



UPPSALA
UNIVERSITET

Department of Law
Spring Term 2017

Master's Thesis in EU Competition Law
30 ECTS

Assessing Rebates under Article 102 TFEU

- A Path Towards Legal Certainty

Author: Eddie Johansson

Supervisor: Senior Lecturer Vladimir Bastidas



Table of Contents

Abbreviations.....	5
1 Introduction	6
1.1 Background.....	6
1.2 The Aim	8
1.3 Method and Material.....	8
1.4 Delimitation	10
1.5 Disposition	11
2 EU Competition Law, Intel and Rebates	11
2.1 Goals of Competition Law	11
2.2 Infringements of Article 102 TFEU.....	13
2.2.1 The relevant market	14
2.2.2 A dominant position	14
2.3 Categorisation of Rebates	15
2.3.1 Quantity Rebates.....	15
2.3.2 Exclusivity Rebates	16
2.3.3. The Third Category.....	18
3 An Economic Background to Rebates in Competition Law	18
3.1 The As Efficient Competitor Test and Rebates	21
4 A selection of case law	22
4.1 Hoffman La Roche.....	22
4.2 Michelin II.....	24
4.3 Tomra	25
4.4 The Intel Case	26

5 Discerning the Classification of Rebates	27
5.1 AG Wahl on Hoffman La Roche and the Classification of Rebates.....	27
5.2 ‘An assumption of unlawfulness cannot be rebutted’	28
5.3 ‘Loyalty rebates are not always harmful’	29
5.4 ‘The effects of loyalty rebates are context-dependent’	30
5.5 ‘Related practises require considerations of all the circumstances’	31
5.6 Further analysis in light of Post Danmark II.....	32
6. The effects of not regarding all the circumstances	34
6.1 In defence of a ‘by object’ approach.....	34
6.1.1 Competition only has value with unpredictable results?	35
6.1.2 An economic analysis has already been carried out	37
6.2 Rejecting a ‘by form’ approach	38
6.2.1 Issues stemming from a modified per se abuse regarding exclusivity rebates	38
6.2.2 Are exclusivity rebates harmful to competition?.....	42
6.2.3 Over-enforcement of Competition Law and the Reality of Dominance	43
7 Making way for a Consistent Assessment of Rebate Schemes under Competition Law	46
8 Conclusions	47
9 Bibliography	49
Case law	49
Court of Justice of the European Union	49
General Court.....	50
Opinions of Advocate General	50
Commission	51

Legislation.....	51
Doctrine.....	52
Other sources of law.....	54
Other materials	54

Abbreviations and explanations

AG	Advocate General
CJEU	Court of Justice of the European Union
CPU	Central Processing Unit
ECJ	European Court of Justice
EU	European Union
GC	General Court
NCA	National Competition Authority
p(p).	page(s)
para(s)	paragraph(s)
OJ	Official Journal of the European Union
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
Undertaking	An entity engaged in economic activity
v	versus

1 Introduction

1.1 Background

The concept of rebates is familiar to most, consumers and companies alike. While differing in their form, the basic idea of rebates on purchases is lower pricing due to a reduction of the original price of a product for sale. A rebate can be given when a certain quantity of purchases or value of goods is reached. By issuing rebates, undertakings may be able to boost sales due to the perceived value of the rebate by their customers. In EU competition law, rebate schemes constitute a conduct which is up for legal review. The assessment of rebates and their compliance with law and its instruments is limited to undertakings which hold a dominant position on a relevant market. While companies who do not hold a dominant position may employ rebates freely, the dominant undertakings may infringe EU competition law through abusive rebate schemes.¹

The European Commission ('Commission'), oversees and enforces EU legislation. The Commission calls competition policy a cornerstone of the EU which is of rising importance due to the ongoing strive for a continued economic recovery and growth.² Competition policies and law is a difficult subject which requires an understanding of law and economic theory. While it may be innate to argue that dominant undertakings should have certain responsibilities in order to protect competition, the factual disturbances or benefits of measures carried out by dominant firms are often up for discussion. Such is the case regarding rebate schemes which so far are presumed to be lawful only if they are based on volume in transactions.³

¹ See case 85/79, *Hoffmann-La Roche*, EU:C:1979:36, para 89.

² Report on Competition Policy 2015, SWD(2016) 198 final, p 2.

³ So far, the ECJ has only found that volume-based rebates are presumed lawful, see for example case 85/79, *Hoffmann-La Roche*, EU:C:1979:36, para 90.

Together with the Commission, national competition authorities ('NCAs') are responsible for ensuring that competition is upheld. If infringements of EU- and national law are suspected and/or found, due measures shall be taken.⁴ As the EU legal system is founded on the rule of law⁵, it is up to the European Court of Justice ('ECJ' or 'the Court') to interpret the substance of EU law. Competition law mainly revolves around articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'). As this thesis regards rebates, Article 102 TFEU is of central interest as the relevant undertakings hold a dominant position. These undertakings have a special responsibility to not distort competition in the internal market of the EU.⁶

In recent years, the competition aspect of rebates schemes employed by dominant undertakings has developed further. One of the most covered cases in recent years regards Intel. The manufacturer of central processing units ('CPUs') was fined by the Commission⁷ to the amount of 1 060 000 000 euros, in large part due to employing a loyalty inducing rebate scheme. Recent case law such as Intel has sparked a discussion within the competition field as to whether loyalty inducing rebates, particularly 'exclusivity rebates', can and should be presumed to be harmful to competition.

This thesis examines rebate schemes in EU competition law and questions the current approach in case law stemming from the Intel judgment. First came the Commission decision, second was the judgment by the General Court ('GC'). By the time of writing, the judgment from the GC is under appeal in the ECJ and only an opinion from the Advocate General ('AG') Wahl has been released. The precise

⁴ See articles 104-105 TFEU and Article 35(1) of regulation 1/2003.

⁵ Article 2 on the Treaty of the European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, p. 1-390, 2012.

⁶ See for example case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission*, EU:C:1983:313, para 57, case C-202/07 P, *France Télécom v Commission*, EU:C:2009:214, para 105, case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603, para 176 and case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, para 24.

⁷ Case COMP/C-3/37.990, Intel, decision of 13 May 2009.

extent and material of competition law can be deliberated upon, but consensus pronounces that the benefit of competition law is the protection of competitive processes and consumer welfare.⁸ These goals of competition law constitute the yardstick to which the assessment of rebates will be measured against.

1.2 The Aim

The aim of the thesis is to investigate the current method of assessing rebate schemes under Article 102 TFEU in order to evaluate its effectiveness in relation to the purposes of EU competition law as well as if the method achieves legal certainty. Further, comments are given on a prospective assessments of rebates in the future. Notably, certain rebate categories are arguably unlawful by their form which is described as an ‘by form’ or ‘by object’ approach., Such approach is based upon form of conduct rather than investigating the effects on competition due to the conduct. The following questions are aimed at achieving the overarching goal of the thesis.

- Does economic theory deem rebate schemes to be negative for competition?
- How are rebates viewed and assessed under Article 102 TFEU?
- What are the effects of considering ‘exclusivity rebates’ as a modified *per se* abuse of antitrust law?
- Does the current treatment of rebates create legal certainty and is it purposive with the aims of competition law?

1.3 Method and Material

In order to fulfil the aims of the thesis, a traditional legal dogmatic theory is applied, meaning that both primary and secondary sources will be used. *A de lege*

⁸ See for example K.J, Cseres, & J, Mendes, Consumers’ Access to EU Competition Law Procedures: Outer and Inner Limits, *Common Market Law Review*, Vol. 51, No. 2, 2014, p. 483 f.

lata perspective is the basis, invoking certain de lege ferenda questions which are detailed and analysed. The foundation and development of Article 102 TFEU and assessing rebate schemes is intertwined with case law, especially the case law stemming from the ECJ. In the EU, its courts play a major part in the development of law as it interprets its substance.⁹ As such, case law provides the legal backdrop upon which further analysis and discussions are founded upon. Some judgments such as Intel are from the GC which also is known as the Court of First Instance.¹⁰ While both the ECJ and GC interpret EU law, the ECJ's judgments are deemed to be of higher legal value. That is due to the ECJ reviewing the GC's judgment as a higher instance and their special role established in the treaties.¹¹ The consistency of the judgments in the thesis' subject can and will be questioned.

Decisions from the Commission as well as the guidance on enforcement priorities¹² regarding Article [102 TFEU] is referred to throughout the thesis in relation to the interpretation of the Article. As such, the legal value of the guidance is of interest. For the CJEU, guidance from the Commission has no binding effect.¹³ As demonstrated by its title, it gives guidance of the Commission's enforcement priorities. Its legal status is dependent on who is applying it but it should be noted that it is a soft law instrument. As for the Commission, it creates rules of practise which cannot be departed from unless reasons are given which are compatible with the equal treatment principle.¹⁴ The guidance is also meant to be an aid for undertakings as the application of rules becomes clearer. The content of the guidance arguably meant a policy change in enforcement of competition law

⁹ See for example articles 260, 267 and 269 TFEU, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, p. 1-390, 2012.

¹⁰ http://eur-lex.europa.eu/summary/glossary/general_court.html last viewed 2016-12-18.

¹¹ See the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, p. 1-390, 2012, protocol no 3 on the Statute of the Court of Justice of the European Union.

¹² Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009.

¹³ See Article 288 TFEU and AG Kokott's opinion in case C-226/11, Expedia, EU:C:2012:544, para 30.

¹⁴ Compare case C-189/02, Dansk Rørindustri and Others v Commission, EU:C:2005:408, para 209.

towards a more ‘effects-based approach’ (analysing the effects of the conduct) when assessing conduct.¹⁵ However, it is not a complete departure from ‘form-based assessments’ (by object or form) when conduct only raises obstacle to competition without efficiencies.¹⁶ Therefore, the guidance may still be rekindled with previous case law but the clarity for undertakings is lacking due to the different approaches. The use of the guidance in this thesis is to aid in the understanding of Article 102 TFEU as well as conversing the issues which exist regarding legal certainty and loyalty rebates issued by undertakings in a dominant position.

Doctrine is used mainly in capacity to demonstrate the different interpretations and agreement or disagreement with the case law under Article 102 TFEU from legal scholars. Lastly, competition law is an area which undeniably reflects political views. However, the thesis aims to refrain from strictly political discussion and rather focus on legal principles such as legal certainty and coherency in line with economic theory.

1.4 Delimitation

Competition law is a complicated area of law. In the decentralisation of the enforcement of competition law to NCA’s and national courts, worries were that they were not acquainted with the concepts of competition law. Market definition, market foreclosure, market power, efficiency gains and the meaning of a dominant position are some of the many concepts in competition law which all can be discussed in depth.¹⁷ As such, it is necessary to limit the thesis to only include elements which are required for its aim. Short introductions to key concepts will

¹⁵ Regarding rebates, see the Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, paras 37-45.

¹⁶ Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009. para 22.

¹⁷ Compare D. Gerard, K. Kenaerts, Decentralisation of EC Competition Law Enforcement: Judges in the Frontline, *World Competition* Issue 3, 2004, pp. 328-329.

be given. Article 102 TFEU is of main interest due to the different treatment of rebates in contrast to Article 101 TFEU. However, certain comparisons will be made to the latter article when appropriate. As such, the thesis limits itself to conduct which relates to the assessment of rebates issued by dominant undertakings but draws inspiration from other conduct in EU competition law when opportune.

1.5 Disposition

To guide the reader into the subject, the study begins with an introduction to the aims of EU competition law and basic concepts such as abuse of a dominant position under Article 102 TFEU and the different categories of rebates currently distinguished in EU competition law. A background is given regarding the effects of rebate schemes in economic theory. Thereafter, relevant case law regarding the assessment of rebates is detailed. Particular attention is given to the Intel case as it is of central interest in demonstrating the current discussion of rebates. The recent opinion from AG Wahl, which aids the ECJ in its forthcoming Intel judgment, is analysed as it conflicts with the views of the GC. Continuing, the effects of the GC's approach to classification of rebate schemes are investigated in order to discern potential benefits and disadvantages. Especially, the legal certainty of the classifications is of interest. As the case law regarding abuse of dominance in judgments such as Intel is extremely long, the focus will remain on the legal points in relation to the aim of the thesis. The study is concluded by proposing a way forward of rebates under EU competition law.

2 EU Competition Law, Intel and Rebates

2.1 Goals of Competition Law

Competition law is meant to aid the functioning of markets for the benefit of both businesses and consumers.¹⁸ In essence, there are two schools of thoughts regarding the objective of EU competition law. One believes that competition law should focus on protecting the process of competition. As such, the effect is not the focus but rather the structure of keeping competition intact as it is that the benefits of competition may not always be demonstrated in effects. The other school confirms to the idea of competition benefitting the consumer. Structure of competition should be protected if it results in consumer welfare and as such, it is a more effects oriented approach. These different schools of thought will be used as tools to understanding how rebates should be assessed and how the goals of competition can be achieved.¹⁹ In case law, it is not easily distinguishable as to which ideology should rule and they do not seem to be excluding each other.

In recent years, a more economic approach which is effects-based rather than form-based has gained popularity but differing opinions remain.²⁰ While criticized at times, the guidance on [Article 102 TFEU] support more investigations of the effects which leads to a more predictable approach.²¹ Recent case law on abuse of a dominant position also support an effects-based investigation but does not necessarily mean that the same approach is applicable in regard to rebates. The ‘by form/object’ and ‘by effects’ approach to conduct is a continuous theme in the study.

¹⁸ Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20, para 1.

¹⁹ Compare Peeperkorn, L, Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates, February 2014, Concurrences Review N° 1-2015, Art. N° 70835, pp. 47-49 and Wouter, P.J. W, *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*, World Competition, vol. 37, issue 4, December 2014, accessible at <http://ssrn.com/author=456087> last viewed 2016-11-24, pp. 15-17.

²⁰ See for example Report by the EAGCP, ‘An economic approach to Article 82’, 2005, pp. 2-4.

²¹ See Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para 25 and L. Lovdahl Gormsen, ‘Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?’, World Competition 36, no. 2, 2013, p. 243.

2.2 Infringements of Article 102 TFEU

This section provides a background to Article 102 TFEU as it is the legal foundation upon which business conduct may be found to infringe competition law. Therefore, an introduction is given to the key elements when assessing rebate schemes by undertakings in a dominant position. The Article states that

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

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers [...]

As such, four requirements are identified and must be met to find an unlawful breach in accordance with the Article. It must regard an *undertaking* which is in a *dominant position* that is held on *within the common market or a substantial part of it*. Furthermore, the abuse shall have an *effect on Inter-state trade*. Article 102 TFEU contains rules which are only applicable to undertakings in dominant positions as these must take special considerations. An undertaking which has a dominant position is considered to weaken competition on the relevant market due to its presence.²² For the Commission, rebate schemes are one of the prioritized conducts which is examined in their operations.²³ In summary, assessing dominance is carried out by defining the relevant market and relating it to the undertaking's market share and position on the named market.

²² Especially regarding rebates, see for example case C-322/81, *Michelin v Commission*, EU:C:1983:313, para 70.

²³ Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20, paras 32 and 37.

2.2.1 *The relevant market*

The relevant market as well as the concept of a dominant position are likely the two of the more discussed terms under Article 102 TFEU. Upon assessing whether an undertaking has a dominant position, it must be carried out by determining the relevant market as the dominant position only exists there. In essence, the relevant market is defined through the product market and geographic market. The product market is determined through complex economic assessments. Generally, products and services which are sufficiently interchangeable or substitutable due to their characteristics, prices and intended use, are deemed to be on the same relevant product market.²⁴ The relevant geographic market it is defined as ‘... *the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*’.²⁵

2.2.2 *A dominant position*

A dominant position is one of economic strength, enabling the undertaking to prevent the maintenance of effective competition and it is able to operate independently to an appreciable extent on a relevant market.²⁶ A position of dominance is presumed when an undertaking holds a 50 percent share of the relevant market.²⁷ In contrast, the Commission has found that a market share below 40 percent makes finding a dominant position unlikely.²⁸ Furthermore,

²⁴ See for example case T-301/04, *Clearstream v Commission*, EU:T:2009:317, paras 47-49 and cited case law.

²⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13, para 8.

²⁶ See for example case C-27/76, *United Brands v Commission*, EU:C:1978:22, para 65.

²⁷ Case C-62/86, *AKZO v Commission*, EU:C:1991:286, para 60.

²⁸ Compare Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20, para 14.

undertakings which hold a very large market share for some time, makes them unavoidable trading partners. Such undertakings are insensitive to the acts of competitors, costumers and consumers.²⁹ Holding and achieving a dominant position is of course lawful, but it creates a special responsibility to not distort competition on the market.³⁰ The assessment of a dominant position derives from several factors which are not independently decisive necessarily.³¹ For example, market structures vary and entry barriers for competitors differs, why the relevant market must be investigated in the cases. To conclude this section, a position of dominance is one of independence on the relevant market where competitive constraints are not sufficiently efficient.³²

2.3 Categorisation of Rebates

In its Intel judgment, the GC suggested that there are three different categories of rebates granted by dominant undertakings which may be characterised as abusive. The classification is of importance as the legal tests carried out by the Courts differ depending on which category a rebate system belongs to. In extension, whether a rebate scheme is deemed anti-competitive or not may depend on the classification.³³

2.3.1 *Quantity Rebates*

As the category suggests, quantity rebates are rebates which are ‘... *linked solely to the volume of purchases made from an undertaking occupying a dominant position....*’. These forms of progressive rebates are presumed lawful as they

²⁹ Compare Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20, para 10.

³⁰ See case C-202/07 P, France Télécom v Commission, EU:C:2009:214, para 105 and the cited case law.

³¹ Case C-250/92, Gøttrup-Klim and Others Grovwareforeninger v Dansk Landbrugs Grovvareselskab, EU:C:1994:413, para 47 and cited case law.

³² Compare Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20, paras 10-12.

³³ Case T-286/09, Intel v Commission, EU:T:2014:547, para 74.

generally do not have foreclosure effects. As the supplier is able to gain economic advantages due to lower costs, this may further be passed on to consumers in form of lower pricing. The premise is that quantity rebates are reflected gains in both efficiency and economics of scale.³⁴

Rebates in this category will only be deemed incompatible with EU competition law and Article 102 TFEU if they prevent costumers the possibility of obtaining supplies from competitors and are not based on ‘economically justified countervailing advantages’. The assessment of abuse is conducted by considering all the circumstances.³⁵ In conclusion, quantity rebates are considered legal per se.

2.3.2 Exclusivity Rebates

The GC defined exclusivity rebates as rebates which are conditional upon customers purchasing all or most of its requirements from the dominant undertaking. The rebates are tied to the customer fulfilling such obligations and have been deemed to have foreclosure effects. Such rebates are not founded on economic transactions which justify the burden or benefit of the rebates and are therefore seen as incompatible in pursuing the goals of competition. The GC continued by stating that the financial advantages of exclusivity rebates come at the cost of preventing dominant undertakings’ customers from using their purchaser freedom and likely denies the entry of other products into the market.³⁶

Due to the incompatibility with the objective of undistorted competition, exclusivity rebates are presumed to be unlawful and may only be justified in ‘exceptional circumstances’. The language used by the GC suggests that

³⁴ See Case T-203/01, *Michelin v Commission*, EU:T: 2003:250, paras 58-60 and the cited case law. For a slightly different view on quantity rebates, see AG Kokott’s opinion in case C-23/14, *Post Danmark*, EU:C:2015:343, paras 28-29.

³⁵ See Case T-203/01, *Michelin v Commission*, EU:T: 2003:250, paras 58-60 and the cited case law. For a slightly different view on quantity rebates, see AG Kokott’s opinion in case C-23/14, *Post Danmark*, EU:C:2015:343, paras 28-29.

³⁶ See case T-286/09, *Intel v Commission*, EU:T:2014:547, paras 76-77.

exclusivity rebates by their very nature distorts competition. As such, NCA's and the Commission are not required to demonstrate foreclosure caused by these rebates. Therefore, it is not considered necessary to assess all the circumstances to conclude an abuse of dominance under article 102 TFEU. Even so, the GC states that it is possible for a *'dominant undertaking to justify the use of an exclusivity rebate system, in particular by showing that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers...'*³⁷

The coherency with the forwarded line of thinking is difficult to perceive as exclusivity rebates appear to be abusive by object and form. Exclusivity rebates are similar to the market share rebates which are discussed in section 3 and economic theory suggest that these rebates may have beneficial effects on competition. Nonetheless, there is a possibility for the dominant undertaking to justify their use of exclusivity rebates. Clearly, it is not necessary to demonstrate the foreclosure of competition on a case by case basis. Therefore, it appears as only the conditional aspect of rebates must be assessed in order to find an abuse of dominance – regardless of what the rebate actually constitutes. A potential possibility for the dominant undertaking to justify the rebate is uncertain due to the difficulties in demonstrating a factual necessity of a rebate and its overweighting efficiencies for consumers.³⁸ In court proceedings, the dominant firm targeted by the Commission could potentially be better off arguing that the rebate in question is not conditional as Intel tried to do in its case. The GC's argumentation has been heavily criticised, often claimed to disregard economic analysis.³⁹

³⁷ See case T-286/09, Intel v Commission, EU:T:2014:547, paras 76-77, 80-83, 143.

³⁸ Compare case T-286/09, Intel v Commission, EU:T:2014:547, para 143.

³⁹ See for example AG Wahl's opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, paras 80-105, and Peeperkorn, L, Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates, February 2014, Concurrences Review N° 1-2015, Art. N° 70835, pp. 43-63

2.3.3. *The Third Category*

Essentially, the third category refers to rebates which do not fit into the other two groups of classification consist of rebates by a rule of reason analysis.⁴⁰ Certain rebates granted by dominant firms are not solely based on a degree of exclusivity nor volume but the system still has a fidelity-binding effect. Such rebates are assessed by considering all the circumstances of the case.⁴¹ Emphasis is added on the terms of the rebate. Factors included assessing if it provides advantages which are not economically justified, if it restricts buyer's freedom, if it bars competitors from the market and distorts competition.⁴²

3 An Economic Background to Rebates in Competition Law

Interestingly, treatments of rebates in US and European competition law is of great divergence. In the US, loyalty rebates have generally been viewed as procompetitive conduct while the CJEU has on several occasions found these rebates to be distorting competition. The question is whether rebates constitute competition on the merits or if distortions are a natural consequence when undertakings in a dominant position apply loyalty rebates.⁴³ For this context, loyalty rebates are such rebates which may have a loyalty inducing effect and are not solely based upon quantity of sales. This background is of vital importance in the thesis as the discussions and conclusions will lean upon economic theory in order to determine the desired treatment of these rebates in EU competition law.

⁴⁰ See N. Petit, 'Intel, Leveraging Rebates and the Goals of Article 102 TFEU', 2015, accessible at SSRN: <https://ssrn.com/abstract=2567628>, last viewed 2016-12-08, p 5-6.

⁴¹ See case C-23/14, Post Danmark, EU:C:2015:651, para 29.

⁴² See case T-286/09, Intel v Commission, EU:T:2014:547, paras 78.

⁴³ H. Zenger, Loyalty Rebates and the Competitive Process, *Journal of Competition Law & Economics*, p 1.

Talking economics, rebates schemes are viewed as price discrimination as they allow the seller to differentiate its price of different units of a purchaser's demand. The rebate may be granted after a certain threshold of units has been reached. Possible interpretations of this are that the purchases below the thresholds are a surcharge, suggesting that rebates raise the price. Another competitive concern is an exclusionary effects of loyalty rebates as they may result in foreclosure of markets as purchaser's risk losing a rebate if they switch their purchases to a smaller undertaking on the market.⁴⁴

In a well-functioning competitive process, Zenger describes the market actors as free to make economic choices under the rules which are set by public bodies. The referees of these rules are the antitrust agencies which act when competition is harmed. However, the evolutionary behaviour and outcome of a market is not questioned in general. The benefit of the free market system has been described as the very nature of life and death for undertakings in a capitalist system as it creates a need for continuing innovation.⁴⁵ Pursuit of profits functions as an incentive for innovation with an outlook of earnings over costs which validates the entrepreneurial effort and risk. This pressure of market powers triggers economic progress and developments. Loyalty rebates are indeed used as way for undertakings to maximize profits. Arguably, competition law enforcement should only be actualized when the conduct is illegitimate and disturbs the competitive process. Such an approach is an encouragement of competition through superior products, services and lower prices while competition law hinders harm on the competitive process.

The following question is therefore the role of loyalty rebates in the competitive process. Rebates granted by monopolies will not be investigated due to their special position which is outside the aim of this thesis. In order to demonstrate the

⁴⁴ E. Elhauge, Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory, Harvard Law Review, volume 123, no. 2, pp 402-403 and 459-461..

⁴⁵ H. Zenger, Loyalty Rebates and the Competitive Process, Journal of Competition Law & Economics, pp. 11-12.

economic theory of rebates and their effects on competition, particularly market share discounts will be investigated as they relate to the Intel decision and judgment which later is discussed more thoroughly. Market share discounts refers to rebates that are dependent on a sales of other firms than the dominant undertaking itself. Logically, it has similarities with quantity rebates in the sense that quantities of sales determine the rebate. However, market share contracts allows for differentiation of prices depending on the preferences of customers. As such, these rebates may be more powerful than others regarding price discrimination. Zenger argues that targeted pricing is an expression of the competitive process due to an increased competition for output for firms and competition on the merits.⁴⁶ Market shares discounts are not insensitive to fluctuations in demand as it is not the quantity itself which determines the rebate granted. In this regard, only market share discounts allow for an efficient targeting of marginal sales and increase competition between producers. Possible benefits also include lower pricing as firms would find it profitable regarding contestable units rather than a large range of units. Market risk is also shifted to dominant undertakings and producers due to market share being the decider of rebates rather than a set volume of sales. Therefore, these producer can reduce commercial risks by applying market share contracts in their business dealings as the rebate does not vary on the size of the market.⁴⁷

The term ‘efficiencies’ is used throughout the thesis as a possible counter argument if a dominant undertaking appears to be infringing competition law. By explaining their reasons, it is possible to for the undertaking to justify their conduct. These explanations may be successful as efficiencies if they are objective justifications. A defence by the dominant undertaking is possible if four cumulative conditions are fulfilled. These are, that the conduct is indispensable in realising the efficiencies and does not eliminate efficient competition by excluding or

⁴⁶ H. Zenger, *Loyalty Rebates and the Competitive Process*, *Journal of Competition Law & Economics*, pp. 39-40.

⁴⁷ H. Zenger, *Loyalty Rebates and the Competitive Process*, *Journal of Competition Law & Economics*, pp. 39-41.

foreclosing actual and potential competition. Furthermore, efficiencies are at least likely to be realised a result from the conduct and these likely efficiencies outweigh any negative effects which may be caused in regard to consumer welfare and competition.⁴⁸ The following section exemplifies the difficulties in assessing such effects.

3.1 The As Efficient Competitor Test and Rebates

In order to exemplify the practical problems with assessing rebate conduct, rebate examination is particularly examined. Therefore, one of the more famous and frequent tests is analysed. As with most business conduct, there are possibilities to make use of an abusive strategy such as rebates. For example, it is possible to lower the effective price of products below costs and/or by foreclosing competition. The Commission deemed the latter to have ensued in Intel as an efficient competitor ('AEC') test was carried out which demonstrated such effects. An AEC test is a hypothetical exercise which is set on analysing whether competitors who are as efficient as the dominant undertaking but without a similar sale base, would be foreclosed on the market due to the conduct in question. The result can indicate that a smaller undertaking is more efficient due to lower costs of production and/or with a higher valued product for customers. Another possible result is that the competitor is not as efficient and the conduct in question constitutes competition on the merits. Dominant undertakings are often unavoidable trading partners from which follows that it may use rebates for the non-contestable share of demand as leverage for the contestable share. Extremely simplified, a company which produces banana boats and holds a dominant position in the market, may use rebates for their banana boats (non-contestable share) in order to lower the price and sell more of their banana boat oars (contestable share) which therefore has the possibility of foreclosing expansion and entries on the market of efficient competitors. The assessment of rebate systems is carried out by

⁴⁸ H.W. Friederiszick, L. Gratz, Dominant and Efficient – On the Relevance of Efficiencies in Abuse of Dominance Cases, as seen in the OECD Policy Roundtables on The Role of Efficiency Claims in Antitrust Proceedings, DAF/COMP(2012)23, pp. 218-219.

determining the ‘... *effective price for the buyer over a relevant range of its purchases, if this amount were to allow the buyer to benefit from the rebate. The lower the calculated effective price is compared to the average price of the dominant supplier, the stronger the foreclosure effect. As a general rule, it can be concluded that a rebate scheme is capable of foreclosing equally efficient competitors if the effective price is below a measure of viable cost.*’ As such, the AEC-test aids in demonstrating foreclosing effects of rebate systems applied by dominant undertakings. Therefore, while rebate systems such as loyalty rebates may constitute competition on the merits, there is also a possibility to use the rebates to foreclose competitors from entry on markets.⁴⁹ As efficiencies,

4 A selection of case law

4.1 Hoffman La Roche

Hoffman La Roche⁵⁰ was the world’s largest manufacturer of bulk vitamins and the company also produced certain vitamins and acted as a reseller on the market for vitamins. The Commission held a dominant position in the market which was later confirmed by the ECJ.⁵¹ Roche applied a fidelity rebate system to purchasers which was explained as ‘... *discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position.*’ The rebates were market-share based and had a clause meaning that discounts increased when purchasers fulfilled their estimated requirements from Roche.⁵²

⁴⁹ See and compare case COMP/C-3/37.990, Intel, 2009, paras 1001-1007.

⁵⁰ Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36.

⁵¹ Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, facts and procedures section and para 89.

⁵² Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, paras 90 and 97.

The ECJ established that dominant firms may not tie purchasers to purchase all or most of their requirement, even if they so request it and a rebate is granted on that basis. Further, without formally tying purchasers, applying conditional rebates based upon the purchaser fulfilling all or most of his/her requirement from the dominant undertaking constitutes an abuse of Article [102 TFEU].⁵³

The Court stated that such a system of fidelity rebates is incompatible with the objective of undistorted competition as they deprive or restrict the possible choices of sources of supply and are aimed at denying other producers access to the market. Importantly, the rebates may under exceptional circumstances be allowed, seemingly if there are economical justifications. In this context, a reference was made to Article [101 TFEU] which invokes the question whether a *per se* abuse of these rebates would be found under Article 102 TFEU.⁵⁴

Another key statement from the Court was *‘The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.’* AG Wahl has stated that the GC in Intel misinterpreted the ECJ which led to the former erring in law.⁵⁵

The ECJ continued by an elaborated assessment of the circumstances regarding the fidelity rebates. The assessment was extensive, for example taking into account the market shares, other contractual clauses which partly remedied some of the unfair consequences of the rebates as well as analysing the different form of

⁵³ Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, paras 89.

⁵⁴ Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, paras 89-90.

⁵⁵ Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, para 91 and AG Wahl’s opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, paras 99-106.

contracts and their intricacies such as rebate scales for different vitamin groups. In the end, the Court ruled that the mitigating factors were not sufficient as an abuse of dominance was found regarding the fidelity rebates.⁵⁶ In its entirety, the judgment demonstrates a detailed and in depth investigation of the circumstances at hand in establishing that the rebate schemes were abusive.

4.2 Michelin II

The tyre company Michelin was found to have abused its dominant position through their rebate systems. A fine was imposed by the Commission⁵⁷ and the decision was later upheld by the Court of First Instance.⁵⁸ In particular, the quantity rebates were investigated by the Court. This is of importance as quantity rebates are presumed lawful, reflecting gains in efficiency and economics.⁵⁹ The different types of quantity rebates in the case had an increasing discount rate in relation to increased turnover⁶⁰ by the dealer. The reference period of the discounts was a full year. Unsurprisingly, loyalty-inducing effects of rebates increase with a longer reference period. Furthermore, the discounts were granted on a basis of turnover thresholds from dealers. These dealers gained important price reductions which promotes purchases in order to reach a higher threshold as no further discount is given unless the next threshold is reached.⁶¹

The characteristics of the rebates were deemed to be those of a loyalty-inducing system. The rebate system was found to be loyalty-inducing, preventing dealers from selecting competitors as it would result in appreciable economic disadvantages. While the rebates was competition on price, the special

⁵⁶ Case C-85/76, *Hoffman-La Roche v Commission*, EU:C:1979, paras 92-121.

⁵⁷ 2002/405/EC: Commission Decision of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin), OJ L 143, 31.5.2002, pp. 1–53.

⁵⁸ See case T-203/01, *Michelin v Commission*, EU:T:2003:250.

⁵⁹ Compare T-203/01, *Michelin v Commission*, EU:T:2003:250, paras 58 and cited case-law.

⁶⁰ Case T-203/01, *Michelin v Commission*, EU:T:2003:250, paras 70-71.

⁶¹ Case T-203/01, *Michelin v Commission*, EU:T:2003:250, paras 85-88.

responsibility of an undertaking in a dominant position means that it may not distort competition on the market.⁶² As such, the following questions was whether the quantity based rebate system was based on a countervailing advantage and if it could be economically justified. Michelin was deemed to have argued too generally and insufficiently in regard to the specific economic reasoning behind the discounts rates in the rebate system. In conclusion, the limitation of dealers' choice, difficulties in market access for competitors and the dependence position of dealers to Michelin resulted in the quantity rebate system being found abusive and in violation of Article [102 TFEU].⁶³

4.3 Tomra

Tomra was a manufacturer of reverse vending machines for empty beverage containers.⁶⁴ The Commission fined Tomra for abusing their dominant position through a strategy with anti-competitive object or effect on national reverse vending machine markets.⁶⁵ A part of the strategy included agreements which established individualised retroactive rebate schemes.⁶⁶ The rebates were individual as the thresholds to be granted discounts were linked to a total requirement of each customer to Tomra. Thresholds were decided by estimated customer's requirement and/or from past purchasing volumes. The rebates were also connected to a reference period.⁶⁷ The ECJ noted that undertakings in a dominant undertaking may abuse their position by applying a system of loyalty rebates meaning rebates that discounts are given upon the customer purchasing most of its requirement from the undertaking. In these situations, all circumstances

⁶² Case T-203/01, *Michelin v Commission*, EU:T:2003:250, paras 96-98.

⁶³ Case T-203/01, *Michelin v Commission*, EU:T:2003:250, paras 107-114.

⁶⁴ Case C-549/10 P, *Tomra and Others v Commission*, EU:C:2012:221, para 1, appeal of case T-155/06, *Tomra System and Others v Commission*, EU:T:2010:370.

⁶⁵ Commission decision, case COMP/E.-1/38 — 113/Prokent-Tomra.

⁶⁶ Case C-549/10 P, *Tomra and Others v Commission*, EU:C:2012:221, para 11.

⁶⁷ Case C-549/10 P, *Tomra and Others v Commission*, EU:C:2012:221, paras 11-15.

must be considered. The ECJ forwarded that the GC had been correct in finding that the rebates had an inherent loyalty mechanism by ‘suction’ to itself for the contestable demand. A ‘suction effect’ argument was forwarded due to the rebate system resulting in a low effective price for Tomra’s customers if they achieved the higher thresholds. The fact that Tomra did not sacrifice profits when applying the rebates were not of relevance in this regard.⁶⁸ Interestingly, the Court found that no analysis on the effects on competition was necessary as Article 102 TFEU only requires demonstrating that the conduct is capable of having an effect. The loyalty mechanism was found in the rebate system itself. As such, no cost based test was needed. The Court upheld the GC’s and Commission’s previous decision and found the rebate system unlawful in line with the presented arguments. Lastly, it should be noted that the judgment predated the Commission’s guidance on Article [102 TFEU] which support a more effects-based approach to assessing conduct such as rebates.⁶⁹

4.4 The Intel Case

This section provides an introduction to the lengthy judgment in order to achieve a basic understanding of the case as the argumentations will be investigated.

Advanced Micro Devices (‘AMD’) submitted complaints regarding Intel to the Commission which thereafter launched formal investigations. The relevant product market regarded CPU’s of x86 architecture. AMD and Intel were the only large manufacturers of such CPU’s since the 2000’s and Intel had a market share of around 70 % or more during the relevant period of the decision, year 1997-2007. The Commission deemed the geographical market to be worldwide and the market had significant barriers of entry due to the necessary facilities required for manufacturing x86 CPU’s. Furthermore, Intel was considered as a must-stock brand and all competitors but AMD had left or had insignificant shares of the

⁶⁸ Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, para 60-79.

⁶⁹ Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, para 74-81.

market. The infringement of competition law concerned naked restrictions and conditional rebates towards Intel's trading partners. As noted, the interest of this thesis regards rebates. Intel issued rebates to major original equipment manufacturers which were conditional for example on the manufacturer purchasing all or most of their supply from Intel. As the Commission established an infringement of Article [102 TFEU] as well as Article 54 of the EEA agreement, Intel was imposed a fine exceeding a billion euros.⁷⁰

Intel launched an action for annulment of the decision in the General Court. The action was unsuccessful as the General Court dismissed it.⁷¹ This judgment is currently under appeal and is being reviewed by the ECJ.⁷²

5 Discerning the Classification of Rebates

Advocate General ('AG') Wahl recently stated, in contrast to the GC, that there are only two categories of rebates according to case law. Wahl argues that 'exclusivity rebates' constitutes a creation of a super-category of rebates which cannot be redeemed despite the individual circumstances of the case.⁷³ This statement will be studied, as well as the potential consequences of the classification.

5.1 AG Wahl on Hoffman La Roche and the Classification of Rebates

Commenting on the GC's interpretation of Hoffman La Roche in Intel as well as the case law which has derogated since, AG Wahl claims that there are only two

⁷⁰ Summary of Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel).

⁷¹ Case T-286/09, Intel v Commission, EU:T:2014:547.

⁷² See Case C-413/14 P, Intel v Commission.

⁷³ AG Wahl's opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, paras 78.

categories of rebates. As previously noted, the category in question regards exclusivity rebates which Wahl considers a creation of a super category of rebates by the GC.⁷⁴

The issue is identified in the GC applying a verbatim method of the Court's statement in Hoffman La Roche regarding conditional rebates depending upon exclusivity. In doing so, AG Wahl forwards that the statement was taken out of context and allowed the creation of the sub-type 'super category' of loyalty rebates, termed exclusivity rebates. Abuse is then found by form of the rebate and without considering all the circumstances of the case.⁷⁵ As previously noted upon elaborating in Hoffman, the Court did make detailed investigations in the case. However, it did not explicitly state that all the circumstances must be assessed upon finding an infringement of competition law. Nonetheless, the Court investigated in depth regarding the relevant market, market coverage of the rebates, the duration and terms of the rebates as well as its conditions before concluding that the loyalty inducing rebate scheme was unlawful.⁷⁶ Four arguments are raised and will be analysed as to why exclusivity rebates should not be dealt with differently to the other categories except quantity rebates.

5.2 'An assumption of unlawfulness cannot be rebutted'

While loyalty rebates are presumed unlawful, there is a possibility to rebut the presumption which does not appear possible regarding exclusivity rebates. The reason being that the prohibition is based on the form of the conduct rather than the effects.⁷⁷ As the GC contends that competition is already restricted by the existence of a dominant undertaking, an efficiencies-based argument and potential justifications are seemingly without meaning. The GC justifies this approach by

⁷⁴ AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 80-84.

⁷⁵ AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 80-84.

⁷⁶ Compare for example with case *Hoffman-La Roche v Commission*, EU:C:1979:36, paras 31-35, 50-51, 69, 82 87-88,

⁷⁷ AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 85-88.

referring to the special responsibility which dominant undertakings carry. However, this approach not in line with Hoffman La Roche as well as appearing to be contrary to the judgment by the GC itself.⁷⁸

I agree with AG Wahl insofar as the GC seemingly contradicts itself by admitting possible benefits for competition due to exclusivity conditions but potentially disregarding these benefits at the same time. Such a line of thinking appears questionable in regard with the goals of competition law. While dominant firms do carry a special responsibility, the results in my opinion would only be the protection of competition which is not an intrinsic value. The consistency of such a result with what the ECJ later stated in Post Danmark can also be discussed as the Court proceeded to demonstrate how the detrimental effect to consumers is the focus when investigating exclusionary conduct by dominant firms. The Court pointed out that competition on the merits could lead to competitors' departure from the market but is not necessarily detrimental to competition.⁷⁹ I ponder how such an approach would unify with the GC's judgment in Intel as abuse of dominance could be assumed by the categorisation of rebates without investigating the circumstances.

5.3 'Loyalty rebates are not always harmful'

AG Wahl contends that exclusivity rebates should only be singled out if there are no possible justification of the rebate. Both AG Wahl and the GC in Intel stated that exclusivity conditions may have beneficial effects but this was not looked into due to the reasons stated in the first argument.⁸⁰ While the conduct at issue is of great competitive concern, AG Wahl forwards that other types of rebates may have

⁷⁸ Case T-286/09, Intel v Commission, EU:T:2014:547, paras 81 and 89-90 and case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, para 89.

⁷⁹ Compare case C-209/10, Post Danmark, EU:C:2012:172, paras 21-22.

⁸⁰ AG Wahl's opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, paras 85-88 and case T-286/09, Intel v Commission, EU:T:2014:547, para 89.

similar effects which is possible even without being conditional to exclusivity. As such, a stricter treatment of this sub-category of rebates is deemed to be without objective reason.⁸¹

5.4 ‘The effects of loyalty rebates are context-dependent’

The argument is based on economic literature which suggests that effects of exclusivity depends on its context. AG Wahl refers to Tomra⁸² as a demonstration that the Court has recently noted the importance of considering all the circumstances. The rebate scheme in Tomra regarded individualised and retroactive rebates which would be placed in the third category according to the methodology provided by the GC in Intel. However, the Court made no such categorisation of rebates and repeated the statement made in Hoffman La Roche regarding discounts conditional on the purchaser buying all or most of its requirement from the undertaking in a dominant position. Further, the Court added that in such regard ‘... *it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition...*’⁸³

The statement is too ambiguous to answer the question regarding which legal test should be applied to exclusivity rebates as both parties in Intel have opposing

⁸¹ AG Wahl’s opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, paras 89-93. For further support, see OECD Policy Roundtables on Fidelity and Bundled Rebates and Discounts, DAF/COMP(2008)29, p. 9 and 21 as well as the Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para 37.

⁸² Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221.

⁸³ Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, paras 70-71 and case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, para 89.

views. It is argued that the rebates in Hoffman La Roche and Tomra were different only in degree, rather than in kind. Both cases dealt with rebates which had certain characteristics of individual retroactive rebates. Multiple analysed contracts contained rebate clauses related to the majority of the purchaser's requirements as well as progressive rebate rates dependant on the purchaser fulfilling their estimated requirement during a reference period. AG Wahl suggests that no distinction of the rebates in Tomra and Hoffman La Roche should be made due to slight differences.⁸⁴ Indeed, the author contends that the legal certainty should be of central interest as it creates the conditions for dominant firms to conduct their business in ways which benefits the consumers instead of risking hefty fines due to ambiguous categorisations. While an assumption of unlawfulness regarding exclusivity rebates issued by dominant firms is reasonable, not assessing the scheme in its context is questionable.

5.5 'Related practises require considerations of all the circumstances'

Case law regarding other conducts such as margin squeeze and pricing demonstrates a requirement to consider all the circumstances to find an abuse of a dominant position. Interestingly, the GC disregarded such case law in stating that it is limited to pricing practises which therefore should not affect the characterisation of exclusivity rebates, seemingly due to pricing not being an abusive conduct in of itself.⁸⁵ AG Wahl questions the conclusion as the GC reaches a different end result regarding exclusivity rebates, yet it is based upon the pricing of such schemes. While the conducts of rebates and pricing differ, they share the potential effect of a price based exclusion. Therefore, AG Wahl reminds us of the importance of legal tests which are coherent with other comparable practises of conducts as it benefits the legal certainty as well as aiding competition authorities

⁸⁴ AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 94-100.

⁸⁵ Case T-286/09, *Intel v Commission*, EU:T:2014:547, paras 95-101.

in enforcing competition law.⁸⁶ The argument is ended with a reference to Post Danmark I⁸⁷ and Post Danmark II⁸⁸. While AG Wahl admits that a possible interpretation of Post Danmark II supports the existence of three rebate categories of which exclusivity rebates does not need to be assessed by their effects to find an abuse. However, it also noted that a different interpretation is possible as well which he supports with general statements made by the Court but also by relying on Post Danmark I, stating that a conclusion of not needing to consider all the circumstances would be in contrast with the judgment.⁸⁹

5.6 Further analysis in light of Post Danmark II

I consider the interpretation of Post Danmark II to be of central interest in analysing the coherency of rebate classification as it is the latest case law from the ECJ regarding abuse of dominance and rebate schemes. Also, it was a reference for a preliminary ruling which gave the Court freedom they deemed necessary in answering the referred questions regarding rebate schemes. Many competition practitioners and legal scholars have seemingly read Post Danmark II as a confirmation of the GC's three category approach to rebates.⁹⁰ However, the Court did not explicitly make use of such categorisation. In paragraph 27 of the judgment, quantity rebates and loyalty rebates are singled out which indicates a two-fold categorisation. The following paragraph muddles the matter.

⁸⁶ AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 101-103.

⁸⁷ Case C-209/10, *Post Danmark*, EU:C:2012:172.

⁸⁸ Case C-23/14, *Post Danmark*, EU:C:2015:651.

⁸⁹ AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 101-105.

⁹⁰ See for example Rummel, P, *Rebate schemes under Article 102: Post Danmark II*, *Common Market Law Review*, Issue 4, pp 1128-1129, Batchelor, B, *Post Danmark II – EU Commission Guidance on Economic Assessment of Rebates under Article 102 Survives... Just.*, *Kluwer Competition Law Blog* October 15, 2015, Sidiropoulos, K, *POST DANMARK II: A CLARIFICATION OF THE LAW ON REBATES UNDER ARTICLE 102 TFEU*, <http://europeanlawblog.eu/?p=3013> accessed 2016-11-15.

‘So far as the rebate scheme at issue in the main proceedings is concerned, it must be observed that that scheme cannot be regarded as a simple quantity rebate linked solely to the volume of purchases [...]. Moreover, it was not coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark, a point which served to distinguish it from loyalty rebates within the meaning of the case-law referred to in paragraph 27 above.’⁹¹

The coherency of AG Wahl’s interpretation of the case law may therefore be probed as the Court appears to have distinguished the rebate scheme in Post Danmark II to a category which does not fit into quantity nor loyalty rebates. A possible solution is a bi-partite reading of the paragraphs. James Venit who was among the counsel which assisted Intel in the proceedings, argues that such an interpretation is sensible as rebates may not prima facie fit into one of the two classes. However, after examining the circumstances, it is possible to place the rebate at issue into one of the two classes as suggested by AG Wahl. As such, an investigation will clarify if the actualised rebate is a loyalty- or a quantity rebate. Venit forwards that the Court’s assessment of all the relevant circumstances in Post Danmark II support such a conclusion.⁹²

Furthermore, the Court did consider other case law on pricing and margin squeeze.⁹³ Here, an argument for legal certainty and unity of competition law is forwarded. The GC’s approach in Intel seemingly establishes a near per se illegality of certain rebates without the desired regard to consumer harm or benefit. While a two-fold categorisation of rebates is a possible interpretation, it is certainly uncertain and remains an important question which the ECJ should answer in their forthcoming judgment in Intel. Not regarding the circumstances of the cases at

⁹¹ Case C-23/14, Post Danmark, EU:C:2015:651, paras 27–28.

⁹² Venit, J.S. Post Danmark II and the Intel opinion: much more in common than first meets the eye, Global Competition Review website, 2016, accessible at <http://globalcompetitionreview.com/article/1070727/post-danmark-ii-and-the-intel-opinion-much-more-in-common-than-first-meets-the-eye> last viewed 2016-11-21.

⁹³ Case C-23/14, Post Danmark, EU:C:2015:651, paras 55.

hand would be a rigid approach unfit with the dynamics of competition law. If the assessment of loyalty-inducing rebates and their compliance with EU law depends on what sub-type of rebate it is, distinctions should be made clear and be well reasoned as it greatly effects the business freedoms of dominant undertakings as well as potentially dominant undertakings. As it stands now, the benefits of a categorical approach to loyalty-inducing rebates are hazy. It possibly diminishes the interests of the consumer and the potential benefits which so called ‘exclusive rebates’ may have on competition.⁹⁴

6. The effects of not regarding all the circumstances

It has been argued that the approach to exclusivity rebates by the GC in Intel result in a modified per se abuse by dominant undertakings when applying loyalty rebates which belong to the sub-category of exclusivity rebates. While there is a theoretical possibility of justifying this kind of loyalty rebate, the practical possibility of doing so is unclear due to the presumption of unlawfulness and lack of case law.⁹⁵ Therefore, the effects of such an approach must be investigated more thoroughly in order to determine whether it results in foregoing the goals of competition law. At first, arguments which support the by object approach to rebates is detailed to problematize the discussion. Thereafter, it is reasoned that such an approach is undesired in competition law due to the possible procompetitive effects of exclusivity rebates and lack of legal certainty.

6.1 In defence of a ‘by object’ approach

⁹⁴ Compare with the Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para 37.

⁹⁵ Compare Case T-286/09, Intel v Commission, EU:T:2014:547, paras 84-87.

6.1.1 Competition only has value with unpredictable results?

Perhaps the most discussed⁹⁶ defence of the GC's approach to rebates comes from professor and Hearing Officer at the Commission, Wouter Wils. He argues that it is economically sound and in line with EU case law to distinguish exclusivity rebates issued by firms in a dominant position.⁹⁷ A preliminary remark concerns the ingrained thinking of economics of the EU which started as an economic community. Both historically and presently, competition law has been closely linked to economic theory and the case law should be seen as a reflection of this. An important foundation in following Wils' argument, is that the objective of article 102 TFEU is '*a system of undistorted competition, as a part of the internal market established by the EU*'.⁹⁸ Furthermore, Nobel Prize winner Friedrich Hayek's lecture in 1968 where he spoke about competition as discovery procedure which only has value when the results '*... are unpredictable and on the whole different from which anyone has, or could have deliberately aimed at*'.⁹⁹

Wils criticises proponents of a 'more economical approach' stemming from a Chicago welfarist approach who value competition and its processes only in the sense of consumer welfare or efficiency. As such, the value of a competitive process itself is forgotten.¹⁰⁰ In discussing the Intel judgment, Wils argues that the

⁹⁶ Lamadrid, A, *Much more on the Intel Judgment*, Chillin' Competition, 23 feb 2015, accessible at 24 at <https://chillingcompetition.com/2015/02/23/much-more-on-the-intel-judgment/> last viewed 2016-11-30.

⁹⁷ Wouter, P.J. W, *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*, World Competition, vol. 37, issue 4, December 2014, accessible at <http://ssrn.com/author=456087> last viewed 2016-11-24.

⁹⁸ Wouter, P.J. W, *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*, World Competition, vol. 37, issue 4, December 2014, accessible at <http://ssrn.com/author=456087> last viewed 2016-11-24, pp. 15-16. See also Protocol No 27 annexed to the Treaty of Lisbon, OJ C 83/309.

⁹⁹ Wouter, P.J. W, *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*, World Competition, vol. 37, issue 4, December 2014, accessible at <http://ssrn.com/author=456087> last viewed 2016-11-24, p 11.

¹⁰⁰ Wouter, P.J. W, *The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*, World Competition, vol. 37, issue 4, December 2014, accessible at <http://ssrn.com/author=456087> last viewed 2016-11-24, p 12.

classification carried out by the GC is sound and in line with EU case law. Clarity, foreseeability and administrative possibilities are forwarded as preferable by the current test in comparison to a ‘more economic approach’. The reason being that he considers a category of exclusivity rebates is conceptually clear and recognisable for both consumers and dominant undertakings.¹⁰¹

I wonder if the category of exclusivity rebates are as clear as desired. In the Intel case, the undertaking argued that the rebate schemes employed were not of ‘exclusivity’. A comparison with Tomra is timely in this regard. As previously mentioned, the rebates in the case were categorised as a system of individualised rebates.¹⁰² In contrast to rebates are individually adapted to the requirements of customers which creates benefits for the dominant firms due to its loyalty enhancing effect.¹⁰³ When the ECJ dealt with individualised rebates in Tomra, it did not mention a third category of rebates. The Court repeated the classic line stemming from Hoffman, *‘In the event that an undertaking in a dominant position makes use of a system of rebates, the Court has ruled that that undertaking abuses that position where, without tying the purchasers by a formal obligation, it applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position’*.

In addition, the Court stated that all the circumstances must be considered in such a matter as well as that the demonstration of rebates restricting competition, or tend

¹⁰¹ Wouter, P.J. W, *The judgment of the EU General Court in Intel and the so-called ‘more economic approach’ to abuse of dominance*, World Competition, vol. 37, issue 4, December 2014, accessible at <http://ssrn.com/author=456087> last viewed 2016-11-24, p 21-22.

¹⁰² Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, paras 73, 74, 77 and 78, case T-286/09, Intel v Commission, EU:T:2014:547, para 97 and AG Wahl’s opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, para 95.

¹⁰³ Compare Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para 45.

to do so, is sufficient in showing an abuse of dominance.¹⁰⁴ The author therefore hesitates if the categorisation of rebates carried out in Intel are in line with case law. As there is no clear-cut answer, I hesitate in making such a claim.¹⁰⁵ Wils has compelling arguments founded on both an economic and legal basis which deserves a reading in full by the reader as a summary does not make it justice. Nevertheless, the reason for treating loyalty inducing rebates differently due to its sub-categorisation as carried out by the GC remains perplexing.

6.1.2 An economic analysis has already been carried out

Some commentators on Intel seemingly approve of a formalistic approach of the Court. One of the reasons of that is because of the Commission which in its case handling, thoroughly carry out an economic analysis of the rebate scheme at hand.¹⁰⁶ Indeed, the potential risks of the Court having a formalistic approach toward exclusivity rebates are at least somewhat countered by the Commission and NCA's riddling out the cases in which dominant firms employ exclusivity rebate schemes that do not distort competition. Even so, the Court has clarified that there is no de minimis abuse of dominance regarding rebates.¹⁰⁷ While the practical issues of a formalistic approach are limited due to thorough investigations carried out by the 'foot workers' of EU law, it is seemingly not in congruency with the word of the Court and can therefore be questioned. While the working methods of a NCA and a court naturally differ, wouldn't cases regarding exclusivity rebates potentially be written off for example due to the Commission not finding economic effects in line with their guidance? Even if counter-weighting benefits are possible, a uniform application of EU law is preferable in the perspective of legal certainty.

¹⁰⁴ Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, paras 68, 73, 74, 77 and 78.

¹⁰⁵ Compare AG Wahl's opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, para 94-100.

¹⁰⁶ Usai, A, The Intel Case: Between Tomra Systems ASA, the Commission's Guidance on Enforcement Priorities, and the Alleged Infringement of Procedural Requirements - No Fat Left on the Bone, p 21 f E.C.L.R.2014, issue 8, pp. 387-401.

¹⁰⁷ See for example Case C-23/14, Post Danmark, EU:C:2015:651, paras 70-73.

In *Michelin II*¹⁰⁸ and *British Airways*¹⁰⁹, it was demonstrated that even though the dominant undertakings' market share had decline and their competitors had gained market shares, an abuse of a dominant position had occurred due to the exclusivity schemes. In the Commission's decisions, they stated that the decline of market shares would have been higher if the conduct was not put into practise.¹¹⁰ The author agrees that a market share decline it itself does not mean that a distortion of competition is the result. In *British Airways*, the decline was at least in part due to a liberalisation of the air transport market in the UK.¹¹¹ Furthermore, it is consistent with previous case law on Article 102 TFEU as the behaviour would nonetheless influence the market, directly or indirectly and potentially prevent the realization of the single market.¹¹²

6.2 Rejecting a 'by form' approach

This section presents a division of the case law on Article 102 TFEU in order to question the restriction of exclusivity rebates due to their form. Inspiration is gathered from Article 101 TFEU.

6.2.1 Issues stemming from a modified per se abuse regarding exclusivity rebates

Judgments from EU case law regarding Article 102 TFEU may be divided into two categories. One of the categories contains conduct which is not deemed to be

¹⁰⁸ Case T-203/01, *Michelin v Commission*, EU:T:2003:250.

¹⁰⁹ Case C-95/04 P, *British Airways v Commission*, EU:C:2007:166.

¹¹⁰ See COMP/E-2/36.041/PO — *Michelin*, OJ L 143, 31.5.2002, p. 1–53, paras 332-340 and IV/D-2/34.780 - *Virgin/British Airways*, OJ L 30, 4.2.2000, p. 1–24, para 107.

¹¹¹ IV/D-2/34.780 - *Virgin/British Airways*, OJ L 30, 4.2.2000, p. 1–24, para 107.

¹¹² See case the operative part in case 56-65, *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38.

abusive in nature.¹¹³ Foreclosing effects of the conduct determine if an abuse of dominance is at hand. The second category concerns conduct which in its essence constitutes abuse as no exclusionary effects must be demonstrated. The only plausible reason for the conduct is driving out the competition. As such, a presumption of abuse is at hand in the second category. As previously noted, exclusivity rebates have been found to be capable of restricting competition by their very nature.¹¹⁴ The same presumption of unlawful conduct can be seen in case law regarding pricing below average cost¹¹⁵ and exclusive dealing¹¹⁶. The line of thinking stems from Hoffman La Roche¹¹⁷ and several legal scholars argue that different standards are more appropriate when assessing loyalty rebates.¹¹⁸

The core of the objection concerns the presumption of abuse when applying exclusivity rebates. Under Article 101 TFEU, which concerns all undertakings even if they are not in a dominant position, the ECJ have made statements which arguably are in tension with a near per se abuse of exclusivity approach.¹¹⁹ In *Groupement des cartes bancaires*, the Court stated ‘*The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that*

¹¹³ See P. Ibáñez Colomo, Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy, p 12 f, LSE Law, Society and Economy Working Papers 29/2014, accessible at https://www.lse.ac.uk/collections/law/wps/WPS2014-29_Colomo.pdf. Compare with case C-62/86, AKZO v Commission, EU:C:1991:286, paras 69-72.

¹¹⁴ Case T-286/09, Intel v Commission, EU:T:2014:547, paras 84-87.

¹¹⁵ Case C-62/86, AKZO v Commission, EU:C:1991:286, para 71.

¹¹⁶ See for example case T-203/01, Michelin v Commission, EU:T:2003:250, para 245 and case T-83/91, Tetra Pak v Commission, EU:T:1994:246, para 140.

¹¹⁷ Case C-85/76, Hoffman-La Roche v Commission, EU:C:1979:36, paras 89-90.

¹¹⁸ See P. Ibáñez Colomo, Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy, LSE Law, Society and Economy Working Papers 29/2014, accessible at https://www.lse.ac.uk/collections/law/wps/WPS2014-29_Colomo.pdf and D. Geradin, Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche, *Journal of Competition Law & Economics*, issue 11, 2015, pp. 579-615.

¹¹⁹ Compare D. Geradin, Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche, *Journal of Competition Law & Economics*, issue 11, 2015, p 25 f.

*it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.*¹²⁰

Clearly, the ‘by object’ infringements of competition law are limited under Article 101 TFEU. For example, horizontal price fixing by cartels is one of the ‘by object’ restrictions.¹²¹ These hardcore restrictions can be compared to the discussed modified ‘per se’ abuse of exclusivity rebates. Business conduct by undertakings such as issuing loyalty rebates to customers would presumably be lawful under Article 101 TFEU. With an undertaking being in a dominant position, the same conduct is presumably unlawful.¹²² This difference gives pause for thought. Article 101 and 102 TFEU and their differences will not be investigated in depth but there are, as competition scholars and practitioners are well-aware of, differing goals of the articles. Article 102 TFEU is only applicable when an undertaking is in a dominant position which creates special responsibilities.¹²³ It is this position which in case law has been argued as the reason why these undertakings are subject to different standards in competition law. Exclusivity rebates, a sub-category of loyalty rebates are therefore, as previously noted, presumably unlawful.¹²⁴ This means that the same conduct will be viewed differently under EU competition law as the reason for the conduct is assumed to be of an anti-competitive purpose.¹²⁵

¹²⁰ Case C-67/13 P, *CB v Commission*, EU:C:2014:2204, para 58.

¹²¹ Case C-67/13 P, *CB v Commission*, EU:C:2014:2204, para 51.

¹²² Compare D. Geradin, *Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche*, *Journal of Competition Law & Economics*, issue 11, 2015, p 25 f.

¹²³ See for example case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission*, EU:C:1983:313, para 57.

¹²⁴ Compare AG Wahl’s opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, para 94-100.

¹²⁵ Compare P. Ibáñez Colomo, *Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy*, p 17, LSE Law, Society and Economy Working Papers 29/2014, accessible at https://www.lse.ac.uk/collections/law/wps/WPS2014-29_Colomo.pdf

While the reasoning above is in line with *Hoffman La Roche*,¹²⁶ it is a distinction of the same conduct. As such, the author argues that a solid argumentation should be behind this separation in treatments. Indeed, competition may already be weakened on a market by the very presence by a dominant undertaking.¹²⁷ That would imply that the rebates in *Tomra* should have presumably been unlawful, but rather they were categorised under the third category as an individualised and retroactive rebate system where all the circumstances of the case must be assessed.¹²⁸

In my view, the separation of the rebate system is indeed possible and in line with the case law. Even so, a more effect-based approach to foreclosure-effects appear more reasonable due to the many potential reasons as to why undertakings would employ rebate schemes in their businesses. It could aid in creating a coherent treatment of rebates under Article 102 TFEU which likely would be less controversial than the approach suggested by the GC in *Intel* as the foreclosing effect of the conduct would be of central interest. Such an interpretation of existing case law is also possible. As AG Wahl reasons, despite the Courts statement in both *Hoffman La Roche* and *Tomra*, the Court did consider all the circumstances of the cases.¹²⁹

The suggested negative presumption of loyalty rebates and specifically exclusivity rebates by the GC in *Intel*, makes sense only if the result of the practise legitimately effects competition negatively. This is of fundamental importance as 'by object' restrictions may be perfectly valid in such scenarios. Other examples are cartel agreements¹³⁰, prohibiting the testing of competitors' products and paying competitors to delay the launching of products. A detailed assessment of conduct may not be necessary. As it is argued in the guidance papers on Article [102 TFEU], the conduct can only raise obstacles to competition without creating

¹²⁶ Case C-85/76, *Hoffman-La Roche v Commission*, EU:C:1979:36, paras 89-90.

¹²⁷ Case C-85/76, *Hoffman-La Roche v Commission*, EU:C:1979:36, paras 89-90.

¹²⁸ Case T-286/09, *Intel v Commission*, EU:T:2014:547, para 97.

¹²⁹ Compare AG Wahl's opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, para 83.

¹³⁰ Case C-67/13 P, *CB v Commission*, EU:C:2014:2204, para 51.

efficiencies.¹³¹ I find that this approach to questionable conduct of dominant undertakings is logical as resources may be saved due to competition authorities not investigating something which is already obvious or answered by economic theory.

6.2.2 Are exclusivity rebates harmful to competition?

The following question is whether exclusivity rebates only raise obstacles to competition or is demonstrated to have such an effect. In section 4, economic theory was discussed which suggested that the effects on competition varies de to market share discounts. While the effects of loyalty-inducing rebates may definitely generate anti-competitive effects, I argue that an ‘by form’ treatment of exclusivity rebates must be demonstrated to only raise obstacles to competition or similar as stated in the mentioned guidance papers. Rebate schemes issues by dominant undertakings are allowed in EU competition law but the categorisation made by the GC in Intel seemingly interprets the position of dominance as one which prohibits exclusivity rebates. While stating it was possible to justify such rebates, it would only be possible in the context of ‘exceptional circumstances’ according to the GC.¹³² However, exclusivity conditions may have beneficial effects for competition which the GC forwards as well.¹³³

Amongst others, AG Wahl, promotes the potential beneficial effects even when dominant undertakings use exclusivity conditions in their dealings as rebates lead to rivalry which stimulates further competition.¹³⁴ As Professor Nicolas Petit suggests, the GC in Intel introduced a modified per se prohibition rule for dominant

¹³¹ See Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para 22.

¹³² Case T-286/09, Intel v Commission, EU:T:2014:547, para 77.

¹³³ Case T-286/09, Intel v Commission, EU:T:2014:547, para 89.

¹³⁴ See OECD Policy Roundtables on Fidelity and Bundled Rebates and Discounts, DAF/COMP(2008)29, p. 9 and 21 and AG Wahl’s opinion in case C-413/14 P, Intel v Commission, EU:C:2016:788, para 90.

undertakings which apply exclusivity rebates.¹³⁵ My issue is predominantly the unclarity as to what defence can be used to demonstrate the potential beneficial effects for competition as it is possible only under ‘exceptional circumstances’. So far, the case law does not give much support as to what efficiencies must be proven to deem exclusivity tying conduct lawful. Suggesting that the conduct must be objectively necessary or have counterbalanced efficiencies for the consumers despite the potential foreclosure is problematic. In Intel, such efficiencies were not argued which naturally does little to provide a deeper understanding of the actual efficiencies-assessment.¹³⁶ The reason why Intel did not argue such a line of thinking likely stems from the legal strategy of denying any exclusivity. Further, as Petit forwards, it could reasonably be believed that there was no possibility to argue efficiencies if exclusivity rebates are at least quasi per se prohibited.¹³⁷ Also, the GC in Intel claimed that a positive AEC-test¹³⁸ would not rule out potential foreclosure effects due which is inherent in the rebate category.¹³⁹ As such, uncertainties remain as the GC considers presume the exclusivity rebates to harm competition.

6.2.3 Over-enforcement of Competition Law and the Reality of Dominance

It has been argued that exclusivity conditions may have pro-competitive effects. One should also reason regarding the consequences of a modified per se prohibition of exclusivity rebates.

¹³⁵ N. Petit, ‘Intel, Leveraging Rebates and the Goals of Article 102 TFEU’, 2015, accessible at SSRN: <https://ssrn.com/abstract=2567628>, last viewed 2016-12-08, p 10.

¹³⁶ Compare with case T-286/09, Intel v Commission, EU:T:2014:547, para 94.

¹³⁷ N. Petit, ‘Intel, Leveraging Rebates and the Goals of Article 102 TFEU’, 2015, accessible at SSRN: <https://ssrn.com/abstract=2567628>, last viewed 2016-12-08, p 17.

¹³⁸ As Efficient Competitor Test, see Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, paras 23-27.

¹³⁹ Case T-286/09, Intel v Commission, EU:T:2014:547, para 151.

In contrast to Wils, Luc Peeperkorn, who serves as a Principle Advisor Antitrust Policy at the Commission where he has worked since 1991, has severely criticized the Intel judgment as a proponent of an effect-based approach in competition law.¹⁴⁰ He argues that an effect-based approach should be decisive in assessing conduct under Article 102 TFEU. The assessment for EU competition lawyers, authorities and the Courts should be focused on ‘... understanding the effects, within a relevant time frame and against reasonable costs.’. Lawyers are the ones who should decide the cases. Peeperkorn does forward the importance of economic theory and its role in enforcing competition law. However, as stated in the guidance papers on Article 102 TFEU, convincing evidence is the basis on which intervention should be pursued due to likely anti-competitive foreclosure. One of the main points in the discussion regards the objectives of competition law. Instead of supporting the idea of protecting the process of competition, Peeperkorn confirms to the school of thought which sees the goal of competition as the protection of competition when its benefits the consumer with the purpose of consumer welfare.¹⁴¹

While the case law from the courts can be interpreted to support both ideologies, the recent Grand Chamber judgment in Post Danmark I pushes the objective of consumer benefit. Notably when qualifying an exclusionary abuse under Article [102] TFEU, the Court added that the assessment should focus on whether the conduct is ‘... to the detriment of competition, and, thereby, of consumers’ interests.’¹⁴² While the case focused on pricing practises, the statement was general and can be aligned with case law on rebates.

Peeperkorn forwards that the Court’s stance in Post Danmark I demonstrates an approval of pressuring competition due it stating that competition on the merits

¹⁴⁰ See for example <http://www.concurrences.com/auteur/luc-peeperkorn?lang=en> accessed 2016-12-05.

¹⁴¹ L, 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, pp. 43-46 and Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, paras 19-20.

¹⁴² Case C-209/10, Post Danmark, EU:C:2012:172, para 24.

may lead to undertakings' departure from markets and a more efficient resource allocation.¹⁴³ Continuing, it is shown in the judgment that pricing above costs does not result in to foreclosure effects in general. On the other hand, too low pricing harms competition and has harmful effects as competitors cannot compete for customers' demand in whole and limits the contestable share of customers. In this aspect, Peeperkorn argues that the distinction made by the GC in Intel towards Post Danmark I is not very convincing regarding pricing and rebates.¹⁴⁴ The reason being that the circumstances in Post Danmark I were that two major undertakings were competing in the unaddressed mail sector and Post Danmark had a target pricing policy supposedly aimed at ensuring customers' loyalty. It included not putting its own customers on an equal footing regarding rebates and charging its major competitor's' customers differently without justifying the differences.¹⁴⁵ As such, it can be inferred from the circumstances that the rebates in the case were at least quasi exclusive regardless if the demand was explicitly expressed or simply the effect of the dominant undertaking's marketing strategy. The foreclosing effect is the same or of similar degree in either scenario and should not change an analysis of the effects if competition policy is consistence.

I agree with Peeperkorn's analysis in this part as the categorisation of the conduct as pricing strategy in Post Danmark I, even though the strategy included (loyalty-inducing) rebates, is difficult to reconcile with the approach by the GC. While the differentiation is understandable in so far as the conduct classification due to Post Danmark being a dominant undertaking but also facing competition from another undertaking which the customers could realistically switch to in order to fulfil their demand. The problem is foreclosing-assumption of competition by the GC in Intel. If exclusivity rebates are being issued by an undertaking in a dominant position, I

¹⁴³ Compare case C-209/10, Post Danmark, EU:C:2012:172, paras 20-22.

¹⁴⁴ L, 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, pp. 50-52 and case T-286/09, Intel v Commission, EU:T:2014:547, para 100.

¹⁴⁵ See case C-209/10, Post Danmark, EU:C:2012:172, paras 6-8.

argue that the foreclosing effect should be assessed in a consistent manner nonetheless.¹⁴⁶

7 Making way for a Consistent Assessment of Rebate Schemes under Competition Law

Previously, the benefits and disadvantages of a ‘by object’ approach of rebates has been analysed. As exclusivity rebates may have procompetitive effects (compare section 4), the thesis argues for a more economic approach in line with AG Wahl’s reasoning. A practical solution is considering all rebate categories, excluding quantity rebates, as presumably unlawful when issued by dominant undertakings. However, an infringement of competition law should only be found after determining all the circumstances of the case which demonstrates the anti/pro-competitive effects of the conduct.¹⁴⁷ This approach protects business conduct which is beneficial for competition instead of creating uncertainties which comes with an ‘by object’ approach as dominant undertakings likely will avoid such conduct in its entirety due to its apparent risks. In its essence, the idea has similarities with the views expressed by AG Kokott in her opinion in *Post Danmark II*. The assignment of a rebate scheme to a category is ‘ultimately immaterial’ as the compliance of the rebates are based upon whether they are capable of exclusionary effects on the relevant market which are not economically justified.¹⁴⁸ The Court has recently supported using the AEC test as one of the tools when assessing whether an abuse of Article 102 TFEU due to rebate schemes, has occurred or not which constitutes an economic approach. Further, the Court stated that ‘... in order to determine whether a dominant undertaking has abused its position by operating a rebate scheme, it is necessary, *inter alia*, to examine

¹⁴⁶ Compare with L, 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, pp. 55.

¹⁴⁷ Compare AG Wahl’s opinion in case C-413/14 P, *Intel v Commission*, EU:C:2016:788, paras 78-83.

¹⁴⁸ Compare AG Kokott’s opinion in case C-23/14, *Post Danmark*. EU:C:2015:343, paras 28-29.

whether that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition. [...] the anticompetitive effect of a particular practice must not be of purely hypothetical.' It is the anticompetitive conduct and its effects on the markets which falls under Article 102 TFEU.¹⁴⁹ In conclusion, a more economic approach is suggested when assessing rebates, determining the legality of the conduct based upon its effects on competition. While any approach in assessing business conducts is bound to have drawbacks, the suggested method accepts the diverse effects of rebates schemes and allows for competition on the merits. The economic theory behind rebate schemes is argued to deem a 'by object' approach unwarranted due to the many possible effects of the conduct. A near per se prohibition of 'exclusivity rebates' which was proposed by the GC in Intel is therefore unwarranted in the author's view.¹⁵⁰

8 Conclusions

The assessments of rebate schemes in EU competition law continues to challenge courts, authorities, legal scholars and businesses alike. A reading of the case law from the Court does not give clear answers which is a major reason behind the vast discussions of what the legal assessment shall consist of. It has been demonstrated that rebate schemes such as exclusivity rebates, may have pro-competitive effects. This answers the first question of the thesis, as economic theory does not deem rebate schemes such as exclusivity rebates to necessarily distort the competition. It may simply be an expression of competition on the merits. While rebate schemes are possible to have foreclosing effects on markets, the thesis argued that a more

¹⁴⁹ Compare case C-23/14, Post Danmark, EU:C:2015:651, paras 61, 64-66

¹⁵⁰ See also N. Petit, THE ADVOCATE GENERAL'S OPINION IN INTEL V COMMISSION: EIGHT POINTS OF COMMON SENSE FOR CONSIDERATION BY THE CJEU, *Concurrences Review*, No. 1, Forthcoming 2016, pp . 11-14.

economical approach would be advantageous. By considering all the circumstances of the case, pro-competitive rebate schemes can be upheld as well as competition on the merits. This a different standpoint than the one expressed by the GC in its Intel judgment regarding exclusivity rebates while still being reconcilable with other case law from the CJEU. Such a starting point is preferable to a more formalistic approach as some rebate schemes constitutes a near per se abuse of dominance. The possibility for dominant undertakings to justify their rebate schemes seems small at best. Particularly, the GC in Intel already deemed competition to be restricted due to the existence of a dominant undertaking which likely means that efficiencies-based justifications are more improbable. Such effects of a by object approach to rebate categories has been argued to be unwarranted and undesired. In line with the goals of competition law, markets can develop organically under competition policies which properly allows for competition on the merits rather than policies which seemingly decide what business strategies will be chosen by the dominant undertakings. In contrast to per abuses such as price fixings by cartels, rebate schemes may very well provide economical benefits and welfare for consumers.

Investigating the effects of rebate schemes is also in line with the ECJ:s position in Post Danmark II. There lacks evidence and reason to presume loyalty rebates such as exclusivity rebates as unlawful when the effects are ambiguous. This demonstrates a need of investigations of the circumstances which will aid with legal certainty and protect competition on the merits which likely improves consumer welfare. Arguably, a simple prohibition of exclusivity rebates is more understandable for companies than the results of assessing the conduct based on all circumstances. However, the legal certainty with taking all the circumstances into account and assessing the effects of the conduct will over time lead to a developed framework which is beneficial for competition law. Dominant undertakings would likely have a greater possibility to compete on the merits which is one of the policies behind competition law Perhaps needless to state, the ECJ's forthcoming judgment in Intel will guide the rule of law on rebates further. However, it remains unclear if and how the question of assessing rebates under

Article 102 TFEU will be answered. While the Court has the duty to clarify the law, I would look forward to an answer which focuses on legal certainty and the beneficial effects on competition.

9 Bibliography

Case law

Court of Justice of the European Union

Case C-413/14 P, Intel v Commission, pending judgment.

Case C-23/14, Post Danmark, EU:C:2015:651.

Case C-67/13 P, CB v Commission, EU:C:2014:2204.

Case C-549/10 P, Tomra and Others v Commission, 2012, EU:C:2012:221.

Case C-209/10, Post Danmark, 2012, EU:C:2012:172.

Case C-52/09, TeliaSonera Sverige, 2011, EU:C:2011:83

Case C-280/08 P, Deutsche Telekom v Commission, 2010, EU:C:2010:603

Case C-202/07 P, France Télécom v Commission, 2009, EU:C:2009:214,

Case C-95/04 P, British Airways v Commission, EU:C:2007:166.

Case C-189/02, Dansk Rørindustri and Others v Commission, EU:C:2005:408.

Case C-62/86, AKZO v Commission, EU:C:1991:286

Case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission*, 1983,
EU:C:1983:313

Case 85/79, Hoffmann-La Roche & Co. AG v Commission of the European
Communities, 1979, EU:C:1979:36

Case 56-65, Société Technique Minière v Maschinenbau Ulm GmbH,
EU:C:1966:38.

General Court

Case T-286/09, Intel v Commission, EU:T:2014:547.

Case T-155/06, Tomra System and Others v Commission, EU:T:2010:370

Case T-301/04, Clearstream v Commission, EU:T:2009:317.

Case T-203/01, Michelin v Commission, EU:T: 2003:250

Case T-83/91, Tetra Pak v Commission, EU:T:1994:246.

Opinions of Advocate General

AG Wahl, C-413/14 P, Intel v Commission, EU:C:2016:788

AG Kokott, C-23/14, Post Danmark, EU:C:2015:343.

AG Kokott, C-226/11, Expedia, EU:C:2012:544.

Commission

Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20.

Case COMP/E.-1/38 — 113/Prokent-Tomra.

Case COMP/C-3/37.990, Intel.

Case COMP/E-2/36.041/PO — Michelin.

Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13

IV/D-2/34.780 - Virgin/British Airways.

Legislation

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, p. 1-390, 2012.

Protocol No 27 annexed to the Treaty of Lisbon, OJ C 83/309.

Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, p. 1-25, 2003.

Doctrine

Bill Batchelor, '*Post Danmark II – EU Commission Guidance on Economic Assessment of Rebates under Article 102 Survives... Just.*', Kluwer Competition Law Blog, 2015

Katalin Cseres, Joana Mendes, 'Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits', *Common Market Law Review*, Vol. 51, No. 2, 2014

E. Elhauge, Tying, Bundled Discounts and the Death of the Single Monopoly Profit Theory, *Harvard Law Review*, volume 123, no. 2 dec 2009 pp 399-478.

Damien Geradin, Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche, *Journal of Competition Law & Economics*, issue 11, 2015, p 579-615.

Damien Gerard, Koen Lenaerts, Decentralisation of EC Competition Law Enforcement: Judges in the Frontline, *World Competition* Issue 3, 2004, pp. 313-349.

Pablo Ibáñez Colomo, 'Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy', LSE Law, Society and Economy Working Papers 29/2014, accessible at https://www.lse.ac.uk/collections/law/wps/WPS2014-29_Colomo.pdf.

Alfonso Lamadrid,, '*Much more on the Intel Judgment*', *Chilling Competition*, 2015, accessible at <https://chillingcompetition.com/2015/02/23/much-more-on-the-intel-judgment/>.

Liza Lovdahl Gormsen, 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?', *World Competition* 36, no. 2, 2013, p. 223-246

Luc Peepkorn, 'Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates', February 2014, *Concurrences Review* N° 1-2015, Art. N° 70835, pp. 43-63

Nicolas Petit, 'Intel, Leveraging Rebates and the Goals of Article 102 TFEU', 2015, accessible at SSRN: <https://ssrn.com/abstract=2567628>.

Nicolas Petit, 'THE ADVOCATE GENERAL'S OPINION IN INTEL V COMMISSION: EIGHT POINTS OF COMMON SENSE FOR CONSIDERATION BY THE CJEU', *Concurrences Review*, No. 1, Forthcoming 2016,

Per Rummel, 'Rebate schemes under Article 102: *Post Danmark II*', *Common Market Law Review*, Issue 4.

Konstantinos Sidiropoulos, 'POST DANMARK II: A CLARIFICATION OF THE LAW ON REBATES UNDER ARTICLE 102 TFEU', 2015, accessible at <http://europeanlawblog.eu/?p=3013>.

Andrei Usai, 'The Intel Case: Between Tomra Systems ASA, the Commission's Guidance on Enforcement Priorities, and the Alleged Infringement of Procedural Requirements - No Fat Left on the Bone', *E.C.L.R.* 2014, issue 8, pp. 387-401.

James Venit, 'Post Danmark II and the Intel opinion: much more in common than first meets the eye', *Global Competition Review*, 2016, accessible at

<http://globalcompetitionreview.com/article/1070727/post-danmark-ii-and-the-intel-opinion-much-more-in-common-than-first-meets-the-eye>

Wouter Wils, '*The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance*', *World Competition*, vol. 37, issue 4, 2014, accessible at <http://ssrn.com/author=456087>

H. Zenger, *Loyalty Rebates and the Competitive Process*, *Journal of Competition Law & Economics*, volume 8, Issue 4, pp. 717-768.

Other sources of law

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 'Report on Competition Policy 2015', SWD(2016) 198 final.

Summary of Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel)

OECD Policy Roundtables on Fidelity and Bundled Rebates and Discounts, DAF/COMP(2008)29

Other materials

Pia Opper, Foo Yun Chee, 'EU Court adviser backs Intel fight against record EU fine', 2016, Reuters, accessible at <http://www.reuters.com/article/us-eu-intel-antitrust-court-idUSKCN12K0QN>