la Corte sembra riconoscere il test AEC come mezzo idoneo a dimostrare la capacità di preclusione, dall'altra, non lo menziona nella lista indicata al paragrafo 139, confermando che questo non rappresenta un requisito necessario, ma solo un possibile strumento.
Inoltre, la Corte ha annullato la decisione per mancata considerazione del test AEC, non perché questo fosse un elemento necessario per verificare i potenziali effetti anticoncorrenziali, ma perché era stato violato un requisito procedurale. Come Venit afferma, la Corte ha dato una risposta procedurale a una domanda sostanziale, probabilmente per non perdere il consenso di coloro che erano ancora scettici riguardo l'adozione di un test quantitativo in questo settore.
Avendo accolto, quindi, il primo motivo d'appello, la Corte ha ritenuto che non fosse necessario analizzare gli altri, tra cui, ad esempio, la scarsa copertura di mercato. Ma il fatto che la Corte abbia attribuito importanza determinante all' errore procedurale del Tribunale, e invece non abbia considerato la copertura di mercato, che aveva però indicato all'interno della lista di circostanze a paragrafo 139, riduce la rilevanza sostanziale di questo paragrafo e crea incertezza riguardo al suo significato. Infatti, si potrebbe paradossalmente verificare che, nel giudizio di rinvio, il Tribunale attesti la correttezza del test AEC condotto dalla Commissione, e quindi confermi l'illegalità del sistema di sconti, senza neanche considerare il tasso di copertura di mercato.
In conclusione, il caso Intel ha rappresentato un importante passo in avanti verso l'adozione di un approccio maggiormente economico agli sconti fidelizzanti, ma ha anche lasciato molte questioni irrisolte. Infatti, l'analisi effettuale e quantitativa degli sconti non è stata implementata in quanto tale, ma per mezzo di un espediente procedurale, lasciando grande incertezza su come il Tribunale risolverà il giudizio di rinvio, e su che approccio la Commissione adotterà nei futuri casi riguardanti gli sconti.

Il caso Intel si presta quindi a interpretazioni e necessita di chiarimenti, che saranno forse in parte fornite dal Tribunale nel giudizio di rinvio.

OVERVIEW

Fidelity rebates may be defined as price reductions granted to customers to reward a certain purchasing behavior, namely conditional on them achieving a certain volume threshold within a reference period. The traditional case-law is characterized by a formalistic approach towards this practice, which has been recently challenged by the European Court of Justice in the Intel Case.

The first relevant case in this area is Hoffmann La-Roche, which involved a system of rebates offered by a dominant firm and conditional on the customer's obtaining all or most of its requirements from it. The ECJ qualified this type of rebates as fidelity rebates and established a presumption of abusiveness towards them on the ground that, in the same way as an exclusive dealing agreement, they were designed to limit customers' choice of supply and to restrict competitors' access to the market. Fidelity rebates were distinguished from quantity rebates, merely linked with the volume of purchases, which were instead considered presumptively lawful.

The Michelin I case concerned the gran of rebates, which, unlike the latter, were not based on exclusivity, but were conditional on the achievement of an individualized sales target. Accordingly, the ECJ concluded that they were neither classifiable as quantity rebates, nor as fidelity rebates, and introduced the so-called "third category of rebates", which comprises schemes that, although lacking of an exclusivity obligation, may have the same loyalty-inducing effect. In this case, the Commission must assess "all the circumstances", and in particular the "criteria and rules for the grant of the discount", to determine whether the rebate scheme tends to have exclusionary effects. The same test has been applied to the rebates offered by British Airways, which, likewise, were classified in the third category.

In Tomra, the "all the circumstances" assessment comprised not only the consideration of the formal features of the rebates scheme, but also of "the context in which those agreements operate". Nonetheless, the EC Courts have deemed unnecessary to analyze the effects of the practice through a comparison between prices and costs.

Lastly, in Post Danmark II, the presumption of lawfulness for standardized rebate schemes was overruled. The ECJ, indeed, established that also for this type of rebates it is sometimes necessary to scrutinize "all the circumstances", which comprise also the factors related to the context of the conduct. However, it clarified that there is no obligation to undertake an AEC test, but this is just "a tool amongst the others".

The above-mentioned case law has been criticized for having adopted an excessively formalistic approach towards loyalty rebates, inferring the existence of anticompetitive effects from the formal characteristics of the conduct, without any requirement to prove such effects. This is true not only with regard to fidelity rebates, which have been deemed presumptively abusive, but also to those belonging to the third category, which require an analysis of "all the circumstances" to determine whether they are loyalty-enhancing. The reason for this id that the factors considered concern the formal features of the conduct, and not its impact on the market structure. Only in Tomra and Post Danmark II some relevance has been attached to the contextual elements of the practice, but the rejection of the AEC test as a necessary element for this assessment revealed that the Courts were not yet ready to endorse a fully effect-based approach.

The origin of this approach has been identified in the ordoliberal school of thought, which aimed at protecting economic freedom, that is granted through the maintenance of the competitive process. The ordoliberal attention to the protection of market structure has led to the condemnation of conducts that, although being harmless to consumer welfare, had produced an even insignificant change in the market structure, as the exclusion of a less efficient competitor.

Conversely, the traditional objective of Competition Law is not the protection of the competition process as such, but with the ultimate purpose of benefiting the consumers. Therefore, foreclosure is anticompetitive only when it has an adverse impact on consumer welfare, namely when it leads to the exclusion of competitors which are at least as efficient as the dominant firm.

A *per se* approach to fidelity rebates, which does not consider the impact of the conduct on consumers, can instead chill price competition, by protecting possibly inefficient competitors; moreover, loyalty rebates may be either pro or anti-competitive, depending on the circumstances of the case, therefore the establishment of a *per se* standard might result in the condemnation of procompetitive conducts and in the loss of possible efficiencies; in addition, it might lead to inconsistency of treatment between practices, which have different forms but serve the same purpose.

For this reason, many scholars have encouraged the adoption of a more effect-based approach in this area. Significant steps in that direction have been taken with the issuing of the Guidance Paper in 2008, which aims at providing guidelines for the application of an effect-based analysis to exclusionary abuses.

To better understand when fidelity rebates may be anticompetitive, one can refer to the “suction effect”, upon which the loyalty inducing effect of retroactive rebates depends. It implies that the more the customer buys from the dominant firm and gets closer to the threshold of eligibility, the more the effective unit price for purchasing the remaining units from the dominant firm decreases. Therefore, the incentives not to switch supplier are maximal in proximity of the threshold, where the effective price is most of the time negative, but minimal at the beginning of the reference period.

Fidelity rebates might, indeed, become exclusionary, when the dominant firm enjoys an “assured base”, namely a volume of purchases that the firm is reasonably certain to obtain. In this case, the customer will not be able to compare from the beginning the offer of the dominant firm with that of the rivals but this will happen only after having reached a significant volume of purchases from the dominant firm. If, in the moment he takes the decision, the effective price is already below the marginal cost, then a rival will not be able to compete.

In the Guidance Paper, the Commission has elaborated a price-cost test to assess whether conditional rebates are abusive, the so-called “as efficient competitor test”. This analysis starts from the estimation of the contestable demand, namely the part of the customer’s demand which is not “assured” to the dominant firm. This is used to calculate the effective price that a competitor would have to charge to match the offer of the dominant firm. The effective price is obtained by subtracting to the list price the

discount, applied only on constable shares of demand. Then, the effective price must be compared with the appropriate cost benchmarks, which are taken from the cost structure of the dominant firm, given that the test aims at protecting rivals which are as efficient as the dominant firm. The outcome of the AEC test needs, however, to be integrated by other relevant evidence, such as the position of the dominant undertaking and those of its competitors, the conditions of the relevant market or the extent of the conduct.
However, the Guidance Paper amounts only to a soft law instrument, therefore it has no binding effects on Courts, which remain free to implement it or not. In the Intel case, indeed, the effect-based approach described in the Guidance Paper has been partially applied, although many questions have been left unanswered.
Intel is a producer of central processing units, who granted to its major customers rebates based on an exclusivity condition, which were deemed abusive by the Commission.
The Commission qualified the schemes as “fidelity rebates” and recalled the presumption of abusiveness established by prior case law towards them. It claimed that the exclusivity condition was sufficient to demonstrate that the rebates were capable of restricting competition, and that there was no obligation to conduct the AEC test, but this was only one possible tool. Notwithstanding, the Commission carried out an additional economic analysis, *ad abundantiam*, also including the AEC test, which confirmed the abusive nature of Intel’s rebates.
The case was brought before the General Court. It, firstly, restated the distinction between the three categories of rebates established by the settled case law and renamed those belonging to the second category as “exclusivity rebates”. Intel’s rebates fell under the latter category, and, accordingly, they did not require an analysis of “all the circumstances”. In fact, exclusivity rebates can be considered “by their very nature” capable of restricting competition, while assessment of potential foreclosure effects is necessary only for rebates falling within the third category. Moreover, the Court substantiated the *per se* condemnation of Intel’s rebates also with its status of “unavoidable trading partner”, which granted to the firm an “assured base of sales”, that could be used as a leverage to decrease the price to be paid for the contestable part of demand.
Moreover, the General Court refused to consider Intel’s allegations as to the correctness of the AEC test carried out by the Commission, denying that it is a necessary element in the context of an “all the circumstances” assessment, and, *a fortiori*, that it is required in case of exclusivity rebates.
The General Court also refused to consider several circumstances put forward by Intel, which could have been relevant under a more economic analysis, such as the small foreclosure rate, the small portion of the customer’s demand tied, and the significant customers’ buying power.
The GC’s *per se* approach to exclusivity rebates represented “a severe setback” for those who regarded the Intel case as the opportunity to implement the more economic approach outlined in the Guidance Paper. Accordingly, although the EGC referred to the “theory of leveraging”, which in the Guidance Paper constitutes the premise for an effect-based analysis, it nonetheless concluded that it was unnecessary to scrutinize the economic context of the rebates and to carry out the AEC Test.

The case was appealed before the Court of Justice, whose decision followed the opinion delivered by A G Whal. He claimed that the *per se* unlawfulness of exclusivity rebates was based on a misinterpretation of prior case law, which, although having in principle established a presumption of abusiveness towards type two rebates, in concrete, had always relied on an assessment of the circumstances of the conduct. As a consequence, he challenged the three-fold classification of rebates recalled in the GC's decision, recognizing only two categories of rebates: quantity rebates, presumptively lawful; and a comprehensive category of loyalty rebates, presumptively unlawful, but which still required an analysis of the specific legal and economic context.

When the latter category is concerned, "capability" to restrict competition must be assessed "in all likelihood", and must be confirmed on the basis of "all the circumstances", including those factors that the General Court has considered irrelevant, such as market coverage and the AEC test. In case conformation is not given, then a fully-fledged analysis is required.

The sustainers of the more economic approach appreciated the substance of the opinion, but not the form, which was the result of a failed attempt to be consistent with previous case-law, as shown by the fact that some expressions, such as "presumption of abusiveness" or "capability" to restrict competition, taken from the past, have been used to refer to new concepts.

The ECJ's ruling focuses on the first ground of appeal, where Intel claimed that the General Court failed in applying a *per se* standard of unlawfulness without considering some relevant circumstances, and that, since the Commission had carried out the AEC, the General Court should have considered Intel's allegation that it was incorrect.

The ECJ started its reasoning by clarifying that an undertaking is free to gain a dominant position on its own merits and that it is not the purpose of Art 102 to protect less efficient competitors, thereby adhering to the idea that Competition Law does not protect the structure of competition as such, but for the benefit of consumers.

The Court then restated the Hoffmann La-Roche presumption of abusiveness towards exclusivity rebates, but it introduced the possibility for the dominant undertaking to rebut the presumption only by submitting evidence challenging the rebates capability of restricting competition. In this case, the Commission is required to undertake an analysis of the capacity to foreclose, by examining the circumstances of the case.

The decision provides also, at para. 139, a list of circumstances that the Commission must take into account: the extent of the dominant position, the share of the market covered by the practice, the conditions and arrangements for granting the rebates, their duration and their amount, and finally the possible existence of a strategy aiming to exclude competitors.

The ECJ, therefore, refers to the "capacity of foreclosure" as the legal standard to be proven by the Commission, without, however, clarifying its meaning. Moreover, the list of factors provided is not exhaustive, and the Court fails to identify a precise hierarchy between them or to define their significance. Accordingly, the level of proof required seems to vary according to the specific case.

It is also unclear which is the level of evidence sufficient for the dominant firm to rebut the presumption, which is determinative since, if it is low enough, then the second phase concerning the "all the circumstances" analysis will be reached in practically every case.

In fact, it is probable that the Commission, in its first analysis, will already assess the circumstances of the case, without benefiting of the presumption, and, as a result, the traditional distinction between type two and type three rebates would be meaningless.
As to Intel's claim concerning the AEC test, the ECJ concluded that "the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors" and that, indeed, the General Court should have considered all Intel's arguments regarding this test. For this reason, "the judgment of the General Court must be set aside".
This part of the judgement is deeply controversial. In fact, on one hand, the Court accepts the AEC test as a legitimate tool to prove capability of foreclosure; on the other hand, it does not include it within the list under para. 139, confirming the view held in Post Danmark that this is just a "tool amongst the others".
Moreover, the Court rejected the General Court's judgement due to its failure to consider the AEC test, not on the ground that it was a necessary element for the assessment of capability, but rather for the infringement of a procedural requirement. In other words, the ECJ had given a "procedural answer to a substantive question", probably to avoid disappointing those who were still skeptical about the use of a quantitative test in this area.
Having upheld the appeal in the first ground, the ECJ deemed unnecessary to consider the other Intel's allegations, and, particularly, the small market coverage of the practice. The fact that the ECJ attached decisive importance to the GC's procedural error without considering market coverage, which is included in the list of relevant circumstances provided in the decision, reduces the substantive importance of para. 139 and creates ambiguity as to its significance. It is, indeed, possible that, in remittal, the General Court will deem Intel's conduct abusive again, having found that the Commission's AEC test is correct, without even considering the magnitude of market coverage.
In conclusion, the Intel case has represented a big step towards the adoption of a more economic approach to fidelity rebates, however, the judgement leaves many questions unsolved. In fact, the effect-based approach has not been endorsed "as such", but by means of a procedural expedient, creating uncertainty as how the General Court will solve the remand case, and as which legal standard will the Commission adopt in future rebates cases.
Therefore, the Intel case is still opened to interpretation and clarification, which would hopefully be provided, at least in part, by the ruling of the General Court in remand.

Chapter 1

Main Features of Article 102 TFEU and a Brief Overview of Article 101 TFEU

1.The Achievement of Effective Competition Through Consumer Welfare

In a modern prospective, the overall purpose of competition policy is that of protecting the process of competition for the benefit of consumers.[1]

In fact, the EC Courts have clarified, in many occasions, that the ultimate objective of competition law is consumer welfare, which could be indirectly hindered through behaviors that affect the structure of competition.[2]

However, there are other objectives that have been sometimes pursued by competition authorities. For instance, competition policy may address conducts that hinder consumers' interests directly, by imposing precise obligations to the dominant firms, such as requiring them to charge lower prices. These actions might, however, be too interventionist and lead in the long run to negative consequences also for consumer welfare.

Another alternative objective is the redistribution of wealth, in the name of equity and democracy. Moreover, there are examples of application of competition law as to protect smaller firms against the possibility to be kicked out from the market by the most efficient competitors. This tendency has been related to the influence of the ordoliberal school of thought,[3] and has been lately overcame.[4]

The connection between protection of the structure of competition and outcomes in terms of consumer welfare is substantiated by the neo-classical economic theory that relates the condition of perfect competition with several benefits.

First, it enables the achievement of allocative efficiency, namely the condition whereby the economic resources are distributed in the best way possible for all economic agents, to the extent that it is not possible to increase someone's wealth without depriving someone else of it; in the long run, this leads prices to equate marginal costs.

Second, perfect competition brings about benefits in terms of productive efficiency, namely production costs to be set at the lowest possible level. This happens because firms, subjected to competition constraints, cannot deliberately increase prices above costs and, as a consequence, attempt to maximize profit by improving productive efficiency; this tendency repeated over years would lead them to produce at the lowest cost possible.

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[1] WHISH R., BAILEY D. (2012) *Competition Law.* 7th Edition. OUP, p. 1.

[2] EUROPEAN COURT OF JUSTICE (1973) Case 6/72 Europemballage Corporation and Continental Can Co Inc v Commission EU:C:1975:50, para. 26. [2] Guidelines on the Commission's Enforcement Priorities in Applying Art [102] to abusive exclusionary conduct by dominant undertakings OJ [2009] C 45/7, para. 5. As better explained later in chapter 2, para. 4.

[3] As better explained in chapter 2, para. 4.

[4] WHISH R., BAILEY D. (2012), pp. 19-22.

Another advantage of perfect competition is dynamic efficiency, namely that it incentivizes companies to invest in innovation. However, the question is still opened to debate, and it was, conversely, argued that monopoly profits, most of all, provide incentives to innovate.
Monopoly would instead lead to the opposite situation, given that the monopolistic firm, being free to discretionally determine prices, would be able to attain profit maximization by increasing prices and reducing output, to the detriment of consumers, who will be consequently charged with higher prices that those they were willing to offer and, in most cases, who will be deprived of goods.
Moreover, monopolists might be less incentivized to produce more efficiently and to innovate, because they are not placed under pressure by other competitors.
The model of perfect competition has been, however, criticized on the ground that the conditions for its realization are extremely difficult to be found in concrete and also monopoly in its purest form is unlikely, but real markets are generally something in the middle between these two extremes. Moreover, this model is based on the unrealistic premise that all economic operators are perfectly rational and will always seek to maximize their profit, but this is not always the case, and, in reality, they can be moved by other interests or objectives.
Another possible objection is that competition is not always the best means to achieve consumer welfare and efficiency. For examples, in markets that require significant fixed costs, monopoly can turn out to be more efficient than perfect competition, since it allows the exploitation of economies of scale.
Although perfect competition seems unattainable and, in some situations, it is not even the best solution, it can be said that generally it leads to better consequences in terms of efficiencies and consumer welfare than monopoly. Competition policy is still considered a useful means to achieve allocative and productive efficiency, to keep prices low, to provide consumers with a wider choice of products and to encourage innovation.
The standard of competition which needs to be achieved to allow these gains is that of "effective competition", a legal category which does not follow from any precise economic theory but indicates that firms should be subject to a sufficient degree of competitive constraints. [5]
The precise benchmarks that define effective competition should be identified with reference to the market outcomes related to the different competition levels and not to the forms taken by competition. What matters is the consequences that a certain market structure has for consumers. Pursuant to this idea, also the concept of "restriction of competition" entails a comparison between market outcomes. Therefore, competition law should be concerned with the individuation of the outcomes produced by effective competition, not in abstract, but focusing on what could actually be done through regulation and enforcement.[6]

2.Article 102

[5] Ibid, chapter 1.
[6] BISHOP S. AND WALKER M. *The Economics of EC Competition Law.* Sweet and Maxwell. 3rd Edition, pp. 15-21.

Article 102 TFEU is the other fundamental provision of EC Competition Law, which addresses abusive unilateral conducts of dominant firms.
The article provides as follows:
"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 or according to commercial usage, have no connection with the subject of such contracts."
Therefore, the key elements of the provision are: the undertaking, the position of dominance in the internal market or in a substantial part of it, the effects on inter-state trade, the abuse, which could be of four types, and the possible objective justification, although not mentioned in the article. Each of these elements will be analyzed hereafter.

2.1 Undertaking

The concept of "undertaking" has been elaborated by the Court of Justice, which first defined it as "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed"[7] and subsequently clarified the meaning of "economic activity" as "any activity consisting in offering goods or services on a given market".[8]
It is possible to infer from this definition that the Court has adopted a functional approach to the concept of undertaking, namely that the form attributed to the entity concerned is irrelevant as long as it carries out an economic activity and that the same legal organization could act either as an undertaking or as something else, depending on the activity it is performing.[9]
Moreover, it has been further clarified that it is possible to qualify an activity as economic even in the absence of a profit motive. For example, in *Piau*[10] it was held that the organization of football games by football clubs is an economic activity.
Even public authorities have been considered undertakings, such as the Federal Employment Office in *Höfner and Elser*,[11] on the ground that the employment procurement which it was engaged in was an economic activity.

2.2 Effect on Inter-state Trade

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[7] EUROPEAN COURT OF JUSTICE (1991) Case C-41/90 Höfner and Elser v Macrotron GmbH EU:C:1991:161, para. 21.
[8] EUROPEAN COURT OF JUSTICE (2000) C-180/98 Pavlov and Others EU:C:2000:428, para. 75.
[9] WHISH R., BAILEY D. (2012), p. 84.
[10] EUROPEAN COURT OF JUSTICE (2005) Case T-193/02, Piau v Commission EU:T:2005:22, para. 69.
[11] Hofner (1991).

An abuse of dominance can be caught by Article 102 if it *may affect trade between Member States* to an appreciable extent.
For this purpose, it is important to consider the overall impact of the conduct, whether it is not necessary to assess the effect related to every element of the conduct individually.[12]
The concept of "trade" is intended in its wider meaning, comprising "all cross border economic activity, including establishment".[13] Moreover, it is not necessary that the conduct affects the whole territory of the states concerned, but they can be involved only partially.[14]
As to the notion of "may affect", this indicates that "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".[15] Accordingly, it is not necessary to show the subjective intent,[16] nor to prove the actual effects, but only mere capability to affect.[17]
Moreover, it must be noted that the effect could be *direct or indirect, actual or potential*, therefore Community law jurisdiction can reach a wide scope, even though hypothetical or speculative effects are not sufficient for satisfying this criterion.[18]
Moreover, effect on trade must be appreciable. Appreciability must be assessed on a case by case basis and its likelihood is strongly related to the strength of the undertaking's market position.[19][20]

2.3 Dominant Position

A condition for the Application of Article 102 is the undertaking concerned being "dominant". Dominance has been identified in the case law as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition 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".[21]
This definition seems to identify the concept of dominance with that of market power, and does not clarify which is the relationship between them.[22] Pursuant to this, in the Guidance Paper, the Commission has referred dominance to "the degree of competitive constraint exerted on the undertaking in question", since the absence of effective constraints enables the firm to maintain a significant level of market power over time.[23]

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[12] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101, p. 81–96, para. 14.
[13] Ibid, para. 19.
[14] Ibid, para. 21.
[15] Ibid, para. 23.
[16] Ibid, para. 25.
[17] Ibid, para. 34.
[18] Ibid, para. 43.
[19] Ibid, para. 45.
[20] WHISH R., BAILEY D. (2012), pp. 146-147.
[21] EUROPEAN COURT OF JUSTICE (1978) C-27/76 United Brands v Commission EU:C:1978:22, para. 65; EUROPEAN COURT OF JUSTICE (1979) Case 85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para. 38.
[22] WHISH R., BAILEY D. (2012), p. 180.
[23] Guidelines on the Commission's Enforcement Priorities in Applying Art [102] to abusive exclusionary conduct by dominant undertakings OJ [2009] C 45/7 (hereafter: Guidance Paper), para. 20.

In this context, substantive market power is identified with the "*capability* of profitably increasing prices above the competitive level for a significant period of time".[24]
The determination of whether a firm is dominant is extremely important because the possibility to scrutinize its conduct under Article 102 depends upon it. If a firm is not found dominant, indeed, its unilateral conduct cannot be challenged at all, but it is free to compete by any means.[25] On the other hand, the position of dominance entails, for the undertaking concerned, "a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market",[26] as a result, conducts which are normally legally become forbidden when the firm is found to be dominant.

There are two stages in the process of finding dominance: first, the determination of the relevant market through the "hypothetical monopolist test", second, the assessment of the existence of a dominant position over that market, which is not merely based on market shares, but it involves the consideration of several factors.[27]
In this context, The Court of Justice established a presumption of dominance for firms with a market share of 50% and more, rebuttable by the defendant, which, however, does not imply a safe harbour in favour of the firm when this threshold is not reached.[28] This is confirmed by the several cases of finding of dominance despite a market share below 50%.[29] An example can be provided by *British Airways*, where it did not even reach 40%, but other factors were considered, such its world rank on international passengers' kilometers flown or the wideness of its transport services and of its network, and its position of unavoidable trading partner for travel agents.[30]
The *Akzo* presumption is not mentioned in the Guidance Paper, which, however, states that dominance is unlikely when market share is below 40% and that a high market share provides "an important preliminary indication of the existence of a dominant position". Nonetheless, the Commission should always engage in a "dynamic analysis", based on "all the factors which may be sufficient to constrain the behaviour of the undertaking".[31]
In particular, it is necessary to consider: "constraints imposed by the existing supplies from, and the position on the market of, actual competitors", "constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors" and "constraints imposed by the bargaining strength of the undertaking's customers".[32]

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[24] Ibid, para. 11.
[25] WHISH R., BAILEY D. (2012), p. 180.
[26] EUROPEAN COURT OF JUSTICE (1983) Case C-322/81 Michelin v Commission, EU:C:1983:313, para. 57; EUROPEAN COURT OF JUSTICE (2012) Case C-209/10 Post Danmark A/S v Konkurrenceråde EU:C:2012:172, para. 23; EUROPEAN COURT OF JUSTICE (2017) Case C-413/14 P Intel v Commission EU:C:2017:632, para. 135.
[27] EUROPEAN COURT OF JUSTICE (1979) Case 85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para. 39-40.
[28] EUROPEAN COURT OF JUSTICE (1991) Case C-62/86 Akzo EU:C:1991:286, para. 60.
[29] United Brands (1978).
[30] EUROPEAN COURT OF JUSTICE (2003) Case T-219/99 British Airways v Commission EU:T:2003:343, paras. 189-225.
[31] Guidance Paper, paras. 13-15.
[32] Ibid, para. 11.

The potential and actual competitors' capability to condition the dominant undertaking depends upon barriers of different nature, which can obstacle the entry in the market as well as the expansion of existing rivals.[33]
The firms can face legal barriers such as intellectual property rights or patents; then there are economic barriers such as economies of scale and scope, privileged access to essential facilities or to superior technologies, developed sales network, high investments in advertising or a consolidated brand image; finally, also high switching costs or network effects can prevent customers from switching its demand to another competitor.[34]
Another source of constrain for the dominant firm is represented by bargaining power exerted by customers. Buyers might influence the undertaking's ability to profitably increase prices when they are sufficiently big, when they represent key costumers for it or when they can easily turn to other suppliers.[35]

2.4 Substantial Part of the Internal Market

The existence of a dominant position is not, however, sufficient, but such position must be held over the whole internal market or, at least, a significant part of it. This is an important element within the assessment of market power, which prevents minor infringements to be caught under article 102, as similarly provided by the *de minimis* doctrine in the context of Art. 101(1).[36]
The issue of whether this condition is fulfilled comes up especially when dominance is exercised over a narrower territory than the whole European Union, for example, when it concerns one Member State or a part of it.[37]
Several factors must be considered as to determine whether a certain area can be deemed sufficiently relevant: first, it is necessary to consider, beyond the geographic market, also "the pattern and volume of the production and consumption" of the products concerned, and also the "habits and economic opportunities" of the market operators;[38] second, in case of statutory monopoly, the Member State where this is established must be regarded as a substantive area;[39] third, no particular threshold for this purpose has been set, therefore the percentage of dominance coverage shall not be regarded as determinative;[40] fourth, exclusion of dominance in a substantial part of the EU market does not prevent it from being found within a Member State territory according to the national law.[41]

2.5 Abuse

2.5.1 The objective of Art. 102

Before addressing the meaning of "abuse" it is necessary to clarify which is the underlying objective of Article 102 TFUE. This issue is deeply linked with the question of whether competition law is goal-oriented, namely that it pursues a particular outcome,

[33] Ibid, para. 16.
[34] WHISH R., BAILEY D. (2012), pp. 184-185. Guidance Paper, para. 17.
[35] Guidance Paper, para. 18.
[36] Explained hereafter.
[37] WHISH R., BAILEY D. (2012), p. 189.
[38] EUROPEAN COURT OF JUSTICE (1975) case C-40/73 Suiker Unie EU:C:1975:174, para. 371.
[39] EUROPEAN COURT OF JUSTICE (1974) Case C-127/73 BRT v SABAM EU:C:1974:25, para. 5.
[40] EUROPEAN COURT OF JUSTICE (1978) BP v Commission case C-77/77 EU:C:1978:141.
[41] WHISH R., BAILEY D. (2012), p. 190.

or whether it is only concerned with the protection of the process of competition itself, following a rule-based approach.[42]
Accordingly, a common complaint regarding Article 102 is that it has been interpreted, in many cases, as aimed at protecting competition itself, rather than the structure of competition for the benefit of consumers, resulting in the protection of less efficient competitors.[43]
There have been, indeed, many instances that the purpose of competition policy is to enhance consumer welfare by protecting competition. Lately, for example, the Commission has emphasized, in its Guidance Paper, that foreclosure is anticompetitive when it has "an adverse impact on consumer welfare",[44] or that "what really matters is protecting an effective competition process and not simply protecting competitors".[45]
This assertation has just consolidated what had already been held in the case law. Already in Hoffmann La-Roche the Court of Justice had identified the scope of Article 102 in those conducts that hamper "the maintenance of the degree of competition existing in the market", when it is "to the detriment of consumers".[46] Subsequently, in Post Danmark II, it has been claimed that Art 102 addresses "not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition".[47]

2.5.2 The concept of abuse

Having clarified the purpose of Article 102, it is possible to analyze the meaning of the word "abuse", given that a clear definition of it has not been provided. The concept of abuse, indeed, tends to be very much grounded on the facts of the case, which makes it very difficult to derive generalizations about it, as shown by the fact that the list of practices that can be comprehended in this concept, provided under Article 102, are not exhaustive.[48]
Some attempts to define "abuse" could be found in the case law as :in Hoffmann La-Roche it has been identified as "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to 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".[49]

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[42] PEEPERKORN L. (2015) Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates, *Concurrences N° 1-2015,* Art. N° 70835, pp. 43-63. AHLBORN C. & PICCINI D. (2015) The Intel Judgement and Consumer Welfare – A Response to Wouter Wils *Competition law and Policy Debate*, Volume 1 (Issue 1).
[43] JOHN KALLAUGHER, BRIAN SHER (2004) Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82 25(5) *European Competition Law Review* 263. VENIT J. V. (2004) Article 82: The Last Frontier - Fighting Fire with Fire *28 Fordham International Law Journal, Volume 28 (Issue 4, Article 10).*
[44] Guidance Paper, para. 19. PEEPERKORN L. (2015).
[45] Guidance Paper., para. 6.
[46] Hoffmann La-Roche (1979), para. 24.
[47] EUROPEAN COURT OF JUSTICE (2015) Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651, para. 20.
[48] WHISH R., BAILEY D. (2012), p. 193.
[49] Hoffmann La-Roche (1979), para. 91.

The former definition is incomplete and presents some uncertainties. First, it refers only to conducts capable of restricting competition, leaving aside exploitative abuses, which are abusive as well; second, it refers to "methods different from those which condition normal competition", raising the issue of what is meant by the phrase "normal competition".[50]

Its meaning has been clarified subsequently in Deutsche Telecom, where normal competition has been equated to "competition on the merits",[51] which can be related to the "lower prices, better quality and a wider choice of new or improved goods and services" that the consumers can enjoy when effective competition is maintained.[52][53]

2.5.3 The shift towards a more economic approach

It is, however, difficult, to draw a precise line between anticompetitive conducts and lawful competition on the merits. In fact, there are conducts that, although could be regarded as abusive according to their form, may have some procompetitive outcomes that risk to be eliminated in case of a strict application of the rules. Moreover, since prohibitions apply only to dominant undertakings, enforcement actions may end up penalizing more successful firms in favor of the less efficient competitors, to the ultimate detriment of consumers.[54]

An effective balance has been achieved with reference to Article 101(1), which in some cases prohibits conducts *by object*, in others, requires a *by effect* assessment and, in any case, minor infringements can benefit from the safe harbor provided at art 101(3). For many years, the EC Courts have applied a similar framework to Art. 102, distinguishing between practices that require an effects analysis, since they are considered more likely to lead to pro-competitive outcomes, and practices which are deemed abusive "by their very nature", since they are not considered as an expression of "competition on the merits", except when the defendant is capable to put forward an objective justification.[55]

However, in recent years, some scholars have been criticizing the adoption of *per se* prohibitions under Article 102 for many reasons; not only to ensure consistency within the case law, which could be endangered if functionally equivalent practices are treated differently merely because of their form,[56] but also, with reference to exclusionary practices, to grant consistency with Art 101, whereby agreements that may have a foreclosure effects are considered unlawful *by effect*.[57]

In light of these considerations, the Commission has firstly moved some steps towards an effects-based approach to unilateral conducts, as it has explicitly declared in occasion of the adoption of the Guidance Paper,[58] and as shown by the effects analysis performed in

[50] WHISH R., BAILEY D. (2012), p. 193.

[51] EUROPEAN COURT OF JUSTICE (2010) Deutsche Telekom / Commissione Case C-280/08 P, EU:C:2010:603, para. 177.

[52] Guidance Paper, para. 5.

[53] WHISH R., BAILEY D. (2012), pp. 198-199.

[54] COLOMO P. I. (2016) Beyond the More Economics-Based Approach: A Legal Perspective on Article 102 TFEU Case Law 53 *Common Market Law Review*, Volume 53, p. 709.

[55] Ibid.

[56] Ibid.

[57] PEEPERKORN L. (2015).

[58] Commission Press Release IP/08/1877, 3 December 2008, quoted in WHISH R., BAILEY D. (2012), p. 201.

some of its recent decisions.[59]Moreover, also the Court of Justice is lastly showing some openings in this direction.[60]

2.5.4 Exploitative, exclusionary and reprisal abuses

Article 102 provides a list of possible abuses, which is not exhaustive. Commentators have inferred from the EC Courts case law that it is possible to distinguish between two, or, in some views, three kinds of abuse.

First, "exploitative abuses" are those whereby a dominant firm takes advantage of its market power as to obtain benefits that are unavailable in a condition of normal competition, such as price increase or output reduction, to the detriment of consumers. Art 102 refers to them when extending its scope to the "*imposition of* unfair purchase or selling prices or other unfair trading conditions". Therefore, the premise for this kind of abuses is a significant degree of dominance because they could be performed only in the absence of effective competition. [61]

Second, "exclusionary abuses" are those which produce a restriction of competition or an alteration of the market structure as to strengthen the dominant firm' s market power. These types of conducts can be performed also by less powerful firms, but they are considered capable of weakening the process of competition only when engaged in by dominant firms. [62]

Applicability of Art 102 to both exploitative and exclusionary abuses has been recognized for the first time in *Continental Can*.[63] Subsequently, it was confirmed in the Guidance Paper, which, however was meant to deal with only exclusionary conducts.[64]

Sometimes, a third category of abuses is identified, namely "reprisal" abuses, which consist in conducts designed to interfere with the business activity of another firm, even though they are not aimed at restricting competition or strengthening dominance. It could happen, for example, when the dominant firm wants to penalize a smaller company for sponsoring a rivals' product, or for any other activity that it could be damaged from. However, the existence of this category is controversial, and it is not clear whether it could be regarded as distinct from exclusionary conducts.[65]

2.6 Defences

Once an abuse of dominance is found, the undertaking concerned can attempt to defend its conduct by putting forward an objective justification, even though article 102 does not provide any textual basis for it.

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[59] Commission Decision of 24 March 2004, Microsoft, Case COMP/C-3/37.792, *OJ L 32, 6.2.2007, p. 23–28.* Telefonica, 4 July 2007. Intel, 13 May 2009. Commission Decision of 13 May 2009, Intel, Case COMP/C-3/37.990 (OJ C 227, 22).

[60] EUROPEAN COURT OF JUSTICE (2010) C-280/08 P - Deutsche Telekom v Commission EU:C:2010:603. EUROPEAN COURT OF JUSTICE (2011) C-52/09 - TeliaSonera Sverige EU:C:2011:83. WHISH R., BAILEY D. (2012), pp. 200-201.

[61] WHISH R., BAILEY D. (2012), pp. 200-201. TEMPLE LANG, J. (1979) Abuse of Dominant Positions in European Community Law, Present and Future: Some Aspects, 1978 *Fordham Coporate Law Institute* 25, p. 17.

[62] TEMPLE LANG, J. (1979), p. 17.

[63] Continental Can (1973). WHISH R., BAILEY D. (2012), p. 203.

[64] Guidance Paper, para. 7. WHISH R., BAILEY D. (2012), p. 201.

[65] TEMPLE LANG, J. (1979), pp. 21-22.

This concept has been frequently mentioned in the EC case law. For example, in *United Brands*,[66]the ECJ established that the abusive conduct can be justified if it is motivated by a genuine intent, and not simply that of reinforcing the dominant position,[67] and if the damage deriving from it is proportionate to the underlying justification.[68] Subsequently, it has been established that an objective justification could be based on an external and objective cause, such as the shortage of supplies.[69] An even stricter view of proportionality was held in *BII/Boosey and Hawkes*,[70] where it was claimed that the actions undertaken to protect legitimate commercial interests should not go beyond what is necessary.[71] Moreover, in *Microsoft*, the Commission has referred to the requirement for the defendant to provide a "balancing test" so as to show that the procompetitive advantages of the conduct can outweigh its negative impact on competition.[72][73]
The Guidance Paper has clarified the meaning of objective justification, stating that it could consist either in the proof that the conduct is "objectively necessary" or that it "produces substantial efficiencies which outweigh any anti-competitive effects on consumers". It is, in any case, necessary to assess compliance with the principles of indispensability and proportionality.[74]
As to the objective necessity, this must be determined "on the basis of factors external to the dominant undertaking", such as "health of safety reasons related to the nature of the product in question", even though it must be considered that health and safety standards are provided by public authorities, while the dominant undertaking is not entitled to take measures for these purposes on its own initiative.[75]
On the other hand, concerning the "efficiency defence", this is subjected to the existence of four cumulative conditions: that "the efficiencies have been, or are likely to be, realised as a result of the conduct", that "the conduct is indispensable to the realisation of those efficiencies", that any likely negative effect is outweighted, and that "the conduct does not eliminate effective competition".[76]

2.7 Practices caught under Art 102

2.7.1 Exclusive Dealing Arrangements

An exclusive dealing arrangement can either amount to an "exclusive supply obligation", whereby the supplier is bound to sell only to a specific customer, or to an "exclusive purchasing obligation", whereby the costumer can purchase only for a certain supplier.
The second type of agreement, which is also named "single branding", is the most frequent and implies that the costumer is forbidden to buy the whole or the largest part of

[66] United Brands (1978).
[67] Ibid, para. 189.
[68] Ibid, para. 190.
[69] EUROPEAN COURT OF JUSTICE (1978) C-77/77 B.P. v Commission EU:C:1978:141, para. 33.
[70] Commission Decision of 29 July 1987 BBI/Boosey & Hawkes, 87/500/EEC (OJ L 286).
[71] Ibid, para. 19. ALBORS-LLORENS A. (2007) The Role of Objective Justification and Efficiencies in the Application of Article 82 EC Common Market Law Revie, Volume 44, p. 1727.
[72] Commission decision of 24 March 2004 Microsoft, COMP/C3/37.792 (OJ L 32), para. 783.
[73] LOWENTHAL P. (2005) The Defence of "Objective Justification" in the Application of Article 82 EC *World Competition*, Volume 28 (Issue 4), p. 445.
[74] Guidance Paper, para. 28.
[75] Ibid, para. 29.
[76] Ibid, para. 30.

its requirements from a supplier other than the dominant undertaking.[77] This is an exclusionary practice, since it may produce exclusionary effects on the smaller competitors that customers will be prevented to buy from.
This practice was condemned for the first time in *Hoffmann La-Roche*, when it was established a *per se* prohibition for obligations imposed by a dominant undertaking to its costumers "to obtain all or most of their of their requirements exclusively from *it*", this being valid either if this commitment is undertaken in exchange of the grant of a rebate, or if it is just a contractual clause with no offer of economic advantages in return.[78]
It was subsequently clarified that this prohibition applies to both contractual and *de facto* exclusivity, namely when it is achieved by means other than a contractual provision.[79]
Exclusive dealing arrangements are therefore deeply related with another abusive practice, namely Fidelity Rebates, which presents analogue restrictive effects on competition. The approach of EC Courts to fidelity rebates will be analyzed in detail hereafter in chapters 2 and 3.
After the formalistic approach held in Hoffmann La-Roche had been reiterated in subsequent cases, this was finally challenged in the Guidance Paper. At paragraph 34, the Commission states that, even though sometimes a customer could have an interest in the agreement, it is necessary to consider whether "all exclusive purchasing obligations, taken together, are beneficial for customers overall", in particular this would not happen when they "have the effect of preventing the entry or expansion of competing undertakings".
Moreover, the Commission, identifying the factors that must be taken into account in this assessment, not only refers back to those mentioned in paragraph 20,[80] but lists some other specific ones. For example, it is important to consider whether "competitors can compete on equal terms for each individual customer's entire demand", because, when the dominant firm is an "unavoidable trading partner", they probably would not be able to do so and the agreement might have foreclosure effects on them. Another important factor is the duration of the agreement, that increases the possibility of exclusionary effects, even though sometimes even short contracts might be anticompetitive.[81]

2.7.2 Predatory Pricing

Predatory Pricing is an exclusionary pricing practice whereby the dominant firm charges prices above costs for a sufficient period of time as to drive out a competitor or a new entrant from the market, in order to raise prices again once the threat exerted by the rival has been eliminated, to the detriment of consumers.
Overall, competition on price is a legitimate tool to win over customers, moreover lower prices might be a means to pass on customers the firm's efficiency gains. Therefore, the policy adopted towards predatory pricing should achieve a complex balance between repressing anticompetitive exclusionary conducts and avoiding deterring dominant firms from engaging in procompetitive practices.[82]

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[77] WHISH R., BAILEY D. (2012), p. 683.
[78] Hoffmann La-Roche (1979), para. 89.
[79] Commission Decision of 11 March 1998 Van den Bergh Foods Limited, 98/531/EC (OJ L 246), quoted in WHISH R., BAILEY D. (2012), p. 686.
[80] Guidance Paper, para. 33.
[81] Ibid, para. 34.
[82] WHISH R., BAILEY D. (2012), pp. 739-740.

The main difficulty is that of finding a test to identify when a price is predatory, by comparing it with the appropriate cost benchmarks. Accordingly, in Akzo,[83] the Court of Justice distinguished three cases: where prices are below Average Variable Costs (AVC), namely an alternative measure of marginal costs, they are presumptively abusive, since every sale would generate a loss for the dominant firm, and consequently there would be no other possible explanation for this choice except for the exclusionary intent;[84] where they are above AVC but below Average Total Costs (ATC), which comprise also the fixed costs per unit, then they can be deemed unlawful only if there is proof of the anticompetitive intent;[85] finally, if they are above ATC, they are considered lawful.[86]
However, the Guidance Paper suggests the adoption of more appropriate cost benchmarks. It indicates that AVC could be substituted by Average Avoidable Costs (AAC), namely the amount of money that the dominant firm would have saved if it had interrupted the production during the reference period, therefore it includes, beyond the variable costs, also the fixed costs that it would have incurred in that period, determining most of the times, in the long run, an higher amount. On the other hand, it promoted, instead of ATC, the use of Long Run Average Incremental Costs (LRAIC), namely “the average of all the (variable and fixed) costs that a company incurs to produce a particular product”, which would be more accurate since they do not include common costs in case of multiple-products business. [87]
Despite many commentators have suggested the importance to show the possibility of recoupment of the dominant firm for a predatory pricing finding,[88] the EC Courts have held that this is not required. In *Tetra Pak,* it was held that there is no need to prove the firm’s “realistic chance of recouping its losses”, since abusiveness arises “whenever there is a risk that competitors will be eliminated”.[89] Moreover, in *France Télécom* the possibility of recoupment was considered not “a necessary precondition to establishing that such a pricing policy is abusive”.[90][91]

2.7.3 Price Discrimination

Price Discrimination is an exclusionary practice, which consists in charging prices for different units which do not reflect the different costs of production. This is valid for both the case of identical products charged with different prices, and the case of the same price applied to products with different costs of supply.
It is, however, important to distinguish the cases where price discrimination might be procompetitive since it could result in a more efficient allocation of resources and therefore in an overall increase of output sold. An example of efficient price discrimination is that of Ramsey pricing, whereby the same firm owns two different productions which share the same costs; if the two productions address two different markets with different price elasticity, then it would be convenient for the company to

[83] EUROPEAN COURT OF JUSTICE (1991) C-62/86 AKZO v Commission EU:C:1991:286.
[84] Ibid, para. 71.
[85] Ibid, para. 72.
[86] Ibid, para. 70.
[87] Guidance Paper, para. 26 and Note 18.
[88] GAL M.S. (2007) Below-Cost Price Alignment: Meeting or Beating Competition? The *France Télécom* case *European Competition Law Review*, Volume 28, p. 382, at p. 383.
[89] EUROPEAN COURT OF JUSTICE (1996) Case C-333/94 Tetra Pak II EU:C:1996:436, para. 44.
[90] EUROPEAN COURT OF JUSTICE (2009) Case C-202/07 France Télécom EU:C:2009:214., para. 110.
[91] WHISH R., BAILEY D. (2012), pp. 745-746.

charge to one category of customers an higher price than the other, in order to maximize the sales.
Moreover, price discrimination may have beneficial effects on the society as a whole, because it produces a redistribution of wealth from the richer to the poorer, since people who earn a lower income will be more price sensitive and, consequently, firms will be incentivized to charge than with lower prices that wealthier people. On the ground of these considerations, the prohibition of price discrimination must not be *per se*.
This is one of the practices mentioned in Article 102, at letter c: "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". From the wording of this provision and the subsequent case law it is possible to infer that the test for finding price discrimination comprises five conditions: the position of dominance, the equivalent transactions with other trading parties and the dissimilar conditions to equivalent transactions, the competitive disadvantage deriving from discrimination, the objective justification.[92]
As to the equivalent transactions, equivalence must be established in terms of nature of the products and costs. For example, transactions related to different markets which operate in different conditions are considered not equivalent.[93]
Another necessary element is the dissimilar conditions, which have been found, for example, in British Airways, where the Court of Justice held that travel agents had received different rates of commission for the same volume of BA tickets sales.[94]
Finally, the provision requires to show a "competitive disadvantage", which has, however, been ignored in some cases.[95] In British Airways, the Court of Justice finally gave it some consideration when requiring to prove that the discrimination at issue "tends to distort" competition, namely that the competitive position of the business partners is likely to be weakened as a result.[96][97]

2.7.4 Tying

Tying is an example of a non-pricing exclusionary practice and "refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product)".[98]
It is possible to distinguish between different types of tying: contractual tying, when it results from a contractual clause; technical tying, when the tied product is incorporated in the tying product; pure bundling, when two products can be bought only together at a single price; mixed bundling, when two products purchased together are less expensive than them sold independently.
The reason why tying is abusive is that it enables the dominant firm to use its market power in the market of the tying product as a leverage to increase purchases in that of the tied product.
However, tying might determine some procompetitive effects, that suggest that it should not be held *per se* illegal. In fact, the integration of one product in another can improve quality and diminish the costs of production; moreover, some components of the product

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[92] WHISH R., BAILEY D. (2012), p. 759-760.
[93] United Brands (1978), para. 227.
[94]British Airways (2003)., paras. 235-236.
[95] EUROPEAN COURT OF JUSTICE (1994) Case C-18/93 Corsica Ferries v Commission EU:C:1994:195.
[96] Ibid, paras. 143-144.
[97] WHISH R., BAILEY D. (2012), pp. 761-763.
[98] Guidance Paper, para. 48.

are usually more efficient when provided by the manufacturer itself; sometimes tying may lead to economies of scale and scope, resulting in cost savings; additionally, it can allow price discrimination according to the use that consumers do of the tying product.[99]

Reference to tying is made at Art 102 letter d, whereby an abuse may consist in "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

The test to establish whether a tying conduct is likely to have foreclosure effects can be derived from the Guidance Paper and the case law.

The first condition is clearly the finding of dominance, which, in this case, could be in the market of either the tying or the tied product.[100]

Then it must be assessed whether the two products concerned can be regarded as distinct, because otherwise tying does not occur. The guidance Paper clarifies that two products can be considered separate when "in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product", this must be proven by the Commission even by means of indirect evidence.[101]

Another element of tying is that costumers must be forced into buying both products. This is evident in contractual tying, but it is also usually very strong in technical tying since it might be difficult or expensive to separate the products.[102]

Then, it must be noted whether the practice is likely to have anticompetitive effects. For this purpose, it is necessary to consider, beyond the factors listed at paragraph 20 of the Guidance Paper, that foreclosure is more frequent in technical tying for the above-mentioned reasons,[103] that customers interested in buying only the tied product can be left with less competitors and therefore suffer from a price increase,[104] that if prices in the tying market are regulated, tying can be used from the undertaking to circumvent it by increasing prices of the tied product,[105] that if there are less suppliers of the tied product, this could obstacle entrance in the tying market alone.[106]

Lastly, the possibility to objectively justify its conduct is opened to the dominant firm.[107]

2.7.5 Refusal to Supply

Refusal to supply is a very controversial topic, since companies should be, in principle, free to trade with whomever they want, but dominant companies' refusal to supply might, in some circumstances, be abusive. [108]

The Guidance Paper, indeed, when dealing with refusal to supply, clarifies that the Commission should carefully intervene in the firm's freedom to choose business partners, because the imposition of an obligation to supply "may undermine undertakings'

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[99] WHISH R., BAILEY D. (2012), pp. 689-690.
[100] Guidance Paper, Note 34.
[101] Guidance Paper, para. 51.
[102] Guidance Paper, para. 53. EUROPEAN COURT OF JUSTICE (2007) T-201/04 Microsoft v Commission EU:T:2007:289, para. 936.
[103] Guidance Paper, para. 53.
[104] Ibid, para. 55.
[105] Ibid, para. 57.
[106] Ibid, para. 58.
[107] WHISH R., BAILEY D. (2012), pp. 691-696.
[108] WHISH R., BAILEY D. (2012), p. 697.

incentives to invest and innovate and, thereby, possibly harm consumers". Additionally, this would enable free riders to take advantage of the dominant firm's investments without having to make their own.[109]
Most of the cases of refusal to supply occur when a vertically integrated firm which has a dominant position in an upstream market refuses to supply one of its competitors in the downstream market. This behavior was firstly deemed abusive in *Commercial Solvents*, since it "risks eliminating all competition" in the downstream market, by enabling the integrated undertaking to take advantage of the dominant position in the upstream market.[110]
There are basically four conditions that must be considered when distinguishing legitimate from abusive refusal to supply: the existence of a dominant position in the upstream market, the indispensability of the product supplied by the dominant firm to compete in the downstream market, if elimination of effective competition is likely to arise from the refusal, if there is an objective justification.[111]
It seems clear that a dominant undertaking cannot be forced to supply certain firms just because they are its competitors in a downstream market. This is obligatory only when the products supplied by the dominant firm are "indispensable" to compete in the downstream market. This requirement has been identified for the first time in *Oscar Bronner*,[112] where indispensability was intended as impossibility of duplication. The same view is taken in the Guidance Paper, that require the Commission to scrutinize whether "competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable".[113]
Moreover, the refusal must be likely to eliminate effective competition in the downstream market. A first indication of this requirement can be found in *Commercial Solvents*,[114] which, however, mentioned the elimination of "all competition", although having referred, earlier in the judgement, only to the possible elimination of one of the main competitors in the downstream market. It was subsequently clarified, in *Microsoft*, that it is not necessary to demonstrate that refusal to supply could eliminate all competition, it is, instead, sufficient to look at "all effective competition".[115] The consideration of effective competition is also confirmed in the Guidance Paper.[116][117]

2.7.6 Margin Squeeze

Margin Squeeze involves firms which are dominant in an upstream market and supply an indispensable element to their own competitors in the downstream market. These firms might use their market power in the upstream market to charge a price which could place its rivals at competitive disadvantage in the downstream market.[118]

[109] Guidance Paper, para. 75.
[110]EUROPEAN COURT OF JUSTICE (1974) Case C-6/73 Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation EU:C:1974:18.
[111] WHISH R., BAILEY D. (2012), p. 699.
[112] EUROPEAN COURT OF JUSTICE (1998) C-7/97 Bronner EU:C:1998:569.
[113] Guidance Paper, para. 83.
[114] Commercial Solvents (1974).
[115] Microsoft (2005), para. 563.
[116] Guidance Paper, para 85.
[117] WHISH R., BAILEY D. (2012).
[118] WHISH R., BAILEY D. (2012), p. 771.

Margin Squeeze has been recognized as an independent abuse, but potential foreclosure effects on an as efficient competitor must be demonstrated.[119]
Anticompetitive foreclosure arises when the margin left between prices charged by the dominant firm in the upstream market and prices charged in the downstream market is not sufficient.[120] The cost benchmark that can be used to establish whether prices charged in the upstream market allow an equally efficient rival to compete profitably in the downstream market are the LRAIC of the dominant firm in the latter.[121]

3. Article 101

Article 101(1) TFEU is, instead, concerned with bilateral conducts, and specifically agreements, decisions by associations of undertakings and concerted practices. Moreover, Art 103 (1) provides a safe harbor for some conducts that would be caught by Article 101(1), but are exempted if certain conditions are satisfied.
The text of Article 101 provides as follows:
"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

3.1 The Personal Scope

[119] EUROPEAN COURT OF JUSTICE (2011) C-52/09 TeliaSonera Sverige EU:C:2011:83, para. 31 and 65.
[120] EUROPEAN COURT OF JUSTICE (2010) Case C-280/08 Deutsche Telekom EU:C:2010:603, para. 183.
[121] Guidance Paper, para. 80.

The Article addresses agreements and concerted practices between undertakings. The concept of "undertaking" has already been addressed in the analysis of Art 102.
It further covers decisions taken by associations of undertakings, which do not need to perform an economic activity of their own, or to establish an agreement with an external partner to fall within the scope of the provision,[122] even though an agreement between an association, which is itself an undertaking, and other undertakings might be as well caught by Article 101.[123]
Moreover, agreements between legal persons that, however, form part of a single economic entity, such as in case of parent and subsidiaries, are not caught by the provision, because they are considered together as a unique undertaking.
This was firstly established in the *Viho* judgement, where it was found that parent and subsidiaries formed a single economic unit on the ground that the subsidiaries acted following the indications of the parent company without exercising independent decision-making.[124] Accordingly, it was also established a rebuttable presumption of control in cases where parents own the 100% of the subsidiaries' share, implying that parents are held liable for the subsidiaries' infringements unless providing evidence of their autonomy.[125][126]

3.2 Agreements, Decisions and Concerted Practices

As to agreements, they have been defined as a "Faithful expression of the joint intention of the parties…with regard to their conduct",[127] and it was specified that "A concurrence of wills between at least two parties the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention".[128] The agreement could therefore take many forms, obviously legal contracts, but also non-binding gentleman's agreements,[129] oral agreements,[130] an expired contract which is still applied in practice.[131] Therefore agreements could be proven through direct evidence but also through circumstantial evidence.[132]

Even decisions by trade associations may amount to a cartel, entailing that the association itself con be held liable as well as its members. As well as agreements, decisions may

[122] EUROPEAN COURT OF JUSTICE (2000) T-25/95 Cimenteries CBR EU:T:2000:77, para. 1320.
[123] Ibid, paras. 1325 and 2622.
124 EUROPEAN COURT OF JUSTICE (1996) C-73/95 P Viho v Commission EU:C:1996:405, para. 16.
[125] EUROPEAN COURT OF JUSTICE (2009) C-97/08 P Akzo Nobel e a. EU:C:2009:536, paras. 60-62.
[126] WHISH R., BAILEY D. (2012), pp. 92-94.
[127] EUROPEAN COURT OF JUSTICE C-41/69 - Chemiefarma / Commissione EU:C:1970:71.
[128] EUROPEAN COURT OF JUSTICE (2000) Case T-41/96 T-41/96 Bayer v Commission EU:T:2000:242.
[129] EUROPEAN COURT OF JUSTICE (1970) C-41/69 Chemiefarma v Commission EU:C:1970:71.
[130] EUROPEAN COURT OF JUSTICE (1978) C-28/77 Tepea v Commission EU:C:1978:133.
[131] EUROPEAN COURT OF JUSTICE (1991) T-7/89 Hercules Chemicals v Commission EU:T:1991:75.
[132] WHISH R., BAILEY D. (2012), pp. 99-101.

have different forms, also a recommendation may amount to a decision, although neither binding[133] nor adopted at unanimity.[134][135]

Conducts which are not attributable to an agreement or a decision can still infringe Article 101 when that are identifiable as concerted practices. A definition of the latter can be found in the *Dyestuffs* case, where the concerted practice was delineated as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".[136]
Moreover, "by its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants".Therefore, there must be a mental consensus between the undertakings concerned which does not need to be achieved verbally, but it may simply result from their coordinated bahaviour.[137]
Indeed, "although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market".[138]
Moreover, in *Suiker Unie*, it was held that it is not necessary to prove the existence of an actual plan to find the existence of an anticompetitive concerted practice.[139] In fact, even though economic operators are free to adapt intelligently to their competitors' foreseen conduct, Art 101 prohibits "any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market".[140]

3.3 Restrictions of Competition by Object or Effect

The object or effect to restrict competition are not cumulative, but rather alternative conditions for the application of article 101, in other words, effects must be scrutinized only when restriction of competition is not the evident object of the agreement.
The by object restriction occurs when it is possible to infer from all or some of the clauses of the agreement itself that it distorts competition, whereas, if it is not the case, an effects analysis will be required, involving consideration of the nature and quantity of the products covered by the agreement, the position and importance of the parties on the market for the products concerned, the isolated nature of the disputed agreement or its position in a series of agreements, the severity of the clauses intended to protect the

[133] EUROPEAN COURT OF JUSTICE (1972) Case C-8/72 Vereeniging van Cementhandelaren EU:C:1972:84.
[134]Commission Decision of 19 December 2017 European Research Council, C/2017/8580 (OJ C 439), para. 384.
[135] WHISH R., BAILEY D. (2012), p. 111.
[136] EUROPEAN COURT OF JUSTICE (1972) Case C-48/69 ICI v Commission EU:C:1972:70, para. 64.
[137] Ibid, para. 65.
[138] Ibid, para. 66.
[139] Suiker Unie (1975), para. 173.
[140] Ibid, para. 174.

exclusive dealership or the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation. [141]

The word "object" does not refer to subjective intentions, but rather to the "objective meaning and purpose of the agreement when considered in its economic context".[142] In addition, it was clarified that "the essential legal criterion" to distinguish a by object from a by effect restriction is the finding that "such coordination reveals in itself a sufficient degree of harm to competition",[143] so it must be inherently or, in other words, by its very nature, anticompetitive. In this case, the standard of proof is simply capability of restricting competition and no actual anticompetitive effects must be shown.[144]
The by object box is certainly constituted by the list of examples provided in Art 101, but this is not exhaustive.[145] Therefore it is up to the Court of Justice to ultimately determine which agreements fall within the by object box.[146]

On the other hand, an explanation of what a "by effect" analysis entails has been given in *European Night Services*, where it was held that "It must be borne in mind that in assessing a agreement under Article [101(1)] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned", clearly except in case of "an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets".[147]
In *Maxima Latvija* the Court of Justice held that the effects of an agreement on competition must be analysed in the economic and legal context of the agreement and that it must be noted whether the latter might combine with other agreements generating a cumulative effect on the market.[148]
Moreover, it was held that the restriction of competition shall be assessed with reference not only to existing competition, but also to the impact of potential entrants.[149] Nonetheless, it was specified that potential competition shall not be confused with theoretical or speculative competition, but it must be a real, concrete possibility supported by a market scrutiny.[150]
Finally, the Court of Justice emphasised the necessity to undertake a counter-factual analysis, in other words, to consider the hypothetical situation that would have established in the absence of the agreement at issue.[151][152]

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141 EUROPEAN COURT OF JUSTICE (1966) Case C-56/65 Société Technique Minière EU:C:1966:38, p. 375.
142 EUROPEAN COURT OF JUSTICE (2009) Case C-8/08 T-Mobile Netherlands and Others EU:C:2009:343, para. 27.
143 Case C-67/13P *Groupement Cartes Bancaires*, para. 57
144 T-Mobile Netherlands (2009), *para 30.*
145 C-298/07, para. 23.
146 WHISH R., BAILEY D. (2018) *Competition Law.* 9th Edition. OUP., p. 128.
147 EUROPEAN COURT OF JUSTICE (1998) Case T-374/94 European Night Services e a. v Commission EU:T:1998:198, para, *136.*
148 EUROPEAN COURT OF JUSTICE (2015) Case C-345/14 Maxima Latvija EU:C:2015:784, para. 26.
149 EUROPEAN COURT OF JUSTICE (1997) Case T-504/93 Tiercé Ladbroke EU:T:1997:84.
150 European Night Services (1998), paras. 139-147.
151 EUROPEAN COURT OF JUSTICE (2006) T-328/03 O2 Germany v Commission EU:T:2006:116.
152 WHISH R., BAILEY D. (2018), pp. 132-135.

3.4 Art 101 (3)

Agreements that fall within article 101(1) are void, unless they satisfy the four cumulative conditions set out in article 101(3), which provides a legal exception to the above-mentioned prohibition.
To be exempted, an agreement must, fist, "contribute to improving production or distribution of goods or to promote technical or economic progress". Therefore, it must produce efficiencies, which are objectively[153] beneficial to the European Community as a whole, and which can outweigh the negative effects. They can be subdivided into two categories: cost efficiencies and qualitative efficiencies, of which examples are provided in the Art [(101)3] Guidelines.[154]
Second, a fair share of these benefits must be passed on to consumers, category which comprises all direct and indirect users of the product concerned, in the relevant market.[155]
Third, the restriction must be indispensable for the realization of the benefits. This involves a double verification: if the overall agreement is *reasonably necessary* to obtain the procompetitive outcomes and then if each individual restriction is *reasonably necessary* for this purpose. [156]
Fourth, the agreement must not afford to the undertakings involved the possibility to eliminate competition in a substantial part of the market, since clearly the protection of the process of competition is more important than possible efficiency gains.[157]

3.5 The De Minimis Doctrine

Some practices which can formally fit in Article 101, are, however, not considered illegitimate, since they do not affect competition to a relevant extent, according to the *de minimis* doctrine.
This idea was firstly sustained in *Volk v Vervaecke*[158], where it was held that "an agreement falls outside the prohibition in Article 101 (1) when it has only an insignificant effect on the market".
The Commission has issued some guidelines as to in which cases an agreement can be considered *de minimis*, namely the *Notice on Agreements of minor importance*.[159]
The Notice sets out the market share thresholds below which an agreement can be considered *de minimis*, specifying that it just provides a safe harbour for agreements below the threshold, without implying that agreements above the threshold are automatically unlawful.[160]
Accordingly, it has been provided that "agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:

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[153]EUROPEAN COURT OF JUSTICE (1966) C-56/64 Consten e Grundig EU:C:1966:41*;* Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101, 27.4.2004, para. 49.
[154] Ibid, paras. 64-72.
[155] Ibid, para. 84
[156] Ibid, para. 73.
[157] WHISH R., BAILEY D. (2012), chapter 4.
[158] EUROPEAN COURT OF JUSTICE (1969) Case C-5/69 Voelk / Vervaecke EU:C:1969:35.
[159] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014.
[160] Ibid, paragraph 2.

(a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors) (2);

(b) or (b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors)."[161]

However, agreements entailing a *by object* restriction are not covered by the safe harbor, even if they are below the threshold. Indeed, in the Notice it is clarified that it does not apply to "agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers." Similarly, it does not apply "to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object."[162][163]

[161] Ibid, para. 8.
[162] Ibid, para. 13.
[163] WHISH R., BAILEY D. (2018), pp. 149-151.

Chapter 2

Prior Case Law on Fidelity Rebates: A Formalistic Approach

1. Notion and Categories of Loyalty Rebates

In general terms, loyalty or fidelity discounts and rebates may be defined as price reductions granted to customers to reward a certain purchasing behavior, or, in other words, conditional on the achievement of a certain amount of purchases during a reference period. They differ from unconditional rebates, that are applied to every unit bought irrespectively of the customer purchasing behavior.[164]
Loyalty discounts and rebates are very frequent in the market and generally not problematic. When rivals are able to compete on equal terms, indeed, they enhance price competition and are therefore procompetitive. Only when they are applied by a dominant firm, they might raise some concerns, since they can have an exclusionary effect on smaller competitors, limit purchasers' freedom of choice between suppliers and strengthen the firm's position of power.[165] In these cases, they might be deemed in breach of article 102.[166]
As to the difference between discounts and rebates, the former consists in a direct reduction of the list price, while the latter is a sum awarded to the costumer that has already paid the list price, the reduction is therefore indirect.[167]

In Hoffman La Roche the ECJ has drawn a clear-cut distinction between quantity rebates, namely those exclusively linked to the volume of purchases, that are presumptively lawful, and fidelity rebates, which are instead conditional on the costumer buying all, or almost all, of its requirements from the dominant firm, and are presumptively unlawful.
However, it was noted that rebates that are not formally conditional upon exclusivity may have the same purpose and/or effects in practice. In Michelin I, in fact, analyzing a rebate scheme conditional on the achievement of an individualized sale target, the ECJ concluded that, when a rebate doesn't fit into the above-mentioned categories it is necessary to consider "all the circumstances", relating to their nature and operation, to assess the likelihood of an exclusionary effect.
Lastly, in cases as Michelin II and Post Danmark II, the ECJ clarified that schemes based

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[164]DG Competition, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' COM [2005], p. 39. SAMA' D. (2014) Essays on Economic Analysis of Competition Law: Theory and Practice, Ph.D. Dissertation Defence, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426815, p. 2.
[165] ROUSSEVA K. (2005) Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints *Common Market Law Review*, Volume 42 (Issue 3), p. 587.
[166]SAMÀ D. (2013) La Valutazione Antitrust degli Sconti Fedeltà nel Diritto della Concorrenza Europeo. *Mercato, Concorrenza e Regole*. Volume 15 (issue 2). Pp. 237-266. At p. 1.
[167] Ibid.

on volume may also be abusive where it can be shown that they are likely to have an exclusionary effect, and extended the circumstances to be considered also to the features of the relevant market and the conditions of competition.[168]

Following the ECJ approach, Gylsen distinguishes between three types of rebates. First, rebates linked to exclusive dealing, when the rebates are granted in exchange of a full or partial dealing arrangement, such as in Hoffmann la Roche. In these cases, the level of the rebate usually depends on whether customers have reached the estimates that the dominant company has made about their future purchase requirements. In the U.S. they are known as market share discounts since they grow along with the dominant firm's share in its customers' business. Second, rebates linked to individualized volume targets, where there is no explicit exclusive dealing obligation, but rebates are determined according to the volumes purchased by the customers in a past reference period compared with the volume of purchases estimated in a corresponding future period. It is possible to find examples of this kind of rebates in Michelin I, British Airways and partly in Michelin II. Concerning the third kind, the volume levels that customers are supposed to reach in order to get the discounts are no longer individualized, but they are standardized for all customers. This situation is present partly in Michelin II[169] and in Post Danmark II.

A more articulated classification of conditional rebates is provided by Geradin. He argues that they can be distinguished according to the type of threshold, the scope of the application and the products or set of products to which they apply.
As to the first ground of distinction, quantity rebates are those conditional to the achievement of a certain volume target, while market-share rebates are granted if the customer reaches a percentage of his total requirements, and growth rebates are offered in exchange of an increase in purchases compared to those of the previous reference period. A market-share scheme where the percentage required is 100% or almost 100%, we can speak of exclusivity rebates.
Concerning the scope of the application, if rebates can apply only to increments unites above the threshold, they are called incremental rebates, whereas if they apply to all the unites bought during the reference period, including those below the threshold, they are retroactive.
Finally, when they apply to one category of products, they are called single product rebates, on the other hand, when the undertaking encompasses under the same rebates a range of products purchased, they are defined as bundled rebates.[170]
In the Discussion paper is drawn the same distinction between rebates granted on all purchases made during the reference period and those applied only to incremental purchases above the threshold, but only the former are related to the suction effect,[171] that

[168]COLOMO P. I. (2016) Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law 53 *Common Market Law Review*, Volume 53, p. 709. Precisely at pp. 715,716 and 721.
[169]GYLSEN L. (2003) Rebates: competition on the merits or exclusionary practice? *8th EU Competition Law and Policy Workshop What is an Abuse of a Dominant Position? European University Institute.*
[170] GERADIN D. (2009) A Proposed Test for Separating Pro-competitive Loyalty Rebates from Anti-competitive Ones *World Competition*, Volume 32, p. 41.
[171] Discussion Paper, para. 151 and following.

will be explained below, whereas incremental rebates are deemed abusive only if the resulting price for the incremental purchases is a predatory price.[172]
Moreover, retroactive rebates can be further subdivided according to whether the threshold is formulated as a percentage of the total requirements of the buyer, or as an individualized volume target, where rebates are targeted to individual purchasers,[173] in general according to his past purchases or to estimates of his future purchases, or as a standardized volume target, where the level of purchases that triggers the rebate is the same for all buyers and that is normally loyalty-enhancing only when well-targeted.[174]
In conclusion, as Bishop stated, the term loyalty rebate encompasses a wide range of discount schemes. “What each of these different schemes have in common is that they provide incentives for customers to purchase more product or services from the firm offering the loyalty scheme”, to sum up, they are loyalty enhancing.[175]

2. Case Law Prior to the Intel Case

2.1 Hoffman La-Roche

2.1.2 Assessment

Hoffmann-La Roche is the world's largest vitamins manufacturer, which produced vitamins and sold them for many uses, especially in the pharmaceutical sector.

The Commission identified seven different vitamins markets, and assessed Roche's dominant position on all of them, on the basis of the comparison between the applicants' market share and those of the competitors, and the existence of other factors that would prove the dominance even if the market share criterion wasn't held sufficient,[176] for example: a wider range of vitamins, an higher turnover and many technological advantages compared to the other producers.[177] All these factors granted Roche such freedom of action as to enable it to impede effective competition.[178]

Roche was deemed to have abused its dominant position by concluding agreements with its customers, where they committed themselves to procure all or almost all their requirements from Hoffman-La Roche, in exchange of a promise of discount, which was classified as a fidelity rebate.[179]
The duration of the most of the contracts was for an indefinite period, and they were clearly meant to last in the long term.[180] Moreover, in many of these contracts, the

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[172] Ibid, para. 168.
[173] ZENGLER H. (2012) Loyalty Rebates and the Competitive Process 8(4) *Journal of Competition Law and Economics*, Volume 8 (Issue 4), p. 717. and BISHOP S. (2015) Delivering Benefits to Consumers or Per Se Illegal?: Assessing the Competitive Effects of Loyalty Rebates “The Pros and Cons of Price Discrimination”, *Konkurrensverket Swedish Competition Authority,* p. 65.
[174] Discussion Paper, paras. 158-159.
[175] BISHOP S. (2015).
[176] EUROPEAN COURT OF JUSTICE (1979) Case 85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para. 91.
[177] Ibid, para. 46.
[178] Ibid, para. 37.
[179] Ibid, para. 80.
[180] Ibid, para. 86.

percentage of the rebate provided increase from 1% to 3%, according to the volume purchased every year.[181]

It also results from the Commission decision[182] that in many cases the rebates were "across-the-board", which means that they were based on the purchases of all the groups of vitamins considered together.[183] Moreover, an internal circular stated that, in order to obtain the rebate, the customer was supposed to order from Roche all or almost all of his purchases of any single vitamin required by him and manufactured by Roche.[184]

The CJEU deemed Roche's conduct abusive, stating that the establishment of a system of fidelity rebates, namely those conditional on customer's obtaining all or almost all of its requirement from it, has the same effects of an exclusive purchasing agreement, where purchasers are instead tied by a formal obligation to do so.
It held that "obligations of this kind... are incompatible with the objective of undistorted competition within the common market, because... they are not based on economic transaction which justifies this burden or benefit but are designed to deprive... the purchasers of his possible choices of sources of supply and to deny other producers access to the market."[185]

At this point, the CJEU introduces an important distinction between quantity and fidelity rebates, defining the former as exclusively linked with the volume of purchases from the producer ,and therefore presumptively lawful, unless predatory.[186] Unlikely, the latter kind of rebates, conditional on the customer's obtaining all or most of its requirements from dominant position, are considered presumptively illegal regardless of whether quantity is large or small, unless objective justification is provided ex Art. 101(3) TFEU.[187] This due to the fact that fidelity rebates are "designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers", and that they may lead to the circumstance that two purchasers pay a different price for the same quantity of the same product, depending on whether they buy supplies exclusively from the undertaking or not.[188]

The Court then verifies the fidelity nature of Roche's discounts. Concerning contracts providing fixed rate rebates, it concludes that in none of them the rebates are linked to the volume of purchases, but they all refer to "requirements" or a portion of requirements.[189] Relating to fixed rate rebates, the Court states that, although at first sight they could appear quantitative, a deeper analysis highlights that they are a "specially worked out form of fidelity rebates".[190] In fact, on one hand, it bounds the purchaser to obtain "most of his requirements" from the undertaking, leaving him with considerable freedom of

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[181]Ibid, para. 87.
[182]Commission Decision of 9 June 1976, Hoffmann-La Roche, 76/642/EEC (O.J. L 223/27 of 1608-1976).
[183]Ibid, para 22 c.
[184]Ibid, para. 12.
[185]Hoffmann-La Roche (1979), para. 90.
[186]Ibid, para. 90.
[187]Ibid, para. 89.
[188]Ibid, para. 90.
[189]Ibid, para. 95.
[190]Ibid, para. 98.

action. On the other hand, granting rebates at a progressive rate in accordance with the percentage of requirements obtained from Roche every year, would obviously incentivize the purchaser to reach the maximum percentage.[191]
In addition, the discounts at issue are linked to "estimates made for every costumer according to the latter's presumed capacity of absorption", and therefore are very different from quantitative rebates, related to "quantities fixed objectively and applicable to all possible purchasers."[192]

2.1.3 Analysis and Criticisms of the Decision

Gylsen observes that Roche case concerns a target rebates system combined with an exclusive dealing arrangement, where the volume target is used to monitor customers' compliance with the explicit exclusive dealing arrangement. Therefore, it is not possible to derive from the judgement a prohibition of "stand-alone" target rebates system, because in the present case it is deemed unlawful because of its combination with an exclusive dealing agreement.

Moreover, the system is characterized by the combination of two features: it is "customer-specific" and "time-related", since Roche made a prevision of each costumers' future requirements during a given reference period and offered a major or minor rebate depending on the actual purchases made in the same reference period. Thus, it is not clear whether time-related rebates might be unlawful even if they aren't customer-specific. According to the distinction drown by the CJEU, they would fall within the quantity rebate frame, since they are linked to uniform volume targets. However, this doesn't imply that they can't have any loyalty enhancing effect, which is discussed.[193]

Gylsen identifies some additional factors that contribute to the loyalty-enhancing nature of the rebates. First, the rebates progressive rate produces a more than proportionate increase of the discounts when the volume purchased grows, and it gives the costumer "a powerful incentive to obtain the maximum percentage of the requirement from Roche". Second, the fact that the rebates are "across the board" would enhance their exclusionary effect, since it would make it even more difficult for competitors who produce a smaller range of vitamins to offer a rebate capable of compensating the customer for the loss of Roche's rebate. It also has a tying effect, because "a customer would lose the entire rebate if it did not reach the volume targets for one or more of the vitamins groups". [194]

Hoffmann-La Roche decision was criticized for being too formalistic, since it establishes a "per se" standard to assess whether rebates are illegal. This approach was considered inappropriate when it applies to conduct that might have anti-competitive, pro-competitive or neutral effects, depending on the particular circumstances of the case.[195]
Many authors sustained the necessity to elaborate an appropriate legal test for exclusionary abuses, since the case law up to this moment didn't require some showing of actual or potential anti-competitive effects, such as a reduction in outputs or an increase

[191] Ibid, para. 99.
[192] Ibid, para. 100.
[193] GYLSEN L. (2003), p. 17.
[194] Ibid, p. 18.
[195] WHISH R., BAILEY D. (2018), p. 205.

in prices, but it was sufficient that the practice was "loyalty-enhancing", which means capable of increasing costumers' fidelity to the dominant firm.[196]

The "per se" standard adopted reflects the presence of a "structuralist approach". The structuralist approach has its origin in the ordoliberal thinking, which aims at protecting the "fairness" of the political and social order through the control and limitation of private power. As a consequence, dominant firms, which own the private power, are not allowed to exclude other competitors from access to the market. Therefore, the only form of competition not unfair was the one based on economic performance. On this ground, Hoffman La Roche rebates were considered abusive, because "not based on an economic performance which justifies this burden or benefit".[197]They were not motivated by "the legitimate efforts to increase sales" but by an exclusionary intent.[198]

This approach is criticized because it doesn't take into account consumer welfare. In this respect, there are measures that increase an undertaking's efficiency and create consumers' welfare benefits without being related to the firm's performance, and therefore falling outside from the "performance based competition".[199] An example could be found in economies of scale, which don't improve the undertaking's performance and therefore can't be regarded as a justification for a target rebate system.[200]

In addition, it is criticized that in Hoffmann-La Roche "the only issue that has been considered is the extent to which there is a significative impairment of the freedom of customers to choose their suppliers". There is no assessment of which rivals have been effectively foreclosed by the practice, and of how the need to pay switching costs has affected their cost structure, since "when the structure of competition has already been weakened… Any further weakening of the structure of competition may constitute an abuse of dominant position."[201]

2.2 Michelin I

NV Nederlandsche Banden-industrie Michelin, known as Michelin NV, is the Netherlands subsidiary of the Michelin group. It is responsible for the production and sale of Michelin tyres in the Netherlands. Therefore, it owns a factory in the dutch territory where tyres for vans and lorries are produced. [202]

First, the existence of a dominant position is assessed on the base of various criteria and evidence.

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[196] KALLAUGHER J., SHER B. (2004) Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82 25(5) *European Competition Law Review* 263.
[197] Ibid
[198] TEMPLATE J., O'DONOGHUE R. (2002) Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC *Fordham International Law Journal.* Vol. 28:83
[199]Hoffmann-La Roche (1979), para. 90.
[200] Ibid.
[201]Hoffmann-La Roche (1979), para 123.
[202] EUROPEAN COURT OF JUSTICE (1983) Case C-322/81 Michelin v Commission, EU:C:1983:313, para. 1-2.

The Commission, defining the relevant product market as the one involving new replacement tyres for lorries, buses and similar vehicles, found that Michelin NV's market shares of 57 to 65% were significantly bigger than the 4 to 8% market shares of its competitors.[203] The CJEU endorses the Commission's assessment of the relevant market, rejecting the applicant's claims that it failed, on one hand, to include the different types and sizes of tyres and, on the other, to exclude car and van tyres.[204]Then the CJEU states that "the market share constitutes a valid indication of Michelin NV's preponderant strength in relation to its competitors",[205] and analyzes the additional criteria taken into account by the Commission.
The Court refers to Michelin NV's network of commercial representatives, which grants it direct access to users at all times, enabling it "to maintain and strengthen its position on the market and to protect itself more effectively against competition."[206]
Moreover the Court noted that in the Netherlands many users have a preference for Michelin tyres, and that they will unlikely change their mind because the purchase of tyres represents a huge investment, but too much time is needed to verify the concrete cost-effectiveness of a brand of tyre. This makes Michelin NV an unavoidable trading partner, since dealers are obliged to sell Michelin's tyres if they want to remain in the market.[207]
Thus, Michelin NV's dominant position is confirmed by other evidence provided.

However, the Court clarifies that "a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."[208] Then the Court proceeds by analyzing the abusive nature of Michelin's conduct.

The deemed abuse of dominant position is related to an annual variable discount system, the percentage of which was determined according to the costumer's yearly turnover in Michelin NV, on the basis of a progressive rate, used until 1978.[209] Therefore, the rebates were costumer-specific, and, since this turnover comprised tyres for any category of vehicle, they were "across the board", such as Roche's rebates.[210]
Thus, the discount was conditioned on the dealer achieving a certain sales target, agreed at the beginning of the year, which was based on estimates of the dealer's sales potential, and was always higher than the amount of purchases made the previous year.[211] Before 1989, there were three possible sales targets on which depended the amount of the rebate, a minimum, an intermediate and a maximum one, but after a single target was fixed.[212]
The scale of discounts was not published by Michelin and the criteria on which targets

[203] Ibid, para. 33.
[204] Ibid, para. 35, 52.
[205] Ibid, para. 52.
[206] Ibid, para. 58.
[207] Ibid, para. 56.
[208] Ibid, para. 57.
[209] Ibid, para. 66.
[210] GYLSEN L. (2003), p. 27.
[211] Ibid
[212]EUROPEAN COURT OF JUSTICE (1983) Case C-322/81 Michelin v Commission, EU:C:1983:313, para. 67.

depended were not known in advance, moreover, although the targets were discussed at the beginning of each year between the dealer and Michelin NV's commercial representative, no written confirmation was provided by Michelin NV.[213]
A small portion (generally up to 4%) of the rebate was paid in advance, initially every month and then every four months.[214] This was probably intended to remind dealers that was convenient for them to purchase from Michelin during the whole year.[215]

Then the Court refers to the distinction, provided in Hoffmann-La Roche, between quantity and loyalty discounts. However, it observes that the rebate system at issue cannot be qualified as a mere quantity discount linked solely to the volume of purchases, because they are instead based on a progressive scale of the previous year turnover. And they do not ether amount to fidelity rebates, because the dealers have no obligation to obtain all or most of their requirements from Michelin NV. [216]

For this reason, the Court introduces a third category of rebates, stating that, when is neither possible to qualify the discounts within the quantity type nor within the loyalty one, it is necessary to assess "all the circumstances", and in particular the "criteria and rules for the grant of the discount", to determine whether the rebate scheme "tends to remove or restrict the buyer's freedom to choose his sources of supply", or to prevent market access to competitors, when there is no "economic service justifying it".[217]

Then the Court moves to the analysis of the circumstances indicating strong a loyalty-inducing effect.
Firstly, rebates are retroactive and are based on a one-year reference period. This is deemed relatively long and therefore capable of pressuring the dealer, at the end of the year, to buy the necessary requirements to meet the target expected, although not needed, because otherwise he would lose the rebate for the entire year. In fact, "the one last order, even a small one, affected the dealer's margin of profit of the whole year's sales of Michelin tyres" and "even quite slight variations might put dealers under appreciable pressure".[218]
Gylsen analyzes this passage of the judgement, noting that the "increasing pressure" mentioned by the Court is related mostly to uncertainty about the unit price for the product. Dealers are unsure until the end whether they will reach the necessary purchases to obtain the rebate, and every product obtained by rival companies will worsen uncertainty, leading to loyalty-enhancing effects.[219]
However, Kallaugher and Sher argue that the loyalty-enhancing effect is not linked to uncertainty, but to a form of switching costs, known as "suction effect", which is explained below.[220]

This has an effect not only on buyers, but also on competitors, which is enhanced by the divergence of market shares between them and Michelin NV. This could be explained by

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[213] Ibid, para. 69.
[214] Ibid, para 66.
[215] GYLSEN L. (2003), p. 30.
[216] Ibid, para. 72.
[217] Ibid, para. 73.
[218] Ibid, para. 81.
[219] GYLSEN L. (2003), p. 30.
[220] KALLAUGHER J., SHER B. (2004).

the suction effect, discussed hereafter, which implies that, since dealers buy a lesser quantity of requirements from competitors, to avoid losing its portion of demand, the competitor would have to offer a very high percentage of discount, in order to compete with Michelin NV's annual target discount, which are lower but applied to a wider amount of purchases. Only in doing so, it is possible to compensate dealers from the losses suffered if they fail to attain Michelin NV's targets.[221]

Thirdly, the Court takes into account the lack of transparency of the discount system, which leaves dealers in a condition of uncertainty as how to predict the effective consequences of attaining or failing to attain their sales target. For example, the Court recalls the absence of publication of the rebates scale or written communication of the sales target, which enables Michelin NV to change the rules many times during the reference period.[222]
In the Court's sight, this was intended to increase pressure on dealers, because the possible loss in case of failure to reach the target was not easy to predict, and therefore there was no guarantee that the rebate offered by the competitor would be able to outweigh it.[223]
In this way, dealers were prevented from changing supplier without suffering any considerable economic loss, and therefore dealers' choice of suppliers was limited, as well as competitors' market access.[224]

Then, the Court excludes any objective justification, stating that "neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of costumer's freedom of choice and independence", which "is therefore not based on any countervailing advantage which may be economically justified".[225]
In conclusion, Michelin NV's rebates system amounts to an abuse of dominant position.[226]

2.3 Michelin II

This case concerns Michelin France, which manufactures and sells tyres for various vehicles, including, in France, also new and used tyres for heavy trucks.[227]
Regarding the market of new tyres, it is possible to draw a distinction between the original equipment market, where tyres are bought directly by the vehicle producer without any intermediary, and the replacements tyres market, where they are sold to final consumers through specialized stores.[228]
Three different practices have been challenged, which involve the market of new and replacement tyres for trucks: the general price conditions for professional dealers, the agreement for optimum use of Michelin truck tyres and the agreement on business cooperation and assistance service (known as "Michelin friends club").[229]

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[221] Ibid, para. 82.
[222] Ibid, para. 83.
[223] Ibid, para. 84.
[224] Ibid, para. 85.
[225] Ibid, para. 85.
[226] Ibid, para. 86.
[227]EUROPEAN COURT OF JUSTICE (2001) Case T-203/01 Michelin v Commission EU:T:2003:250, para. 1.
[228] Ibid, para. 2.
[229] Ibid, para. 4.

The general price conditions are characterized by a list price and a list of rebates.
The rebates were divided into three categories: quantity rebates, rebates based on the quality of the dealers' service to users, called service bonus, and rebates based on increase in sales, called progress bonus.[230]
Quantity rebates were calculated on the basis of the annual turnover achieved by the dealer with Michelin tyres, according to a progressive rate.[231]
Service bonus depended on the degree of compliance to various obligations undertaken by the dealers, concerning the improvement of his facilities and after-sales services. Anyway, the bonus was conditional on the achievement of a minimum annual turnover and corresponded to a portion of this value, which comprised all tyres types bundled together[232] ("across the board" rebates).
Finally, progress bonus was offered when dealers managed to exceed a certain amount of purchases, negotiated at the beginning of the year and based on past performance and estimates of the future needs of the dealers.[233]

The agreement for optimum use of Michelin truck tyres introduced some additional rebates meant only for dealer purchasing new truck tyres from Michelin France. These rebates were conditional on some commitments undertaken by the dealers, for example to give back to Michelin those truck tyres which had reached the legal tread wear limit. Moreover, the bonus was limited by the number of new truck tyres bought by the dealers in the previous year.[234]

Lastly, the "Michelin Friends Club" defines the agreement between Michelin and those dealers who wanted to obtain further advantages from Michelin, in exchange of cooperation with Michelin in certain areas. In particular, dealers would receive help in terms of investment and training and a financial contribution up to 0.75% of annual Michelin service turnover. However, they committed to provide Michelin with information about their undertaking, to promote Michelin brand and to always have enough stock of Michelin products as to satisfy immediately any growth in customer demand.[235]

The Court starts its assessment from the quantity rebates, which differ from the rebates seen in the previous case law because the target volume is standardized, and not based on estimates of each costumer's purchase requirements. The Court, indeed, states that when rebates are linked solely to the volume of purchases, they "are generally considered not to have the foreclosure effect prohibited by art 82". Moreover, quantity rebates might produce efficiency gains, since the bigger quantity is purchased, the lesser costs the dealers would have to sustain, and that would result in lower prices also for the final consumer.[236]
But the Court, overruling the absolute presumption introduced in Hoffmann- La Roche,

[230] Ibid, para. 4-5-6.
[231] Ibid, para. 7.
[232] Ibid, para. 10.
[233] Ibid, para. 11.
[234] Ibid, para. 20.
[235] Ibid, para. 22.
[236] Ibid, para. 58.

states that: “It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors.”[237]
And, therefore, introduces the need of carrying the “all the circumstances” test also when quantity rebates are concerned, and not only for the so called “third category of rebates”, as previously stated in Michelin I.[238]

In this connection, Gylsen observes that a loyalty inducing effect can arise from a system of standardized target system, even if it might be less evident than in an individualized one, where the dominant firm sets “challenging customer-specific volume thresholds below which no rebates are available at all”. On the contrary, the system at issue comprises a high number of volume levels that grant different corresponding rebates. Therefore, the level of uncertainty as to the exact net price of the products purchased is lower, even though it could be still existent and relevant. Since uncertainty might still be present to some extent, it is necessary, as in individualized volume systems, to consider all the circumstances. It is interesting to point out also that standardized systems might be justified on the ground of economies of scale, while individualized ones are ineligible for this purpose due to their discriminatory nature.[239]

Thus, the Court verifies whether the quantity rebates at issue have a loyalty-inducing effect, namely the effect of tying the dealer to the dominant company preventing it from buying requirements from other suppliers.[240]The scale of the rebates considered the annual turnover achieved with the applicant for all tyres types combined (“across the board”), and the rate of the discount increased according with such turnover. It is also possible to notice that the increase in the discount rate over the first steps of the scale was greater than over the higher steps. [241]

The Court identifies two factors that contribute to the loyalty-inducing nature of the rebates system. First, the one year reference period, which has already been deemed relatively long in Michelin I, and therefore capable of increasing pressure on the dealer to reach the required quantity at the end of the period.[242] But it was correctly objected that the Court had never established a maximum limit of the reference period (which according to the Commission is three months)[243], and that, in the mentioned decision, the length of the reference period was deemed fidelity enhancing because combined with the whole design of the system. In fact, in Michelin I, the dealer would have lost the whole rebate if he did not reach the single (and customized) high target, whereas in the present

[237] Ibid, para. 59.
[238] Ibid, para. 60.
[239] GYLSEN L. (2003), pp. 50-51.
[240] Ibid, para. 66.
[241] Ibid, para. 69,71.
[242] Ibid, para. 81.
[243]Commission Decision of 20 June 2001, PO - Michelin, Case COMP/E-2/36.041, Official Journal of the European Communities, 2002/405/EC L 143/1, 31 May 2002., para. 216.

case the large number of thresholds grants that, even if the dealer doesn't reach the highest level of purchases, he would still be entitled to a smaller discount, and therefore he is subjected to a significantly inferior degree of pressure. [244]

Second, the discount is calculated on the dealer's total turnover, and not only on the quantities that exceed the required threshold. This clearly increases loyalty inducing effects, because the one last order will affect the cost of the all the purchases made during the refence period, and not only of the additional amount above the threshold. [245] The real unit purchase price will be unknown until the last order is placed, and this would place dealers in a situation of uncertainty and insecurity.[246] Consequently, the length of the reference period acquires relevance, because "the loyalty-inducing nature of a system of discounts calculated on total turnover achieved increases in proportion to the length of the reference period".[247] The degree un uncertainty that the rebates generates is directly proportional to the length of the reference period.[248]

Concerning the defence put forward by Michelin, that the variations in the upper end of the scale were slight, the Court points out that, as already stated in Michelin I, when the one last order might affect a dealer's marginal profit, even a slight variation is sufficient to put him under considerable pressure.[249]
Michelin pointed out also that the aim of any discount system is to encourage the dealer to purchase more from the same supplier.[250] The Court replies by the consideration, already affirmed in the previous judgements, that only dominant firms, among the others, have "a special responsibility not to allow their ("its" in the original text) conduct to impair genuine undistorted competition on the common market".[251]

Finally, the Court analyzes whether the quantity rebates system might be objectively justified. Michelin identified a countervailing advantage in the economy of scale, deriving from the large quantities ordered thanks to the rebates. In fact, larger quantities sold reduce costs for the dominant firm, which will shift down that reduction to the costumer, charging lower prices.[252]
However, in the Court's sight, a generic reference to economies of scale in the area of production costs and distribution, is not enough to sustain the economic justification argument, but Michelin would have to provide more specific information, in order to establish that the rebates were based on actual costs savings.[253]

[244] Ibid, para. 82.
[245] Ibid, para 85.
[246] Commission Decision of 20 June 2001, para. 220.
[247] Ibid, para 85.
[248] GYLSEN L. (2003), p. 42.
[249] Michelin II, para. 91.
[250] Ibid, para. 96.
[251] Ibid, para. 97.
[252] Ibid, para. 98.
[253] Ibid, para. 108.

Gylsen criticizes several points of the Commission decision, which are confirmed by the Court in the present judgement. First, it is not explained on which ground standardized rebates are challenged, and why they are treated in the same way as individualized rebates. Second, the Commission considers three months as the threshold between a reasonable and a long reference period, although this doesn't result from previous case law. The Court, albeit precising that a minimum limit for the reference period has not been established, fails to provide some criteria to ascertain when a reference period could be held relatively long or not.[254]

Moving to the service bonus system, the Court identified three main reasons why it infringed Art 102. To start with, they were deemed unfair, because the points were attributed according to subjective criteria, that left Michelin a wide range of discretion, particularly when it came to assess whether the commitments undertaken by the dealers had been met. [255] Rebates offered by a dominant firm should be, instead, based on objective economic justification. On the contrary, a subjective assessment would enable the undertaking to discriminate between dealers, keeping them under strong pressure,[256] because they wouldn't be able until the end to predict the rate of the discount they will receive. [257]

Another ground for service bonus illegality is its loyalty-inducing nature, given the fact that some points were granted if the dealers achieved a certain sales target of new Michelin products. In the Court's view, this was intended to prevent the dealers from buying other supplier's products, even though there were more onerous commitments to meet.[258]

Lastly, service bonus has a tied sales effect, since one point was attributed if the dealer complied with the commitment to bring back used tyres to Michelin for retreading.[259]This ensures that dealers will be more willing to choose Michelin for retreading, blocking access to market of other retreaders. [260]

Likewise, the "Michelin Friends Club" has been challenged by the Commission on three main aspects.

First, certain obligations imposed through the agreement were intended to strengthen Michelin's position on the market. For example, the obligation to promote Michelin's brand and to guarantee a certain market share for Michelin, or to carry enough stock to satisfy demand immediately.[261]

Second, some obligations enable Michelin to monitor the dealers' activity, without any justification other than supervising distribution in detail. For instance, to provide financial information, or information about shareholders. Moreover, through certain obligations Michelin can exercise influence on many aspects of the dealer's business, investment

[254] GYLSEN L. (2003), p. 40-41.
[255] Michelin II (2001), para 138-139.
[256] Ibid, para. 140.
[257] Ibid, para. 141.
[258] Ibis, para. 160.
[259] Ibid, para. 161.
[260] Ibid, para. 164.
[261] Ibid, para. 170-171.

above all. In particular, the acceptance of a list of area for progress drawn by Michelin, or participation to promotion programs. Finally the obligation to provide statistics and sales forecast, enables Michelin to monitor the dealer's commercial policy.[262]To sum up, the membership to the club creates a strong loyalty-inducing effect on dealers, because they wouldn't be able to change their policies, or to sell to competitors, without Michelin finding out. Since Michelin is an important supplier for them, their decisions would always be conditioned by the fear to lose the partnership, and the economic advantages arising from it. Therefore they are strongly dependent on Michelin.[263]
Third, the obligation to turn only to Michelin for retreading tyres and casings was regarded as a form of exclusive dealing agreement, capable of restricting the dealer's choice and access to market to other retreaders.[264]
The Court confirms the Commission's vision. It also notes that, since entry in the club was conditioned on the achievement of a certain market share in Michelin's product, the obligation imposed on dealers to carry sufficient stocks to meet spontaneous demand was meant to consolidate Michelin's dominant position.[265]

Finally, it is important to mention the Michelin's argument that the Commission should have carried out an economic analysis of the effects of the practice at issue.
To support this point, Michelin refers to the previous case law stating that "an abuse is an objective concept referring to the behavior of an undertaking in a dominant position which… has the *effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[266]
However, there is no assessment of that effect, otherwise the Commission would have found that Michelin's position had not been strengthened and that the degree of competition had not been altered. This is based on supporting evidence, since Michelin's market shares and prices have decreased, whereas existing competitors have improved their position and new competitors have entered the market.[267]
Nonetheless, the Court objects that the effect referred to in the quotation above, doesn't have to be actual, but could be also potential. It states that: "For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect."[268]

This passage has raised many criticisms in doctrine. Heimler, although admitting that the exclusionary effect doesn't necessarily have to be actual, argues that "the Commission decision does not contain enough information for exactly assessing it" (it added). This leaves many doubts on the conclusion reached, which are confirmed by the circumstance that while carrying that practice Michelin lost part of its market shares.[269]
Conversely, Venit states that, once established that the rebate system induces loyalty and lacks of objective justification, "the Michelin II test tends to focus on the object of the

[262] Ibid, para 172.
[263] Ibid, para.172.
[264] Ibid, para.174.
[265] Ibid, para 208.
[266] Ibid, para. 235-238
[267] Ibid, para. 236.
[268] Ibid, para.239.
[269] HEIMLER A. (2004) Pricing Below Cost and Loyalty Discounts: Are They Restrictive and If So When? *Competition Policy International, 2005.*

conduct under review in a manner reminiscent of the object test under article 81(1)", but without the clear reference to the "object or effect" of the conduct present in Art. 81. Therefore, in absence of a legal legitimation, it would be necessary to undertake an economic analysis.[270]

2.4 British Airways

2.4.1 Commission decision

British Airways was the first loyalty rebates case concerning the service sector and a dominant buyer.[271]

Following the Virgin Atlantic Airways complaint, a company who operates scheduled passenger services on a number of international routes, the Commission started an investigation about certain British Airways' bonus schemes.

British Airways is the largest airline in the United Kingdom, which operates a wide range of domestic and international scheduled and charter services.[272]

The challenged schemes consisted in rewarding travel agents for meeting certain individualized volume targets during a reference period. It is possible to distinguish between three different practices: the "Marketing Agreements", the "Global Arrangements" and the "Performance Reward Scheme".[273]

In the "Marketing Agreements", the bonus was granted on the basis of tickets purchased in the United Kingdom during a year, according to individualized volume targets calculated on a sliding scale.

The "Global Arrangements" concerned only three travel agents and the rewards were instead base on their worldwide sales, with a reference period of a year quarter.

Finally, through the "Performance Reward Scheme", travel agents could receive additional commissions of up to 3% for international tickets and up to 1% for domestic tickets, if they achieved a certain target of tickets sold in the United Kingdom during a month.

Volume targets were individualized, meaning that they were determined through a comparison with the travel agent's sales in the corresponding period of the past year, which were respectively: the previous year, the corresponding quarter and the corresponding month of the previous year.

Moreover, since they were calculated on the travel agent's total sales, not only on the sales above the volume target, they were retroactive.[274]

As a start, British Airway was found dominant according to several factors. The most direct evidence is his share of 46,3 % of United Kingdom sales through travel agents,

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[270] VENIT J. S. (2004) Article 82: The Last Frontier - Fighting Fire with Fire *28. Fordham International Law Journal.* Volume 28 (Issue 4, Article 10).

[271] *Borlini L. (2008) Legal and Economic Appraisal of the 'More Economic Approach' to Unilateral Exclusionary Conduct: Regulation of Loyalty-Inducing Rebates (Case C-95/04P) Yearbook of European Law. Volume 27 (Issue 1). Pp. 445–518. At p. 450.*

[272] Commission Decision 2000/74/EC of 14 July 1999, O.J. 2000, L 30/1, para. 1-2.

[273] GYLSEN L. (2003), at p. 34.

[274] Commission Decision 2000/74/EC of 14 July 1999, O.J. 2000, L 30/1, paras. 6-28. GYLSEN L. (2003), p. 35. MIROSLAVA M. (2018), p. 25.

compared with 3,6 % of his largest competitors. His position is further strengthened by the dominant position he owns also on the United Kingdom market for air travel, which makes BA an unavoidable trading partner for travel agents. In fact, a large part of agents' income depends on the sale of BA tickets, therefore they can't in any case afford to lose this partnership.[275]

Concerning the assessment of the abuse, the schemes at issue were deemed very similar to the loyalty inducing rebates condemned in Michelin I and in Hoffmann-La Roche cases. Here the Commission established that rebates by dominant firms are allowed only when related to efficiencies, whereas they can't be designed to encourage loyalty and consequently restrict buyers' freedom to choose between suppliers.
Therefore, the Commission deemed the discounts abusive, on the ground that they were loyalty inducing as well as very similar in form to those in Michelin I, and that the efficiency justification put forward by British Airways was to be rejected. This was based on the consideration that the individualized nature of the rebates prevented the realization of economies of scale, since the schemes enable an inefficient travel agent to achieve the maximum commission, just because it increased its sales, and don't grant to an high volume travel agent an extra commission, unless it increases its sales.[276]

2.4.2 General Court decision

The Commission decision was appealed against the Court of First Instance, which however rejected all the pleas submitted by British Airways.
Firstly, the CFI upheld the Commission assessment of BA dominance. In this respect, even though a market share of less than 40% was generally considered low for a finding of dominance, other relevant circumstances were taken into account for this purpose: the divergence with competitors' market share; the fact that market share used to be higher in the previous 10 years; and the presence of barriers to entry, for example the BA's slot holding at Heathrow.[277]

The CFI confirmed the finding of an abuse of dominance on a double ground: the discriminatory nature of the schemes, and their loyalty inducing effect.
Concerning the first aspect, it was related to the performance reward schemes, that were applied not only to the tickets sold after the target was reached, but on all BA tickets sold during the reference period, therefore they "could result in different rates of commission being applied to an identical amount of revenue generated by the sale of BA tickets".[278]
Discriminatory conditions distorted the level of remuneration which travel agents received from BA. Consequently, it affected also competition among travel agents, which would have been normally based on their ability to suit travellers' wishes at a reasonable cost.[279]

[275]Ibid, paras. 88-94.
[276] Ibid, paras. 97-102.
[277] GENERAL COURT (2003) Case T-219/99 British Airways v Commission EU:T:2003:343, paras. 190-225. BORLINI L. (2008), p. 452.
[278] Ibid, paras. 234-236.
[279] Ibid, paras. 237-238.

Since discriminatory conditions are regarded as generating competitive disadvantage, article 82 (c) EC explicitly "provides that abuse of a dominant position may consist in applying dissimilar conditions to equivalent transactions with other trading parties."[280]

On the other hand, the fidelity-building effect was linked to the progressive nature of the schemes, on the ground that the commission rates grew along with the number of tickets sold, and therefore could rise exponentially from one reference period to another.[281] Accordingly, "the higher revenues from BA ticket sales were, the stronger was the penalty suffered by the persons concerned in the form of a disproportionate reduction in the rates of performance rewards, even in the case of a slight decrease in sales of BA tickets compared with the previous reference period."[282]
The exclusionary effect arising from the schemes was further consolidated because the rival undertakings didn't have enough economic resources to contrast it by offering similar rewards.[283]
The CFI then recalls that: "for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect." Therefore, the Commission can't be accused of failing to demonstrate that the practice at issue produces an exclusionary effect, since there's no need to assess its actual effects.[284]This approach has been regarded as "rather imprecise", because the wording "tends to restrict", "likely to restrict" and "capable of restricting" suggest three possible different tests.[285]

The judgement of the CFI still reflects a form-based approach to loyalty-inducing rebates, but, a consistent part of the doctrine was expecting a change of prospective in the ECJ ruling, which instead followed "an essentially legal viewpoint", based on the applicable precedents. This expectation is routed on the fact that the DG Discussion Paper[286] ,which represents an important step towards a more economic approach, was published after the CFI ruling and before the ECJ one. Despite the criticisms arisen from the ECJ judgement, Borlini suggests that it might be interpreted as an effort to safeguard "primary legal values", so that the future process of review would not alter "the very nature of EC competition regulation", and create troubles in justice administration.[287]

2.4.3 The European Court of Justice decision

[280] Ibid, para. 233.
[281] Ibid, para. 272.
[282] Ibid, para. 273.
[283] Ibid, para. 278.
[284] Ibid, para. 293.
[285] VENIT J. S. (2004), p. 1167.
[286] DG Competition, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' COM [2005].
[287] BORLINI L. (2008), p. 448.

Concerning criticisms to the form-based approach adopted in this case, one can refer to the first three pleas submitted by the applicant before the ECJ. Firstly, British Airways contested that the Court of First Instance failed to draw “a distinction between the fidelity of customers resulting from the most generous commission or the lowest prices, and the fidelity of customers induced by anti-competitive or exclusionary practices”. In other words that the schemes were condemned only on the basis of fidelity, regardless of whether it produced foreclosure or had procompetitive effects instead.[288]
The ECJ, in rejecting the first plea, moves from the previous case law, recalling Michelin I as a relevant precedent. The present case, as Michelin I, concerns individualized target schemes, that can’t be qualified neither as quantity discounts nor as fidelity discounts, and therefore require the assessment of all the circumstances, “particularly the criteria and the rules governing the grant of the discount”.[289]
The Court then refers to the two-stage assessment that has been elaborated in previous cases: first, “it first has to be determined whether those discounts or bonuses can produce an exclusionary effect”, namely whether they are capable of impede or make it more difficult for competitors to enter the market and for the co-contractors to choose between different commercial partners; then, “it then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted”.[290]

Concerning the exclusionary effect, The Court refers to the characteristics taken into account by the CFI: the schemes were based on individual targets;[291]they were retroactive, namely applied to the entire turnover reached in the whole reference period;[292]due to BA’s significantly higher market share, competitors would have to offer disproportionately higher rebates in order to compensate co-contractors for the loss suffered in case they fail to exceed BA threshold.[293]
Given the exclusionary effect, it has to be determined whether “it may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer”.[294]Since the Court of Justice has a limited jurisdiction to assess errors of law, it can’t interfere with the assessment of facts and evidence made by the CFI, which had already denied the presence of an objective justification.[295]
The ECJ concluded that “The Court of First Instance did not therefore make any error of law in holding that the bonus schemes at issue had a fidelity-building effect”, which led to an exclusionary effect not economically justified.[296]

As a second plea, British Airways accused the CFI of not having examined the actual or probable effects of the practice, although required by article 82.[297] In particular, it claimed

[288] British Airways (2007), paras 42-43.
[289] Ibid, paras. 65-67.
[290] Ibid, paras. 68-69.
[291] Ibid, para. 72.
[292] Ibid, paras. 63-64.
[293] Ibid, para. 65.
[294] Ibid, para. 86.
[295] Ibid, paras. 87-88.
[296] Ibid, para. 90.
[297] Ibid, para. 92.

that the CFI had disregarded "evidence clearly indicating that the bonus schemes at issue had no material effect",[298] by showing that, during the period where the schemes at issue were applied, the market share of BA's rivals increased, whereas the portion of BA's tickets sold by travel agents diminished.[299]
However, the Court replied that there was in the CFI ruling an explanation of the effect of those schemes (paras 272-273). For example, it emphasized the effect at the margin, the progressive nature of the commission rates, their exponential effect in case of tickets sales increase and their disproportionate reduction in case of a slight decrease.[300]
Moreover, the Court observed that evidence put forward by BA on the absence of material effect could not be taken into account in the present judgement, because it exceeded its jurisdiction, and therefore it had to rely on the CFI analysis.[301]

In the third plea, BA alleged an error in law of the CFI, that didn't assess whether the conduct involved a prejudice to consumers, as required by article 82 (b).[302]
The Court dismissed the argument, stating that "article 82 EC is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure".[303]Therefore, it is not necessary to demonstrate the prejudice to consumers, but only the restrictive effect on competition, that would indirectly damage them.[304]

As mentioned above, it has been argued that the Courts in the present case have undertaken an excessively formalistic approach which doesn't take into due account the effects of the practice.
Borlini observes that "the three features taken into account by the Courts in order to assess the potential exclusionary effects of the BA's schemes should be considered merely indicative",[305] whereas proof of potential foreclosure is a necessary condition for the application of ART. 82 EC, and it should be based on factual circumstances.[306]
Vinit, as well, criticizes the lack of rigor in the economic analysis undertaken, whereas a more detailed assessment is needed.[307]
Similarly, Heimler claims that "the analysis of the way markets operate is quite abstract and incomplete": there is no consideration as to whether competitors could profitably match BA discounts; there is no analysis of the way firms actually compete in the market, especially concerning the possibility that the consumers could be directly informed about the different offers by the airlines themselves, without being misled by travel agents

[298] Ibid, para. 93.
[299] Ibid, para. 94.
[300] Ibid, para. 97.
[301] Ibid, para. 101.
[302] Ibid, para. 103.
[303] Ibid, para. 106.
[304] Ibid, para. 107.
[305] BORLINI L. (2008), p. 457.
[306] GYLSEN L. (2003), p. 9, para. 19.
[307] VENIT J. S. (2004), p. 1167.

pursuing BA sales target; finally, the Courts disregarded the circumstance that Virgin has profitably entered the market during the alleged abuse.[308]
In the Kallaugher and Sher paper, is noted that unlawfulness of the rebate system doesn't depend just on the loyalty enhancing effects, nor on the circumstance that, without it, Bratish Airways would have sold fewer tickets. Conversely, the real issue "is whether it was ever likely that the impact of the system would affect the ability" of the rivals "to act as a competitive constraint to BA" and therefore "lead to higher prices and loss in consumer welfare", "but the Commission never asked the question". Is therefore concluded that the case involves "a lot of protection for competitors without much impact on consumer welfare".[309]

2.5 Tomra
This case differs from the previous analyzed because in was ruled after the publication of the Discussion Paper (2005), and, with regard to the judgement of the General Court and of the Court of Justice, also after the Guidance Paper (2009).[310]These two documents are the result of the process of Competition Law review towards a more effect based approach, and introduce a new test to assess an infringement, based on economic analysis. Notwithstanding, the proposed approach was only partially applied, and the assessment of the Courts remained overall form based.[311]

2.5.1 Commission decision
Tomra was a supplier of the so-called reverse vending machines, and related products and services. It was also involved in services related to operation deposit systems, such as the administration of data. Its activity was worldwide and it had subsidiaries in all major markets.[312]
The proceeding, originated from a Prokent complaint, has shown that Tomra engaged in a combination of anti-competitive practices, including exclusive dealing agreements, as well as agreements containing individualized quantity commitments or retroactive rebate schemes; and there is evidence that this was part of a strategy aiming at excluding competitors.[313]

Concerning the quantity targets, they constituted individualized commitments that were different for each customer and corresponded to the customer's entire requirements or to a large proportion of them.[314] In fact, "although the stipulated volumes refer to absolute quantities they were manifestly based on the estimated requirements of the customer in the reference period".[315] Whereas, regarding the rebate schemes, they were individualized and rewarded consumers for reaching a given purchasing target at the end of a given

[308] HEIMLER A. (2004), p. 10.
[309] KALLAUGHER J., SHER B. (2004), p. 281.
[310] Guidelines on the Commission's Enforcement Priorities in Applying Art [102] to abusive exclusionary conduct by dominant undertakings OJ [2009] C 45/7.
[311] SAMÀ D. (2013) La Valutazione Antitrust degli Sconti Fedeltà nel Diritto della Concorrenza Europeo. *Mercato, Concorrenza e Regole*. Volume 15 (issue 2). Pp. 237-266. At p. 18.
[312]Commission Decision of 29 March 2006, Prokent-Tomra, Case COMP/E1/38.113, C(2006)734. Paras. 1-2.
[313] Ibid, paras. 97 and following.
[314] Ibid, para. 297.
[315] Ibid, para. 124.

reference period, which was usually one year.[316]
Moreover, during the practices at issue, Tomra's average market share was around 80%[317], while the rivals' position remained weak and unstable.[318]Since very large market shares are in themselves evidence of dominance, which is further upheld by other factors, such as the gap with competitors' market share, or the absence of countervailing buying power, Tomra was deemed to have a dominant position.[319]

Then, the Commission starts its assessment with the premise that: "Although, as stated by the Court in Michelin II and British Airways, to establish an abuse under Article 82 it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect", the Commission has completed its analysis in this case by considering the likely effects of Tomra's practices on the RVMs market."[320] Therefore, the Commission confirmed the authority and the validity of the previous case law, and stated that the analysis of the likely effects of the conduct were alleged just in support of the established criteria.
Then, the Commission undertakes the two stage analysis consolidated in the previous case-law: by assessing the foreclosure effect through the Michelin I "all the circumstances" test,[321] and by rejecting the Tomra defence that the practice was based on cost efficiencies, for lack of evidence.[322]

However, although the application of the Guidance Paper test is still far, the Commission attempted to undertake an effect based analysis, "putting Tomra's practices in the relevant economic context and identifying their likely and actual negative effects".[323] Here some examples of economic elements taken into account by the Commission.
First, it was calculated that the non-contestable demand and the level of the foreclosed market had grown during the practice at issue.[324] Moreover, the Commission noted that some customers started purchasing more of the competing products after the expiry of Tomra's agreements.[325]
Then, the Commission affirmed that the rebate schemes forced Tomra's competitors to offer very low or even negative prices in order to compete with it. In fact, providing a smaller number of machines, they would have to offer much higher rebates in order to grant to consumers the same economic advantages of rebates applied to a larger number of units.[326]
The Commission calculated the unit price a competitor would need to offer to induce a customer to buy the remaining units from it, considering that it had already bough most of the products from Tomra. Thereby, it was noted that the effective price of the last unites

[316] Ibid, para. 316.
[317] Ibid para. 336.
[318] Ibid, para. 345.
[319] Ibid, paras. 92-93.
[320] Ibid, para. 332.
[321] Ibid, para. 333.
[322] Ibid, para. 334.
[323] PEEPERKORN L. & ROUSSEVA E. (2011) Article 102 TFEU: Exclusive Dealing and Rebates. *Journal of European Competition Law and Practice*. Volume 2 (issue 1). P. 36.
[324] Commission Decision of 29 March 2006, para. 163.
[325] Ibid, para. 345.
[326] Ibid, para.165.

bought to reach the threshold was negative. Consequently, if the consumer had already reached this level, a competitor would have to offer the additional machines at a price below cost. [327]

Tomra, as well, put forward a defence based on economic analysis, claiming that if the demand is sufficiently above the threshold, the discount that the competitor needs to offer is reduced,[328]in a manner that would enable him to compete with Tomra. As evidence for that, Tomra mathematically showed that a competitor, by averaging prices between units above and below the threshold, would obtain a unit price capable of making "the customer indifferent between that competitor and Tomra", and that "may well be above cost and feasible for any competitor.[329]
The argument was rejected by the Commission, because it "violates individual rationality", not considering that competitors would aim at profit maximization, not possible in the model above described. Therefore, the argument is not relevant as to whether foreclosure is likely in these schemes.[330]

Despite the attempt of the Commission to go beyond the traditional form-based approach, Samà argued that focusing only on the last unit prior to the threshold, and considering a negative price for the marginal unit equal to an exclusionary foreclosure, "risks to establish a per se prohibition for any type of retroactive rebate". In fact, it is a common feature of loyalty discounts and rebates that the incremental price for marginal units just below the threshold is negative.[331] For this reason, the Discussion Paper provides that "what is relevant for an assessment of the loyalty enhancing effect is not competition to provide an individual unit, but the foreclosing effect of the rebate system on commercially viable amounts supplied by (potential) competitors of the dominant supplier".[332]

2.5.2 General Court decision
The General Court confirmed the established case-law, considering unnecessary the evaluation of the actual effects produced by the conduct, and rejected Tomra's appeal, which was instead mainly founded on economic arguments.[333]However, some noted that, despite adherence to previous case law, in the present judgement the CJ had moved some steps forward.[334]

In rejecting Tomra's argument that its practice was found *per se* illegal, the General Court started by recalling concepts consolidated in the case law. It stated that: "A rebate system which has a foreclosure effect on the market will be regarded as contrary to Article 82 EC if it is applied by an undertaking in a dominant position"[335]; it also quoted the Michelin I

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327 Ibid, para. 166.
328 Ibid, para. 386.
329 MAIER-RIGAUD F.P., VAIGAUSKAITE D. (2006) Prokent/Tomra, A Textbook Case? Abuse of Dominance under Perfect Information. *EC Competition Policy Newsletter*. Issue 2. Pp. 23-24.
330 Ibid.
331 SAMÀ D. (2013), p. 24.
332 paragraph 154 of the Discussion Paper, substantially reproduced in the paragraph 40 of the Guidance Paper, referred to in SAMÀ D. (2013), p. 24.
333 SAMÀ D. (2013), p. 27.
334 PEEPERKORN L. & ROUSSEVA E. (2011).
335 GENERAL COURT (2010) Case T-155/06 Tomra Systems and Others v Commission EU:T:2010:370, Official Journal of the European Union, 2010/C 288/31, 23 October 2010, para. 211.

judgement and the necessity to consider "all the circumstances".[336]
However, while in Michelin I by "circumstances" the ECJ was implying "the criteria and rules governing the grant of the rebate", namely the features of the rebate itself,[337] in the present case, the CG referred also to "the context in which those agreements operate".[338]
This can be regarded as an important change, since in considering the context, the CG took into account factors which were also mentioned by the Guidance Paper in the analysis of "anticompetitive foreclosure", [339] such as: Tomra market position, compared with those of its competitors; the size of customers; the terms of the agreement; the tied part of the demand; the development of the demand.[340]
In conclusion, since the Commission had taken into account the circumstances of the case, including the market context, and the applicant had the opportunity to allege an economic justification,[341] it was not possible to sustain that the practice was considered *per se* illegal.

However, the Court, not only recognized that the Commission had analyzed the actual effects of the applicants' practices, by illustrating with diagrams the "suction effect", but also observed that this was unnecessary. [342]In fact, for the purpose of establishing an infringement of Article 82 EC, it is sufficient "to show that the applicants' practices tended to restrict competition or that their conduct was capable of having that effect", and "it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets". Therefore, the consideration of the likely effects of the practice was only meant to complement and support the rest of the Commission analysis.[343]
Samà underlines how the evaluation of the GC is distant from the test proposed in the Guidance Paper, since it "appears to attach more importance to the loyalty effect of the practice itself rather than to its actual capability of excluding competitors from the market". This could be very worrying because it makes dominant firms unable to contrast the finding of an infringement, even though they can prove the absence of actual effects. [344]
By contrast, Peeperkorn and Rousseva, argue that even effect-based analysis, also the one provided by the Guidance Paper, do not always require proof of actual anticompetitive effects, since effects of a conduct might develop some time after its implementation, and it would be unreasonable to intervene only when competition has already been weakened. Then the paper distinguishes between two situation: when, despite the abuse, competition appears unaffected, it is necessary to show the actual impact of the practice; but when, as in the present case, there is evidence of actual negative effects, that would be unnecessary.[345]

Another issue raised in the appeal was whether it is necessary to estimate the contestable portion of the customer's demand and the minimum viable scale, since Tomra claimed

[336] Ibid, para. 214.
[337] PEEPERKORN L. & ROUSSEVA E. (2011).
[338] Tomra (2010), para. 215.
[339] PEEPERKORN L. & ROUSSEVA E. (2011)
[340] Commission Decision of 29 March 2006, paras. 217-218.
[341] Tomra (2010), para. 224.
[342] Ibid, para. 219.
[343] Ibid, paras. 287-290.
[344] SAMÀ D. (2013), p. 33.
[345] PEEPERKORN L. & ROUSSEVA E. (2011).

that its practice affected only a limited part of the market, whereas the 61% of the market, on average, remained constable, enabling an as-efficient competitor to stay in the market.[346]
Even though Tomra's argument was in line with the Guidance paper, the CFI rejected it on the ground that foreclosure of a substantial part of the market "cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors". The reasons for this are that customers "should have the opportunity to benefit from whatever degree of competition is possible" and competitors "should be able to compete on the merits for the entire market and not just for a part of it". [347]
At first sight, The GC seems to equate protection of competitors and protection of customers as valid reasons to condemn a practice, thereby making no distinction between efficient or inefficient competitors. The Guidance Paper, instead, clarified that the aim of competition law is not protecting competitors in general, but "protecting an effective competitive process".[348] Therefore, only those conduct capable of foreclosing an as efficient competitor and, thus, of leading to consumer harm are to be deemed unlawful.[349]
However, in the Peeperkorn and Rousseva paper is noted that the CFI above mentioned statement, read in the context of the decision, might acquire a different significance. In fact, in the following sentence, the CFI refers only to viable competitors, not to any competitor. [350] Moreover, the CFI specified that the portion of the tied market that may lead to exclusionary effects has to be determined according to an analysis of the circumstances of the case.[351] In this respect, it recalls that: the portion of demand foreclosed was considerable, contrary to what affirmed by Tomra; the practices led to an high percentage of the tied demand in the years where demand was highest and could foster new entries; the practice tied final customers and not merely distributors.[352]

Another point put forward by Tomra is that the Commission hasn't undertaken a price cost test, which was later proposed in the Guidance Paper under the name of "as efficient competitor test". The CFI rejected the plea, stating that "the fact that the retroactive rebate schemes oblige competitors to ask negative prices… cannot be regarded as one of the fundamental bases of the contested decision".[353]
However, it observed that a number of other considerations underpinned the founding of anticompetitive effects in the contested decision.[354] And the factors that the CFI refers to are very different than those traditionally considered, whereas they are mentioned in the Guidance Paper as relevant for this analysis.[355]Some examples are: the threshold to obtain the rebate corresponded to the customer's total or almost total requirements,[356] the retroactive rebates in many cases applied to the applicants' largest customers,[357] Tomra's

[346] SAMÀ D. (2013), p. 28.
[347] Tomra (2010), para. 241.
[348] Guidance Paper, para. 5. Referred to in SAMÀ D. (2013), p. 28.
[349] SAMÀ D. (2013), p. 28.
[350] Tomra (2010), para. 241.
[351] Ibid, para. 242.
[352] Ibid, paras. 243-245.
[353] Ibid, para. 258.
[354] Ibid, para. 259.
[355] PEEPERKORN L. & ROUSSEVA E. (2011).
[356] Tomra (2010), para. 262.
[357] Ibid, para. 263.

status of "unavoidable trading partner" implied that customers turned to other suppliers only for the limited remaining part of their demand.[358]
Another argument which is absolutely in line with the Guidance Paper is that "the exclusionary mechanism represented by retroactive rebates does not require the dominant undertaking to sacrifice profits, since the cost of the rebate is spread across a large number of units",[359]whereas smaller competitors won't be able to offer the same prices remaining above costs.

In conclusion, it seems evident that the General Court hasn't adopted a modernized approach to loyalty rebates, deluding the expectations for a radical change. Notwithstanding, it is possible to notice the signs of a new sensitivity in several elements: the consideration of the market context, the reference to factors considered important in the Commission analysis and later included in the Guidance Paper, and also the denial of a *per se* illegality standard.[360]

2.5.3 European Court of Justice decision

The ECJ confirmed the CJ assessment. In particular, it established that "a minimum viable scale" test to determine the precise threshold beyond which the practice is abusive is not required.[361]This statement appears weak from an economic point of view because it may lead to the consequence that even an agreement applied to a *de minimis* portion of the market would be deemed abusive.[362]
Moreover, the ECJ notices that below cost prices are not necessary to find an infringement[363], but it is sufficient to demonstrate that the conduct at issue has a potential capability to restrict competition.[364]

2.6 Post Danmark II

In Post Danmark II, the ECJ had to deal with a preliminary ruling concerning the interpretation of Art 82, the first one in the area of fidelity rebates.
At the time of the facts, Post Danmark had a statutory monopoly under the Danish State and was responsible for the one-day delivery universal postal service in the Danish territory, the service included also bulk mail.[365]
Post Danmark applied rebates which amounted to between 6 and 16% to customers sending over 2 million items of mail per year. The scheme was standardized, namely to a certain amount of aggregate purchases corresponded the same applied rebate for any customer. The reference period was one year.[366]
The rebates were retroactive, because calculated on all mailings presented during the period concerned, and not only to those above the initial estimate. Moreover, rebates were

[358] Para. 269.
[359] Para. 267.
[360] PEEPERKORN L. & ROUSSEVA E. (2011).
[361] EUROPEAN COURT OF JUSTICE (2012) Case C-549/10 Tomra Systems and Others v Commission EU:C:2012:55, para 46.
[362] SAMÀ D. (2013), p. 37.
[363] Tomra (2012), para. 73.
[364] EUROPEAN COURT OF JUSTICE (2015) Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651, para. 79.
[365] Ibid, para. 3-4.
[366] Ibid, para. 7.

released during the year on the basis of estimations agreed at the beginning of the same reference period between PD and the costumers. At the end of the year, PD verified whether the quantity presented matched the estimate and made an adjustment on the price for each customer, which applied retroactively. The costumers had to reimburse PD if it failed to reach the estimate.[367]

The Danish Competition Council started its investigation, following a complaint of Bring Citymail, PD only serious competitor in the bulk mail market during the relevant period. It found that Post Danmark enjoyed a dominant position on the bulk mail market and additionally the status of "unavoidable trading partner". It indeed held a market share of over 95%, further enhanced by high barriers to entry and economies of scale. Moreover, it was conferred with a statutory monopoly, which covered over 70% of all bulk mail, and his geographical coverage encompassed all of Danmark.[368]
As a result, Citymail could compete on approximately 30% of mail in its own geographic coverage.[369]
In addition, the Danish Competition Council, considering the retractive nature of the rebates with a one-year reference period, found that about the "two-thirds of advertising mail not covered by the monopoly could not be transferred from Post Danmark to Bring Citymail without an adverse impact on the scale of the rebates".[370]
It indeed concluded that the scheme had exclusionary effects. Moreover, it held that it was not necessary for this purpose to carry out the "as-efficient-competitor" test. In fact, given the specific characteristics of the market, it cannot be required that a new competitor should be as efficient as Post Danmark.[371]

Then, Post Danmark brought the case before the Maritime and Commercial Court, which, in finding uncertainty as to the criteria to be used in order to ascertain the exclusionary effect, requested a preliminary ruling.[372] The points that ECJ was supposed to address were mainly three: which criteria must be taken into account when assessing whether a standardized rebate scheme has exclusionary effects, the relevance of the "as efficient-competitor" test; how probable and serious or appreciable must the anticompetitive effect be. [373]

As to the first point, the ECJ recalled that quantity discount linked solely to the volume of purchases is not, in principle, liable to infringe Article 82 EC.[374]But it specified that the rebates at issue cannot be regarded as such, since they are not applied to each individual order, but on the whole orders of a certain time period bundled together.[375]
Since they don't fit neither as loyalty, nor as quantity rebates, the ECJ, as in the previous case law, asserted the necessity to consider all the circumstances.[376] In this respect, the Court considered firstly that the rebate system is retroactive, and therefore capable of

[367] Ibid, para. 8.
[368] Ibid, para. 14.
[369] Ibid, para. 15.
[370] Ibid, para. 16.
[371] Ibid, para. 17.
[372] Ibid, para. 19.
[373] Ibid, para. 20.
[374] Ibid, para. 27.
[375] Ibid, para. 28.
[376] Ibid, para. 29.

putting co-contractors under stronger pressure, [377] since the price of the purchases made over the whole period would depend on the last orders. Secondly, the pressure is strengthened by the one-year reference period, which has already been deemed as relatively long.[378]
Thirdly, the Court considered PD's strong position on the market, which made it an unavoidable trading partner.[379] In those circumstances, a retroactive rebate scheme, even though standardized, might limit customers' choice of suppliers and produce an anticompetitive exclusionary effect.[380] Therefore, in this case, as we have already seen in Tomra, the "all the circumstances" test is not limited only to the analysis of the rules and the criteria governing the rebate, but involves also the consideration of other factors, such as the extent of the dominant position, the coverage of the practice and the regulatory context, which can endorse an effect-based approach.[381]

Concerning the relevance of the AEC test, there is no legal obligation to undertake it, as inferred from art 82 and the case law.[382]However, it can be used to ascertain whether a rebate scheme is abusive "as a tool amongst others".[383]
Nevertheless, in the present case this test would be useless. In fact, the structure of the market, affected by Pd's large market shares, structural advantages and statutory monopoly, "makes the emergence of an as-efficient competitor practically impossible".[384]
Some authors criticized the refusal to adopt an AEC test, since it had already been applied in cases of marginal squeeze or single branding which have effects very similar to rebates. On the other hand, Tòth argues that in this case "the assessment of the exclusionary effect and the conduct of the AEC had proven to be unnecessary", but this doesn't impair the relevance of this tool and doesn't prevent it from being used in future cases.[385]

Finally, concerning the third request, the Court held that, in order to condemn a practice, the effects arising from it don't have to be concrete, but it is enough to prove that they are likely.[386]
Moreover, as to the serous nature of the effects, considering that the structure of the market has already been weakened by the presence of PD, any further weakening, even slight, may amount to an abuse of dominance.[387] Therefore the practice is, by its very nature, capable of producing anticompetitive effects, and "fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified".[388]

3. Eu Courts' Assessment of the Rebate Schemes: Main Features

[377] Ibid, para. 33.
[378] Ibid, para. 34.
[379] Ibid, paras. 39-40.
[380] Ibid, para. 42.
[381] COLOMO P. I. (2016), p. 733.
[382] Ibid, paras. 56-57.
[383] Ibid, para. 61.
[384] Ibid, para 59.
[385] TOTH A. (2015) CJEU judgement in Post Danmark II: Role of economic evidence in Competition Cases *European Networks Law & Regulation Quarterly*, Volume 4, p. 266.
[386] Post Danmark II (2015), paras. 66-67.
[387] Ibid, para. 72.
[388] Ibid, para.73.

Some scholars observed that in the above-mentioned cases the Courts outlined a two-tier assessment of fidelity rebates, which involves, on one hand, the appraisal of (potential, as explained below) foreclosure, and, on the other, the evaluation of whether the conduct might be cost-based, but only when the objective justification is put forward by the dominant firm.[389]
As to the first stage of the test, a necessary premise for identifying an abuse is the existence of a dominant position, since in this case the firm operates in a market where the degree of competition has already been weakened by its position,[390] and therefore it owns the special responsibility not to allow further impairment of the market structure,[391] because that would have exclusionary effects. Therefore, loyalty rebates are considered unlawful only when performed by a dominant undertaking.
Once the dominant position has been established, two types of rebates have been recognized as abusive: fidelity rebates linked to exclusivity obligations, [392] whose effects have been compared to those of an exclusive dealing agreement, and fidelity enhancing rebates, [393] that, although in absence of an exclusivity obligation, present similar effects to the first category.[394]

Fidelity rebates, conditional on the consumer acquiring all or almost all of its requirements from the dominant firm, have been held presumptively unlawful when applied by a dominant firm.[395] In other words, these rebates are deemed by their very nature capable of restricting competition, according solely to the presence of the exclusivity obligation. For these reasons, many authors have identified a "by object" standard in the assessment of fidelity rebates, because the presumption of unlawfulness arises "where the object of the conduct is to distort competition".[396]
On the contrary, fidelity enhancing rebates don't require dealers to enter in exclusive binding agreements in order to obtain the rebates, but might nonetheless have anticompetitive effects, that might be assessed having regard to "all the circumstances", and in particular "the criteria and the rules for the grant of the discount".[397]

In this regard, the main circumstances taken in account by the Courts to assess the exclusionary effect are the following:

- The significant variation in discount rates between the lowest and the highest steps.[398]
- The relatively long reference period, which is identified with one year.[399]

Concerning this point, Gylsen argues that it is impossible to determine in general terms which length makes the reference period problematic. In fact, although a relatively long

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[389] VENIT J. S. (2004). KALLAUGHER J., SHER B. (2004), GYLSEN L. (2003).
[390] Hoffman La-Roche (1979), para. 120.
[391] Michelin I (1983), para. 57.
[392] Hoffmann La-Roche (1979), para. 89.
[393] Michelin I (1983), para 72.
[394] MIROSLAVA M. *(2018*). At p. 33.
[395] Hoffmann La-Roche (1979), para. 90.
[396] GORMASEN L. L. (2013) Are Anti-Competitive Effects Necessary for an Analysis under Article 102 TFEU? *World Competition* Volume 36 (Issue 3), p. 223. At p. 227; MIROSLAVA M. *(2018*), p. 34; COLOMO P. I. (2016), p. 722.
[397] Michelin I, para. 73.
[398] Michelin II, para. 95.
[399] Michelin I (1983), para. 75; Michelin II (2001), para. 95; Post Danmark II (2012), para.34.

reference period affects the degree of foreclosure, the critical length varies in every sector, because it is related to the order cycles of the consumers. Moreover, the relatively long reference period doesn't automatically create a foreclosure effect, but it arises from the combination with other relevant parameters.[400]

- Retroactivity, namely that rebates are applied to the purchases made over the entire reference period, and not only to those above the threshold.[401]
- The individualized nature of the rebate scheme, namely that the purchase targets to be reached in order to obtain the rebate are different for each costumer, usually determined on the basis of the customer's estimated requirements and/or past purchasing volumes.[402]
- The rebate system is not transparent, as to prevent consumers to foresee whether they will be rewarded until the end.[403]
- The progressive nature of the rebates, namely they grow proportionately more that the purchased volume.[404]
- The progressive nature of the increased commission rate, which has a very noticeable effect at the margin, accentuating the radical effects which a small reduction in sales could have on the rates of the commissions.[405]
- The circumstance that rebates are "across the board" or bundled, which means that the volume of purchases required to get the rebate is calculated over a range of products, therefore consumers have to show loyalty to several products provided by the dominant firm, not only to one of them.[406]
- The divergence between the dominant firm's market shares and those of its competitors, which generally makes it an unavoidable trading partner for the suppliers.[407]
- Also the grant of rebates to the largest customers could amount to a useful indication of the impact of the practice on the market.[408]
- The cumulative fidelity enhancing effect of several co-existing rebate schemes.[409]
- Finally, also the standardized nature of the rebates, when they are not granted in respect of each individual order, but on the basis of the aggregate orders placed over a given period.[410]

It is therefore possible to conclude that the Courts focused their assessment on the formal characteristics of the rebate scheme, rather than on its actual impact on the market structure. Accordingly, in order to undertake the "all the circumstances" test, neither it is necessary to carry out an as-efficient competitor test[411], nor to take into account the extent

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[400] GYLSEN L. (2003), p. 47.
[401] Michelin II (2001), para. 95; British Airways (2007), para. 74; Tomra (2012), para. 75; Post Danmark II (2015), para. 32. BORLINI L. (2008), p. 461.
[402] British Airways (2007), para. 71-73; Tomra (2012), para. 75. BORLINI L. (2008), p. 461.
[403] Michelin I (1983), para. 83. GYLSEN L. (2003), p. 47.
[404] Hoffmann La Roche (1979), para. 99. GYLSEN L. (2003), p. 47.
[405] British Airways (2007), para. 74.
[406] Hoffman La-Roche (1979); Michelin I (1983). GYLSEN L. (2003), p. 47.
[407] Michelin I (1983), para. 82; British Airways (2003), para. 75; Tomra (2012), para. 75. GYLSEN L. (2003), p. 47.
[408] Tomra (2012), para. 75; Post Danmark II, para. 46.
[409] Michelin II (2001); GYLSEN L. (2003).
[410] Post Danmark II (2015), para. 28; Michelin II (2001).
[411] Tomra (2012), paras. 73,76,80; Post Danmark II (2015), para. 57.

of the coverage and the portion of tied market through a minimum viable scale test,[412] provided that the Guidance Paper is considered as "soft law" without binding effects.[413]
Consequently, also fidelity-enhancing rebates are treated as a "by object" restriction of competition,[414] since "the Courts set a very low threshold for the establishment of a fidelity-enhancing effect, above which every form of fidelity rebates were condemned as abusive with no further evaluation of their effect."[415]
In this respect, the ECJ has specified many times that it is not necessary to show the actual or likely concrete effects of the conduct,[416] but it is sufficient to show that the conduct tends to restrict competition or is capable of having that effect.[417]Therefore, once a rebate scheme, due to the rules and criteria that govern it, is found to be loyalty enhancing, then it is presumed to have exclusionary effects.

4. Criticism of the Case Law: A Form-based Approach

The approach of the Courts in the reviewed cases was criticized for relying on a *per se* standard for the assessment of loyalty inducing rebates, by inferring the existence of anticompetitive effects from the formal features of the conduct, without an actual appraisal of such effects.[418]
The origin of this methodology con be found in the ordoliberal ideology, whose attention to the protection of the market structure has led to the condemnation of conducts that, although being harmless to consumer welfare, had produced an even insignificant change in the market structure, thus also in case on exclusion of a less efficient competitor.
The protection of the competition process is definitely one of the goals of competition law, but only when this is instrumental for the achievement of consumer welfare, that is hampered only when competitors as efficient as the dominant firm are excluded from the market due to an anticompetitive conduct.
For these reasons, many scholars hope for the adoption of a more economic approach, that would actually ascertain the effects of the conduct on the market and not merely presume them, as to avoid condemnation of pro-competitive practices and false positives. On the other hand, there are also skeptical voices that are worried about how this would affect legal workability.

4.1 Ordoliberal Tradition

Originally, EEC Competition Law was very much influenced by the policy and legal structure of EC Competition Law, which was based on the "ordoliberal" ideology, developed by the "Freiburg School".
The Freiburg School highlighted the need for an "economic constitution", that would

[412] Tomra (2012), para. 46; Post Danmark II (2015), para. 73. Also in Hoffmann La-Roche (1979) at para. 90 is held that a *de minimis* threshold is unnecessary in this area of Competition Law.
[413] Post Danmark II (2015), para. 53.
[414] SHER B. (2015) Keep Calm – Yes; Carry on – No! A Response to
Whish on Intel (2015) *Journal of European Competition Law and Practice* Volume 6 (Issue 4), p. 219.
[415] MIROSLAVA M. (2018), p. 39.
[416] British Airways (2007), paras. 96-100.
[417] Michelin II (2001), para. 239; Tomra (2012), para. 68; Post Danmark II (2015), para. 66.
[418] EHLERMANN C. & MARQUIS M. (2008) *European Competition Law Annual 2007 A Reformed Approach to Article 82 EC*. Hart Publishing (2008). At p. 295.

comprise a set of rules to govern economic activities.
The aim of these rules was the protection of individual economic freedom against the concentration of private economic power, in order to create a free and fair political and social order.
Individual freedom is, in fact, the premise of individual equalities and civil liberties.
Therefore, the competitive process is regarded as a vehicle of economic freedom, which should be maintained through the prohibition to dominant firms of those practices that create unjustified limits on the competitive autonomy of rivals.
Accordingly, in the Ordoliberal tradition, the competitive process is protected to achieve individual economic freedom, which leads to social justice and civil liberties, not to consumer welfare. [419]

To better understand the influence of the ordoliberal ideas on Art 102 enforcement, it is possible to recall that, during the debate concerning the scope of ART 102, namely whether it was intended to prevent only practices which directly harmed consumers, or also those which harm consumers through the exclusion of competitors, German scholars were in favor of the second option, stating that limitation of freedom of choice of either consumers or competitors amounts to an abuse.
Following this approach, the first times that the ECJ enforced article 102, it stated that it was designed to caught not only practices that cause direct damage to consumers, but also "those which are detrimental to them through the impact on an effective competition structure". [420]In addition, the definition of abuse, given in Hoffman La Roche, "emphasized the impact of the conduct upon the market structure".[421]

In the subsequent case-law, however, the scope of article 102 was further widened and "the connection between significant changes of market structure and harm to consumers, became neglected". On the contrary, "changes of the market structure started being associated with harm to competitors rather than consumers".
The Court, indeed, started to identify harm to consumers with the simple limitation of consumers choice of suppliers. This could be found any time a competitor, even if less efficient that the dominant firm, is eliminated from the market. Therefore, Article 102 was actioned for the slightest change of market structure and ended up in protecting competitors instead of consumers.[422]

Another ordoliberal idea which had an impact on EC competition law is "performance-based competition", namely competition based on factors that are effectively beneficial to consumers, such as lower prices or better quality, which has to be distinguished from "impediment competition" aimed only at excluding competitors. Therefore, a firm could improve its profits only by improving its performance and not by impeding the

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[419] JOHN KALLAUGHER, BRIAN SHER (2004). GORMASEN L. L. (2007) The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC (2007) *European Competition Journal*, Volume 3, p. 329.
[420] Continental Can (1975).
[421] Hoffman La-Roche (1979).
[422] PEEPERKORN L. & ROUSSEVA E. (2011).

performance of a rival, because in this way it would interfere with the competitive process.
As a consequence, economically powerful firms, in competing, could not take advantage of their position to exclude a rival, but they were required to act as if they were subject to competition, in other words, as if they didn't have this power.
To better clarify the distinction Franz Bohm, an ordoliberal scholar, had made a catalogue of the types of conduct that amounted to "non-performance" competition, where included also loyalty rebates.[423]

The idea of "performance-based" competition influenced the concept of abuse on two grounds. First, the assessment of an abuse focuses on whether the rivals' ability to compete is impeded by the conduct, while the real question to address is whether it gave rise to some efficiencies.
Second, since "impediment competition" was identified and classified according to the formal characteristics of the conduct, the same "compartmentalized approach" was adopted in abuse assessment. This led to per se illegality prohibitions, because if a conduct matched with a non-performance competition category, it would be condemned irrespectively of its effects.[424]

4.2 Protection of Competition

Given that the Ordoliberal influence on EC Competition law has contributed to the development of a form-based approach, which tends to favor protection of competitors over protection of consumer welfare, it is necessary to discuss the objectives of Competition Law.

The traditional objective of competition law is defined as the protection of competition. But, what does this formula stand for? It is necessary to identify the standard to be used to assess whether the conduct examined is detrimental to "competition". This standard can be found in "consumer welfare", therefore it is important to analyze the effects of the practice on consumers. Legitimate conducts are those which raise consumer welfare, whereas a lowering of consumer welfare indicates harm to competition.[425]

Condemning a conduct which modifies the structure of competition, independently from the outcomes on consumer welfare, would risk to hinder competition, instead of protecting it.
In this respect, it is not wrong to assert that protection of competition as a process of rivalry between competitors can lead in the longer run to protection of customer and consumer welfare, but this is possible only when the connection between the structure of competition and consumer welfare is based on sound economic underpinnings.

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[423] GERBER D. J. (Oxford, 1998) *Law and Competition in Twentieth Century Europe: Protecting Prometheus.*
[424] PEEPERKORN L. & ROUSSEVA E. (2011), at p. 595.
[425] J Gual, M Hellwig, A Perrot, M Polo, P Rey, K Schmid, R Stenbacka, Report to the European Commission by the European Advisory Group for Competition Policy (hereinafter: EAGCP) An Economic Approach to Article 82. (The Report is also published in (2006) 2 Competition Policy International 111 et seq, p. 9.

Otherwise, the Courts will end up in protecting one or more competitors rather than the process of competition.[426]

Accordingly, "what is important is safeguarding not competitors per se, but the competitive process whereby more efficient firms win at the expense of less efficient rivals".[427]
In fact, on one hand, the move of protecting competitors isn't necessarily the best option for consumers, because it is possible that "the most productive way of supplying customers will be through fewer suppliers, particularly when economies of scale are great". On the other hand, "an exclusion of some small and medium-sized companies, which lack economies of scale, would not harm consumer welfare if these companies were unable to guarantee consumer welfare in the form of lower prices, better quality and an effective choice". [428]
Even though to draw a line between legitimate competition and exclusionary practice is very difficult,[429] a consumer welfare standard in the context of an effects-based approach provides a suitable criterion for distinction. This also because competitors dispose of better means to defend their interest than consumers do, in addition, the majority of complaints come from companies, therefore "the procedure tends to be biased towards the protection of competitors".[430]

Accordingly, the more economic approach to Art 82 focuses on improved consumer welfare, where competition is considered as "a process that forces firms to be responsive to consumers' needs… over time it also acts as a selection mechanism, with more efficient firms replacing less efficient ones".[431] The strong emphasis on consumer welfare is, in fact, present in the Guidance Paper, when is stated that "the Commission will focus on those types of conduct that are most harmful to consumers"[432] and that it will "normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking".[433]

4.3 Arguments Against the Form-based Approach Towards Rebates

The treatment of fidelity rebates elaborated in the above-mentioned case law has been criticized for being too formalistic, by overestimating the form of an allegedly anti-competitive behavior without considering its effects.[434]

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[426] GYLSEN L. (2003).
[427] WAELBROECK D. (2005).
[428] GORMASEN L. L. (2007).
[429] GYLSEN L. (2003). and BORLINI L. (2008), p. 475.
[430] EACGP Report (2006), at p. 3.
[431] Ibid, p. 9.
[432] Guidance Paper, para 5.
[433] Ibid, para 23.
[434] BORLINI L. (2008).

Accordingly, since loyalty rebates are presumptively considered not in compliance with normal price competition,[435] their lawfulness is assessed by focusing on whether the practice can fit in the definition of fidelity rebates, and not on the actual anticompetitive effects arisen from the conduct.
Harmful effect is not analyzed, but presumed, and the standard of proof is not "actual harmful effects", but only the "capability of creating harmful effects", that can be derived from the formal features of the conduct, without the necessity of proving effects.[436]

Consequently, in fidelity rebates cases, the burden of proof, which is traditionally placed on the authority, is instead reversed. So, once assessed that the conduct is loyalty-inducing, the dominant company, to rebut the presumption, would have to prove that it is cost justified.[437]
Gormsen adopts an event more extremist view on this point, stating that when the conduct is identified as capable of having foreclosure effects, although effects are not proven, the presumption of their existence is irrebuttable. In irrebuttable presumptions, in fact, "once the basic fact is proven, the presumed fact is accepted as true regardless of evidence to the contrary". Therefore, the dominant undertaking, in order to defend himself, can't put forward the lack of actual effects, but it would have to challenge the basic fact that the conduct is not capable of having foreclosure effects.[438]
Accordingly, Geradin, sustains that, instead, the burden of proof as to the foreclosure effect should be on the authority, and only once anticompetitive effects are proven the firm should have the chance to plea an objective justification capable of counterbalancing them.[439]

Many scholars emphasized the adverse impact that a form-based approach could have on competition. Waelbrook, for example, argued that "imposing too strict a test on dominant companies as to their rebate schemes can indeed have the effect of chilling price competition, protecting possibly inefficient competitors and raising prices to consumers".[440]
The first observation that could be made is that on one hand different practices might serve the same purpose, and on the other practices falling in the same category might have a different purpose. Therefore, a form-based assessment would lead to inconsistency between the treatment of practices with the same purpose.[441] This would also make it easier for company to circumvent the law, by pursuing anticompetitive aims with the use of a lawful type of practice.[442]

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[435] ZENGLER H. (2012).
[436] Michelin II (2001), paras. 241-244; Tomra (2012), para. 13. GORMASEN L. L. (2007).
[437] Michelin II (2001), para. 58. WAELBROECK D. (2005) Michelin II: A Per Se Rule
Against Rebates by Dominant Companies? *Journal of Competition Law and Economics*, Volume 1 (Issue 1), p. 149.
[438] GORMASEN L. L. (2007), at p. 232.
[439] GERADIN D. (2009).
[440] Michelin II (2001).
[441] EACGP Report (2006), pp. 6-7.
[442] Ibid, p. 3.

Secondly, the same practices might be either pro or anti-competitive, depending on the circumstances. Therefore, to judge a practice only by its from, might end up in condemnation of a pro-competitive conduct.[443]
For instance, loyalty rebates are an efficient fixed cost recovery[444], and encourage investments that require that huge fixed cost[445]. In fact, loyalty discounts provide one method of price discrimination, namely charging different prices to different customers, which, as noted by Ramsey, is often used by industries characterized by high fixed costs and which sell their products to different market segments or to different markets, as a tool to recover those fixed costs. The explanation for this is that those firms, in order to recover fixed costs, must charge prices higher than the marginal cost, thereby losing some clients and incurring in less output sold. The only way to recover fixed costs, minimalizing the negative effects on sales, is to charge higher prices in markets with a lower elasticity of demand, and lower prices in markets with high elasticity of demand, in other words, to price discriminate. [446]

Moreover, lower marginal prices obtained with rebates by customers, especially when retroactive, are passed on to consumers, therefore they lead to lower prices for final consumers.[447] The economic explanation for that is that they avoid double marginalization, which means that final prices changed to consumers include the profit margins of both suppliers and customers.
However, if a fidelity rebate is applied, the customer will have to lower its prices, in order to sell more products of the supplier and reach the target threshold necessary to obtain the economic advantage afforded by the rebate. Therefore, the second profit margin will be cut down and the problem of double marginalization will be solved. [448]

Rebates can also be used as an incentive to induce a more efficient behavior of customers, by supplying complementary services. Those additional services could consist in promoting the supplier's product,[449] providing detailed product information to consumers, keeping in store enough stock of product as to always satisfy consumers' demand, or merely being more motivated to sell the products. The customer, indeed, would normally provide a lower standard of additional services than the supplier would wish, because they would represent a cost not outweighed by any benefit for the customer. Loyalty rebates, instead, have the function to align incentives of the costumer with those of the supplier.[450]

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443 Ibid, p. 7. BORLINI L. (2008), p. 467.
444 BISHOP S. (2015).
445 EACGP Report (2006).
446 RAMSEY F.P. (1927) A Contribution to the Theory of Taxation *The Economic Journal*, Volume 37 (issue 145), pp. 47-61. Referred to in EHLERMANN C. & MARQUIS M. (2008), at p. 304.
447 ZENGLER H. (2012).
448 EHLERMANN C. & MARQUIS M. (2008), at p. 304.
449 EACGP Report (2006), BISHOP S. (2015).
450 EHLERMANN C. & MARQUIS M. (2008), at p. 303.

Finally, they can favor economy of scale for the dominant firm, economy of transactions for the costumer that would have to negotiate with only one supplier, and, in general, security of supply for both parties.[451]

Another argument against the per se approach is that, if a practice is deemed abusive every time it has a slight impact on market structure and even without proof of effective foreclosure effect, it is very likely to incur in false positives. The solution proposed by Gormsen to avoid it, is to distinguish between harm to equally efficient competitors and to less efficient competitors, because only the second would be actually harmful to competition.[452]

Easterbrook identifies three main reasons why false negatives must be preferred to false positives.

Firstly, procompetitive or neutral conducts are more than anticompetitive ones, therefore in absence of proves of exclusionary effects, absolution won't cause particular harm.

Secondly, false negatives are more likely to be corrected than false positives. There is no automatic way to overrule a decision of the Supreme Court that mistakenly condemns a beneficial conduct, moreover this could become a binding precedent against other firms that will use the condemned practice. Conversely, a judicial error that excuses an abusive conduct will be automatically corrected by the economic system, because monopoly prices eventually attract entry.

Thirdly, false negatives have lower costs that false positives. **"**A beneficial practice may reduce the costs of production for every unit of output; a monopolistic practice imposes loss only to the extent it leads to a reduction of output," which can be easily avoided. [453]

It has also been argued that the form-based approach places too much emphasis on dominance, which, as we have seen, lies at the heart of the assessment of abuse of dominance outlined by the above discussed case law. [454]

It has been noted that, when burdening dominant firms with the special responsibility not the impair competition, the ECJ failed to clarify the exact scope of this responsibility, and also to establish a connection between the degree of dominance and the kind of responsibility deriving from it. Once dominance is assessed, the firm is automatically and unlimitedly bound by this special responsibility, irrespectively of whether it is concretely capable of foreclosing an as efficient competitor by taking advantage of its dominant position. This approach suffers from an excess of interventionism, which is not justified when the undertaking has a relatively weak position, although falling within the dominance frame.[455]

This is further accentuated if we consider that establishing dominance is itself problematic. In fact, the factor that, above all, indicates the presence of dominance is the firm's market share, which is assessed on the relevant market. In this respect, it is noted that market definition is not always a straightforward task, due to the so called "cellophane fallacy",[456] which has two main implications. The first is that usually relevant

[451] EHLERMANN C. & MARQUIS M. (2008), ZENGLER H. (2012).
[452] GORMASEN L. L. (2007).
[453] EASTERBROOK F. (1984) The Limits of Antitrust *Texas Law Review*, Volume 63.
[454] EHLERMANN C. & MARQUIS M. (2008), p. 300.
[455] BISHOP S. (2015).
[456] Ibid.

markets tend to be defined too broadly, leading to an overestimation of the firm's market strength. The second is that in many cases available empirical facts are "unable to discriminate between two plausible and therefore competing definitions of the relevant market", because are consistent with them both.[457]
What scholars propose to address this problem, is to attribute a different role to dominance, namely that of a safe harbor for those firms which are not dominant under any market definition. Only when the firm doesn't fall in the safe harbor, further investigations con be undertaken, but they must focus on the actual economic effects of the loyalty rebate scheme, which is must be the core of the assessment. [458]

4.4 Issues Related to the Adoption of a More Economic Approach

The opportunity to adopt a more economic approach is, however, contrasted by sceptics. It is possible to identify three main concerns, which justify the reluctance to consider the effects of the practice: that it will produce legal uncertainty, that it will undermine the principle of administration of justice and that it will imply higher costs.
As to the first point, the actual assessment of the consequences of the conduct might "open the doors to a flood of pretextual and vague economic justifications", that the Court would have to balance against the anticompetitive effects in an unpredictable way.[459] Against this argument, Bishop points out that "the per se approach does not remove the uncertainty but rather shifts the discussion and uncertainty to whether a firm is likely to be held to be dominant",[460] as we explained above.
The second concern is related to the idea that an excessively detailed economic analysis might lead to a pointless "war of experts", delaying judicial decisions and therefore hindering the enforcing action.[461] Bishop replies that, instead, the use of economic analysis in mergers turned out to be a success.[462]
Finally, the per se methods allow to save costs, since they are applied to categories of practices that are almost always anticompetitive and only rarely beneficial. Thus, even though in few cases procompetitive conducts are mistakenly banned, the costs of these wrong condemnations are less that the information, litigation and error costs that a case by case adjudication would bring about.[463]
Conversely, Bishop sustains that a form-based per se approach prohibits dominant firms from employing loyalty schemes, which, as we have seen, could be in many cases pro-competitive, with consequent adverse effects for competition and consumer welfare.[464]

5. An Economic Explanation of Loyalty Rebates

This section aims at providing the economic underpinnings of law concerning loyalty rebates, and to show how the EC Courts analysis results incomplete and needs to be further improved.

[457] EHLERMANN C. & MARQUIS M. (2008), p. 300.
[458] Ibid. BISHOP S. (2015).
[459] ZENGLER H. (2012).
[460] BISHOP S. (2015).
[461] BORLINI L. (2008), p. 467.
[462] BISHOP S. (2015).
[463] EASTERBROOK F. (1984).
[464] BISHOP S. (2015).

Indeed, loyalty rebates have been deemed anticompetitive because capable of creating incentives for customers not to switch volumes away from the dominant firm.[465] These incentives are maximal in correspondence of the last unit below the threshold, due to the "suction effect", explained below.
The suction effect is, however, typical of any conditional rebate, and it has not been explained why it is likely to be exclusionary only when operated by a dominant firm. Moreover, the Courts approach focuses only on the last unit, leading to the assumption that a conditional rebate is likely to have anticompetitive effects, just because, at a precise point in time, marginal price is negative.
This is likely to lead to the *per se* condemnation of all loyalty rebates operated by dominant firms.
It is then explained what the EC Courts fail to take into account, and in which circumstances loyalty rebates might actually give rise to foreclosure of an as efficient competitor.
The following analysis will focus on retroactive rebate schemes, since this form of rebate is the most frequently adopted, and also the most likely to be condemned as per se illegal.[466]

5.1 The Suction Effect

As already seen, what loyalty rebates have in common is the so called "effect of inducing loyalty", namely that they create incentives for costumers to purchase all or almost all of their requirements from the firm offering the rebate, driving them away from competitors. The loyalty inducing effect of a loyalty rebate depends on the so called "suction effect".[467]
A hypothetical example will clarify how this operates:
Firm X has a variable unit cost of production of 1 $ and an annual fixed cost of 1 million $. This firm charges a list price of 1 $ per unit sold, providing also a 5% rebate conditional on the achievement of a certain target threshold. If the rebate applies, the effective price for unit falls to 1.90 $.
As the costumer increases its volume of sales from the firm offering the rebate, the incentives to purchase even more also grow, since the costumer will be more and more close to the achievement of the threshold that would decrease the unit price for all the volumes bought. Moreover, when the very unit before the threshold is reached, the effective price for purchasing additional units becomes negative.[468]
This can be shown by the graphic:

465 Michelin I (1983), para. 82. British Airways (2007), para. 65.
466 SAMÀ D. (2013), p. 3 (English version).
467 BISHOP S. AND WALKER M. (2010) *The Economics of EC Competition Law.* Sweet and Maxwell. 3rd Edition, p. 257. EHLERMANN C. & MARQUIS M. (2008), p. 296.
468 EHLERMANN C. & MARQUIS M. (2008), pp. 296-297. BISHOP S. AND WALKER M. (2010), pp. 258-259.

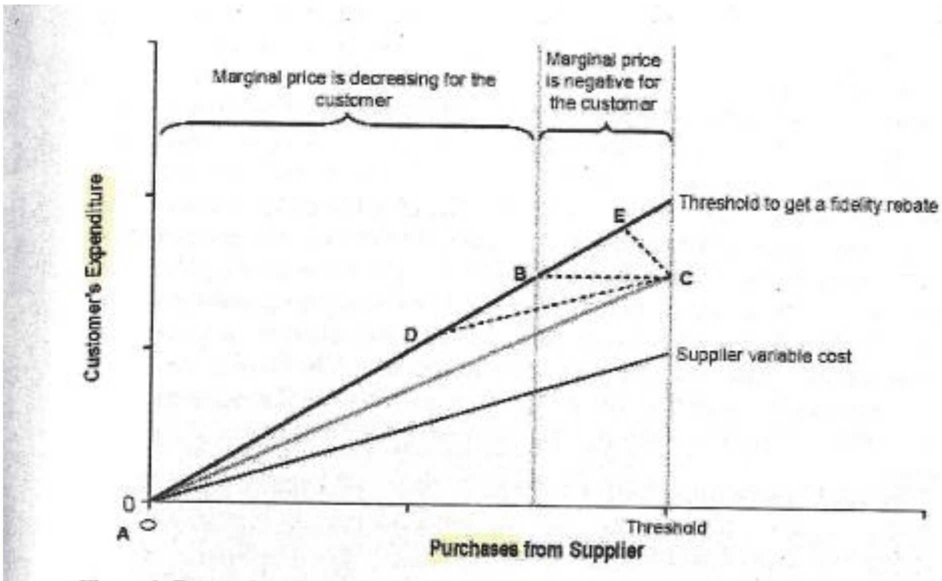

Figure 1: Properties of loyalty rebate schemes [469]

The line running from A to E shows the customer's expenditure when buying at the list price, namely 2 $ per unit. In other words, what he pays until he reaches the target threshold to qualify for the discount.
The line running from A to C indicates, instead, the amount to be payed when the rebate applies, therefore when the customer complies with the conditions of the rebate. Here the total expenditure is decreased by 5%, leading to an effective unit price of 1.90 $.
The bottom line illustrates the supplier variable cost corresponding to the volumes of units purchased from it.
The graphic shows that, once the customer has reached a number of purchases from firm X equivalent or greater than B, then the effective unit price for purchasing the rest of its requirements from it becomes negative, because the value of the rebate applied to the whole set of units purchased during the reference period is greater than the price payed for the additional units.
Consequently, a costumer that has already purchased B from firm X, will be maximally incentivized to buy from it also the rest of its requirements, making it extremely hard for competitors to contest the costumer's demand above B. Indeed, a rival firm would need to offer negative prices in order to compensate the costumer for the loss he would incur in if he chose to switch from firm X.[470]

5.2 The Courts' Assumptions Are Incorrect

The example demonstrates that loyalty rebates can provide strong incentives to consumers, leading potentially to the marginalization of smaller rivals. However, it also demonstrates that this effect is related to any loyalty rebate, also to that employed by a non-dominant firm,[471] since the incremental price of units in proximity of the threshold is most of the time negative due to the proper structure of retroactive rebates. Therefore, assuming that a rebate is exclusionary just because it involves negative prices for the last

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[469] EHLERMANN C. & MARQUIS M. (2008), p. 297.
[470] EHLERMANN C. & MARQUIS M. (2008), pp. 297-298. BISHOP S. & WALKER M. (2010), pp. 258-259.
[471] EHLERMANN C. & MARQUIS M. (2008), p. 298. BISHOP S. & WALKER M. (2010), p. 263.

unit prior to the threshold, is incomplete and risks to establish a per se prohibition for loyalty rebates. [472]
The EC Courts, however, tend to assume that retroactive rebates are anticompetitive due solely to their suction effect, because they mistakenly focus on "static incentives", those produced around the threshold of eligibility, failing to address other important issues. Moreover, also when focusing on the last unit, they fail to consider the complexity that in many industries may characterize incentive properties.[473]

5.2.1 It is wrong to focus on the last unit

Accordingly, it is possible to show, with an example, that loyalty rebates are not necessarily exclusionary, even when offered by a dominant firm.
Given that, having the costumer already purchased a volume equivalent or greater that B, the ability of competitors to contest the consumer's demand above B will be extremely limited, it would be more appropriate to analyze how the loyalty rebates affect customer's incentives
throughout the whole reference period, rather than in a particular point in time. It will be, in fact, demonstrated that the customer's incentives vary significantly according to the point at which the costumer takes the purchasing decision.

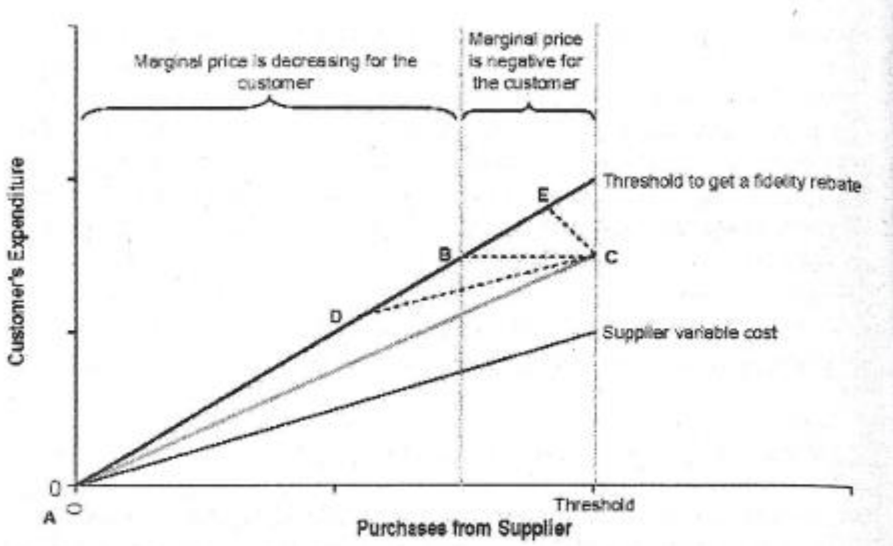

Figure 1: Properties of loyalty rebate schemes

[474]

In the moment when the customer has bought quantities corresponding to point B, the marginal price of making the remaining purchases from the firm is zero. And if we consider point E, which is even beyond B, the effective marginal price is even negative, since the value of the rebate obtained outweighs the price for additional units.
However, if we consider the situation of a costumer at a lower level of purchases, such as that in point D, the incentives turn out to be less powerful. Although for the costumer it would still be costly to switch supplier at this point, because he would renounce to the

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[472] SAMÀ D. (2013), at p. 22 (english version). FEDERICO, G. (2011), The Antitrust Treatment of Loyalty Discounts in Europe: Towards a more Economic Approach *Journal of European Competition Law & Practice*, Volume 2 (Issue 3).
[473] EHLERMANN C. & MARQUIS M. (2008), p. 305. BISHOP S. & WALKER M. (2010), p. 266.
[474] EHLERMANN C. & MARQUIS M. (2008), p. 306.

rebate he might gain at the end of the reference period, the price for buying extra units is positive and thus it is still possible for rival firms to meet it.
The incentive effect that the rebate scheme has on the costumer at point D could be economically explained. It depends on the fact that, having bought the majority of its requirements from Firm X, the full value of the rebate, that the customer would obtain purchasing from it the remaining requirements, would be spread across the additional units, decreasing the associated marginal price. In the graphic, the marginal price is represented through the slope of the line drawn between point D and point C, which is the total discounted price for the whole purchases made during the reference period. Point D has been chosen so that this marginal price is the same as the dominant firm's variable costs.
As we go back in time at points where the level of purchases is lower, the incentive effect gets weaker, until the rebate provides no incentives at all.
Accordingly, at point A, which represents a time prior to the supply contract or the beginning of the reference period, the price offered if the costumers succeeds in reaching the target threshold is 1.90 $ per unit. Therefore, the rival would be able to win over customers by offering a price lower than 1.90. In this situation, the rebate does not have exclusionary effects, although its form is that of a loyalty agreement.
To sum up, the effects of the rebate on competition depend on the costumer's available effective options in the moment he takes the decision. As shown by the fact that, if the costumer has the possibility to evaluate the offer from the beginning, and also to compare it with a better options afforded by rival suppliers, the rebate is unable to prevent it from choosing other suppliers, irrespectively of its loyalty-inducing form. In such situation, the rebate scheme does not produce the powerful incentives that might arise when the costumer is close to the last unit below the threshold.[475]

5.2.2 The analysis of "static incentives" is incomplete

EC Courts are therefore wrong not to consider the effects of the rebate scheme throughout the whole period, rather than focusing only on the incentives arising at or around the threshold. Moreover, also the Courts' analysis of "static incentives" is not complete, because they presume that those incentives will inevitably constrain customers to buy the remaining units from the firm offering the rebate, failing to take into account the complexity of the markets.
Accordingly, this presumption is based on three assumptions, that are instead easily rebuttable: costumers can disregard the interests of their own clients, the use of target thresholds involves that customers will be much more incentivized to buy from the dominant firm rather than from smaller rivals, what is true for a single individual applies in all the market as a whole.[476]

As to the first assumption, it is based on the idea that customers have no interest in investing in complementary services that can add substantial value to a supplier's product (pre-sales advice, in-store placement or retail discounts), as to influence the purchasing decisions of their own clients in favor of this product. As a consequence, suppliers seek to provide incentives to consumers to encourage sales of their products instead of those of the consumers, such as loyalty rebates, to the extent that incentive scheme have been held as the main parameter of competition between suppliers, disregarding the price, the

[475] EHLERMANN C. & MARQUIS M. (2008), pp. 305-307. BISHOP S. & WALKER M. (2010), pp. 267-268.
[476] EHLERMANN C. & MARQUIS M. (2008), p. 307. BISHOP S. & WALKER M. (2010), p. 269.

quality and the other forms of competition.
However, this is not always true, since, in many industries the costumers themselves compete with the other costumers to provide the best service possible to their own clients. Competition between costumers is based on quality, price, capability to fulfill the final costumers' requirements and many other aspects beyond complementary services. Therefore, scheme incentives provided by the suppliers are not the only factor that influence costumer's purchasing decisions, because it would depend also on final consumers' requirements.[477]

Concerning the second assumption, the following example will demonstrate that the employment of a loyalty rebate will not necessarily advantage the dominant firm over smaller rivals.
There are two suppliers: the dominant supplier A and a smaller supplier B. Both suppliers employ a retroactive target rebate scheme.

Table 1 Incentives for customers under different sales scenarios

	Supplier A	Supplier B
Target Threshold	220	55
Revenue per unit (€)	20	20
Current Sales		
Scenario #1	210	50
Scenario #2	230	50
Scenario #3	230	60

[478]

Table 1 indicates the target threshold at which the rebate chicks in, which is 220 for supplier A and 55 for supplier B. The additional revenue per unit once the threshold is met is of 20 $ for both firms.
Table 1 illustrates also the level of sales of a certain costumer in three different scenarios: when threshold has not been reached for either supplier (scenario #1), when it has been exceeded for supplier A but not for supplier B (scenario #2), when both targets have been achieved (scenario #3).
Now, supposing that the costumer needs to buy 10 additional units, its choice between supplier A and B would depend on which scenario we are considering. Assuming that the list price is the same, the costumer will choose the option that grants it the greatest increase in discount.

Table 2 Choices of customers under different sales scenarios

	Supplier A		Supplier B	
	Current	Increment	Current	Increment
Scenario #1	-	4,400	-	1,200
Scenario #2	4,600	200	-	1,200
Scenario #3	4,600	200	1,200	200

[479]

Table 2 shows, in the different scenarios, the current value of the discount at the level of

[477] EHLERMANN C. & MARQUIS M. (2008), p. 308. BISHOP S. & WALKER M. (2010), p. 270.
[478] EHLERMANN C. & MARQUIS M. (2008), p. 309.
[479] Ibid.

purchases shown in Table 1 and the increment of the discount that the costumer would obtain buying the extra units from either A or B.
In scenario #1 the increment of the discount obtained choosing supplier A amounts to 4.400, whereas he would get only 1200 $ choosing supplier B. Here the effect of the loyalty rebate scheme benefits the dominant undertaking.
However, in scenario #2, the additional revenue from supplier A would be of only 200 $, since he has already reached the volume target, while buying other 10 unites from supplier B would enable the costumer to achieve the threshold necessary to obtain the rebates, and so the additional revenue would amount to 1200 $. In this case, the costumer would certainly choose suppler B.
Finally, in scenario #3, the two options would lead to the same revenue of 20 $ per unit, since both thresholds have already been reached.
The example shows how the customers' choices are affected by the level at which the target is set. Indeed, if it is too high, to the extent that costumers have no prospect of reaching it, then they will not even bother trying. Similarly, if the threshold is set too low, then the costumer might be able to reach it without particular effort, and without need to switch from other suppliers.
Concluding, when a customer can freely choose which product to sell between a dominant firm and a smaller one, the employment of a target rebate will not necessarily imply that the customer will always be more incentivized to buy from the dominant firm, but this would vary from case to case according the circumstances. For this reason, a much more careful analysis is needed.[480]

The third incorrect assumption is that a rebate scheme capable of binding an individual costumer to the dominant firm, is therefore likely to do so in the entire market, without leaving enough space for competitors.
The Courts should, instead of focusing on the effects that the loyalty scheme has on the single competitor, assess whether, despite the practice, there is still sufficient room in the market for a rival to operate efficiently. This can happen either if the rebate scheme covers only part of the costumers' demand, or if those customers that have chosen not to comply with the scheme can buy enough volume from the rival.
The concept of foreclosure, indeed, relates to the market as a whole and not to the choices of individual costumers, that may vary according to different circumstances.[481]

5.3 What Makes Loyalty Rebates Exclusionary: The "Assured Base"

Given the above, it is incorrect to assume that loyalty rebates adopted by a dominant firm would necessarily give rise to anticompetitive effects. However, there are some circumstances in which they might become exclusionary.
In this respect, we have seen that, at the beginning of the reference period of the scheme, equally efficient rivals can compete on equal terms with the dominant firm. But the situation would be different if the costumer has a strong pre-disposition to buy a portion of its requirements from the dominant firm, which gives it an "assured base",[482] namely a volume of purchases that the firm is reasonably certain to obtain from the costumer.

[480] EHLERMANN C. & MARQUIS M. (2008), pp. 308-310.
[481] EHLERMANN C. & MARQUIS M. (2008), p. 310. BISHOP S. & WALKER M. (2010), p. 273.
[482] EHLERMANN C. & MARQUIS M. (2008), p. 311. BISHOP S. & WALKER M. (2010), p. 274.

This might happen, for example, if the dominant firm is an "unavoidable trading partner", which implies that the costumers must necessarily buy a certain amount from it. This leads to the establishment of a non-contestable part of demand for which the competitors are not able to compete.[483]
The presence of an assured base would completely change the likely effects of the rebate scheme. The costumer will not be able to compare from the beginning the offer of the dominant firm with that of the rivals, but it will consider the latter only after having reached a significant volume of purchases from the dominant firm. At this point, the costumer might be very close to the target threshold and therefore the marginal price for additional purchases might be much lower. If this marginal price falls below the supplier's marginal cost, it would become extremely difficult to contest those units, since it would involve pricing them below the supplier's avoidable costs.[484]
Therefore, in these circumstances, the loyalty rebates scheme is likely to foreclose even an as efficient competitor, as can be shown by the following example.

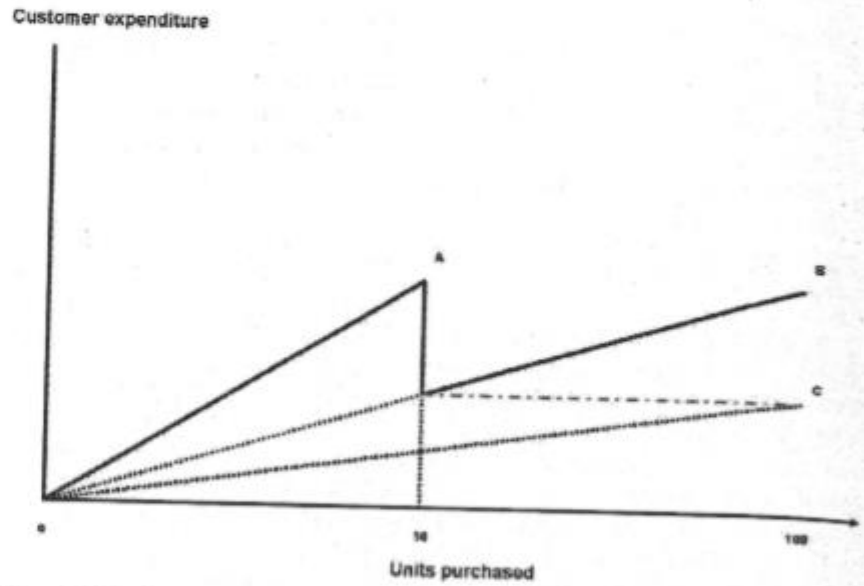

Figure 2: The impact of an assured base of sales on the competitive effects of rebate schemes [485]

Supposing that a dominant firm charges 20 $ per unit and grants a rebate of 10 $ per unit for all sales above 50 units, assuming a marginal cost of 5 $ per unit, we can conclude that the loyalty rebates, considered from the beginning of the scheme, do not involve below cost pricing. For example, 100 units will correspond to revenues of 1000 $ and costs of 500 $.

[483] MIROSLAVA M. (2018), p. 60.
[484] EHLERMANN C. & MARQUIS M. (2008), p. 311. BISHOP S. & WALKER M. (2010), p. 274.
[485] EHLERMANN C. & MARQUIS M. (2008), p. 312.

But if the firm has an assured base of 50 units, the 50 extra units will have incremental revenues equal to zero, while incremental costs will be 250 $ and, as a result, the overall rebate scheme can be regarded as exclusionary.[486]

As shown, the exclusionary effect of a loyalty rebates lays in the fact that it may enable a dominant firm "to use the non-contestable portion of the demand of each costumer as a leverage to decrease the price to be paid for the constable portion of the demand",[487] by targeting the effective discount on those units for which the costumer would consider other suppliers.[488]
In other words, "the retroactive structure hides the existence of very low prices on contestable volumes by the application of the discount on all of the volumes sold by the dominant firm". Therefore, the loyalty rebate results in the charging of two different prices: a monopoly price on non-contestable sales, and a much lower effective price on the contestable sales, where the whole retroactive discount is targeted.[489]

5.4 A Price-cost Test Applied on Constable Shares

To avoid per se condemnation of loyalty rebates, many scholars have suggested the need to undertake a price-cost test, similar to that used in predatory pricing, to assess their exclusionary effect.
If the rebate concerned is incremental, then it is possible to use the exact same test used for predatory pricing, by assessing whether the price for the incremental units could be lower than the average incremental cost per unit. Therefore, rebates applied to the units above the threshold will be judged under the same law as predatory pricing. [490]
However, if the rebate considered is retroactive, on the light of the foregoing considerations, it is necessary to demonstrate the presence of an assured base of sales, which however must not be inferred solely from the dominant position. Then, the effects of the rebate must be analyzed only on the range of sales opened to competition, because the real competition takes place only there. Clearly, the larger the assured base is, the easier will be to produce the exclusionary effect.[491]
Therefore, it is necessary to use a modified price-cost test, where the cost of the incremental units is compared with the list price of those units decreased of the revenue resulting from the application of the discount to all units, in other words, with the implied price for sales in the constable shares.[492]

[486] EHLERMANN C. & MARQUIS M. (2008), pp. 311-312.
[487] Guidance Paper, para. 39.
[488] EHLERMANN C. & MARQUIS M. (2008), p. 312. BISHOP S. & WALKER M. (2010), p. 275.
[489] FEDERICO, G. (2011), The Antitrust Treatment of Loyalty Discounts in Europe: Towards a more Economic Approach *Journal of European Competition Law & Practice*, Volume 2 (Issue 3).
[490] Discussion Paper, paras. 168-169. MIROSLAVA M. (2018), p. 59.
[491] EHLERMANN C. & MARQUIS M. (2008), pp. 312. SAMÀ D. (2013), p. 60.
[492] EHLERMANN C. & MARQUIS M. (2008), pp. 313. SAMÀ D. (2013), pp. 60-61.

Chapter 3

The Intel Case: A More Economic Approach?

1. Effect-Based Approach

Unlike the form-based approach, an effect-based approach implies that a conduct will be judged anticompetitive, not accordingly to its form, but rather to its actual or likely anti-competitive effects, namely the impact of such conduct on competition and consumer welfare.[493]

Accordingly, an economic approach to article 102 aims at promoting consumer welfare, thereby avoiding confusion between the protection of competition and the protection of competitors.[494]

It requires the Commission to identify a competitive harm, which would have to be assed case by case, on the basis of sound economics and supporting factual evidence.[495] Indeed, it is important to consider whether competitive harm is consistent with actual market evidence, for example, by looking at the conduct of dominant firm's buyers over time, or at the competitors' ability to increase market share during the reference period.

In assessing competitive harm, the Commission should bear in mind the distinction between harm to competitors and harm to competition, explaining why the conduct of the dominant firm has an adverse impact on the structure of competition and how this ultimately hinders consumer welfare.[496]

This, therefore, entails a burden-shifting from the dominant company to the Commission, since the Commission would be firstly required to provide proof of anticompetitive effects, and then the defendant would have to chance to show an objective justification that would outweigh the adverse effects. Therefore, abuse could never be found in absence of anticompetitive effects.[497]

The emphasis on the effects makes it more difficult for companies to circumvent competition laws, by pursuing an anticompetitive objective through a legitimate form. Moreover, it grants a more consistent treatment of practices, since it would enable the

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[493] JESSEN A. (2017) *Exclusionary Abuse after the Post Danmark I Case: The Role of the Effects-Based Approach under Article 102 TFEU* Wolters Kluwer. J Gual, M Hellwig, A Perrot, M Polo, P Rey, K Schmid, R Stenbacka, Report to the European Commission by the European Advisory Group for Competition Policy (hereinafter: EAGCP Report) An Economic Approach to Article 82. The Report is also published in (2006) 2 *Competition Policy International* p. 111 et seq. MIROSLAVA M. (2018), p. 71.

[494] EACGP Report.

[495] EACGO Report. AKMAN P. (2006), The EC Discussion Paper on the Application of Article 82 *Norwich Law School, Centre for Competition Policy*.

[496] BISOP S. & MARSDEN P. (2006) The Article 82 Discussion Paper: A Missed Opportunity *European Competition Journal*, Volume 2 (Issue 1).

[497] JESSEN A. (2017).

Commission to equate practices that, despite the different forms adopted, lead to the same result.
Finally, an economic approach prevents pro-competitive conducts from being weakened by competition laws enforcement.[498]

Modernization of EU Competition Law, and, specifically, the adoption of a more economic approach, is a phenomenon which involves all the areas of Competition Law. The Commissioner Mario Monti was the first to recognize it as one of the main objectives of competition policy, stating that it was necessary in order to strengthen the enforcement of EC Competition Law.[499]
The shift towards an effect-based approach has been previously implemented in other areas of Competition Law, starting from 1990, through the reform of Article 101 and later of Merger Regulation.[500]
The reform of Art 101 started with the introduction of the Block Exception Regulation[501], that established some conditions under which vertical restraints are excluded from the scope of the provision. The purpose was to clarify the rules governing vertical agreements, and to make them less burdensome for the firms, preventing unduly ban of procompetitive conducts.[502]
Moreover, in 2004, a new Merger Regulation[503] was published, together with the Guidance on horizontal mergers,[504] which introduced a new assessment of mergers, not anymore based on the structure of the market, but rather on effects on competition and consumers. Accordingly, the new test is aimed at verifying whether the merger creates substantial obstacles to effective competition.[505]

Coming to the Article 102 reform, the first step was the publication of the EACGP Report[506] in 2005. The Report sets, in general terms, the key principles that should underpin an effect-based approach to Article 102.
The aim of the reform is the promotion of consumer welfare and economic growth. In this context, competitive harm must be identified through well-stablished economic analysis and by reference to the specific facts of the case. In addition, potential efficiencies must be balanced against the anticompetitive effects of the conduct, always according to sound economic underpinnings and grounded in the facts.

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498 EACGP Report. JESSEN A. (2017).
499 Mario Monti, Introduction to the Commission's XXXth Report on Competition Policy (2000) European Commission. MIROSLAVA M. (2018), p. 74.
500 MIROSLAVA M. (2018), p. 71.
501 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1 (Block Exemption Regulation on Vertical Agreements).
502 MIROSLAVA M. (2018), pp. 75 and following.
503 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.
504 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3.
505 MIROSLAVA M. (2018), pp. 82 and following.
506 EACGR Report.

Moreover, the Report, departing from the previous case law, denies the need of a prior assessment of dominance, stating that competitive harm is what matters and that, once found, it already implies dominance.
Although one might argue that providing sound economic arguments can be too onerous and delay the enforcing action, it is asserted that it ensures a consistent treatment of the practices, thereby favoring predictability and effectiveness of competition laws enforcement.[507]
The EACGP Report was followed by the issuant of the Discussion Paper and of the Guidance Paper, which provided a new test for the assessment of Fidelity Rebates.

1.1 The Discussion Paper

The Discussion Paper, published in 2005, aims at defining the guiding principles for the application of Article 82 to exclusionary abuses, namely conducts by dominant firms which are likely to have foreclosure effects on actual or potential competitors, and which are ultimately detrimental to consumers.[508]
As to the assessment of dominance, the Paper does not uphold the new approach proposed in the EACGP Report, but sticks to the settled case law.[509] It, in fact, defines it as a "position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".[510] The key element of dominance is therefore "independence", which means that the undertaking should not be subject to significant competitive constraints,[511] or, in other words it should have substantive market power, namely the capability to exert influence on the different parameters of competition.[512]
The main objective of Article 82 is identified in the "protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources".[513] It, thus, "prohibits exclusionary conduct which produces actual or likely anticompetitive effects in the market and which can harm consumers in a direct or indirect way".[514] In addition, harm to final consumers is generally presumed from harm to competitors. [515] In this context, many scholars have argued that not requiring a direct demonstration of consumer harm is inconsistent with the recognition of consumers welfare as the ultimate objective in this field, and that protection of rivals is still mistaken for protection of competition.[516]

[507] Ibid.
[508] Discussion Paper, para. 1.
[509] AKMAN P. (2006).
[510] Discussion Paper, para. 21.
[511] Ibid, para. 23.
[512] Ibid, para. 24.
[513] Ibid, paras. 4 and 54.
[514] Ibid, para. 55.
[515] Ibid, para. 55.
[516] BISOP S. & MARSDEN P. (2006). SPECTOR D. (2006) From Harm to Competitors to Harm to Competition: One More Effort Please *European Competition Journal 145*, Volume 2 (Issue 1). AKMAN P. (2006). COMPETITION LAW FORUM'S ARTICLE 82 REVIEW GROUP (2006) The Reform of

It is specified that the assessment of competition harm shall not be based only on the form of the conduct, but also on its impact on the market, considering, for example, the market coverage of the practice, the characteristics of the market, the extent of dominance.[517]
The Paper distinguishes between price based and non-price based exclusionary abuses,[518] and specifies that, in the former case, only foreclosure on a competitor as efficient as the dominant firm, namely with the same costs, is generally considered relevant.[519]
Relating to the Rebates area, the Discussion Paper distinguishes between rebates granted on all purchases in the reference period and those granted only on on incremental purchases. While the latter are subjected to a standard predation test, for the former a more complex test is proposed.[520]
The test is structured as following. First, the Commission should establish the "required share",[521] namely the share of costumer demand necessary for the rival to keep the effective price, calculated over the commercially viable shares (contestable portion of demand),[522] as high as the average total cost of the dominant company. Then, the required share must be compared with the rivals' share of customers' demand. If it is bigger and there is no evidence that rivals are less efficient than the dominant company, then the rebates scheme will be considered abusive, while, when it is significantly smaller, it is not likely to raise any concern.[523]
If this comparison is not sufficient to assess clearly whether rebates are likely to have foreclosure effects, the required share should be compared with the commercially viable share that an as efficient competitor or entrant is reasonably expected to supply. If the commercially viable share does not reach the required share, this means that the effective price for a certain number of units is below ATC, and consequently that the practice is likely to have anticompetitive effects.[524]
The Paper suggests also to assess whether the rebate scheme affects a substantial part of market demand.[525] Moreover, some additional factors should be considered: whether rebates are indivisualised or standardised;[526] customers' uncertainty concerning the target threshold or the level of the rebate;[527] the length of the reference period;[528] the presence of actual evidence of foreclosure.[529]

Article 82: Comments on the DG-Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, European Competition Journal, 2:1, 169-175.
[517] Discussion Paper, para. 59.
[518] Ibid, para. 61.
[519] Ibid, para. 63.
[520] Ibid, para. 151.
[521] Ibid, para. 155.
[522] Ibid, para. 154.
[523] Ibid, para. 155.
[524] Ibid, para. 156.
[525] Ibid, papa. 162.
[526] Ibid, para. 158-159.
[527] Ibid, para. 160.
[528] Ibid, para. 161.
[529] Ibid, para. 162.

On the basis of this test, the Commission might establish a presumption of exclusionary effect of the rebate system, that the dominant firm can rebut, by putting forward factors that will impede the production of such effect.[530]
Moreover, the firm can attempt to justify its conduct through efficiency considerations.[531] In fact, several examples of procompetitive effects arising from rebate schemes are provided.[532]
This analysis is too complex to be applied in concrete. Above all, it is difficult to determine the size of each costumers' constable portion of demand and, also, to establish the required share on each costumer' s demand. Additionally, it is not specified whether the required shares calculated on each buyer of the dominant firm should be aggregated in order to be compared with the rivals' shares of customers' demand. Finally, how the commercially viable shares of an as efficient competitor or entrant should be determined is not fully addressed and it may result impossible in dynamic industries.[533]
The Guidance Paper, which represents another step towards a more economic approach, provides a clearer and more complete methodology for assessing loyalty rebates.

1.2 The Guidance Paper – A General Framework

The "Guidance Paper on the application of Article 102 of the Treaty on the Functioning of the European Union", published by the Commission in 2008, provides essential guidelines to apply an effect-based analysis to exclusionary abuses of dominant firms.

1.2.1 Dominance

The Commission, as well as the Discussion Paper, restates the definition of dominance established in case law as "a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers". Moreover, independence is related to the level of competitive constraints that the firm has to face.[534] It further recalls that it is not in itself illegal to be in a dominant position as long as the dominant firm competes on the merit, but it has "a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".[535]
This definition was criticized for being still tied up to the previous case law. In fact, the Commission, although pulling together an overall definition of dominance, is merely restating what has already been established, without finding a solution to the issues raised by this pattern.[536] There is, indeed, no explanation of why the firm's dominance entails a weakening of the competitive structure and a loss of the competitors' capability to exert

[530] Ibid, para. 163.
[531] Ibid, para. 172.
[532] Ibid, paras. 173-176.
[533] AHLBORN C., DENICOLO' V., GERADIN D., PADILLA J. (2006) DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries, p. 36.
[534] Guidance Paper, para. 10.
[535] Guidance Paper, para. 1.
[536] As explained above in Chapter 2, para. 4.3.

constraints on its behavior, but this is taken for granted. Thus, the imposition of a special responsibility to the dominant firm derives from a mere presumption that dominance itself harms competition.[537] This approach fails to consider whether the dominant firm's position concretely enables it to foreclosure an as efficient competitor, thus, it might result excessively burdensome.

1.2.3 Harm to consumers

As to the objectives pursued by the Commission, it explicitly declares that "the Commission will focus on those types of conduct that are most harmful to consumers", therefore, the prevention of consumer harm should be the ultimate goal of its action. Moreover, this objective should be achieved through the grant of an effective competitive process, which does not mean to simply protect competitors. Indeed, "this may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market".[538]

1.2.4 Anticompetitive Foreclosure

The Commission clarifies that dominant firms' conducts caught by art 102 are those which lead to anticompetitive foreclosure, which is defined as "a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers".[539]
The concept of anticompetitive foreclosure is, therefore, constituted by two elements, which the Commission would have to prove: foreclosure and consumer harm.
Foreclosure is produced when "effective access of actual or potential competitors to supplies or markets is hampered or eliminated". As a result, it is not necessary that competitors are driven away from the market, but it is sufficient that they are disadvantaged.[540]
The Commission, referring to price-based conducts, further clarifies that "the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking", thereby avoiding, with its intervention, to merely encourage the presence of inefficient competitors on the market.[541]
However, there might be circumstances where the dominant firm is inefficient and even the entry of less efficient competitors might exert a significant pressure on it, since they could, in the long run, become more efficient and threaten the undertaking's position. Therefore, in these cases, the Commission might also take into account constraints

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[537] MARSDEN P. & GORMSEN L. (2010) Guidance on Abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure *The Antitrust Bulletin,* Volume 55 (Issue 4), pp. 875, 892.
[538] Guidance Paper, paras. 5-6.
[539] Ibid, para. 19.
[540] PETIT N. (2009) From Formalism to Effects? – The Commission's Communication on Enforcement Priorities in Applying Article 82 EC *World Competition*, Volume 32, pp. 485, 489.
[541] Guidance Paper, para. 23.

provoked by less efficient competitors, and even foreclosure of less efficient competitors might become relevant.[542]
Foreclosure to competitors is anti-competitive when it has an adverse impact on consumer welfare. Consumer harm can take the form of higher prices as well as lower quality, limitation of consumer choice and any other parameter of competition.[543]
Moreover, the assessment should entail both actual and potential anticompetitive foreclosure, since the Commission's intervention is not only corrective, as to restore the competitive process once the exclusionary effects have already been produced, but it should be also aimed at preventing those effects.[544]

Many authors have emphasized that the analysis of "consumer harm" elaborated in the Guidance Paper is particularly unsatisfactory. In fact, the capability to affect consumers through impact on prices, quality and other parameters of competition is unprecise and does not amount to a clear test for consumer harm. What is missing in the Guidance Paper is the requirement of a causal link between foreclosure and consumer harm, as well as that between the conduct and foreclosure is needed. Consumer harm is merely derived by imposition of higher prices, loss in quality and other indicators, which may be caused by factors different than anticompetitive conduct.
Therefore, it was argued that the Commission is testing the impact of the conduct on the structure of competition, rather than direct consumer harm, which is instead presumed. There is no need to demonstrate likelihood of consumer harm, but this is merely inferred from proof of likelihood of foreclosure.[545]

1.2.5 Per se prohibitions in exceptional cases
However, the Commission specifies that a detailed economic analysis is not necessary only when the conduct seems to be detrimental to competition without producing efficiencies. In these circumstances the abusive nature of the conduct can be merely deduced. This could happen, for example, when the dominant firm prevents purchases from rivals by offering financial advantages to its customers if they avoid testing them, or if they delay the launch of those products on the market.[546]Therefore, the Commission admits some *per se* prohibitions but only in exceptional circumstances.

1.2.6 Cogent and convincing evidence
Then, the Guidance Paper states that the Commission will normally intervene when there is "cogent and convincing evidence" that the challenged conduct is likely to lead to anti-competitive foreclosure.

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[542] Ibid, para. 24. PETIT N. (2009).
[543] Ibid, para. 19. PETIT N. (2009).
[544] Ibid, para. 38. PETIT N. (2009).
[545] PETIT N. (2009). MIROSLAVA M. (2018), p. 90. MARSDEN P. & GORMSEN L. (2010). AKMAN P. (2006). KATSOULACOS Y. (2009) Some Critical Comments on the Commission's Guidance Paper on art.82 EC *Antitrust Chronicle*, available at: https://www.researchgate.net/profile/Yannis_Katsoulacos/publication/227386833_Some_Critical_Comments_on_the_Commission's_Guidance_Paper_on_Art_82_EC/links/566ac76f08aea0892c4b9c96/Some-Critical-Comments-on-the-Commissions-Guidance-Paper-on-Art-82-EC.pdf. Spector.
[546] Guidance Paper, para. 22.

The factors to be considered in this first scrutiny are: the position of the dominant undertaking, the conditions of the relevant market, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive
conduct, possible evidence of actual foreclosure, direct evidence of any exclusionary strategy.[547]
Once considered all these factors, the Commission would have to undertake a counterfactual analysis, to assess whether, in absence of the allegedly abusive practice, the actual or potential anticompetitive foreclosure would still arise. The counterfactual analysis is a means to verify that the exclusionary effect is the consequence of the conduct in question and cannot be attributed to other factors.[548]

1.2.7 Appropriate cost benchmarks

Then, the Commission suggests that likelihood of foreclosure of an as efficient competitor must be assessed with reference to costs and prices of the dominant firm.
Indeed, if the firm is engaging in below-cost pricing, an as efficient competitor with the same cost structure will not be able to stay in the market without incurring a loss. Therefore, a dominant firm might be willing to sacrifice profits for a short time in order to drive a smaller but efficient competitor away from the market. [549]
In this regard, the Commission decided to use as cost benchmarks: average avoidable costs (AAC) and long-run average incremental costs (LRAIC). LRAIC are usually higher than AAC because they include fixed costs prior to the implementation of the challenged conduct, whereas the latter comprise only those sustained during the period under examination. Therefore, on one hand, pricing below AAC "indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss". On the other, pricing below LRAIC "indicates that the dominant undertaking is not recovering all the fixed costs… and that an equally efficient competitor could be foreclosed from the market".[550]
To sum up, the Commission introduces a price-cost test for price-based exclusionary conduct as a tool to measure harm to competition, which would indirectly lead to consumer harm.

1.3 The Guidance Paper in the Area of Fidelity Rebates

In the area of Fidelity Rebates, the Guidance Paper represents a big step towards a more economic approach. The Commission, indeed, starts by recognizing that conditional rebates may stimulate demand and benefit consumers, but they can also have foreclosure effects comparable to those produced by exclusive purchasing obligations, without requiring the firm to sacrifice profits though.[551]
It then refers to the suction effect that might be produced by conditional rebates, enabling the dominant undertaking "to use the 'non contestable' portion of the demand of each customer… as leverage to decrease the price to be paid for the 'contestable' portion of

[547] Ibid, para. 20.
[548] Ibid, para. 21. PETIT N. (2009).
[549] MIROSLAVA M. (2018), p. 91.
[550] Guidance Paper, para. 26.
[551] Ibid, para. 37.

demand".[552]However, it asserts that the suction effect is strongest in the last purchased units, therefore the assessment should not be focused merely on the loyalty enhancing effect arisen just before the threshold, but it should entail the overall impact of the rebate scheme during the whole reference period.[553]

1.3.1 The AEC Test

The Commission, then, introduces a price-cost test for assessing whether Conditional Rebates are abusive, which is better known as the "as efficient competitor test".

The test comprises the following stages: estimation of the contestable demand, calculation of the effective price, comparison with the above-mentioned cost benchmarks and investigation of other relevant factors.

1.3.2 Estimation of the contestable demand

The contestable demand is that for which costumers are willing to consider substitutes of the dominant firm.[554] It, therefore, constitutes "the relevant range over which to calculate the effective price",[555] namely "the price that a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking".[556]

However, the relevant range for incremental rebates differs from that considered for retroactive rebates, since in the former case the dominant firm is not able to leverage any non-contestable share of costumer's demand to win over the contestable share of that demand.[557]

Accordingly, for incremental rebates, the relevant range includes only purchases above the threshold, whereas, for retroactive rebates, the relevant range is constituted by the "contestable share" of costumers' demand, namely "how much of a customer's purchase requirements can realistically be switched to a competitor", or, in other words, the part of the demand open to competition.[558]

In fact retroactive rebates are potentially harmful only when the dominant undertaking enjoys an "assured base of sales".[559] This could be the case, for example, when the dominant undertaking's brand is a 'must stock item', chosen by the main part of final consumers, or because of capacity constraints faced by rivals.[560]

Although an assured base grants to the dominant company, in any event, a certain portion of the costumers' purchasing requirements, the anticompetitive effect is produced only when an as efficient competitor is unable to compete for the portion of demand which is not assured to the dominant firm. The price-cost test is therefore aimed at ascertaining whether the effects of the rebate scheme would prevent an "as efficient competitor" to compete on the contestable part of the demand without incurring in losses.[561]

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[552] Ibid, para.39.
[553] Ibid, para. 40.
[554] Ibid, para. 39.
[555] Ibid, para. 41.
[556] Ibid, para. 40.
[557] GERADIN D. (2015) Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffmann-La Roche *Journal of Competition Law and Economics,* Volume 11 (Issue 3), p. 579.
[558] Guidance Paper, para. 42.
[559] As previously explained in Chapter 2, para. 5.3.
[560] Ibid, para. 36.
[561] SAMÀ D. (2013).

As to the determination of the contestable demand, the Commission specifies that the more the costumers would prefer and be able to switch big portions of demand to rivals in a short time, the larger the relevant range would be. Conversely, if they would and could switch only small parts of demand progressively, then the relevant range would be less wide.[562]

Geradin observes that the contestable portion of demand is easier to identify for multi-products rebates rather than for single-product rebates. For example, if the dominant firm offers a rebate on a range of products, part of which is not supplied by competitors, then the contestable part of the demand would comprise only those items that are produced by both the dominant firm and the competitors.

On the contrary, in single-product rebates it is not so easy to determine the size of the contestable demand.[563] The Commission refers to some factors that should be considered when making this examination: on one hand, the capacity of existing competitors "to expand sales to consumers" and "the fluctuations in those sales over time", on the other, "the scale at which a new entrant would realistically be able to enter". For the latter assessment, it is even possible to use past records of new entrants' growth trends in the same or similar markets.[564]

Geradin analyzes these factors and concludes that they represent only rough instruments for the assessment of the relevant range. He argues that, although it is certainly true that some competitors might be able to expand sales, this does not imply that consumers will automatically switch their purchases to them.

As to the fluctuation in rivals' sales over time, there is no clear relationship between this factor and the degree of contestability. Indeed, if a rival supplies a certain percentage of a costumer's demand at a determined time, this does not say anything about the portion of contestable demand at that time or subsequently. There is no direct correspondence between these two measurements, since the firm might have covered the contestable share only partially.

Finally, Geradin criticizes the use of the "historical growth pattern" of the new entrants to determine the degree of contestability. Accordingly, the historical growth might have different explanations than the consumers' willingness to switch orders to new entrants.[565]

The Commission itself shows uncertainty as to the reliability of the factors mentioned, by clarifying in the footnote that the data used for assessing the relevant range might have different levels of precision, which the Commission will consider when drawing its conclusions. [566]

1.3.3 Determination of the effective price

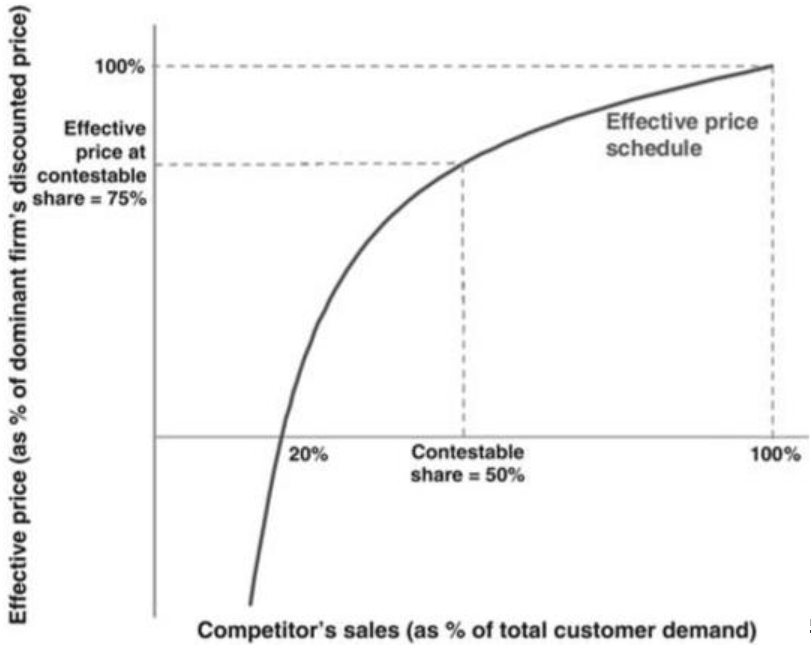
The size of the contestable demand is used to calculate the effective price, which is the average price that a competitor would need to offer in order to refund the customer for the loss of the conditional rebate, in case he would switch the contestable portion of its demand away from the dominant firm.[567]

[562] Guidance Paper, para. 42.
[563] GERADIN D. (2015).
[564] Guidance Paper, para. 42.
[565] GERADIN D. (2015).
[566] Guidance Paper, footnote to para. 42.
[567] Guidance Paper, para. 41.

As to incremental rebates, the effective price consists of the list price minus the premium applied to the additional units above the threshold. In conditional rebates, instead, the effective price does not correspond to the discounted price offered by the dominant firm, namely the list price minus the rebate granted on all units purchased over the reference period. Indeed, the price that the rival would have to offer to match that of the dominant firm will be lower than the latter, since the rival would be able to spread the rebate over a smaller range of units corresponding only to the contestable part of the demand.
Therefore, the effective price is calculated by subtracting to the list price the discount, applied only to the contestable shares of demand and in the relevant period. [568]
In this respect, the effective price clearly increases along with the number of sales of the rival firm, and therefore with the size of the contestable demand, because reliance on a wider relevant range would enable it to spread the rebate over a higher number of units and to compensate more easily the costumer for the rebate lost.[569]

This can be shown by the following example: the dominant firm offers a rebate of 20%. If we consider the situation where the constable share amounts to the 50% of costumers' demand, the price that the rival would have to offer to compensate the rebate is equal to the 75% of the dominant firm's discounted price, corresponding to a rebate of 40% on the list price.
Therefore, when the contestable share is limited, the rival would have to offer a price which is significantly smaller that the dominant firm's discounted price, which means that, to leave the costumer indifferent, he would have to offer a rebate above the double of the dominant firm's one. Whereas, as the constable portion grows, the effective price tends to equate the discounted price granted by the dominant firm.[570]

[568] Guidance Paper, para. 41. SAMÀ D. (2013).
[569] SAMÀ D. (2013).
[570] SAMÀ D. (2013). FEDERICO, G. (2011).



[571]

Moreover, the effective price can be calculated through the following formula:

$P^E = P^L [X - r (X + Y)] / X$
$D = X + Y = 1$
$P^E = P^L [1 - (r / X)]$

P^E = effective price
P^L = list price
r = discount rate
D = total demand
X = share of demand contestable
Y = share of demand non-contestable [572]

It is possible to infer from this equation that the effective price is directly proportional to the constable portion of demand, and, moreover, that it is positive when the constable share is higher than the discount rate (X greater than r), but it gets null when they are equal (X=r).
In addition, it emerges that if the dominant firm does not benefit from an assured base, then the rival is able to compete on the whole demand, and the effective price is the same as the dominant firm's discounted price. In this case, conditional rebates would enhance competition and be beneficial to consumers.[573]

[571] Federico, G. (2011).
[572] SAMÀ D. (2013).
[573] SAMÀ D. (2013). FEDERICO, G. (2011).

1.3.4 Comparison with the cost benchmarks

In order to establish whether the effective price calculated over the constable part of the demand is not high enough to enable an as efficient competitor to compete on the market, it is necessary to compare it with an appropriate cost benchmark.

First, the comparison needs to be made with reference to the cost structure of the dominant firm, since the purpose of the test is to protect only rivals that are as efficient as the dominant firm.

Accordingly, it is not relevant whether the effective price, that a rival would have to offer to match the rebate, entails a profit sacrifice, as long as the rival's cost structure is less efficient than that of the dominant firm. Conversely, if that price is even below the costs sustained by the dominant firm, then it is likely to exclude an as efficient competitor and, as a result, to hamper competition.

Moreover, this solution complies with the need of legal certainty and administrability, since the dominant firm could easily provide data concerning its own cost structure, but it cannot be asked to provide those of its competitors.[574]

Given that, if the effective price is above the LRAIC of the dominant undertaking, the rebate is generally considered not capable of generating anticompetitive foreclosure,[575] whereas, when it is below AAC, it will normally prevent an as efficient competitor from competing profitably.[576]

Finally, when the effective price is between AAC and LRAIC the Commission will take into account other factors that might indicate that the rebate scheme is likely to impede entry or expansion of an as efficient competitor. Pursuant to this, the Guidance suggests to take into account whether competitors may rely on effective counterstrategies to contrast the effect of the rebate scheme, for instance, by leveraging the non-contestable share of their own buyers to reduce the price on constable share.[577]

1.3.5 Other circumstantial evidence

Then, the Commission recognizes that the price-cost test is not in itself sufficient to establish the anticompetitive nature of a rebate scheme, but it needs to be integrated by other relevant evidence.[578]

These other circumstances comprise not only the factors already mentioned in the general part of the Guidance Paper,[579] but also some specific factors that may amount to important indicators of anticompetitive foreclosure in the specific area of conditional rebates.[580]

For example, it is important the distinction between individualized and standardized rebates. In fact, an individualized threshold, which is determined in accordance with each single costumer's specific demand, can be set at a level which can make extremely hard for the costumer to buy a part of its requirements from another supplier without losing the rebate, for example, it may require the costumer to buy a percentage or the totality of

[574] SAMÀ D. (2013).
[575] Guidance Paper, para. 43.
[576] Ibid, para. 44.
[577] Ibid, para. 44.
[578] Ibid, para. 45.
[579] Ibid, para. 20.
[580] Ibid, para. 39.

its requirements from the dominant firm. On the contrary, a standardized threshold, which is identical for all costumers, may be too high for the smallest costumers, that wouldn't even bother trying to reach it, or too low for the biggest ones to prevent them from switching part of their demand to other suppliers. It is, however, possible for a standardized threshold to be well targeted to the most important costumers' demand.[581]
In addition, it is, clearly, important the distinction between retroactive and incremental rebates, to the extent that, as already mentioned, incremental rebates are subjected to a pure predation test, which is modified when retroactive rebates are concerned. Retroactive rebates are generally considered more likely to have anticompetitive effects, since the decision to switch from the dominant firm would entail the costumer losing a rebate granted not only on units above the threshold, but on all units purchased from the beginning of the reference period, thereby triggering the "suction effect".[582]
The reference to other available circumstantial evidence suggests that the Commission is aware that the price-cost test might be complex to apply in certain cases and the it might entail errors, especially due to the difficult estimation of the constable demand.[583] This is evident also from other provisions, for example, when it states that also less efficient competitors might exert pressure on the dominant firm,[584] or that, in certain cases, is possible to deduce the antico-competitive nature of a conduct without carrying out such detailed analysis.[585] Moreover, the Commission explicitly admits that the test is sometimes uncertain, and that the possible margin of error will be taken into account.[586]
Therefore, when it is not possible to carry out this examination with a sufficient degree of certainty, all available circumstances can be used to prove the anticompetitive nature of the rebates. This has been associated with the "all the circumstances test" elaborated by the case law for the third category of rebates, which the Commission would have to apply in parallel with the price-cost test, as a remedy to the cases when the latter is not easy to implement. It is, in fact, reasonable that the Commission would use all the elements at its disposal to integrate the price-cost test when it is not suited to well address all the elements of the case.[587]

1.3.6 Efficiencies

Finally, if the conduct, on the basis of the AEC test, is found to lead to anticompetitive foreclosure, the dominant undertaking might still claim that such conduct is objectively justified, either because it is necessary or because it gives rise to efficiencies which are passed on to consumers. Moreover, the Commission will ascertain whether such conduct is proportionate to the advantages pursued. [588]
The Guidance provides, in the general part, that the dominant firm must demonstrate that, due to those efficiencies, no consumer harm will result from the conduct. Therefore, it

[581] Ibid, para. 45.
[582] Ibid, para. 40.
[583] GERADIN D. (2009). FAELLA G. (2008) The Antitrust Assessment of Loyalty Discounts and Rebates *Journal of Competition Law and Economics,* Volume 4 (Issue 2), p. 375.
[584] Guidance Paper, para. 24
[585] Ibid, para. 22.
[586] Ibid, para. 41.
[587] GERADIN D. (2015).
[588] Guidance Paper, paras. 28 and 46.

will have to prove the fulfilment of four criteria, which are cumulative, “with a sufficient degree of probability”, and “on the basis of verifiable evidence”.
These conditions are the following: “the efficiencies have been, or are likely to be, realized as a result of the conduct’; “the conduct is indispensable to the realisation of these efficiencies”; “the likely efficiencies brought about by the conduct concerned outweigh any likely negative effects on competition and consumer welfare in the affected markets”; “the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.”[589]
Therefore, the dominant firm is required to show, on one hand, that the efficiencies are indispensable, on the other, that there is no adverse impact on consumer welfare, and this must be “verifiable” and not just likely. This is an excessively heavy burden of proof, considering that the Commission is, instead, expected to establish only likely foreclosure of an as efficient competitor, which is merely indirectly detrimental to consumers. Consequently, it falls upon the dominant firm to demonstrate the absence of consumer harm, and not on the Commission to prove the opposite, which places the dominant firm and the Commission on asymmetric positions.[590]
Consequently, once the anticompetitive foreclosure has been assessed, it is going to be extremely difficult for the dominant firm to put forward an efficiency defence likely to be accepted by the Commission.
In the case of rebates, the most difficult criterion to meet is that of indispensability, especially when individualized rebates are concerned, since they are often regarded as unnecessarily restrictive of competition.[591] Unlikely, standardized volume targets are considered a more suitable means to achieve cost savings, because they are conditional on objective amounts.[592]
This view is, however, misleading, since individualized rebates can allow efficiency gains that are not achievable through standardized rebates. For instance, the latter can become detrimental to costumers in industries where the size of future sales depends upon unpredictable circumstances, since they can fail to reach the required target, for reasons that are beyond their will. In these cases, customers might benefit from individualized targets, especially when the threshold corresponds to a percentage of their requirements, since they will be able to obtain the rebate simply by purchasing a portion of their requirements from the firm, even though their sales are lower than what expected.[593]
Moreover, individualized rebates might allow firms to realize more significant economies of scale or scope than standardized rebates. They can, indeed, create incentives which are appropriate for the size and the characteristics of each costumer, which is not possible through quantity threshold, that might be too low or too high for some costumers.[594]
The same objection is valid for retroactive rebates, which are regarded as being less likely to incentive costumers’ purchases than incremental rebates.[595] By contrast, they may be

[589] Ibid, para. 29.
[590] MARSDEN P. & GORMSEN L. (2010).
[591] GERADIN D. (2009).
[592] Guidance Paper, para. 46. FAELLA G. (2008).
[593] GERADIN D. (2015).
[594] FAELLA G. (2008).
[595] Guidance Paper, para. 46.

well used as a tool to share risk between the suppliers and their customers, in a way similar to incremental rebates. In fact, if a customer is uncertain as to the volume of purchases it will need in a certain time period, retroactive rebates allow it to avoid agreeing the volume and the price in advance. The supplier and the customer may just agree that if the number of sales exceed a certain threshold, then the rebate will chick in and the price will be reduced. This solution is beneficial to them both, since the supplier will create incentives to buy more of its products, while the customer will not be obliged to buy a volume of units that could eventually result unnecessary.[596]

1.4 Weaknesses

In conclusion, the Guidance Paper represents a big step towards the implementation of a more effect-based approach towards abuse of dominance cases and, in particular, fidelity rebates. It is, however, necessary to highlight also its flaws and uncertainties.

Firstly, although the Commission states that its ultimate objective is the protection of consumer welfare, it fails to provide a test capable of directly addressing it, but consumer harm is still indirectly assessed through evaluation of harm to competition. In fact, the AEC test measures the likelihood of foreclosure on an as efficient competitor, which only indirectly entails consumer harm.[597]

Secondly, the finding of dominance still automatically bounds the firm with the “special responsibility”, regardless of the actual circumstance of the case.

Moreover, the AEC test presents several difficulties in its implementation: it is not easy to assess the size of the constable demand, especially in single product rebates, and the indicators suggested by the Commission are rather unprecise; the determination of the effective price is complex;[598] the burden of proof for the firm to demonstrate the objective justification is too heavy, compared to that of the Commission, especially with regard to the criterion of indispensability.

Finally, the Guidance fails to set a *de minimis* threshold for the establishment of anticompetitive foreclosure, although this was suggested by those who promoted the shift to a more economic approach. It is not required to verify whether costumers tied by the practice represent a substantial share of the market, which could be found by comparing the foreclosure rate, namely the market coverage of the practice, with the minimum efficient scale.[599]

However, what mostly hinders the Guidance Paper effectiveness is that it “is not intended to constitute a statement of the law”,[600] but it only amounts to soft law. It has the function to guide the enforcing action, without binding effects over Courts. This means that it could lead to inconsistency, not only at European level, but also between national courts.

[596] GERADIN D. (2015).
[597] MIROSLAVA M. (2018), p. 91.
[598] SAMÀ D. (2013). SHER B. (2009) Leveraging Non-Contestability: Exclusive Dealing and Rebates under the Commission's Article 82 Guidance *The Online Magazine for Global Competition Policy.* GERADIN D. (2009).
[599] GERADIN D. (2015). GERADIN D. (2009).
[600] Guidance Paper, para. 3.

Unsurprisingly, the CFI and the ECJ might reject or modify aspects of the Guidance Paper during the appeal judgements, and even the Commission might get back to the form-based approach when the effect-based approach results difficult to apply. On the other hand, national courts are free to endorse this approach or to dismiss it, since they are bound only by European hard law, consequently, different possible tests might be used in the different nations.

Until a positive instrument is adopted, the Guidance Paper is unlikely to lead to the definitive adoption of an effect-based approach, but rather to inconsistency amongst courts and uncertainty of the firms as to the conducts they are allowed to engage in.[601]

2.The Intel Case

2.1 Commission Decision

Intel represents the first Commission's attempt to implement the effect-based analysis set out in the Guidance Paper. In fact, after having recalled and applied the settled case law, it engaged in a deep economic analysis, which included the As Efficient Competitor Test.[602] Thus, although having pointed out that the Guidance Paper did not apply to the Intel Case, since the proceeding had been initiated before it was published, the Commission, however, demonstrated that the conclusion reached was in line with the new approach.[603]

2.1.2 Background

Intel is a producer of central processing units (CPUs) of the x86 architecture. The CPU is a device that interprets and executes instructions.[604] It is an essential element of any computer, since a substantial part of both its performance and its costs depend on it. Intel sells its products to the original equipment manufacturers (OEMs), which build up computers that are destined to final consumers. Intel's major customers are Dell, Lenovo, HP and NEC. Computers could also be bought from PC retailers, whose leader in Europe is MSH. Moreover, Intel's CPUs are designed for different types of computes, such as desktop, laptop and server computers.

CPUs can be subdivided into two categories: the x86 CPUs, which are built on the basis of the Complex Instruction Set Computers architecture, designed and adopted by Intel, and the non x86 CPUs. The x86 CPUs are compatible with both Linux and Windows and for the latter they represent the most suitable instruction set. Nonetheless, after 2000, ADM remained essentially the only Intel's competitor on the market of x86 CPUs, due to the market exits of the other competitors. Moreover, access to the market of x86 CPUs

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601 PETIT N. (2009). EZRACHI A. (2009) The European Commission Guidance on Article 82 EC-The Way in Which Institutional Realities Limit the Potential for Reform *Oxford Legal Studies Research Paper No. 27/2009*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463854.

602 USAI A. (2014) The Intel Case: Between Tomra Systems ASA, the Commission's Guidance on Enforcement Priorities, and the Alleged Infringement of Procedural Requirements - No fat left on the Bone *European Competition Law Review*, Volume 35 (Issue 8), p. 387. PETIT N. (2015) Intel, Leveraging Rebates and the Goals of Article 102 TFEU *European Competition Journal*, Volume 11 (Issue 1), p. 26.

603 Commission Decision of 13 May 2009, Intel, Case COMP/C-3/37.990 (OJ C 227, 22), para. 916.

604 Ibid, para. 106.

has been made very difficult by intellectual property rights protection and the high costs related to the acquisition of the necessary know-how. [605]

2.1.2 Dominance

As to the relevant product market, the Commission concluded that it encompassed only the CPUs of x86 architecture, on the basis of a demand and supply side lack of substitutability with the other CPUs.[606] Whereas, the geographic market has been defined as worldwide.[607]

Then, the Commission assessed Intel dominant position, by reference to the settled case law, where it is defined as a "position of economic strength" which enables the undertaking concerned to act independently from competition constraints and which entails a special responsibility, "the scope of which must be considered in the light of the specific circumstances of each case".[608]

The first indication of dominance is market shares, which for Intel, in the relevant period, amounted to around or beyond 80% in the market of x86 CPUs and 70% in the other submarkets. Market shares around this threshold are in themselves evidence of dominance, but the Commission considered other contextual factors to verify this assumption.[609]

In this context, berries to entry or expansion have been identified, relating to "the nature and the size of sunk investment required" for both R & D and manufacturing facilities and to the "significant product differentiation".[610] In fact, in addition to plant production sunk costs, also initial R & D investments would be necessary to face the significant intellectual property barriers. Moreover, an entrant would need to adopt economies of scale, by increasing its utilization capacity, in order to decrease costs and compete more efficiently with Intel and ADM. Finally, also product differentiation represents an entry barrier, since it requires high marketing expenditure. [611]

Therefore, having rejected Intel's argument about the OEMs byer power and considering Intel's high market shares and the barriers to entry and expansion, the Commission concluded that Intel held a dominance position on the market.[612]

2.1.3 Abuse of Dominant Position

The Commission found that Intel engaged in two different exclusionary conducts: conditional rebates and the naked restrictions.

Concerning the former, which is the most relevant for our analysis, the Commission showed that the rebates granted from Intel to Dell, HP, NEC, Lenovo were *de facto*[613]

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[605] Ibid, paras. 120-121-122-123-126-129. ALLIBERT B., BARTHA G., BOSZE B., HODLMAYR C., KAMSKI D., SCHOLZ M. (2009) Commission finds abuse of dominance in the Intel case *Competition Policy Newsletter*, number 3, p. 31.

[606] Commission Decision of 13 May 2009, paras. 808 and 831.

[607] Ibid, para. 836.

[608] Ibid, paras. 837-838.

[609] Ibid, para. 852.

[610] Ibid, para. 853.

[611] Ibid, paras. 866-867.

[612] Ibid, paras. 911-912.

[613] Without an express contractual condition of exclusivity, as explained in PETIT N. (2015).

conditional on them obtaining all or almost all their requirements from Intel and, similarly, that the payments to MSH were conditional on it selling only Intel-based computers, thereby preventing them from buying ADM's products, or at least making it more difficult.[614]
In this connection, the Commission recalls, by reference to previous case law, that a dominant undertaking which offers rebates under the condition that the customer would purchase all or almost all of its sources from it, is abusing its dominant position. These types of discounts are defined as "fidelity rebates" and are "incompatible with the objective of undistorted competition".[615]Accordingly, the discounts offered from Intel fulfilled the conditions established by the relevant case law for their qualification as abusive.[616]

2.1.4 Is the AEC Test required?

However, Intel argued that, in order to establish an abuse, it is not sufficient to consider the exclusivity condition, but it is necessary to assess also the concrete impact of the practice on the market.
The Commission rejected this argument, on the ground that in previous cases the Courts had never regarded the actual effects of the conduct, but it had been deemed sufficient "to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct in question is capable of having or likely to have such an effect".[617]
In fact, although discounts belonging to the third category required to consider all the circumstances and "particularly the criteria and rules for the grant of the discount", this did not entail the necessity to find actual evidence of foreclosure.[618]
Consequently, the fact that Intel's rebates were *de facto* conditional, thereby restricting customers' freedom to choose, was sufficient to find an infringement under Article 102.
Nonetheless, the Commission specified that, although for this purpose, according to the case law, it was not necessary to conduct an as efficient competitor analysis, this was "one possible way of showing whether Intel's rebates and payments were capable of causing or likely to cause anticompetitive foreclosure".[619]
So the Commission, despite qualifying the rebates as "fidelity" and presuming them abusive without need to prove actual or potential anticompetitive effects, then applied the test elaborated in the Guidance Paper to assess whether they were likely to foreclose an es efficient competitor.[620]
This has been interpreted as an attempt to win the case before the European Courts, which had always adopted a formalistic approach towards conditional rebates, without renouncing to undertake for the first time the economic analysis set out in the Guidance Paper, although it was just a soft law document. The Commission decision managed to

[614] Commission Decision of 13 May 2009, paras. 926 and 1001.
[615] Ibid, para. 920.
[616] ALLIBERT B., BARTHA G., BOSZE B., HODLMAYR C., KAMSKI D., SCHOLZ M. (2009).
[617] Commission Decision of 13 May 2009, para. 922.
[618] Ibid, para. 923.
[619] Ibid, para. 925.
[620] KRAFFERT F. (2019) How the Intel case changed our understanding of the objectives of EU competition law *European Competition Journal*, Volume 15 (Issue 1), pp. 136-152.

implement the new approach without departing from the settled case law, thereby demonstrating that the practices were unlawful from both a formalistic and an effect-based prospective.[621]
It is, however, necessary to specify that not even the Guidance Paper requires the demonstration of the actual effects of the practice, as Intel had claimed, but the economic analysis undertaken is aimed at assessing only whether rebates were "likely or just capable" of having anticompetitive effects.[622]
In conclusion, the more economic approach set out by the Guidance Paper was not fully embraced, since the law of Fidelity Rebates is still the one elaborated by the European Courts. On the other hand, it was not nullified, since it was used by the Commission to confirm the results achieved with the formalistic approach.[623]

2.1.5 The as Efficient Competitor Test

The AEC Test establishes whether a competitor which is as efficient as Intel but with a smaller sales base is likely to be foreclosed from the market. That would happen if, in order to compensate an OEM, which decides to switch its demand away from Intel, for the loss of the rebate, the competitor would have to charge a price below a measure of viable cost. The test considers an
hypothetical as efficient competitor, and it is immaterial whether ADM was likely to be foreclosed.[624]
The Commission started this analysis by noticing that Intel was an "unavoidable trading partner", and consequently enjoyed a non-contestable part in the customers' demand, namely a portion of requirements that they would have bought from Intel in any case. This enabled Intel to use the non-contestable share of customers' demand as a leverage to decrease the price to be paid for the elastic part of demand, for which they were instead free to turn to other suppliers.[625]
In order to assess whether the rebate scheme is likely to foreclose an as efficient competitor, it is necessary to calculate the effective price that it would need to offer to stay in the market, which will then be compared with a measure of viable costs.[626]The effective price is calculated over the constable share of customers' demand, the part of demand which can "realistically be switched" to another competitor in any given period.[627] This has been proven to be particularly low for the customers that received the rebates at issue.[628]
It is also necessary to consider on which time horizon the OEMs base their decisions concerning whether to switch to another competitor. In fact, in longer time horizons the shift of a portion of requirements is less likely to face obstacles or constraints than in short

[621] USAI A. (2014).
[622] Ibid.
[623] USAI A. (2014). PETIT N. (2015).
[624] USAI A. (2014). Commission Decision of 13 May 2009, para. 1004.
[625] Commission Decision of 13 May 2009, para. 1005.
[626] Ibid, para. 1006.
[627] Ibid, para. 1009.
[628] Ibid, para 1012.

time periods. In this case, the time horizon seemed to amount to one year, since longer term commitments were made difficult by the dynamic characteristics of the market.[629]
Then, the Commission considered which is the relevant measure of viable cost for an as efficient competitor. The cost that needs to be covered to be sustainable in the long run is the total cost of production, consequently "prices on average must be significantly above marginal costs".[630]Given that, in order to choose a cost measure which is more favourable to Intel, the Commission decided to use Average Avoidable Costs, [631] which do not include fixed costs, but only those costs sustained during the period under examination. In fact, according to the Guidance Paper, if the as efficient competitor is forced to price below AACs, there is an almost un-rebuttable presumption of anticompetitive foreclosure, since it is not only failing to recover fixed costs, but also marginal costs. [632]
After having undertaken the AEC test for all the rebates schemes offered by Intel, the Commission concluded that they were capable to foreclose an as efficient competitor.

2.1.6 Harm to competition and consumers
Intel's exclusivity rebates not only prevented Intel's competitors from using certain distribution channels, and limited OEM's freedom of choice between different suppliers, but in doing so, also deprived final consumers from buying other products, which the OEMs were forced not to offer. In the absence of Intel's practice, customers would have had a wider choice in terms of quality and price and final consumers would have been reached by ADM-based products in the quantity determined only according to competition on the merit, which was instead distorted as a consequence of the rebates. [633]

2.1.7 Improvement in ADM's performance is irrelevant
Intel claimed that the Commission failed to consider actual evidence against ADM's foreclosure from the market, namely that it performed better during and subsequently to the alleged practice.[634]
By contrast, the Commission pointed out that "the notion of abuse is an objective concept" and that improvements in competitors' performance do not entail absence of anticompetitive effects of the rebate schemes. In fact, it may be well argued that the performance would have grown even more significantly without Intel's practice.[635]

2.1.8 Objective justification and conclusion
Intel attempted to justify its rebate schemes, by putting forward that they were only a response to price competition and that they were necessary for the achievement of

[629] Ibid, paras. 1013-1014-1018-1019.
[630] Ibid, para. 1036.
[631] Ibid, para. 1037.
[632] Guidance Paper, paras. 26 and 44. USAI A. (2014).
[633] USAI A. (2014). ALLIBERT B., BARTHA G., BOSZE B., HODLMAYR C., KAMSKI D., SCHOLZ M. (2009), paras. 1154-1679.
[634] Ibid, para. 1668.
[635] Ibid, para. 1669.

significant efficiencies, [636] namely lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies.[637]
The Commission, however, rejected both justifications, on the ground that Intel failed to substantiate them with adequate evidence.[638]
It was therefore concluded that conditional rebates granted by Intel to the OEMs and conditional payments offered to MSH constitute an abuse of dominant position.[639]

2.1.9 Naked restriction

The second abusive practice concerns payments awarder to the OEMs in exchange of them delaying or cancelling the launch of ADM-based products or restricting the commercialization of such products.[640] Unlike the rebates, payments are related to a short reference period and to a specific product or sales channel.
The Commission concluded that the two conducts "complement each other and form part of a single strategy to foreclose AMD from the x86 CPU market".[641]

2.2 Case T-286/09: The Judgement of the General Court

Intel appealed the Commission's decision, which was instead entirely upheld by the General Court on 12 June 2014.

2.2.1 Per se illegality of exclusivity rebates and no need to assess all the circumstances

Concerning substantive grounds, the Appeal was focused on two main pleas: first, that the Commission should have considered "all the surrounding circumstances" to be able to conclude that the rebates were anticompetitive, which entails an assessment of the context and the impact of the rebates; second, that the Commission was supposed to assess also whether "they were actually capable of foreclosing competition to the detriment of consumers", this is to say that, when the conduct is historic, it should investigate available market data to find empirical evidence of the alleged foreclosure.[642]

In addressing the first plea, the General Court distinguished between three categories of rebates.
First, quantity rebates are those "linked solely to the volume of purchases made from an undertaking occupying a dominant position". They are generally considered not capable of producing exclusionary effects. In addition, they are deemed to reflect efficiencies and economies of scale, since they enable the supplier to lower its costs by increasing the quantities sold, and to pass on this savings to the final consumer in terms of lower prices.[643]

[636] Ibid, para. 1625.
[637] Ibid, para. 1632.
[638] Ibid, paras. 1631-1633.
[639] Ibid, para. 1640.
[640] Ibid, para. 1641.
[641] Ibid, para. 1642.
[642] GENERAL COURT (2010) Case T-286/09 Intel v Commission EU:T:2014:547, para. 70. PETIT N. (2015).
[643] Intel (2010), para. 75. Michelin II (2001), para. 58.

Second, the Court refers to "exclusivity rebates" as those "conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position".[644] These have been traditionally qualified as "fidelity rebates"[645] and renamed by the General Court to emphasize their exclusive nature.[646]
Exclusivity rebates are, instead, generally considered as "designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market"[647] and they are unlikely to be justified through efficiency considerations, except in peculiar circumstances. Consequently, they are deemed incompatible with the objective of undistorted competition, unless objectively justified.[648]
The third category comprises other rebate systems, that are not characterized by an exclusivity or quasi-exclusivity condition but may still produce a fidelity-building effect through other mechanisms. This corresponds to the definition given by the traditional case law of "rebates falling within the third category". They include, for example, rebates based on individualized sales target, determined according to purchases made in the previous year or to estimates of the future purchases.
Unlike the other categories, the assessment of whether they are capable of producing anticompetitive foreclosure requires to consider "all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition". [649][650]

Having clarified that, the General Court agreed with the Commission finding that Intel's rebates fell under the second category, since they were conditional upon customers' purchasing all or almost all of what they needed from Intel.[651]
Accordingly, Intel's argument that an analysis of the circumstances was required is flaw. In fact, it follows from settled case law that, in absence of an objective justification, exclusivity rebates are always abusive, without any necessity to prove their capability of foreclosure on the basis of the circumstances of the case.[652]
The "all the circumstances" test is necessary only when rebates belonging to the third category are concerned,[653] whereas exclusivity rebates can be considered "by their very nature" capable of restricting competition[654], since "the capability of tying the costumers is inherent" in them. In fact, the grant by an undertaking in a dominant position of a financial advantage in exchange of an exclusivity commitment implies the intention to

[644] Intel (2010), para. 76.
[645] Hoffmann La Roche (1979).
[646] MIROSLAVA M. (2018), p. 108.
[647] Hoffmann-La Roche (1979), para. 90.
[648] Intel (2010), para. 77.
[649] Michelin I (1973), para. 74.
[650] Intel (2010)., para. 78.
[651] Ibid, para. 79.
[652] Ibid, paras. 80-81.
[653] Ibid, para. 84.
[654] Ibid, para. 85.

prevent customers from obtaining supplies by its competitors. Therefore, it would be unnecessary to consider all the circumstances in order to verify what is already implied in the nature of the rebates, namely that they are designed to restrict competition.[655]

Consequently, the Commission was not supposed to establish "at least potential foreclosure effects" of the rebate schemes, as claimed by Intel, since this assessment is necessary only for rebates falling within the third category.[656]

It is interesting to notice that the Court, in denying the relevance of the precedents submitted by Intel in support of its claim, argued that exclusivity rebates are not a pricing practice, since the complaint does not relate to the amount of the rebates but to the exclusivity condition. Therefore, the rebates at issue are correctly treated differently than pricing practices on the ground that the level of the price, unlike the latter, "cannot be regarded as unlawful in itself".[657]

Although exclusivity conditions may have beneficial effects in competitive markets and this would require to consider the specific context where they operate,[658] this is not true when in the market the structure of competition has already been distorted due to the presence of a dominant position.[659]

Therefore, the only way to prove exclusivity rebates lawful would be to allege an objective justification, which lacks in the present case, leading to a per se condemnation of the rebate schemes, regardless of their positive effects.[660]

This is the first time that the possibility to justify fidelity rebates on the ground of efficiency considerations is affirmed in an appeal judgement and like *obiter dicta*, namely without any defendant's allegation in that sense. Notwithstanding, the per se prohibition of fidelity rebates makes it very difficult to put forward the objective justification in practice, since it must be proven that anticompetitive effects are counterbalanced. But how could it be done if, as explained below, all the quantitative instruments to measure the magnitude of those effects have been declared irrelevant by the Court?[661]

2.2.3 Unavoidable trading partner

The General Court based the per se illegality of exclusivity rebates on two main arguments: first, the limitation of customers' freedom to choose their suppliers and the restriction of competitors' access to the market,[662] which are inherent in such rebate schemes; second Intel's strong dominant position.[663]

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[655] Ibid, paras. 86-87-88.
[656] Ibid, paras. 95-100.
[657] Ibid, paras. 99 and 108.
[658] As seen in cases concerning Vertical Agreements, such as: EUROPEAN COURT OF JUSTICE (1991) Case C-234/89 Delimitis v Henninger Bräu EU:C:1991:91, paras. 14 to 27.
[659] Intel (2010), para. 89.
[660] Ibid, para. 94. MIROSLAVA M. (2018), p. 116.
[661] PETIT N. (2015).
[662] Intel (2010), para. 77.
[663] USAI A. (2014).

In fact, Intel's position on the market is such that "for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking", which makes it an "unavoidable trading partner".[664]
This entails that a part of the customers' demand, the non-constable share, will be in any case covered by Intel's products and only the remaining part, the constable share, will be open to competition. Accordingly, exclusivity rebates would make it even more difficult for a competitor to sell its products, since, if the customer fails to meet the exclusivity condition, it risks losing a rebate applied not only to the constable part of the demand, but also to the non-constable part.[665]
Therefore, in order to submit a convenient offer, the rival would need not only to offer an attractive price for the part of the demand where it is able to compete, but also to grant the customer "compensation for the loss of the exclusivity rebate".[666]
This is the first time that a systematic distinction is made between ordinary and strong dominant position. This raises the question of whether the Court's findings could have been different in case of a weaker dominance. However, this distinction is considered only in the section related to the "leveraging mechanism", while it seems that the central aspects of the Court's decision (no need to prove actual effects, consumer harm, causal links, no de minimis threshold) are of general application to any level of dominance.[667]

2.2.4 No need to establish actual effects, causality or consumer harm

The second plea concerns the need to prove actual foreclosure when the conduct is historic and, also, the necessity to establish a causal link between the alleged practices and the effects on the market. Accordingly, Intel claimed that the Commission had failed to consider the absence of anti-competitive effects on the market.[668]
In this respect, the Court clarified that, when exclusivity rebates are concerned, as the prove of potential effects is unnecessary, due to the leveraging mechanism explained above (para. 93), the assessment of actual effects is not required either. It, however, specified that, even in cases where the Commission must assess all the circumstances, it is anyway used to prove only the likely
anticompetitive effects and not also the actual ones.[669]
This point is further developed later in the decision, where the Court argued that ADM's growth and success during the infringement period was irrelevant. This is substantiated with two explanations: first, that for article 102 to be applied it is sufficient that the practice is capable of restricting competition, whereas it is immaterial whether this capability does not turn into actual effects; second, that it may be considered that ADM's increase would have been greater.[670]
It follows from this that "the Commission is also not required to prove a causal link between the practices complained of and actual effects on the market". Accordingly, even

[664] Ibid, para. 92.
[665] Ibid, para. 93.
[666] Ibid, para. 93.
[667] USAI A. (2014).
[668] Intel (2010), para. 102.
[669] Ibid, para. 103.
[670] Ibid, para. 186.

if it were demonstrated that Intel's customers supplied exclusively from Intel for reasons unrelated to the rebates, this would not deny the rebates capability of producing the same effect.[671]

The absence of any necessity to show actual effects additionally implies that "the Commission is not required to prove either direct damage to consumers or a causal link between such damage and the practices at issue in the contested decision". The Court substantiated it by recalling the settled case law,[672] according to which Article 102 "is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure".[673]

2.2.5 Irrelevance of the AEC Test

Intel also alleged that the AEC test is an important factor when assessing the potential exclusionary effects of a rebate scheme and that the Commission made many mistakes in applying it to the practice at issue, that had conditioned the result of the test.[674]

The Court denied that an AEC Test was necessary and clarified several points relating to this: in case of exclusivity rebates, assessment of lawfulness does not require consideration of all the circumstances; by contrast, circumstances need to be examined in case of type three rebates, although in prior cases[675] this has never entailed a quantitative test; in fact, in order to find an infringement in the area of fidelity rebates "it is not necessary to show that an as-efficient competitor would be forced to charge negative prices, … but it is sufficient to demonstrate the existence of a loyalty mechanism". [676][677]

If a price-cost test is not required for type three rebates, a fortiori, it is not necessary for exclusivity rebates.[678]

The Court further substantiated its reasoning by stressing that anticompetitive effects arise not only when access to the market in made impossible for rivals, but also when it is made more difficult. However, the AEC Test only establishes whether it is possible for an as efficient competitor to offer compensation for the loss of the rebate without being forced to price below costs, but does not consider whether, even if the competitor is still able to supply, this has been made more difficult by the practice. Therefore, a positive result is not sufficient to exclude a foreclosure effect, since the mechanism of exclusivity rebates in itself is still able to make access to the market more difficult for rivals.[679]

Accordingly, Intel's argument that the AEC test had not been carried out correctly is immaterial, because, even if it turned out to have a positive outcome, this would not be

[671] Ibid, para. 104.
[672] British Airways (2007), paragraph 74 above, paragraph 106.
[673] Intel (2010), para. 105.
[674] Ibid, para. 140.
[675] Michelin I (1983), paras. 81-86.
[676] Tomra (2010), para. 79.
[677] Intel (2010), paras. 142-147.
[678] Ibid, para. 153.
[679] Ibid, paras. 149-150. VENIT J. S. (2014) Case T-286/09 Intel v Commission—The Judgment of the General Court: All Steps Backward and No Steps Forward *European Competition Journal*, Volume 10 (Issue 2), pp. 203-230.

sufficient to exclude the likely anticompetitive effects which are inherent in the exclusivity rebates mechanism.[680]

Then, the Court restated that a price-cost test is necessary only when pricing practices are concerned, since "it is impossible to assess whether a price is abusive without comparing it with other prices and costs"; by contrast, in the case of exclusivity rebates, which are consequently not considered a pricing practice, abusiveness follows from the exclusivity condition rather than from their amount.[681]

Wils further explains the Court's reasoning on this point, arguing that, in case of predatory pricing, competition harm can only arise from low prices, which are normally pro-competitive, therefore the AEC test is the appropriate test to identify those exceptional cases where they are anti-competitive; conversely, in exclusivity rebates, there is also an exclusivity condition, which is "a distinct source of harm to the competitive process".[682]

However, it was objected that it is wrong to separate price from exclusivity, since the exclusivity effect is achieved only by means of the low price.[683]

2.2.6 Irrelevance of the amount of the rebates, the short duration of the supply contracts, the small coverage of the market, the small portion of demand tied and the strong byer power

Intel claimed that not considering the amount of the rebates would lead to an illogical condemnation of very small rebates, but the Court objected that, for the reasons explained above, what matter is whether they induce customers to purchase exclusively or quasi-exclusively from the applicant.[684]

Intel also sustained that "account must be taken of the short duration of its supply contracts and of the fact that some of those contracts could be terminated at 30 days' notice". This point could not be accepted for many of reasons: any financial incentive to supply exclusively from an undertaking in a dominant position entails a distortion of the structure of competition, regardless of the duration of the agreement; the possibility to terminate the contract at short notice does not say anything about the duration of such contract, since this right might never be exercised; moreover, in practice, contracts were applied from 1 year to 5 year, since they had been renewed many times.[685]

Additionally, Intel put forward the small foreclosure rate of the x86 CPU market resulting from the practice at issue, namely between 0,3% and 2% per year. The Court denied the relevance of this argument, on the ground that, according to prior case law, when the structure of competition had already been weakened as a result of the dominant position "any further weakening of the structure of competition may constitute an abuse of a

[680] Intel (2010), para. 151.

[681] Ibid, para. 152.

[682] WILS W. (2014) The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance 37(4) *World Competition*, Volume 37 (Issue 4).

[683] AHLBORN C. & PICCINI D. (2015) The Intel Judgement and Consumer Welfare – A Response to Wouter Wils *Competition law and Policy Debate*, Volume 1 (Issue 1).

[684] Intel (2010), paras. 107-108.

[685] Ibid, paras 110-113.

dominant position",[686]consequently, in the context of Article 102, there is no need to apply an "appreciable effect" criterion[687] or a *de minimis* threshold.[688]

Moreover, Intel argued that rebates covered a non-significant portion of customers' total demand of x86 CPUs, which is around 28%.[689] In this context, the Court clarified that the percentage submitted was calculated with reference to all Intel's product segments, whereas, in some specific segments, the exclusivity condition covered almost the totality of the customers' requirements.
Rivals, indeed, must be able to compete on the merits for the entire market and not just for a part of it.[690]It follows that "an undertaking in a dominant position may not justify the grant of a rebate subject to a quasi-exclusive purchase condition by a customer in a certain segment of a market by the fact that that customer remains free to obtain supplies from competitors in other segments".[691]
In this way, the Court had narrowed the scope of the "all or most" threshold "by applying it to any identifiable portion, rather than the totality, of customer demand for the relevant product". Rebates conditional upon exclusive or almost exclusive supply are, indeed, unlawful if they apply to an identifiable portion of the market, even if it "does not constitute a distinct market and represents only slightly more than a quarter of the customer's total demand for the relevant products". [692]
The notion of exclusivity turned out to be even wider that of the traditional case law, leading to a more extensive application of *Hoffman-La Roche*'s per se rule of illegality.[693]

Finally, Intel submitted that the significant customers' buying power impedes the finding of an infringement, considering that they used it "as a leverage to obtain larger rebates".[694]
Also this argument was rejected on a double ground: first, even though the customer is itself powerful and, as a consequence, the contract is not the result of any pressure exerted by the dominant firm, but may have even been requested by the customer, this does not justify the exclusivity condition, which makes the rebate schemes abusive due to the above-mentioned additional interference on an already weakened competition structure; second, Intel is still an unavoidable trading partner and this entails that the OEMs, despite their buying power, are to a certain extent dependent on it.[695]

2.2.7 Applicability of the Guidance Paper

The General Court stated that, in the case at issue, there was no need to verify the compliance of the decision with the Guidance Paper. In fact, the proceeding had been

686 Hoffmann-La Roche (1979), para. 123.
687 Tomra (2010), paras. 42 and 46.
688 Intel (2010), paras. 114-120.
689 Ibid, paras. 125-127.
690 Tomra (2010), para. 42.
691 Intel (2010), paras. 129-136.
692 VENIT J. S. (2014).
693 GERADIN (2015).
694 Intel (2010), para. 138.
695 Ibid, para. 139.

started before its publication, therefore the Commission was under no duty to apply the analysis proposed in this document.[696]

In arguing so, the Court prevented the Intel case from nullifying the new effect-based approach described in the Guidance Paper, which remained applicable to post 2009 proceedings.[697]

2.2.8 Overall strategy aimed at foreclosing AMD's access to the most important sales channels

Finally, the EGC confirmed the presence of a general strategy aimed at foreclosing ADM, which had been found by the Commission on the basis of a body of indirect evidence. Intel contested that the Commission had failed to prove the existence a "coherent anticompetitive plan", which was however deemed unnecessary by the General Court.[698]

The doctrine of the "Single Continuous Conspiracy" had been elaborated with reference to concertation, therefore the consequences of its application to a unilateral conduct are not very clear. It probably increased the gravity of the Intel's infringement with implications on the magnitude of the fine imposed or on the consideration of Post Danmark as a possible relevant precedent.[699]

2.3 Issues Raised by the General Court Judgement

The Court's per se approach to exclusivity rebates and its rejection of the relevance of the AEC test represented "a severe setback" for those who hoped that, after the issuing of the Guidance Paper, the Intel Case would have been the chance for EC Courts to open the door to a more effect-based approach in the area of fidelity rebates.

As described above, the per se approach to exclusivity discounts relied basically on two different rationales: the restriction of customers' freedom to choose and of rivals' access to those customers and the structural effects arising from rebates conditioned upon exclusivity, when they are offered by an unavoidable trading partner. [700]

The latter shows how the General Court's per se approach departed partially from that adopted in Hoffmann-La Roche and hide an inherent paradox. In fact, unlike Hoffmann-La Roche, the Court engaged in an economic explanation of the potential foreclosure effect of exclusivity rebates referring to the so called "theory of leveraging", which corresponds exactly to the scenario depicted in the Guidance Paper with reference to conditional rebates.

However, while in the Guidance Paper this was intended as the premise for an effect-based analysis, which entailed the execution of the AEC Test as well as the consideration of other circumstantial evidence, the General Court concluded not only that it was unnecessary to scrutinize the economic context of exclusivity rebates, but also that it was inappropriate to carry out the AEC Test.

[696] Ibid, paras. 155-157.
[697] PETIT N. (2015).
[698] Intel (2010), paras. 1523-1525.
[699] VENIT J. S. (2014).
[700] VENIT J. S. (2014).

In other words, the idea that rebates must be challenged when they are likely to generate this leveraging mechanism has its evidentiary consequence in the assessment of whether, in the market context, they are indeed capable of producing a foreclosure effect by means of this mechanism, while, in the Court's view, this is automatically implied. [701] Fidelity rebates were deemed abusive according to their capability to produce anticompetitive effects, however quantitative evidence that those effects had been produced was not required.[702]

Accordingly, the Court justified the rejection of the AEC Test claiming that it fails to catch those practices that make access to the market more difficult, although not impossible. This is linked to the idea that "where dominance exists, competition has, by definition, been so severely restricted that no further restriction can be tolerated". According to Venit, this is "a mantra", an "a priori notion" based on the concept of dominance as an absolute and inflexible condition, very distant from the complexity of concrete markets. This view is likely to lead to "anticompetitive outcomes by imposing special obligations on dominant firms that unnecessarily restrict their ability to compete and offer lower prices".[703]
The rejection of the AEC Test, according to Petit, is also based on the idea that there is no distinction between exclusive obligations and exclusive options and that exclusivity rebates are, indeed, not pricing practices. By exclusivity obligations is meant commitments to purchase exclusively from the supplier, whereas, when there is an option, customers are still free to act differently, but they would lose the economic advantage which is granted in exchange of exclusivity, as in the case of fidelity rebates. While obligations can be presumed to generate exclusivity, in options this would depend much on what customers decide. For this reason, the Guidance Paper introduced a quantitative method to examine the "exclusivity potential" of fidelity rebates, based on the effective price that the rival would need to charge, in order to stay in the market. The General Court, instead, treated exclusivity rebates as if they were obligations, by a presumption of abusiveness. This is probably aimed at preventing options to be used as an expedient to circumvent the law on exclusivity obligations, but it generates the risk that options with no exclusivity potential are caught under the per se prohibition.[704]

The General Court's decision not only disregarded the approach proposed in the Guidance Paper, but also the ECJ's views in Post Danmark II. In particular, the ECJ had confirmed the relevance of actual effects in historical cases, such as improvements in the rivals' performance,[705]which were present also in the Intel case. However, Post Danmark was not considered an adequate precedent, since it was related to type 3 rebates[706];moreover,

[701] Ibid. PETIT N. (2015). GERADIN (2015), p. 602.
[702] NIHOUL P. (2014) The Ruling of the General Court in Intel: Towards the end of an Effect-Based Approach in European Competition Law? 5(8) *Journal of European Competition Law and Practice*, Volume 5 (Issue 8) pp. 521-528.
[703] VENIT J. S. (2014). GERADIN (2015), p. 601.
[704] PETIT N. (2015).
[705] Post Danmark II (2012), paras. 33-39.
[706] Intel (2010), para. 100.

the Intel's conduct was probably further aggravated by the presence of a plan to exclude rivals.
It is not clear whether these may amount to valid reasons to exclude the relevance of Post Danmark, but it is anyway possible to challenge the arguments that the General Court used in support of its choice to disregard actual effects. In fact, the idea that authorities must not wait for actual effects to be produced before taking measures against them[707] is not valid in historic cases, and the argument that rivals might have reached even more success without the practice[708] constitutes a mere hypothesis and consequently must be proven by the Commission.[709]

On the other hand, some commentators defended the General Court's form-based approach to exclusivity rebates. According to Wish, "laws by their very nature have form" and rules based on form are essential for legal administrability and certainty.[710] Similarly, Wils argued that classifying business practices in certain categories with corresponding legal tests is unavoidable, but "what matters is that the categories used are economically and legally sound", which is certainly true in this case.[711]Ahlborn, however, did not regard such classification as economically sound, especially with regard to the treatment of exclusivity rebates as if they were equivalent to exclusive dealing arrangements, by disregarding the AEC test, although refusing to consider even those factors which are relevant in an exclusive dealing case. Accordingly, whether this equivalence is true depends on the effective price that needs to be offered to match the rebates, and, even when it happens, the likelihood of anticompetitive foreclosure has to be assessed in light of the other circumstances of the case.[712]
Moreover, the part of the judgement related to the "legal characterization" of the rebates is full of inconsistent references to previous case law.[713] For example, Post Danmark II was not considered a relevant precedent because it concerned type 1 rebates,[714] but it was instead referred to when dealing with the justifiability defence;[715] similarly, Tomra' s practices were firstly cited to support Intel's schemes qualification as "exclusivity rebates",[716] and later considered as Type 3 rebates.[717]

In conclusion, some would interpret the Intel case as a "test case" for the Commission to see whether European Courts were ready to uphold the "modernized approach" set out in the Guidance Paper. Given the General Court's resilience to the traditional formalistic approach, the Court of Justice ruling was going to be decisive in determining the

[707] Ibid, para. 252.
[708] Ibid, para. 136.
[709] VENIT J. S. (2014).
[710] WISH R. (2014) Intel v Commission: Keep Calm and Carry on! (2014) *Journal of European Competition Law and Practice*, Volume 6 (Issue 1).
[711] WILS W. (2014).
[712] AHLBORN C. & PICCINI D. (2015).
[713] PETIT N. (2015).
[714] Intel (2010), paras. 99-100.
[715] Ibid, para. 94.
[716] Ibid, para.77.
[717] Ibid, para. 97.

relevance of the Guidance Paper and the chance for European Competition policy to get closer to the new economic theories.[718]

2.4 The Opinion of the Advocate General Wahl

Intel appealed the General Court's ruling before the Court of Justice on 21 June 2016 and A G Wahl was asked to issue an opinion on the merit, which was delivered on 20 October 2016.

In this opinion, by rebutting the EGC's approach in total, AG Whal proposed a solution to the conflict between the settled case law and the Guidance Paper, in which, on one hand, was seeking consistency with the prior case law, on the other, was attempting to bring a significant change in favor of a more economic approach.[719]

2.4.1 Object of the law

AG Whal started its reasoning by recalling that "EU competition rules have aimed to put in place a system of undistorted competition" and this does not entail protection of competitors that are forced to leave the market due to normal competition and not to anticompetitive behavior. This is because the ultimate objective of competition policy is, indeed, to enhance efficiency, [720] which then reflects in consumer welfare.

This premise was important in the AG's reasoning to justify his approach to fidelity rebates and, specifically, the need to consider "all the circumstances" in every case.[721] This is also the starting point to refute the GC's findings, since, although this issue was not directly addressed in its ruling, it is possible to infer from certain passages[722] that the "objective of undistorted competition"[723] was intended as protection of the "competition process itself" and not of "competition for the benefit of consumers", namely a process-oriented rather that an outcome-based goal.[724]

2.4.2 Categories of rebates

AG Whal challenged the classification of rebates drawn in Intel, on the ground that it was based on a misinterpretation of prior case law and proposed a new framework.

In fact, the General Court substantiated its finding that exclusivity rebates are per se unlawful by referring to Hoffomann La-Roche, where it was claimed that rebates conditional on the customer purchasing all or most of its requirements from the dominant undertaking are presumptively abusive.[725]

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[718] NIHOUL P. (2014).
[719] CLARKE J. (2017) The Opinion of AG Wahl in the Intel Rebates Case: A Triumph of Substance over Form? *World Competition*, Volume 40 (Issue 2), pp. 241-268.
[720] Opinion of AG Wahl in Case C-413/14 P, Intel Corporation v. Commission, EU:C:2016:788, para. 41.
[721] CLARKE J. (2017).
[722] Intel (2010), para. 93, when stating that even making rivals' access more difficult is abusive, as explained in PETIT N. (2015).
[723] Intel (2010), para. 77.
[724] PEEPERKORN L. (2015) Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates, *Concurrences N° 1-2015*, Art. N° 70835, pp. 43-63. CLARKE J. (2017).
[725] Opinion of AG Wahl in Case C-413/14 P, para. 62.

In the AG's view, however, the conclusion reached in Hoffmann La-Roche as to the unlawfulness of fidelity rebates relied, indeed, on an extensive assessment of the circumstances of the case, such as the conditions for the grant of the discount or the market coverage.[726]Moreover, even though in subsequent cases the presumption of unlawfulness has been reiterated in principle, the Court has never failed to consider the circumstances of the case in practice.[727]

Therefore, AG Whal claimed that "the General Court's interpretation of *Hoffmann-La Roche* misses an important point". Accordingly, although in the judgement the necessity to assess all the circumstances to find an infringement is not explicitly stated, the Court actually "considered several circumstances relating to the legal and economic context of the rebates" and based on this analysis its conclusion.[728] It follows that a more careful interpretation of the case law would have shown that "abuse of dominance is never established in the abstract", but requires "the assessment of the context of the conduct".[729]

It follows from these considerations that the case law distinguishes between two and not three categories of rebates, because loyalty rebates encompass not only those based on exclusivity, but also those which produce the same loyalty-inducing effect through a different condition, such as the achievement of a particular target.[730]

Therefore, the only relevant distinction is between volume-based rebates, merely based on quantity, which are presumptively lawful and require a full effects examination in order to be challenged,[731] and this comprehensive category of loyalty rebates, which are presumptively unlawful, but still require an analysis of the specific legal and economic context in order to exclude any other possible explanation for the practice.[732]

Accordingly, the General Court's mistake was to apply "the statement of the Court in *Hoffmann-La Roche* to the letter, without placing that statement in its proper context", thereby leading to the creation of "a sub-type of loyalty rebate", which it called exclusivity rebates, "for which consideration of all the circumstances is not required in order to conclude that the impugned conduct amounts to an abuse of dominance", but this is abstractly inferred from their form. [733]

Moreover, AG Whal added that the adoption of a per se standard for this sub-category was further not convincing according to some reasons: the presumption of unlawfulness was not open to rebuttal because related to the form rather than the effects of the rebates,[734]contemporary economic theories suggested that the effects of exclusivity rebates are "context-dependent";[735] finally, ensuring consistency of legal tests applied to

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[726] Ibid, para. 66.
[727] Ibid, para. 70.
[728] Ibid, para. 73.
[729] Ibid, para. 73. GERADIN D. (2016) The Opinion of AG Wahl in Intel: Bringing Coherence and Wisdom into the CJEU's Pricing Abuses Case-Law *TILEC Discussion Paper No. 2016-034; Tilburg Law School Research Paper No. 18/2016*. Available at SSRN: https://ssrn.com/abstract=2865714 or http://dx.doi.org/10.2139/ssrn.2865714 .
[730] Opinion of AG Wahl in Case C-413/14 P, paras. 80-81.
[731] Ibid, para. 81.
[732] Ibid, para. 82.
[733] Ibid, para. 84.
[734] Ibid, para. 86.
[735] Ibid, para. 94.

similar practices is an important goal of competition policy because it improves legal certainty,[736] and the opinion put loyalty rebates in the "price based exclusion" box with marginal squeeze or predatory pricing, for which is required an assessment of all the circumstances.[737]

Although AG Whal spent much time explaining why the two-category approach is consistent with the existent case-law, this does not seem very realistic. The idea that the effects arising from rebates are context-dependent would instead entail a departure from earlier formalistic presumptions to a new approach substantially more in line with the Guidance Paper.

The AG's attempt to reconcile his classification with previous case-law and, in general, to bring coherence within this area, can be explained with a desire for legal certainty and continuity, which would even make it easier for the ECJ to follow this opinion without having to reconsider authoritative precedents.[738]

Likewise, the use of the terminology "presumptions" can be interpreted under the same rational of avoiding strong departures from previous case-law as to increase the chances that ECJ would accept the approach submitted.

In fact, on one hand, the presumptive lawful category can fit within the generally acknowledged notion of legal presumption, since this can be reversed only by alleging proof of actual anti-competitive effects. On the other hand, the presumption of unlawfulness does not follow automatically from the categorization of the conduct as one capable of producing anticompetitive effects, but it requires a consideration of "all the circumstances" to confirm it. Unlike how a typical presumption would work, there is no burden shifting towards the defendant, but the onus of proof remains with the applicant.

The presumption here is meaningless and, while the opinion seems to enlarge the category of presumptively unlawful rebates, it, instead, nullifies it, leaving the presumptive mechanism free to operate only when the presumption of lawfulness is concerned. By using the wording "presumption of illegality", AG Whal was trying to cover the novelty of his approach, but, as a matter of fact, he suggested that every type of fidelity rebates would need an "all the circumstances" assessment in order to be deemed abusive.[739]

2.4.3 The "in all likelihood" threshold

Given that the General Court erred in law in considering exclusivity rebates as a stand-alone category, whose assessment does not require consideration of "all the circumstances", it had then taken into account also the alternative scenario in case it was required to establish whether the conduct was capable of restricting competition on the basis of an analysis of the circumstances,[740] for example if type 3 rebates were concerned.[741]

[736] Ibid, para. 103. GERADIN D. (2016).
[737] Ibid, paras. 100-101.
[738] CLARKE J. (2017), pp. 256-258.
[739] Ibid, pp. 258-259.
[740] Intel (2010), para. 176.
[741] Opinion of AG Wahl in Case C-413/14 P, paras. 106-107.

Thus, AG Whal moved to considering the alternative assessment described by the General Court. In this context, the appellant claimed that the Court was wrong in upholding the Commission's finding that the "capability of restricting competition" standard was sufficient to find an infringement, without taking into account the "likelihood of anticompetitive effects".[742]
This raises the issue of what is the threshold of "capability", namely "what level of capability is required" and "what are the relevant circumstances" to be considered in this assessment.[743]
In this regard, AG Whal agreed with the Court's idea that "evidence of actual effects does not need to be presented" and it is, indeed, sufficient that the conduct is "capable of restricting competition", but he gave a different meaning to the notion of capability. He suggested that "capability cannot merely be hypothetical or theoretically possible", otherwise the requirement to consider the context of the practice would be meaningless.[744]On the contrary "the aim of the assessment of capability is to ascertain whether, in all likelihood, the impugned conduct has an anticompetitive foreclosure effect", where likelihood requires something more that the mere possibility that the conduct would restrict competition,[745] in order to avoid the costs of over-inclusion.[746]
Therefore, the assessment of capability requires confirmation "that the rebates remove or restrict the customer's freedom to choose its sources of supply, bar competitors from access to the market, or strengthen the dominant position by distorting competition", based on all the circumstances.[747] If such confirmation was not to be found, then a fully-fledged analysis would be required.[748]

According to Clarke, the level of probability necessary to satisfy the "in all likelihood" threshold was set far beyond what was traditionally associated with the standard of "capability", which was intended as a mere "plausibility". Therefore, also in this part, the AG used a terminology borrowed from the settled case-law to indicate concepts that belonged to a new approach. [749] Moreover, it was unclear what a "fully-fledged analysis" could entail, considering that "all the circumstances" of the case should have been already scrutinized in the first stage of the assessment.[750] Moreover, the high burden of proof placed on the Commission in the confirmation phase risks to increase false negatives and enforcing costs.[751]

2.4.4 Factors to be considered in the assessment of capability

[742] Ibid, para. 109.
[743] Ibid, para. 111.
[744] Ibid, para. 114.
[745] Ibid, para. 117.
[746] Ibid, para 119.
[747] Ibid, para. 121.
[748] Ibid, para. 120.
[749] CLARKE J. (2017), p. 262.
[750] CLARKE J. (2017), p. 262. GERADIN D. (2016), p. 8.
[751] CLARKE J. (2017), p. 261.

This analysis of "all the circumstances", which is necessary to determine whether the presumptive anticompetitive effects are confirmed, included some factors that, according to AG Whal, the General Court had erred in considering irrelevant.[752]

First, the market coverage is an important element, especially when it is low because it indicates that loyalty rebates are unlikely to restrict competition .[753] However, the AG admitted that it is difficult to define a precise threshold of market coverage, beyond which the practice can be deemed capable of anti-competitive foreclosure.[754]This difficulty cannot be overcome by relying on the assumption that exclusivity rebates granted by an undertaking which is an unavoidable trading partner are capable of restricting competition,[755] since this entails only a mere possibility of anticompetitive outcome, which is not sufficient to meet the "in all likelihood" threshold.[756]Consequently, the General Court cannot establish that the share of the market tied is sufficient to enable production of anticompetitive effects.[757]

Second, the General Court had deemed the short duration of the contracts irrelevant, because the important criterion is the overall period where the conduct takes place.[758]However, AG Whal objected that, even though short duration cannot exclude anticompetitive foreclosure, also the overall period is irrelevant.[759]This is because loyalty rebates are options, which means that customers can choose whether remaining with the dominant firm or switching supplier, therefore it is not possible to simply assume that the decision to perpetuate the contracts is the result of an abusive behavior.[760]Moreover, the option to switch producer, even when not exercised, is still competition enhancing.[761]

On the contrary, as to the irrelevance of ADM's performance and of declining prices, AG Whal agreed with the General Court and added that factual elements are not indicators of the capability of restricting competition.[762]

Finally, AG Whal contested the fact that the Court had dismissed the importance of the AEC test and had not even reviewed the one carried out by the Commission.[763]He claimed that the AEC test "cannot be ignored" and "can help identify conduct that has, in all likelihood, an anticompetitive effect".[764] Although in Post Danmark II it was stated that there is no legal obligation to carry out the test, but this is just "one tool amongst the others"[765], in that case there were other qualitative elements indicating that the rebates were capable of restricting competition.[766] Conversely, in the case at issue "the other circumstances assessed by the General Court do not unequivocally support a finding of

[752] Opinion of AG Wahl in Case C-413/14 P, paras. 132-136.
[753] Ibid, paras. 139-140.
[754] Ibid, para. 141.
[755] Intel (2010), para. 178.
[756] Opinion of AG Wahl in Case C-413/14 P, paras. 144-145.
[757] Ibid, para. 146.
[758] Ibid, paras. 147-149.
[759] Ibid, para. 150.
[760] Ibid, paras. 153-155.
[761] Ibid, para. 156.
[762] Ibid, para. 160.
[763] Ibid, para. 163
[764] Ibid, para. 165.
[765] Post Danmark II (2010), para. 61.
[766] Opinion of AG Wahl in Case C-413/14 P, para. 167.

an effect on competition", therefore the AEC cannot simply be ignored and the analysis of the Commission had to be examined.[767]

On the other hand, AG Whal criticized the fact that the General Court had considered the existence of a strategy aimed at foreclosing competitors as a relevant circumstance in its alternative assessment of Intel's rebates, claiming that it had "put the cart before the horse". In this context, he argued that the single continuous strategy can only prove a subjective intent to foreclose rivals, which does not automatically translate into capability to do so. Therefore, when the General Court had relied on it to substantiate the finding of potential exclusionary effects, it was merely assuming abusiveness, rather than assessing it through an analysis of all the circumstances.[768]

2.4.5 Criticism of the opinion

AG Whal's opinion is overall consistent with the more economic approach, by requiring consideration of "all the circumstances" in every case and by referring to the factors mentioned in the Guidance Paper as relevant for this assessment.
However, it has raised two main criticisms: first, the terms "presumptively unlawful" and "capability" are inappropriately used to indicate concepts which are very distant from the meaning traditionally attributed to them, with the risk of creating legal uncertainty. Second, the first stage of the analysis already comprises a high threshold for capability and the requirement to consider the AEC test, which makes it difficult to imagine what could be left for the "fully-fledged" analysis that must be conducted in an eventual second stage, if the first was inconclusive.
In conclusion, the sustainers of the new approach appreciated the substance of the opinion, which effectively removed the strict form-based presumptions, but not the form, which was the result of a failed attempt to be consistent with previous case-law, and hoped for a lowering of the first stage threshold in the ECJ judgement.[769]

2.5 Case C-413/14: The Judgement of the European Court of Justice

Intel appealed the General Court's decision on six grounds: the first three rely on substantive issues while the second three concern procedural matters, namely right of defence, jurisdiction and the amount of the fine, which are not relevant for this analysis. As to the substantive allegations, Intel claimed that the General Court failed in applying a per se standard of unlawfulness without considering some relevant circumstances, that the market coverage in the last two year was too low to find an infringement and that some rebates could not be qualified as "exclusivity rebates" since they covered an insignificant portion of the customers' demand.[770]

2.5.1 Competition on the merit

[767] Ibid, paras. 169-170.
[768] Opinion of AG Wahl in Case C-413/14 P, para. 128. VENIT J. S. (2017), p. 185.
[769] CLARKE J. (2017), pp. 267-269.
770 Official Journal of the European Union, C 395, 10 November 2014, p. 25-26. EUROPEAN COURT OF JUSTICE (2017) Case C-413/14 P Intel v Commission EU:C:2017:632, para. 31.

The first ground of appeal could be subdivided into three parts, in the first two Intel criticized the GC's finding of an infringement without before considering all the circumstances and assessing likelihood of foreclosure, in the third Intel argued that, since the Commission had carried out the AEC, the General Court should have considered Intel's allegation that it was incorrect.[771]

The ECJ started its reasoning by clarifying the basic principles underlying Art 102 TFUE, confirming what had already been held in Post Danmark II. It stated that an undertaking is free to gain a dominant position on its own merits and that it is not the purpose of this provision to protect less efficient competitors. Accordingly, "not every exclusionary effect is necessarily detrimental to competition" and "competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient".[772]

On the other hand, "a dominant undertaking has a special responsibility not to allow its behavior to impair genuine, undistorted competition on the internal market". It follows that it should refrain from "adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits".[773]

In this passage, the ECJ is implicitly rejecting the General Court's assertation that abusive practices are not only those that make market access impossible, but also those that make it more difficult,[774] by adhering to the idea that Competition Law does not protect the structure of competition as such, but for the benefit of consumers. The introduction of the AEC Test in the Guidance Paper was, indeed, based on this logic, therefore this constitutes the premise for accepting the AEC Test as a legitimate means to establish capability of foreclosure, as explained hereafter.[775]

2.5.2 A rebuttable presumption and the threshold for capability

Then, the Court restated the Hoffmann La-Roche presumption that a system of loyalty rebates offered from a dominant undertaking to its costumers conditional upon them buying all or almost all of their requirement from it constitutes an anticompetitive abuse, irrespectively of the effective amount of purchases made.[776]

However, the Court claimed that the case-law must be "further clarified" in the case the undertaking provides supporting evidence that its conduct was not capable of restricting competition and producing exclusionary effects.[777]In this case, the Commission is supposed to carry out an analysis of the rebates capacity to foreclose competitors, conducting an in-dept examination of the circumstances of the case. [778] Therefore, the ECJ introduced the possibility for the dominant undertaking to rebut the presumption of

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[771] Ibid, paras. 129-132.
[772] Ibid, paras- 133-134.
[773] Ibid, paras. 135-136.
[774] Ibid, para. 149.
[775] VENIT J.S. (2017) The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question? *European Competition Journal*, Volume 13 (Issues 2-3), pp. 172-198.
[776] Intel (2017), para. 138.
[777] Ibid, para. 137.
[778] ROBERTSON V. (2018) rebates under EU Competition law after the 2017 Intel Judgment: The Good, the Bad and the Ugly *Market and Competition Law Review*, Volume 2 (Issue 1).

abusiveness only by submitting evidence challenging the rebates *capability* of restricting competition.
In this context, the Court expressly refers to some circumstances that the Commission is required to consider, namely "the extent of the undertaking's dominant position on the relevant market", "the share of the market covered by the challenged practice", "the conditions and arrangements for granting the rebates in question", "their duration and their amount", and finally "the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market."[779]
The Court, therefore, rejected the position of the Commission and of the General Court that exclusivity rebates are abusive irrespectively of the circumstances of the case, and upheld the Advocate General's view that the legal and economic context matters. However, this was done implicitly, without clearly stating that the General Court was wrong in adopting a per se standard, but merely noting that the case law must be "further clarified" in the specific case where the dominant undertaking alleges evidence to rebut the presumption.[780]Although one could argue that the economic analysis is not necessary in every case, in practice it is very unlikely that a dominant undertaking will miss the opportunity to have its rebates analyzed from an effect-based prospective rather than condemned merely on the basis of their form.[781]

The ECJ, therefore refers to the "capacity of foreclosure" as the legal standard to be proven.[782] However, the test for capability set out by the ECJ presents some uncertainties. First, despite the efforts made by AG Whal to define an "in all likelihood" threshold for capability, the issue as to the meaning of this term is not taken in any consideration by the Court, which completely misses to define it. Therefore, it is unclear whether by "capability" the Court is referring to the "likelihood" or to a lower threshold.[783]
Moreover, the ECJ provides a list of factors which must be considered in the capability assessment, which is not however exhaustive, but it leaves the Commission free to consider any other suitable tool. It does neither identify a hierarchy between the mentioned elements nor define their potential significance, but it remains up to the Commission to balance them in the concrete case.[784] Therefore, there is not clear guidance as to the level of proof that the Commission has to satisfy, but this seems to be based on

[779] Intel (2017), para. 139.
[780] VENIT J. (2017).
[781] PETIT N. (2018) The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases *European Law Review,* Volume 43 (Issue 5), pp. 728-750.
[782] KADAR M. (2019) Article 102 and Exclusivity Rebates in a Post-Intel World: Lessons from the Qualcomm and Google Android Cases *Journal of European Competition Law & Practice*, Volume 10 (Issue 7). Intel (2017), also later in para. 140.
[783] KADAR M. (2019), CARLI C. (2017) Intel contro tutti. I quesiti irrisolti della Corte di Giustizia *Mercato Concorrenza Regole*, a. XIX (Fascicolo 3). FERNANDEZ C. (2019) Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment *Journal of European Competition Law & Practice*, Volume 10 (Issue 7), p. 448. COLOMO P.I.C. (2018) The Future of Article 102 TFEU after Intel *Journal of European Competition Law & Practice*, Volume 9 (Issue 5).
[784] KADAR M. (2019). VENIT (2017).

a case by case analysis,[785] as specified by Laitenberger, who claimed that "The evidence, methods and tools relied on by the Commission will depend on the circumstances of each case, taking into account the criteria specified by the ECJ".[786]

In addition, it is also unclear how detailed the evidence required from the dominant undertaking must be so as to rebut the presumption and this is particularly important since, if the level of proof is sufficiently low, the second phase concerning the "all the circumstances" analysis will be reached in practically every case.[787] According to Venit, it should be considered sufficient a "plausible claim, based on these facts, that the dominant firm's conduct may not have been capable of foreclosing its rivals",[788] which is, indeed, a very easy threshold to be met.

If an effects analysis will be required in every case, the traditional distinction between type two and type three rebates will be meaningless, but it will be possible only a two-pronged categorization between presumptively lawful rebates and those which require a consideration of all the circumstances, as AG Whal had suggested. Moreover, given the low threshold for the presumption rebuttal, it is unlikely that the Commission will deem a rebates scheme anticompetitive without having before checked all the factors of the case.[789] Therefore, if the Commission's first analysis will already contain this assessment, it is even more likely that exclusivity rebates will completely be absorbed in the third category. [790] However, in the judgement there is no direct rejection of the three-sided categorization made by the General Court and no express criticism to the assertion that exclusivity rebates are a separate category which does not require an effects assessment.[791]

2.5.3 De minimis?

Another question left open by the Intel decision is whether there is a sort of *de minimis* threshold in the rebates area, which would provide a safe harbor for those conducts that affect only a limited part of customers' demand.[792]Before Intel, in Post Danmark II, the ECJ had denied the relevance of a *de minimis* threshold when there is an abuse of dominant position,[793] on the ground that this is more simply justifiable by showing countervailing efficiencies.[794] On the one hand, the fact that Intel is completely silent on this precedent and introduced market coverage between the circumstances to be considered in the rebates assessment, at paragraph 139, was interpreted as a possible reintroduction of a *de minimis* threshold, or at least as a sign that the anticompetitive

[785] FERNANDEZ C. HAJNOVICOVA R., LANG N., USAI A. (2019) Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel *Journal of European Competition Law & Practice,* Volume 10 (Issue 3), p. 141.
[786]LAITENBERGER J. (2017) DG for Competition, European Commission 'Accuracy and administrability go hand in hand' (CRA Conference, 12 December 2017), pp. 8–10. Available at http://ec.europa.eu/competition/speeches/ text/sp2017_24_en.pdf.
[787] ROBERTSON V. (2018). CARLI C. (2017). COLOMO P.I.C. (2018).
[788] VENIT (2017).
[789] WHISH R., BAILEY D. (2018).
[790] ROBERTSON V. (2018). CARLI C. (2017).
[791] Ibid.
[792] Ibid.
[793] Post Danmark II (2010), paras. 72-74.
[794] PETIT N. (2018).

effect must be appreciable to determine an abuse. [795] On the other hand, under paragraph 139, there is no express reference to a *de minimis* threshold, and the ECJ refused to consider Intel's second ground of appeal,[796] which would have required to directly address this issue. These might be signals that the ECJ is still uncertain on this matter. [797]

2.5.4 Single Continuous Infringement

Less uncertainty is left as to the relevance of the existence of a strategy to exclude, which is explicitly mentioned between the factors listed at paragraph 139. Therefore, the Court seems to reject the AG Whal's idea that this factor cannot be used "to extend the ambit of the prohibitions".[798] This could have a significant impact on future cases, because the finding of a single continuous infringement would enable the Commission to connect separate elements of a conduct so as to amplify its negative effects, thereby make it very difficult to show that those effects are absent or could by outweighed, by simply relying on individual factors.[799]

2.5.6 Objective justification

The Court goes on adding that "the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified". In addition, the conduct might be justified also on the ground of efficiency considerations, when the negative effects are outweighed by advantages in terms of efficiency which also benefit the consumers. The "analysis of the intrinsic capacity" to foreclose as efficient competitors is also essential to carry out "that balancing of the favourable and unfavourable effects of the practice in question on competition ".[800]

In this passage, the Court emphasizes how the circumstances considered for the capability assessment are relevant also in another stage of the proceeding, when an objective justification or an efficiency defence is put forward to legitimate a conduct which would otherwise be deemed unlawful. This is particularly significant, given that, up until that moment, "the possibility of justifying exclusionary conduct has been more theoretical than real",[801] since abusiveness was found according to the rebates form rather than to their effects, thereby, even if the restriction of competition was outweighed by efficiencies, their form would still remain the same and any quantitative instrument to measure this balancing would be precluded to the defendant, as correctly pointed out by the Advocate General.[802]Accordingly, it is possible that the ECJ, by relating the capability

[795] CARLI C. (2017). PETIT N. (2018). BATCHELOR B. & REAL S., Baker McKenzie, (2018) A practical approach to rebates *Practical Law UK Articles.* Available at https://uk.practicallaw.thomsonreuters.com/w-010-9828?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1. ROBERTSON V. (2018). WHISH R., BAILEY D. (2018).

[796] Explained hereafter.

[797] VENIT J. (2017).

[798] Opinion of AG Wahl in Case C-413/14 P, para. 184.

[799] VENIT J. S. (2017).

[800] Intel (2017), para. 140.

[801] VENIT J. S. (2017).

[802] Opinion of AG Wahl in Case C-413/14 P, para. 88.

standard also to this stage of the proceeding, is suggesting that "justification may in the future be given more serious consideration than has been the case up until now".[803]

2.5.7 The AEC test: "a procedural answer to a substantive question"

Then, the Court addresses the issue of whether the General Court was right in considering the execution of an AEC test unnecessary for the purpose of finding an infringement of Art 102 and consequently in not taking into account Intel's claim that the Commission had not carried it out correctly and the submission of an alternative calculation.

In fact, although the Commission condemned the rebate schemes on the basis of their form, deeming the evaluation of any other circumstance and the AEC test irrelevant, " it nevertheless carried out an in-depth examination of those circumstances, setting out, in paragraphs 1002 to 1576 of that decision, a very detailed analysis of the AEC test", whose result confirmed the abuse.[804]

Accordingly, the ECJ concluded that, as a matter of fact, "the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors" and that, indeed, the General Court should have considered all Intel's arguments regarding this test.[805] On the Ground of these considerations, "the judgment of the General Court must be set aside" for having failed to address Intel's claims concerning the mistakes made by the Commission when executing the AEC test.[806]

This part of the judgement is deeply controversial. In fact, on one hand, the Court accepts the AEC test as a legitimate tool to prove capability of foreclosure, as already held in Post Danmark II.[807] On the other hand, it does not include it within the list of factors that the Commission *must* consider,[808]confirming the Post Danmark's view that the AEC test is a "tool amongst the others"[809], which " may be useful in some cases" but "its use does not constitute a necessary condition for finding that a rebate scheme is abusive".[810]

Accordingly, the Court rejected the General Court's judgement due to its failure to consider the AEC test, not on the ground that it was a necessary element for the assessment of capability, but rather because the Commission had itself chosen to undertake it and, as a consequence, the General Court was compelled to examine any defendant's argument aiming at challenging its execution. In other words, the General Court's decision was criticized for having infringed a procedural requirement and not on substantive grounds, leaving the highly debated issue as to the AEC Test value and relevance without a clear answer. Accordingly, it was pointed out that the ECJ had given a "procedural answer to a substantive question".[811]

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[803] VENIT J. S. (2017).
[804] Intel (2017), paras. 142 and 145-146.
[805] Ibid, paras. 143-144.
[806] Ibid, para. 147.
[807] ROBERTSON V. (2018).
[808] Ibid, para. 139.
[809] Post Danmark II (2010), paras. 59-61.
[810] VENIT J. S. (2017). PETIT N. (2018), p. 20.
[811] VENIT J. S. (2017). PODSZUN R. (2018) The Role of Economics in Competition Law Journal of European Consumer and Market Law, Volume 7 (Issue 2), p. 57. At p. 60.

This might lead to the paradoxical outcome that the Commission will lose the case on the AEC test, which was not required, when it would have probably won it by simply relying on the settled case law. Accordingly, once the Commission has engaged in additional economic analysis and the defendant has attempted to challenge it, even though it was unnecessary, it is not then possible to sidestep the undertaking's arguments and solve the case on the basis of the precedents.[812]

However, some other commentators suggested that the AEC test might even become a relevant circumstance in this kind of assessment, both because in the Guidance Paper it was recommended to normally use it when dealing with pricing practices,[813] and because it can be introduced in the judgement as the "supporting evidence" that the dominant firm can allege to rebut the presumption.[814]

Several hypothesis have been made as to why the Court chose to solve the case on a procedural ground: first, it is possible that it did not want to disappoint those who were still skeptical about the use of a quantitative test in the field of loyalty rebates, and therefore preferred to "move the discussion on the procedural terrain", waiting for this solution to gain more consensus; second, the Court maybe simply wanted the General Court to have the chance to confirm the Commission's decision again, having repaired the procedural error;[815]third, Podszun suggested that the Court probably wanted to emphasized it role of reviewing body which "does not so much shape the application of the law".[816]

2.5.8 Remittal to the General Court

In the end, the Court concluded that the General Court's judgement had to be rejected because it had failed to address Intel's argument as to the correctness of the AEC test performed by the Commission. The Court added that, having upheld the appeal in the first ground, it was not necessary to consider the second and third ground,[817] concerning respectively: the limited extent of market coverage of the rebates in the last two years, and whether the rebates offered to HP and Lenovo could be qualified as exclusivity rebates, given the small portion of demand covered by the practice.

The case was then referred back to the General Court, which was required to rule again, but this time on the basis of the ECJ's clarifications.[818] This brings up to the question of which could be the possible outcome of the case following its remittal to the General Court.[819]

In this connection, the decision of the General Court not to address Intel's second and third ground of appeal might lead to paradoxical consequences. Accordingly, the ECJ included market coverage between the factors which have to be examined in the assessment, but then refused to consider Intel's argument that the market coverage of 3.5% during the last two years was not sufficient to substantiate a finding of exclusionary

[812] ROBERTSON V. (2018).
[813] Guidance Paper, para. 23.
[814] PETIT N. (2018), p. 21. WHISH R., BAILEY D. (2018).
[815] PETIT N. (2018), p. 12.
[816] PODSZUN R. (2018).
[817] Intel (2017), para. 147.
[818] Ibid, paras. 149-150.
[819] Case T-286/09 RENV *Intel v Commission*, not yet decided.

effects. Conversely, it rejected the GC's decision on a procedural ground and remitted the case to it for an assessment of whether the AEC test was mistakenly performed, although the test was, instead, not listed under paragraph 139.

It appears that "the Court has reduced the substantive importance of para 139 and attached decisive importance to the General Court's procedural error". Accordingly, if the ultimate outcome of the case depends upon the application of the AEC test, which does not take into account market coverage, this would create "ambiguity as to the significance of para 139 in relation to the AEC test". It is, indeed, possible that the General Court will deem Intel's conduct abusive again, having found that the Commission's AEC test is correct, without even considering the magnitude of market coverage, contrary to what the ECJ had suggested in paragraph 139.[820]

Similarly, failure to analyze the third ground of appeal could be prejudicial. With this choice, the Court ignored "the issue of whether 28% (or 42%) of a customer's requirements can be characterized as "all or most" of its requirements in the context of an alleged loyalty rebate". By doing so, the Court has made it possible to condemn a rebate scheme, which does not entail the purchase of all or most of a customer's requirements, merely because the revised AEC test submitted by the defendant has been found incorrect.[821]

2.6 Conclusion

The Intel case has represented a big step forward for many aspects and constituted, to some extent, a revolutionary judgement. It provided a solution which is something in the middle between the traditional formalistic approach and a pure economic approach, and gave, for the first time, a judicial follow-up to some of the principles and guidelines contained in the Guidance Paper.[822]

It swept aside the rigid *per se* standard of illegality applied to exclusivity rebates, which did not take into account the circumstances of the case, by promoting a context-based analysis.[823]

It finally brough about some legal certainty as to the possibility for the dominant firms to challenge the presumption of abusiveness and to benefit of an in-depth analysis of their practices, and as to the endorsement of the AEC test as a legitimate tool to assess the foreclosure effect, available both for the Commission and for the defendant.[824]

It also provided more realistic chances for the dominant firm to rely on the efficiency defence, finally elaborating a more effective interpretation of this provision.

Moreover, it moved away from the idea of dominance as an absolute condition, which hinders the market structure to the extent that any further weakening would be capable of producing anticompetitive effects. Conversely, it clarified that the exclusion of less efficient competitors by a dominant firm is not abusive when it is achieved through

[820] VENIT J. S. (2017).
[821] Ibid.
[822] ROBERTSON V. (2018).
[823] PETIT N. (2018), VENIT J. S. (2017).
[824] VENIT J. S. (2017). CARLI C. (2017).

competition on the merits, thereby attributing some relevance to the degree of dominance.[825]

The sustainers of the approach endorsed by the ECJ emphasize that it promotes "both accuracy and administratibility", since, on the one hand, when there is not sufficient evidence to demonstrate the absence of exclusionary effects, the case is immediately solved, on the other, if the dominant firm puts forward "serious and substantiated arguments", the analysis is deepened, therefore companies are incentivized to show their best evidence at an early stage of the process.[826]

The Intel case has also been regarded as an "attempt to preserve legal certainty while at the same time allowing enforcing agencies some flexibility in terms of the tools to be used to prove potential effects", since it provides a list of circumstances that the enforcers must consider, but, at the same time, leaves them free to use also different means which can be chosen on a case by case basis.[827]Similarly, this was defined as a "holistic approach", which requires to consider not only the form of the conduct, but also the effects and the possible efficiency gains.[828]

However, as already mentioned, the judgement leaves many questions unsolved: the Court does not explain what it means by "capability to foreclose" and which legal standard this exactly entails;[829] there is no reference to the three-fold categorization present in the GC's judgement, inherited from the prior case law and challenged by AG Whal, therefore it is unclear whether a distinction between Type 2 and Type 3 rebates will still be possible;[830] the judgement is silent about which sort of evidence the dominant firm must provide in order to rebut the presumption and also about the tools that the Commission can use to assess capability;[831] it is unclear whether the ECJ reintroduced a *de minimis* threshold for market coverage;[832] the Court's attribution of relevance to the existence of a strategy and its failure to address the last two substantive grounds of Intel's appeal raise many concerns as to the possible paradoxical outcomes of the remittal judgement and of future rebates assessments.[833]

Last, but not least, many authors have emphasized how the judgement has not endorsed an effect-based approach "as such", but by means of a procedural expedient. The EGC's failure to perform an AEC test was, indeed, not censored because this was a necessary element for the assessment, but simply because this had played an "important role" in the Commission's decision and Intel had the procedural right to submit arguments against it.[834]

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[825] VENIT J. S. (2017).

[826] LAITENBERGER J. (2017).

[827] KADAR M. (2019).

[828] TYLOR M. & SCHINDL J. (2017) Intel: Clarification or Contradiction? *The Antitrust Source.* Available at: http://awa2018.concurrences.com/IMG/pdf/dec17_taylor_12-11.pdf.

[829]KADAR M. (2019). CARLI C. (2017). FERNANDEZ C. (2019). COLOMO P.I.C. (2018). HAJNOVICOVA R., LANG N., USAI A. (2019).

[830] ROBERTSON V. (2018). CARLI C. (2017).

[831] KADAR M. (2019). VENIT J. S. (2017). ROBERTSON V. (2018). CARLI C. (2017). COLOMO P.I.C. (2018).

[832] CARLI C. (2017). PETIT N. (2018). BATCHELOR B. & REAL S., Baker McKenzie, (2018). COLOMO P.I.C. (2018). WHISH R., BAILEY D. (2018). VENIT J. S. (2017).

[833] VENIT J. S. (2017).

[834] VENIT J. S. (2017). PODSZUN R. (2018). PETIT N. (2018).

Therefore, there is still uncertainty as how the General Court will solve the remand case, and as which legal standard will the Commission adopt in future rebates cases. In fact, the Commission would theoretically be capable of still relying on previous case law, given that the substantive relevance of paragraph 139 is unclear and that the execution of an AEC test is not necessary.[835] On the other side, it is also possible that the Commission, conscious that the dominant firm will try to rebut the presumption by any means, will conduct her own economic analysis in the first place, without benefiting of the presumption, [836] in order to avoid the possible waste of resources deriving from the double stage of assessment.[837]

Although the Intel case has represented a significant step towards a more economic approach, it is certainly still opened to interpretation and clarification, which would hopefully be provided, at least in part, by the ruling of the General Court in remand.

3. Commission's Decisions after Intel

An indication as to how the Intel case has influenced the Commission's practice can be given by two decisions which were adopted subsequently in 2018, regarding exclusivity payments.

The first concerns Qualcomm,[838] the dominant firm in the worldwide market for baseband LTE chipsets, which offered to its major customer, Apple, significant payments conditional on it using in its products only Qualcomm's LTE chipsets. In case Apple had breached the agreement, supplying from Qualcomm's competitors, not only it would have lost all future payments from Qualcomm, but it would also have to return most of those already received.

Having qualified Qualcomm's practice as exclusivity payments, it applied "the framework established by the Court of Justice in Intel". Accordingly, it first recalled the presumption of unlawfulness, and then, given the Qualcomm's submission that the payments were incapable of restricting competition, it had to consider the relevant circumstances, such as the extent of Qualcomm's dominance, the duration of the practice, the market coverage or the fact that Apple was a strategic customer in the chipsets supply market.

It then concluded that Qualcomm's payments were capable of restricting competition and, having considered that the body of evidence provided was sufficient for this purpose, it did not carry out an AEC test. It, however, had to analyze the AEC test put forward by Qualcomm, and found that it was incorrect, due to a mistaken calculation of the constable share of demand.[839]

In this connection, it is interesting to notice how the AEC test most relevant uncertainty relates to the determination of the constable share, which had already led Intel to a different result than that found by the Commission.[840]

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[835] ROBERTSON V. (2018).
[836] WHISH R., BAILEY D. (2018).
[837] PETIT N. (2018), p. 12.
[838] Commission Decision of 24 January 2018, Qualcomm, Case AT.40220.
[839] KADAR M. (2019), pp. 443-445.
[840] ROBERTSON V. (2018), p. 43.

The second relevant case is Google Android,[841] whereby Google was sanctioned for having granted to its customers part of its search-related revenues in exchange for the preinstallation of Google Search on all or almost all of the Android devices they manufactured.
The Commission concluded that the practice was abusive, not only because exclusivity payments are presumptively unlawful, but also on the ground that, after having performed an effect-based analysis, they were found to be capable of restricting competition.
As in the Qualcomm case, the Commission took into account several circumstances, such as market coverage, the "portfolio effect", namely that the installation of Google Search on any device of a certain portfolio resulted in the sharing of revenues for the whole portfolio, or also the existence of an overall strategy aimed at consolidating Google's dominant position; moreover, the Commission chose to carry out an AEC test which confirmed the potential foreclosure effects on as efficient competitors.[842]
In these decisions the Commission complied with what established by CJEU in the Intel case: it, indeed, applied the presumption of unlawfulness, but, still, did not forget to conduct an analysis of the economic context when required, choosing to consider the most relevant circumstances according to the specific case. In this context, while in Qualcomm the AEC test was deemed unnecessary, since the other evidence provided was already sufficient, in Google Android the test constituted an important element to substantiate the finding of capability to restrict competition.[843]

[841] Commission Decision of 18 July 2018 Google Android, Case AT.40099.
[842] ROBERTSON V. (2018), p. 446.
[843] Ibid, p. 447.

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