LOYALTY REBATES AFTER Intel: TIME FOR THE EUROPEAN COURT OF JUSTICE TO OVERRULE Hoffman-La Roche

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Journal of Competition Law & Economics, Vol. 11, Forthcoming 2015

George Mason University Law and Economics Research Paper Series

15-15

This paper is available on the Social Science Research Network at http://ssrn.com/abstract=2586584
Loyalty Rebates after Intel:
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Abstract

In June 2014, the GCEU confirmed the Decision of the European Commission that condemned Intel for breaching Article 102 TFEU by adopting exclusive rebates and “naked restrictions”. This judgement, in which the GCEU considered that in line with Hoffman-La Roche loyalty rebates should be quasi-
per se illegal has been subject to many criticisms as not in line with the teachings of economics. This paper discusses the shortcomings of this judgment and argues that it is great time for the CJEU to abandon the application of its quasi-
per se rule of illegality approach to exclusive dealing and loyalty rebates and replace it by a structured rule of reason. Such an approach would have many advantages and create greater coherence in the case-law of the CJEU on unilateral pricing conduct.

JEL: D 40, K 21, L12, L 22

I. Introduction

On 12 June 2014, the General Court of the European Union (“GCEU” or “GCEU”) confirmed the Decision of the European Commission (“Commission”) that condemned Intel for breaching Article 102 of the Treaty on the European Union (“TFEU”) by adopting exclusive rebates and “naked restrictions”. The judgment of the GCEU was appealed to the Court of Justice of the European Union (“CJEU”). This appeal is still pending at the time of writing.

The judgment of the GCEU was coldly received by the vast majority of academic and practicing lawyers and economists as unduly formalistic, and also created some steer within the Commission

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with senior officials expressing conflicting views on the soundness of that judgment. This judgment, like earlier judgments of the EU courts on conditional rebates, is seen by many as failing to incorporate the teachings of economics and by pursuing a form-based analysis to the assessment of such rebates. The Intel judgment also raises the question of what is left of the Guidance Paper on Article 102 TFEU and the effects-based approach it promotes since the GCEU considered that it was not necessary for the Commission to carry out an “as efficient competitor test” to establish the potential anti-competitive effect of the rebates at stake. Finally, the Intel judgment has triggered a debate about the goal of Article 102 TFEU, i.e. whether it was designed to protect the structure of competition or consumer welfare.

Against this background, the purpose of this paper is two-fold. First, it argues that the main criticism that can be made against the GCEU’s Intel judgment is that, while this judgment identifies the ways in which “exclusive” rebates (which, in this paper, will generally be referred to “loyalty”

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3 Contrast Wouter P.J. Wils, “The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance”, (2014) 37 World Competition, 405 with Luc Peeperkorn, “Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates”, 2015(1) Concurrences, 43.


6 Contrast Wils, supra note 3 with Ahlborn & Piccinin, supra note 2.
rebates since the *Intel* judgment covers rebates that are not necessarily conditioned on exclusivity) can harm competition, it fails to establish a coherent legal framework to analyze them. Which legal framework should be applied to loyalty rebates is by no means a trivial question. For instance, in the United States, a debate is raging over which test should be used to separate pro-competitive loyalty rebates from anti-competitive ones. Some commentators have expressed the view that loyalty rebates should be analyzed by analogy to predatory pricing, while others consider that the right analogy is exclusive dealing. The case-law of the federal courts is divided on this point. As will be seen below, the GCEU borrows from both analogies, but fails to draw the logical consequence that whatever the analogy selected, it requires a foreclosure analysis based on the available data/evidence concerning the rebate scheme. Instead, and somewhat illogically, the GCEU decides to stick to the quasi-*per se* rule of illegality contained in *Hoffman-La Roche*.

Second, based on this observation, this paper then argues that it is great time for the Court of Justice to abandon its *Hoffman-La Roche* line of case-law on which the controversial judgments of the EU courts on loyalty rebates are based, and replace it by a structured rule of reason analysis. The CJEU can no longer ignore the teachings of several decades of economic analysis that show that, unlike hard-core cartels, can be a source of efficiencies and should therefore not be treated under a *per se* rule. The Court should also aim to create a greater degree of coherence in the EU courts’ case-law. The current position of the EU courts on loyalty rebates is at odds with the position it has taken on other forms of price-related unilateral conduct which can fall within Article 102 TFEU, but also with the way in which it has dealt with exclusive agreements in the context of Article 101 TFEU.

This paper is divided in five parts. Part II briefly summarizes the *Hoffman-La Roche* line of case-law pursued by the EU courts with respect to conditional rates. It then describes the effects-based approach suggested by the Economic Advisory Group on Competition Policy (EACGP)’s Report on Article 102 TFEU and subsequently implemented in the Guidance Paper on the Commission’s enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct (the “Guidance Paper”), and analyses the exclusionary pricing case-law adopted after the Guidance

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9 See papers cited supra note 5.

10 See infra, text accompanying note 115.

11 See infra, text accompanying note 119-122.
II. The assessment of loyalty rebates prior to the Intel judgment

In order to place the Intel judgment in its broader context, this Part first summarizes the main teachings of the case-law of the EU courts on loyalty rebates prior to the adoption of the Guidance Paper (Section A). It then contrasts this case-law with the effects-based approach put forward by the EACGP in its Report and the Commission in its Guidance Paper (Section B). Next, this part outlines a few key elements the judgment of the CJEU in the Tomra case, which was adopted after the issuance of the Guidance Paper. It also refers to the TeliaSonera and Post Danmark judgments, which although not involving loyalty rebates, deal with potentially exclusionary pricing practices by dominant firms (Section C). The final section discusses the scholarly debate among US scholars and practitioners, and the case-law of the federal courts over which test should be applied to assess the legality of loyalty rebates (Section D).

A. The case-law of the EU courts prior to the Guidance Paper

Over the last thirty five years, the EU courts adopted a number of important judgments addressing the compatibility of loyalty, and other forms of, rebates with Article 102 TFEU. Hoffman–La Roche concerned fidelity agreements whereby Roche paid a rebate to its customers who obtained
all or most of their requirements from it. The CJEU ruled that when a dominant firm applies “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,” it violates Article 102 TFEU. The CJEU considered that such rebates were incompatible with the objective of “undistorted competition” within the common market because they were not based on “an economic transaction which justifies this burden or benefit 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.”

The CJEU distinguished between fidelity rebates and volume rebates by stating that the former, unlike the latter, were “designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers.”

In *Michelin I,* the CJEU observed that the rebate regime in question, which was characterized by the use of sales targets, did not fit within the distinction made in *Hoffman–La Roche* between fidelity and volume rebates, as it did not either require dealers to enter into any exclusive dealing agreements or to obtain a specific proportion of their supplies from Michelin. In order to determine whether Michelin had committed an abuse in granting these rebates it was therefore necessary

“to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.”

A few years later, Michelin had another brush with EU competition law regarding a complex rebates regime comprising different components (*Michelin II,*). Following the approach pursued by the CJEU in *Michelin I,* the GCEU indicated that it would look at all the relevant circumstances to determine whether the rebates were exclusionary. In its decision, the Commission had inferred that the rebates were loyalty-inducing in light of the fact that the discount was calculated on the dealer’s entire turnover with Michelin (so-called “retroactive” or “all-unit” rebates) and the fact that the reference period applied for the purpose of the discount was one year. The GCEU observed that “if a discount is granted for purchases made during a reference period, the loyalty-inducing

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13 Case 85/76, supra note 4, at § 89.
14 Id. at § 90.
15 Id.
16 Case C-322/81, supra note 4.
17 Id. at § 14
18 Case T-203/01, supra note 4.
effect is less significant where the additional discount applies only to the quantities exceeding a certain threshold than where the discount applies to total turnover achieved during the reference period.”\textsuperscript{19} The GCEU also considered that for the purposes of establishing a breach of Article 102 TFEU, it is sufficient to show that the abusive conduct of the dominant firm “tends to” restrict competition or, in other words, that the conduct “is capable of” having that effect. Hence, for the purposes of applying Article 102, “establishing the anti-competitive object and the anti-competitive effect are one and the same thing.”\textsuperscript{20}

Finally, in \textit{British Airways},\textsuperscript{21} the CJEU had to assess the compatibility with Article 102 TFEU of agreements that BA had concluded with UK travel agents entitling them to a basic standard commission on their sales of BA air tickets, as well as three distinct systems of financial incentives: marketing agreements, global agreements and, finally, a performance reward scheme. Citing \textit{Michelin I}, the CJEU observed that an exclusionary effect may arise from goal-related discounts or bonuses, i.e. those the granting of which is linked to the attainment of sales objectives defined individually, and that BA’s bonus schemes in question were of such a nature.\textsuperscript{22} The Court found that this effect is particularly strong when the dominant firm in question holds a market share that is subsequently higher than its competitors, which was again the case of BA.

Thus, the distinction between, and separate treatment for, three categories of rebates (quantity, exclusive and other fidelity-enhancing), which as will be seen, is a central part of the \textit{Intel} judgment could already been found in the pre-Guidance Paper rebates case-law of the EU courts. On this point, like on several others (see Part III), the \textit{Intel} judgment merely restates the earlier case-law of the EU courts.

B. \textbf{The Guidance Paper}

The EU courts’ case-law on rebates, but also on other forms of unilateral conduct by dominant firms, was severally criticized by scholars and practitioners as excessively formalistic and not in line with the teachings of economics.\textsuperscript{23} The intellectual foundations of the effects-based approach can be found in the EAGCP’s June 2005 report.\textsuperscript{24} This report, authored by leading academic

\textsuperscript{19} Id. at § 85.
\textsuperscript{20} Id. at § 241.
\textsuperscript{21} See Case C-95/04, supra note 4.
\textsuperscript{22} Id. at § 71.
\textsuperscript{23} See supra note 2.
economists, emphasized the advantages of an economic approach focused on improving consumer welfare. In this respect, a key element of the report was the view that:

“An economics-based approach to the application of [Article 102 TFEU] implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes (for example, exclusive dealing, tying, etc.) but rather will be based on the assessment of the anti-competitive effects generated by business behaviour. This implies that competition authorities will need to identify a competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains. The identification of competitive harm requires spelling out a consistent business behaviour based on sound economics and supported by facts and empirical evidence. Similarly, efficiencies - and how they are passed on to consumers - should be properly justified on the basis of economic analysis and grounded on the facts of each case.”

The report also outlined that if a *per se* approach to some unilateral conduct were to be adopted

“the *per se* rule should be a systematic ban only if the expected cost of false negatives is perceived to dominate. The economic approach highlighted below suggests however that in general both types of errors are likely, and that they can be much more accurately assessed when taking into account the specific circumstances of a case. This therefore provides a strong argument in favour of a rule of reason.”

As to rebates, the report considered that they may be a source of efficiencies, which it lists. As to the relevance to the form of the rebates to their assessment, the Report observes that:

“rebates that take the form of pure quantity rebates are more likely to be motivated by efficiency considerations than fidelity rebates. It is, however, difficult to demonstrate that efficiency considerations motivate the rebate scheme. In particular, the mere form of the rebate may not constitute a clear indicator; for instance, efficiency considerations might require personalized rebate schemes, tailored to the ‘size’ of the retailer, which could take the simple form of "market-share" fidelity rebates.”

Thus, the core thesis of this paper, which is that it is time for the CJEU to abandon the *per se* rule of illegality contained in *Hoffman-La Roche* for a rule of reason analysis was already strongly supported by independent academic economists in 2005.

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25 EAGCP Report, at p. 3. (emphasis added)

26 Id. at p. 7. (emphasis added)

27 Id. at § 37. (emphasis added)
In line with the philosophy of the EAGCP’s Report, Commissioner Kroes made a major policy speech at the Fordham international antitrust conference in September 2005 in which she declared that she was

“convinced that the exercise of market power must be assessed essentially on the basis of its effects in the market, although there are exceptions such as the per se illegality of horizontal price fixing. […] Article 82 enforcement should focus on real competition problems: In other words, behavior that has actual or likely restrictive effects on the market, which harm consumers. […] Low prices and rebates are, normally, to be welcomed as they are beneficial to consumers.”

This led to the publication of a Discussion Paper in 2005 outlining the contours of the Commission’s new effects-based approach and the adoption of the Guidance Paper three years later. The Guidance Paper sought to move away from the terminology traditionally used by the Commission and the EU courts, which relied on concepts, such as fidelity rebates, quantity rebates or target rebates, towards the more neutral notion of “conditional rebates”, which it defines as “rebates granted to customers to reward them for a particular form of purchasing behaviour.”

While the Guidance Paper acknowledged that conditional rebates are not an uncommon practice, it notes that such rebates, when granted by a dominant undertaking, can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Thus, logically, conditional rebates are discussed under the “exclusive dealing” heading of the Guidance Paper.

The Guidance Paper details several factors that it considers to be of particular importance in determining whether a given system of conditional rebates is liable to result in anticompetitive foreclosure. It indicates that anticompetitive foreclosure is more likely to occur where the dominant undertaking’s rivals are not able to compete on equal terms for the entire demand of each individual customer. The reason is that a conditional rebate granted by a dominant undertaking may enable it to use the “non-contestable” portion of the demand of each customer (i.e. the amount that would anyhow be purchased by the customer from the dominant undertaking) as leverage to

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30 Guidance Paper, supra note 12 at § 37.

31 Id.

32 Id. at § 39.
decrease the price to be paid for the “contestable” portion of demand (i.e. the amount for which the customer may prefer and be able to find substitutes).33

Moving away from the formalistic approach pursued by the EU courts, the Guidance Paper provides that the Commission intends to investigate “to the extent that the data are available and reliable” whether the rebate granted by the dominant firm is capable of hindering the expansion or entry of “as efficient” competitors by making it more difficult for them to supply part of the requirements of individual customers.34 The Commission will estimate what price a rival would have to offer to the buyer that has received a conditional rebate from a dominant firm in order to compensate this buyer for the loss of that rebate if the latter would switch part of its demand, which is referred to as the “relevant range”, away from the dominant undertaking. The price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate it loses by switching (i.e., the “effective price”), calculated over the relevant range of sales and in the relevant period of time.

The Guidance Paper provides that for incremental rebates, the “relevant range” is normally the incremental purchases (i.e., the purchases made beyond the threshold set by the dominant firm for granting the rebate) that are being considered. For retroactive rebates, the relevant range is determined by assessing how much of a customer’s purchase requirements can realistically be switched to a rival (the “contestable share”). The methodology of the Guidance Paper is thus to attribute the totality of the conditional rebate that is granted by the dominant firm to the contestable share of the customer’s demand and assess whether the effective price on that part is above or below the dominant firm’s costs (this is why it can be referred as a discount or rebate attribution test).35 As will be seen below, this methodology was used by the Commission in its Intel decision.

The Guidance Paper indicates that the Commission will be willing to consider “claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to

33 Id.
34 Id. at § 41.
35 The Guidance Paper distinguishes between three scenarios. First, where the effective price (that is the list price minus the rebate) remains consistently above the LRAIC of the dominant undertaking, this should allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way. By contrast, where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even as efficient competitors. Finally, where the effective price is between AAC and LRAIC, the Commission will investigate whether other factors point to the conclusion that entry or expansion even by as efficient competitors is likely to be affected. In such a case, the Commission will investigate whether and to what extent rivals have realistic and effective “counterstrategies” at their disposal, for instance their capacity to also use a “non-contestable” portion of their buyer’s demand as leverage to decrease the price for the relevant range. Guidance Paper, supra note 12, at § 44.
customers.” The Guidance Paper is, however, rather cryptic as to the categories of cost advantages that will be accepted by the Commission, merely providing that transaction-cost related advantages are often more likely to be achieved with standardized volume targets than with individualized ones. As to other efficiencies, the Guidance Paper limits itself to noting that incremental rebates are generally more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes without, however, explaining why this is the case.

C. The Tomra case

While the judgment of the CJEU in Tomra came after the adoption of the Guidance Paper, the Court indicated that the Guidance, published in 2009, had no relevance to the legal assessment of a decision, which was adopted in 2006. In any event, the CJEU follows the reasoning of the pre-2009 case-law. The CJEU confirmed the view earlier held by the Commission and the GCEU that Tomra, a company that produces reverse vending machines (“RVMs”) had infringed Article 102 TFEU by implementing an exclusionary strategy in several national RVM markets, involving exclusivity agreements, individualized quantity commitments and individualized retroactive rebate schemes, thus foreclosing competition on the markets.

One of the most controversial aspect of the judgment relates to the degree of foreclosure needed for a rebate scheme to fall under Article 102 TFEU, the GCEU considering that “the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors” as “the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it.” This quote suggests that dominant firms should not be allowed to foreclose any part, however, small, of the relevant market. In addition, the CJEU stated that the invoicing of “negative prices”, i.e. prices below cost prices, to customers was not a prerequisite of a finding that a retroactive rebates scheme was abusive. Thus, the Commission was not obliged to examine the question of whether the prices charged by Tomra were or were not lower than their long-run average incremental costs.

36 Id. at § 46.
37 Id.
38 Case T-155/06, supra note 4.
40 Case T-155/06, supra note 4, at § 241.
41 Case C-549/10 P, supra note 4, at § 56.
Although these cases do not involve loyalty rebates, it is important to make a reference to the *TeliaSonera* and *Post Danmark* preliminary rulings of the CJEU. *TeliaSonera* concerned a reference for a preliminary ruling by a Swedish court concerning the interpretation of Article 102 TFEU with regard to the criteria on the basis of which a pricing practice causing margin squeeze should be held to constitute an abuse of a dominant position. The Court not only recalled that the objective of the price cost test developed by the CJEU in *Akzo* was to determine whether the prices in question could exclude equally efficient competitors, but also observed that in *Deutsche Telekom* the CJEU "ruled out the possibility that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors can constitute an abuse within the meaning of Article 102 TFEU without it being necessary to demonstrate an anti-competitive effect."  

*Post Danmark* concerned a reference for a preliminary ruling by a Swedish court regarding the compatibility with Article 102 TFEU of the selective price cuts Post Denmark, a dominant operator, had made to three customers of one of its competitors. The judgment delivered by the Court’s Grand Chamber was seen as largely supportive to an effects-based analysis to dominant firm’s conduct as it contained a number of statements echoing that approach. The Court, for instance, observed that Article 102 TFEU does not seek to ensure that competitors less efficient than the dominant firm “should remain on the market” and that competition on the merits may “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."  

The Court also noted that in order to assess the existence of anti-competitive effects “it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests."  

43 Id. at § 39.  
44 Id. at § 61.  
45 Case C-209/10 *Post Danmark* [2012] ECR 0000.  
46 Id. at § 21.  
47 Id at § 22.  
48 Id. at § 44.
As will be discussed further below, the case law of the EU courts regarding pricing strategies that can be used by dominant firms is not easily to reconcile, and the *Intel* judgment of the GCEU does not make things any easier.

**D. Loyalty rebates and US antitrust law**

Unsurprisingly, the way in which antitrust authorities and courts should analyze loyalty rebates is a matter of controversy in other legal regimes. This is, for instance, one of the most unsettled areas of US antitrust law. The question that has divided scholars, but also federal courts is whether loyalty rebates should be subject to the “as efficient competitor” price-cost test applied to predatory pricing or the “rule of reason” analysis that is applied to exclusive dealing. While loyalty rebates involve a price cut (which can be analogized to a predatory pricing scenario when the effective price is below a certain measure of cost), but also a condition restricting purchases from rival (which can be analogized to an exclusive dealing scenario). This debate is worth exploring since, as will be seen below, in *Intel* the GCEU confusingly borrows from both analogies, but fails to rely on any of the foreclosure tests applied by US courts.

A significant part of the US legal and economic literature argues that loyalty rebates should be analyzed under the same principles as predatory pricing. Hovenkamp, for instance, argues that:

“when a discount is offered on a single product (whether a quantity or market share discount) the discount should be lawful if the price, after all discounts are taken into account, exceeds the defendant’s marginal cost or average variable cost because such discounts are covered by antitrust’s ordinary predatory pricing rule. One of the factors driving the predatory pricing rule is that, as long as prices are above the relevant measure of cost, the discounts cannot exclude an equally efficient rival.”

This approach has been followed by some US federal courts. For instance, in *Concord Boat Corp. v. Brunswick Corp.*, several boat builders challenged Brunswick’s loyalty discounts on stern-drive engines, a market on which it had a 75% market share in 1983. The following year,

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51 207 F.3rd 1039 (8th Cir. 2000).
Brunswick started to offer discounts off the list price for all engines purchased, the level of which varied depending on the percentage of their requirements they would purchase from Brunswick. Brunswick’s discount programme did not mandate boat builders to commit to Brunswick for any period of time, and some boat builders switched to other engine makers when offered higher discounts. The court also considered that the boat builders did not show significant barriers to entry. In concluding that plaintiffs had not offered sufficient evidence for a jury to determine that Brunswick’s market-share discounts were anticompetitive, the 8th Circuit emphasized that Brunswick’s discounted prices were above cost, and that “[t]he decisions of the Supreme Court in Brooke Group and Matsushita illustrate the general rule that above cost discounting is not anticompetitive.52

The US case-law does not apply different price-cost tests to rebates depending on whether they are based on volume or market share requirements, or whether they are incremental or retroactive. Some commentators, however, suggested that the application of a pure predation test may lead to an unacceptable level of false negatives in situations where rivals cannot compete with the monopolist for all or almost all sales because, for instance, the product sold by the dominant firm is a “must stock” item for the buyer.53 In that situation, by using an all-unit rebates, the dominant firm could leverage its position of strength in the non-contestable part to the contestable part of a customer’s sales. While in such a situation, the Commission’s Guidance Paper suggests the application of a discount attribution test (see Part II, B, above), the Department of Justice in its (now withdrawn) Report on Single Firm Conduct recommended against the use of such a test for single-product discount rebates stating that they believed that

“an approach requiring courts to determine whether a portion of a market is uncontestable and to quantify that portion, as well as to analyze whether a discount deprived plaintiff of efficient scale, would be difficult to administer. More importantly, such an approach would not provide much clarity to firms deciding whether to offer discounts and likely would chill desirable price competition.”54

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52 Id. at 1061.


They, however, recommended the use of a discount attribution test in the case of multi-product (bundled) rebates, an approach that was followed by 9th Circuit in *PeaceHealth*.

Another strand in the literature, however, considered that predatory pricing was not the right analogy to analyze loyalty rebates. For instance, in FTC Commissioner Wright’s view, “loyalty discounts elicit the same concerns about raising rivals’ costs that ‘total’ exclusive dealing does and, for that reason, ought to be analyzed under the same legal rubric as exclusive dealing.” Consistent with that view, a court should not focus on whether the defendant’s discounts/rebates have resulted in prices below cost, but whether they did or are likely to “increase or maintain a defendant’s market power and harm competition through increased prices, reduced output, and/or diminished quality.”

The dilemma for courts over whether to apply a predatory pricing test or a rule of reason analysis to loyalty rebates is particularly well illustrated in the *ZF Meritor* judgment adopted by the 3rd Circuit in 2012. In that case, plaintiff ZF Meritor alleged that they had been excluded from the market for heavy-duty truck transmissions (“HD transmissions”) by the exclusionary conduct of Eaton Corp. Eaton started making HD transmissions in the 1950s until Meritor entered the market in 1989. In 1999, Meritor transferred its transmission business to a JV with ZF AG. A series of mergers in the 1990s reduced the number of truck OEMs who purchased HD transmissions to four and a severe economic downturn resulted in HD transmissions orders to fall by 40-50%.

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55 Id. at 105.
56 *Cascade Health Solutions v. PeaceHealth*, 479 F.3d 726 (9th Cir. 2007). At issue in the case were defendant PeaceHealth’s preferred provider agreements, which offered a lower reimbursement rate to insurance companies that agreed to make PeaceHealth its exclusive preferred provider of primary, secondary and tertiary hospital services. The plaintiff (formerly known as McKenzie-Willamette Hospital) offered primary and secondary services, but did not offer tertiary services. McKenzie sued PeaceHealth for attempted monopolization under Section 2, claiming that PeaceHealth’s bundled pricing agreements were exclusionary and threatened monopolization of the competitive markets for primary and secondary services. The Ninth Circuit adopted the discount attribution test as a safe harbor for bundled pricing claims, holding that bundled pricing cannot constitute exclusionary conduct under Section 2 unless, after allocating the full amount of the discount on the bundle to the competitive products, the price of the competitive products falls below the defendant’s incremental costs of production.

57 See Wright, supra note 8, at 20. This approach is, however, criticized by Hovenkamp: “In a case of unlawful exclusive dealing the defendant seller enters into a contract for a specified period requiring the purchaser to take all of its products from that seller. By contrast, the typical discount contract is typically conditional: if you want to obtain a 20% discount, then you must purchase all (or a specified percentage) of your goods from the contracting seller. The penalty for not taking the specified percentage is not a breach of contract suit or termination of a franchise. Rather, it is simply the loss of the discount. But the loss of the discount is not a penalty at all if a rival is willing to match the discounted price.” See, Hovenkamp, supra note 7, at 846-47.

58 Id.
Soon thereafter, Eaton entered into new multi-year Long Term Agreements (LTAs) with each OEM. These LTAs, which had a five-year duration, provided for market-share rebates, and some of them gave Eaton the right to terminate the agreements if the share penetration goals were not met. Moreover, if an OEM did not meet its market-share goal for one year, Eaton could require repayment of all the contract savings. Some of the LTAs also contained a series of additional measures designed to boost Eaton’s sales to the detriment of ZF Meritor. For instance, each LTA required the OEM to publish Eaton as the standard offering in its data book, and under two of the four LTAs, the OEM was required to remove competitor’s products from its data book. The LTAs also required the OEMs to preferentially price Eaton transmissions against competitors’ equivalent transmissions. By 2003, ZF Meritor concluded that, because of the LTAs, its market share was limited to approximately 8% of the transmission market, and not the 30% it had originally expected at the beginning of the JV, which it therefore decided to dissolve.

Eaton tried to convince the 3rd Circuit to apply the price-cost test used in predation cases. On the other hand, the plaintiffs argued that the LTAs, in their entirety, constituted de facto exclusive contracts, which improperly foreclosed a substantial share of the market and thus harmed competition. The court sided with the plaintiffs and decided that the legality of Eaton’s conduct had to be examined under the rule of reason. The court justified its approach on the ground that unlike in predatory pricing cases, the plaintiffs did not solely rely on the exclusionary effect of Eaton’s prices, and instead highlighted a number of anticompetitive provisions in the LTAs. In its application of the rule of reason, the court looked at the following elements: (i) whether the LTAs could reasonably be viewed as exclusive dealing arrangements; (ii) Eaton’s monopoly power, the concentrated nature of the market, and the ability of Eaton to engage in coercive conduct; and (iii) the anticompetitive effects of the various provisions of the LTAs and Eaton’s procompetitive justifications for the agreements. As to the second element, the court observed that there was evidence that Eaton was able to leverage its position as a supplier of necessary products to coerce OEMs into entering into the LTAs. OEMs presented testimony suggesting that, although the terms of the LTAs were unfavourable to them, they had no choice but to accept them.

60 Id. at 265.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
66 Id. at § 269.
67 Id. at § 270.
as without Eaton’s transmission products, they would be unable to satisfy customer demand. As to the third element, the court looked at a variety of factors, including the extent of the foreclosure, the duration of the LTAs, and the additional anticompetitive provisions of the LTAs.

However, in a recent decision, the US District, D. New Jersey, took a different approach in *Esai Inc. v. Sanofi-Aventis US, LLC*, a case that involved Sanofi’s alleged anticompetitive loyalty-discount contracts for its Lovenox drug. It was undisputed that Sanofi did not sell Lovenox below-cost, that its discount programme did not contractually mandate customers to purchase any amount of Lovenox from Sanofi, and that the loyalty-discount contracts were terminable at any time by any party subject to a 30 days’ written notice. Sanofi argued that the fact that Lovenox was never sold below price was dispositive. Eisai was, however, of the view that price was not the predominant method of exclusion. Rather, Sanofi’s Lovenox marketing programme amounted to de facto exclusive-dealing arrangement, and therefore the rule of reason had to be applied. Unlike in *Meritor*, the court considered that because price was the primary mechanism of exclusion under Sanofi’s practices, the price cost test applied. Based on the evidence, the court rejected Eisai’s argument that there was “something more” than the exclusionary effect of Sanofi’s prices.

The US case-law on loyalty rebates thus seems in a state of flux. While some courts have analyzed loyalty rebates under a price cost test, others have applied the rule of reason on the ground that these rebates effectively amounted to exclusive dealing. Recent case-law suggests that the test applied to a loyalty rebate programme may depend on whether the price was the primary means of exclusion or whether exclusion resulted from additional measures foreclosing competitors. In such case, above cost loyalty rebates could be found illegal. Importantly, independently of the approach adopted, loyalty rebates were not subject to a per se rule of illegality as federal courts recognized that whether or not a rebate was legal or illegal depended on the facts of the matter.

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68 Id. at § 285.
69 Id. at § 286.
70 2011 WL 5416330.
71 Id. at *4.
72 Id. at *25.
73 Id.
74 Id. at *30.
III. The Intel judgment of the GCEU

It is against the background described in Part II A and B that the Commission adopted its 13 May 2009 Decision condemning Intel to a record fine of €1.06 billion on the ground that it had granted conditional rebates and payments to a number of OEMs and a large retailer of consumer electronics purchasing its x86 CPUs, and that it had paid OEMs to delay, cancel or in some other way restrict the commercialization of specific AMD-based products.75

In its Decision, the Commission claimed that it was not bound by the Guidance Paper as it was a priority-setting document that “does not apply to proceedings that had already been initiated before it was published, such as this case”.76 Instead, the Commission relied on Hoffman-La Roche recalling that “an undertaking which is in a dominant position on a market and ties purchasers […] 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 within the meaning of article 82 EC […]”77 Referring to British Airways and Michelin II, the Commission also noted that for establishing an infringement of Article 102 TFEU it was not necessary to “demonstrate that the abuse in question had a concrete effect on the markets concerned.”78 In direct contradiction with the philosophy of the Guidance Paper, the Commission thus stuck to the formalistic approach of the EU courts, and of its own decisional practice, whereby no evidence of foreclosure is needed.79 To avoid criticism, the Commission nevertheless applied an “as efficient competitor” test to demonstrate that Intel’s conditional rebates prevented or made it more difficult for each of those OEMs to source x86 CPUs from AMD.80 But it made it very clear that this test was not required pursuant to the EU Courts case-law.

Intel appealed the Commission’s Decision at the GCEU whose judgment is reviewed hereafter. Section A first summarizes the main elements of the analysis of the GCEU. Section B then reviews the criticisms that can be made against this judgment.

75 The restrictions, which the Commission referred to these as “naked restraints”, are not analyzed in this paper.
77 Id.at § 920.
78 Id. at § 922.
79 Id.
80 Id., sections 4.2.2, 4.3.1 and 4.5.
A. **Summary of the Intel judgment**

While the *Intel* judgment is extremely long, the legal analysis of the exclusive rebates granted by Intel to OEMs is essentially found in paragraphs 72 to 197 of the judgment. This analysis can be summarized as follows.

*First*, in relation to whether the grant of a rebate by a dominant firm can be characterized as abusive, the GCEU draws a distinction between three categories of rebates. Quantity rebates, i.e., rebates linked solely to the volume of purchases made from a dominant firm, are generally considered not to have the foreclosure effect prohibited by Article 102 TFEU.81 Exclusive rebates, i.e., rebates that are conditional on the customer’s obtaining all or most of its requirement from the dominant firm, are “incompatible with the objective of undistorted competition within the common market”82 as they “are designed to remove and restrict the purchaser’s freedom to choose his sources of supply and to deny other producers access to the market.”83 Other rebate systems, which are not directly linked to a condition of exclusive or quasi-exclusive supply from the dominant firm, but which may have a fidelity-building effect,84 such as for instance target rebates,85 should lead to an examination of “all the circumstances, particularly the criteria and rules governing the grant of the rebate.”86

*Second*, the GCEU considers that the rebates granted to Dell, HP, NEC and Lenovo are rebates falling within the second category, as those rebates were conditional upon customers’ purchasing from Intel, at least in a certain segment, either all or most of their x86 CPU requirements, and that therefore these rebates constitute an abuse of a dominant position in the absence of objective justification.87 The GCEU observes that since the “capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates”,88 it is not necessary to examine the circumstances of the case to determine whether these rebates are aimed to prevent customers from obtaining their supplies from competitors.89 The GCEU also adds that a foreclosure effect occurs

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81 Case T-286/09, supra note 1, at § 75.
82 Id. at § 76.
83 Id. at § 77.
84 Id. at § 77.
85 Id.
86 Id.
87 Id. at § 79.
88 Id. at § 86.
89 Id.
not only where market access is made impossible for competitors, but also where that access is made “more difficult.”90 In addition, the GCEU observes that although exclusivity conditions may, in principle, have beneficial effects for competition, “those considerations cannot be accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted.”91 That strict approach is justified by the “special responsibility” that a dominant firm has not to allow its conduct to impair genuine undistorted competition and by the fact that, where an operator holds a strong market position, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute “additional interference with the structure of competition on the market.”92

Third, the GCEU explains the rationale for its strict position vis-à-vis loyalty rebates granted by dominant firms. It is inherent in a “strong dominant position” that for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant firm as customers will in any event obtain part of their requirements from this firm (“the non-contestable share”).93 As a result, the dominant firm’s rivals are not in a position to compete for the full supply of a customer, but only for the portion of the demand exceeding the non-contestable share (“the contestable share”). The grant of exclusivity rebates therefore enables the dominant firm “to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.”94

Fourth, the GCEU distinguishes the present case from the EU courts’ judgments in Deutsche Telekom, TeliaSonera and Post Danmark on the ground that these cases concerned pricing practices, whereas the complaint made against Intel in the Commission decision “is not based on the exact amount of the rebates and thus on the prices charged by the applicant, but on the fact that the grant of those rebates was conditional on exclusive or quasi-exclusive supply.”95 The different treatment of exclusivity rebates and pricing practices is justified by the fact that “unlike an exclusive supply incentive, the level of a price cannot be regarded as unlawful in itself.”96

90 Id. at § 88.
91 Id. at 89.
92 Id. at § 90.
93 Id. at § 91.
94 Id. at § 93.
95 Id. at § 99.
96 Id.
Fifth, the GCEU considers that to establish a breach of Article 102 TFEU it is not necessary to prove the actual effects of the rebates on the market. Similarly, there is no need to prove a causal link between the practices complained of and the actual effects on the market.97 On that point, the Court observes that Article 102 TFEU does not aimed not only aim at practices which may harm consumers directly, but also at those which may affect them through their impact on an “effective competition structure.”98

Sixth, the GCEU considers that the arguments made by the applicant with respect to the amount and the duration of the rebates are irrelevant.99 The Court also observes the “possible smallness of the parts of the market which are concerned by the practices at issue is not a relevant argument” as when the conduct at stake is adopted by a dominant firm “on a market where for this reason the structure of competition has already been weakened, any further weakening of the structure of competition may constitute an abuse of a dominant position.”100 No “appreciable effect” or de minimis threshold therefore applies for the application of Article 102 TFEU. Citing Tomra, the Court also notes that the customers on the foreclosed part of the market should have the opportunity to benefit from “whatever degree of competition is possible on the market” and competitors should be able to compete on the merits “for the entire market and not just for a part of it.”101

Finally, the GCEU states that in order to find anti-competitive effects, “it is not necessary that a rebate system force an as-efficient competitor to charge ‘negative’ prices, that is to say prices lower than the cost price.”102 It also notes that “an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult.”103 Thus, even a positive result to this test would not be capable of ruling out the presence of a foreclosure effect.

The Intel judgment of the GCEU is thus fully in line with the Hoffman-La Roche line of case law on loyalty rebates and contains few novelties. The difference with this earlier case law, however, is that the GCEU gives more explanation as to the reasons why it applied the strict standard set in Hoffman-La Roche to Intel’s rebates, despite the effects-based approach promoted by the Guidance

97  Id. at § 102.
98  Id. at § 105.
99  Id. at § 111.
100 Id. at § 116.
101 Id. at § 117.
102 Id. at § 145.
103 Id. at § 150.
Paper and the abundant legal and economic literature suggesting that loyalty rebates should not be subject to a quasi-\textit{per se} rule of illegality. In any event, as will be seen hereafter, the GCEU’s explanations fail to convince and, in several ways, create confusion.

B. Criticisms made against the \textit{Intel} judgment

The \textit{Intel} judgment has attracted a considerable degree of attention among scholars and practitioners, which led to the publication of a fairly large number of papers providing a number of reasons why the approach followed by the GCEU and the justifications for this approach are wrong. Although, as noted above, this judgment contained few novelties, it triggered strong reactions due to the fact that the Guidance Paper and some of the most recent case-law of the CJEU (e.g., \textit{Post Danmark}) created (perhaps unreasonable) expectations that the GCEU would adopt a judgment that would be better in line with the effects-based analysis that has been promoted by the vast majority of lawyers and economists in the past ten years. However, the GCEU felt somewhat compelled to adhere to the quasi-\textit{per se} rule of illegality contained in \textit{Hoffman-La Roche}, even if it required it to engage in complex legal gymnastics to distinguish this case from other price-related unilateral conduct cases where an effects-based approach had been adopted. The criticisms that can be made against the \textit{Intel} judgment are reviewed hereafter.

\textit{First}, the quasi-\textit{per se} rule of illegality applied by the GCEU to loyalty rebates in line with the \textit{Hoffman-La Roche} line of case-law is not justified considering that, while exclusive rebates can be used by dominant firms to exclude rivals, such rebates are not anti-competitive in themselves.\textsuperscript{104} That was made clear in the EAGCP Report handed to the Commission in 2005 and, to the author’s knowledge, there is no serious economist suggesting the opposite. Thus, although it makes sense to subject practices, such as price-fixing or market-sharing agreements to a \textit{per se} rule of illegality, that approach is undesirable with respect to practices that can be procompetitive as the CJEU observed in \textit{Cartes Bancaires}.\textsuperscript{105} This is also why US courts, although they may not agree on whether loyalty rebates have to be dealt with by analogy to predatory pricing or exclusive dealing, have never analyzed loyalty rebates under a \textit{per se} rule of illegality, but have either applied price-cost tests or a rule of reason analysis.

\textit{Second}, the three categories drawn by the GCEU are based on the form of the rebates used by the dominant firm rather than their concrete anti-competitive effects. This categorization should not come as a surprise as it essentially restates the \textit{Hoffman-La Roche} line of case-law on rebates summarized in Part II, A. It nevertheless represents a serious setback compared to the Guidance

\textsuperscript{104} See the literature survey conducted by Neven, supra note 2. See also Peeperkorn, supra note 3, at §§ 74 et seq. and Rey & Venit, supra note 2, at 18 et seq.

Paper, which no longer referred to such form-based categories, but to the more neutral notion of “conditional” rebates, and treated all “conditional” rebates under the same legal framework. In line with the EAGCP Report, it also focused on the potential exclusionary effects of such rebates, rather than their form.

Distinguishing rebates, and assessing their compatibility with Article 102 TFEU, on the basis of their form makes little economic sense as the same pro-competitive or anti-competitive outcomes can be achieved by these “different” categories of rebates depending on a variety of factors, such as the amount of the rebates in question, their duration, the volume of sales they foreclose, etc. Clearly, in terms of potential competition harm there is no difference between a quantity rebate calculated to cover 90% of a customer’s requirement and a loyalty rebate, which requires that a customer buys 90% of its requirements from the dominant supplier. There is thus no reason why the former should be presumed illegal while the latter should be presumed legal. In fact, a customer may have a strong preference for a loyalty rebate as it gives it the guarantee to obtain its financial reward if it meets the percentage threshold, independently of the quantities it eventually buys. Loyalty rebates can thus be used as a risk-sharing mechanism.106

If anything a legal categorization based on form rather than effects may help dominant firms to conceal the exclusionary features of their practices as they can modify the form of their conduct to escape, or at least reduce the risk of liability. This was pointed out in the EAGCP’s Report on Article 102 TFEU:

“By focusing on the effects of company actions rather than on the form that these actions may take, an economics-based approach makes it more difficult for companies to circumvent competition policy constraints by way of attempting to achieve the same end results through the use of different commercial practices. At the same time, this approach provides a more consistent treatment of practices, since any specific practice is assessed in terms of its outcome and two practices leading to the same result will therefore be subject to a comparable treatment.”107

Third, the GCEU’s suggestion that the Intel case has to be distinguished from exclusionary pricing cases because what is objectionable in this case is not necessarily the price level, but the fact that

106 See Dolmans & Graf, supra note 2, at 85 (“[a]n upfront, binding, take-or-pay volume commitment provides the supplier with the greatest planning certainty, but leaves all the risk of unneeded units with the customer. A discount conditioned on exclusivity, on the other hand, may still improve planning certainty for the supplier, but at the same time increases flexibility and reduces risk for the customer.”)

107 EAGCP Report, supra note 24, at p. 2. See also Peeperkorn, supra note 3, at § 18 (“Applying the full effects-based approach to some forms of conduct and a more restricted effects-based approach or even a form-based approach to others would not only create unjustified differences in treatment, it would also create an inefficient bias in firm conduct and would open the possibility of so-called “forum shopping,” i.e. firms choosing their conduct less on the basis of effectiveness and more on the basis of the enforcement standard being applied.”)
the rebates are conditional on exclusive or quasi-exclusive supply may appear surprising. However, it echoes the US case-law supporting the view that loyalty rebates should not be analyzed under the as efficient competitor test applied to predatory pricing case, but under the rule of reason applied to exclusive dealing arrangements. On this point, the CGEU’s analysis is largely in line with the 9th Circuit *Meritor* judgment with one major caveat, which is that the 9th Circuit did not apply a quasi- *per se* rule of illegality to Eaton’s rebates. This is where the GCEU’s analysis breaks down. If the Court considered that Intel’s loyalty rebates, unlike the conducts at stake in predatory pricing or margin squeeze cases in were not a matter of exclusionary pricing but exclusive dealing, it should have focused its attention on the very factors it considered irrelevant, such as the duration of the rebates, the level of the market foreclosed, and the effects of these rebates. 108 These factors, as well as others, formed the basis of the analysis of the 3rd Circuit in *Meritor*. The GCEU was, however, held back from following this sensible approach by the quasi- *per se* rule of illegality attached to exclusive dealing in *Hoffman-La Roche*.

Particularly shocking in the judgment is the GCEU’s view that even the foreclosure of a minimal share of demand by a dominant firm can infringe Article 102 TFEU. This, for instance, means that if a dominant firm grants loyalty rebates to five customers representing 10% of the overall demand for the product concerned, such rebates should be subject to the quasi- *per se* rule of illegality. In fact, the GCEU side steps what should be the two core elements of an analysis of the effects of a given loyalty rebate scheme, which are first to determine whether the rebate can exclude as efficient competitors, and second to determine whether, even if competition for the customer(s) that are granted the rebate is foreclosed, there remains a sufficient share of the total demand for the product in question for rivals to enter and/or expand.

The GCEU justifies the lack of relevance of the share of demand that is foreclosed by the rebate on the ground that when the rebate is granted by a dominant firm “on a market where … the

108 The primary competitive concern with raised by exclusive dealing is that it might foreclose enough of the market to competitors to impair competition. Such foreclosure may impede entry or expansion of rivals in the market, or accelerate their exit from the market, hence increasing the market power of the excluding firm. But even if foreclosure reduced rival efficiency without outright eliminating them, it will worsen the market options available to consumers, and mean that these rivals will impose less of a constraint on the defendant’s market power than they otherwise would have. This can thus enhance or maintain that market power even if it does not drive rivals from the market bar their entry. Economic models exploring the possibility of a supplier using exclusive dealing to reduce competition and harm consumers generally require strict assumptions concerning the existence of significant economies of scale, barriers to entry, and the absence of procompetitive efficiencies. There are further limitations on the loyalty discount-induced foreclosure result described above. For example, that result requires rival firms to be constrained from competing to satisfy a large or complete portion of the distributor’s requirement. Although exclusive dealing agreements can have many possible anticompetitive effects, they also have many possible redeeming efficiencies that help explain why they are often used even by firms without market power who are not foreclosing a substantial share of any market. They might reduce uncertainty about whether future sales will occur at the contractually set price. This can lower risk-bearing costs or inventory costs, or give firms the contractual commitments they need to invest in expanding their capacity in a way that achieves economies of scale.
structure of competition has already been weakened, any further weakening of the structure of competition may constitute an abuse of a dominant position.”109 But the presence of a dominant firm does not necessarily suggest that the structure of competition has been weakened as, even in the presence of a dominant firm, a large part of demand can still be contestable.110 The GCEU seems to have a “static” view of dominance that is not a true reflection of many industries. In consumer electronics, for instance, the winners of yesterday are the losers of today, and the winners of today may fade away tomorrow.

The approach of the GCEU is made even more problematic by the fact it takes an expansive view of the notion of exclusivity.111 The Intel judgment suggests that if the exclusivity condition applies to only one or a few segments of a customer’s demand, the rebate in question will qualify as an exclusive rebate independently of the share of the total customer’s demand represented by these segments. For instance, in the case of HP, the enterprise PCs to which the exclusivity condition applied represented only 28% of HP’s total demand for x86 CPUs.112 This approach stretches the notion of exclusivity and extends Hoffman-La Roche’s quasi-per se of illegality very far.

Fourth, the judgment is subject to internal contradictions and is paradoxical in some aspects. For instance, while the GCEU seems to suggest that the problem of loyalty rebates is not one of exclusionary pricing, but one of exclusive dealing, it abundantly refers to the leveraging theory that underpins the “as efficient competitor” discount attribution test developed in the Guidance Paper and applied by the Commission in its Intel decision. At paragraph 93 of the judgment, the GCEU states that:

“the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant

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109 Case T-286/09, supra note 1, at § 116.

110 The Guidance Paper does not identify a link between dominance and the non-contestability of a part of a given customer demand. See § 36: “Competitors may not be able to compete for an individual customer’s entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a ‘must stock item’ preferred by many final customers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier. If competitors can compete on equal terms for each individual customer’s entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition.” See also Dolmans and Graf, supra note 2, at 81 (“it would be wrong to conclude more generally from the existence of a dominant position that an exclusivity discount always leverages a non-contestable portion of demand. The concept of dominance relates to a company’s position in the market overall. In contrast, the question of whether a discount applies to the non-contestable demand of a customer concerns the specific situation of that customer and the particular conditions of the discount arrangements it has concluded with the dominant company. It is possible therefore for a company to hold a dominant position, but for its exclusivity discounts not to leverage non-contestable demand.”)

111 See Dolmans and Graff, supra note 2, at 77; Venit, supra note 2, at 215.

112 Id. at § 126.
position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.”

This is where the judgment is paradoxical: while the GCEU recognizes and supports the underlying logic of the discount attribution test, it rejects the application of this test by the Commission as entirely irrelevant.¹¹³

**Fifth,** the position taken by the GCEU with respect to exclusive rebates granted by dominant firms seems to be inconsistent with the position taken by the EU courts in the application of both Articles 101 and 102 TFEU.¹¹⁴ The analysis of the GCEU is, for instance, hard to reconcile with the approach taken by the CJEU in *TeliaSonera*, and *Post Danmark*, whereby the CJEU firmly established the principle that alleged exclusionary pricing practices must be analyzed under an as efficient competitor test and that there cannot be an abuse in the absence of effects.¹¹⁵ As noted above, the GCEU distinguished from these cases by noting that the complaint against Intel was not above the level of prices, but the exclusivity attached to the rebates, which is a position that can be defended, although it does not justify the application of quasi-*per se* rule of illegality.

The quasi-*per se* illegality approach applied to loyalty rebates in the *Intel* judgment also seems to be in tension with the recent judgment of the CJEU in *Cartes Bancaires*, according to which the concept of restriction of competition “by “object” (the equivalent of *per se* illegality under Article 101 TFEU) must be interpreted “restrictively” and

“can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.”¹¹⁶

¹¹³ See Ahlborn & Piccinin, supra note 2, at 69 (“It is not without irony that the General Court, which has rejected the Commission’s overall approach towards exclusivity rebates set out in the Guidance Paper, nevertheless adopts core elements of the Guidance Paper’s analytical framework when it comes to identifying any potential competitive harm.”) See also Venit, supra note 2, at 212.

¹¹⁴ On the importance of ensuring consistence between the application of Articles 101 and 102, see Peeperkorn, supra note 3, at 15 (“the approach applied under Article 102 should be consistent with the approach applied under Article 101. This is necessary because in many instances the same conduct can be, and sometimes is, assessed under both provisions of the Treaty.”)

¹¹⁵ See Part II, C above.

¹¹⁶ Case C-67/13 P, supra note 105, at § 58.
The CJEU also observed in that case that

“in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition ‘by object’ within the meaning of Article [101(1) TFEU], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part.”

It is hard to see why the above statements cannot apply to loyalty rebates and to other forms or other abuses more generally. Unlike in the case of hard-core cartels, there are no reasons to believe that loyalty rebates are inherently anti-competitive. Hence, the anti-competitive nature of loyalty rebates should be determined with the regard to the “content, objectives and the economic and legal context” of the measure in question.

The *Intel* judgment is also at odds with the *Delimitis* judgment where the CJEU observed that the exclusivity obligations contained in the beer supply agreements in question were a source of efficiencies to the benefits of the suppliers and the users. As these agreements did not have the “object” of restricting competition, it was thus necessary to determine whether they had the effect of distorting competition, and that the effects of these agreements “in the context in which they occur and where they might combine with others to have a cumulative effect on competition.”

The *Intel* judgment, however, distinguishes *Delimitis* in holding that although exclusivity conditions may, in principle, have beneficial effects for competition “those considerations cannot be accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted.” As noted above, there is no reason to believe that competition is necessarily restricted in the presence of a dominant firm unless one adopts a static view of dominance.

In sum, the *Intel* judgment is deficient on many counts. While the GCEU borrows from both the predatory pricing and exclusive dealing analogies outlined in the US case-law, it fails to draw the logical consequences of these analogies, in that it neither applies an as efficient competitor test nor a rule of reason. The reason is that the CGEU’s analysis is constrained by the quasi-per rule of illegality contained in *Hoffman-La Roche*. It is submitted that this approach no longer makes sense

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117  Id. at § 53.
118  See Peeperkorn, supra note 3, at §§ 58 et seq.
120  Id. at §§ 10 et seq.
121  Id. at § 14.
122  Case T-286/09, supra note 1, at 89.
and that it should be overruled by the CJEU in its forthcoming appeal of the *Intel* judgment. The CJEU should also seize the opportunity to describe the main components of the effects-based test that should be applied to loyalty rebates or, as the assessment of rebates should not be based on form, to all conditional rebates.

IV. **What is the right conceptual framework to analyze loyalty rebates?**

While it is easy to criticize the GCEU’s *Intel* judgment, it is harder to propose an alternative legal framework to analyze loyalty rebates. As we have seen, the US literature and case-law is unsettled on the issue of whether loyalty rebates should be dealt with under the as efficient competitor test applied to predatory pricing cases or the rule of reason analysis applied to exclusive dealing. In fact, the two approaches do not seem to be mutually exclusive as an as efficient competitor test can be combined with an analysis of the factors that would be taken into account under a rule of reason.

This part seeks to propose a framework for the assessment of loyalty rebates (although it can be applied to all types of rebates) based on sound legal and economic principles. Each step of the proposed test also relies on objective economic criteria, moving away from the formalistic approach to the assessment of rebates which has plagued the EU courts’ case-law. Key to the assessment of rebates is to focus on the relevant issues – central to which is the presence of foreclosure – and in so doing to rely on proper economic tools. In many ways, the proposed framework is in line with, and even based on, the Guidance Paper, but with variations to address some limitations of this policy document.

In line with *Post Danmark*, the starting point of the analysis should be that the rebate scheme in question needs to produce “an actual or likely exclusionary effect” to breach Article 102 TFEU. To establish an anticompetitive effect, it must be demonstrated that the rebates granted by the dominant firm can exclude as efficient competitors, foreclose a substantial share of the market, and are not counterbalanced by efficiencies. This demonstration should involve a three-step test taking the form of the following questions:

(i) Can the rebates in question foreclose competitors because the dominant firm’s customers cannot turn to alternative suppliers without incurring substantial switching costs, which equally efficient competitors cannot overcome?

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123 And should be implemented on the basis of relevant data.

124 See supra, text accompanying note 48.
If so, do the customers eligible to receive the challenged rebate represent a substantial share of the market to which equally efficient rivals can turn, depriving them of the possibility to profitably enter and/or expand?; and

If the answers to the above questions are affirmative:

(iii) Are the foreclosure effects of the rebates in question offset by pro-competitive efficiencies?

Each element of this test is discussed below.

A. Can the rebates foreclose equally efficient competitors from the dominant firm’s customers?

One of the most disconcerting aspect of the Intel judgment – or, more generally, of the Hoffman-La Roche line of case-law – is that different forms of conditional rebates are dealt with under distinct legal tests. As similar exclusionary aims can be achieved through quantitative, loyalty or other types of loyalty-enhancing rebates, it is not clear why the quantitative rebates should be presumptively legal, loyalty rebates presumptively illegal and other forms of rebates subject to an analysis of “all the circumstances” of the case. It is submitted that this third test should be extended to all forms of conditional rebates as it is the test that best allows the Commission and other competition authorities to best take into account the (typically) large amount of evidence they have collected during its investigation. Presumptions of legality or illegality should be limited to circumstances where it is clear that firm practices never generate any anti-competitive or pro-competitive effects. That is not the situation with respect to conditional rebates.

In line with the above proposal, the first question is whether the Commission should conduct an as efficient competitor test to the loyalty rebates at stake in the Intel case. The answer is that it depends on whether it has sufficient data to perform that test with a reasonable degree of accuracy. Sub-section 1 discusses the as efficient competitor test the Commission uses to deal with conditional rebates. It focuses on the challenges that are created by the application of a discount attribution test in the case of retroactive rebates. Sub-section 2 addresses the situation when the Commission does not have sufficient data to perform that test with a reasonable degree of accuracy. Sub-section 3 shows that there is no inconsistency to rely on the “as efficient competitor” and “all the circumstances” of the case tests alternatively, but also in parallel.

1. The as efficient competitor test
When rebates are *incremental*, the Commission, as suggested in the Guidance Paper, should apply a pure predation test on the incremental units (the unit above the rebate’s threshold) as in that case the dominant firm is not able to leverage any non-contestable share of the customer’s demand to expand its sales on the contestable share of that demand. The application of a pure predation test in this case should neither be difficult nor controversial.

When the rebates are *retroactive*, the analysis is more complex. In its *Intel* Decision, the Commission applied a discount attribution test where the totality of the rebate is applied to the contestable share of a given customer’s demand to determine whether an equally efficient competitor could contest that share of the demand. A discount attribution test is relatively easy to apply to a multi-product rebate because the contestable and non-contestable parts of the customer’s demand are easy to determine. For instance, if a rebate is granted when customers buy products X and Y, but only Firm A is able to produce X, then the ability of A to foreclose customers from the contestable product (Y) can be assessed by applying the totality of the bundled rebate to that product.

Reliance on conceptually similar tests for retroactive single product rebates and multi-product rebates seems logical since the risks of foreclosure created by these categories of rebates are analogous. In both cases, there is a concern that a dominant firm may be able to leverage its strength on the non-contestable part of a given customer demand (single product rebates) on a combination of different products (multi-product rebates) to the contestable part of that demand. Seen from that angle, rebates that cover both the contestable and non-contestable shares of a given customer’s demand amount to an intra-product bundled rebate. The difficulty, however, is that in the case of single-product rebates, such as those at stake in the *Intel* case, it is not easy to determine the respective sizes of the contestable and non-contestable demand. That largely explains why US courts have occasionally applied a discount attribution test to multi-product rebates, but never to single product rebates cases.\footnote{See United States, Submission for the Roundtable on Bundled and Loyalty Discounts and Rebates, OECD, 1 July 2008, available at \url{http://www.justice.gov/atr/public/international/234014.htm}, at §§ 40-50.}

Several factors can certainly help in determining the size of the contestable share of a customer’s demand:

- *Switching costs:* When such costs are significant, they may have the effect of locking-in customers with the dominant supplier even if they were willing to switch part of their requirements to alternative suppliers. The contestable share will thus be small.
- **Must-have brands (or must-stock products):** Some leading brands or products may be essential for various categories of retailers. For instance, supermarkets may have to stock certain popular consumer brands, such as for instance Coca-Cola.

- **Capacity constraints:** Even when customers are willing and able to switch to alternative suppliers, such suppliers may be unable to satisfy the resulting demand, hence ensuring an assured base to the dominant firm (at least equal to the total demand minus the maximum available capacities of its rivals).

- **Single-source supply:** In sectors where transaction costs savings are of critical importance, customers may prefer to buy from a single supplier that is able to supply them with the full, or at least a large part, of the range of the products they need. This may prevent suppliers with a narrow range of products from supplying such customers.\(^{126}\)

The problem is that these different factors, and their relative importance for a given product/service and/or a given customer, are hard to measure. In its Guidance Paper, the Commission also refers in a footnote to some factors that need to be taken into account in the determination of the scope of the contestable share:

> “For existing competitors their capacity to expand sales to customers and the fluctuations in these sales over time may also provide an indication of the relevant range. For potential competitors, when possible, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken. 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.”\(^{127}\)

\(^{126}\) Note, however, that a supplier that is unable to supply the full range of products required by a given customer, can try to team up with other suppliers producing the products missing from its products range so as to jointly offer the product range needed.

\(^{127}\) Id at § 41. Although this is not mentioned among the factors referred to in this paragraph, the competition authority investigating the rebate could perhaps rely on the business documents (such as business plans of the dominant firms’ competitors, documents outlining the purchasing strategy of the dominant firm’s customers) to determine the size of the contestable share of the relevant customers’ demand. The problem, however, is that such documents may be misguided or simply contradictory. A potential buyer may, for instance, exaggerate the share it is willing to buy from a dominant firm’s rival in order to induce that rival to give it a good price. This is only where business documents (seized or requested by a competition authority in the context of an investigation, or produced in court) appear to converge that they could be used as one of the factors taken into account in the assessment of the size of the contestable share of a given customer’s demand. But even if this is the case, recourse to such materials would be subject to criticism. If the size of the contestable share, a factor essential to the application of the suction effect, depended on the assessments/expectations of its customers or competitors, a dominant firm could never determine through a self-assessment whether a retroactive rebate regime is compliant with antitrust law.
Some of these factors may be more relevant than others. As far as existing competitors are concerned, it is certainly true that some of these firms may be able to develop strategies to “expand sales to customers”. For instance, when faced with capacity constraints, a dominant firm’s rival may decide to concentrate all its supplies on one or a limited number of customers. If its output needs to be increased, this rival may also decide to subcontract the manufacturing of its products to other producers. However, the fact that rivals may be able to expand their sales is only one of the factors that may allow them to satisfy a given customer’s demand, but it does not say very much as to the willingness of that customer to switch its orders to these rivals.

Moreover, “the fluctuations in these [firms’] sales over time” is a questionable factor. No clear relationship can be established between the share of a given customer’s demand supplied by one or several rivals of a dominant firm at a given stage, and the degree of contestability of that demand at that stage or, a fortiori, at a later stage. It is not, for instance, because one or several rivals of a dominant firm supply 5% of the share of a given customer’s demand that these 5% represent the contestable share of that customer’s demand. These firms may in fact have failed to capture the totality of the contestable share of that customer’s demand (which would be, for instance, as high as 20%) for a variety of reasons (high prices, insufficient quality, etc.).

As far as new entrants are concerned, their “historical growth pattern in the same or in similar markets” represents at best a rough instrument to determine the size of the buyer in question’s contestable share. First, the determination of the size of the contestable share is an issue that should be analyzed at the customer level, not at the market-wide level. Moreover, the fact that historical growth in the market in question or in “similar” (whatever this means) markets has been limited may be explained by a variety of factors, which have little to do with the willingness of one or several buyers to switch their requirements to one or several new entrants.

The Commission seems to acknowledge the limitations of the factors mentioned in its Guidance Paper as it indicates in a footnote that: “[t]he relevant range will 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 as efficient competitors.”

The above discussion does not suggest that the discount attribution test is unmanageable or too uncertain to be used to assess the compatibility of retroactive loyalty rebates with Article 102 TFEU. In many cases, by combining a variety of factors that may not necessarily be dispositive taken individually, the Commission may be able to develop a fairly accurate picture of the respective sizes of contestable and non-contestable parts of a given customer demand. The above
discussion, however, shows that this test raises a number of challenges that in some cases may be difficult for the Commission to overcome.

2. Looking at “all the circumstances” of the case

When it is not possible to establish with a sufficient degree of certainty the respective sizes of contestable and non-contestable parts of a given customer demand, the Commission should consider all the available evidence that can be used to determine whether the rebates in question can have actual or exclusionary effects.

As to the evidence that should be considered by the Commission, the factors analyzed by 3rd Circuit in the Meritor case, such as, for instance, whether the dominant firm was able to coerce buyers because it produced must-stock items (and thus controlled a share of the individual customers’ demand), the level and duration of the rebates, as well as their anti-competitive effects, should allow the Commission to have a fairly precise view of the exclusionary potential of the loyalty rebate regime at stake. This analysis essentially places loyalty rebates under the same framework as the third category of rebates for which “all circumstances” of the case must be considered. In Meritor, the 3rd Circuit also considered a number of measures, which in addition to the loyalty rebates, had the effect of making it harder for competitors to supply the customers to which rebates had been granted.

The Commission had the same approach in mind in its 2005 Discussion Paper, in which it observed that:

“[w]here it is in general not possible to accurately establish the [contestable] share, the Commission will overall assess to what extent the rebate system hinders expansion or entry by competitors. It will do so by investigating the market performance of the dominant company and its competitors, preferably by comparing the situation before and after the rebate system was introduced. It will amongst others estimate the importance of the rebate by comparing its size to the full price per unit of product and will assess the indications of an actual foreclosure effect such as exit or declining market shares of competitors or delisting of their products.”

Similarly, in its general section on foreclosure, the Guidance Paper states that a number of factors will be taken into account to determine when an alleged abusive conduct is likely to lead to anti-competitive effects, including possible evidence of actual foreclosure:

If the conduct has been in place for a sufficient period of time, the market performance of the dominant firm and its competitors may provide direct evidence about anticompetitive

129 See Discussion Paper, supra note 29, at § 164.
foreclosure; for reasons attributable to the allegedly abusive conduct, the market share of the dominant firm may have risen or a decline in market share may have been slowed; for similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed.”

3. Using the “as efficient competitor” and “all circumstances test” in parallel

The above proposed approach could be criticized for being conceptually inconsistent as it borrows from the distinct tests applied by US courts to loyalty rebates, i.e. the price cost test applied to predatory pricing, and the rule of reason applied to exclusive dealing. But the inconsistency is only apparent. Unlike the US papers supporting the exclusive dealing analogy, this paper is not hostile to the application of a price cost test to loyalty rebates, but it observes that in the case of retroactive rebates the discount attribution test may not always be easy to implement. Thus, when the Commission does not see itself in a position to apply this test, it should use all the available evidence, including the factors that will be typically looked at in a rule of reason analysis, to determine the likelihood of anticompetitive effects.

More generally, the two approaches are not mutually exclusive and an analysis of factors such as those relied on in the Meritor case may helpfully confirm the foreclosure effects of a rebate regime even when the discount attribution test has delivered its verdict. At the opposite pole of the quasi-per se rule of illegality contained in Hoffman-La Roche, the proposed approach seeks to ensure that the Commission is able to use all the relevant elements at its disposal to determine whether the rebates in question are likely to have foreclosure effects. The application of Article 102 TFEU should be informed by the facts, not by some abstract notion that loyalty rebates are “inherently” anti-competitive, unless serious economic evidence suggests it is the case.

B. Do the foreclosed customers represent a significant share of the relevant market?

It is not because a price cost test or a broader inquiry demonstrate that, due to the loyalty rebates granted by the dominant firm, rivals may be foreclosed from supplying a certain number of customers that these rebates should be held in breach of Article 102 TFEU. The next stage in the inquiry should be to determine whether these customers represent a substantial share of the market to which such rivals can turn, depriving them of the possibility to profitably expand and/or enter. The fact that a given rebate forecloses one or several competitors of the dominant firm from supplying one or several customers is not sufficient to demonstrate the presence of anti-


131 For an application of this standard in US law, see Concord Boat Corp. v. Brunswick Corp., supra note 51 at 1059 (the court noting that the boat builders had “failed to produce sufficient evidence to demonstrate that Brunswick had foreclosed a substantial share of the stern drive engine market through anticompetitive conduct.”)
competitive effects. Such effects will only appear when such customers represent a substantial share of the market that is critical for rivals’ competitiveness. Otherwise, even if they are unable to supply one or several customers, rivals will have access to a sufficient share of the demand for the products/services in question to allow them to profitably enter or remain on the market, and thus constrain the dominant firm. This central point was made by Philip Lowe, the Director General of DG COMP, in relation to the *Discussion Paper*:

“In the [Discussion Paper] we propose that for rebates – as well as for other types of price based conduct – the exclusion of “as efficient competitors” is abusive. Though this is not the only test which can be used to show abuse, it is a useful one, as it allows dominant firms to assess their conduct based on their own costs. A failed price-cost test is of course not the end of the analysis. We would still have to show a likely market foreclosure effect.”¹³²

Similarly, the DoJ in its Report on Single-firm Conduct noted that

“in any situation in which a foreclosure-based approach is used, plaintiff should be required to demonstrate that the discount forecloses a significant amount of the market and harms competition.”¹³³

The *Intel* judgment’s rejection of the view that the level of the share of total demand foreclosed by the royalty rebate is irrelevant to the analysis is hard to comprehend. Even Whish, who is otherwise supportive of that judgment, observed that:

“One feature of the *Intel* judgment disturbs me: paragraph 116 says that in an Article 102 case there is no room for the application of a de minimis threshold: it is not necessary to show an appreciable effect. This finding is based on paragraph 123 of the Hoffmann-la Roche judgment of 1979 and a sentence in the Advocate General’s Opinion in Tomra, which does nothing more than cite Roche. In fact the Court in Roche simply said that, where a firm is dominant on a market, ‘any further weakening of the structure of competition may constitute an abuse of a dominant position’ (emphasis added). I hope that the Court of Justice will consider whether that one sentence, written 35 years ago, is sufficient to support the proposition that an ‘abuse of minor importance’ (to borrow words from the Commission's de minimis Notice under Article 101) can violate Article 102.”¹³⁴


¹³³ DoJ, supra note 54, at 117.

The question is of course to determine what a “substantial” share or amount of the market is. The answer is bound to vary from one market to the other. For instance, in sectors where economies of scale and scope are small and network externalities irrelevant, a loyalty rebate that forecloses a substantial share of the market may not, in itself, be capable of driving out competitors, and thus must be deemed lawful.135 In the context of an analysis of rebates, “substantial” should thus mean a level of the overall demand that is sufficient to prevent rivals to enter into the market or to maintain/expand their presence on this market. For instance, in a market where the minimum efficient scale (the “MES”) is at 50% of the market (i.e., a duopoly), a market coverage of 60% is exclusionary, whereas in a market where the MES is at 20%, a 50% market coverage may be insufficient to foreclose the market.136 Determining market foreclosure thus requires a case-by-case analysis.

C. Are the rebates’ anti-competitive effects counterbalanced by the efficiencies?

If the rebate in question forecloses a substantial share of the market, the dominant firm should be allowed to demonstrate that the foreclosure effects of the rebates are offset by pro-competitive efficiencies. While the importance of efficiencies has long been recognized by US courts, one of the criticisms often made against the decisions of the Commission and the case law of the EU Courts was that they failed to sufficiently consider the rebates’ actual or potential efficiencies, focusing too much instead on their actual or potential exclusionary effects.137 The more recent case law of the EU Courts, as well as the Commission’s Guidance Paper signal that greater attention may be given to the efficiencies invoked by dominant firms to justify their otherwise abusive conduct.138

As far as conditional rebates are concerned, the CJEU held in British Airways that

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136 Following this line of reasoning, one scholar suggests the following safe harbor: “per se legality for arrangements less than one year in duration or arrangements that foreclose less than 40% of total distribution would improve consumer welfare without significant risk of anticompetitive harm.” See Joshua D. Wright, “Antitrust Law and Competition for Distribution”, (2006) 23 Yale Journal on Regulation at 169-208.


138 “Lately there has been a shift in the Commission’s and the European Courts’ practice which, more clearly than in the past, ensures that efficiencies are taken into account by allowing the dominant firm to show that the efficiencies are likely to outweigh the anti-competitive effects to the benefit of consumers.” See European Commission, European Commission, Roundtable on Bundled and Loyalty Discounts and Rebates, 10 June 2008, available at http://ec.europa.eu/competition/international/multilateral/2008_june_rebates.pdf, at § 28.
“[t]he Court of First Instance was right, after holding that the bonus schemes at issue produced an exclusionary effect, to examine whether those schemes had an objective economic justification.

Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case ... It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.”139

The CJEU thus assimilates the “objective justification” that can be used by the dominant firm to justify an otherwise abusive conduct to an Article 101(3)-type analysis (some would say an Article 102(3) analysis). This approach is confirmed in the Guidance Paper, which states that to succeed under an efficiency defense the dominant firm adopting conduct leading to the foreclosure of competitors must “demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence” that: (i) “the efficiencies have been, or are likely to be, realised as a result of the conduct”; (ii) “the conduct is indispensable to the realisation of these efficiencies”; (iii) “the likely efficiencies brought about by the conduct concerned outweigh any likely negative effects on competition and consumer welfare in the affected markets”; (iv) “the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.”140

The question, of course, is whether dominant firms granting loyalty rebates that may produce exclusionary effects stand a real chance to be able to justify their conduct on the basis of an efficiency defense as structured in British Airways and the Guidance Paper.

There are at least two difficulties. First, given the fact that in the Intel judgment the GCEU presumed the anti-competitive effects of loyalty rebates, it makes it very hard, if not impossible, for the dominant firm to show that the effects are counterbalanced by efficiencies.141 This shows that the quasi-<i>per rule</i> of illegality resulting from Hoffman-La Roche is in fact a <i>per se</i> rule as the ability of a dominant firm to produce an objective justification is virtually nil. This is also one of the reasons why Hoffman-La Roche must be replaced by an effects-based analysis where the Commission must demonstrate the rebate scheme is capable to produce “an actual or likely

139  Case C-95/04 P, supra note 4, at §§ 85-86.
141  See Petit, supra note 2, at 16.
exclusionary effect” to breach Article 102 TFEU. Short of that any attempt to justify otherwise exclusionary abuses on the basis of efficiencies will remain entirely theoretical.

Second, the condition of “indispensability” may appear difficult to meet with most rebates and, in particular, loyalty rebates as it could always be argued that the objectives intended by the dominant firm can be achieved through other forms of rebates. But adopting such a narrow view would be misguided. Market-share rebates may be needed to reach objectives that cannot be achieved through volume-based rebates. As alluded to above, while volume-rebates tend to incentivize buyers to buy larger quantities (hence allowing the supplier to achieve economies of scale, etc.), they may represent a risk for buyers in industries where it is hard to predict in advance how a given line of products will sell. In such industries, customers may fail to obtain the rebate at the end of the period for reasons that may be independent of their will and efforts. Customers may thus ask suppliers for a market-share rebate since they ensure customers will collect the rebate by purchasing their requirements up to the percentage level needed to reach the threshold. Hence, percentage-based rebates amount to a risk-sharing mechanism between the suppliers and their customers.142

When demand is uncertain, risks can also be shared between suppliers and customers through the adoption of a retroactive rebate. Rather than setting in advance the price and the volume of the products to be purchased (which guarantees volumes to the supplier, but places a lot of pressure on the buyer), the supplier and the buyer may agree that a retroactive rebate will be granted above a certain threshold. The supplier knows that the buyer will have a strong financial incentive to meet the threshold (which should in turn guarantees some volumes to the supplier), but the buyer will not be forced to meet the threshold on pain of breaching its contractual obligations. In the worst case scenario, failing to meet the threshold will only translate in not obtaining the rebate and thus suffering a price penalty.143

V. Conclusions

While some authors have suggested that the Intel judgment should be read “intelligently” in that GCEU would have limited the application of quasi-per se rule of illegality to the situation where a dominant firm would seek to leverage the non-contestable share of a given customer’s demand to capture a greater share of the contestable share of that demand.144 The scope of Hoffman-La Roche’s quasi-per se rule would thus be narrower than generally alleged. This reading is, however, inadequate for two reasons. First, while it is true that the GCEU expresses concerns about this

142 See supra text accompanying note 106.
144 See, e.g., Dolmans and Graf, supra note 2, at 81 and Petit, supra note 2, at 9.
leveraging strategy, there is nothing in the judgment suggesting that the quasi-\textit{per se} rule of illegality applying to loyalty rebates should be interpreted narrowly. The second category of rebates identified by the GCEU to which the quasi-\textit{per se} rule of illegality applies covers all the loyalty rebates, not only the “leveraging” ones. Second, even of this interpretation proved to be correct, it would still be problematic as it would presume that all leveraging market-share rebates are anti-competitive, while this needs to be demonstrated.

The CJEU should thus seize the opportunity of the \textit{Intel} appeal to declare that to the extent it applies a quasi-\textit{per se} rule of illegality to exclusive dealing and “exclusive” (or more precisely “loyalty”) rebates \textit{Hoffman-La Roche} is no longer good law and replace it by a structured rule of approach along the lines proposed in Part IV.

Such a move away from \textit{Hoffman-La Roche} would present many advantages. First, this would much better align EU law with the teachings of economic analysis, which is desirable since economics informs competition law. Second, it would create a higher degree of coherence within the EU courts’ case-law, not only in the way in which the various forms of conditions rebates are dealt with, but more generally in the way in which unilateral pricing conduct is assessed. For instance, the \textit{Intel} judgment cannot be reconcile with the CJEU’s \textit{Post Danmark} judgment. Third, the proposed legal framework is simple as it is structured around three clearly defined questions. Fourth, by adopting an effects-based approach structured around these questions, the CJEU would side with the almost unanimous position of the legal and economic literature. While the CJEU is not bound to apply popular approaches, it cannot completely ignore the views held by experts, including the EAGCP and DG Competition,\textsuperscript{145} especially since it has already taken on board the effects-based approach in its analysis of other forms of unilateral pricing conduct.

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