Revolution or Evolution?

Loyalty Rebates and the Role of the As Efficient Competitor Test under Article 102 TFEU

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Abstract

This paper has sought to answer the question of how loyalty rebates should be evaluated under Article 102 TFEU as well as analysing what role the AEC test plays. This has been carried out by applying an EU legal method. In doing so, the conclusion reached was that following *Intel*, some loyalty rebates, namely exclusivity rebates, are presumed illegal. This presumption can however be rebutted by the defendant submitting supporting evidence that its conduct was not capable of producing foreclosure effects on as efficient competitors. A procedural obligation has been put on competition authorities to analyse the evidence produced by the defendant. One such piece of evidence that might be frequently put forward is the AEC test. If the competition authority itself relies upon an AEC test in proving an abuse, the defendant's arguments concerning that test must be analysed by the court. This indicates an acceptance of the test which has previously mostly been used in margin-squeeze and predatory pricing cases, although this acceptance is not entirely free from doubt. This paper has also examined Commission decisions post-*Intel*. These decisions indicate that the Commission may feel reluctant to carry out a full-fledged AEC test itself. The test has however been used as a means to rebut the presumption of illegality.

This established legal position has been critically analysed from two perspectives. First, it was analysed whether the current legal position regarding the AEC test would help Article 102 TFEU fulfil its purpose or not. This was carried out through a method of law and economics. It was established that the main purpose of Article 102 TFEU is consumer welfare alongside economic efficiency. It was further concluded that in the long run, the idea of only protecting as efficient competitors, which is the essence of the AEC test, is often important for consumer welfare maximisation. However, it is important to recognise that this may not be unequivocally true as sometimes the emergence of an as efficient competitor is unlikely or impossible. In theory, the AEC test would also achieve legal certainty which would be beneficial for economic efficiency. This is because undertakings could self-assess their rebate schemes which provides the possibility to engage in rebate schemes only when they are beneficial for competition. However, the AEC test is difficult to apply in practice since the outcome depends on how the variables needed are calculated and how an as efficient competitor is defined. An AEC test conducted by an undertaking may very well not lead to the same result as when it is conducted by a competition authority.

Second, it was analysed whether or not the accepted use of the AEC test would make enforcement efficient, i.e., easy and not too time-consuming. This was done by applying a legal analytical method. It was concluded that the

acceptance of the AEC test might make the task of the competition authorities difficult and not efficient but rather time-consuming and resource-intense. This is because the AEC test is very technical and dependent upon several variables which can be argued in length one way or the other. Dominant undertakings often have large resources and therefore the ability to invoke economists to argue that a test carried out by the competition authority is vitiated with error or in fact does not show capability of exclusion of as efficient competitors. It is also very possible that dominant undertakings themselves will provide AEC tests that are biased in their favour. The competition authority (or private litigants) must then go to great lengths, using their more limited resources and a lot amount of time in arguing the AEC test their way. As soon as the presumption of abuse is rebutted, the competition authority has the burden of proof in showing an abuse. This may prove to be very difficult when an AEC test is introduced into the proceeding.

Abbreviations

AAC	average avoidable costs
AEC	as efficient competitor
AG	Advocate General
AVC	average variable costs
CJEU	Court of Justice of the European Union
CoGS	Cost of Goods Sold
CPU	central processing unit
EU	European Union
GC	General Court of the European Union
R&D	research and development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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1 Introduction

1.1 Background

One of the primary goals of competition law is consumer welfare.[1] Consumer welfare is achieved by, among other factors, low prices and wide choices. Rebates are therefore in its foundation positive for consumers as it reduces the cost of a product or service as well as expands markets to more consumers.[2] However, rebates can sometimes instead be used to impede competition to the detriment of consumers. One type of rebate which can cause competition concerns is what is referred to as "loyalty rebates". Loyalty rebates may become problematic when they are conditioned upon the customer obtaining all or most of its requirements from an undertaking or when they otherwise have a strong loyalty-inducing nature. When dominant undertakings engage in these types of rebate schemes, it has the potential of foreclosing customers to competing undertakings. This can make it difficult or impossible for existing undertakings and potential market entrants to compete with the dominant undertaking offering the rebate, even in cases where the competing undertaking is just as efficient as the dominant one. This may result in less competition which in turn results in less consumer welfare.[3]

Although loyalty rebates are not explicitly forbidden under the wording of Article 102 Treaty on the Functioning of the European Union ("TFEU"), consistent case law from the Court of Justice of the European Union ("CJEU") has established that when dominant undertakings offer loyalty rebates, it may under certain circumstances constitute an abuse in violation of the Article. This case law has been far from uncontroversial with many commentators arguing that the CJEU's approach to loyalty rebates has been far too formalistic and failed to reflect the effects of a given loyalty rebate.[4] In 2017, the CJEU in *Intel* "clarified" its case law concerning how it should be evaluated whether a loyalty rebate offered by a dominant undertaking is illegal or not. The importance as well as the meaning of *Intel* has been fiercely debated. The ruling seems to suggest a step toward a more "economic" or "effects-based approach" to loyalty rebates. The case was remitted to the General Court (GC) where a €1.06 billion fine imposed

[1] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, 3rd edn., Hart Publishing, Oxford, 2020, pp. 5-6.

[2] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ 2009 C 45/7 (hereinafter the "Guidance Paper"), para. 37.

[3] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 551-552.

[4] See Whish, R & Bailey, D, *Competition Law*, 10th edn., Oxford University Press, 2021, p. 768.

on Intel was annulled earlier this year (2022). The GC had a few years prior found Intel to be guilty of abuse of dominance.

Despite the clarification of the case law by the CJEU, it is nevertheless still unclear in several respects concerning how loyalty rebates should be approached and what is required from any effects-based approach. One important aspect is the use of the so-called as-efficient competitor ("AEC") test as evidence. This test has been used in proceedings by the European Commission (the "Commission") and by the European Union ("EU") Courts, but has not always been in the centre of attention or even been paid attention to at all. This gives rise to the question of what the accepted use of the AEC test currently is and whether an acceptance of the test may give rise to any concerns. Any uncertainty as it pertains to the acceptance and importance of the AEC test could cause issues regarding predictability for all parties. Lack of predictability can in turn have large economic impacts, both on the competition authorities which risks wasting resources on investigations that will be struck down in court as well as for undertakings which risks severe fines, potentially ranging in the billions. An acceptance and emphasise on the AEC test may also impact how efficiently the competition rules can fulfil its purposes as well as how efficiently enforcement can be carried out.

1.2 Purposes and Research Questions

The purpose of this paper is to show how it should be evaluated whether or not loyalty rebates constitute abuse of dominance under Article 102 TFEU. It is furthermore the purpose to show the role of the AEC test in such cases. In addition, the purpose of the paper is to show how the current accepted use of the AEC test may affect the ability of the competition rules to achieve its goals. Finally, the purpose is to show how the current accepted use of the AEC test may risk making the competition rules difficult to be enforced efficiently, i.e., in an easy and timely manner. The following research questions will be answered respectively in order to achieve the purposes:

- What is the current legal position regarding how loyalty rebates should be evaluated under Article 102 TFEU?
- What role does the AEC test play in evaluating loyalty rebates?
- What impact does the current acceptance of the AEC test have on the ability of Article 102 TFEU to achieve its purposes?
- What impact does the current acceptance of the AEC test have on the ability of Article 102 TFEU to be enforced efficiently?

1.3 Delimitations

First, since this is a paper in EU law, considerations will only be made to Article 102 TFEU and other EU sources. Even though Article 102 TFEU forms the basis of the EU member states' law, national legal sources will not be considered.

This means that case law from national courts and national competition authorities has not been examined.

Second, Article 102 TFEU consists of several different conditions to be applicable. This paper will only explain the condition of abuse and not the other conditions needed for the Article to be applicable.

Third, this paper is confined to loyalty rebates and will only examine other abuses and case law concerning other abuses when it is directly relevant for loyalty rebates.

Fourth, there are numerous cases from the CJEU regarding loyalty rebates. This paper will only focus more in-depth on a handful of cases which are considered to be most significant in the sense that they contain important statements in regard to the current legal position and have been widely discussed in the legal academic debate. They are therefore considered to be best suited to answer the research questions of this paper. Other CJEU cases will be referenced to but not analysed in depth. The chosen cases may sometimes contain conduct in addition to offering loyalty rebates. This other conduct will only be examined to the degree it is necessary to create an understanding of the case as a whole. The most important analysed case is *Intel*. This case concerns a certain type of loyalty rebate, namely exclusivity rebates. Consequently, the majority of the discussion in this paper is about exclusivity rebates. *Intel* also concerns so-called "naked restrictions" which will, for the reasons above, not be analysed in detail.

Finally, under Article 102 TFEU there is no equivalent to Article 101(3) which offers a defence for a conduct that is presumptively illegal if it can be shown that it produces efficiencies. Through case law of the CJEU a doctrine of "objective justification" has been established that can excuse abuses under Article 102 TFEU.[5] This paper will not be analysing objective justifications in regard to loyalty rebates in depth. Even though this question is important in practice, it lies on the fringe of the purpose of this paper and is as such not a necessity in order to answer the research questions.

1.4 Methods and Sources

1.4.1 EU Legal Method

The first two research questions of this paper aim at ascertaining the current legal position. A legal method that allows for this must therefore be applied. Since this is a paper in EU law, an EU legal method is applied. This is the overarching method used throughout the entire paper and is as such also relevant to the third and fourth research question. The EU legal method is a way of approaching the EU legal sources.[6] The EU itself constitutes an autonomous legal order with its

[5] See Whish, R & Bailey, D, *Competition Law*, pp. 219-223.

[6] Reichel, J, 'EU-rättslig metod', in Nääv, M & Zamboni, M (eds.), *Juridisk Metodlära*, 2nd edn., Lund, Studentlitteratur AB, 2018, p. 109.

own internal hierarchy.[7] The main legal sources of the EU are primary- and secondary law, with primary law being at the highest level of the hierarchy of norms. Primary law consists of the different EU treaties, including the TFEU, the Treaty on European Union ("TEU") and the Charter of Fundamental Rights of the EU as well as the general principles of law established by the CJEU. The binding secondary law consists of regulations, directives and decisions.[8] The central source outside the written primary and secondary law is the CJEU case law which contains a large part of the binding EU law.[9] The CJEU shall ensure that in the interpretation and application of the Treaties the law is observed,[10] and the Court has the definitive say on how EU law should be interpreted.[11] The CJEU uses several different methods to interpret the law such as textualism, contextual interpretation etc. Arguably, the most important method of interpretation of the Court is the teleological interpretation.[12] Opinions of Advocate Generals ("AG") are not binding insofar they are not mentioned directly by the CJEU. However, they can have great impact in practice on subsequent cases.[13] Although non-binding, one other legal source of particular importance in the area of competition law are soft law instruments.[14] Lastly, regarding the source of legal doctrine, which is also non-binding. This legal source is within EU law not referred to by the CJEU in its judgements. Nevertheless, it is well known that it is used by the Court in its workings and is therefore still of importance.[15]

In this paper, the EU legal method will be used to answer how the legality of loyalty rebates should be determined and what role the AEC test plays, by analysing the beforementioned legal sources according to their hierarchy. When applying the overarching EU legal method, the main legal source used in this paper is Article 102 TFEU. In order to interpret this Article in regard to loyalty rebates, numerous cases from the CJEU will be used. Three cases will be analysed in more detail. The cases are *Hoffmann-La Roche*, *Post-Danmark II* and *Intel*. More cases will be discussed but not to the same degree. The cases are chosen on the criteria of relevance to the subject and authority. This means that they are considered to have had the most impact on the current legal situation regarding loyalty rebates and the AEC test, based on important statements made, that they have been discussed widely in the academic debate and the fact that they have been referred to frequently by the CJEU. *Intel* is currently the latest CJEU case concerning

[7] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1, para. 3.
[8] Publications Office of the European Union, *Sources of European Union law*, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534, (accessed 17 April 2022).
[9] Hettne, J & Otken Eriksson, I, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, 2nd edn., Stockholm, Norstedts Juridik, 2011, p. 41.
[10] Article 19.1 TEU.
[11] Hettne & J, Otken Eriksson, I, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, p. 49; Bernitz, U & Kjellgren, A, *Europarättens grunder*, 6th edn., Stockholm, Norstedts Juridik, 2018, p. 187.
[12] Reichel, J, 'EU-rättslig metod', p. 122.
[13] Hettne, J & Otken Eriksson, I, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, p. 117.
[14] Bernitz, U & Kjellgren, A, *Europarättens grunder*, p. 201.
[15] Hettne, J & Otken Eriksson, I, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, pp. 120-122.

loyalty rebates and is also a Grand Chamber case which indicates the highest possible authority. A methodology issue arises in connection to this. The CJEU does not often expressively overturn its previous case law.[16] This means that it is difficult to say with any degree of certainty to what extent cases like *Hoffmann-La Roche* and *Post Danmark II* are still relevant after *Intel*, especially considering that *Post Danmark II* is not mentioned by the CJEU in *Intel*. Comparing *Intel* with *Post Danmark II* also warrants caution as *Intel* may be confined to exclusivity rebates and not loyalty rebates in general.[17] To deal with these methodology issues, legal takeaways will mainly be made from *Intel* and where the different judgements contain differences, these will be discussed and analysed. Opinions of AGs have been used to highlight certain interpretations of case law but have not been used as an authority to make any definitive interpretations of the established law. Furthermore, CJEU cases has also been prioritised over GC cases because of their (lack of) authority, with the notable exception of the remitted GC case in *Intel*. This is because it is the first EU Court case which applies the judgement of the CJEU in *Intel* to loyalty rebates. Four Commission decisions will also be analysed in closer detail, not because of their legal authority, but because of their ability to showcase how the Commission has interpreted the established law and how enforcement is carried out in practise based on this interpretation. The four Commission decisions which will be discussed in closer detail are *Intel*, *Broadcomm*, *Qualcomm* and *Google Android*.

1.4.2 Law and Economics

In order to give depth to the discussion, the paper will not stop at establishing the current legal position. The established law will also be critically analysed and put into a wider context. This is the essence of the third and fourth research question. Two perspectives will be used. The first perspective is whether the current acceptance of the AEC test helps achieve the purpose of Article 102 TFEU. This is the third research question. Consequently, what the purpose of Article 102 TFEU is will also be examined. It is important to highlight from the start that competition law is to a high degree connected with and based upon economics. The purpose of Article 102 TFEU is thus of economic character. Therefore, economic considerations will be impossible to ignore.[18] It is important to emphasise however that this is neither a paper in economics, nor is the author of this paper an economist. A specific economic theory will not be employed. Nevertheless, an analysis of the established law in order to ascertain its economic effects and assess whether these effects are in accordance with the purpose of the law, is warranted within the academic legal discussion.[19] To allow for these external economic considerations, a method of positive law and economics will be employed. The method will be utilised to evaluate the established law from

[16] *Ibid*., p. 51.
[17] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 555.
[18] Sandgren, C, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, 4th edn., Stockholm, Norstedts Juridik, 2018, p. 27.
[19] *Ibid*., p. 72.

economic considerations to analyse whether the current legal situation regarding the AEC test fulfils the economic goals of the regulation.[20] This part will also focus a great deal on legal certainty.

The sources used in this part will first of all be the above-mentioned case law. An analysis of this case law is important in ascertaining what the purpose of Article 102 TFEU is. Alongside the case law, the Commission's Guidance Paper on Article 102 Enforcement Priorities, which can be considered a soft law instrument, will also be analysed in order to help answer the question of what the purpose of Article 102 TFEU is. As the title of the document suggests, the Guidance Paper is not a set of guidelines on the law of Article 102 TFEU but rather sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority. The Guidance Paper is as such non-binding.[21] Furthermore, there is extensive literature on the subject of loyalty rebates. One important piece of literature used is "The Law and Economics of Article 102 TFEU" by Robert O'Donoghue QC and Jorge Padilla. This piece of literature thoroughly analyses both the law and economics of *inter alia* loyalty rebates in regard to Article 102 TFEU. The book is described by judge of the CJEU Nils Wahl as "a reference book in this area of EU competition law and a must-have companion for academics, enforcers and practitioners alike, as well as EU and national judges".[22] This indicates a high level of authority. This book, as well as a number of articles from different journals will be used in the analysis to answer whether the current accepted use of the AEC test helps Article 102 TFEU fulfil its purpose. The articles have been chosen on the criteria of relevance to the topic and their authority. A wide range of literature from different authors and countries has been chosen to critically analyse the interpretations and arguments made. Articles after the CJEU judgement in *Intel* have been given priority as they are most suited to comment on the established law.

1.4.3 Legal Analytical Method

The second perspective used to critically analyse the established law is enforcement efficiency. In other words, is the current acceptance of the AEC test in regard to loyalty rebates satisfactory in order for Article 102 TFEU to be applied efficiently by the enforcer, i.e., in an easy and timely manner? This is the fourth research question. This will be answered through a legal analytical method. This method does not stop at merely establishing the current law but allows for a freer critical perspective of this law. By using this method, the judgements from the CJEU will be critiqued and questioned. The method will also be used to further analyse soft law instruments, Commission decisions and literature even though they are not part of the established binding law.[23] The Commission decisions

[20] Bastidas Venegas, V, 'Rättsekonomi', in Nääv, M & Zamboni, M (eds.), *Juridisk Metodlära*, 2nd edn., Lund, Studentlitteratur AB, 2018, p. 180.
[21] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 52.
[22] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, Foreword to the Third Edition.
[23] Sandgren, C, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, pp. 50-52.

used are primarily *Intel* and *Qualcomm* since these two decisions contain the most complete AEC tests. These decisions will showcase how the AEC test has been applied in practice in Commission decisions and what difficulties have arisen which may affect enforcement efficiency. The above-mentioned Guidance Paper and literature will also be analysed to examine arguments made and thereby answer the question of whether the current accepted use of the AEC test is beneficial from the perspective of enforcement efficiency.

1.5 Disposition

The paper will begin in chapter 2 by explaining some fundamental starting points for this paper. In this chapter, the foundations of Article 102 TFEU and abuse of dominance will be covered. In addition, the concept of loyalty rebates and why it can be both positive but also detrimental to competition will be explained. A description of the AEC test will also be carried out.

In chapter 3, the current legal situation on loyalty rebates will be covered. This part will summarise and analyse the important case law on loyalty rebates in regard to abuse of dominance. The legal takeaways from the case law will be summarised and analysed at the end of the chapter in order to answer the first research question.

Chapter 4 examines how the case law and current legal situation discussed in chapter 3 impacts the role of the AEC test. This chapter also analyses how accepted the test has been historically and how it has been used in regard to other exclusionary abuses. This will be done in order to get a more systematic understanding and give depth to the discussion. This chapter will answer the second research question.

Following this, a discussion of the AEC test will be carried out to assess whether the current accepted use of the test fulfils the purpose of Article 102 TFEU. This will be done in chapter 5 which will thus answer the third research question.

In the next chapter, it will be analysed how the current accepted use of the AEC test may impact enforcement efficiency. Chapter 6 will therefore answer the fourth research question.

Finally, the paper will end with a conclusion in chapter 7 which will summarise the paper and offer some final thoughts and conclusions. This part will examine some alternatives to the current legal position as well as adding a wider perspective concerning the use of economics in law.

2 The Relationship Between Abuse of Dominance and Loyalty Rebates

2.1 A Few Starting Reflections on Article 102 TFEU

Article 102 TFEU is concerned with unilateral abusive conduct of dominant undertakings. Article 102 TFEU provides that:

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

The Article then gives a non-exhaustive list[24] of what abuses in particular may consist of. Loyalty rebates are not explicitly mentioned in this list but may constitute abuse under consistent case law in certain circumstances.[25] From Article 102 TFEU, five criteria can be distinguished which must be fulfilled in order for the Article to be applicable. Article 102 TFEU applies to any (i) **abuse** by (ii) **undertakings** in a (iii) **dominant position** within a (iv) **substantial part of the internal market** which may have an (v) **effect on inter-state trade**.

This part will give a few reflections on the concept of abuse. An important starting point is that it is only the **abuse** of a dominant position that is prohibited; merely having a dominant position is not.[26] There is no overarching definition of what constitutes an abuse.[27] Generally speaking, an abuse is an act designed to extend or maintain a dominant undertaking's market power, to the detriment of consumers.[28] It involves having to decide if the dominant undertaking's behaviour deviates from a counterfactual world in which competition qualifies as "competition on the merits"[29] or is otherwise "normal".[30] Needless to say, this is easier said than done given the ambiguity of these expressions.[31] Another way of defining abuse is that dominant undertakings have a "special responsibility" not

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[24] See e.g., Case 6-72*, Europemballage and Continental Can v Commission*, EU:C:1973:22, para. 26; Case C-280/08 P, *Deutsche Telekom AG v Commission*, EU:C:2010:603, para. 173.
[25] Whish, R & Bailey, D, *Competition Law*, pp. 180 and 768.
[26] See e.g., Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para. 57.
[27] Whish, R & Bailey, D, *Competition Law*, p. 198.
[28] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 262.
[29] See e.g., Case C-280/08 P, *Deutsche Telekom AG v Commission*, EU:C:2010:603, para. 177; Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, para. 75; Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 25; Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 136.
[30] See e.g., Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para. 91.
[31] Whish, R & Bailey, D, *Competition Law*, p. 195.

to allow its conduct to impair genuine undistorted competition on the common market.[32]

Abuses can be categorised in different ways although there is no formal legal way.[33] At least two types of abuses can be recognised.[34] First, there are exploitative abuses. These are practices which result in a direct loss of consumer welfare by in some way taking advantage of the consumers, for instance through excessive pricing. Second, there are exclusionary abuses. These are strategies directed against competitors which indirectly cause a loss of consumer welfare since they unlawfully limit the ability of competitors to compete.[35] Regarding the last-mentioned abuse, it is important to note that one key element is loss of consumer welfare. Exclusionary abuses are the most common category of abuse. Regarding the topic of this paper which is loyalty rebates, these belong to the exclusionary category of abuses since they have the potential of foreclosing competitors.[36]

Before taking action against a dominant undertaking, an important question to answer is what standard of proof a competition authority should attain. It is difficult to ascertain a clear answer to this question since the CJEU case law has not always been consistent. In *Post Danmark I* the CJEU required the Commission to show "likely exclusionary effects".[37] In *Post Danmark II* the standards "likely" and "capable" seem to be used interchangeably.[38] In *Intel*, which will be analysed in length below, the CJEU appears to settle with a standard of proof requiring to show that the conduct was "capable" of restricting competition.[39] In order to meet a certain burden of proof, any means of evidence can be used since the principle of unfettered evaluation of evidence prevails in the EU Courts.[40] This is what allows for economic evidence to be submitted such as the AEC test.[41] However, the body of evidence produced must be sufficiently precise and consistent to support the firm conviction that the alleged infringement took place.[42] As will be explained, exclusivity rebates have in previous case law been considered to be capable of restricting competition in their very nature i.e., *per se.*

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[32] See e.g., Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para. 57; Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 23; Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 135.

[33] Whish R, & Bailey, D, *Competition Law*, p. 209.

[34] C.f. *ibid.*, pp. 209-210; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 262.

[35] See e.g. Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 24; Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 20.

[36] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 263.

[37] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 44.

[38] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, e.g. paras. 68-69.
Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, paras. 138-142; See also Whish, R & Bailey, D, *Competition Law* p. 207.

[40] Ortiz Blanco, L (ed.), *EU Competition Procedure*, 3rd edn., Oxford University Press, 2013, para. 4.41.

[41] Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', *Journal of European Consumer and Market Law*, vol. 7, issue 2, 2018, p. 63.

[42] See e.g. Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 163.

2.2 What Are Loyalty Rebates?

The CJEU has in its case law several times referred to certain types of rebates as "exclusivity rebates", "fidelity rebates" or "loyalty rebates", although these terms have no precise legal meaning.[43] This chapter aims at trying to define what loyalty rebates are. The Organisation for Economic Co-operation and Development has provided a helpful definition which states that loyalty rebates are pricing structures offering lower prices in return for a buyer's agreed or *de facto* commitment to source a large and/or increasing share of his requirements with the discounter.[44] The common feature of loyalty rebates is consequently that they are **conditional** upon the customer achieving a certain share or quantity of sales with the dominant undertaking.[45]

There are different categories of rebates and they may be categorised differently. The following categorisation cannot be regarded as a legal one.[46] A first category of rebate is **quantity rebates**. These are linked solely to the volume of purchases made. These are not regarded as loyalty rebates and they are generally considered not to have foreclosure effects.[47] A second category are rebates which are linked to exclusive or near-exclusive dealing (hereinafter "**exclusivity rebates**"). As such, the rebate is conditional upon the customer fulfilling all or most of its requirements from the dominant undertaking and is therefore a certain type of loyalty rebate.[48] Exclusivity rebates has a strong resemblance to non-compete or single-branding obligations. A third category of rebate are loyalty rebates which are neither based on quantity nor exclusivity but which may nevertheless have loyalty-inducing effects.[49] An example of loyalty-inducing effects will be shown in the next chapter. In order to understand why this can be the case, it is important to recognise that these types of loyalty rebates can have different designs. A first distinction is that loyalty rebates can either be **individualised** or **standardised**. Under an individualised rebate scheme, the customer will receive a rebate on the condition of it purchasing a number of units exceeding a certain threshold over a certain period of time, tailored to its needs. A standardised rebate scheme works the same way except the threshold is the same for all customers. A second distinction is that a loyalty rebate may be **retroactive** or **incremental**. A retroactive rebate applies not only on the purchased units above

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[43] See O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 543; European Commission, *Guidance Paper*, para. 37.

[44] The Organisation for Economic Co-operation and Development, *Loyalty and Fidelity Discounts and Rebates*, 2003, (DAFFE/COMP(2002)21), p. 7.

[45] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 543.

[46] It follows the categorisation of the judgment in Case T-286/09, *Intel Corp. v Commission*, EU:T:2014:547. That judgement judgment was in parts set aside by the CJEU in Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632.

[47] See e.g., Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para. 71; Case C-163/99, *Portugal v Commission*, EU:C:2001:189, para. 50.

[48] See e.g., Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, paras. 89-90; Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 137.

[49] See e.g., Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, paras. 72-73; Case C-95/04 P, *British Airways plc v Commission*, EU:C:2007:166, paras. 65 and 67.

a certain threshold, but also on the units below. An incremental rebate, on the other hand, only applies to units above a certain threshold.[50]

2.3 Why Are They Controversial?

Before discussing why loyalty rebates may be problematic, it is appropriate to acknowledge that loyalty rebates may in certain circumstances bring several efficiencies and contribute to consumer welfare. Explaining these efficiencies can involve complex economic considerations and will therefore not be explained in detail here.[51] A basic explanation to why it may be positive for undertakings, even dominant ones, to engage in loyalty rebate schemes, is that it can attract more demand, and as such may stimulate demand and benefit consumers.[52]

However, loyalty rebates can also be used to foreclose customers to competitors and thereby having anticompetitive effects. Such effects can arise whenever a customer of a dominant undertaking would lose a rebate on purchases it has made or will make by dealing with a competitor of the dominant undertaking. Dominant undertakings can through loyalty rebates create strong disincentives not to purchase from other undertakings and thereby having loyalty inducing effects. This hampers the competitive structure which is already weakened by the existence of a dominant undertaking and may raise barriers to entry and expansion significantly.[53] Through such schemes, the competing undertaking must not only compete on the price of the units that the customer is seeking to purchase, but must also compensate the customer on the purchases it has already made from the dominant undertaking if a rebate is lost.[54] Loyalty rebates that are individualised or retroactive have a tendency to have more loyalty inducing effects and a rebate that is both has additional potential of having such effects. Exclusivity rebates has the most potential to lock in customers.[55] Of course, other factors play a part too such as the size of the rebate, under how long a period loyalty is required, and how the rebate otherwise is structured. The structure of the market also matters. Loyalty inducing effects are greater if there exist high barriers to entry, network effects or where competitors are unable to contest a significant proportion of the demand due to capacity constraints, narrower range of products or if the dominant undertaking is selling must-stock products.[56]

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[50] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU* pp. 554-555.
[51] For further discussion see O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU* pp. 547-551.
[52] European Commission, *Guidance Paper*, para. 37.
[53] Hajnovicova, R, Lang, N & Usai, A, 'Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel', *Journal of European Competition Law & Practice*, vol. 10, issue 3, 2019, p. 143.
[54] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 551-552.
[55] *Ibid*., p. 554; European Commission, *Guidance Paper*, para. 45.
[56] Hajnovicova, R, Lang, N & Usai, A, 'Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel', p. 143; Boutin, A & Boutin, X, 'The as Efficient Competitor Test - Back to Facts', *Competition Law & Policy Debate*, vol. 4, issue 2, 2018, pp. 53-54 and 62.

An example using an individualised retroactive loyalty rebate can illustrate the loyalty inducing effect. This discussion will be technical but necessary in order to create an understanding of the phenomenon. Suppose a customer has a requirement of 1000 units each year. For different reasons, such as capacity, brand strength or distribution coverage, the customer have the previous years purchased 90% (900 units) of its requirements from the same dominant undertaking. The dominant undertaking has a list price of €10 per unit. One year, the dominant undertaking proposes a loyalty rebate where any purchase in excess of 900 units will generate a 10% (€1) discount not only on the all units above 900, but also on all the previous units (a retroactive rebate). With the rebate, every unit will therefore cost €9. Consider that the customer has bought its usual supply of 900 units from the dominant undertaking and must now decide from which undertaking it is going to purchase its remaining requirement of 100 units. If the customer purchases the remaining 100 units from the dominant undertaking, the cost of every additional unit over 900 will be zero (€10 x 900 = €9 x 1000). A competing undertaking would in this scenario have to give away the 100 units for free to be able to compete. This example shows the strong "lock-in" or "suction" effect a seemingly small and harmless rebate can have. These effects can exclude actual competition and increase barriers to entry. Loyalty rebates are in this way a cheap form of exclusion strategy since it does not necessarily require incurring any losses as other exclusion strategies may require, such as predatory pricing.[57]

As a conclusion, it can be said that loyalty rebates have the potential of having both negative and positive effects. It can be difficult to distinguish *ex ante* whether a loyalty rebate is pro- or anticompetitive which invites problems for the lawmaker. If the distinguishing line between pro- and anti-competitive rebates is drawn to aggressively, the law risks resulting in so-called "false positives" and being over-inclusive. Procompetitive rebates would in such a case be prohibited leading to chilling price competition that would otherwise benefit consumers in the form of lower retail prices. If the distinguishing line on the other hand is drawn to passively, this would result in so called "false negatives" where anticompetitive rebates would be deemed legal and the law being under-inclusive. This would result in the dominant undertakings being able to exclude competitors, which leads to fewer product choices and reduces overall welfare.[58]

2.4 An Introduction to the AEC Test

The AEC test is a form of price/cost test. By using the test, it is possible to establish whether a certain conduct is capable of excluding competitors that are as efficient, i.e., competitors with equal (or lower) costs as the dominant undertaking. Using the AEC test in regard to loyalty rebates refers to the process whereby a price cut by a dominant undertaking is analysed in order to determine

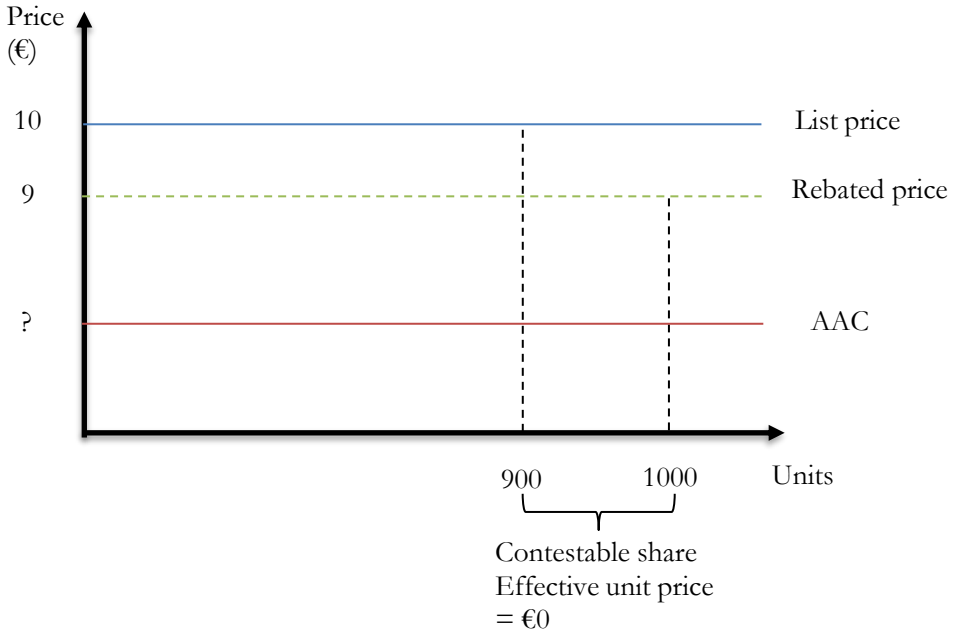
[57] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 552.
[58] Whish R, & Bailey, D, *Competition Law*, p. 203; Ordover, J, Shaffer, G, *Exclusionary Discounts*, Centre for Competition Policy Working Paper 07-13, 2007, p. 2.

whether or not it is selling at below some appropriate measure of cost.[59] One such measure which has been used by the Commission is average avoidable cost ("AAC").[60] Avoidable costs refer to costs which a firm would avoid incurring by ceasing a particular activity over a specified period of time. The measurement thus includes the variable costs of continuing the activity as well as all fixed costs that are not sunk. AAC is calculated by dividing all avoidable costs by output.[61] To summarise the test, it can be said that if an as efficient competitor is forced to price below its AAC to be able to compete, this means that competition is foreclosed because the as efficient competitor incurs losses by making sales to customers covered by the dominant undertaking's conduct.[62]

The use of the AEC test in regard to loyalty rebates can be illustrated by building on the example in chapter 2.3 above. A depiction will also be made on the next page. Suppose the customer purchases all of its supplies (1000 units) from the dominant undertaking at a price of €9 per unit, a total of €9000. The list price is usually €10 but as recalled any purchase in excess of 900 units generated a €1 rebate on all units purchased. Assume that the customer one year decides to potentially purchase units from another supplier. Another supplier might not be able to compete for the entire purchase of all 1000 units because of, for instance, lack of capacity. Suppose it can compete for 100 units. These 100 units which are open for competition is the "contestable share". If the customer were to purchase 100 units from the competitor, it would still have to purchase the remaining 900 units from the dominant undertaking. It would therefore lose its loyalty rebate and have to pay 900 x €10 = €9000. The customer thus saves €0 by purchasing 100 units fewer from the dominant undertaking. The "effective price" per unit for the contestable share is consequently €0. The competitor would have to match the effective price to be able to compete for the contestable share. The AEC test examines if this is possible for an as efficient competitor. Since an as efficient competitor certainly has an AAC above €0, this rebate scheme would fail the AEC test. An as efficient competitor would not be able to compete with the dominant undertaking since it would have to sell the units below its costs. Lower rebate, larger contestable share and lower AAC would increase the likelihood of passing the AEC test and vice-versa.[63]

[59] Whish, R & Bailey, D, *Competition Law*, p. 775.
[60] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, para. 1037.
[61] Whish, R & Bailey, D, *Competition Law*, p. 755; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 589.
[62] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, para. 1037.
[63] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 591.

Figure 1: The AEC test using the variables from the example above[64]



[64] Influenced by O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU* p. 572.

3 Loyalty Rebates: The Current Legal Situation

Chapter 2 concluded that loyalty rebates may be considered an exclusionary abuse contrary to Article 102 TFEU if it is capable of restricting competition. One way to show whether a rebate scheme is capable of such effects is through an AEC test. This test examines whether an as efficient competitor is able to match a competitor's price that follows from a loyalty rebate on the share of the market that is open to competition without selling under cost. What the following section will focus on is how the legality of loyalty rebates should be evaluated under Article 102 TFEU, thus answering the first research question. In doing so, important case law will be presented and analysed. Three cases will be presented: First, *Hoffmann-La Roche* regarding exclusivity rebates, second *Post Danmark II* which concerns standardised retroactive rebates and third *Intel* which also concerns exclusivity rebates. The Commission's papers concerning exclusionary abuses will also be examined.

3.1 *Hoffmann-La Roche* – a Formalistic Approach?

In order to know where we stand regarding loyalty rebates, it is important to know where we come from. A landmark case regarding exclusivity rebates is *Hoffman-La Roche* which is why some attention must be given to it. Hoffman-La Roche was the world's largest pharmaceutical company at the time which in the early 1960s entered into agreements with several customers in industries, such as pharmaceutical, food and animal feed, regarding the purchasing of its vitamins. The agreements contained contractual clauses offering rebates ranging from usually 1-5%. The rebates were conditioned on fidelity meaning that the rebates were granted only if the customer obtained most (around 80 %) or all of its requirements from Hoffmann-La Roche (exclusivity rebates). The contracts were contested by the Commission and the case reached the CJEU. The Court concluded in paragraph 89 that:

> An undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position (…) [t]he same applies if the [dominant] undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most

> of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position.

The Court held that the exclusivity rebates were incompatible with the objective of undistorted competition and therefore abusive. This was motivated with the argument that exclusivity rebates are not based on an economic transaction which justifies the burden or benefit of exclusivity but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.[65]

But why was paragraph 89 of the Hoffman-La Roche case controversial? There have been several objections to the approach of the CJEU. First, reading paragraph 89 in a literal way would suggest a "*per se*" standard. This would mean that an exclusivity rebate would be unlawful in of itself, regardless of whether it produced or were even capable of producing adverse effects on the market. Such an approach could be criticised on the fact that it is too formalistic and fails to reflect the economic effects of a specific loyalty rebate. Secondly, the approach of the CJEU was criticised given that in general rebates lead to more price competition and should therefore be encourage, even when they come from dominant undertakings. Thirdly, it can be questioned whether the approach in the case granted unduly favourable treatment to competitors rather than to protect the process of competition. Finally, it could be argued that loyalty rebates should only be unlawful if they are capable of eliminating as efficient or more efficient competitors. This perspective would be lost with the formalistic approach.[66]

The formalistic position to exclusivity rebates laid out in *Hoffman-La Roche* was confirmed in subsequent cases.[67] These cases did not primarily concern exclusivity rebates but loyalty rebates that were conditioned upon individualised targets. In these cases, where the rebate was neither an exclusivity rebate nor a quantity rebate linked exclusively to the volume of purchases, a consideration of "all the circumstances" was required according to the CJEU.[68] It was not until *Intel* that the CJEU would "clarify" paragraph 89 of *Hoffmann-La Roche*. Before *Intel* however, there were efforts from the Commission to transition to a more effects-based approach, including a price/cost test.

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[65] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para. 90.

[66] Whish, R & Bailey, D, *Competition Law*, pp. 204-205 and 768-770.

[67] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para. 71; Case C-95/04 P British Airways plc v Commission EU:C:2007:166, para. 62; Case C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, para. 70.

[68] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313 para. 73; Case C-95/04 P *British Airways plc v Commission* EU:C:2007:166, para. 67; Case C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221 para. 71; Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 29.

3.2 The Commission Tries to Transition to an Effects-Based Approach

In 2005 the Commission published its Discussion Paper[69] on the application of Article 102 TFEU. In it, the Commission suggests moving away from any *per se* approach regarding loyalty rebates towards an effects-based approach, including an analysis whether the loyalty rebates would lead to a price below cost for the contestable share, in essence an AEC test.[70] A similar version of the effects-based approach was later reflected in the Commission's Guidance Paper of 2008. In this Paper, the Commission states that concerning price-based exclusionary conduct, 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.[71] The Guidance Paper states in regard to loyalty rebates specifically, that one element of the approach should be to evaluate the effective price. The paragraph explains that where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors.[72] The Commission hereby arguably declared that an AEC-test should be applied when evaluating loyalty rebates and whether the Commission should intervene.[73]

The Commission's transition to a more economic approach including a price/cost test such as the AEC test, as advocated in its papers, has not been without problems though. In *Tomra*, which was a case concerning exclusivity rebates as well as individualised retroactive rebates, the Commission used an effects-based approach including a price/cost test. The Commission wanted to go even further in not only showing the capability but the likely effects of the rebate schemes, maintaining at the same time this was not necessary according to the CJEU case law when finding an abuse. Such an analysis was merely optional according to the Commission.[74] The CJEU found that, as alleged by Tomra, the Commission's price/cost test in fact contained errors. However, the CJEU held that the fact that the rebate schemes obliged competitors to ask negative prices (prices below cost) to be able to compete was not a prerequisite in finding an abuse and that this circumstance could not be regarded a fundamental part of the Commission's decision.[75] The CJEU thereby agreed with the Commission that the price/cost test and the effects-approach was not important in finding an abuse. Of course, it did not help the Commission's cause of trying to advance an important shift in policy regarding loyalty rebates when it at the same time

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[69] European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, 2005.
[70] *Ibid*., chapter 7 and in particular section 7.2.2.1.
[71] European Commission, *Guidance Paper*, para. 23.
[72] *Ibid*., para. 44.
[73] *Ibid*., paras. 37-46; Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 58; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 284 and 545-546.
[74] Case COMP/E-1/38.113, *Prokent-Tomra*, Commission Decision of 29 March 2006, para. 332.
[75] Case C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, paras. 73-74.

disavowed the approach as being unnecessary when it was challenged in appeals.[76] As will be explained below, the same situation occurred in *Intel* but with the result that the CJEU found that it could not disregard the Commission's effect analysis and AEC test.

3.3 *Post-Danmark II* – "all the circumstances"

An important case regarding loyalty rebates is *Post Danmark II* which was decided two years before the CJEU judgement in *Intel*. Post Danmark was at the time controlled by the Danish State and was responsible for the one-day delivery universal postal service, throughout Danish territory, for letters and parcels, including bulk mail, weighing less than 2 kg. Post Danmark had a statutory monopoly on the distribution of all mail weighing up to 50 grams. The monopoly therefore covered over 70% of the bulk mail market, which was the relevant market in the case. A segment of the bulk mail market was direct advertising mail. Post Danmark had implemented a loyalty rebate scheme concerning direct advertising mail. That rebate scheme contained a scale of rates from 6% to 16% and was standardised to all customers. In addition, the rebate scheme was retroactive in character. Bring Citymail had entered the market for a short number of years as the only serious competitor on the bulk mail market, including direct advertising mail, but had to withdraw due to suffering heavy losses. After a complaint from Bring Citymail, the national competition authority found that Post Danmark through its rebate scheme had abused its dominant position. The decision was upheld in the Competition Appeals Tribunal and later brought before the Maritime and Commercial Court which asked the CJEU for a preliminary ruling.[77]

The CJEU in *Post Danmark II* made a series of important findings. First, it reaffirmed earlier case law stating that when assessing rebate schemes which are not based solely on exclusivity but at the same time are not pure quantity discounts, it is necessary to consider all the circumstances. The Court stated that foreclosing indicators of particular importance was the criteria and rules governing the grant of the rebate, and whether the 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. As to criteria and rules governing the grant of the rebate it was held by the CJEU that the retroactive nature combined with a relatively long reference period (one year) had the potential of creating a "suction" effect on customers.[78]

Second, in examining all the circumstances, it was also considered necessary to take into account the extent of the undertaking's dominant position and the particular conditions of competition prevailing on the relevant market. The

[76] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 546-547; Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', *Competition Law & Policy Debate*, vol. 4, issue 2, 2018, p. 43.
[77] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 3-20.
[78] *Ibid*., paras. 28-29 and 32-35.

CJEU held that Post Danmark had a 95% share of the market, access to which was characterised by high barriers and the existence of economies of scale. Post Danmark also had structural advantages in form of *inter alia* the monopoly and unique geographical coverage. The CJEU stated that given those circumstances, a loyalty rebate scheme as the one in question tends to make it more difficult for customers to obtain supplies from competing undertakings thereby producing an anticompetitive exclusionary effect.[79]

Third, the CJEU stated that market coverage may constitute a useful indication as to the extent of the contested practice and its impact on the market, which may bear out the likelihood of an anticompetitive exclusionary effect. This was relevant in the case since the rebate scheme covered the majority of the customers on the market.[80]

Fourth, the CJEU held that charging prices below cost to customers is not a prerequisite of a finding that a retroactive rebate scheme is abusive.[81] As a result, it was not considered a legal obligation that finding an abuse must be based always on the AEC test. According to the CJEU, the AEC test was to be regarded as one tool amongst others for the purpose of assessing whether there is an abuse of a dominant position in the context of a rebate scheme. The test was considered of no relevance in the particular case.[82]

3.4 The *Intel* saga – a Reorientation of the Law?

3.4.1 The Decision of the Commission and the GC Judgement

In 2009 the Commission imposed a fine of €1.06 billion on Intel after complaints from a competitor called AMD. Intel and AMD were at the time considered the main manufactures of a certain type of central processing unit ("CPU") called x86. Intel was according to the Commission dominant in this market given a market share of around 80% combined with very high barriers to entry and expansion. The Commission alleged abuse by Intel consisting of two different practices. The first practice was granting rebates to its customers on the condition that they obtained all or most of their CPUs from Intel (exclusivity rebates). The second practice were so-called "naked restrictions" which meant direct payments to its customers to delay, cancel or in some other way restrict the commercialisation of specific AMD-based products. The Commission considered the rebates and payments a single continuous infringement of Article 102 TFEU which was

[79] *Ibid*., paras. 30 and 39-42.
[80] *Ibid*., para. 46.
[81] *Ibid*., para. 56; C.f. Case C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, para. 73.
[82] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 57 and 61-62.

capable of having or likely to have had a negative impact overall on the market, which harmed consumers by depriving them of choices.[83]

Regarding the exclusivity rebates, the Commission argued in its decision with reference to case law, in particular *Hoffman-La Roche*, that it was not obligated to prove any actual anticompetitive effects or indeed the capability or likelihood of anticompetitive effects.[84] Nevertheless, in its decision the Commission still set out to demonstrate this through an AEC-test.[85] As it had done in previous cases,[86] the Commission therefore undertook an effects analysis including an AEC test, in line with its Guidance Papers, while at the same time claiming that this was not a necessity.

The GC essentially agreed with the arguments made by the Commission and upheld its decision. The rebates were held to be exclusivity rebates which were considered to be generally illegal. The GC concluded that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition. The GC held that the Commission was not required to carry out an analysis of the circumstances of the case in order to establish at least a potential foreclosure effect. An AEC test was therefore not necessary in finding an abuse. In light of this, the GC also held that it was not necessary to consider Intel's claim that the AEC test was not carried out correctly.[87]

3.4.2 The Judgement of the CJEU

The case was appealed to the CJEU. The CJEU began with recalling some general principles regarding exclusionary abuses, including that competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation. Nevertheless, the Court reiterated that it is prohibited for a dominant undertaking to adopt pricing practices, such as loyalty rebate schemes, that have an exclusionary effect on competitors as efficient as it is itself.[88]

The CJEU then went on to "clarify" paragraph 89 of *Hoffman-La Roche*[89] in the case where a dominant undertaking submits, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. The Court stated that in these cases an analysis of the intrinsic capacity of the practice to foreclose competitors which are at least as efficient as the dominant undertaking must be carried out. Five

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[83] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, paras. 123, 852, 1640, 1678 and 1747; C.f. Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 122.
[84] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, paras. 920-925; C.f. Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 122.
[85] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, section 4.2.3.
[86] C.f. chapter 3.2 above.
[87] Case T-286/09, *Intel Corp. v Commission*, EU:T:2014:547, paras. 76-77, 79, 85, 95-101, 143 and 151.
[88] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, paras. 134 and 136.
[89] C.f. chapter 3.1 above.

criteria must therefore be analysed by the competition authority: (i) the extent of the undertaking's dominant position; (ii) the share of the market covered by the contested practice; (iii) the conditions and arrangements for granting the rebates in question; (iv) their duration and their amount; (v) the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[90]

The CJEU also decided that the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue were capable of having foreclosure effects on as efficient competitors. Therefore, the GC was required to examine all of Intel's arguments concerning that test. This led to the conclusion that the GC wrongly failed to take into consideration Intel's line of arguing seeking to expose alleged errors committed by the Commission in the AEC test. The GC judgement was thus set aside.[91]

3.4.3 The Renvoi Judgement of the GC

The judgement of the GC in the remitted case clarified some important points. First, the GC stated that exclusivity rebates set up by a dominant undertaking may be characterised as a restriction of competition, since, given its nature, it may be assumed to have restrictive effects on competition. Nevertheless, the GC pointed out that this is a mere presumption and not a *per se* infringement of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to conduct an effects analysis. Second, the GC reiterated the competition authority's obligation to analyse the five criteria set out by the CJEU. Lastly, the GC stated that although the CJEU did not hold that an AEC test necessarily had to be carried out in order to examine the foreclosure capability of all rebate systems, where the Commission has carried out an AEC test, that test is one of the factors which must be taken into account by the Commission to assess whether the rebate scheme is capable of restricting competition. The Court must also analyse the substance of any arguments the defendant makes concerning that the AEC test is vitiated by errors.[92]

The GC undertook an in-depth analysis of Intel's alleged errors of the AEC test carried out by the Commission. The GC concluded that the AEC test was indeed vitiated by errors. Among other errors, in regard to one customer the calculation of contestable share was not considered to be correct, and in regard to a second customer, the size of the rebate was overestimated. The Commission failed to establish to the requisite legal standard that the rebates were capable of having anticompetitive foreclosure effects in regard to **all** the customers examined using the AEC test.[93]

It was also examined whether the Commission had properly analysed the five criteria set out by the CJEU. The GC found that the Commission did not

[90] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, paras. 139-140.
[91] *Ibid*., paras. 140-146.
[92] Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, paras. 119, 124-126 and 159.
[93] *Ibid*., paras. 256, 287, 335, 411, 457 and 481.

properly consider the criterion relating to the share of the market covered by the contested practice. In addition, it was found that although the Commission had in its AEC test examined some duration aspects, this was not enough in fulfilling the criterion of examining the rebates duration. The GC held that its previous finding regarding the unlawfulness of the naked restrictions would still stand, but that the Commission had considered the naked restrictions and the exclusivity rebates as a whole. The GC therefore annulled the Commission's imposed fine in its entirety.[94]

3.5 Conclusions on the Current Legal Situation

There has been a debate whether *Intel* is a reorientation of the law towards a more effects-based approach from the allegedly formalistic approach in *Hoffman-La Roche*. Some argue that the legal position is not all that different and that *Intel* merely was, to use the terminology of the CJEU, a "clarification".[95] According to AG Wahl, who was the AG in *Intel*, the conclusion concerning the unlawfulness of the rebates in *Hoffman-La Roche* was based on a thorough analysis of, *inter alia*, the conditions surrounding the grant of the rebates and the market coverage thereof.[96] According to Wahl, the CJEU therefore considered several circumstances relating to the legal and economic context of the rebates in finding that the undertaking in question had abused its dominant position.[97] Wahl thus makes the point that since *Hoffman-La Roche* it has always been necessary to take into account "all the circumstances" and that the CJEU have been doing this ever since that case.[98] With this in mind, *Intel* does not seem to reorient the law in any ground-breaking way. Others argue that the CJEU did much more than just "clarify" the law and that *Intel* is the case that *de facto* marks the end of the *per se* approach.[99] For instance, Nicolas Petit argues that the *Intel* promulgates a rule of reason approach.[100] The CJEU has re-affirmed its position that there exists no *per se* illegality in *Paroxetine*. In this case the CJEU stated that if a conduct is to be characterised as abusive, that presupposes that the conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects and that assessment must be undertaken having regard to all the relevant facts surrounding that conduct.[101]

In practice, the judgement of the CJEU in *Intel* meant that an, in essence, procedural obligation was put in place on the competition authority to consider

[94] *Ibid*., paras. 90-102, 482, 500, 520 and 526-530.
[95] Grasso, R, 'Conditional Pricing in Europe and the CJEU's Ruling in Intel: What's New', *Competition Law & Policy Debate*, vol. 4, issue 2, 2018, p. 32.
[96] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2016:788, para. 66.
[97] *Ibid*., para. 75.
[98] *Ibid*., para. 74.
[99] Whish, R & Bailey, D, *Competition Law*, pp. 205 and 772; Monti, G, *Rebates after the General Court's Intel Judgment*, TILEC Discussion Paper No. DP2022-004, 2022.
[100] Petit, N, 'The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases', *European Law Review*, vol. 43, issue 5, 2018, p. 23.
[101] Case C-307/18, *Generics (UK) Ltd and Others v CMA*, EU:C:2020:52, para. 154.

evidence from the dominant undertaking allegedly showing the absence of anti-competitive foreclosure effects on competitors because of its coverage, conditions, duration etc. (the five criteria). This creates an opportunity for dominant undertakings to produce evidence, for instance an AEC test, to rebut the presumption that the rebates in question were capable of foreclosing competition – a rebuttable presumption.[102] The CJEU did not use the term "presumption", which led to commentators questioning whether such a presumption even existed and arguing that the effects-based approach was to be carried out without such a presumption.[103] However, the GC in the remitted case did use the term "presumption", bringing clarity to this particular issue.[104] *Intel* thus removes any existing *per se* approach to loyalty rebates and is in line with the Commission's Guidance Paper of 2009.[105]

Since it is possible to rebut the presumption, a dominant undertaking would almost inevitably respond to an accusation from a competition authority with a claim that its evidence shows that the loyalty rebates in question do not have foreclosure effects. The competition authority would then have to respond with its own economic analysis based on the five criteria: (i) the extent of the undertaking's dominant position; (ii) the share of the market covered by the contested practice; (iii) the conditions and arrangements for granting the rebates in question; (iv) their duration and their amount; (v) the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[106] While the CJEU in *Intel* did not directly reference *Post Danmark II*, the Court seems to affirm the principle of considering all the circumstances (without using the term "all the circumstances") and the foreclosure indicators stated *Post Danmark II*, even in cases involving exclusivity rebates.[107] Since this is needed in cases concerning exclusivity rebates where the abuse is presumed, this demonstrates the importance of showing anticompetitive effects in cases where the loyalty rebate scheme is not subject to a presumption of illegality, i.e., cases regarding rebates that are neither based solely on exclusivity nor quantity, for instance loyalty rebate schemes such as the one in *Post Danmark II*.[108] Given that a dominant undertaking would almost inevitably try to rebut the presumption of abuse, it is impossible to suppose that the competition authority

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[102] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 561; Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', *Competition Law & Policy Debate*, vol. 4, issue 2, 2018, pp. 68-69; Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 60; Whish, R & Bailey, D, *Competition Law*, p. 205.

[103] Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', pp. 47-49.

[104] Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 124.

[105] Boutin, A & Boutin, X, 'The as Efficient Competitor Test - Back to Facts', p. 51; Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', p. 43.

[106] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, paras. 139-140.

[107] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 29; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 547 and 577; Robertson, V, 'Rebates under EU Competition Law after the 2017 Intel Judgment: The Good, the Bad and the Ugly', *Market and Competition Law Review*, vol. 2, issue 1, 2018, p. 41.

[108] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 577-578.

would not conduct an effects analysis in the first place.[109] Of course, this raises the theoretical question of how much evidence is needed to rebut the presumption. Arguably, if the dominant undertaking submits at least some evidence that goes beyond mere assertion or speculation[110] that raises doubts about the capability of the practice to restrict competition, the Commission would most likely have to analyse and try to rebut it.[111] In light of this, it must be considered fairly easy for a dominant undertaking to rebut the presumption of abuse.[112]

[109] Whish, R & Bailey, D, *Competition Law*, p. 772; see also Grasso, R, 'Conditional Pricing in Europe and the CJEU's Ruling in Intel: What's New', pp. 26 and 32; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU* pp. 561 and 578; Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', p. 49.

[110] C.f. Case T-216/13, *Telefónica, SA v Commission*, EU:T:2016:369, para. 130: "it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of the evidence".

[111] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 561; Colomo, P, 'The future of Article 102 TFEU after *Intel*', *Journal of European Competition Law & Practice*, vol. 9, issue 5, 2018, p. 302.

[112] See Potter, A, & Wilkins, N, 'Long Way from Formalism: Has Price Abuse Law in the European Union Come of Age', *Antitrust*, vol. 32, issue 3, 2018, p. 85: "[t]he presumption should, therefore, have become one in name only".

4 The Role of the AEC Test

Chapter 3 has discussed the current legal situation regarding loyalty rebates in general. This chapter will go deeper into the current legal situation specifically concerning the AEC test. This section will answer the second research question.

4.1 What Does *Intel* Entail for the AEC Test?

The CJEU in *Intel* contains three important parts with regard to the AEC test which arguably indicates in a more direct way than previously, that the AEC test is of importance when considering loyalty rebates.[113] First, competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient.[114] Second, where a dominant undertaking submits, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, it is a requirement to undertake an analysis of all the circumstances based on the five criteria including market coverage, conditions, duration, amount of the rebate etc.[115] Third, 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 therefore the GC was required to examine all of Intel's arguments concerning that test.[116] This was confirmed in the remitted GC case were the GC stated that where an AEC test has been carried out, the test is one of the factors which must be taken into account to assess whether the rebate scheme is capable of restricting competition and the substance of the defendant's argument concerning the test would have to be examined.[117]

Intel therefore made two important points in regard to the AEC test. First, the CJEU made the general point that the line between anticompetitive behaviour and competition on the merits is whether an as efficient competitor is excluded from the market.[118] The CJEU therefore seems to accept the AEC test as the conceptual framework for the analysis.[119] In other words, the AEC test is part of

[113] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 291-292 and 577.
[114] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 134.
[115] *Ibid*., paras. 138-139.
[116] *Ibid*., paras. 143-144.
[117] Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, paras. 126 and 159.
[118] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 292 and 577-578.
[119] Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', pp. 66-67.

the definition of abuse which distinguishes hard, but fair, competition from anticompetitive effects. Second, the Commission will in practice be under the obligation to consider the AEC test in loyalty rebate cases. Following *Intel*, dominant undertakings will probably routinely submit evidence that is *prima facie* exculpatory, serving to rebut the presumption of abuse (see chapter 3.5 above). In practice, an AEC test will therefore be carried out and submitted frequently as such evidence and the Commission will be hard-pressed to analyse it as part of their procedural obligation.[120] One could go as far as arguing that in practice the effect is not merely a procedural obligation but the creation of a *de facto* substantive rule to this effect. Among others, one that has argued this is AG Whatelet.[121] Though, some would argue that it is unclear to what degree the five criteria that are required to be analysed can supersede the AEC test, if such a test is presented by the dominant undertaking as evidence. In other words, is it in theory possible for the competition authority to not respond to an AEC test carried out by a dominant undertaking and instead solely focus on these five criteria, or is it required at least to rebut the test?[122]

The only reasonable scenario in which a dominant undertaking would not submit an AEC test is where the dominant undertaking believes that it will overwhelmingly fail the test. In these cases, it is not likely that the Commission would rely solely on a mere presumption of abuse, but would rather conduct its own AEC test in an effort to show that the rebate scheme in question was capable of anticompetitive foreclosure.[123] An AEC test is thus likely to be introduced into proceedings one way or the other.

It is important to reiterate that the CJEU held in *Post Danmark II* that the AEC test is not a formal legal requirement but merely one tool amongst many to assess abuse.[124] The GC's renvoi judgement in *Intel* likewise stated that the AEC test is not a legal requirement.[125] Nevertheless, the CJEU has also stated that there is no reason, on principle, to exclude an AEC test for examining a rebate scheme's compatibility with Article 102 TFEU.[126] What this discussion shows is that the AEC test will probably frequently be submitted in practice as evidence, either by the defendant or by the competition authority itself. The competition authority will therefore in most cases be under the obligation to consider an AEC test.

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[120] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 292 and 577-578.
[121] Case C-123/16 P, *Orange Polska S.A. v Commission*, EU:C:2018:87, paras. 74-77; See also O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 292; Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', pp. 43 and 49.
[122] Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', p. 50.
[123] *Ibid*., p. 49.
[124] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 57 and 61.
[125] Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 126.
[126] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 58.

4.2 What About Other Exclusionary Abuses and the Issue of Pricing Under Cost?

Intel would certainly indicate an acceptance of the use of the AEC test in legal proceedings concerning loyalty rebates. However, this must be seen in light of the history of the test's usage and systemic considerations of exclusionary abuses, which may not leave this acceptance free from doubt. Over three decades ago, the CJEU decided the landmark case *AKZO* regarding predatory pricing. The Court established that a price/cost analysis was to be applied where a dominant undertaking would be allowed to charge prices as low as its average variable costs ("AVC") without there being a presumption of abusive behaviour.[127] This would also apply where the dominant undertaking's costs are lower than its competitors. Exclusionary effects on less efficient competitors (those with higher costs) were not protected under the test.[128] This same AEC test has later also been used in several margin-squeeze cases.[129]

However, outside the areas of predatory pricing and margin squeeze, the AEC test has been an outlier, not being applied by the Commission and EU Courts.[130] In *Post Danmark II* the CJEU confirmed the acceptance of use of the AEC test in cases of predatory pricing and margin squeeze. Nevertheless, the CJEU then continued in the following paragraphs in making three important statements concerning the application of the AEC test specifically in regard to loyalty rebates. First, pricing below cost is not a prerequisite in finding an abuse. Second, there is no legal obligation that finding an abuse must be based always on the AEC test. Third, the AEC test is just one tool amongst others for the purpose of assessing whether there exists an abuse.[131] This could be interpreted as the CJEU trying to make a deliberate distinction in the use of the AEC test between on the one hand unconditional price cuts under predatory pricing and margin squeeze, and on the other hand conditional price cuts under loyalty rebates.[132] *Post Danmark II* has not been overruled so one could ask if such a distinction exists regarding the use of the AEC test? It is not uncommon that it is argued that such a distinction should be made concerning exclusivity rebates with the argument that exclusivity rebates resemble exclusive dealing more than a pricing practise. For instance, a price is not predatory and does not produce any anticompetitive foreclosure effects unless it is below cost. An exclusivity rebate, on the other hand, is in practice a non-compete obligation and thereby distorts the competitive process in of itself even though it may be above some measurement of

[127] Case C-62/86, *AKZO Chemie BV v Commission*, EU:C:1991:286, paras. 70-73.
[128] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 289.
[129] See e.g. Case C-280/08 P, *Deutsche Telekom AG v Commission*, EU:C:2010:603, paras. 198-204; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paras. 40-46.
[130] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 290.
[131] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 55-57 and 61.
[132] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 290.

cost.[133] Nevertheless, it is argued that the same exclusionary mechanisms are at play for exclusivity rebates as for pricing practices such as predatory pricing, which is why they should be treated the same way.[134] The Commission has likewise recently argued that exclusivity rebates should be treated differently from exclusive dealing in *AdSense*:

> "(…) an exclusive supply obligation constitutes a greater obstacle to access to the market than exclusivity rebates. An exclusive supply obligation deprives a customer of the possibility to switch any of its requirements to a competitor of the dominant undertaking whereas exclusivity rebates deprive a customer of the rebate associated with the exclusivity condition if it switches part of its requirements to a competitor of the dominant undertaking."[135]

As to the current legal position, one could argue that a formalistic distinction between conditional and unconditional price cuts made in *Post Danmark II* has been superseded by statements in *Intel* where the CJEU did not make such a distinction and qualified the exclusivity rebate scheme merely as a "pricing practice" (and not exclusive dealing).[136] This can be supported by the fact that *Post Danmark II* is not referenced to by the CJEU in *Intel*.[137]

Adding doubts to the acceptance of the AEC test in regard to loyalty rebates is the fact that the Commission's stance has historically not always been clear. As touched upon above in chapter 3.2, the Commission sometimes seems to promulgate one thing on paper and not endorsing this in practice. In paragraph 27 of its Guidance Paper, the Commission states that if the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anticompetitive foreclosure, taking into account other relevant quantitative and/or qualitative evidence. Arguably, this indicates that an AEC test would be in the centre when assessing exclusionary pricing abuses such as loyalty rebates.[138] However, as late as the decision in *Intel*, the Commission did not consider the AEC test to be central. The AEC test was instead considered to be of a facultative nature.[139]

In addition, going back to cases before *Post Danmark II*, there may also have been some lack of consistency by the CJEU. In *Post Danmark I* the CJEU held that to the extent that a dominant undertaking sets its prices at a level covering its costs it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete.[140] This indicates an endorsement of an AEC test.

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[133] Case T-286/09, *Intel Corp. v Commission*, EU:T:2014:547, para. 99; Wils, W, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance', *World Competition: Law and Economics Review*, vol. 37, issue 4, 2014, p. 429.
[134] De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', *Competition Law & Policy Debate*, vol. 4, issue 2, 2018, p. 76.
[135] Case AT.40411, *Google Search (AdSense)*, Commission Decision of 20 March 2019, para. 344.
[136] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 136.
[137] Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', pp. 44-46.
[138] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 290-291.
[139] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, para. 925.
[140] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para. 38.

Nevertheless, not too long after this judgement, the CJEU in *Tomra* stated that failing to examine whether the prices charged by the dominant undertaking were under its costs had no effect on the conclusion of finding an abuse. The CJEU further added that pricing below cost is not a prerequisite in finding an abuse.[141] This later statement was reiterated in *Post Danmark II*.[142] This indicates that there might even be some inconsistencies between *Post Danmark I* and *Post Danmark II*. It is known that the CJEU is not always keen on expressively overruling its own judgements,[143] but it must be considered noteworthy that *Post Danmark II* is not referenced to even once in *Intel*. Arguably, this is a sign that the judgement in *Post Danmark II* has fallen out of favour. The rulings of the CJEU and the decisions of the Commission discussed above therefore casts some doubt over how reliable the AEC test is for the purpose of finding an abuse in regard to loyalty rebates. This is because it cannot be ruled out that rebate schemes which does not require as efficient competitors to charge prices below cost can nevertheless be considered abusive in some circumstances.[144] Reading *Intel* in isolation of its history may lead one to believe that the current legal situation and the acceptance of the AEC test in regard to loyalty rebates is crystal clear, when it in fact may be covered in some doubt.[145]

4.3 The Use of the AEC Test Post-*Intel*

It is of interest to see how the Commission and dominant undertakings in practice have used, or not used, the AEC test as a result of the CJEU judgement in *Intel*. There have been several Commission decisions since *Intel* that can shed light on the situation. The following cases mainly concern exclusivity payments which are treated the same way as exclusivity rebates.

Three leading post-*Intel* cases on exclusivity are *Broadcom*, *Qualcomm* and *Google Android*. Broadcom is a worldwide dominant supplier in several different chipset markets for TV set-top boxes and modems.[146] It had allegedly abused this position by entering into exclusivity agreements with its customers.[147] The Commission did not carry out an AEC test which Broadcom argued that the Commission should have done. The Commission, on the other hand, argued that *Intel* did not provide such an obligation but rather left it to the enforcement authorities to assess whether or not it is appropriate to run such a test in a particular case.[148]

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[141] Case C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, paras. 67 and 73.
[142] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 56.
[143] Hettne & J, Otken Eriksson, I, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, p. 51.
[144] C.f. De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', p. 74.
[145] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 289-294.
[146] Case AT.40608, *Broadcom*, Commission Decision of 16 October 2019, para. 173.
[147] *Ibid*., paras. 189-191 and 240-243.
[148] *Ibid*., paras. 342 and 350-351.

The case was later settled with the Commission accepting commitments from Broadcom.[149]

Qualcomm was imposed a €997 million fine as it was considered to be dominant in the worldwide market for LTE chipsets and had abused this position by granting payments to Apple on condition that Apple obtain from Qualcomm all of Apple's requirements of LTE chipsets. The Commission held that the behaviour was presumed abusive à la *Hoffmann La-Roche*. Secondly, it held à la *Intel* that where the dominant undertaking concerned seeks to rebut the presumption of abuse by submitting, during the administrative procedure, on the basis of supporting evidence, that its exclusivity payments were not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the Commission is required to analyse the five criteria.[150] Consequently, since Qualcomm sought to rebut the presumption, *inter alia* by carrying out an AEC test, the Commission therefore examined: (i) the extent of Qualcomm's dominant position on the worldwide market for LTE chipsets; (ii) the share of the worldwide market for LTE chipsets covered by the exclusivity payments; (iii) the conditions and arrangements for granting the exclusivity payments; (iv) their duration and amount; and (v) the importance of Apple as a baseband chipset customer. Following this, the Commission concluded that Qualcomm's exclusivity payments were capable of having anticompetitive effects. The Commission did not use an AEC test, arguing that it was not obliged to carry out such a test. It instead relied upon other evidence such as internal documents of Apple to show reduced incentives to switch supplier. However, a central part of Qualcomm's defence was that the payments passed an AEC test. The test allegedly showed that had Apple taken the decision to switch supplier, a hypothetical competitor, assumed to have the same AVC as Qualcomm, would have been able to cover those costs when supplying LTE chipsets. The Commission rejected the AEC test, arguing that it was based on several unrealistic or incorrect assumptions. One argument was that a competitor would have to not only recover AVC but also fixed costs due to the fact that the LTE chipsets market was characterised by high research and development ("R&D") expenses. A second argument was that Qualcomm's assumption that *all* Apple's requirements of LTE chipsets for the relevant iPhone generations were contestable was wrong.[151]

Another Commission decision of interest is *Google Android*. Google has been fined over €4.3 billion for several different infringements that together were considered a single and continuous infringement. One of those infringements was that Google had granted payments to customers on condition that they pre-installed no competing general search service on any device within an agreed portfolio. As a result, if a customer had pre-installed a competing general search service on any device within an agreed portfolio, it would have had to forego the payments not only for that particular device but also for all the other devices in that portfolio. This was considered exclusivity payments by the Commission

[149] Case AT.40608, *Broadcom*, Commission Decision of 7 October 2020.

[150] See case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 139.

[151] Case AT.40220, *Qualcomm (Exclusivity payments)*, Commission Decision of 24 January 2018, paras. 305, 382-383, 388, 411, 486-503, 533 and section 11.4.2.

since the payments made by Google were conditioned on the customer obtaining from Google all or almost all of their requirements for general search services.[152] The Commission argued that a competing search service would have been unable to compensate for the loss of Google's payments since it would sometimes have to pay more than its revenues.[153] Although this line of arguing was intended to show that the payments would exclude as efficient competitors, it is noteworthy, for the purpose of this paper, that the Commission did not engage in an AEC test to the same extent as it did in *Intel*.

4.4 Conclusions on the Role of the AEC Test

Intel indicates an endorsement of the AEC test given two reasons. The first reason is the fact that engaging in a loyalty rebate scheme is only abusive if it is capable of foreclosing as efficient competitors. The second reason is the practical significance a carried-out test has on proceedings. If the Commission has relied upon such a test, arguments concerning that test must be examined by the court. In addition, *Intel* also provides defendants the opportunity to rebut the presumption of abuse by producing their own AEC test. In practice, this is likely to occur and the Commission must then examine all the circumstances regarding the rebate in question based on five criteria. The Commission will be hard-pressed not to simply ignore an AEC test submitted by the defendant as this may present an appeal point. The real practical question for the future is how demanding the EU Courts will be in assessing the Commission's decisions where an AEC test is submitted by the defendant to show the absence of foreclosure effects on as efficient competitors.[154] The unconditional acceptance of the AEC test in legal proceedings is however not without doubt. First, earlier case law, especially *Post-Danmark II*, indicates that an AEC test is not always relevant. Second, exclusivity rebates differ from other types of exclusionary abuses for which the AEC test has previously been confined to, due to its conditionality and strong resemblance to exclusive dealing rather than pricing practices. It is however likely that *Intel* has removed such a distinction.

As to the use of the AEC test post-*Intel*, it is difficult to draw any certain conclusions from these cases. What can be said is that the Commission may feel reluctant to carry out a full-fledged AEC test since it can be contested by the dominant undertaking at every juncture of the test. Considerable disputes of facts and issues of judgement are likely to arise leading to a huge scope of variability in outcomes regarding the test which makes it easier to argue that the test has not been carried out correctly. This is what happened in *Intel* where the test was heavily contested.[155] The in-depth scrutiny of the test by the GC in the renvoi judgement, which caused the Commission to lose the case, will probably amplify

[152] Case AT.40099, *Google Android*, Commission Decision of 18 July 2018, section 13.3.
[153] *Ibid*., section 13.4.1.2.
[154] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 578.
[155] *Ibid*., p. 591.

the reluctance to use an AEC test from the competition authority's point of view. What *Qualcomm* also indicates is the increased importance of the AEC test as a line of defence in loyalty rebate cases. How demanding the EU Courts will be in their evaluation of the coming Commission's decisions, especially where an AEC test is introduced, remains to be seen. *Qualcomm* and *Google Android* are both pending appeal before the GC at the moment this paper is written.[156]

[156] Case T-235/18, *Qualcomm v Commission*, OJ 2018/C 190/66; Case T-604/18, *Google and Alphabet v Commission*, OJ 2018/C 445/26.

5 How does the AEC Test Conform with the Purposes of Article 102 TFEU?

Different interests are at stake when creating an optimal legal rule for abusive conduct. In essence, what is sought after is an optimal trade-off between making the rule fulfil its purpose without making practical enforcement inefficient.[157] This chapter is dedicated to the former interest. This chapter will therefore analyse whether the current legal situation concerning the AEC test in regard to loyalty rebates is desirable or not from the perspective of making Article 102 TFEU fulfil its purposes. This section therefore answers the third research question.

5.1 What Is Being Protected and What Are the Purposes of Article 102 TFEU?

Historically, one main criticism of Article 102 TFEU has been that it subjects dominant undertakings to a handicap vis à vis its competitors, where legal acts that are beneficial for competition such as rebates become illegal as soon as the undertaking becomes dominant. The criticism stems from the argument that undertakings which are more efficient become restrained in order to make room for less efficient competitors.[158] The Commission has responded to the criticism by stating in its Guidance Paper that it is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors.[159] *Intel* furthermore provides clear evidence that the purpose of Article 102 TFEU is in fact in no way to protect competitors that are less-efficient.[160] This confirms both previous case law in recent time[161] and has been confirmed by the CJEU after *Intel*.[162] The answer to the question of what is being protected by Article 102

[157] C.f. Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', p. 65.
[158] Whish, R & Bailey, D, *Competition Law*, p. 201.
[159] European Commission, *Guidance Paper*, para. 6.
[160] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 133.
[161] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paras. 31-33, 39-40, 43, 63-64, 67, 70 and 73; Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, paras. 21, 22, 25 and 38; Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 53-55 and 66.
[162] Case C-525/16, *MEO – Serviços de Comunicações e Multimédia*, EU:C:2018:270, para. 31; Case C-165/19 P, *Slovak Telekom v Commission*, EU:C:2021:239, para. 109.

TFEU must therefore be considered to be the process of competition and not individual competitors.[163]

A closer look is needed to understand why this is. Article 3(3) TEU and its Protocol 27 only provides that the EU shall establish an internal market which includes a system ensuring that competition is not distorted. It does neither say **why** this is beneficial nor what competition law is meant to achieve. Several different goals are imaginable: efficiency, consumer welfare, producer welfare, total welfare, fairness, economic freedom and economic equity. These goals all sound desirable but vague and they may not always be consistent with one another.[164] The Commission has offered its thoughts on what the primary goals of Article 102 TFEU are in its Guidance Paper where it is stated that the exclusion of less efficient competitors may well mean that competitors **who deliver less to consumers** in terms of price, choice, quality and innovation will leave the market.[165] The Commission has further stated that:

> "In applying Article [102] to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are **most harmful to consumers**. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that **consumers benefit** from the **efficiency** and productivity which result from effective competition between undertakings" [Emphasis added].[166]

This indicates that consumer welfare is one primary goal of Article 102 TFEU as well as economic efficiency. These statements have been, at least indirectly, endorsed by the CJEU in the Grand Chamber judgement *Post Danmark I*. The CJEU stated *inter alia* that Article 102 TFEU covers conduct that has a detrimental effect on consumers. It furthermore reiterated the idea that what is worth protecting is as efficient competitors and stated that conduct that is contrary to Article 102 TFEU may nevertheless be justified due to benefits to consumers.[167] Another Grand Chamber judgement in *Intel* provides further evidence that consumer welfare is the primary objective. It stated that competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[168] The CJEU continued in stating that the exclusionary effect arising from a rebate scheme which is disadvantageous for competition, may be justified by advantages in terms of efficiency which also benefit the consumer.[169] These statements by

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[163] Whish, R & Bailey, D, *Competition Law*, p. 202; Hajnovicova, R, Lang, N & Usai, A, 'Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel', p. 146.
[164] Whish, R & Bailey, D, *Competition Law*, p. 17; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 6.
[165] European Commission, *Guidance Paper*, para. 6.
[166] *Ibid*., para. 5.
[167] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, paras. 24 and 38-41.
[168] Case C-413/14 P, *Intel Corp. v Commission*, EU:C:2017:632, para. 134.
[169] *Ibid*., para. 140.

the Commission, and more importantly by the two Grand Chamber judgements, indicates that consumer welfare primarily, but also efficiency, is at the heart of the goals of Article 102 TFEU. The process of competition is used as a proxy to establish whether a conduct will hurt consumer welfare; if the competitive structure is hurt, a reduction of consumer welfare will often follow.[170]

5.2 Should Less Efficient Competitors be Protected?

The current legal position is thus that only as efficient competitors should be protected. The AEC test encapsulates this idea. Since the test allows for the identification of exclusion of less efficient competitors it can be considered an appropriate test to use and *Intel* also indicates an acceptance of the test in proceedings.[171] However, a discussion on whether this current legal position is satisfactory in achieving the purposes of Article 102 TFEU is warranted. One criticism of the test is that less efficient competitors can in fact enhance consumer welfare when the increased competition they bring benefits the consumer more than the cost of their relative inefficiency and that the AEC test therefore is too strict.[172] In other words, a less efficient competitor can still exercise a competitive constraint on a dominant undertaking. This is recognised by the Commission in the Guidance Paper's paragraph 24. This was also recognised by the CJEU in *Post Danmark II* as one main argument to why the AEC test is not relevant in all cases and therefore should only be considered one tool amongst others. In *Post Danmark II* the AEC test was not relevant since the dominant undertaking had a very large market share and structural advantages, *inter alia*, by the undertaking's statutory monopoly. The structure of the market and the structural advantages made the emergence of an as-efficient competitor practically impossible. Because of the fact that the barriers to the relevant market were so high, the less efficient competitors might have been able to exert a constraint on the conduct of the dominant undertaking.[173] If a less efficient undertaking that is exercising a competitive constraint is forced to exit the market it will lead to, for example, higher prices for the consumer and as such be harmful to consumer welfare which, as concluded, is the primary goal of Article 102 TFEU.[174]

There is also the issue that competitors may need time to become as efficient. Economies of scale can have an impact on an undertaking's efficiency. It would be harmful to consumer welfare if the AEC test were to be applied in such a

[170] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 6, 287 and 335-336.
[171] De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', pp. 75-76; Grasso, R, 'Conditional Pricing in Europe and the CJEU's Ruling in Intel: What's New', p. 36.
[172] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 277 and 283; Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 63.
[173] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 59-60.
[174] De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', p. 75; Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', p. 67.

formalistic way that it allows for the exclusion of competitors that are not yet as efficient because of their scale, when they would be considered as efficient when they reach a larger scale.[175] With the above mentioned in mind, even some loyalty rebates that in theory could be matched by an as efficient competitor can be detrimental to competition and consumer welfare. However, a general rule forbidding certain types of loyalty rebates *per se* even when they are above cost would probably also eliminate legitimate price competition and therefore be over-inclusive (false positives).[176] A dynamic application of the AEC test is therefore warranted. The Commission has stated to this effect that when a less efficient competitor exercises a competitive constraint, the Commission will take a dynamic view of that constraint.[177] In addition, there are other markets than those characterised by economies of scale where the AEC test would lead to inappropriate results. This is true for markets characterised by high fixed costs, network effects and anywhere the competition is **for** the market itself rather than **in** the market.[178] In other words, one criticism of the AEC test is that it will lead to the exclusion of competitors that can enhance consumer welfare, if applied in a formalistic manner. This is especially true for markets where the emergence of an as efficient competitor is practically difficult, impossible or may take time.[179]

On the other hand, protecting competitors that are less efficient is usually detrimental for competition and consumer welfare in the long run. This is because the vast majority of productivity improvements come from the process of entry and exit. Competition on the merits should lead to inefficient undertakings exiting the market and more efficient undertakings entering. A legal order which does not protect individual competitors might thus in the short run reduce the number of competitors and competition. However, in the long run it will be beneficial for competition since it leaves room for entry of competitors on the market which are more efficient, thereby spurring more competition.[180] Legitimate competition that excludes competitors is thus an essential component in maximising consumer welfare.[181] In light of this, it is from a perspective of enforcement management more effective to focus on the more harmful conduct that excludes as efficient competitors instead of trying to keep less efficient competitors alive for short term consumer benefits.[182] This line of arguing supports the use of the AEC test in competition enforcement as it ensures more effective

[175] De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', pp. 79-80; Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', p. 67.
[176] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 277.
[177] European Commission, *Guidance Paper*, para. 24.
[178] Grasso, R, 'Conditional Pricing in Europe and the CJEU's Ruling in Intel: What's New', p. 37.
[179] Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 63.
[180] Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', p. 67; De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', pp. 75-76.
[181] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 263; C.f. European Commission, *Guidance Paper*, paras. 6 and 19.
[182] De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', pp. 75-76.

competitors and thus consumer welfare in the long run. However, it must be maintained that the AEC test also be applied in a dynamic sense because of the fact that it might not be possible for competitors to become as efficient right away because of economies of scale and sometimes, as was the case in *Post Danmark II*, it might not even be possible for as efficient competitors to emerge at all in certain markets. In addition, there can also be situations where a rebate scheme would not lead to consumer harm due to its small market coverage or that the rebate itself is relatively limited.[183]

5.3 Legal Certainty Enhances Economic Efficiency

An economically efficient legal rule should give incentives to undertakings to engage in loyalty rebates schemes only if it does not lead to unlawful foreclosure of competitors. Competition rules must thus be predictable and enjoy a high degree of legal certainty. Furthermore, in order to achieve this goal, it is necessary that undertakings are aware of which rebate schemes are problematic and under what circumstances. The necessary information must therefore be available for the undertaking to observe. From this perspective, the acceptance of the AEC test as a way of distinguishing procompetitive from abusive loyalty rebates is arguably attractive. If efficiency can be measured based on cost, the undertaking only needs information about its own costs to know whether it is foreclosing as efficient competitors through its rebate scheme. Compliance with competition law is therefore possible without information on competitors' actual costs and prices and the impact of the rebate scheme on the ability of a competitor to compete. Such information can be difficult, impossible or even illegal to ascertain by an undertaking. Self-assessment would be easy since there would be no need to make conjectures on how the competition authority would assess a particular rebate. In addition, the AEC test can be done ahead of time before implementing a rebate scheme. If the rebate passes the test, it can be seen as relatively risk free while a rebate that fails the test would be considered very risky. An advantage of the AEC test in theory is therefore that it contributes to a high degree of predictability and legal certainty for undertakings which is in turn is beneficial for economic efficiency since it gives the possibility and incentive to engage in loyalty rebate schemes only when they are beneficial for competition.[184]

However, the AEC test has the flaw that it assumes that an as efficient competitor can be easily defined just by measuring costs. This of course opens up the debate to what cost measurement should be used, which will be discussed in chapter 6.3. In reality there are more parameters which determine when competitors are as efficient. The issue is that an undertaking can have advantages over a

[183] *Ibid*., p. 76.

[184] Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', pp. 65-67; De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', pp. 76-77; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 553-554 and 562; Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 64.

competitor even though it may have the same costs. One advantage is that an undertaking could hold a first mover position. This means that an undertaking that is first on a market holds a competitive advantage because it enables, for instance, the creation of a strong brand recognition, customer loyalty and time to perfect a product or service.[185] Consumers might therefore value other parameters than only price.[186] Other difficulties in defining an as efficient competitor stems from how to treat economies of scale.[187] To measure which competitors are as efficient in practice therefore requires a close look into two undertakings which hardly can be compared.[188] These inherent definitional issues of an as efficient competitor decrease the predictability and legal certainty of using the AEC test as a test to distinguish procompetitive from abusive rebate schemes. In addition, as will be explained in chapter 6, the different parts of the test can be subject to complex discussion and considerations. Consequently, an AEC test carried out by a competition authority may not necessarily be identical to an AEC test carried out by the dominant undertaking and may therefore have very different results.[189] This adds to the decreasing predictability and legal certainty which in turn is harmful to economic efficiency.

One further element of the creation of an efficient legal rule in regard to loyalty rebates must be discussed. Given the inherent difficulty of determining which loyalty rebate schemes are anticompetitive and which are procompetitive, the competition authorities will inevitably make errors sometimes. Two types of error can occur: false positives and false negatives. A false positive is where a behaviour is wrongly considered abusive when it in fact is beneficial for competition. A false negative is where an abusive behaviour is wrongly considered legal when it in fact is anticompetitive. The question that arises is what type of error cost is preferred in regard to abusive loyalty rebates? What type of error is costlier depends on whether the particular practice is, on balance, more likely to lead to harm or good.[190] In regard to loyalty rebates, it can be argued that the risk of false positives is more harmful than false negatives.[191] This is because market forces offer at least some correction in regard to false negatives while it does not offer any correction in regard to false positives.[192] In other words, "the economic

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185 O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 284-285; Investopedia, *First Mover Definition* [website], https://www.investopedia.com/terms/f/first-mover.asp, (accessed 20 April 2022).

186 Wils, W, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance', p. 429.

187 O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 284-285.

188 Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 63.

189 Komninos, A, 'Intel: The CJEU Finally Speaks - Time to Listen', p. 50.

190 Whish, R & Bailey, D, *Competition Law*, pp. 203-204; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 276.

191 Grasso, R, 'Conditional Pricing in Europe and the CJEU's Ruling in Intel: What's New', pp. 34-35.

192 Geradin, D, 'The Opinion of AG Wahl in Intel: Bringing Coherence and Wisdom into the CJEU's Pricing Abuses Case-Law', *Tilburg Law School Legal Studies Research Paper Series*, no. 18, 2016, footnote 40 on p. 8. with reference to Easterbrook, F, 'The Limits of Antitrust', *Texas Law Review*, vol. 63, issue 1, 1984.

system corrects monopoly more readily than it corrects judicial errors."[193] As discussed above in the previous chapter, in some markets, competitors that are less efficient or competitors that are not yet as efficient because of economies of scale, can sometimes be (and become) beneficial for competition and consumer welfare. Using the AEC test in a formalistic manner, would allow for the exclusion of these competitors and therefore be biased towards under-enforcement because it would allow anticompetitive foreclosure.[194] Of course, a bias towards any sort of error is not beneficial for economic efficiency which is why the AEC test is somewhat flawed in this respect. Nevertheless, for economic efficiency, it is probably preferable to have this bias towards under-enforcement than vice versa.

5.4 Conclusions on the Use of the AEC Test Regarding the Purposes of Article 102 TFEU

In these chapters, it was concluded that EU competition law is concerned with protecting the process of competition, and not individual competitors. This is because it has been deemed the best way to achieve the underlying purposes of Article 102 TFEU which was established to be mainly consumer welfare, but also efficiency. In light of this, the current legal position outlining that only as efficient competitors should be protected, and thus the theoretical acceptance of the AEC test, was critically analysed. It was concluded that in markets where the emergence of as efficient competitors would be impossible, the protection of less efficient competitors would increase consumer welfare. In addition, it was concluded that the use of the AEC test in regard to competitors that will become as efficient in the future due to economies of scale is inappropriate as these would be excluded from the market under the test, to the detriment of consumer welfare. However, it was also concluded that a main rule of protecting only as efficient competitors is most often beneficial for consumer welfare in the long run as it leaves room for more efficient entrants. A dynamic application of the AEC test is therefore warranted.

Furthermore, the AEC test may in theory help achieve legal certainty and consequently efficiency. This is due to the fact that the test can be used as a tool to self-evaluate loyalty rebate schemes and therefore give incentives to engage in loyalty rebates schemes only when they are procompetitive. However, it was concluded that there are several practical difficulties of the AEC test. One difficulty stem from the fact that it is not easy to define what an as efficient competitor really is. A second difficulty is that an AEC test carried out by an undertaking may have a different result compared to one carried out by a competition authority. Finally, it was concluded that the AEC test has a bias towards under-

[193] Easterbrook, F, 'The Limits of Antitrust', p. 15.
[194] Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', pp. 66-67.

enforcement which is a flaw in the test. Nevertheless, it was concluded that a bias towards under-enforcement is preferred than the vice-versa.

6 The AEC Test and Enforcement Efficiency

Efficient practical enforcement means that the regulation in question should be enforceable in an easy and timely manner. In this regard, a *per se* rule can be considered efficient given that it clearly sets out a conduct to be illegal without having to examine its effects any further. This could be one reason why it has been preferred in the past regarding exclusivity rebates, since it creates a high degree of legal certainty as to whether it is considered illegal or not. However, one downside with *per se* rules is that it is difficult to create an exhaustive list of all the ways to achieve the same objective. This failure may induce firms to test alternative schemes.[195] The CJEU has concluded that the legality of exclusivity rebates should be evaluated through a presumption of illegality, where the AEC test, if carried out, plays an important part in showing either the absence or existence of abusive foreclosure effects. This raises the question whether the AEC test is an appropriate test to distinguish legal from abusive loyalty rebate schemes from the perspective of enforcement efficiency. In order to answer this question, which is the fourth research question of this paper, it will in this section be examined how the variables needed for the AEC test to be carried out has been ascertained in practice by the Commission and what difficulties have arisen which may affect enforcement efficiency.[196]

6.1 The Contestable Share

The first step of the AEC test is to define the "contestable share". As stated in chapter 2.4, this is the share that is commercially viable or in other words open to competition. The important question is if the dominant undertaking is able to use the non-contestable share as leverage to reduce the price on the contestable share of the market so that as efficient competitors would not be able to compete regarding the contestable share.[197] Perhaps fairly obvious, the Guidance Paper states that if it is likely that customers would be willing and able to switch large amounts of demand to a (potential) competitor relatively quickly, the relevant range is likely to be relatively large. If, on the other hand, it is likely that customers would only be willing or able to switch small amounts incrementally, then the relevant range will be relatively small. The Commission furthermore states that:

[195] Rey, P & Venit, J, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils', *World Competition*, vol. 38, issue 1, 2015, p. 18.
[196] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 276-278.
[197] C.f. Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 152.

> "[f]or existing competitors their capacity to expand sales to customers and the fluctuations in those sales over time may also provide an indication of the relevant range. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant."[198]

Determining the contestable share will therefore be dependent upon the facts in every individual case.[199] A small contestable share will increase the risk of foreclosure of as efficient competitors and vice-versa.[200]

One concept that has been referred to in the CJEU case law is the concept of an "unavoidable trading partner". The concept was *inter alia* stated in *Post Danmark II* where the position as an unavoidable trading partner was considered generally to follow a dominant position.[201] The GC in *Intel* in the renvoi judgement considered the company to be an unavoidable trading partner for its customers given, in particular, Intel's brand image, its profile and the nature of its product.[202] The Commission not only considered Intel to be an unavoidable trading partner, but also considered its products having the character of "must-stock".[203] Regardless of whether a dominant undertaking is an unavoidable trading partner or carries a product that is must-stock, the portion of demand said to be contestable must be ascertained.[204] The Commission's calculation of the contestable share for Intel's customers was one contributing factor to why the Commission lost the case in the GC renvoi judgement. The GC undertook a relatively in-depth analysis of the Commission's calculation of the contestable share for one of Intel's customers. The GC concluded that other evidence than the one the Commission had relied upon in its decision, which was solely an internal spreadsheet of that customer, pointed towards a larger contestable share. As recalled, a larger contestable share would have made the AEC test easier to pass. The conclusion reached was that the Commission was considered not having demonstrated to the requisite legal standard that the assessment of that contestable share was well founded.[205] One noteworthy point is that Intel did not seem to have had access to that internal document since it was an internal document of one of its customers.[206] In *Qualcomm*, the Commission, similarly to in *Intel*, relied upon Apple's own internal evidence in addition to Qualcomm's own assessment of its competitor's ability to supply viable chipsets, in order to determine the contestable share. Again, there is no indication that Qualcomm would have had access to Apple's

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198 European Commission, *Guidance Paper*, para. 42.
199 *Ibid.*
200 Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 156.
201 Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para. 40.
202 Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 152.
203 Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, para. 870.
204 O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 587.
205 Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, paras. 234 and 254-256.
206 See Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, para. 1231; Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 189.

internal documents at the time.[207] This gives rise to a potentially controversial issue. If the only way to determine the contestable share is based on customer expectations which were unknown to the dominant undertaking at the time, that raises concerns of legal certainty. This is true especially considering the quasi-criminal penalties which can be imposed and the fact that the dominant undertaking could have made its own assessment of the contestable share which is higher.[208] This argument of legal certainty was raised by Intel but rejected by the GC since the Commission would have been obliged to rely solely on a statement made by a representative of Intel which sought to mitigate Intel's responsibility for the established abuse.[209]

As a conclusion, it can be said that the concept of contestable share is theoretical in nature and therefore difficult to identify in practice.[210] The Commission has even said in its Guidance Paper that the calculations will in practice be estimated on the basis of data which may have varying degrees of precision. The Commission will take this into account in drawing any conclusions regarding the dominant undertaking's ability to foreclose equally efficient competitors.[211] Competition authorities will try to argue in favour of a small contestable share since it will make the AEC test harder to pass. Conversely, the defendant will try to argue the opposite.[212] The determination of the contestable share will be dependent upon the specific facts in every individual case. In some industries, switching to a competitor would be gradual, as it would have been in *Intel*. In *Post Danmark II*, a switch could have been more direct.[213] This adds to the complexities of pinpointing exactly how large the contestable share should be when applying the AEC test.

6.2 The Relevant Time Frame

The relevant time frame in which the customer in question bases their decision to change or not change their supplier is the next step in the AEC test. This step of the analysis can have a great impact on the outcome of the test. If the time frame is relatively short, nothing may be contestable. If the time frame is relatively long, everything may be contestable.[214] A shorter relevant time frame will therefore make the AEC test more difficult to pass and vice-versa. In *Intel*, the

[207] Case AT.40220, *Qualcomm (Exclusivity payments)*, Commission Decision of 24 January 2018, paras. 491-492.
[208] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 587-588; C.f. Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, paras. 1231-1240.
[209] Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 199.
[210] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 585; De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', p. 78; Boutin, A & Boutin, X, 'The as Efficient Competitor Test - Back to Facts', pp. 56-58.
[211] European Commission, *Guidance Paper*, footnote 1 under para. 42.
[212] C.f. De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', p. 78.
[213] Boutin, A & Boutin, X, 'The as Efficient Competitor Test - Back to Facts', pp. 56-57.
[214] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 588.

Commission stated that the customers' decision regarding from whom they were going to purchase and in what quantity was not solely based on immediate, short-term considerations, and it was natural to assume that long term considerations were limited to the part of the future that was reasonably foreseeable. With regard to several considerations, *inter alia* the fast development on the market, the Commission concluded that the relevant time frame should be one year. Intel on the other hand argued that it was more appropriate with a relevant time frame of two years.[215] The particular point on how long the relevant time frame should be was not analysed in detail by the GC. In regard to one customer where the relevant time frame was examined, the GC concluded that the Commission had failed to show that the rebate scheme had anticompetitive foreclosure effects during the entire relevant time frame.[216]

Similar to the contestable share, the relevant time frame will also be contested in legal proceedings as this is too dependent upon the specific facts of the case. There may be a significant number of circumstances speaking to a shorter or longer time frame. One big problem is that the time frame must correspond with the technical and business reality of the industry in question. For instance, in complex industries, there can be a significant lag between the **decision** to buy from a new supplier and the effective purchase. Suppose a customer has already decided to switch supplier in the near future but is currently still purchasing from the dominant undertaking and thus still receiving a rebate. Assessing if the rebate is hindering a switch of supplier during this time frame would lack basis in reality as this decision has already been made.[217]

6.3 The Relevant Measure of Viable Cost

Since the AEC test is a price/**cost** test, the choice of cost can obviously have an impact on whether or not the test is passed. In *Intel*, the Commission used the AAC as the measurement of cost in their AEC test.[218] This measurement of cost is also used in the Guidance Paper where it states that where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors.[219] It could be argued that using the AAC is rather conservative from an enforcers point of view and that a more appropriate measurement is long-run average incremental cost which would, unlike the AAC, include all product-specific sunk costs such as R&D investments.[220] Qualcomm used the measurement of AVC in its AEC test. Variable costs are costs that vary with the number of products that an undertaking is producing. AVC is calculated

[215] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, paras. 1013-1019 and 1022.
[216] Case T-286/09 RENV, *Intel Corp. v Commission*, EU:T:2022:19, para. 319.
[217] Boutin, A & Boutin, X, 'The as Efficient Competitor Test - Back to Facts', pp. 56-58.
[218] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, para. 1037.
[219] European Commission, *Guidance Paper*, para. 44.
[220] Boutin, A & Boutin, X, 'The as Efficient Competitor Test - Back to Facts', p. 55; See O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 589 on the definition of long-run average incremental cost.

by dividing all variable costs by the total of its actual output.[221] The choice of AVC was indeed criticised by the Commission with the argument that in a market such as the worldwide market for LTE chipsets characterised by high R&D expenses, a competitor would need to cover not only its AVC, but also a share of fixed costs, including at least some part of R&D expenses.[222]

Of course, when using a particular cost concept, difficulties might arise regarding the practical measurement and classification.[223] In *Intel*, the Commission had not been successful in obtaining adequate cost data from Intel and the Commission considered the numbers from Intel's expert as not verifiable. The Commission instead put forward as a *prima facie* measurement, the Cost of Goods Sold ("CoGS"), which was directly available from Intel's audited accounts. Intel did not consider the CoGS as an appropriate reflection of Intel's AAC, which was the cost measurement used in the Commission's AEC test. This was because the CoGS allegedly included the costs of other products than x86 CPUs and that parts of those costs were in fact unavoidable.[224]

As can be shown, what measurement of cost that should be used can be argued in length. If for instance the AAC is used, the defendant will argue that it has a low AAC as this will make it easier to pass the AEC test. One challenge is the fact that the costs used in the AEC test may not at all correspond with how the dominant undertaking is viewing its own costs and may be different to the normal investment cycle. Over 30 pages of the Commission's decision in *Intel* was dedicated to the issue of AAC, which only goes to show the complexity and the variety of outcomes which are possible. In addition, there could arise an issue of legal certainty as to whether any of the AAC determinations by the Commission made *ex post* were reasonably foreseeable *ex ante* by the defendant.[225]

6.4 Conclusions on the Impact of the AEC Test Regarding Enforcement Efficiency

As can be seen by the above, the AEC test relies upon several different components in order to make the required calculation and to ascertain a result whether the test is passed or not. At first glance, the replacement of easily enforceable *per se* rules with the AEC test would still make the competition rules easy to enforce regarding loyalty rebates that are anticompetitive. As can be shown by the analysis in foregoing, the AEC test which in theory is an easy test, is much more difficult to apply in practice.[226] Sometimes the competition authority will need to

[221] Whish & R, Bailey, D, *Competition Law*, p. 755.
[222] Case AT.40220, *Qualcomm (Exclusivity payments)*, Commission Decision of 24 January 2018, para. 490.
[223] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 589.
[224] Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, paras. 1043-1050.
[225] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 589-590.
[226] Hajnovicova, R, Lang, N & Usai, A, 'Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel', p. 146 and footnote 42; Wils, W, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance', p. 431.

rely upon information from customers and competitors that is not available to the defendant. This can raise issues of legal certainty which can be invoked by the defendant. Another point is that litigants trying to use the growing mechanism of private enforcement[227] through courts may not have access to this type of information since they do not have the same investigative powers as the Commission or national competition authorities have.[228]

In *Intel*, the AEC test was over a whopping 150 pages long. As can be shown, at each juncture and every part of an AEC test, disputes of fact and judgement can, and probably will, arise. The final outcome of the test is dependent upon how the contestable share, the relevant time frame and measure of viable cost is determined, leading to a huge scope of possible outcomes and in addition, errors may often occur.[229] Adding to the difficulties is the fact that a separate calculation must be done for each of the customers which have been granted loyalty rebates, which can be many. In *Intel*, the Commission conducted an AEC test to each of Intel's customers and all of the tests failed to establish to the requisite legal standard that the rebate was capable of having anticompetitive foreclosure effects.

The variables are subject to economic analysis and not legal determination through interpretation. Both parties will therefore invoke experts that can argue their way regarding every element of the test in an effort to sway the final outcome. Of course, large actors such as multi-billion-euro firms, which dominant undertakings not too seldom are, will have significant amounts of resources and therefore lots of economics experts that can argue on their behalf. This would further decrease the possibilities of private enforcement as private parties would have to engage in costly and complex economic assessment of facts they may not even have access to in the first place. It would probably also impede the courts from being able to decide cases in a timely manner. Since rebutting the presumption of abuse must be considered fairly easy for dominant undertakings,[230] the competition authority, which then has the burden of proof, will have difficulties meeting this burden. This is true both when it provides its own AEC test as well as when trying to refute an AEC test submitted by the defendant. If it took the specialised team of Directorate-General for Competition and over 150 pages to argue the AEC test in *Intel* (and still produced an AEC test considered vitiated with errors), it raises the question of whether that can be considered reasonable for a first instance competition authority or private litigant to embark upon? Enforcing competition rules based on a complex AEC test may therefore be inefficient, consume resources and take vast amounts of time which may delay decisions and court rulings. During this time, competitors risk being irremediably weakened or eliminated. This can undermine the confidence in the competition

[227] Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 64.
[228] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 562.
[229] *Ibid*., p. 591; Hajnovicova, R, Lang, N & Usai, A, 'Exclusivity Agreements and the Role of the As-Efficient-Competitor Test After Intel', p. 147.
[230] C.f. chapter 3.5 above.

authorities as well as reduce deterrence to engage in abusive loyalty rebate schemes.[231]

[231] Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', pp. 58 and 64; O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 591; De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', p. 75; Wils, W, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance', p. 431.

7 Final Conclusions

7.1 Summary and Conclusions Regarding the Research Questions

Theoretically, a move away from form-based rules toward an effects-based approach regarding loyalty rebates would better represent the economic realities which forms the basis of competition law. The Commission has for some time tried to achieve such a shift by examining effects on competition, in accordance with its Guidance Paper, even though this was not required by law. After *Intel*, the current legal position is now to allow undertakings, presumed to abuse their dominant position by engaging in certain types of rebate schemes, to produce evidence that their conduct is not capable of restricting competition and thus rebut the presumption. When this is done, the Commission must consider all the circumstances surrounding the rebate scheme based on five criteria. This likely represents a shift towards effects-based examination of loyalty rebates. The CJEU has concluded that it is only when a dominant undertaking engages in loyalty rebate schemes that have the capability of foreclosing competitors which are as efficient, that such a scheme is abusive contrary to Article 102 TFEU. The aforementioned answers the first research question of this paper.

One key piece of evidence that can be used in these cases is consequently the AEC test. The test can be used both by the Commission in proving an abuse or by the dominant undertaking in showing the absence of foreclosure effects on as efficient competitors. When carried out, the test must be taken seriously and arguments concerning the test must be examined by the court. The unconditional acceptance of the test is however compromised by the fact that previous case law from the CJEU and the decisional practice of the Commission does not seem to clearly endorse the test as a necessity. As late as *Post Danmark II*, the test was not considered an important part of the analysis. Though, it is difficult to know how much weight is to be placed on this case considering it is not mentioned once by the CJEU in *Intel* and the fact that it contained specific circumstances where the exclusion of less efficient competitors would be harmful for consumers. The aforementioned answers the second research question of this paper.

Furthermore, the AEC test has strong theoretical attractions. It conforms well with one of the primary purposes of Article 102 TFEU, which is consumer welfare, since consumers in most cases benefit in the long run from the exclusion of less efficient competitors. Nevertheless, this may not always be true[232] which is

[232] C.f. Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651.

why a dynamic use of the AEC test is warranted. The test is arguably also beneficial from the perspective of economic efficiency, which is another purpose of Article 102 TFEU, since it in theory contributes to a degree of legal certainty that allows dominant undertakings to self-assess their rebate schemes and therefore only engage in procompetitive rebate schemes. However, these theoretical gains of the AEC test can be difficult to ascertain in practice. First, it is not an easy task to define what an as efficient competitor really is. Second, even though the AEC test is a rather uncomplicated test, it suffers from the fact that the variables needed to conduct the test are more or less hypothetical and can lack basis in reality. Consequently, they are open to debate and it can be argued in length how small/large the contestable should be, how short/long relevant time frame should be used and how low/high the costs are for the undertaking in question, which affects whether the test is passed or failed. The aforementioned answers the third research question of this paper.

This also complicates the use of the AEC test from the perspective of the enforcer and may be one of the reasons why the Commission has been reluctant to use the test since the CJEU judgement in *Intel*. The striking down of the Commission's decision in the GC renvoi judgement also showed that succeeding in proving an abuse on the basis of an AEC test is complicated and time-consuming. After *Intel*, the AEC test has however been used by the defendant in the exclusivity case *Qualcomm*. It remains to be seen how effective this approach will be but what can be said it that the Commission can probably not disregard the test and it will take resources and time for the Commission to argue that the AEC test does not show absence of capability to foreclose as efficient competitors or that the test is vitiated by errors. This is especially true considering that the Commission has the burden of proof of as soon as the presumption of abuse is rebutted. It is therefore the opinion of the author of this paper that, although the assumption of only protecting as efficient competitors is well founded based on the goals of Article 102 TFEU, an overemphasis on the AEC test in the courts will make competition authorities' task difficult and time-consuming as well as making private enforcement extremely difficult. The aforementioned answers the fourth and final research question of this paper.

7.2 Alternatives to the AEC Test

There are alternative tests which have been proposed in the literature to prove the existence of exclusionary abuses. There is the "profit sacrifice test" which assumes that an undertaking would not rationally engage in conduct that sacrifices profit in the short term if it did not expect it would gain in the long run as a result of foreclosing competitors. This test could remedy some weaknesses with the AEC test, for instance the difficulty of defining an as efficient competitor. It is however flawed in other respects such as the difficulty of determining what the sacrifice must consist of; should an undertaking always be obliged to choose the most profitable conduct? Another difficulty is whether any sacrifice automatically should be considered abusive. Consequently, the test would potentially rely

heavily on evidence of intent.[233] The Commission has also somewhat disavowed such an approach by stating that loyalty rebates can have foreclosure effects without necessarily entailing a sacrifice for the dominant undertaking.[234]

Another test is the "consumer welfare test". This test involves an assessment of whether the conduct in question would have adverse effects on consumer welfare in terms of factors such as innovation, output, quality and price. The test is attractive from the perspective that it has a close relationship with the primary purpose of Article 102 TFEU which is consumer welfare. The most obvious criticism of this test is that it is not a requirement according to case law to demonstrate direct consumer harm; it is sufficient to show harm to the structure of competition. This is because it can be argued that harm to the structure of competition is a reasonable proxy for consumer harm. A second criticism of the test is that it is difficult for an undertaking to assess *ex ante* whether a certain conduct, on a whole, would have a positive or negative effect on consumers since much would depend on how competitors would react. This is especially true for markets which are more unpredictable such as where technology rapidly evolves or where new undertakings enter frequently. This would reduce legal certainty and consequently economic efficiency.[235]

7.3 Economics in Law – a Wider Context

It therefore seems like we are stuck with the AEC test for now, for better or for worse. Nevertheless, the current accepted use of the AEC test raises a broader question of what role economics should play in regulatory decisions, or in other words, to what degree should economics influence how competition norms should be interpreted? If the AEC test is considered a crucial part of finding an abuse, should then judges be replaced by economists?[236] One could argue that economic theory cannot claim validity in the way a legal rule does. Economic theories are open to discourse and they change over time as some perspectives prevail over others. A judge is not trained and apt to make a decision in favour of a particular economic reading as this makes that judge the arbitrator of an academic debate outside the judge's field of expertise. It can therefore be argued that economic theory should be confined to the areas of informing the legislative process as well as forming the basis of prioritising which cases the enforcer should pursue. With regard to this, there exists a strong argument for the AEC test to be mainly used on the pre-investigative stage, being utilised as a yardstick to determine what cases to pursue. The loyalty rebates that fail an initial AEC test will probably be the most detrimental to competition and with limited

[233] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, p. 279-283; Kuhn, K & Marinova, M, 'The Role of the as Efficient Competitor Test after the CJEU Judgment in Intel', pp. 67-68.
[234] European Commission, *Guidance Paper*, para, 37.
[235] O'Donoghue, R & Padilla, J, *The Law and Economics of Article 102 TFEU*, pp. 285-289.
[236] C.f. Podszun, R, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU', p. 62.

resources and time, it therefore makes sense for the competition authorities to primarily pursue these cases. This is also the essence of the Guidance paper.[237]

7.4 Final Words

Loyalty rebates, and especially exclusivity rebates, have undergone some changes in the last years and is, at the time this paper is written, a topic of much debate. Perhaps the importance of the "clarification" by the CJEU in *Intel* and the annulment of the over €1 billion fine by the GC, should not be overstated. Maybe it is only a judgement on procedural fairness. But perhaps the rules on abuse of dominance as it pertains to loyalty rebates has dramatically shifted. The author of this paper is inclined to lean towards the latter. How dramatic impact the EU Courts' case law, in particular the *Intel* saga, will have on this topic, only time will tell. The Commission has announced that the *Intel* saga will continue as it has appealed the GC judgement to the CJEU, more than twenty years after the initial complaint to the Commission.[238] The Commission is currently on the backfoot, but maybe good things come to those who wait.

[237] *Ibid*., pp. 59 and 63-65; De Coninck, R, 'The as-Efficient Competitor Test: Some Practical Considerations following the CJEU Intel Judgment', pp. 75-76.
[238] Case C-240/22 P, *Commission v Intel Corp*.

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