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Rebates after the General Court's *Intel* Judgment

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ABSTRACT

Twenty-one years after the first complaint against Intel's distribution strategy was received by the European Commission, the case is finally closed: the General Court annulled the Commission's infringement decision because it had not shown that Intel's practices foreclosed market access. This paper reviews the General Court's final judgment by first locating the Intel case in its wider context. We show that the Commission and the European Court of Justice used this case improperly to usher in a new approach to analyzing rebates. We then turn to discuss how the new approach is expected to operate and show why the Commission lost this case but more generally that the new approach to analyzing the compatibility of rebates under Article 102 TFEU makes it difficult for a competition authority to pursue these cases. More generally, the application of the new approach to rebates reveals a completely different understanding how competition law is to be used when assessing conduct of dominant firms from that which had been developed since the 1970s. There is little in judgments of the ECJ in 2017 and General Court in 2022 (which embrace and apply the new approach respectively) to explain why the Courts felt it legitimate to change the legal framework so radically.

JEL Classification: K21

1. Introduction

In the autumn of 2000 Advanced Micro Devices, Intel's sole remaining competitor in the market for central processing units, sent two complaints to the European Commission alleging that Intel had abused its dominant position, contrary to Article 102 TFEU. On 29 January 2022 the General Court (GC) annulled the Commission's 2009 infringement decision.[1] After 21 years, one decision of the European Ombudsman,[2] three judgments from the GC,[3] and one judgment from the Court of Justice,[4] is this saga finally over? The answer to this question is in the affirmative. While the Commission might try and issue a fresh decision since some of its findings were not quashed, this is not desirable. Likewise, while one might be tempted to appeal this judgment to secure some clarity on certain points of law where the GC (as we show below) erred, this too is not a productive use of limited resources.

What have we learned from this judgment? We have learned that the Commission ultimately did not have the evidence necessary to make a finding of anticompetitive effects stick. We have also learned that the as-efficient competitor test is nearly impossible to apply, and that using Article 102 TFEU to assess the

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[1] *Intel v Commission*, Case T-286/09 RENV (hereinafter *Intel – Renvoi*).

[2] The Ombudsman (https://www.ombudsman.europa.eu/en/press-release/en/4403) found there was maladministration because the Commission did not take minutes of a meeting with one of Intel's clients which was pertinent to the case. However the Commission subsequently made the contents known to Intel and the ECJ ruled that no procedural infringement had been committed, *Intel v Commission,* Case C-413/14 P, EU:C:2017:632 (hereinafter *Intel ECJ*), paras 79-107.

[3] In addition to two judgments on substance (*Intel v Commission*, Case T-286/09, EU:T:2014:547 (hereinafter *Intel 2014*) and *Intel Renvoi* (above n 1), the President of the General Court also considered a request for interim measures pending a challenge requesting a longer deadline to reply to the Commission. The President denied the interim order and the procedural aspects challenges were discontinued: *Intel v Commission*, Case T-457/08 R, EU:T:2009:18.

[4] Above n 2.

legality of rebates is more challenging now than it was before this judgment. More widely, this saga raises, once again, the question of the proper role of Article 102 TFEU.

Before discussing the GC's latest judgment and the three lessons noted above, it is important to recall some background material. Thus, in section 2 we provide a concise summary of the Commission's decision and of the first judgment of the General Court in 2014. This helps us to explain the factual background and what we might now call the old approach to the analysis of rebates. In section 3 we place the Commission's Intel decision of 2009 in its policy context. We show that the Commission appeared to use the decision as a way of showcasing the new approach to rebates that it had recently pioneered in a soft law document. Second, we explain the Court of Justice's 2017 judgment and its significance in crystallizing the new approach to rebates. Third, we briefly point out that the design of the new approach in the Guidance Paper and its implementation in *Intel* did not completely satisfy economists and we provide a sketch of the main economic literature to demonstrate that neither the ECJ nor the Commission have yet worked out a fully economics-based approach to test whether rebates are anticompetitive. The transformation of the law of rebates so that it truly reflects an effects-based analysis that many commentators have been clamoring for remains work in progress.

Armed with this background, we discuss the judgment of the General Court. We divide the analysis in two: section 4 looks into the legal standards deployed by the Court and section 5 looks into the review of the facts and compares the analysis of loyalty rebates under the old and new approach. We then take a view as to the significance of this saga in section 6.

2. The old approach to rebates

2.1 The Commission decision in a nutshell

The Commission found that Intel committed a single and continuous infringement of Article 102 TFEU from October 2002 until December 2007. [5] The practices constituted a strategy aimed at foreclosing a competitor, AMD, from the market for x86 CPU microprocessors. CPUs are necessary to operate computers and their manufacture requires heavy investments. The x86 architecture is a standard developed by Intel and x86 CPUs run on Windows and Linux operating systems. While at one point there were a number of firms making CPUs, as of 2000 only Intel and AMD remained, with Intel dominating the world market with a share of 70% between 1997 and 2007. High entry barriers made this dominance stable but Intel felt some competitive pressure from AMD in a market with rapid innovation.

The abuses of dominance, according to the Commission, could be classified into two categories. First, Intel granted rebates to four Original Equipment Manufacturers (OEMs): Dell, Lenovo, HP and NEC. The rebates were conditional on those undertakings purchasing all or almost all of their x86 CPUs from Intel. Intel also awarded payments to a retailer, Media Saturn-Holding GmbH (MSH), which were conditional on MSH selling exclusively computers containing Intel's x86 CPUs.[6] Second, the Commission found that Intel had imposed certain naked restrictions: it awarded three OEMs (HP, Acer and Lenovo) payments which were conditional on those OEMs postponing or cancelling the launch of products with AMD x86 CPUs or placing restrictions on the distribution of those products.[7] All of these discrete arrangements amounted,

[5] Case COMP/C-3/37.990 – *Intel* (decision of 13 May 2009). A summary may be found at [2009] OJ C 227/13. References are to the full text of the decision.

[6] Ibid., section VII, part 4.2.

[7] Ibid., section VII, part 4.3. As the GC observed, these restrictions 'were part of a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels.' Intel 2014 (above n 3) para 213.

cumulatively, to a strategy designed to foreclose market access to AMD and thus constituted a single continuous infringement. A fine of EUR 1.06 billion was imposed on Intel.[8]

2.2 The General Court's first review: the old approach to rebates confirmed

In 2014 The GC dismissed Intel's appeal. The GC confirmed previous case-law and noted that for the purposes of competition law analysis, rebates offered by dominant firms could be divided in three categories.

First, rebates based on quantities purchased, which do not normally have foreclosure effects: 'if increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff.'[9] This creates a safe harbour, but such rebates may still be challenged if the rebates are not based on cost reductions.

Second, rebates may be based on loyalty: the customer agrees to buy all or most of its requirements from the dominant company. These are normally an abuse of dominance but the dominant firm may offer objective justifications or it may show that the 'potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.'[10] The GC justified this strict approach by reference to the special responsibility that dominant undertakings have and by the fact that the dominant firm is an unavoidable trading partner for all customers, which means that even absent rebates, entry by rivals is more difficult than in competitive markets and therefore any further action, like 'the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market.'[11] The rebates found by the Commission in *Intel* fell within this category and much of the GC's review of the Commission decision hinged on checking the evidence that the rebates were in exchange for exclusivity.

Finally, there are rebates that are not based on quantity or loyalty and whose legality is to be assessed having regard to all relevant circumstances to see if they have the same anticompetitive effects as loyalty rebates. The types of effects one looks for are the following: whether the rebate tends (i) to remove or restrict the buyers' freedom to choose his sources of supply; (ii) bar competitors from access to the market; (iii) apply dissimilar conditions to equivalent transactions with other trading partners or (iv) to strengthen the dominant position by distorting competition.[12] Observe that there are four discrete theories of competition harm which were embraced by the case-law, two of these focus on harm to customers, one looks at harm to competitors and one considers the general effect on competition.

The GC suggested that rebates that are not explicitly based on loyalty should be examined to test if they have the same effects as loyalty rebates. The factors that matter therefore have to reveal the existence of one or more of the harms noted above. The relevant circumstances include the criteria and rules for

[8] Ibid., Section IX and Article 2.

[9] *Intel 2014*, above n 3, para75.

[10] *Intel 2014*, above n 3, paras paras 77 and 94. Accordingly it is wrong to say that loyalty rebates under the old approach are per se illegal.

[11] *Intel 2014*, above n3, para 93.

[12] Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* EU:C:1983:313, para 73. See also, to the same effect *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, EU:C:1979:36 para 90. It is worth noting that the third effect is articulated differently in the treaty: "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." This emphasizes that the harm is suffered by the customers, not the consumers.

getting the rebate, the duration of the rebates, and the degree of dominance. These factors allow one to show if the customer has a strong incentive to buy exclusively from the dominant undertaking.

This judgment drew considerable criticism because the GC's categories gave no space to understanding the effects of the practice in question.[13] This criticism takes the view that the effect to be looked at is the foreclosure of as efficient rivals which is likely to cause harm to consumer welfare. A moment's reflection reveals that this criticism is not about the absence of an effects analysis but an absence of an assessment of the 'right' kind of effect. As we saw just above the GC is interested in effects, but in a different kind of effects from those of the critics: harm to customers, discrimination, the strengthening of a dominant position and the marginalisation of rivals from a part of the market. The debate then is about what effects matter. It was said that its approach analysed loyalty rebates under a quasi per se prohibition rule.[14] However as we saw above the dominant undertaking is always free to offer an objective justification. There was some support for the judgment, indicating that the GC confirmed existing case-law and developed an approach that is economically sound as well as being easy to administer.[15]

3. The new approach to rebates

3.1 Policy context

The old approach to rebates summarised in section 2 has been one of the most criticised aspects of the enforcement of EU competition law because it targets a practice which appears innocuous and prohibits rebates with no reference to their impact consumer welfare. In 2005, the Commission began to respond to these critiques with a consultation about how to best apply Article 102 TFEU to exclusionary conduct. The main focus of the reform was to adjust the Commission's approach to rebates. In 2009, only a few months before the Commission decided the *Intel* case, but by which time nearly all the evidence had been gathered, the Commission published a soft law document designed to reorient its approach: 'Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings' (hereinafter, the Guidance Paper).[16] The document contains three points of importance for this discussion.[17]

First, the Commission slimmed down the theories of harm that it would apply when examining suspected exclusionary conduct. An infringement would only be found if the conduct causes anticompetitive foreclosure: '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.'[18] Note that this is a much narrower view than that explained by the Court in its earlier case-law on rebates where

[13] Peeperkorn, 'Conditional Pricing: Why the General Court is wrong in *Intel* and what the Court of Justice can do to rebalance the assessment of rebates' Concurrences N.1-2015, 43, Rey and Venit 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38(1) World Competition 3.

[14] Petit, '*Intel* and the Rule of Reason in Abuse of Dominance Cases' (2018) 43 European Law Review 729, 732.

[15] Wils, 'The Judgment of the EU General Court in Intel and the so-called more economic approach to abuse of dominance' (2014) 37(4) World Competition 4, Whish '*Intel v Commission*: Keep Calm and Carry On!' (2015) 6 Journal of European Competition Law and Practice 1.

[16] [2009] OJ C45/7. This document has a bizarre title: DG Competition wished to issue it as Guidelines but there was an objection to this because, as the text shows, the document is not entirely faithful to the ECJ case-law. The compromise was to refer to it as a document about enforcement priorities.

[17] For a more general overview, see Akman, 'The European Commission's Guidance on Article 102TFEU: From Inferno to Paradiso?' (2010) 73(4) Modern Law Review 605 and Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1(1) Journal of Competition Law and Practice 2.

[18] Above n 13, para 19.

harm to customers and discrimination among customers were also seen as competition concerns, as well as considering general adverse effects from reducing competition.

Second, the Commission set out a general analytical framework to assess anticompetitive potential. Gone is an approach that provides that loyalty rebates are an abuse of dominance save when the firm may objectively justify these. Instead the Commission increased its own burden of proof by setting out indicators to examine the risk of anticompetitive foreclosure: the strength of the dominant position, entry barriers, the relative strength of competitors, the position of customers (e.g. if some customers are particularly important for the entry of rivals, then tactics targeted these may be more problematic); the extent of the conduct ('in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect'); the presence of actual foreclosure effects; internal documents indicating an exclusionary strategy.[19] Note that this differs somewhat from the types of factors looked at in the context of loyalty rebates under the old approach because the emphasis is now exclusively on looking for evidence that rivals may be foreclosed from the market in such a way that the monopolist is able to retain its dominant position.[20] The evidence that the rebates harm customers or discriminate among them is no longer relevant. Nor is there a general assessment of the competitive process. Evidence is only relevant when it helps one examine whether there is anticompetitive foreclosure likely to cause consumer harm. We return to discuss this general principle in section 3.5 below.

Finally, the Commission introduced a specific test for analysing rebates: 'to the extent that the data are available and reliable' it would examine 'whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers.'[21] This became known as the as-efficient competitor (AEC) test and we now turn to explaining this test and its relationship to the general analytical framework.

3.2 The AEC test: what it is and how it works

In thus section we draw on the latest judgment of the GC in *Intel,* which offers a very clear exposition of the AEC test.[22] This is supplemented with a hypothetical example so that we can understand the logic of the test. The numbers used bear no relation to the facts of the Intel decision. This discussion is somewhat technical but it is necessary to understand the mechanisms which the Commission uses in order to appreciate the significance of this test.

Suppose Domco holds 80% of the market for widgets. Many consumers are loyal to Domco's brand so that a retailer sees Domco as an unavoidable trading partner. Suppose one of the retailers, call it Klant,[23] orders 1000 widgets a year. Klant knows that half of its customers are loyal to Domco. Therefore Klant will necessarily buy 500 widgets from Domco. This means that competitors of Domco can only hope to sell Klant at most 500 widgets per year. No matter what discounts the competitors offer, Klant will buy 500 widgets from Domco because that is what half of its customers want. From a competition law perspective the market for sales to Klant may be divided in two: *a non-contestable share* (500 units that Klant will

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[19] Above n 16, para 20.

[20] The approach however is aligned with the assessment of vertical restraints in Article 101 TFEU. For a discussion of alignment between Articles 101 and 102 TFEU, see Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (2010) ch.11.

[21] Above n 16 para 41.

[22] *Intel Renvoi* (above n 1) paras 152 to 158.

[23] This is Dutch for client.

always buy from Domco) and a *contestable share* (500 units where competition between Domco and rivals is possible).

Now, suppose that Domco is selling Klant 800 units but finds its contestable share under threat from rivals and decides to respond by offering Klant a rebate of 10% of the purchase price if Klant buys all its widgets from Domco. Say the price per widget is EUR 1. Before the rebate, if Klant were to buy all widgets from Domco, it would pay EUR 1000. With the rebate the price of the same quantity becomes EUR 900.

How can a rival respond to this rebate? It would have to offer Klant a deal that makes it profitable for Klant to forego the rebate offered by Domco. The rival could say: 'if you buy 500 widgets from me, they will cost to you EUR 400 and you will have a more diversified offering for your clients.' If this offer is accepted, Klant would then buy 500 units from Domco, paying EUR 500 (the non-contestable share) and 500 units from the rival, playing EUR 400. Total payment is EUR 900, exactly the price Klant would pay to Domco with the rebate if it bought all units from Domco. Observe what this means for Domco and its rival, respectively. For Domco, if Klant accepts the rebates Domco offers, it means that the price at which it sells its 1000 widgets falls from EUR 1 to EUR 0.9 per unit. From Klant's perspective however, things look different: Klant would anyway buy 500 units from Domco at EUR 1, so the discount only matters for the extra 500 units. Thus, if we look at this discount from Klant's perspective this means that Klant sees that the offers made by Domco and the rival allows him to buy an extra 500 units at a price of EUR 0.8 (i.e. 500 units at EUR 1, plus 500 units at EUR 0.8 = 500 + 400 = 900). This calculation applies irrespective of whether Klant buys everything from Domco or buys 500 units from each. Looking at Domco's offer from Klant's perspective is key because it means that in order for the rival to make its offer of EUR 400, it would sell each unit at a price of EUR 0.8. This is called the *effective price* at which the rival must sell widgets to convince Klant to buy 500 units. Note that the unit price that the rival has to offer is lower than the unit price that Domco needs to offer with the rebate: Domco can spread the discount over all 1000 units.

Having explained the commercial calculation, we now turn to competition law principles. It is well-established that EU competition law penalises prices set by Domco that are below average avoidable cost (AAC) on the basis that a rival as efficient as Domco would be unable to match those prices.[24] This is the approach used to determine if prices are predatory.[25] The AEC test suggests that we can apply the principles from the law on predatory pricing to rebates. For this we need to find out the average avoidable cost of making widgets. Suppose the AAC is EUR 0.9. Using this and the rest of the data above, we can work out if Domco's rebates can exclude a rival as efficient as Domco. Note that we don't ask whether rivals are or are not as efficient, this is a hypothetical test: we ask if a firm as efficient as the Domco (i.e. with the same AAC as Domco) would be able to offer the same discounts.

The arithmetic (based on the data above) shows the following: if Domco offers a rebate of 10% if Klant buys 1000 units, it means that the effective price for the contestable share is EUR 0.8. This means that Domco is selling its widgets in the contestable part of the market at an effective price which is below its AAC, which is EUR 0.9. It follows that a rival as efficient as Domco would not be able to match this discount and Domco fails the AEC test. As the GC puts it:

> 'a system of exclusivity payments is capable of foreclosing market access for equally efficient competitors if the effective price is below Intel's AAC. In that situation, the AEC test has a negative result. If, by contrast, the effective price is above the AAC, an as-efficient competitor is deemed

[24] 'Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct.' (Guidance Paper, above n 16, footnote 18).

[25] *AKZO Chemie BV v Commission*, Case C-62/86, EU:C:1991:286, paras 71 and 72.

to be able to cover its costs and to therefore be in a position to enter the market. In that situation, the AEC test has a positive result.'[26]

It may help to develop the hypothetical further to get to grips with this test. Suppose that the non-contestable share is higher (e.g. 80%) and the other facts stay as they are. If Domco offers a rebate of 10% if Klant buys 1000 units, it means that the effective price for the contestable share (which is now only 200 widgets) is EUR 0.22 per unit. It means that if the rival is to have any hope of selling 200 widgets to Klant, it would have to price these at EUR 0.5 each because then Klant would be indifferent between (i) buying all units from Domco and pay EUR 900 or (ii) buying 800 from Domco at EUR 1 each and 200 from the rival at EUR 0.5 each (EUR 800 paid to Domco and EUR 100 paid to the rival). Here, the effective price that the rival has to match is way below the average avoidable cost and it is clear that this rebate cannot be offered by a firm as efficient as Domco. It means that Domco is sacrificing some profits in anticipation of a future without rivals. This example shows that the smaller the contestable share, the more difficult it will be for a rival to offer a price to beat the rebates offered by Domco.

Furthermore, the smaller the contestable share, the less generous need the discount be to exclude a rival as efficient as Domco. Keeping with the same example of a contestable share of 20%, what if Domco offers a rebate of 5%? Again the issue is solved by simple arithmetic: if Klant buys all units from Domco it pays EUR 950 for 1000 units, which means from Klant's perspective it is paying EUR 800 for the non-contestable portion of purchases and EUR 150 for the contestable portion. It means that for a rival to tempt Klant to switch and buy 200 units from it, these would have to be priced at EUR 0.75 each (then Klant buys 800 from Domco at EUR 1 each and 200 from the rival at EUR 0.75 each, which means EUR 800 paid to Domco and EUR 150 paid to the rival). Again here the effective price is below AAC.

Note finally that this approach does not forbid loyalty rebates. The biggest rebate that Domco can offer is one where the effective price is EUR 0.8, equal to its average avoidable cost. This means that, keeping the contestable share at 20%, Domco can offer a discount of 4% if Klant buys all units from Domco (i.e. Klant would buy 800 units at EUR 1 and 200 units for EUR 0.8, for a total of EUR 960). In this setting the rival could also offer a price of 0.8 per widget and be able to compete effectively with Domco because a rival as efficient as Domco would be able to sell at this price. Any rebate greater than 4% cannot be offered by a rival as efficient as Domco.

Thus, what matters for the application of the AEC test is the size of the non-contestable share (the smaller this is the easier it is for Domco to exclude a rival) and the size of the discount (the more generous the discount it is the more likely it is that Domco is selling at an effective price below AAC). In the jargon, the AEC test has a *negative result* when it is shown that the effective price is below AAC and it has a *positive result* when the effective price is above AAC.[27] A negative results indicates a possible abuse of a dominant position, a positive approach indicates that the conduct may not be anticompetitive.

Having explained the arithmetic, it is worth explaining the genius of this approach as well as its limitations. On the positive side, the framework transposes the analysis we use for predatory pricing to rebates because the logic of both practices is the same. The dominant firm uses price cuts as a way of foreclosing market access to rivals: it sacrifices some profits in order to exclude rivals and therefore gain the power to increase prices once the rival has been disciplined. It makes sense to try and apply comparable evaluative criteria to exclusionary conduct rather than have different rules apply to practices that have similar effects. Furthermore, the test is not very complicated. Once one agrees with the normative economic proposition that a rival as efficient as the dominant firm should not be excluded, the matter can

[26] *Intel renvoi* (above n 1), para 158.
[27] *Intel renvoi* (above n 1), para 158.

be turned over to the accountants and the lawyers to do the arithmetic exercises above based on the evidence. Finally, observe that all the evidence is in the files of the dominant undertaking – there is no need to find out the costs of the rival. The dominant firm ought to know how many sales it is guaranteed and what share of the market is contestable. Competition authorities also have experience in calculating production costs to estimate the AAC.

However, this approach is not free from problems. First, it is under-inclusive. Usually the dominant firm has a number of economic advantages which means that its cost of production is lower than that of rivals who have not scaled up. It means that even if in theory a discount of 4% could be offered by a rival as efficient as Domco, there may be no such efficient rival out there. There might however be promising firms which have only recently entered the market that could evolve to become efficient if they were not priced out. In this setting the AEC test produces results that are not desirable from an economic perspective. On the other hand, it might be claimed that a rival who is not yet as efficient on entry but is confident it can scale up and become as efficient as Domco will try and stay in the market and grow even if it sells at a loss for a period of time.

Second, there are some practical difficulties. The test has to be applied multiple times if the dominant undertaking sells to many customers and if the rebates change frequently then the amount of data to be processed increases significantly. This places a major evidentiary burden on the Commission when rebates are not stipulated in detail in a contract but are discussed and altered frequently. In addition, the test is in reality somewhat more complex than described above because there may be multiple rivals or the rival may not want to conquer all of the contestable share, so the calculation may have to be adjusted somewhat. As we will see these evidentiary issues are precisely what plagued the Commission's decision in *Intel*.

Finally, even we find a negative result of the AEC test, does this mean that the conduct is an abuse of dominance? Let us return to the example above, and suppose that Domco sells 10,000 units annually and that the Commission proves that the rebate to Klant (who buys 1000 of these) excludes a rival as efficient as Domco, but there is no evidence of Domco offering discounts to other customers. From an economic perspective, one would say that there is no anticompetitive effect because the rival can try and sell to any of the other clients, provided the rest of the market is contestable. Foreclosing rivals' access to Klant would not give Domco the power to increase the price of widgets: the discount would be passed on to consumers.[28] Therefore, the AEC test does not operate as a stand-alone smoking gun to show illegal conduct: the rebates still need to be assessed in their wider economic context to assess whether they have an exclusionary potential. From this perspective, the AEC test is a tool that allows the Commission to carry out an assessment which is complementary to the more qualitative criteria that it would otherwise use. It would be unlikely for the Commission to rely only on the AEC test because one has to account for all market conditions, e.g. the likely competitive response of rivals, the market conditions in segments of the market where no rebates are offered.

Conversely, if the Commission were to apply the AEC test and this were to yield a positive result (i.e. the discounted prices are above cost) then it is still possible to find that the agreements infringe Article 102 if it can be shown that the conduct in question can harm rivals. For example, if the rebates are offered for many years and make it hard for rivals to scale up, or if they are combined with other commercial

[28] Conversely, suppose that the purchasers of the other 9000 units have little interest in buying rival widgets and so the contestable share there is very low. Then offering rebate to the client most likely to switch will probably prevent the new entrant from entering the market. This means that an assessment of the capacity of a rebate to foreclose requires attention to all market attributes.

strategies to raise entry barriers, or if the discounts are targeted at the most important customers.[29] Thus, the AEC test is one of the many diagnostic tools that the Commission may use to indicate whether there is an abuse of dominance, but it is neither necessary nor sufficient to make a decision on the legality of a rebate scheme.

3.3 The Commission's *Intel* decision revisited

As we observed above, the Commission established that the conduct of Intel fell within the parameters of the existing case-law. However, the decision is curious because the Commission also followed this conclusion up by applying the as-efficient competitor test and the new approach that had been introduced in the Guidance Paper. In doing so the Commission was careful: the Guidance Paper was only issued after Intel had had the opportunity to respond to the Commission's statements of objection. 'Consequently, the Commission considers that the guidance paper does not apply to this case. The Commission nevertheless takes the view that this Decision is in line with the orientations set out in the guidance paper.'[30] Furthermore, it made it clear that in its view the infringement could be based solely on establishing the existence of loyalty rebates, but that it would carry out an additional step which was 'not indispensable' to show an infringement.[31] This additional step included the following three elements. First, the Commission carried out the as efficient competitor test discussed above. Second, it discussed the strategic importance of the recipients of the rebates. This showed that the OEMs that obtained the rebates had larger market shares than those who did not get rebates, operated in the more profitable part of the market and could legitimise a new CPU because if they picked up a new technology other OEMs would follow. In other words, by targeting certain OEMs this made market access of rivals more difficult as they would rather sell to these OEMs than to others who did not obtain the rebates.[32] Third, the Commission explained how the conduct harmed consumers: it limited their choice by foreclosing a competing CPU and in the longer term the conduct 'may allow that company to foreclose as efficient, or even more efficient rivals, even if its overall average price is higher than that of its rivals. This is therefore to the detriment of consumers and competition both in the short and in the long term, in terms of price, choice and innovation.'[33]

While the Commission took active steps to ring-fence those parts of the decision that analyse the anticompetitive potential of the rebates in ways that match the approach in the Guidance Paper, it is obvious that a serious effort was made to showcase the new interpretation of Article 102 TFEU by applying it to the facts of the case: this was a signal that henceforth a more economics-based approach would be followed. But ultimately, this choice it came back to haunt the Commission.

3.4 The ECJ's ratification of the new approach

While the GC's 2014 judgment ignored the new approach, by holding that the decision could be upheld on the basis of the existing case-law,[34] the ECJ had other ideas. It began by making reference to the old

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[29] To elaborate: it may be that there is one very important customer and if it is convinced to buy a rival product then all other customers will take this as a sign that the rival's products are of high quality and buy from the rival too. See also Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172 where the ECJ suggested that above cost discounts could be an abuse of dominance provided effects are shown.
[30] *Intel* (above n 5), para 918
[31] *Intel* (above n 5), para 925
[32] *Intel* (above n 5) paras 1577-1592
[33] *Intel* (above n 5) para 1612.
[34] *Intel* 2014 (above n 3) paras 154-157.

approach by reference to the key case-law according to which loyalty rebates were anticompetitive. It then added two paragraphs that merit being quoted in full:

> However, that case-law must be *further clarified* in the case where the undertaking concerned 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 alleged foreclosure effects.
>
> In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[35]

These passages are noteworthy for two reasons. The first is that the criteria listed to test the legality of loyalty rebates are very similar to those set out by the Commission in its Guidance Paper and their policy orientation coincides: the focus of these factors is to examine if there is likely foreclosure which could cause consumer harm. It follows that these criteria are far removed from the way in which loyalty rebates had been analysed so far. It looks therefore like a departure from the older case-law.[36]

However, the ECJ masks this departure by introducing a procedural twist to the application of Article 102, which can be seen in the first paragraph quoted above. It states that these new criteria need only be established if, during the administrative procedure, the dominant undertaking shows that the conduct cannot have foreclosure effects. This allowed the ECJ to claim that it was just clarifying the law by establishing that the old approach to loyalty rebates created a presumption of illegality which the dominant undertaking could rebut, but this is achieved by a sleight of hand. It is clear that the law has changed and that the earlier case-law did not generate any presumption.[37] The Court was also able to justify this new approach by reference to one post-Guidance paper judgment where the ECJ appeared to embrace the policy shift in the Guidance Paper, in particular the importance of safeguarding competition from as-efficient competitors and the focus on exploring the potential of conduct to harm consumer welfare.[38] Furthermore, the Commission's actual use of the new approach in the decision reinforced the Court's determination to opt for a new approach.

This was not the only controversial aspect of the Court's judgment. It also said that, irrespective of all the caution exercised by the Commission in the decision in saying that the application new approach was not a necessary part of the decision, the fact that it 'nevertheless carried out an in-depth examination' of the circumstances note in the guidance paper and a very detailed analysis of the AEC test meant that 'the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.'[39] This is deeply worrying. First, this is not an instance where the Commission pioneers a new abuse of dominance in which case one would have

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[35] *Intel* ECJ (above n 2), paras 138 and 139 (emphasis added).

[36] Cf. Ibáñez Colomo, *The Shaping of EU Competition Law* (2018) pp.182-3 for the view that the judgment did not alter the rule in the previous case-law.

[37] The case-law allowed (and still allows) the dominant undertaking to show that rebates were efficient. Thus Domcos after Intel have two shots at challenging the Commission: casting doubts on the foreclosure risk first and if this fails, showing efficiencies.

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

[39] *Intel* ECJ (above n 2), para 143.

expected the ECJ to engage in an assessment of its validity.[40] So it is unfair for the Court to treat the innovative portions of the decision as parts of the reasoning necessary to reach the conclusion since the Commission said the exact opposite. Second, the passage just quoted misrepresents the decision insofar as the Commission based its reasoning on the conventional case-law on rebates where the types of harm are wider than the foreclosure of as efficient competitors and included harm to customers and the competitive process. This is not to justify the Commission: the extensive application of a legally irrelevant economic analysis should not have appeared in the decision and one can understand the ECJ wanting to ensure that all aspects of a decision are reviewed. Nevertheless, the way this portion of the decision was leveraged by the ECJ to change the law is unfortunate.

The tenor of both of these moves on the part of the ECJ is that the law on loyalty rebates is now aligned with that in the Guidance Paper: the Commission must show that such rebates are likely to eliminate an as efficient competitor. The practical consequences of the ECJ's interpretation of the earlier cases and of the Commission's decision were just as significant: since the Commission had (*avant la lettre*) applied the new approach which the Court only ratified six years after the decision, the General Court in 2014 should have reviewed the entirety of the Commission decision, including the AEC test and the economic assessment of the anticompetitive nature of the conduct and therefore the GC had 'wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the AEC test.'[41] A test that the Commission said was unnecessary to support its findings. There could not be a clumsier way alter the law.

3.5 An economic critique of the new approach

Even if many have cheered the ECJ for embracing an economically sound approach to rebates, a fair number of economic papers suggest that while the Guidance Paper and the intel decision are a step in the right direction, greater economic sophistication is warranted for a truly economics-based framework. The gist of the criticism is that the Commission is insufficiently specific about the theory of harm.[42] A theory of harm is a story that uses economics to explain why it makes sense to classify the conduct observed as anticompetitive. As observed the Guidance Paper merely indicates that an abuse occurs when the dominant undertaking's conduct causes anticompetitive foreclosure by excluding an as-efficient competitor. However, there are multiple ways through which rebates can cause this type of harm and economists insist on this being specified more fully. This matters because each specification requires different evidence to be shown and more particularly, not all theories of harm require the application of the as-efficient competitor test described above. Here we can but chart, in a simplified manner, a set of theories of harm that allows us to demonstrate these points by applying these to *Intel*.

First, as we intimated above, rebates are a type of predatory pricing strategy.[43] In this context, the theory of harm is said to be dynamic. In a first stage, the predator sacrifices some profits now in order to scare

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[40] Thus in *Europemballage Corporation and Continental Can Company Inc. v Commission*, Case 6/72, EU:C:1973:22, para 22, the Court held that in order to determine if conduct which was not explicitly forbidden by Article 102 could constitute an abuse one had to refer to 'the spirit, general scheme and wording of Article [102 TFEU], as well as to the system and objectives of the Treaty.'

[41] *Intel ECJ* (above n 2), para 147.

[42] The Commission 'could have done a better job in formulating the theory of harm in a more coherent way.' Fumagalli, Motta and Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (2018) p.217. In a similar vein, Federico, The Antitrust Treatment of Loyalty Discounts in Europe: Towards a More Economic Approach' IESE Occasional Paper OP-106 (2011), Neven and Zenger 'Some Remarks on Pricing Abuses and Exclusionary Conduct' (2012) 6(2) Revista de Concorrência & Regulaçáo 25, Scott-Morton and Abrahamson, 'A Unifying Analytical Framework for Loyalty Rebates' (2017) 81(3) Antitrust Law Journal 777.

[43] This draws on Federico (above n 42).

off the rival. The rival is unsure how long the predator can sustain the discounts, or the predator may establish a reputation for offering deep discounts and this can cause the new entrant to retreat. In a second stage, the predator raises prices. The AEC test is useful in this setting because it proves that there is a profit sacrifice in the first stage. However, it is not sufficient because for this theory of harm to work we need to establish the likely effect of low prices: rival foreclosure and a possible increase in prices afterwards. Thus we need to know whether the rebates last for a sufficiently long time to put rivals off, for example. It has been suggested however, that this is not the theory of harm used for rebates in the Guidance Paper nor in the *Intel* decision: in the former the Commission indicates that a profit sacrifice is unnecessary to find rebates anticompetitive.[44] In the latter the Commission indicated that a dominant company could foreclose rivals 'even if its overall average price is higher than that of its rivals. This is therefore to the detriment of consumers and competition both in the short and in the long term, in terms of price, choice and innovation.'[45] This indicates that the theory of harm is not predation, where the detriment to consumers would only occur in the longer term. Here the concern was that AMD's exclusion reduced consumer choice by marginalising an innovative competitor.

A second theory of harm which comes closer to the *Intel* decision is based on the dominant undertaking offering rebates to a selected number of buyers to prevent the rival from making enough sales to reach a minimum efficient scale of production.[46] If a rival cannot sell enough units, it is not profitable to enter the market at all. Those putting forward this theory of harm suggest that using the as-efficient competitor test can be useful in generating a strong presumption of exclusionary effects but that further evidence is also needed to accompany this, for example that the level of below-cost sales is significant so that we can be confident that enough sales are at a discounted price to make entry of a rival unlikely. However, they also suggest that rebates could be exclusionary even if sales are above cost, for example in instances where the dominance is particularly pronounced and the discounts cover a significant proportion of the market. The proponents of this second theory of harm have explained how it could be applied in a setting like that in Intel. First, Intel had an incumbency advantage evidenced by the large non-contestable share. Second, there were economies of scale (large sunk R&D costs). Third, there were some key customers that AMD had to reach. Fourth, one would have to see if buyers could coordinate to thwart Intel's rebate strategy (if they all rejected it then AMD would be able to enter). Finally, one should consider whether Intel could recoup the losses from the discounts by selling at higher prices to customers who did not get rebates or by discontinuing rebates as soon as AMD exited.[47]

Third, there can be theories of harm that do not rely on profit sacrifice at all.[48] For instance suppose that in a case like Intel the OEMs compete aggressively downstream. This means that any discount offered by Intel will be passed on to consumers. It follows that OEMs will not want to risk missing out on discounts, so the dominant firm can threaten customers with disadvantages if they do not accept the loyalty rebate. However, to work out this theory of harm we would require different evidence to illustrate that there is a strategy by which Intel secures the loyalty of its customers. Here the AEC test plays no role.

From this perspective, two things follow. The first is that even after the *Intel* judgment the Commission has some way to go in developing an analytical framework to deliver an economics-based assessment. In this regard the ECJ listing of a set of factors to be taken into account is unhelpful because the kinds of factors that matter depend on the specific theory of harm. The second is that the GC's review of the

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[44] 'Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking.' Guidance Paper (above n 16) para 37.

[45] *Intel 2009*, above n 5, para 1612.

[46] This is the theory developed in Fumagalli et al (above n 42) see especially ch.2.

[47] Ibid., pp.213-217.

[48] See Neven and Zenger (above n 42) and Federico (above n 42) for more examples.

Commission's economic assessment is necessarily limited by the absence of a clear theory of harm in the decision. Instead the GC's extremely punctilious review which we will see in sections 4 and 5 below may appear pointless given that the decision might have been quashed simply for failure to articulate which of the many rebate theories of harm was used in this case.

4. The General Court's second review of the decision: the legal issues

4.1 What is to be reviewed?

The first issue that the GC had to resolve when the case returned to it was what aspects of the Commission's decision should be reviewed, having regard to the fact that the ECJ had set aside the entirety of the GC's 2014 judgment. The applicants claimed that all of the Commission's decision should be reviewed, save for the procedural points that the applicants had withdrawn. However, the GC held that the ECJ annulled the Commission's decision on one ground only, namely that the GC's failure to review the application of the AEC test and the economic appraisal of the rebates. This test had only been applied to test the legality of the loyalty rebates. It followed that the GC's findings with respect to the naked restrictions had not been annulled by the ECJ and that part of the GC's original judgment could stand. The GC held that the ECJ did not require that naked restrictions should be assessed having regard to the same standard that was applicable to loyalty rebates.[49] It also held that the presence of different tests to assess whether different types of conduct amount to an infringement of competition law did not violate the principle of legal certainty.[50]

The GC also found that the earlier judgment's conclusion that the rebates were to be characterised as based on exclusivity could be accepted.[51] It followed that the GC's review in this instance would focus on assessing whether the Commission had demonstrated 'the capacity of the rebates at issue to restrict competition in the light, first, of the clarifications provided regarding the principles laid down in [*Hoffmann-La Roche v Commission*]…, and, second, the parties' observations on the conclusions to be drawn from those clarifications.'[52]

4.2 What is the standard of review? And what is the standard of proof?

It has been clear since the inception of the GC that the review provided by this court is extensive, with particular close attention paid to the evidence gathered by the Commission.[53] The GC confirmed this, indicating all elements of the decision are subject to 'in-depth review' of both law and facts in light of the applicant's pleas and the evidence they submit.[54]

The standard of proof for the Commission in competition cases has been a matter of some debate. Advocates General have been divided but the General Court has championed an approach which for common lawyers means that the Commission's standard of proof is to demonstrate an infringement beyond reasonable doubt.[55] In *Intel* it held that 'any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed.'[56] This is

[49] *Intel renvoi* (above n 1), paras 90 and 93.
[50] *Intel renvoi* (above n 1) para 94.
[51] *Intel renvoi* (above n 1) para 97.
[52] *Intel renvoi* (above n 1) para 102.
[53] see for example *Società Italiana Vetro SpA, and others v Commission*, Joined Cases T-68/89, T-77/89 et T-78/89, EU:T:1992:38, *Airtours plc v Commission*, Case T-342/99, EU:T:2002:146.
[54] *Intel renvoi* (above n 1) para 150.
[55] Monti, 'EU merger control after CK Telecoms UK Investments v. Commission' [2020] 43(4) World Competition 447.
[56] *Intel renvoi* (above n 1) para 161. The analysis on this point is similar to that offered by the GC in its 2014 judgment, see *Intel 2014* (above n 3) paras 61-67.

justified by reference to the presumption of innocence found in the Charter of Fundamental Rights which applies to undertakings subject to competition law procedures.[57] This strict standard is balanced in two ways. First, that the Commission need not prove the correctness of every item of evidence provided that there is 'sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place.'[58] Second that if the Commission provides sufficient evidence to explain why the conduct infringes the competition rules, then the appellant must normally prove the existence of circumstances which call 'into question the probative value of the evidence relied upon by the Commission.'[59]

This high standard of proof for the Commission is at odds with the nature of decisions rendered under economic uncertainty. The GC seems to confuse the standard of proof when the Commission alleges the truth of a factual assertion (this pen is blue, the average avoidable cost is EUR 1) with the correctness of a judgment call (the evidence supports a finding that the rebates are likely to harm competition). It may be fair to be demanding for the former, but a margin of discretion should be afforded to the Commission to make a reasonable judgment call on whether the various pieces of evidence add up to an infringement.

4.3 What is the law on rebates after the ECJ's clarification?

In a helpful and concise way, the GC explained the law on rebates in three steps. However there is a mistake in the first step and more clarity needed for the other two.

Turning to the first step the GC says:

> '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.'[60]

The helpful aspect of this passage is to clarify that there is a legal presumption of an infringement. The ECJ had not been explicit in stating this in its *Intel* judgment. However, the GC misunderstood the tenor and the letter of the ECJ's judgment: that Court held that a presumption only arises if: (i) the customer agrees to buy exclusively from the dominant undertaking or (ii) is given a loyalty rebate.[61] The passage above is thus making a major error in saying that the presumption applies to all rebates. This is unfortunate because the entire economic logic of the analysis of rebates, which the GC appeared to have understood, is vitiated by this statement. If a dominant firm grants a rebate without requiring exclusivity the risk of anticompetitive effects is low and thus the Commission is expected to engage in an economic assessment having regard to all the facts – this had been the law before *Intel*.

Second, the GC explained that if the dominant firm succeeds in rebutting the presumption, that then the Commission must 'as a minimum' examine the five criteria specified by the ECJ: (i) the extent of the dominant position; (ii) the share of the market covered by the rebates; (iii) the conditions and arrangements for granting the rebates; (iv) the duration and amount of the rebates; (v) the possible existence of a strategy aiming to exclude competitors (that are at least as efficient as the dominant

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[57] *Intel renvoi* (above n 1) para 162.
[58] *Intel renvoi* (above n 1) para 163.
[59] *Intel renvoi* (above n 1), para 166.
[60] *Intel renvoi* (above n 1), para 124 (my emphasis).
[61] *Intel ECJ* (above n 2), para 137.

undertaking) from the market.[62] The need to assess all of these elements may be queried. The final element on this list cannot be asked for: it is not necessary to show a strategy if the other conditions suffice to show the risk of anticompetitive foreclosure, and such smoking gun evidence may be unavailable. Absence of documentary evidence of a strategy cannot vitiate a finding of abuse. The share of the market covered by the rebates needs to be qualified: it may well be that selective rebates sent to certain customers may suffice to foreclose market access even if the dominant company does not offer rebates to many other customers. The duration of the rebates should be specified further: does this mean the number of years that the rebates are offered for, or does it mean the reference period for the grant of a rebate (i.e. a rebate can be calculated based on monthly purchases or on annual purchases and the latter is more likely to foreclose entry because the closer one gets to the final month the more eager the buyer will be to secure the rebate and thus buy from the dominant firm)? More generally, as we discussed in section 3.5, the evidence required has to match the specific theory of harm advanced. From this economic perspective, the list provided by the ECJ is meaningless and the Court should have simply indicated that the Commission's task is to consider factors relevant to explaining the validity of the theory of harm advanced.

Third, the Commission did not have to carry out an AEC test in order to examine the capacity of rebates to foreclose market access but if the Commission has carried out this test, then this is one of the factors which the Commission must take into account in order to determine if the rebates harm competition. [63] It would have been helpful if the GC had explained whether the AEC test was, in its view, a sixth criterion, or whether it was part of the criteria specified above. The better view, as discussed earlier, is that the AEC test is an integral element for some theories of harm (e.g. predation), but that it is unnecessary for other theories of harm where profit sacrifice is unnecessary.

Applying this three stage test to the Commission's decision as a whole, the GC found, that the Commission has committed a legal error. This finding is worth dissecting. First, according to the GC, 'it is common ground, in the present case, that the applicant submitted, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, was not capable of producing the alleged foreclosure effects.'[64] It follows that Intel had thus rebutted the presumption, as a result of which, as a result of the ECJ's clarification, the Commission had to dig deeper to show the anticompetitive potential of the rebates. Second, the GC showed that in the 2009 decision the Commission had made several statements to the effect that the rebates were abusive by object and that there was no need to prove their anticompetitive potential.[65] Third, it was inevitable to conclude that:

> that position is not consistent with the *Hoffman-La Roche* case-law, as clarified by the Court of Justice in paragraphs 137 to 139 of the judgment on the appeal. It must therefore be found that the applicant and ACT are correct in maintaining that the Commission vitiated the contested decision by an error of law in taking as a starting point the premiss that, in essence, the *Hoffman-La Roche* case-law allowed it simply to find that the rebates at issue infringed Article 102 TFEU on the ground that they were by their very nature abusive, without necessarily having to take

[62] *Intel renvoi* (above n 1), para 125 (with reference to Intel ECJ (above n 2), para 139).
[63] Intel renvoi (above n 1), para 126.
[64] *Intel renvoi* (above n 1), para 133. However, at the time of the Commission's decision we did not know that the finding of an exclusivity rebate generated a presumption which the dominant undertaking could query by casting doubt about the anticompetitive effects. See the discussion in section 3 above.
[65] *Intel renvoi* (above n 1), paras 134-138. The Commission held this line in the appeal in this case, see paras 139-145.

> account of the capability of those rebates to restrict competition in order to reach the conclusion that they constituted an abuse.[66]

This is problematic. One can understand the Commission holding the line that under the case law as it existed in 2009, the old approach to rebates stood. As we saw in section 3, the ECJ's new approach to rebates is not a mere clarification of the law on rebates, it represents a fundamental revision of that law. Is it really fair to assess the Commission's decision having regard to the new approach? To a certain extent, the Commission's use of the AEC test (which is a method that is aligned with the ECJ's new test) makes this fairness argument less compelling. Moreover, this whole segment of the GC's decision is in tension with the ECJ having decided that (irrespective of what the Commission had said) the effects analysis carried out by the Commission in 2009 was part of the decision finding an infringement. At any rate this finding of an error of law had little relevance in the judgment because the reason the Commission lost was on the erroneous analysis of the facts, to which we now turn.

5. The General Court's second review of the Commission Decision

The bulk of the judgment is occupied with a detailed dissection of the evidence used by the Commission, coupled with the evidence and arguments submitted by the applicants. It can be divided in two sections: flaws identified in the application of the AEC test and flaws in the application of the other evaluative criteria set out by the ECJ in *Intel*.

5.1 Errors in the application of the AEC test

In this portion the GC assessed the evidence with respect to every client that had obtained loyalty rebates. None of the AEC tests carried out by the Commission withstood judicial scrutiny and the review of each of the assessments by the GC is helpful in revealing the nature of the effort required to carry out this test. After presenting the discussion of each rebate agreement, we comment generally on the lessons to take away for future applications of the AEC test.

With respect to Dell, the GC found two errors. First, the GC was not convinced that the contestable share used by the Commission (7.1%) was accurate. This number was derived from a spreadsheet from 2004 that Dell supplied to the Commission.[67] In contrast, the applicants submitted internal documents from Dell suggesting that the contestable share might be much higher. A set of documents suggested that 'the switch of Dell's requirements to AMD could have involved up to 25% of the volume of x86 CPUs.'[68] This is intriguing because it appears that different persons within Dell had different views about the contestable share. It brings to mind a statement by Frank Easterbrook in one of the key articles which pushed a non-interventionist approach to antitrust law in the US: in his view complaining firms who bring antitrust cases 'hire lawyers who know less about the businesses than the people they represent [and]… the judge knows even less about the business than the lawyers.'[69] The findings here show that even the businesses don't seem to know all the facts about the market. This is worrying for the application of the AEC test because

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[66] *Intel renvoi* (above n 1), para 145.

[67] One further issue discussed here was whether as a matter of legal certainty the Commission could rely on a measure of the contestable share that comes from a document of a client, since this is a figure that Intel would not necessarily have. This is an important point because as we explained above one of the justifications of the AEC test is that it is based on evidence known to the dominant undertaking. However the GC found that the principle of legal certainty was not infringed when, exceptionally, it is not possible to rely on data known by the applicant (*Intel renvoi* (above n 1), para 193).

[68] *Intel renvoi* (above n 1), para 233.

[69] Easterbrook, 'The Limits of Antitrust' (1984) Texas Law Review 1, 5.

it relies on the Commission being able to find out the contestable share. If the parties do not know this, then the test cannot be applied.[70]

The second mistake noted by the GC was that, even if the contestable share was 7.1% this did not apply for the entire duration of the alleged abuse. In particular, 'the AEC test concerning Intel's rebates to Dell led to a positive result during the first four quarters covered by the contested decision.'[71] Therefore the Commission was unable show that 'the rebates which Intel granted to Dell were capable of restricting competition throughout the whole of the relevant period.'[72] A similar point arose with respect to the loyalty rebates offered to HP. The GC found that while the Commission considered that these failed the AEC test between November 2002 and May 2005, the GC found that the calculations did not take into account the months of November and December 2002 and the first three quarters of the 2003 tax year.[73] As a result, the foreclosure effects for this period were not shown by the AEC test.[74] This finding raises a more general point about whether, if the Commission opts to apply the AEC test, it must show that this test is failed for all the duration of the abuse. Arguably even if the dominant undertaking fails the AEC test episodically this could, taking the whole course of conduct into account, indicate the capacity to exclude because a new entrant can ill afford any losses even if these do not occur during every year that the rebates are offered. This point however, was not discussed by the GC and will require further discussion in subsequent cases.

With respect to the loyalty rebates available for NEC, the applicants first contested the size of the rebates which the Commission had calculated. Intel offered two financial rewards to NEC (i.e. exception to customer authorized pricing' ('ECAP') and market development funds ('MDF')) and while the Commission had considered both to be conditional on staying loyal to Intel, the GC found that only the MDF was based on loyalty so that the Commission miscalculated the value of the rebates.[75] Second, the Commission carried out the AEC test based on the commercial conditions in the fourth quarter of 2002 and assumed that these calculations could be extrapolated for all the relevant time periods considered (October 2002 and November 2005). However the GC found that the rebates 'were subject to significant variations after the fourth quarter of 2002 and that the rebate system changed as from the third quarter of 2003.'[76] Therefore, the Commission's analysis of the AEC test was based on inaccurate data.[77]

Lenovo received a loyalty rebate but also secured two non-cash advantages (an extended warranty and access to Intel's hub facilities in China). The Commission had tried to identify an economic value for these advantages so as to include them in the application of the AEC test, and the applicant challenged the method used by the Commission. According to the applicant the Commission should consider what the cost of these two non-cash advantages are for Intel, while the Commission took into consideration the value that these advantages had for Lenovo. In particular, the Commission argued that since an as-efficient competitor did not have a supply hub in China, it would have to 'provide cash compensation for the loss of the advantages granted by Intel to Lenovo.'[78] The GC sided with the applicants because their approach is in line with the nature of the AEC test, which 'amounts, in essence, to examining whether

[70] See also Federico, above n 37, p.5.
[71] *Intel renvoi* (above n 1), para 261.
[72] *Intel renvoi* (above n 1), para 271.
[73] *Intel renvoi* (above n 1), para 307.
[74] *Intel renvoi* (above n 1), para 319.
[75] *Intel renvoi* (above n 1), para 389.
[76] *Intel renvoi* (above n 1), para 410.
[77] *Intel renvoi* (above n 1), para 411.
[78] *Intel renvoi* (above n 1), para 426.

Intel itself could have entered the market despite the system of rebates at issue.'[79] As a result, the Commission's approach is contrary to the way the AEC test was set up by the Commission in the decision:

> The Commission in fact conducted its reasoning by reference to a less efficient competitor, which is not, however, the relevant economic operator for assessing whether the rebate at issue is capable of having a foreclosure effect.[80]

This conclusion is somewhat too far reaching. The GC is right in noting that if the Commission applies the AEC test to determine if there has been foreclosure then it cannot reason by reference to a less efficient competitor. However, if the Commission elects not to apply the AEC test, there are good reasons for comparing the dominant firm with a less efficient competitor. For example, in the market for postal services the incumbent has historical advantages that make it necessarily more efficient than a new entrant who elects to compete on a relatively small segment of the postal services market. In this context, the AEC test would prove unhelpful.[81]

Turning, finally, to the rebates offered to a retailer (MSH) the Commission indicated that a rival would face the challenge of two rebates: first the rebate offered to OEMs which excluded rival chipmakers, second the additional rebate offered to MSH to stay loyal to Intel. In other words, the supply chain meant that the rebates had a cumulative effect, and that a rival would have to offer rebates at both levels to compete with Intel.[82] In itself this is a reasonable position to take, and the GC did not disagree. It is worth noting that if one assessed only the rebates offered to MSH, these did not fail the AEC test (i.e. they were above AAC), so only the cumulative effect would likely find that the rebates were too deep for a rival to enter.[83] However, the GC found that the Commission's analysis was vitiated by two errors. First, it took the rebates offered by Intel to NEC as 'an appropriate proxy for conditional rebates on all Intel-based computers sourced by MSH from any OEM.'[84] However, there was no evidence that all the computers purchased by MSH from other makers had a comparable rebate. However, for the Commission's analysis to work it would have to be shown that Intel was offering rebates to a large portion of OEMs selling through MSH. Absent this showing the calculation of the AEC test could not be made. Second, the Commission used the size of the rebate offered to NEC for one quarter only without showing that the rebates did not vary.[85] In identifying these two flaws the GC sent a clear message:

> when the Commission chooses a quantitative approach to demonstrate that capability [to foreclose], it must ensure that the data used are reliable and must at least explain how such data may be extrapolated.[86]

This passage is a key starting point for a holistic discussion of this vital segment of the judgment. It is clear from looking at the facts as a whole that the rebates offered were not easy to identify, that these varied as contractual negotiations ebbed and flowed, and were offered under some uncertainty about key variables like the contestable share. Therefore, securing evidence about the size of the rebate for each period and for each client as well as identifying the contestable share seem evidence which, on the facts,

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[79] *Intel renvoi* (above n 1), para 436.
[80] *Intel renvoi* (above n 1), para 439.
[81] *Royal Mail PLC v Office of Communications & Anor* [2021] EWCA Civ 669 (07 May 2021), per Males LJ. And note that the Commission also considers that there may be instances where it is worth protecting a competitor who is not yet as efficient (Guidance Paper (above n 16), para 24).
[82] *Intel renvoi* (above n 1), para 462.
[83] *Intel renvoi* (above n 1), para 468.
[84] *Intel renvoi* (above n 1), para 472.
[85] *Intel renvoi* (above n1), para 478.
[86] *Intel renvoi* (above n 1), para 477.

were difficult to obtain. It also shows that even if this evidence is available, the amount of data and the number of calculations that have to be performed by the Commission is huge. It is unlikely that *Intel* presents a unique set of facts: most dominant firms will offer rebates to multiple clients across a fairly long span of time and adjust these according to a multitude of factors. This suggests that while the AEC test looks promising in theory, it seems very hard to apply in practice.

5.2 Errors in the application of the new approach to rebates

As we have suggested above, applying the AEC test would be one way of establishing that rebates are capable of foreclosing rivals as efficient as the dominant undertaking. However the ECJ in *Intel* did not insist that the AEC test must be carried out. Rather, the Commission may establish the anticompetitive potential of the rebates by reference to a set of factors, which, to recall, are: the extent of Intel's dominant position on the relevant market, the conditions and arrangements for granting Intel's rebates, the share of the market covered, the duration and amount of the rebates and the existence of a strategy designed to exclude from the market competitors that are at least as efficient as the dominant undertaking. The applicants claimed that some of these factors had not been considered by the Commission and the GC agreed.

The GC held that the Commission 'failed to determine the share of the market covered by the practice at issue' even if this criterion was spelled out in the Guidance Paper.[87] In its defence the Commission claimed that it placed emphasis on the 'strategic importance of the OEMs which received rebates from Intel.'[88] But the GC dismissed this. It held that, even assuming that 'the Commission could legitimately confine itself to relying on the market shares of certain OEMs rather than examining the share of the market covered by the contested practice, as mentioned [the Intel judgment]' the Commission appeared to only have made reference to some OEMs which had received rebates and then only for some of the time periods during which the assessment of the abuse was carried out.[89]

The applicants also claimed that the duration and amount of the rebates had not been considered. The GC focused its review on the duration of the rebates and found that the decision fell short of what was required to examine this. It considered that the analysis was 'haphazard and limited' and that more was required to show that the duration of the rebates were capable of foreclosing rivals.[90] This aspect of the judgment suggests that the task of the Commission is to establish how long the rebates last for (and when they are up for renewal) and then discuss how far this duration contributes to the foreclosure effect that is estimated.

It is worth comparing these findings with the discussion of similar factors by the GC in its 2014 *Intel* judgment. This allows us to see the vast chasm between the old and new approach to loyalty rebates. With respect to the amount of the rebates, the GC in 2014 held that the level of discount was irrelevant, what had to be shown is that the rebate was 'capable of inducing the OEMs to purchase exclusively.'[91] With respect to the duration of the rebates, this was irrelevant because 'any financial incentive to purchase exclusively constitutes additional interference with the structure of competition on a market and must therefore be regarded as abusive to the extent that it is implemented by an undertaking in a dominant position.'[92] Concerning the claim that the share of the market covered by the rebates was

[87] *Intel renvoi* (above n 1), para 499.
[88] *Intel renvoi* (above n 1), para 489.
[89] *Intel renvoi* (above n 1), para 495.
[90] *Intel renvoi* (above n 1) para 514.
[91] *Intel 2014* (above n 3), para 109.
[92] *Intel 2014* (above n 3), para 111.

relatively small, this was also legally irrelevant: 'the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. A dominant undertaking may not therefore justify the grant of exclusivity rebates to certain customers by the fact that competitors remain free to supply other customers.'[93]

More specifically, compare the discussion about the rebates offered to Dell which we discussed in section 5.1 above with the approach in 2014 where the GC, for the sake of completeness, carried out a review of the effects-based analysis that the Commission had set out. At that time the GC placed emphasis on the following: (i) that the rebates to Dell were part of a strategy 'aimed at foreclosing AMD's access to the most important sales channels';[94] (ii) Rebates were granted to important beneficiaries: Dell had been the vendor with the highest computer sales. 'Accordingly, the applicant's conduct vis-à-vis Dell was capable of making it more difficult for AMD to gain access to a particularly important customer. It was thus capable of producing a particularly harmful effect on the structure of the competition.'[95] (iii) The rebates were of great importance to Dell and that they 'had a significant impact on Dell's choice of supplier.'[96] Bringing these findings together, the GC concluded that the evidence marshalled by the Commission supported the finding of an abuse because the rebates were 'capable of restricting Dell's freedom of choice of supplier and foreclosing AMD from the market.'[97]

This is a very different appraisal from the manner in which these factors were assessed by the same Court in 2022. However, it is not a Damascene conversion by the GC. It is an acceptance of the ECJ's conceptual reorientation of Article 102 from a prohibition that disciplined dominant undertakings so as to facilitate market access for rivals and safeguarded customers from terms that limit their commercial freedom to a prohibition that is triggered if and only if there is sufficient quantitative evidence to demonstrate the likelihood that conduct will harm consumer welfare.

6. The Impact of the Intel saga

This review of the *Intel* decision and its judicial fortunes indicates that the Commission should not have introduced elements of the new approach in a decision whose investigation had begun at a time when this approach was not yet Commission policy. It should have waited for another case after the issuing of the Guidance Paper and then sent a clear message about the new legal standard. Furthermore, by stating that the old and new approaches were compatible, the Commission misrepresented the radical difference between the approach that the ECJ had set out in the 1970s and 80s and that which the Commission was pioneering in the Guidance Paper. The ECJ would have done better to overrule its earlier line of case-law rather than claim that the law only needed a clarification and it seems unfair for it to characterise the Commission's decision as one which hinged on the application of the new test. However, an overruling might well have meant that the Intel decision stood since it was based on the law as known at the time.

As indicated, the Commission's finding that Intel imposed certain naked restraints on some OEMs withstood judicial scrutiny. The GC annulled the fine in total because it was unable to untangle the amount of the fine imposed for the rebates from that imposed for the naked restraints.[98] However, issuing a fresh

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[93] *Intel 2014* (above n 3), para para 117. The GC also noted that there is no de minimis threshold in the application of Article 102, see para 116. Following the ECJ's approach there is probably a de minimis threshold because a rebate offered to a minor client would not foreclose market access even if it fails the AEC test.
[94] *Intel 2014* (above n 3) para 587.
[95] *Intel 2014* (above n 3) para 589.
[96] *Intel 2014*(above n 3) para 591.
[97] *Intel 2014* (above n 3) para 600.
[98] *Intel renvoi* (above n 1) para 529.

decision just to collect a fine for the naked restraints seems unwarranted: they formed a less significant part of the infringement and resources are better devoted elsewhere. Some of the statements of law by the GC could be clarified further, for example is it really necessary to apply all five *Intel* factors to test the legality of loyalty rebates? The GC seems overly formal here: the Commission should be able to run a case by showing sufficient evidence of likely anticompetitive foreclosure, not by following a checklist. The relationship between the AEC test and the other factors to be considered could also be clarified but these issues can be resolved as the new approach is applied in future cases.

From a substantive perspective, the transformation of the law applicable to loyalty rebates reveals, first of all, a change in the purpose of Article 102 TFEU. In *Hoffman La Roche* the ECJ had been clear that loyalty rebates were incompatible with the objective of undistorted competition because 'they are not based on any economic merit' and they strengthen the dominant firm's position 'by means of competition which is not based on economic performance and is therefore distorted.'[99] As noted above, this approach condemns rebates for their adverse effects on customers and rivals as well as to the competitive process.[100] *Intel* rejects this approach by placing emphasis on identifying as abuse only those business practices that foreclose rivals when this will likely harm consumers. The beneficiary of the competition rules has changed as is the analytical method. This requires two levels of discussion: can we justify this change? How can this new approach be implemented?

In terms of justification, it is not clear what legal rationale allowed the ECJ to make such a radical change. For the Commission, the switch is understandable because it allows it to use an approach that most economists think makes more sense than that in the case-law. However, law is not to be assessed by what pleases the prophets of the dismal science today. Moreover it is not as if the approach in *Hoffman La Roche* is economically illiterate: it supports a vision of a market which facilitates the entry of new firms by limiting the commercial freedom of the dominant ones. No Treaty change appears to have occurred to require a change in economic perspective from one that protects markets to one that protects consumers. Supporters of the change will claim that the case-law has evolved incrementally towards a more economics-based approach, the ECJ operating like common law judges. However, in the specific configuration we are discussing here, the change is a radical break from the past, masked as a clarification. Furthermore, the judgment runs counter to the Court's position that it is not for the dominant firm to determine how much of the market rivals can contest.[101] Whether we approve of the new approach or not, its justification has to be based on criteria stronger than its supposed economic superiority.

In terms of the implementation of the new approach, it is important to note that once we change the purpose of Article 102, we necessarily need new methods to decide whether there has been an abuse. This is perhaps unusual in the legal order. For example, in criminal law the purpose of the rules in general (deterrence or retribution) does not determine the adjudication of a single crime. We distinguish the role of the legislator (who looks forward and asks what sort of criminal law system do we need?) and the judge (who looks backwards to decide if the defendant has committed a crime).[102] However, in competition law,

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[99] *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, EU:C:1979:36, paragraph 90. Note that the passages in quotation marks are my translation drawing on the German and French texts. The English language translation of this paragraph is imprecise.

[100] This approach may be associated with the ordoliberal tradition. For a helpful account, see Behrens 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in Di Porto and Podszun (eds) *Abusive Practices in Competition Law* (2018).

[101] This has been restated recently: 'it is not the place of a dominant undertaking to dictate how many viable competitors are to be allowed to compete with it' *Generics and Others v CMA*, Case C-307/18, EU:C:2020:52, para 161.

[102] Rawls, 'Two Concepts of Rules' (1955) 64(1) The Philosophical Review 3.

once we decide that the focus is not the distortion of the competitive process but the risk of foreclosure of an as-efficient competitor, then the criteria for testing legality have to change, as we have shown above. This may be explained by the fact that in competition law intervention is forward-looking: we ask if conduct is capable of causing harm. Thus the objectives of the law and the legal tests chime. On the old approach all loyalty rebates distort the competitive process, while under the new approach there are two major changes.

First, the ECJ indicated that there is a rebuttable presumption that loyalty rebates are anticompetitive. This gives room to the dominant undertaking to show that its conduct does not have the capacity to harm competition. How easily the presumption can be rebutted depends on how one interprets the notion of 'supporting evidence' introduced by the ECJ in *Intel*. However, it will be prudent for the Commission to assume that the presumption will be rebutted and run an effects-based approach always, which will then render the existence of a presumption meaningless.[103] Thus the procedural solution in Intel is meaningless in practice.

Second, once the presumption is rebutted or an effects-based approach is used by the Commission to being with, conduct can only be condemned if it is shown that the rebates foreclose market access to an as-efficient competitor. The new approach gives dominant undertakings considerably greater freedom to offer discounts and raises the evidentiary burden of the Commission, much as the Commission desired when issuing the Guidance Paper. While we have suggested that the practical application of the AEC test may prove unwieldy in many instances, further clarification will anyway be required from the EU courts on how to operationalise the new approach to rebates. The stance taken by the GC in *Intel* appears somewhat rigid in requiring a fulfilment of all factors enumerated by the ECJ for the duration of the abuse. The Commission should be allowed to tell a story of anticompetitive harm without being bound by a precise checklist, which can then be verified on appeal by asking whether the account by the Commission is a reasonable interpretation of the conduct of the dominant undertaking. As we have suggested, economists have shown that the storytelling exercise has to be much more granular than that which is provided in the Guidance Paper and in the *Intel* decision. From this economic perspective, the judgments in *Intel* by the ECJ and the GC in 2022 fail to understand the economics of rebates fully.

In sum, not only does the ECJ fail to give a good enough reason for changing the law; the approach it provides is not even good enough to deliver an appropriate economics-based framework that the Court seemed to want to provide. Furthermore, the GC's overly formal review of the evidence suggests both courts still struggle to understand how to integrate modern industrial economics and law.

[103] This is similar to the Commission's approach to dominance: while a firm is dominant when it holds a market share of 50% or above, the Commission regularly looks to other market features to verify market power. Along similar lines, see the arguments by Petit (above n 14) pp.738-9.