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IS THE EFFECTS-BASED APPROACH HERE TO STAY?
Fidelity Rebates, Anticompetitive Effects, and the *Intel 2022* Judgement

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List of Abbreviations

AAC	Average Avoidable Cost
ACT	Association for Competitive Technology
AEC	As-Efficient Competitor
AG	Advocate General
AMD	Advanced Micro Devices, Inc.
Bn	Billion
Cf.	Confer
Coord.	Coordinator
CPU	Central Processing Unit
ECAP	Exception to Customer Authorised Pricing
ECJ	European Court of Justice
Ed., eds.	Editor(s)
EEC	Treaty of Rome
E.g.	Exempli gratia
Et al.	Et alia
EU	European Union
EUR	Euro
GC	General Court
Ibid.	Ibidem
Id.	Idem
I.e.	Id est
MDF	Market Development Funds
MSH	Media-Saturn-Holding GmbH
N., No.	Number
N.P.	No page number available

OEM	Original Equipment Manufacturer
Op. cit.	Opus citatum
P., pp.	Page(s)
Para., paras.	Paragraph(s)
TFEU	Treaty on the Functioning of the European Union
Vol.	Volume

INTRODUCTION

The construction of Article 102 of the Treaty on the Functioning of the European Union ('TFEU'), previously Article 82 of the Treaty of Rome ('EEC'), has always been contentious. While Article 101 TFEU punishes a plurality undertakings who collude to restrict competition, Article 102 TFEU generally applies to individual undertakings whose strength in a given market is viewed, essentially, as a potential risk to competition. As a result, although, an undertaking's unilateral conduct normally exceeds the scope of competition law, that is not the case for dominant undertakings. However, competition law and enforcement are not perfect. Furthermore, there is no consensus on what kind of dominant conduct constitutes an abuse. As a result, controversy about Article 102 TFEU is rife.

One significant concern for many observers has been Article 102 TFEU's allegedly formalistic application. Commentators criticised the lack of attention that was traditionally paid to anticompetitive effects in Article 102 TFEU enforcement. In this sense, they noted that competition authorities and courts (especially the European Commission ('the Commission') and the European Union ('EU') Courts) tended to declare behaviours by a dominant undertaking as abusive based on their formal features, and regardless of whether said behaviours were capable of restricting competition. The most critical voices claimed that Article 102 TFEU had become a mechanism for the protection of less efficient competitors, rather than of competition. In other words, they argued that the formalistic approach punished dominant undertakings for a strength which could very well have been achieved, not through abuse, but through competition on the merits. The formalistic approach to one type of conduct, specifically, raised scathing criticism: fidelity rebates offered by dominant undertakings.

Notably, the Treaty provision does not mention the need for an abusive conduct to restrict competition. So, what, if any, has been the role of anticompetitive effects in establishing abuses of dominance under Article 102 TFEU? In particular, to what extent are anticompetitive effects part of the current legal approach to fidelity rebates, considering its traditional formalism? And how has the so-called Intel Saga influenced this role? This research work explores these questions, focusing on the latest judgement in the Intel line of cases: the General Court ('GC')'s Judgement of 26 January 2022, Case T-286/09 RENV *Intel Corporation Inc. v Commission* (*Intel 2022*).

For this purpose, Chapter 1 outlines the legal framework of Article 102 TFEU generally, and of fidelity rebates specifically, focusing on the role of anticompetitive effects therein. Chapter 2 analyses the Intel Saga, including the 2009 Commission Decision that started it, the 2014 judgement by the GC (*Intel 2014*), and the seminal 2017 judgement by the Court of Justice ('the Court', 'ECJ') (*Intel 2017*), which set aside *Intel 2014* and transformed one of the most settled case lines regarding anticompetitive effects in fidelity rebates: *Hoffman-La Roche*. Thereafter, Chapter 3 analyses *Intel 2022*, while Chapter 4 critically discusses its relevance, key contributions, and some of the questions it raises for the future.

All in all, this research work concludes that the *Intel 2022* judgement has confirmed the integration of an effects-based approach to fidelity rebates under Article 102 TFEU. The severity with which the General Court has assessed the 2009 Decision's evidence of anticompetitive effects is proof that the change in paradigm is not merely a theoretical one. In this sense, *Intel 2022* has clarified and upheld the substantive principles outlined in *Intel 2017*, arguably maximising the influence of the Intel Saga in the future of competition law.

The full impact of *Intel 2022* is yet to be determined – especially in light of the unexpected announcement, the day before the submission of this research work, that the Commission has appealed the judgement before the Court of Justice.[1] Precisely for this reason, it is more relevant than ever to understand what it is that the Commission is appealing, how we arrived here, and why it matters. This research work is a humble attempt at an answer.

[1] Van Dorpe, S., "Brussels appeals Intel antitrust case to top court", *Politico Europe*, 6 April 2022.

CHAPTER 1. LEGAL FRAMEWORK

1. GENERAL CONSIDERATIONS: ARTICLE 102 TFEU

Article 102 TFEU prohibits the abuse of a dominant position insofar as it may affect trade between Member States.[2] The Treaty leaves the definition of 'dominance', 'abuse', and the provision's objectives in the hands of the EU Courts and the Commission. The development of the law on Article 102 TFEU properly began with the 1972 judgement on *Continental Can*.[3] Citing Article 3(3) EEC (now Article 3 Treaty of the European Union, in conjunction with Protocol No. 27 to the Treaty), the Court of Justice proclaimed that Article 102 TFEU's overriding objective was to ensure a system of effective competition. The Court further clarified that the scope of Article 102 TFEU extends both to conduct that causes direct harm to consumers, and to behaviour that damages them indirectly through its impact on an effective competition structure. In addition, the Court denied the need to prove a causal link between the dominant position and the abuse.

Dominance is the ability to behave in the market, to an appreciable extent, independently from other competitors, customers and, ultimately, consumers.[4] However, a dominant position does not preclude the existence of competition in the market.[5] Dominance affords an undertaking with the ability, even in the presence of lively competition, to appreciably influence the conditions under which competition develops and to largely disregard it.[6] The existence of dominance is established in a two-step process of, firstly, defining the relevant market and, secondly, finding the dominant position itself, through an analysis of three key features: the market position of the (presumably) dominant undertaking and its competitors;

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[2] For an in-depth, up-to-date study of the law on Article 102 TFEU, see O'Donoghue, R. & Padilla, J., *The Law and Economics of Article 102 TFEU*, Hart Publishing, Oxford, 2020.

[3] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission (Continental Can).* The judgement's relevance is owed, *inter alia*, to its comments on the definition of the relevant market. The Court established that such definition is essential to finding a dominant position, even if the market analysis carried out in the case was not grounded in facts. See Ezrachi, A., *EU Competition Law: An Analytical Guide to the Leading Cases*, Hart Publishing, Oxford, 2021, p. 41.

[4] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission (United Brands)*, para. 68. This judgement, *inter alia*, defined dominance in the broad (and not purely economic) manner paraphrased above. It also set an obligation to define the relevant product and geographical market, and to examine its competition structure. See *Ezrachi, A., op. cit.*, p. 241.

[5] *United Brands*, para. 113; Case 85/76 *Hoffman-La Roche & Co. AG v Commission (Hoffman-La Roche)*, para. 70; Case T-340/03 *France Télécom SA v Commission (France Télécom)*, para. 101.

Hoffman-La Roche appears to further relax the test for dominance, establishing that dominance does not preclude *lively* competition. *France Télécom* explains this further. *Hoffman-La Roche* also sets the two-pronged test for establishing dominance. See Ezrachi, A., *op. cit*., p. 242.

[6] *Hoffman-La Roche*, para. 39; *France Télécom*, para. 101.

expansion and entry barriers; and countervailing buyer power.[7]

Generally, a finding of dominance is grounded on a plurality of indices, which, put together, reveal dominance. However, very large market shares that are maintained for some time may by itself be enough to indicate dominance.[8] In fact, an undertaking that has a 50% market share or larger is presumed to be dominant,[9] although dominance may be found with lower market shares.[10] Other factors that may denote dominance include the disparity in the market shares between the leading undertaking and the next competitor, the technological lead of the presumably dominant undertaking, the existence of a highly developed sales network, and the absence of potential competition.[11] Dominance is generally held by a single undertaking, in which case the abuse of dominance constitutes a unilateral behaviour. In addition, dominance may be held collectively by several undertakings,[12] "provided that from an economic point of view they present themselves or act together on a particular market as a collective entity".[13]

By itself, holding a dominant position does not infringe Article 102 TFEU.[14] Its purpose is not to prevent an undertaking from lawfully acquiring dominance, nor to protect less efficient competitors. On the contrary, competition on the merits may itself lead to the departure of less efficient competitors.[15] What Article 102 TFEU prohibits is not dominance, but rather its abuse. The concept of 'abuse', albeit very controversial, refers to an

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[7] *Continental Can,* para. 32. See Whish, R. & Bailey, D., *Competition Law*, Oxford University Press, Oxford, 2018, p. 188.

[8] *Hoffman-La Roche*, para. 41.

[9] Case C-62/86 *AZKO Chemie BV v Commission (AZKO)*, para 60. The AZKO presumption marked a key development in the Article 102 TFEU case law, by quantifying the Court's assertion in *Hoffman-La Roche* that very large shares are (rebuttable) evidence of dominance, and hence putting the burden on the undertaking of proving that it is not dominant, despite its market share. See Whish, R. & Bailey, D., *op. cit.*, pp. 190, 194.

[10] See, *inter alia*, *Virgin/British Airways* (Case IV/D-2/34.780) Commission Decision 2000/74/EC [1999] OJ L 30/1.

[11] *Hoffman-La Roche*, para. 48.

[12] Ortiz Blanco, L. *et al*., *Manual de Derecho de la Competencia*, Tecnos, Madrid, 2008, p. 178.

Collective dominance is a controversial concept on which case law is scarce. In EU competition law, legally independent persons who constitute one economic entity count as a single undertaking. The implication is that collective dominance refers to dominance held by entities which are both legally and economically separate. *Hoffmann-La Roche*, in para. 39, seemed to reject that tacit coordination in an oligopolistic market fell within Article 102. However, the Court later confirmed the concept of collective dominance, *inter alia*, in Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge transports SA and Dafra-Lines A/S v Commission (CMB)*. See Whish, R. & Bailey, D., *op. cit*., pp. 583-594.

[13] *CMB*, para. 36.

[14] Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* (*Michelin I),* para. 57; *CMB*, para. 37.

[15] Case C-209/10 *Post Danmark A/S v Konkurrencerådet (Post Danmark I)*, para. 2; Case C-52/09 *TeliaSonera Sverige v Commission (TeliaSonera)*, paras. 24 and 43.

objective conduct related to the behaviour of a dominant undertaking, whereby it influences the relevant market's structure and, resorting to methods that go beyond the normal means of competition, further hinders the level of competition in the market, or hampers its growth.[16] Thus, the prohibition of abuse forbids dominant undertakings from competing through methods other than competition on the merits.[17] Being an objective concept, an Article 102 TFEU abuse does not require any specific intention by the dominant undertaking to cause harm.[18] Nonetheless, when such an intention exists, it constitutes a relevant factor for the purposes of establishing the existence of an abuse.[19]

Regarding defences, Article 102 TFEU, strictly speaking, does not admit exceptions nor exemptions.[20] Notwithstanding, where a conduct is objectively justified, or justified on efficiency grounds, it shall not constitute an abuse[21] – not because the conduct is exempt, but because it exceeds the scope of the abuse prohibition. The possibility of raising an objective justification is well-established in the case law,[22] with valid justifications including the protection of commercial interests.[23] The efficiency defence is similarly well recognised,[24] and its criteria broadly mirror those of Article 101(3) TFEU.[25] The burden of

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[16] *Hoffman-La Roche*, para. 91. In addition, very importantly, the dominant position, the abuse, and the benefits reaped by the dominant undertaking may take place in different markets. See Whish, R. & Bailey, D., *op. cit*., pp. 211-213.

[17] *Hoffman-La Roche*, para. 177; Case C-457/10 P *AstraZeneca v Commission (AstraZeneca),* para. 75.

[18] T-128/98, *Aéroports de Paris v Commission*, para. 173.

[19] *AstraZeneca*, para. 359; Case C-549/10 P *Tomra Systems ASA and others v Commission (Tomra)*, paras. 19-21.

[20] Ortiz Blanco, L. *et al.*, *op. cit*., p. 157. Similarly, AG Jacobs posited that *"Article* [102 TFEU] *does not contain any explicit provision for the exemption of conduct otherwise falling within it (...). It is therefore more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all".* (Case C-53/03 *Syfait and others*, Opinion of AG Jacobs, para. 72.)

[21] *"As there is no equivalent in Article 102 to Article 101(3) whereby* [a restrictive agreement] *can nevertheless be permitted because it produces economic efficiencies (...), the Commission and the EU Courts came to recognise that there was some conduct which, although presumptively abusive, in fact did not amount to a violation of Article 102 because it had an 'objective justification'".*Whish, R. & Bailey, D., *op. cit*., p. 217.

For more on objective justification, see Loewenthal, P.J., "The Defence of 'Objective Justification' in the Application of Article 82 EC", *World Competition*, vol. 28, n. 4, 2005, pp. 455-477; Albors-Llorens, A., "The Role of Objective Justification and Efficiencies in the Application of Article 82 EC", *Common Market Law Review*, vol. 44, n. 6, 2007, pp. 1727-1761.

[22] Whish, R. & Bailey, D., *op. cit.*, p. 217, citing *United Brands*, para. 184; Case T-65/89 *BPB industries plc and British Gypsum v Commission*, para. 71; and Case 311/84 *CBEM v CLT and IPB*, para. 26.

[23] The Court, in Cases C-468/06 etc. *Sot. Lélos* v GlaxoSmithKline *(Sot. Lélos),* paras. 71-72, declared that a dominant position does not deprive the dominant undertaking from the right to protect its own commercial interests from an attack. However, the protective behaviour must be proportional, and it shall not abuse the dominant position, nor aim to strengthen it. See Wish, R. & Bailey, D., *op. cit.*, pp. 217-218.

[24] See, *inter alia,* Case C-95/04 P *British Airways plc. v Commission (British Airways)*, *TeliaSonera*, and *Post Danmark I*.

[25] Wish, R. & Bailey, D., *op. cit.*, p. 172, citing *Post Danmark I*, paras. 41-42.

proof, however, falls entirely on the undertaking and, as far as the writer is aware, the EU Courts have rejected all of the justification pleas that have come before it.[26]

In addition, Article 102 TFEU imposes a special responsibility on dominant undertakings *vis a vis* protecting the competitive process. The idea is that a market where there is a dominant undertaking is one where competition is weakened. In this sense, any further weakening of competition enabled by a dominant undertaking may risk constituting an abuse. Hence, dominant undertakings are under a special duty to abstain from any behaviour that could further undermine competition.[27] The special responsibility must not be confused with an obligation to protect less efficient competitors;[28] it merely implies that dominant undertakings may be prohibited from a conduct which is legitimate for a non-dominant ones,[29] precisely because of their ability to warp, through their dominance, the already weakened competition.

Letters (a) through (d) of Article 102 TFEU list examples of abusive conduct: (a) excessive prices and unfair contractual terms (b) exclusionary abuses that limit production, markets or technical development and damage consumers, (c) discriminatory abuses, and (d) tying abuses. However, the concept of abuse is much broader,[30] as many conducts, although not listed, fall within its terms.[31] Broadly speaking, there are three types of abuses: exploitative, exclusionary, and reprisal abuses.[32] Firstly, exploitative abuses take advantage of consumers (for instance, by obtaining rents that a non-dominant undertaking could not have acquired), directly harming consumer welfare. Secondly, exclusionary abuses target competitors, unlawfully limiting their production, and indirectly harming consumer welfare, by preventing the long-term development of effective competition in the market.[33] Finally, in

[26] *Ibid.*, p. 218; Vijver, T., "Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *Prima Facie* Dominance Abuses?", *Journal of European Competition Law & Practice*, vol. 4, n. 2, 2013, p. 122.

[27] *Michelin I,* para. 57.

[28] Yet that is precisely the criticism it has received. This links back to the critiques about Article 102 TFEU's formalistic application; how it has protected competitors, more than competition. See Geradin, D., "'Loyalty rebates after *Intel*: Time for the European Court of Justice to Overrule *Hoffman-La Roche*", *Journal of Competition Law and Economics*, vol. 11, n. 3, 2015, p. 579; Whish, R. & Bailey, D., *op. cit.*, p. 205.

[29] Case T-191/98 *Atlantic Line and Others v. Commission,* para. 1460.

[30] *CMB*, para. 112.

[31] O'Donoghue, R. & Padilla, J., *op., cit*., N.P.

[32] Other classifications are possible. The exclusionary and exploitative types are consolidated, while the doctrine disagrees on the third type. E.g., while O'Donoghue, R. & Padilla, J., *op. cit.,* N.P., as cited in the body of the text, identify 'reprisal' abuses, Whish, R. & Bailey, D., *op. cit.,* pp. 207-208, find 'single market' abuses.

[33] Whish, R. & Bailey, D., *op. cit.,* pp. 207-208.

reprisal abuses, the dominant firm punishes a rival seeking to prevent it from competing aggressively.[34] Another categorisation distinguishes between pricing and non-pricing abuses. The former type includes conditional rebates, bundling, margin squeezes, and price discrimination. The latter includes tying, exclusive dealing, refusals to supply, and preferential treatment.[35] All in all, the case law has progressively broadened the types of conducts susceptible of constituting an abuse.

2. THE RELEVANCE OF ANTICOMPETITIVE EFFECTS IN ARTICLE 102 TFEU: AN EVOLVING MATTER

2.1. The Traditional Approach: Formal Requirement

One of the most controversial issues regarding Article 102 TFEU has been drawing the line between a dominant undertaking's legitimate efforts to compete in the market, and the kinds of abusive practices that damage competition and indirectly harm consumer welfare.[36] A closely related question is the extent to which a dominant undertaking's conduct must produce restrictive effects on competition in order to be abusive.

Notably, Article 102 TFEU itself, when prohibiting abuse, makes no reference to its anticompetitive effects. Nonetheless, the jurisprudential concept of abuse, from its early formulation in *Hoffman-La Roche*, defined it as such behaviour by a dominant undertaking that, through methods other than normal competition, produces the *effect* of hindering the maintenance or growth of competition.[37] However, in practice, the Commission and the EU Courts historically applied Article 102 TFEU without engaging in an analysis of the conduct's restrictive effects on competition. Put differently, it was not deemed necessary to show any effect on competition to sustain a finding of abuse.[38]

Following the traditional approach, certain conducts amounted to modified or quasi-*per se* prohibitions. Such was the case of exclusive dealing, predatory pricing, and loyalty rebates.treat[39] These conducts could only escape the prohibition of abuse in the presence of

[34] For instance, in *United Brands*, where the dominant banana supplier ceased supplying its distributor for participating in a competitor's advertising campaign. See O'Donoghue, R. & Padilla, J., *op. cit*., N.P.

[35] Whish, R. & Bailey, D., *op. cit.*, pp. 697, 732.

[36] Ortiz Blanco, L. *et al.*, *op. cit.*, p. 148.

[37] See, *inter alia*, *Hoffman-La Roche*, para. 27; *Michelin I*, para. 70; *AZKO*, para. 69; Case T-228/97 *Irish Sugar plc. v Commission (Irish Sugar)*, para. 111.

[38] Whish, R. & Bailey, D., *op. cit.,* pp. 201, 205; O'Donoghue, R. & Padilla, J., *op. cit.*, N.P.

[39] O'Donoghue, R. & Padilla, J., *op. cit.,* N.P., speak of 'modified' *per se* rules, as opposed to absolute ones,

an objective justification or an efficiency defence. Otherwise, the presumption was irrebuttable, as the illegality of the practice was entirely linked to its form, and independent from other considerations – including the circumstances that surrounded the conduct and, specifically, whether it was capable of having anticompetitive effects.[40] Furthermore, given the EU Courts' restraint in finding objective and economic justifications,[41] in practice, the presumption was irrebuttable.[42]

As a result, the form-based view received extensive criticism. Much of the doctrine and many economists claimed that the traditional approach, rather than protecting competition, protected less efficient competitors.[43] They argued that, where dominance is achieved through competition on the merits, Article 102 TFEU ought not to constitute a punishment to an undertaking's superior efficiency.[44] This is the case, not only because dominant undertakings have the same right to compete in the market, but also because exclusionary effects caused by a dominant undertaking's conduct may at times benefit consumer welfare.[45] In this sense, the formalistic approach risks overenforcement mistakes, potentially capturing legitimate activities.[46] All in all, their core demand was to adopt an effects-based approach to abuses of dominance. This would mean verifying through an analysis of all circumstances – ideally an economics-based one – that the allegedly abusive actions are capable of producing anticompetitive effects.[47]

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referring to the fact that the presumption of illegality was, in principle, refutable, via an objective justification or efficiency defence. Geradin, D., *op. cit.*, describes such conducts as 'quasi-*per se*' illegal.

[40] Fernández, C., "Presumptions and Burden of Proof in EU Competition Law: The Intel Judgement", *Journal of European Competition Law & Practice*, vol. 10, n. 7, 2019, p. 4.

[41] See p. 6 & n. 26 above.

[42] Case C-413/14 P *Intel v Commission*, Opinion of AG Wahl, para. 88; Whish, R. & Bailey, D., *op. cit.,* p. 205.

[43] See Rey, P. (coord.) *et al.*, "Un enfoque económico del Artículo 82", in Martínez-Lage, S. & Petitbò Juan, A. (eds.), *El abuso de la posición de dominio,* Marcial Pons, Madrid, 2006, pp. 99-154.

[44] Ortiz Blanco, L. *et al., op. cit.*, p. 147.

[45] Vijver, T., *op. cit.,* p. 122.

[46] Subiotto QC, R., *et al.*, "The Application of Article 102 TFEU by the European Commission and the European Courts", *Journal of European Competition Law and Practice*, vol. 7, n. 4, 2016, p. 294.

[47] Rey, P. (coord.) *et al., op. cit.*, p. 113.

2.2. From *Michelin II* to *Post Danmark II*: A Growing Role for Effect Analyses

Criticisms of excessive formalism were a wider complaint formulated against EU competition law generally, not only against Article 102 TFEU. In the 1990s, EU competition law adopted the 'more economics-based approach', which significantly reformed competition policy and enforcement.[48] Initially, the economic approach mainly transformed Article 101 TFEU, failing to penetrate Article 102 TFEU until later.[49] Notwithstanding the slower reception, the EU Courts' approach to abuses of dominance was progressively influenced by the economisation. In this sense, case lines developed which gave a much greater role for anticompetitive effects in abuses of dominance.

For instance, *Michelin II*, which dealt with third-category rebates, expressly set a capability standard for analysing anticompetitive effects in dominance abuses.[50] *Michelin II* clarifies its predecessor, *Michelin I*,'s statement that to determine whether Michelin had committed an abuse, it was necessary to analyse all the circumstances to establish whether the rebates "tend[ed] to" restrict competition.[51] In this sense, paragraph 237 of *Michelin II* states that, although Article 102 TFEU does not mention anticompetitive effects, in light of the provision's objective (i.e., the maintenance of a system of effective competition),[52] conduct shall only be abusive provided that it restricts competition. Paragraph 239 notes that there is no need to prove an actual restriction on competition. On the contrary, the effects standard only requires proof that the conduct is *capable* of restricting actual or potential competition. In this sense, capability must be determined by taking into consideration all the circumstances of the case.[53] Similarly, The Court in *British Airways* consolidated the rule

[48] Ibáñez Colomo, P., "Intel and the Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy", *LSE Legal Working Paper*, n. 29/2014, 2014, p. 13.

[49] Behrens, P., "The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU" in Di Porto, F. & Podszun, R. (eds.), *Abusive Practices in Competition Law*, Edward Elgar Publishing, Cheltenham, 2018, p. 19.

[50] Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission (Michelin II).*

[51] *Michelin I*, para. 14.

[52] *Continental Can*, para. 26.

[53] Although the inclusion of the capability standard marks some progress, *Michelin II* has received criticism for still being excessively formalistic, on the grounds that, in para. 241, the Court states that, where it is established that a dominant undertaking's behaviour has an anticompetitive object, then it is automatically liable to have a restrictive effect, without needing to provide any proof. See O'Donoghue, R. & Padilla, J., *op. cit.,* N.P.

In *Michelin II*, Michelin had specifically argued that, as its market share and price levels had fallen during the period of the practices, the Commission had failed to prove that the conduct had reinforced its dominant position or restricted competition. The Court rejected this, finding that, as the Commission had concluded that the discounts were calculated to prevent dealers from being able to select its providers freely, the practice had

that, for the purposes of establishing an abuse of dominance, it is sufficient – albeit necessary – to prove that the conduct tends to restrict competition or that it is capable of having such an effect.[54]

Moreover, regarding margin squeezes and price discrimination, in *Deutsche Telekom, TeliaSonera,* and *Post Danmark I,* the Court established that, to determine whether a dominant undertaking's pricing practice is abusive, one must consider all the circumstances of the case, to establish whether the behaviour is capable of restricting competition. Here, restricting competition can mean either reducing consumers' choice of supply, barring competitors' access to the market, applying dissimilar conditions to equivalent transactions, or distorting competition to strengthen the dominant position.[55] *Post Danmark II* further developed this point by clarifying that, notwithstanding the need to prove foreclosure capability, in abuses of dominance there is no appreciably requirement; no *de minimis* threshold.[56] The logic is that, in a market where competition is already weakened due to the presence of a dominant undertaking, it would be unfair to require appreciability.[57] Furthermore, *Post Danmark I* and *II* seem to clarify that 'capability' of having restrictive effects (the expression used, *inter alia*, in *Michelin II* and *British Airways*) is synonymous with 'likelihood' and 'tendency', although there is still some discrepancy in the doctrine regarding this point.[58]

In addition, regarding misleading representations to public authorities by a dominant undertaking, in *AstraZeneca* the General Court established that whether such conduct was abusive ought to be assessed *in concreto* and depended on the circumstances of the case. Specifically, it depends on whether, in light of its context, the conduct led the relevant public authority to create regulatory obstacles to competition. The GC specified that a

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an anticompetitive object. See *Michelin II*, para. 240.

[54] Geradin, D., *op. cit*., pp. 4-6, citing *British Airways,* para. 293.

[55] Case C-280/08 P *Deutsche Telekom AG v Commission (Deutsche Telekom),* para. 175; TeliaSonera, para. 28; *Post Danmark I,* para. 26.

[56] *Post Danmark II,* para. 73. It has been criticised that, if a conduct is abusive as soon as it is capable of having *any* anticompetitive effect, without needing to be in any way substantial, Article 102 TFEU may still be applied in an excessively formalistic manner. See Venit, J., "Making Sense of *Post Danmark I* and *II*: Keeping the Hell Fires Well Stoked and Burning", *Journal of European Competition Law & Practice*, vol. 7, n. 3, 2016, p. 171.

[57] Case C-23/14 *Post Danmark II*, Opinion of AG Kokott, para. 91.

[58] See paras. 66-67 of *Post Danmark II*, which use these terms interchangeably. On the one hand, AG Wahl (see n. 43 above) supports the view that they are equivalent. *Cf.* Ibáñez Colomo, P., "The Future of Article 102 TFEU after *Intel", Journal of European Competition Law & Practice,* vol. 9, n. 5, 2018 p. 298, who holds that likelihood is a higher standard than capability, citing, *inter alia*, *British Airways* and *AZKO*.

circumstantial analysis of the conduct's ability to produce anticompetitive effects was needed.[59] On appeal, the Court of Justice confirmed this approach, stating that AstraZeneca's conduct was not abusive *per se*; rather, it was abusive because the GC had, by analysing the context, found significant anticompetitive effects.[60]

Arguably as a response to the criticisms, these case lines increasingly emphasised that Article 102 TFEU's aim is to protect the competitive process, not competitors. In this sense, recent judgements specify that not all exclusionary effects harm competition, and that the acquisition of dominance, as well as the exclusion or marginalisation of less-efficient competitors, can be a normal outcome of competition on the merits.[61] Furthermore, in 2009, the Commission published its *Guidelines on Article 102 Enforcement Priorities* ('the Guidelines' or 'the Enforcement Guidelines').[62] *Inter alia*, the Guidelines announced that the Commission would focus its resources on the cases with the greatest potential for serious anticompetitive effects. Furthermore, the document declared that investigations would be conducted on the basis of economic effects, instead of form-based rules. As a soft law instrument, the Guidelines are not binding on the EU Courts, national courts, or national competition authorities. Nonetheless, they are relevant, and they signalled a greater role for effects analyses in Article 102 TFEU cases.[63]

2.3. The Special Case of Fidelity Rebates

However, the evolution in the case law and in enforcement priorities didn't penetrate all aspects of Article 102 TFEU equally. One specific area remained particularly reticent to the effects-based approach: fidelity rebates – alternatively called loyalty, exclusivity, or conditional rebates.[64] For context, the case law on Article 102 TFEU has typically identified

[59] Framiñán, J., Big data, consentimiento para tratar los datos presonales y Derecho de Defensa de la competencia. *Revista de Derecho Mercantil*, 310/2018, 2018, p. 269, citing *AstraZeneca,* paras. 357 and 377.

[60] *AstraZeneca,* paras. 108-109.

[61] See, *inter alia*, *TeliaSonera,* para. 43, and *Post Danmark I,* para. 22.

[62] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (Communication) [2009] OJ C 45/7.

[63] Whish, R. & Bailey, D., *op. cit.,* pp. 183-184.

[64] *Ibid.*, p. 747. See, *inter alia*, *Hoffman-La Roche* for the term 'fidelity'; *Intel 2014* for *'exclusivity'*; the Guidelines for *'conditional'*; and *Tomra* for *'loyalty*. Note that the legal concept of exclusivity rebates extends beyond commitments of 100% exclusivity. In this sense, *"in* Hoffman-La Roche v Commission*, the Court held that it may be abusive for a dominant firm to enter into an agreement requiring a customer to buy most of its requirements from that firm".* Whish, R. & Bailey, D., *op. cit*., p. 699.

three types of rebates: fidelity, quantity, and third-category rebates.[65]

Historically, each type of rebate warranted a different treatment under Article 102 TFEU. On one hand, quantity rebates, linked purely to the volume of purchases made from a dominant undertaking, were considered not to produce a foreclosure effect, as the reimbursement *"reflects the pass-through of savings in production"*.[66] Hence, they were admissible unless an anticompetitive effect was otherwise established through an analysis of all relevant circumstances.[67] On the other, loyalty rebates were generally prohibited, amounting to moderate *per se* restrictions.[68] Finally, third-category rebates (i.e., those which constitute neither purely quantity nor exclusivity rebates, but which may have a loyalty-inducing effect) were neither presumed lawful nor unlawful: their character depends on whether a circumstantial analysis reveals a capability to restrict competition.[69]

Focusing on fidelity rebates, the theory of harm which underpins competition law's concern with them focuses on their leveraging effect.[70] The theory posits that a dominant undertaking has an assured sales base (the 'non-contestable' base) where it faces no competition, and which it tries to exploit (i.e., leverage) to expand its sales in the 'contestable' base, where it may face competition. To do so, the undertaking offers its customers a rebate that is conditional on exclusive or quasi-exclusive purchasing. The more a customer purchases, the closer it comes to receiving the refund and the lower the effective price of purchasing additional units.

Conversely, if the customer purchases from the non-dominant competitor a higher quantity than what the dominant undertaking 'allows', then the customer loses the rebate; not only from the contestable part of its demand that it didn't allocate to the dominant firm, but from the *entirety* of the volume that it acquired from the dominant undertaking. This makes it less attractive for customers to source the contestable portion of their demand from non-dominant suppliers. Such suppliers won't be able to compete with the dominant undertaking's effective price unless they can compensate the customers for *all* of the missed rebates. In this sense, fidelity rebates make it more difficult for a non-dominant competitor

[65] *Michelin I,* paras. 71-73; *British Airways,* para. 65.
[66] Subiotto QC, R., *et al*., *op. cit.,* p. 293.
[67] *Michelin II,* paras. 58-60.
[68] See n. 39 above.
[69] *Tomra,* para. 71.
[70] Subiotto QC, R. *et al*., *op. cit.*, pp. 293-295.

to offer an attractive price, and, hence, they may foreclose competitors' access to the contestable portion of the demand.[71]

The traditional approach in EU competition law to fidelity rebates was grounded in the seminal judgement *Hoffman-La Roche*.[72] The Court of Justice established that, where a dominant undertaking offers rebates under conditions of exclusivity or quasi-exclusivity, it abuses its dominance. This is because such rebates are designed to restrict competition.[73] Hence, such rebates are by nature incompatible with Article 102 TFEU, unless they are objectively justifiable, or they are outweighed by economic efficiencies that ultimately benefit consumer welfare.[74] Absent such defences, where there is proof that a dominant undertaking has offered fidelity rebates (independently of whether or not the exclusivity condition was formalised through an obligation), an abuse may be found; without requiring an analysis of the case's circumstances aimed at establishing whether such rebates were capable of restricting competition.

The rule adopted in *Hoffman-La Roche* was reinforced throughout the decades by an entire line of cases, which includes *BPB industries and British Gypsum* (para. 68),[75] *Irish Sugar* (para. 197),[76] *Solvay* (paras. 314-341),[77] *Microsoft* (para. 664),[78] *France Télécom* (para. 266),[79] *British Airways* (para. 106);[80] and *Tomra* (para. 79).[81] In this sense, while *Hoffman-La Roche* clarified the (theoretical) need for anticompetitive effects in Article 102 TFEU abuses,[82] the judgement simultaneously initiated the formalistic approach to loyalty rebates.

As recently as 2012, the Court of Justice reiterated the traditional interpretation of *Hoffman-La Roche*. In *Tomra*, the Court concluded that, where fidelity rebates are concerned, it is not

[71] Enforcement Guidelines, see n. 64 above, paras. 39-40.
[72] See n. 5 above.
[73] *Hoffman-La Roche*, para. 90.
[74] Once again, for emphasis, these are not exceptions or exemptions to Article 102 TFEU, only instances of non-applicability, as the conduct, where justified, would not fall within by the prohibition of abuse.
[75] See n. 22 above.
[76] See n. 37 above.
[77] Case T-57/01 *Solvay SA v Commission (Solvay).*
[78] Case T-201/04 *Microsoft Corp. v. Commission (Microsoft).*
[79] See n. 5 above.
[80] See n. 24 above.
[81] See n. 19 above.
[82] See pp. 7-8 above.

necessary to examine their effects on competition to finding an abuse.[83] The *Tomra* judgement was delivered in the same time period as some of the more effects-based judgements outlined in Section 2.2 of this Chapter. Specifically, *Post Danmark I* was published on the 23rd of March 2012, not even one month before *Tomra*. Similarly, the *AstraZeneca* judgement was published just a few months later, on the 6th of December 2012. Hence, although other categories of conduct appeared to be evolving into a more economics- and effects-based approach, fidelity rebates seemingly remained a highly formalised matter. This is the context where the Intel Saga takes place.

[83] *Tomra,* para. 79.

CHAPTER 2. THE INTEL SAGA: BACKGROUND TO *INTEL 2022*

Spanning over ten years and four judgements,[84] the Intel Saga ranks as one of the most contentious proceedings in the recent history of EU competition law. The controversy concerned an alleged abuse of dominance by Intel, a Central Processing Unit ('CPU') manufacturer, aimed at foreclosing its sole competitor, Advanced Micro Devices, Inc. ('AMD'), through, *inter alia,* fidelity rebates. The Saga began with a Decision by the Commission, published on 13 May 2009, declaring an infringement and fining Intel.

The Decision is noteworthy for many reasons, one of them being that the bulk of Intel's abuse consisted in fidelity rebates. In this sense, the Decision concerned a category of abuse that has been notoriously reticent to incorporate effects analyses. A second, highly related reason is that the Decision was published just over three months after the Commission's Enforcement Guidelines,[85] which had announced a shift towards a more-economic approach in the Commission's treatment of exclusionary abuses.

Thus, the evident question is: did the Commission, in the Intel Decision, follow the standards set out in the Guidelines, or did it reproduce the traditional approach? More generally, to what extent did the Intel Decision and the subsequent judgements adopt an effects-based approach? To answer these questions, it is first advisable to explore the Guidelines in more depth; specifically, to explain their treatment of loyalty rebates, so it can later be compared with the Intel Decision and case law. This is not to imply in any way that the Guidelines are the ideal embodiment of the more-economic approach; such a question exceeds the scope of this research work. However, understanding the Commission's views is a necessary step for analysing how the Intel Saga, and specifically *Intel 2022*, fit into the evolution of the law on fidelity rebates.

[84] In addition to the three judgements studied in this research work, there was a fourth judgement on interim measures, Case T-457/08 R *Intel Corp. v Commission of the European Communities - Interim measures.*

[85] The Commission decided to publish the Guidelines after Intel had had the opportunity to submit its observations regarding the Commission's pending Decision.

1. THE ENFORCEMENT GUIDELINES

1.1. The Commission's Guidelines on Article 102 TFEU Enforcement Priorities

As introduced in Chapter 1, the Guidelines announced that the Commission intended to conduct its investigations on the basis of economic effects, instead of form-based rules. In this sense, the Guidelines stated that a dominant undertaking's behaviour would only infringe Article 102 TFEU if it was capable of producing anticompetitive foreclosure that leads to consumer harm. Anticompetitive foreclosure refers to

> *"A situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers".*[86]

Thus, the effect that determines whether a dominant undertaking's conduct is abusive is whether rivals are excluded in a way that ultimately damages consumer welfare. The foreclosure potential is assessed via several indicators, which include the strength of the dominant position, of the competitors, entry barriers, the extent of the conduct (i.e., the share of the market affected by the conduct and its duration), and the existence of direct evidence (e.g., documents) that reveal an exclusionary strategy.[87]

In addition, the Enforcement Guidelines set out specific tests to be applied to particular types of conduct, when determining whether they are abusive.[88] Fidelity rebates are one of such behaviours. Paragraph 41 states that, to assess their anticompetitive effects, the Commission intends to investigate whether such rebates would foreclose a competitor *as efficient* as the dominant undertaking.[89] This view is strikingly different to the traditional approach, in three main ways.

Firstly, in *Hoffman-La Roche*, fidelity rebates were quasi-*per se* abusive. Conversely, following the Guidelines, they only infringe Article 102 TFEU if they restrict competition. Secondly, *Hoffman-La Roche* associated three types of anticompetitive effects with fidelity

[86] Enforcement Guidelines, see n. 64 above, para. 19.
[87] *Ibid.*, para. 20.
[88] *Ibid.,* pp. 6 *et seq*.
[89] *Ibid.,* para. 41.

rebates, which justified their consideration as quasi-*per se* abusive: preventing consumers from acquiring their supplies from alternative suppliers, applying dissimilar conditions to equivalent transactions, and consolidating the undertaking's dominant position.[90] By contrast, according to the Guidelines, only one kind of anticompetitive effect causes a dominant undertaking's conduct to be abusive: anticompetitive foreclosure. In this sense, for the purposes of Article 102 TFEU, it would not matter if, for example, the fidelity rebates discriminated between customers.[91] Finally, in the eyes of the Guidelines, not every foreclosure effect matters. Fidelity rebates only produce anticompetitive foreclosure within the Guidelines' meaning if they are capable of foreclosing, not any competitor, but a hypothetical competitor that is *as efficient* as the dominant undertaking.

Admittedly, the Guidelines, in addition to not being legally binding law, give the Commission some flexibility. In this sense, they explicitly state that the Commission *intends* to investigate this way, that it will *normally* do so, without fully binding it to the Guidelines' propositions. Still, the Enforcement Guidelines were a clear attempt at bringing the more-economic approach to exclusionary abuse generally, and fidelity rebates particularly.

1.2. The As-Efficient Competitor Test

As outlined above, paragraph 41 of the Guidelines essentially states that the Commission will normally carry out an as-efficient competitor ('AEC') test to determine whether a dominant undertaking's conditional rebate scheme is abusive. But what is this test, exactly?

The AEC test is an instrument used to assess a given conduct's capability for anticompetitive foreclosure. The AEC test, developed in the United States, was initially applied to predatory pricing.[92] In such cases, the test is used to determine whether a dominant undertaking's prices are fixed below average avoidable cost ('AAC').[93] In these circumstances, an as-efficient but non-dominant competitor would be unable to match the dominant undertaking's prices, as

[90] *Hoffman-La Roche*, para. 91.

[91] Monti, G., "Rebates after the General Court's Intel Judgement", *Tilburg Law and Economics Center Discussion Papers*, n. DP 2022-004, 2022, p. 5.

[92] Davis, P., "As Efficient Competitor Test: An Overview of EU and National Case Law", *Concurrences,* n. 89776, 2019, p. 2.

[93] *"*[AAC] *is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost* (...) *will be the same, as it is often only variable costs that can be avoided".* Enforcement Guidelines, p. 5, footnote 2.

doing so would require selling below cost.[94]

Later on, the AEC test was extrapolated to other price-based conducts, including rebates. In this sense, *Post Danmark II* explored the applicability of AEC tests to third-category rebates. Most importantly, it ruled that, while AEC tests are an available tool for the purposes of establishing foreclosure capability, performing them is not legally required to find an abuse.[95] In addition, as aforementioned, the Enforcement Guidelines purported to apply the test to conditional rebates. In such cases, the AEC test asks whether a hypothetical competitor as efficient as the dominant undertaking would be able to match its rebates; or if, on the contrary, the rebates would force the competitor to sell at an effective price that is below AAC, in order to match the rebate scheme and, ultimately, to gain access to the contestable share of the demand.[96] Importantly, the AEC test is purely hypothetical. It does not compare the dominant undertaking with its actual competitors, who will most likely be less efficient. It creates a fictional competitor, who is as efficient as the dominant undertaking under every parameter but that lacks its dominant position.[97]

Applied to rebates, the AEC has four key elements. Firstly, the market's contestable share is determined. The smaller the contestable share, the easier it is to exclude a rival.[98] Secondly, the conditional portion of the rebates is established. This refers to the portion of the rebates which is offered under conditions of exclusivity, as opposed to quantity-based rebates. At this point, the effective price is calculated. That is the price that compensates for the lost rebates, which the non-dominant competitors must meet, to convince customers to purchase part of the contestable share from them. Finally, the dominant undertaking's AAC is obtained and compared with the effective price. If the effective price is lower than the dominant undertaking's AAC, the test is negative; and vice versa.[99]

[94] Enforcement Guidelines, paras. 25-27.
[95] *Post Danmark II*, paras. 20, 57-62.
[96] Monti, G., *op. cit.,* p. 7.
[97] *Intel* (Case COMP/C-3 /37.990). Commission Decision AT.37990 [2009], recitals 1003-1004.
[98] Enforcement Guidelines, para. 42.
[99] Monti, G., *op. cit.,* p. 7.

2. THE 2009 COMMISSION DECISION

On 13 May 2009, the Commission adopted Decision C(2009)3726 ('the Decision', 'the 2009 Decision', or 'the Intel Decision'), declaring an abuse of dominance by Intel in the worldwide market of x86 CPUs, and imposing a fine of EUR 1.06bn.[100] The Commission, following a complaint by AMD had issued two statements of objections concerning Intel's behaviour towards four original equipment manufacturers ('OEMs') (Dell, HP, Lenovo, and NEC), and the largest desktop computer distributor in Europe: Media-Saturn-Holding GmbH ('MSH').

The relevant product market was the market of x86 CPUs.[101] Initially, several companies had competed in the market for the production and sale of x86 CPUs. By the time of the relevant conduct, only Intel and AMD remained. The geographical market was worldwide. The Commission grounded Intel's dominance on its consistent market shares of over 70%, as well as on the high barriers to entry and expansion, including sunken investments in research and development, intellectual property, and production facilities.

The Commission identified two types of abuse. On one hand, Intel had inflicted naked restrictions on HP, Acer, and Lenovo, granting payments that were conditional on the OEMs postponing or cancelling the launch of products that used AMD CPUs, or on restricting their distribution. On the other hand, Intel had granted rebates that were conditional on the OEMs purchasing all or almost all of their CPUs from Intel, as well as rebates to MSH which were conditional on the distributor only selling computers with Intel CPUs. The Commission concluded that Intel's conduct revealed a strategy to foreclose AMD. It had diminished its competitor's ability to compete on the merits, reduced consumer choice, and lowered the incentives to innovate. Hence, Intel's behaviour amounted to a single and continuous infringement, committed between October 2002 and December 2007.

Regarding the exclusivity rebates, the Commission grounded its finding of abuse on the case law of *Hoffman-La Roche*, whereby loyalty rebates are abusive, save on the grounds of objective justification or economic efficiency, which did not concur.[102] The Commission, referencing the traditional approach, emphasised that it was not legally necessary to analyse the case's circumstances to determine that the rebates restricted competition. Furthermore, the

[100] *Intel* (Case COMP/C-3 /37.990). Commission Decision AT.37990 [2009].
[101] The term 'x86' simply specifies the kind of architecture of the relevant CPUs. See *Intel 2022*, para. 22.
[102] Intel Decision (see n. 100 above), Section VII.4.2.6.

Commission denied the applicability of the Guidelines to the case, on the grounds that they had been published after Intel had responded to the statements of objections.

Notwithstanding the Decision's traditional approach, the Commission exceeded what it identified as the legal standard, by including a detailed analysis of the rebates' foreclosure capability, which it assessed through five AEC tests, performed for each rebate-receiving customer.[103] The Commission's calculations offered five negative results, meaning that Intel failed all of the AEC tests. The Commission considered these results, alongside other evidence, like the existence of a long-term strategy to foreclose, and concluded that the rebates were capable of restricting competition.[104] Throughout this process, the Commission emphasised that the analysis was done purely "for the sake of completeness".[105]

3. *INTEL 2014: HOFFMAN-LA ROCHE* PREVAILS

Following the 2009 Decision, Intel brought an action for its annulment before the General Court. On 12 June 2014, the GC delivered its judgement in Case T-286/09 (*Intel 2014*), dismissing Intel's action in its entirety.[106]

In one of its pleas, Intel contested the Commission's legal assessment of the rebates. Specifically, it argued that, before finding them abusive, the Commission was under an obligation to analyse the case's circumstances in order to establish that the rebates were capable of foreclosing competition. On the contrary, the General Court found that, following *Hoffman-La Roche*, loyalty rebates are "by their very nature capable of restricting competition".[107] This being the case, the GC concluded that their categorisation as abusive "does not depend on an analysis of the circumstances of the case".[108] As such, the Decision's finding of abuse was done in accordance with the law. Intel had cited *Michelin II*, *British Airways*, *Deutsche Telekom*, and *TeliaSonera* in support of its claim. However, the GC distinguished these judgements by looking at the conduct that they examined and noting that none of them concerned loyalty rebates (they dealt with third-category rebates and margin squeezes). Thus, the General Court found that their assertions about the need to analyse

[103] Intel Decision (see n. 100 above), recital 1003 *et seq*.
[104] *Intel 2022,* paras. 173-175.
[105] *Ibid.,* para. 159.
[106] *Ibid.*, para. 1647 – 2
[107] *Ibid.*, para. 85.
[108] *Ibid.,* para. 80.

circumstances had no bearing in this case. Proof of foreclosure may be required for some abuses, but not for fidelity rebates.[109]

In addition, Intel challenged the relevance of the AEC tests, submitting that they had been the Commission's only evidence that the rebates were capable of foreclosing competition. In this sense, Intel posited that the Commission's AEC tests had been carried out deficiently and that they failed to prove to the requisite legal standard that the rebates were capable of foreclosing competition. Against Intel's claims, the GC resolved not to review the AEC test, on the grounds that the test had not been part of the Commission's legal analysis for finding an abuse and, as a result, reviewing the tests was unnecessary.

Overall, the General Court sustained a strict separation between fidelity rebates and other categories of conduct, fully upholding the formalistic approach grounded in *Hoffman-La Roche*. The 2014 judgement was widely criticised,[110] especially in view of the strides towards an effects-based approach in the case lines that surrounded it.[111]

4. *INTEL 2017:* A TURNING POINT

4.1. The Judgement

Intel lodged an appealed against the General Court's judgement before the Court of Justice. Advocate General ('AG') Wahl, in his Opinion, joined in on the criticism of the 2014 judgement and the formalistic approach to loyalty rebates. He posited that the GC's interpretation of *Hoffman-La Roche* had turned its rule into an irrebuttable presumption of illegality, because the illegality of fidelity rebates derived purely from their form. So long as they presented said form, their incapability to negatively affect competition was irrelevant and could not influence whether the relevant conduct was abusive or not.[112] In his view, analysing a conduct's economic and legal context is always necessary to establish an Article 102 TFEU infringement, even regarding presumptively illegal conduct.[113]

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[109] *Intel 2022,* paras. 95-100.

[110] See, *inter alia*, Geradin, D., *op. cit*.; Petit, N., "*Intel*, Leveraging Rebates, and the Goals of Article 102 TFEU", *European Competition Journal,* vol. 11, n. 1, 2015.

[111] E.g., *Deutsche Telekom*, *TeliaSonera*, and *Post Danmark I* and *II*. See pp. 11-13 above.

[112] Opinion of AG Wahl, see n. 42 above, paras. 84-87.

[113] *Ibid.,* para. 73. Furthermore, AG Wahl rejects the GC's classification of rebates into three types, claiming that it follows from the case law that there are only two: quantitative, and loyalty rebates. He argues that the GC is wrong to separate exclusivity rebates from other loyalty-inducing rebates. *Ibid*., paras. 80 *et seq*.

On 6 September 2017, the Court of Justice delivered its judgement on Case C-413/14 P (*Intel 2017)*. In its ruling, the Court arguably changed the law on fidelity rebates, although, in its own words, it merely clarified *Hoffman-La Roche*, which in principle remains good law. The Court established that, when a dominant undertaking submits evidence during the administrative procedure that its rebates are not capable of restricting competition and, in particular, of having foreclosure effects, the Commission must undertake an analysis of all circumstances to determine whether the foreclosure capability exists.[114] In its analysis, the Commission must consider at least five items: (i) the extent of the undertaking's dominant position on the relevant market, (ii) the share of the market covered by the practice, (iii) the conditions for granting the rebates in question, (iv) their duration and amount, and (v) the possible existence of a strategy aiming to exclude as-efficient competitors. In addition, the objective justification and efficiency defences remain available.[115] Furthermore, the Court found that, where the Commission has analysed the rebates and found that they are capable of foreclosing competition, then the General Court, when disposing of an appeal, must review the applicant's claims that question that conclusion.[116]

In applying these rules to the Intel case, the Court proceeded on the premise that Intel had submitted evidence denying its rebates' foreclosure capability, which none of the parties disputed. Hence, it firstly concluded that the Commission was under a duty to analyse the rebates' circumstances, including the five factors specified. In this sense, the Commission and the General Court had erred in law when asserting that the Commission could simply declare the rebates abusive, without any regard for their effects. Regarding the AEC tests, the ECJ concluded that the General Court was under the obligation to examine all of Intel's arguments that question the tests' validity. This is because, notwithstanding the Commission's submissions that the analysis was not legally required, the Commission *had* carried out an in-depth examination of the circumstances, which led it to conclude that the rebates had foreclosure capability. The AEC test had been key in reaching that conclusion. Hence, the GC ought to have examined all of Intel's claims regarding the tests.[117]

Consequently, the Court of Justice concluded that the GC's refusal to review such claims was

[114] *Intel 2017*, para. 138.
[115] *Ibid.,* para. 139.
[116] *Ibid.*, para. 141.
[117] *Ibid.,* paras. 142-144.

a failure to carry out a proper judicial review. Therefore, the Court of Justice set aside the 2014 judgement and remitted the case back to the GC for review.[118]

4.2. Relevance and Pending Questions

Some authors contend that *Intel 2017* was a strike down – albeit an implicit one – of *Hoffman La Roche*. They argue that, in practice, a dominant firm will almost inevitably claim that the practice is incapable of foreclosure, depriving the Commission from the ability to proceed on the basis of the *Hoffman-La Roche* presumption of illegality and forcing it to economically analyse the rebate.[119] In this sense, the Court used a "procedural twist" to avoid an explicit strike down of the prior case law, but in practice the Commission will be unable to proceed on the basis of the presumption of illegality alone.[120] Other authors are more cautious. In their view, *Intel 2017* makes the *Hoffman-La Roche* presumption rebuttable, while maintaining its existence.[121] Loyalty rebates by a dominant undertaking are still presumed to be illegal, but the undertaking may fight the presumption in a way that was unavailable under the traditional interpretation of *Hoffman-La Roche*.

The aftermath of *Intel 2017* begged an obvious question: how will the General Court, who in 2014 had been so traditional in its approach to loyalty rebates, incorporate the 2017 judgement? *Intel 2017* had outlined many substantive principles but did not elaborate on their application. In this sense, the judgement states that the presumption of illegality is rebutted when the dominant undertaking provides evidence that the rebates are incapable of foreclosing competition. However, what standard of evidence must the undertaking meet to rebut the presumption? Assuming that the presumption is rebutted, and thus, that the burden of proving foreclosure capability switches to the Commission, what is the standard of the Commission's proof of anticompetitive effects? Particularly, if it uses an AEC test, what exactly must it show, to be valid evidence of anticompetitive foreclosure?

Furthermore, what is the role of AEC tests after the Intel Saga? Do *Intel 2017*'s principles affect *Post Danmark II*'s assertions that AEC tests are not a necessary element of

[118] *Intel 2017,* paras. 147, 150.
[119] Whish, R. & Bailey, D., *op. cit.*, p. 750.
[120] Monti, G., *op. cit,* p. 22.
[121] See, *inter alia*, Fernández, C., *op. cit.,* p. 453; & Louis, F. *et al*., "The Intel Judgement: (Re)balancing the Burden of Proof"*, Wilmer Hale,* 4 February 2022*,* p. 3.

establishing an abuse?[122] In addition, regarding the five features listed in paragraphs 138-139 of *Intel 2017*, how in-depth must the Commission analyse them? And must *all* of these features be analysed in every single case involving loyalty rebates, regardless of the case's specific circumstances? These were some of the uncertainties that surrounded the General Court's judgement of 2022.

[122] See n. 95 above.

CHAPTER 3. THE *INTEL 2022* JUDGEMENT

The General Court delivered its judgement on Case T-286/09 RENV (*Intel 2022*) on the 26th of January 2022. For purposes of clarity, as the judgement is over eighty pages long, Section 1 lays out its structure, while the following sections analyse the parties' claims and the General Court's findings.

1. STRUCTURE OF THE JUDGEMENT

Firstly, in pages 1-12, the General Court summarises the background to the judgement, including the administrative procedure, the judicial procedures, and the referral.[123] Secondly, pages 12-17 clarify the scope of its review. Thirdly, in pages 19-21, the GC reformulates the framework laid out by the Court of Justice in *Intel 2017*, extracting three principles. This is the framework under which, in fourth place, the GC analyses the substance of Intel's three grounds of appeal, beginning in page 21.[124] Finally, in pages 83-84, the GC adjudicates Intel's application for annulment.

2. PRELIMINARY POINTS

2.1. Scope of the Review and Naked Restrictions

Intel and the Commission disagreed on the scope of the review. On one hand, Intel claimed that, as *Intel 2014* had been set aside in its entirety, the General Court ought to review all the pleas that Intel had raised at first instance on the basis of the legal framework set out in *Intel 2017*. Conversely, the Commission submitted that the GC should exclusively analyse the capability of the rebates to produce anticompetitive foreclosure.

In paragraph 82, the GC finds that it ought to rule again on all the arguments put forward at first instance, excluding the procedural grounds which Intel had withdrawn. Importantly, the GC notes that it is bound by the Court of Justice's decisions in point of law. In this sense, the GC concludes that *Intel 2017* set aside *Intel 2014* on one ground only: the GC's failure to

[123] There are two parts of *Intel 2022* that will not be analysed in this Chapter. Firstly, the background to the judgement, as it was already explained in Chapter 2. Secondly, paras. 103-112 of the judgement, where the GC dismisses the Commission's claims that certain arguments raised by Intel in its observations were inadmissible. The reason is that those paragraphs are not as relevant for the object of this research work, which, as stated, focuses on *Intel 2022*'s contributions to the role of anticompetitive effects in fidelity rebates.

[124] Note that Intel was supported by the Association for Competitive Technology ('ACT'), who, alongside Intel and the Commission, submitted observations to the General Court (*Intel 2022*, paras. 63 and 68). In this sense, throughout the judgement, the GC addresses not only the points raised by the applicant and the defendant, but also those made by the intervener in Intel's support.

assess the rebates' foreclosure capability and, hence, to review the Commission's AEC tests. Thus, this was the only question that fell under its review. All other findings made in *Intel 2014*, including those not appealed by the applicant and those not addressed by the Court of Justice in *Intel 2017*, the GC may accept them without further examination.[125]

In particular, the General Court concludes that *Intel 2014*'s categorisation of certain conducts as exclusivity rebates, and of others as naked restrictions, needed not be reviewed. Regarding the fidelity rebates, the issue was not if Intel had awarded them, but whether they were capable of restricting competition.[126] Regarding the naked restrictions, the GC concludes that nothing indicates that the Court's conclusions in *Intel 2017* applied to the naked restrictions. In fact, the Court had not analysed them at all, merely mentioning them twice. In this sense, the ECJ's conclusions concerned fidelity rebates exclusively.[127]

To summarise, the General Court concludes that it must consider, in light of the framework set out in *Intel 2017*, whether the Commission had proven to the appropriate legal standard that Intel's rebates were capable of producing anticompetitive effects and, specifically, of foreclosing competition.[128] This requires analysing all of Intel's claims regarding the Commission's AEC tests, which questioned the validity of the tests' findings.

2.2. Framework and Principles of *Intel 2017*

In paragraphs 116-122, the General Court summarises the legal framework for fidelity rebates established in *Intel 2017*. Specifically, it extracts three principles.

The first is that pursuant to *Hoffman-La Roche*, there is a presumption of illegality against fidelity rebates, as, given their nature, they "constitute an abuse of a dominant position"[129] and they "may be assumed to have restrictive effects on competition".[130] Nonetheless, the GC emphasises that it is a "mere presumption and not a *per se* infringement".[131]

The second principle reproduces the procedural mechanism developed in *Intel 2017*: the presumption shall be rebutted where a dominant undertaking submits evidence that its

[125] *Intel 2022*, para. 85.
[126] *Ibid.,* para. 97.
[127] *Ibid.,* paras. 86-92.
[128] *Ibid.,* para. 115.
[129] *Ibid.,* para. 117.
[130] *Ibid.*, para. 124.
[131] *Id.*

conduct is not capable of producing a foreclosure effect. In such cases, the GC states, "the Commission must analyse the foreclosure capability of the scheme of rebates by examining (...) at a minimum (...) the five criteria set out in [*Intel 2017*]".[132]

Finally, the third principle provides that, although an AEC test is not legally necessary for determining the foreclosure capability of a given rebate scheme, if the Commission performs it, then the test will be one of the factors taken into consideration, in addition to the five basic criteria, to assess whether said capability exists.[133]

3. FIRST GROUND OF APPEAL: THE COMMISSION'S LEGAL ANALYSIS

Intel's first ground of appeal (Letter A, pages 21-25) claims that the Decision must be set aside, as it was based on an incorrect legal analysis. Intel argues that the Commission had interpreted *Hoffman-La Roche* wrongly, in finding that the rebates were by their very nature abusive, and that there was no need to consider their foreclosure capability. Rather – Intel argues – *Hoffman-La Roche* only generates a presumption, which the Commission ought to nonetheless substantiate through an analysis of the rebates' foreclosure capability.

The Commission acknowledges that the Intel Decision was based on the traditional approach to *Hoffman-La Roche*, hence why it didn't rely on an analysis of the circumstances to conclude that the conduct was abusive. However, the Commission denies that this vitiates the Decision, as the latter nonetheless includes five AEC tests that prove the rebates' foreclosure capability. In support, the Commission cites *Intel 2017*, where the ECJ found that the Commission had taken the AEC test into account when concluding that the rebates were capable of restricting competition.

The GC rejects the Commission's arguments. It is not enough that the Commission used the AEC tests to conclude that the rebates had foreclosure capability. This conclusion ought to have informed its legal assessment of whether the rebates were abusive. However, as the Commission itself acknowledges, the 2009 Decision was not grounded on such considerations, which were deemed extra-legal. As a result, the Commission's legal analysis was legally unsound.

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[132] *Intel 2022*, para. 125.
[133] *Ibid.,* para. 126.

4. SECOND GROUND: THE AEC TESTS

The following ground (Letter B, pages 25-76) submits that the AEC tests were vitiated by errors and unable to prove foreclosure capability. As such, the Decision declaring an infringement ought to be annulled.

4.1. General Considerations on the Burden and Standard of Proof

Firstly, the General Court summarises the concept of an AEC test and the relevant law on the burden and standard of proof. In this sense, following Article 2 of Regulation 1/2003, the burden of proving an Article 102 TFEU infringement rests on the party alleging it. In addition, the presumption of innocence applies. Hence, the Commission must prove the infringement to the adequate legal standard, dispelling any doubts that the GC may have about the existence of the infringement. This implies an obligation to provide a "sufficiently precise and consistent (...) body of evidence that supports the Commission's findings (although it is not necessary for every single item of evidence to meet those standards)". [134]

Secondly, the GC clarifies that the probative value of the evidence submitted by the Commission differs, depending on how it makes its case. On one hand, if the Commission finds an infringement on the grounds that the undertaking's behaviour cannot be explained in any other way than by an abuse, then if the undertaking offers an alternative account, the GC must annul the decision. On the other hand, if the Commission relies on actual evidence that sufficiently demonstrates an infringement, the onus falls on the undertaking to prove that there is a circumstance which undermines the evidence's probative value.

4.2. The AEC Tests

Following the above, the General Court performs a detailed analysis of Intel's claims regarding the AEC tests, complying with the Court of Justice's mandate to carry out a proper judicial review. In this sense, the GC analyses the Commission's AEC tests and whether each of them proved to the necessary legal standard that the rebates granted by Intel to each customer were capable of foreclosing competition. The GC concludes that all AEC tests were vitiated by errors and failed to prove foreclosure capability.

Firstly, regarding the Dell rebates, the GC essentially finds that the Commission had failed to

[134] *Intel 2022*, para. 163.

properly assess the contestable share. The Decision had relied on one Dell spreadsheet to set it at 7%. However, Intel submitted that there were other internal documents and statements that had probative value, which identified a substantially different share of 25%. The GC found that Intel's claims cast doubt on the Decision's assessment of the contestable share. As said indicator constituted the basis for the AEC test, the GC concludes that the Commission had failed to demonstrate the foreclosure capability of Intel's rebates to Dell.

Secondly, concerning HP, the primary issue is that the Commission did not carry out an AEC test for the entirety of the infringement period. In this sense, there were eleven months which weren't included into the AEC test's calculations of the contestable share. The Commission simply transposed the conclusions it drew from the AEC test to those 11 months, without sufficiently justifying why the contestable share would remain stable. Once again, as the contestable share is the basis of the AEC test, the GC finds that Commission had failed to demonstrate the HP rebates' foreclosure capability.

Thirdly, in terms of the NEC rebates, the GC takes issue with the calculations of the conditional portion of the rebates. NEC had received two types of rebates: ECAP and MDF.[135] The Commission considered them fidelity rebates, including them in its calculations. However, Intel argued that the ECAP rebates were not conditional on exclusivity and ought not to be included in the AEC test. The GC finds that the Commission lacked evidence that the ECAP rebates were conditional on exclusivity. Hence, it ought not to have included them in the AEC test. A second issue regarding this AEC test involves the time period. The Decision used data from three months and extended the conclusions to a three-year period, without justifying why the relevant elements remained stable.

Similarly, regarding the Lenovo rebates, the GC found that the value of the conditional rebates had been incorrectly calculated. In addition to cash advantages, Lenovo had received non-cash advantages from Intel, in the shape of access to an Intel facility in China. The Decision quantified the non-cash advantages based on their value for Lenovo, instead of the cost to Intel, arguing that a smaller, non-dominant competitor would not normally have such a facility to offer the customer. However, the General Court found that it should have used their cost to Intel. This is because an AEC test is to be conducted by reference to a

[135] ECAP stands for *"exception to customer authori*[s]*ed pricing";* MDF for *"market development funds". Intel 2022,* para. 338.

hypothetical *as-efficient* competitor. Such a competitor, to compensate the customer for the lost advantages, would have been able to offer the same non-cash advantages as Intel.

Finally, concerning MSH, the General Court found that the Commission had erred in calculating the so-called double conditional rebate method. The starting point for understanding this method is that MSH is a retailer, not an OEM. A hypothetical as-efficient competitor, to sell its computers to MSH, "would have to ensure not only that MSH was ready to buy them, but also that OEMs were ready to manufacture them. Hence, Intel's practices at different levels of the supply can have a cumulative effect".[136] The Commission calculated the amount of the double rebates, based only on the rebates offered to NEC during the fourth quarter of 2002. It then extrapolated those results to the rest of the infringement period, regarding NEC, and to the other OEMs entirely. The Commission failed to justify why the calculations were transposable.

5. THIRD GROUND: *INTEL 2017*'S CRITERIA FOR FORECLOSURE CAPABILITY

Finally, Intel (Letter C, pages 76-82) claims that the Commission failed to properly assess the five criteria laid out in paragraph 139 of *Intel 2017*, which the Commission must analyse, as Intel had provided evidence to rebut the *Hoffman-La Roche* presumption. In particular, Intel poses that the Decision failed to properly analyse three of them: the market share covered by the rebates, their duration and amount, and the existence of a strategy to exclude as-efficient competitors. The General Court examines only two (more accurately, one and a half, as will be explained later on) before finding for the applicant.

5.1. Market Coverage Rate

The Commission points to recitals in the Decision which contemplate how the OEMs who received rebates were strategically important for Intel and how, as a result, the coverage of the abusive practices ought to be held as significant. While Intel acknowledges such recitals, it submits that they do not equate to a proper consideration of the market coverage rate criterion. This is especially the case given that the Commission made such evaluations after it had already found the rebates abusive, whereas *Intel 2017* requires that this criterion be assessed *before*; used to determine abusiveness itself. The GC upholds Intel's claims.

[136] *Intel 2022,* para. 469.

5.2. Duration and Amount

Firstly, the General Court notes that, even though the Decision did examine factors relating to the duration of the rebates, their duration was only analysed in order to calculate the contestable share for the AEC test. Hence, the Commission failed to carry out an analysis of the rebates' duration "as a factor which is capable, in itself, of demonstrating their ability to have a foreclosure effect [;] as a factor intrinsically relevant to determining the capability of Intel's pricing practices at issue to have a foreclosure effect".[137] In addition, the General Court finds that the Decision's superficial references to the rebates' duration were not a sufficiently thorough analysis.

Furthermore, the General Court notes that a Decision must assess *all* of the criteria set out in *Intel 2017* to an adequate standard, "notwithstanding the conclusions that may be drawn from the AEC tests".[138] Having determined that the Decision failed to properly assess the rebates' duration, in the GC's view it is thus unnecessary to analyse the other criteria. In other words, the failure to examine even one criterion means that the Decision failed to prove to the legal standard that the rebates were capable of foreclosing competition.

6. THE GENERAL COURT'S CONCLUSIONS

Following this analysis, in Letter D, the General Court concludes on Intel's application for annulment. The GC summarises the law on loyalty rebates as it stands, capturing the essence of the Intel Saga. In this sense, it states that,

> *"Although a system of rebates set up by an undertaking in a dominant position may be characterised as a restriction of competition since* given its nature it may be presumed *to have* restrictive effects *on competition, (...) what is involved is (...) a mere presumption and* not a *per se* infringement *(...) which would relieve the Commission in all cases of the obligation to examine whether there were anticompetitive effects".*[139]

In addition, the General Court recalls the procedural mechanism introduced in *Intel 2017* to rebut the *Hoffman-La Roche* presumption, including a reference to how to demonstrate foreclosure capacity. In this sense, the GC reiterates that, where a dominant undertaking

[137] *Intel 2022,* paras. 514-515.
[138] *Ibid.*, para. 518.
[139] *Ibid.*, para. 522 [emphasis added].

submits that the conduct was incapable of restricting competition, the Commission must analyse the foreclosure capability by examining, at the very minimum, all of the criteria listed in paragraph 139 of *Intel 2017*. Their correct evaluation is a necessary element of establishing the rebate scheme's foreclosure capability, and hence, of finding an abuse. Conversely, the AEC test is not an obligatory part of establishing foreclosure capability. Nonetheless, where the Commission performs it, then the test will be a relevant factor in assessing said capability.

Regarding the Intel case, the GC concludes that, even though the 2009 Intel Decision had performed a number of AEC tests, they were vitiated by errors and did not prove foreclosure capability. Furthermore, the 2009 Decision had improperly assessed *Intel 2017*'s market coverage rate and duration criteria. Hence, the Commission had failed to establish to the adequate legal standard that the rebates were capable of restricting competition and, specifically, of producing anticompetitive foreclosure. As such, the Commission erred in law in finding the rebates abusive.

Finally, the General Court attempts to adjust the fine to remove the proportion linked with the rebates. However, as it cannot identify the part of the fine that relates specifically to the naked restrictions, it annuls the fine in its entirety.

CHAPTER 4. DISCUSSION

The following Chapter critically analyses some of the main contributions and implications of the *Intel 2022* judgement, linking them with the previous judgements of the Intel Saga, the law on fidelity rebates, and the role of anticompetitive effects therein.

1. NATURE OF FIDELITY REBATES AND TYPES OF REBATES

A logical place to begin is with the General Court's construction of the *Intel 2017* principles. The first principle, which merits being quoted in full, states as follows:

> *"Although a* system of rebates *set up by an undertaking in a dominant position on the market may be characterised as a restriction of competition, since,* given its nature*, it may be* assumed to have restrictive effects *on competition, the fact remains that what is involved is, in that regard, a* mere presumption *and* not a *per se* infringement *of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to conduct an effects analysis".*[140]

In this paragraph, the GC expressly labels the *Hoffman-La Roche* rule as a presumption of illegality and, in this sense, categorises fidelity rebates as presumptively illegal. This is a valuable assertion, as *Intel 2017* was not this explicit. In addition, the GC seeks to end any discussions on whether fidelity rebates are *per se* prohibited, plainly stating that they are not, as a *per se* prohibition is incompatible with any obligation to analyse the conduct's effects. This is relatively consistent with the pre-Intel approach to fidelity rebates, in that they have never been absolutely prohibited – the defences of objective justification and economic efficiencies were always available, at least in theory. Furthermore, the quoted paragraph shows that there remains a view of loyalty rebates as if they have, by their very nature, an intrinsic *tendency* to restrict competition. In this sense, the ethos of the traditional approach to fidelity rebates seems to persist, albeit perhaps diluted.

Notably, the General Court speaks of a 'system of rebates' without any further specification. This raises two possibilities. The first is that, following the Intel Saga, all rebates are subject to this rule, and that the traditional typology of rebates is no longer relevant. Alternatively, it could be that the GC's wording is simply inaccurate, where, in actuality, it was referring only

[140] *Intel 2022,* para. 144 [emphasis added].

to fidelity rebates. The context clearly points to the second possibility. For one, the Intel Saga only deals (notwithstanding the naked restrictions) with rebates that were awarded on conditions of exclusivity or quasi-exclusivity – i.e., fidelity rebates. Furthermore, option one would imply overriding the case law on the other types of rebates. However, *Hoffman-La Roche* itself, which *Intel 2017* and *2022* view as good law, states that quantity rebates are generally lawful. Similarly, recent judgements like *Post Danmark II* and *Tomra* have reaffirmed the law on third-category rebates. In addition, *Intel 2022* itself alludes to the distinction between fidelity and quantity rebates later on in the judgement.[141]

Moreover, there is other evidence that *Intel 2022* maintains the tripartite typology. Firstly, when defining the scope of its review, the GC rules that it is free to accept the findings made in 2014 that the ECJ did not decide in 2017. In this sense, *Intel 2014*'s distinction between quantity, fidelity, and third-category rebates was not addressed in 2017,[142] despite AG Wahl's assertion that the categorisation was wrong, and that fidelity rebates ought not to be separated from other loyalty-inducing rebates.[143] Yet, in contrast to his proposition, Intel seems to treat rebates within the meaning of *Hoffman-La Roche* and third-category rebates differently. Following *Intel 2022*, the starting point for assessing a fidelity rebate is a presumption of illegality that can later be rebutted. Conversely, the starting line for a third-category rebate is a position of neutrality. The rebate is neither lawful nor unlawful, and its character can only be determined through an analysis of its circumstances.[144]

Furthermore, even when a fidelity rebate's presumptive illegality has been rebutted, the law on fidelity rebates and on third-category rebates prohibits different anticompetitive effects. On one hand, following *Intel 2017* and *2022*, and in accordance with the Enforcement Guidelines, a fidelity rebate is abusive if it produces anticompetitive foreclosure. On the other, pursuant to *Michelin I* and *Tomra*, a third-category rebate infringes Article 102 TFEU if it tends to "remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting

[141] The GC's analysis of the AEC test involved determining whether a portion of Intel's rebates to NEC were rebates conditional on exclusivity or not. See p. 29 above.

[142] Notwithstanding, there is a limit to this argument. It's true that *Intel 2017* does not decide on the legal point of rebate categories, and the General Court in 2022 would have been free to accept *Intel 2014*'s classification. However, *Intel 2022* doesn't explicitly accept it either – certainly not in the same way as it clearly confirms *Intel 2014's* conclusions on naked restrictions.

[143] Opinion of AG Wahl, see n. 113 above.

[144] See p. 12 above.

competition".[145] In this sense, the law on third-category rebates holds a broader notion of relevant harm than the post-Intel law on fidelity rebates.

2. ANTICOMPETITIVE EFFECTS ANALYSES: OBLIGATORY AND NON-OBLIGATORY CRITERIA

The second principle reproduces *Intel 2017*'s clarification of *Hoffman-La Roche* and explains the procedural mechanism to rebut the presumption of illegality, including the five criteria that must be analysed to establish anticompetitive foreclosure, if said presumption is rebutted. *Intel 2022* leaves no room for doubt: the criteria must *all* be analysed regarding *every* fidelity rebate scheme, for they constitute a minimum standard. In fact, as soon as the Commission fails to assess even one indicator, then it has failed to prove the rebates' foreclosure capability. This is the case "notwithstanding the conclusions which may be drawn from [an] AEC test".[146] Hence, while an AEC test is not necessary for establishing the foreclosure capability of a fidelity rebate scheme, as reiterated in the third principle, assessing these criteria is.[147] Furthermore, *Intel 2022* clarifies that the indicators must be analysed thoroughly, and a superficial assessment does not meet the standard of proof.[148]

All in all, these indicators appear to constitute the cornerstone for proving anticompetitive effects in fidelity rebate cases. This raises the point of what the reasoning behind the selection of these criteria, and not others, was. Neither *Intel 2017* nor *Intel 2022* address this. However, if the law on fidelity rebates is moving towards a more effects-based approach, as *Intel 2022* confirms, it may be posited that preestablishing five criteria to be analysed in every single rebate case, regardless of its circumstances, is not fully coherent with such efforts.[149] In practice, it may very well happen that they are the not the most appropriate criteria for examining the foreclosure capability of a specific rebate scheme. Nevertheless, this arguably isn't the most crushing of criticisms, in the sense that enshrining these indicators does not preclude the Commission from analysing any other factors that it deems relevant for the purposes of proving foreclosure in a given case – and, when the Commission does choose to examine other factors, like the AEC tests in the Intel Decision, they *will* be

[145] *Michelin I*, para. 73; *Tomra*, para. 71.
[146] *Intel 2022*, para. 518.
[147] *Ibid.,* para. 522.
[148] *Ibid.,* para. 518.
[149] Monti, G., *op. cit.,* p. 12.

relevant when assessing the rebates' foreclosure capability.

Admittedly, a problem might arise in the rather extreme case that none of the mandatory criteria reveal foreclosure capability, but non-obligatory ones do. In principle, *Intel 2017* and *2022* only require that the Commission assess these features; they don't condition foreclosure capability on the analysis giving a positive result. However, if the Court of Justice has enshrined them as necessary, it is arguably because it views them as extremely valuable indicators. In fact, the GC in *Intel 2022* goes as far as to state that they are "intrinsically relevant to determining the capability of [a fidelity rebate] to have a foreclosure effect".[150] If none of the mandatory criteria reveal any foreclosure capability, the EU Courts might be reluctant to ground a finding of foreclosure capability on entirely different ground. However, this is just speculation, as it remains unknown.

The less extreme, and arguably more likely case is that, although certain necessary features reveal some foreclosure capability, the strongest evidence thereof lies in a non-obligatory indicator. In such a situation, a finding of foreclosure capability is likely admissible, so long as the body of evidence is collectively strong enough to prove it,[151] and that the obligatory criteria have been adequately analysed. Finally, despite *Intel 2022*'s contributions to developing this part of the 2017 judgement, the fact remains that the General Court only reviewed two criteria (strictly, one and a half, as it did not examine the 'amount' in the 'duration and amount' criterion). Hence, it provides no explicit guidance on how the extent of the dominant position, the existence of a strategy, the rebates' amounts, and their conditions ought to be determined, in the context of this specific legal issue.

[150] *Intel 2022*, para. 514.
[151] This is the standard of proof clarified by the General Court in *Intel 2022*. See p. 28 above.

3. REBUTTING THE PRESUMPTION OF ILLEGALITY: A STANDARD OF PROOF FOR THE UNDERTAKING?

Similarly, more specificity would be desirable regarding what is needed to rebut the presumption of illegality. *Intel 2017* and *2022* contain the following formulation:

> *"Where a* [dominant undertaking] *submits during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the (...) foreclosure effects...".*[152]

However, is there a standard of proof associated with the undertaking's allegations? Must it prove its claims to any particular extent, in order to rebut the presumption? Looking at the 2009 Decision and at *Intel 2022*, Intel made some fairly specific allegations regarding the AEC test to cast doubt on the Commission's findings. For instance, concerning the rebates to Dell, where it highlighted the discrepancy in the estimated contestable share between the spreadsheet that the Commission used, and Dell's other internal sources.[153] In fact, the General Court's meticulous review of the AEC tests, which takes up almost sixty pages of the judgement, essentially mirrored Intel's claims against them. Other dominant undertakings may freely take Intel's actions as a guide, if they so wish, but *Intel 2022* contains no statement that implies that they illustrate any sort of standard.

It is unclear whether an analogy can be made with *Intel 2022*'s general assertions about the burden and standard of proof in fidelity rebate cases. If so, the dominant undertaking would have to submit enough evidence to cast doubt on the foreclosure capability of the rebates. By contrast, authors like Whish & Bailey imply that practically any evidence provided by the dominant undertaking triggers the Commission's duty to analyse the rebates' circumstances.[154] This partly grounds their claim that the Intel Saga, although formally it only clarifies *Hoffman-La Roche*, has in actuality changed the law on fidelity rebates completely, rendering the traditional ruling virtually irrelevant to these effects. In this sense, they claim that fidelity rebate cases post-Intel are always going to require an analysis of their circumstances, given that a dominant undertaking is almost inevitably going to adduce that

[152] *Intel 2022*, para. 124, citing *Intel 2017,* para. 139.
[153] See pp. 28-29 above.
[154] Whish, R. & Bailey, D., *op. cit.*, p. 750.

its conduct was incapable of restricting competition.[155]

To an extent, even if the standard to rebut the presumption is higher, the law on fidelity rebates may still change, and a circumstantial analysis may nonetheless become the *de facto* norm. In this sense, say that an undertaking has to prove its claim of foreclosure *in*capability to a specified standard. As such allegations are made during the administrative procedure, the Commission would be the one to evaluate whether the undertaking's evidence satisfied it. If the Commission finds that the undertaking didn't meet the standard of proof and proceeds on the basis of the *Hoffman-La Roche* presumption alone, it runs a risk that its decision will be later overturned upon appeal before the EU Courts. This is especially so, in the view of the General Court's strict and thorough review of the Commission's evidence contained in the 2009 Decision, which has been another key takeaway from *Intel 2022*. In such a scenario, it would just be safer for the Commission to analyse the rebates' circumstances anyway. Hence, the abandonment in practice of the *Hoffman-La Roche* presumption might still take place. In any case, any future decisions by the Commission that proceed on the basis of the presumption alone would clash with its own Guidelines, which, although strictly speaking don't bind the Commission to an effects-based approach, might further incite it to do so.

4. CAPABILITY, APPRECIABILITY, AND LIKELIHOOD: IMPLICATIONS FOR THE COMMISSION'S STANDARD OF PROOF

On a different note, *Intel 2022* also provides some lessons on the difference between capability and appreciability.[156] As introduced in Chapter 1, *Post Danmark II* established that there isn't a *de minimis* threshold in Article 102 TFEU cases.[157] In other words, a conduct's anticompetitive effects need not be appreciable for the behaviour to be abusive. *Intel 2014* expressly confirmed this rule for fidelity rebates,[158] in a finding that was not rejected by the appeal judgement. The denial of an appreciability threshold raised the question of whether, since Article 102 TFEU only requires the capability to restrict competition, even the most ineffective of behaviours by a dominant undertaking would be deemed abusive.[159] On the

[155] Whish, R. & Bailey, D., *op. cit.*, p. 750.

[156] For a detailed comparison of both concepts, see Ibáñez Colomo, P., "Appreciability and *De Minimis* in Article 102 TFEU", *Journal of European Competition Law and Practice,* vol. 7, n. 10, 2016, pp. 651-660.

[157] See p. 10 above.

[158] *Intel 2014*, para. 116.

[159] Venit, J., *op. cit.,* p. 171.

contrary, *Intel 2022* has proven that capability is not an empty concept, and that it can be hard to prove. The Commission only had to prove that the fidelity rebates were capable of restricting competition and yet it failed to do so. All in all, *Intel 2022* imposes a high standard of proof for the existence of an abuse generally, and for foreclosure capability specifically, essentially requiring proof beyond reasonable doubt.[160]

For future cases, to meet the capability threshold, the Commission may want to become especially meticulous about the evidence it relies on. In view of *Intel 2022*'s analysis of the AEC tests, one mistake stands out particularly: the Commission must be careful when it extrapolates data. Several times, the Commission transposed results to different time periods or to different OEMs without a proper justification, simply proceeding under the assumption that said that data was transposable. Otherwise, the more effects-based approach to fidelity rebates, as specified in *Intel 2022*, risks annulling many of its findings. However, this point raises precisely one of the major difficulties of implementing an effects-based approach to fidelity rebates, especially when done through an AEC test: many times, the data for an effects analysis is hard to find. The key factors for AEC tests, like the contestable base, are calculated using evidence gathered from the undertakings, who are presumed to know the relevant data. Yet *Intel 2022*, and the existence of contradictory statements and documents within Dell's own sources, demonstrate that this is not always the case. Moreover, the relevant data is sometimes outright impossible to obtain. This is also reflected in *Intel 2022*, where the General Court notes that the Commission's choice, in the context of the AEC test for the MSH rebates, to extrapolate the results obtained for NEC to all other OEMs was based simply on the fact that it was unable to find better data.[161]

Regarding the discussion on capability versus likelihood,[162] *Intel 2022* does not expressly tackle whether they are the same concept. At several points throughout the judgement, the General Court uses the formulation used by the Commission in the 2009 Decision: whether the rebates were "capable of causing or likely to have" anticompetitive effects.[163] Simultaneously, *Intel 2022* constantly refers to the foreclosure *capability* of the fidelity

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[160] *"The Court cannot conclude that the Commission has established the infringement (...) if it still entertains* any doubts *on that point". Intel 2022,* para. 161 [emphasis added].

[161] *Ibid.,* para. 478.

[162] See n. 58 above.

[163] E.g., para. 335 (regarding the HP rebates), para. 411 (regarding the NEC rebates), and para. 526 (generally, regarding all rebates) of *Intel 2022.*

rebates, much more often than it uses the word likelihood. However, given that *Intel 2017* uses both terms interchangeably,[164] it seems like capability and likelihood designate one and the same thing, much like AG Wahl concluded.[165]

5. ENSHRINING AN EFFECTS-BASED APPROACH: HAS *HOFFMAN-LA ROCHE* SURVIVED?

Arguably, the biggest contribution of the *Intel 2022* judgement, put together with *Intel 2017*, is that it has consolidated the role of anticompetitive effects and of effects-based analyses in one of the categories of abuse which had resisted them the most. The changes brought forward by the Intel Saga are undeniable, both from a theoretical and a practical approach.

From a theoretical perspective, it's true that fidelity rebates never formally consisted in absolute prohibitions, even under the most formalistic of approaches, as the objective justification and economic efficiency defences were always available. However, the Intel Saga has expanded the theoretical scope of 'escapes' to the prohibition of abuse. Now, a fidelity rebate will not amount to an abuse of dominance, not only if it is objectively or economically justified, but also if it is incapable of producing anticompetitive effects. From a practical point of view, the change is even starker. Under the traditional approach, fidelity rebates were always abusive in practice, as the EU courts did not accept objective justification or economic efficiency claims. Now, post-Intel, an (*a priori*) easily rebuttable presumption is the only thing standing between fidelity rebates and the obligation to establish their foreclosure capability through an analysis of all the relevant circumstances. In addition, because the standard for proving such capability is strict, in practice, a truly thorough analysis of anticompetitive effects is bound to become the law.

Nonetheless, whether the effects-based approach set out by the Intel Saga is the right one (or, in other words, whether fidelity rebates have been appropriately economised) remains up for debate. Some have observed that Intel's confirmation that the relevant anticompetitive effect is the foreclosure of an as-efficient competitor means that the AEC test may become, in practicality, a substantial requirement for fidelity rebate cases, even if Intel doesn't expressly

[164] *"Intel submits that the General Court failed to assess the* likelihood *of a restriction of competition. Thus, the fact that the rebates at issue were classified or assessed in the judgment under appeal as exclusivity rebates* should not exclude an examination of their capability *to restrict competition". Intel 2017,* para. 113 [emphasis added].

[165] See n. 58 above.

conceive it that way.[166] This may present a problem, given the many limitations that AEC tests present with regards to rebate cases, like how a negative result is not necessarily proof of foreclosure, and how a positive result does not infallibly mean evidence of the rebate's incapability to foreclose.[167] Other authors have mentioned that the EU Courts seem unclear about the economic principles and functioning fidelity rebates. These voices criticise that *Intel 2017* sets out fixed criteria to analyse foreclosure capability, instead of enshrining more flexibility in determining which criteria best demonstrate anticompetitive effects in each case; while *Intel 2022* analyses the Commission's AEC test almost *ad-hoc*, without a clear, organised idea of what it is trying to assess or how to go about it.[168]

Similarly, whether or not the Intel Saga marks the end of *Hoffman-La Roche* lacks a simple answer. A strong argument in favour of concluding that the *Hoffman-La Roche* rule has been effectively overturned is that, especially if the presumption of illegality proves to be as easy to rebut as Whish & Bailey think,[169] every single case will require an effects-based analysis of their circumstances. This is a night and day difference with the old application of *Hoffman-La Roche*, where in practice, anticompetitive effects were not a part of the assessment. Conversely, an argument in favour of finding that the Intel Saga is a continuation, but not a break, of the *Hoffman-La Roche* case law, once more relies on the finding that, at a conceptual level, fidelity rebates were not *per se* abusive under *Hoffman-La Roche*.[170] In this sense, it could be argued that the Intel Saga merely adapts the Hoffman-La Roche conception to more contemporary policy views and priorities.

In any case, winning the debate on *Hoffman-La Roche*'s status arguably is not as important as the Intel Saga's deep practical implications for fidelity rebates, which, once again, can be summarised as the arrival of an effects-based method. In this sense, it is particularly notable that the case line responsible for introducing the more-economic approach to fidelity rebates also accepts the existence of naked restrictions, which amount to *per se* abuses, as they are

[166] O'Donoghue, R. & Padilla, J., *op. cit.,* N.P.

[167] Davis, P., *op. cit.,* pp. 5-6; De Ghellinkc, E., "The As-Efficient-Competitor Test: Necessary or Sufficient to Establish an Abuse of Dominant Position?", *Journal of European Competition Law & Practice,* vol. 7, n. 8, 2016, p. 548.

[168] Monti, D., *op. cit.,* pp. 19-20.

[169] See p. 37 & n. 153 above.

[170] Ibáñez Colomo, P., *The Shaping of EU Competition Law,* Cambridge University Press, Cambridge, 2018, pp. 182-183.

abusive without any need to examine their effects.[171] Admittedly, the category of naked restrictions is not new.[172] Notwithstanding, there is not much case law on them. Intel was an opportunity not only to revolutionise fidelity rebates, but also to advance the law on naked restrictions. This is no small thing: after all, what behaviours by a dominant firm are so egregious that they do not require an effects analysis at all? However, Intel did not appeal their characterisation before the Court of Justice, so the General Court accepted *Intel 2014*'s findings regarding the naked restrictions. As a result, they were not susceptible of review by the General Court in 2022. What *Intel 2022* does emphasise is that naked restrictions are a category are admissible in EU competition law,[173] even if they contrast with the overwhelming trend of effects analyses in Article 102 TFEU.

[171] *Intel 2014*, paras. 199, 203; citing *Irish Sugar* and *France Télécom*.
[172] *Irish Sugar,* para. 226.
[173] *Intel 2022,* para. 96.

CONCLUSION

For many years, it seemed like the Commission was never wrong about Article 102 TFEU. The form-based approach to abuses of dominance meant that the Commission's findings easily passed the EU Courts' legal tests, and its Decisions were rarely annulled. Slowly, the more-economic approach seemed to enter Article 102 TFEU enforcement. However, the approach to some potentially abusive behaviours remained more formalistic than others. This was the case of fidelity rebates.

This research work has explored the impact of the *Intel 2022* judgement and of the broader Intel Saga, on the legal treatment of fidelity rebates. In particular, it has focused on how the Intel case line has influenced the role of anticompetitive effects analyses in determining whether such rebates infringe Article 102 TFEU.

To this aim, Chapter 1 described the legal framework of Article 102 TFEU generally, and of fidelity rebates specifically, including an account of how the case law maintained a highly formalistic approach towards them, even when the treatment of other similar conducts slowly adopted an effects-based approach. Chapter 2 described the background to Intel 2022, including the Commission's Enforcement Guidelines, the 2009 Commission Decision, the first-instance judgement by the General Court, and the appeal before the Court of Justice. Thereafter, Chapter 3 carried out an in-depth analysis of *Intel 2022.* Finally, Chapter 4 critically discussed some of *Intel 2022'*s key contributions and implications for the law on fidelity rebates, and for the role of anticompetitive effects therein.

All in all, this research work has found that *Intel 2022* has consolidated the adoption of an effects-based approach to fidelity rebates, first proclaimed in *Intel 2017*. In this sense, *Intel 2022'*s biggest contribution is confirming that proof of anticompetitive effects is a necessary step for declaring that a dominant undertaking's fidelity rebates abuse Article 102 TFEU, any time that the presumption of illegality is rebutted. Furthermore, *Intel 2022* has helped clarify some of the principles of *Intel 2017*. These include the explicit characterisation of *Hoffman-La Roche* as a presumption of illegality, and the standard of proof which the Commission's evidence must meet, in order to properly prove foreclosure capability.

Admittedly, some issues remain unclear. In this sense, further research avenues include a detailed assessment of the economic soundness of the effects-based approach developed in the Intel judgements. Notwithstanding, the Intel Saga, including *Intel 2022*, will surely acquire historic relevance, as evidence of the effort by the EU Courts to introduce the effects-

based approach even to the most formalistic areas of Article 102 TFEU. The extent of its impact, of course, depends on the outcome of the Commission's appeal against *Intel 2022*. However, the Commission is only allowed to appeal against *Intel 2022*'s points of law. In addition, the Court of Justice may not substitute the General Court's reasoning. Hence, it is safe to say that the crux of the Intel Saga, understood as the inclusion of some sort of anticompetitive effects analysis to fidelity rebate cases, is here to stay.

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