Conditional pricing: Why the General Court is wrong in *Intel* and what the Court of Justice can do to rebalance the assessment of rebates

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I. Introduction

1. In its judgment of 12 June 2014 in the Intel case, the General Court (GC) dismissed in entirety its action brought by Intel against the underlying Commission decision of 2009 to fine Intel for abusing its dominant position in the x86 central processing units (“CPUs”) market. To be clear from the outset, I will not argue in this article that the General Court should not have dismissed the action by Intel or should not have upheld the fine; in its decision, the Commission showed convincingly that Intel abused its dominant position and should be fined. However, the Commission was only able to show this convincingly by applying an effects-based approach, structured along the lines of the approach described in its Article 102 Guidance in which the “as efficient competitor test” plays a significant role. The General Court in its judgment reasons explicitly that, for finding an abuse in a case where a dominant firm uses what it describes as exclusivity rebates, it is not necessary for the competition authority (or complainant in court) to show likely or actual negative effects and that, in addition, use of the “as efficient competitor test” can and should play as part of that approach, for the assessment of conditional rebates, including exclusivity rebates.

This article provides arguments why in the General Court is wrong in denying the relevance of the effects-based approach for the assessment of exclusivity rebates. Conditional rebates, including exclusivity rebates, and single branding/exclusive purchasing and tying obligations, should not be dealt with under a “by object” and single branding/exclusive purchasing and tying rebates. Conditional rebates, including exclusivity rebates, obligations, should not be dealt with under a “by object” standard once the firm in question is dominant. Such treatment is not justified in view of the possible efficiencies, it would undermine the consistent application of Articles 101 and 102 in view of the similarities of the possible effects of the various rebate systems and obligations, and it would discourage pro-competitive agreements and conduct by both dominant and non-dominant firms. The goal of EU competition law is to protect competition for the benefit of consumers, not to protect competitors against competition, even if this competition is waged by a dominant firm. The Court of Justice can rectify the damage to a consistent and proper application of Article 102 by confirming the effects-based approach. This would allow a useful role in the “as efficient competitor test” and can and should play as part of that approach, for the assessment of conditional rebates, including exclusivity rebates.

Principal Expert Anti-Trust Policy, DG Competition. This article was written during my stay as Senior Ernêl Noël Fellow at The Jean Monnet Center for International and Regional Economic Law & Justice, New York University. I have benefited from discussions with and feedback from Ekaterina Rousseva, Svend Albæk, Lars Kjolbye, Einer Elhauge, Abraham Wickelgren and Michael Salinger. Anne Hyád improved the English. All errors and omissions are mine. Although I do not consider that there is any conflict of interest, it may be considered useful to mention that Svend Albæk and I were two of the main authors of the Article 82 Decision Paper and the Article 102 Guidance. The opinions expressed in this article are strictly personal; they do not represent the views of the European Commission, DG Competition or any other institution, entity, person, etc.

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ABSTRACT

Dans cet article, l’auteur expose les raisons pour lesquelles le Tribunal de l’Union européenne refuse, à tort, la pertinence de l’approche “par effets” pour évaluer les rabais d’exclusivité. Les rabais conditionnels, y compris les rabais d’exclusivité, ainsi que les obligations de monomarquage, d’achat exclusif ou de ventes liées, ne devraient pas être appréhendés en tant que restrictions “par objet” dès lors que l’entreprise en question est en position dominante. En effet, non seulement une telle démarche n’est pas justifiée en raison d’éventuelles efficiencies, mais elle pourrait également nuire à l’application cohérente des articles 101 et 102 TFEU au vu des similarités des effets possibles des différents systèmes de rabais d’exclusivité. L’approche “par objet” pourrait, en outre, désorganiser les entreprises, dominantes ou non, d’avoir un comportement favorisant à la concurrence. La Cour de justice peut réparer ce coup porté à l’application cohérente de l’article 102 TFEU en confirmant une approche “par effets”, non en reprenant le rôle que le test du concurrent exclusif, qui en fait, peut et doit jouer dans l’évaluation des rabais conditionnels, dont rabais d’exclusivité.

This article provides arguments why in the General Court is wrong in denying the relevance of the effects-based approach for the assessment of exclusivity rebates. Conditional rebates, including exclusivity rebates, and single branding/exclusive purchasing and tying obligations, should not be dealt with under a “by object” standard once the firm in question is dominant. Such treatment is not justified in view of the possible efficiencies, it would undermine the consistent application of Articles 101 and 102 in view of the similarities of the possible effects of the various rebate systems and obligations, and it would discourage pro-competitive agreements and conduct by both dominant and non-dominant firms. The goal of EU competition law is to protect competition for the benefit of consumers, not to protect competitors against competition, even if this competition is waged by a dominant firm. The Court of Justice can rectify the damage to a consistent and proper application of Article 102 by confirming the effects-based approach. This would allow a useful role in the “as efficient competitor test” and can and should play as part of that approach, for the assessment of conditional rebates, including exclusivity rebates.

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conditional pricing test” is not only not necessary but would be erroneous. This article provides arguments why the General Court is wrong in denying the relevance of the effects-based approach, and the “as efficient competitor test” as part of that approach, for the assessment of exclusivity rebates in particular and conditional rebates more in general. I conclude that the Court of Justice (ECJ) can repair the damage to a consistent and proper application of Article 102 by reversing part of the General Court’s reasoning while confirming the outcome of the judgment.

II. The Intel judgment

2. The reasoning of the GC that requires reversing by the ECJ essentially concerns four points.

3. Firstly, the GC argues that the aim of Article 102 is to preserve “undistorted competition within the common market” (§ 77). This is, or at least could be, understood as implying that the objective of EU competition law is to protect the competitive process itself (a process objective) and not to protect competition for the benefit of consumers (an outcome objective).3

4. Secondly, the GC argues that in case of conditional pricing, the price level itself and the rebate level are not relevant; it is only the conditionality that needs to be assessed. In the words of the GC when comparing the so-called exclusivity rebates with selective price cuts: “However, in the case of an exclusivity rebate, it is the condition of exclusive or quasi exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive” (§ 152, see also § 108).

5. Thirdly, the GC distinguishes, based on earlier case law, between three types of rebates:

- quantity rebates: rebates linked solely to the volume of purchases made from the dominant firm (§ 75);
- exclusivity rebates: rebates the grant of which is conditional on the customer obtaining all or most of its requirements from the dominant firm (§ 76);
- Other rebates: rebates where the grant is not directly linked to a condition of exclusive or quasi-exclusive supply from the dominant firm, but where the mechanism for granting the rebate may also have a fidelity-building effect (§ 78).

6. The first category rebates are deemed generally unproblematic (§ 75), the second are presumed to be abusive (§ 77), and the third require particular consideration of the criteria and rules governing their grant to investigate whether the rebate tends to restrict the buyer’s freedom to choose its sources of supply, to foreclose competitors or to strengthen the dominant position (§ 78).

7. Fourthly, the GC rules that a price-cost test in general and the “as efficient competitor test” (AEC test) in particular are not only not necessary for the assessment of conditional rebates (whether exclusivity or other rebates), as the GC considers it sufficient to demonstrate the existence of a loyalty mechanism to establish a potential anticompetitive effect (§ 145), but would also be erroneous as “an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult” (§ 150).

8. After some preliminary remarks and a summary of the effects-based approach, the remainder of this article will provide economic, legal and policy enforcement arguments why it would be good for EU competition policy and EU consumers if the ECJ would adapt and reverse the GC’s judgment (and where necessary the finding that Intel infringed EU competition law and the resulting fine, but only to adapt the way the GC reached this finding.

III. Some preliminary remarks

9. Firstly, language matters. It is not by accident that I use the term “effects-based approach” and not “more economic approach.”4 For an assessment of firms’ agreements and dominant firms’ conduct under Articles 101 and 102 respectively, it is generally necessary to assess the likely (i.e. potential) and, when distinguishable, the actual effects resulting from the conduct or agreements. Whether these effects are established in a more qualitative or quantitative way, using more or less economic insights and tools, should not be decisive. What should be decisive is that they are established and assessed in an understandable, logical and convincing way, within a relevant time frame and at reasonable costs.

3 At the same time, seemingly not realizing the contradiction, the GC also states (in § 105): “It is apparent from the case law that Article 82 EC [now Article 102 TFEU] is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure.” This is suggesting that the protection of competition for the benefit of consumers is the objective.

4 Case C-209/10 Post Danmark A/S v Konkurrencerådet, judgment of the Court of Justice (Grand Chamber) of 27 March 2012.

5 See, for instance, W. P. J. 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, December 2014.
10. It is thus not a question of applying more or less economics or having cases argued or decided by economists instead of lawyers. It is about getting as close as possible to understanding the effects, within a relevant time frame and against reasonable costs. This is what the Article 102 Guidance describes as intervention “where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure.” The effects-based approach—or for that matter the Article 102 Guidance—is thus certainly not a ploy to get more economists involved or to undermine enforcement. However, if economic insights or econometrics can be helpful, they should not be avoided, unless one is willing to accept sub-optimal enforcement.

11. Secondly, while through their case law the European Union Courts rule on the interpretation of, in this case, Article 102, the case law itself is obviously not static but is continuously changing and developing. This means that, comparing case law over time, there are (partially) conflicting judgments, indicating new directions which EU law has taken or is in the process of taking. One of the consequences is that, possibly aided by some selective citation of case law, different descriptions and visions on EU law can be defended.

12. The aim of this article is not to defend a particular view of EU competition law as the only view possible or the “correct” reading of the case law. The aim is to defend a consistent effects-based and consumer welfare oriented approach for the application of Article 102, which finds support in EU case law as expressed, for instance, in the seminal judgment of the Grand Chamber of the ECJ in Post Danmark and the somewhat older judgment of the GC in Microsoft, but which seems to be under threat.

IV. The effects-based approach

13. The basic philosophy and main elements of the effects-based approach for Article 102, as also embodied in the Article 102 Guidance, can be summarized in a few main points. 6

14. Firstly, the aim of competition policy enforcement is to enhance consumer welfare by protecting competition. This implies that competitors are only protected to the extent that they contribute to consumer welfare. In the words of the Article 102 Guidance, “the aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.” For this the term anticompetitive foreclosure is coined, i.e. foreclosure to the detriment of consumers.

15. Secondly, the approach applied under Article 102 should be consistent with the approach applied under Article 101. This is necessary because in many instances the same conduct can be, and sometimes is, assessed under both provisions of the Treaty. The Van den Bergh case is a good example, where the same obligation on Irish retailers not to use freezers provided by Van den Bergh for the sale of competing ice cream brands, was assessed under both Articles 101 and 102. While the existence of a dominant position and the related degree of market power must be taken into account under both Articles, it would obviously not make sense if the outcome of the assessment depended on the choice of Article being applied.

16. This need for consistency between Articles 101 and 102 holds not only for conduct, such as tying and single brand/exclusive purchasing obligations, which can be assessed under both Articles, but also for other types of conduct, such as rebates, which may normally only be addressed under Article 102. The possible negative and positive effects of rebates, for instance, are very similar to the effects of single branding/exclusive purchasing, and having a different approach would thus not only be unjustified but would also create an unwanted bias in firm conduct.

17. Thirdly, the effects-based approach is applied to all forms of exclusionary conduct and in particular to the specific forms of conduct dealt with in the Article 102 Guidance, such as predation, exclusive purchasing, conditional rebates, tying and bundling. Applying the effects-based approach to such conduct is appropriate for different reasons. It is appropriate because of consistency with Article 101, where it is also general practice to consider agreements which may have a foreclosure

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6 Pt. 20 of the Guidance.
7 For some suggestions along those lines, see for instance the part titled “Cui bono?” in the article of Wils referred to in footnote 5.
8 In anecdotal terms, this is captured by a discussion at a conference on the reform of Article 102 in 2006, where a renowned retired judge said that in his days they did not need a SSNIP test, as they had their own SNIFF test; they used their nose to know when something was rotten. My answer was that, not doubting his intuition, for the sake of consistency and predictability of EU competition policy a more formalized effects-based approach seemed preferable.
10 This part is based on a previous article I wrote: The EU Court of Justice affirms the application of a consumer oriented effects-based approach (Post Danmark), e-Competitions, No 48816, 27 September 2012.
11 Article 102 Guidance, pt 19.
12 Idem.
13 Case T-65/98 Van den Bergh Foods v. Commission [2003] ECR II-4653. In this case, the obligation to use freezers exclusively for the products of the dominant undertaking was considered to lead to outlet exclusivity.
effect as restrictions by effect. It is also appropriate because these various forms of conduct may not only have foreclosure effects harming consumers, but may, depending on the conditions of the case, (also) help to realise efficiencies thereby benefitting consumers.

18. Fourthly, the effects-based approach requires the Commission to show the same standard of actual or likely anticompetitive foreclosure for different forms of conduct. The reason for this is that the possible foreclosure effects of different forms of exclusionary conduct are the same or very similar. A consistent policy thus requires application of the same enforcement standard. Applying the full effects-based approach to some forms of conduct and a more restricted effects-based approach or even a form-based approach to others would not only create unjustified differences in treatment, it would also create an inefficient bias in firm conduct and would open the possibility of so-called “forum shopping,” i.e. firms choosing their conduct less on the basis of effectiveness and more on the basis of the enforcement standard being applied.

19. Of course this policy of one general standard—“the fewer categories the better”—has its limits. For certain types of conduct, a differentiation in approach may need to be made. One obvious justification for applying a lower, more form-based standard to certain forms of conduct is if it can be assumed, based on past experience or the character of the conduct, that these forms of conduct are likely to produce negative effects and unlikely to produce positive effects. In the Article 102 Guidance, an example of such conduct is provided where the dominant firm prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test these products. Such conduct would be akin to what is a restriction by object under Article 101.

20. Fifthly, there is one important differentiation in the application of the effects-based approach in the Article 102 Guidance. A “separate box” is created for refusal to supply. It is in the nature of all types of exclusionary abuses that consumers are harmed by foreclosing competitors. Most types of exclusionary abuse foreclose competitors in an indirect way, by foreclosing competitors from a sufficient customer base (e.g. tying, rebates, predatory pricing) or by foreclosing them from inputs supplied by other undertakings (e.g. exclusive supply obligations). It is rather the exception that the abuse concerns conduct where the dominant firm forecloses competitors from a sufficient customer base. Another reason to be more strict in the case of refusal to supply is that the dominant firm is not forced to share its undertaking’s investment, but rather will invest and innovate themselves to compete with the dominant undertaking. Another reason to be more cautious when intervening against direct foreclosure compared to indirect foreclosure is that the remedy in case of direct foreclosure will often be more intrusive and require monitoring and price setting by the authority. If a dominant firm is forced to provide access or not to limit access to its own input, this will normally require the authority to determine the access conditions (price, quantity, etc.), a role for which it may not be well suited.

21. Sixthly, for all pricing conduct, the effects-based approach includes, where sufficient data is available, the application of the “as efficient competitor test” as an important element for finding anticompetitive foreclosure. Only low pricing can foreclose competitors, but low pricing, in whatever form, may also benefit consumers and help to realise efficiencies. The “as efficient competitor test” is particularly useful to ensure that enforcement protects competition and not (inefficient) competitors. The Article 102 Guidance makes it clear that “the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.”

If the conduct is only capable of excluding less efficient competitors, it is in general unlikely that such conduct will have an adverse impact on effective competition and on consumers. To the extent that sufficiently reliable data is available, the application of the “as efficient competitor” test thus creates a safe harbour for pricing above cost, although it is recognised that “in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anticompetitive foreclosure.”

22. Seventhly, the effects-based approach adopted in the Article 102 Guidance contains a fully-fledged efficiency defence. This efficiency defence is modelled on the efficiency defence in Article 101(3), for reasons of consistency between the application of Articles 101 and 102 (as explained above) and to allow a proper balancing of possible negative and positive effects of the assessed conduct in a particular case. It is clear from the text of the Article 102 Guidance that the last condition of the efficiency defence—that the conduct does not eliminate effective competition—is not failed simply because the firm in question is dominant.

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17 The Article 102 Guidance explicitly states that the stricter criteria to find an abuse apply equally to cases of de novo refusal to supply, termination of supply, constructive refusal and margin squeeze; see its section IVD.

18 Article 102 Guidance, pt 23.

19 Article 102 Guidance, pt 24.

20 Article 102 Guidance, section III.D, in particular pts 30-31.
V. The objective of Articles 101 and 102

1. Two schools of thought

23. There seem to be two schools of thought about what should be considered the objective of Articles 101 and 102. The first school sees the goal as to protect the process of competition, sometimes narrowed to ensuring a competitive market structure and sometimes widened to ensuring that competition is not distorted. The essence of this particular view is that the objective is not the outcome/result/effect of competition, but the process or structure of competition itself. The second school sees the goal as to protect competition for the benefit of consumers, that is to protect the process or structure of competition in order to protect consumer welfare, and it is thus outcome or effects oriented. As indicated in section II of this article, the GC confusingly mentions both objectives.

24. It would be good for the ECJ to confirm the position it took, sitting as a Grand Chamber, in Post Danmark (i.e. that the objective is to protect competition for the benefit of consumers), as it is fair to say that both schools can point to case law and the European Treaties’ Articles and Protocols to support their view.

25. In a recent article, W. Wils argues, rather emphatically, that there can be, and there is, only one interpretation of what the objective of Articles 101 and 102 is: a system of undistorted competition, as part of the internal market. From this he draws the conclusion that the “EU competition rules thus protect the competitive process as such” 21. He bases this on Protocol No 27 on the internal market and competition, annexed to the Treaty on the Functioning of the European Union. This annex effectively reads that “the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.”

26. I would argue that the text of the Protocol requires that the various relevant EU policies (in particular internal market policy and competition policy) together have to ensure the realisation of the internal market, which includes a system ensuring that competition is not distorted. How that should be achieved and what “undistorted competition” means is not made clear in that text. To find out what the role of EU competition policy is in that wider context, as a part of and a complement to the internal market and competition, annexed to the Protocol and Protocols to support their view.

27. As we all know, Article 101(1) prohibits agreements that restrict competition, but such agreements are only void if the conditions for exemption of Article 101(3) are not fulfilled. According to Article 101(3), an agreement restrictive of competition is not prohibited provided the agreement contributes to creating efficiencies, allows consumers a fair share of these benefits, does not restrict further than necessary to obtain the efficiencies and does not afford the firms the possibility to eliminate competition.

28. These conditions harbour and reflect the goal(s) of Article 101. The condition that consumers should benefit indicates that the objective of applying Article 101 is indeed to protect competition as a means to further consumer welfare and not to protect the competitive process itself. The text makes clear that as long as consumers benefit and the restrictions are indispensable, an agreement that restricts competition is allowed. It is allowed although the process of competition is harmed and, for that matter, it is also allowed if other interests, such as easy or equal access to the market for competitors, would be harmed. The Article’s conditions simply do not foresee nor allow balancing of other interests or balancing of consumer welfare against other interests. This logically implies that the restriction of competition (i.e. the assessment under Article 101(1)), is also analysed from the perspective of its effect on consumer welfare; this will be necessary for the balancing and to establish whether consumers do benefit overall from the agreement.

2. Post Danmark

29. The EU Courts did already rule (e.g. in Atlantic Container Line, British Airways, Microsoft and TeliaSonera) that the anticompetitive exclusionary effect arising from unilateral conduct may also be counter-balanced, or outweighed, by advantages in terms of efficiency which benefit the consumer. 22 In the Post Danmark judgment however, the ECJ for the first time aligned the conditions for a successful efficiency defence under Article 102 with those under Article 101(3) TFEU, enumerating all the conditions for a successful efficiency defence in the same way as the Commission had already done in the Article 102 Guidance Paper (§ 40-42 of the judgment and point 30 of the Guidance). 23 This position of the ECJ does not only confirm the seventh element of

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21 Wils, referred to in footnote 5, in addition writes in section 2.4 of his article: “The EU Treaties clearly specify the objective of the EU competition rules. Hence there is no room for the Court of Justice or the European Commission (…) to make a different choice (…) Any economic approach that is based on the assumption that the objective to be pursued is something other than a system of undistorted competition as part of the internal market is not fit for the purpose of interpreting Article 102 TFEU.”


23 The ECJ in Post Danmark followed the Article 102 Guidance practically word by word in its description of the efficiency defence and also followed it by distinguishing this defence from the possibility for the dominant firm to show that its conduct is objectively necessary. These two defences together make up how firms can objectively justify their conduct. Whereas the efficiency defence concerns a case based balancing of effects, the objective necessity test is based on factors external to the parties themselves and unrelated to their position on the market, but for instance based on reasons of public health or safety protection. See pt 29 of the Article 102 Guidance and pt 18(2) of the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 99.
the effects-based approach described in section IV, but also the first element concerning the objective to enhance consumer welfare by protecting competition.

30. Following what had already been said in Continental Can:24 the ECJ in Post Danmark (§ 20) clarified: “It is apparent from the case-law that Article 82 EC [now Article 102 TFEU] covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition (…). It is in the latter sense that the expression ‘exclusionary abuse’ appearing in the questions referred to is to be understood.” In the same vein, the ECJ added to the classical definition of exclusionary abuse provided in Hoffmann-La Roche25 the qualification “to the detriment of consumers.” “In that regard, it is also to be borne in mind that Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition” (§ 24 of the judgment).

3. Not just semantics

31. This may seem like a semantic discussion, as protection of the competitive process is usually a pre-condition to protect consumers. In addition, often the likely harm to consumers is, in practice, established on the basis of evidence that effective competition is distorted. However, it is far from just semantics in light of ensuring that prohibiting a dominant firm’s conduct is not just protecting competitors but is protecting effective competition. It is important that it is clearly recognised that changes in the structure of the market will be relevant to the extent that it can be convincingly argued that these changes are likely to harm competition to the detriment of consumers, for instance because the foreclosed competitors offer innovative products or their foreclosure reduces the competitive constraints on the dominant firm. This focus on consumer harm gives orientation and consistency to competition law enforcement, something that cannot be expected from the goal of preserving a certain (not further defined) structure of the market or the goal of protecting the competitive process itself. The latter either leads to a rudderless enforcement policy because there is no benchmark: it is not clear, for instance, whether a merger from five to four but which will make enforcement arbitrary, unpredictable and most likely very slow.26

32. By reconfirming the position it took in Post Danmark, the ECJ would also confirm its demystification of the somewhat mythical but vague term “competition on the merits.” In Post Danmark, the ECJ stated that “competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view, among other things, price, choice, quality or innovation” (§ 22 of the judgment). By equating competition on the merits to conduct that does not harm consumers, the Court said, again, that an exclusionary abuse of dominance can only exist if the conduct is likely to reduce consumer welfare. By implication, this means that the special responsibility that dominant firms are supposed to have is nothing other than the responsibility not to harm consumers by reducing competition (i.e. to be aware that their position of economic strength may more easily make their conduct and agreements have anticompetitive effects).27

4. But what about the last condition of Article 101/2(3)?

33. It could be argued that the last condition—that competition is not eliminated—makes it clear that this orientation on the outcome for consumers is only relevant up to a certain point: once the agreement or conduct eliminates competition, the agreement or conduct can no longer be allowed. In other words, it could be argued that at that point the process orientation takes over.

34. This has always been a difficult issue in EU competition law; how to interpret the last condition of Article 101(3)? It is difficult for two reasons. Firstly, the point where elimination of competition becomes an issue is not (clearly) defined. Secondly, how to reconcile this break in balancing with the overall consumer welfare balancing approach of the Article?

35. On the first point, there has been a slow but certain development. For a long time the dominant view was

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26 Unless of course the aim of bringing the interests of firms into the equation is to move the objective from protecting consumer welfare to protecting total welfare. But that does not seem the case when commentators speak about the objective of protecting the competitive process itself. See, for instance, Wils, referred to in footnote 5, who mentions as aspects of the competitive process: consumer welfare, efficiency, variety and consumer choice, the right to compete on the merits, and equality of opportunity between economic operators. While variety and consumer choice are part of and can be measured as consumer welfare, the right to compete on the merits and equality of opportunity between economic operators are principles of a different nature, which are very difficult to weigh against consumer welfare. The virtues of having one goal per policy and having as many policies as goals were first explained by the economist Jan Tinbergen (On the Theory of Economic Policy, 1952). For an application to competition policy, see A. Italianer and L. Peperkorn, Schoenmaker blijft bij je leest, ESB Dossier 2014, nr. 4683S, pp. 71-74.
27 This position of the ECJ confirms not only the first but also the second element of the effects-based approach as described above in section IV.
that the last condition—that of no elimination of competition—was factually the same as no dominance (i.e. that a dominant position implied elimination of competition). According to this view, a restrictive agreement could thus never be exempted as soon as one of the parties had a dominant position. It was only logical to consider that the same applied to exclusionary unilateral conduct under Article 102. However, as explained in section V.2., bit by bit the EU Courts started to indicate that the anticompetitive exclusionary effect arising from unilateral conduct may be counter-balanced by efficiencies which benefit the consumer. The end point, at least for the moment, of that development is the recognition in Post Danmark of what is, in effect, a full blown “Article 102(3)” defence. The ECJ thus confirmed the position taken in Atlantic Container Line: that elimination of competition is not the same as dominance, but refers to a higher threshold of market power.

36. An indication of what that higher threshold of market power is can be inferred from the language the ECJ used in Post Danmark (§ 42) to describe the last condition. Here, also, the ECJ followed the somewhat innovative language of the Article 102 Guidance and required that the conduct in question “does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.” That same sentence is followed, in the Article 102 Guidance (point 30), by “Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission’s view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.” The higher threshold thus seems to be a durable (quasi) monopoly position, as that is where there is no residual competition and no foreseeable threat of entry.

37. On the second point, how to reconcile this last condition with the overall consumer welfare balancing approach, the language in the previous paragraph indicates that the overall objective is still to protect the benefits of competition for consumers. However, where, absent monopoly, an individual balancing in each individual case is required for the conduct or agreement concerned, the outcome of that balancing is considered as a rule to be negative in the case of a durable (quasi) monopoly position.

VI. Conditional pricing is not about pricing?

1. Is there factually a lower rebated and higher non-rebated price?

38. The second problematic point in the reasoning of the GC in Intel is that it considers that in case of conditional pricing, the price level itself and the rebate level are not relevant; it is only the conditionality that needs to be assessed. There are two possible reasons that could explain this position.

39. The first reason could be that what is, in effect, at stake in a particular case is not a real rebate system. In a real rebate system, an alternative to the rebate offered by the firm is to purchase less from the firm and forego the rebate. It would not be a real rebate system if the buyer is effectively barred from buying less at the higher price. In other words, if, as in the case of single branding/exclusive purchasing obligations, the alternative to accepting the rebate and higher purchase requirement is to purchase none at all from the dominant firm. If that would be the case, one could indeed argue that such a rebate system is not about pricing or the price level, but only about the requirement to purchase a certain minimum amount, possibly to purchase exclusively from the dominant firm.

40. Whether or not the dominant firm is actually willing to supply a lower amount at the higher price is a factual question. Is the dominant firm effectively allowing customers to forego the rebate and buy less at the higher price, or is the dominant firm effectively refusing to supply less at the higher price or delaying such supplies or making it otherwise impossible for the customer to purchase less from it? In the second scenario, it would indeed make sense to equate the rebate system to a single branding obligation sweetened by a rebate. However, this was not an argument on which the Intel case has been built.

28 See, for instance, pt 135 of the previous Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, pp. 1-44): “The last criterion of elimination of competition for a substantial part of the products in question is related to the question of dominance. Where an undertaking is dominant or becoming dominant as a consequence of the vertical agreement, a vertical restraint that has appreciable anti-competitive effects can in principle not be exempted."

29 Innovative because the language differs from the literal text of the last condition in Article 101(3), which speaks of “eliminating competition in respect of a substantial part of the products in question.” However, given that the Commission stresses in various guidelines the need for consistency in the application of Articles 101 and 102, it cannot be inferred that the difference in language was meant to mean a difference in substance. See also the current Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46, in particular pt 127.

30 The terminology used for obligations to purchase all or most requirements from the supplier varies. Such requirements are referred to as single branding in the Guidelines on Vertical Restraints and the accompanying block exemption regulation and as exclusive purchasing in the Article 102 Guidance. In the US, this is captured under the wider category of exclusive dealing.
2. Do conditional rebates imply lower prices?

41. The second reason, which seems implicitly to play a role in the Intel judgment, could be the view that conditional rebates are not real rebates. That is to say, they do not really entail a lower price and thus do not bring benefits to the customers in the first place. This view seems based on a mistaken reading of the economic literature.

42. There is indeed literature which indicates that rebates can be used to increase prices by allowing the dominant firm to apply different forms of price discrimination. In essence, these models show that a monopolist, if entry of competitors is not an issue, can use rebates to deprive customers of customer surplus that would be available to the customers had the monopolist simply applied a uniform monopoly price. These models are relevant in cases where the theory of harm concerns price discrimination leading to an exploitative abuse. However, that was not the issue in the Intel case, where the theory of harm was about exclusionary abuse.

43. In case of a theory of harm based on exclusion/foreclosure of one or more (potential) competitors of the dominant firm, the question is how rebates can be used by the dominant firm to realise a foreclosure effect. The economic literature is also conclusive on this aspect of conditional pricing: such can be obtained by using rebates to lower the price for marginal sales. That is, one of the reasons why rebates can be attractive to (dominant) firms is that they allow a firm to lower its price selectively for those customers, or that part of demand of a customer, where competition is most fierce. This may allow firms to compete while avoiding having to lower their price for all demand/all customers. However, the way that competition takes place is nonetheless by lowering the price for the part of demand where competition is fierce and that does lead to a direct customer benefit.

3. Competition as a collective good

44. The conclusion that rebates at least lead to lower prices for part of demand usually leads to three remarks. Remarks meant to nuance or put in doubt this price lowering effect. The first is that if there are many customers, this may create a prisoners’ dilemma/free riding type situation: customers have a common interest in having more competition upstream that would result in lower prices, etc., but individually they may be more concerned not to miss the offer of the rebate. In short: competition is a collective good. This may mean that many/all customers settle too quickly for just a minor rebate, fearing the possibility of otherwise missing the opportunity of obtaining a rebate. As a result, the customers’ benefit from the rebate will be (very) limited.

45. This is, of course, a factual question, about the size of the benefit in the form of a lower price. The answer can be expected to be different if there is only one customer or if there are only a few customers, as the free rider problem will be absent or less strong. It will also depend on whether competitors need access to (practically) all customers or whether access to only one or some is sufficient for becoming a serious competitor. In the latter case, the (dominant) firm will normally have to give substantial rebates to all customers in order to foreclose all “the gates,” while the competitor(s) can concentrate their efforts on certain customers only. In the Intel case, the number of producers of desk computers and laptops was limited and some OEMs were considered strategically more important than other OEMs in their ability to provide rival chip manufacturers access to the market. The argument that the rebates were effectively insignificant did not play a role in the case.

4. Higher prices as a result of foreclosure

46. The second remark is that rebates, by foreclosing competition, may allow firms to effectively increase their market power/strengthen their dominant position and that this may allow the (dominant) firm to increase its overall price, possibly leading to a situation where the rebated price is not lower than (and possibly is even higher than) the list price that was asked before the rebate system was put in place. This is, of course, a false or at least a circular argument, because it assumes the foreclosure effect, which is exactly what has to be shown in the first place. In case the rebate does not foreclose but increases price competition, only the benefits to customers in the form of lower marginal prices remain. In case the rebate is instrumental in foreclosing/restricting competition, it is to be expected that this can lead to higher prices, unless there are countervailing efficiencies. That prices may be higher when market power increases is the basic tenet of competition law. The question is, however, whether we can expect that conditional rebates, including exclusivity rebates, as a rule will increase market power of the firm giving the rebate and will not lead to countervailing efficiencies. The general answer is that we cannot expect this (see section VII).


32 A good example of a paper that could be relevant in a case of exploitative conduct but where conclusions are drawn for exclusionary conduct is F. Maier-Rigaud and U. Schwab, Do Retroactive Rebates Imply Lower Prices for Consumers? Document de travail du LEM, 2013-11. In their model about a monopolist’s pricing, entry is assumed impossible and competition and exclusion are thus not an issue. Nonetheless the resulting possibility to apply first and second degree price discrimination with the help of rebates, is used as “proof” that in cases where foreclosure is the issue such rebates will also lead to higher prices and consumer harm.

33 See Economides referred to in footnote 31. See also Wils, referred to in footnote 5, who refers to Economides.

34 In general in this article the expression “increased or higher prices” is used as a short-hand for the various ways in which the parameters of competition—such as prices, output, innovation, the variety and quality of products—can be influenced to the detriment of consumers. See also the Article 102 Guidance, at 11.
5. Why dominant firms cannot be expected to unconditionally lower prices

47. The third remark is that it would be better for customers if firms were forced, by not allowing conditional rebates, to lower their price over all their output (i.e. for all customers/all demand, instead of only lowering the price where competition is felt). This remark starts from the, wrong, premise that a dominant firm (or any firm for that matter) would choose to give the same or a similar rebate unconditionally over all its output in case it would not be allowed to use conditional rebates and to give a rebate over only part of its output.

48. In order to make clear why that premise is wrong, it is useful to consider an example of a dominant firm that currently sells 60 units of its product to a customer at its list price of 100 euro per unit. The supplier would like to increase its sales to this customer to 100 units. In case the firm would apply a conditional rebate in its effort to increase sales, it could for instance lower the price to 90 euro on condition that the customer buys at least 100 units (a retroactive rebate) or lower the price to 75 euro for every unit bought in excess of 60 units (an incremental rebate). In both cases the extra 40 units would be sold against an effective price of 75 euro and would give it an extra 3,000 euro turnover, on top of the 6,000 euro turnover for the first 60 units. If we assume costs are 70 euro per unit, profits will increase from 1,800 euro (60 x (100 – 70) euro) to 2,000 euro (an additional 40 x (75 – 70) euro) on the additional 40 units. Would it be an attractive alternative for the dominant firm to instead lower its price unconditionally to 90 respectively 75 euro if conditional rebate systems were not allowed?

49. This is obviously not an attractive alternative for a profit maximising firm. A profit maximising (dominant) firm will evaluate where it is making its profit, now and in the (near) future. The firm, if not allowed to apply conditional pricing for that part of demand that is willing to switch or has already switched to alternative suppliers, will concentrate, more than before, on that part of the market where demand is less willing to switch and where it may thus have considerable market power. Prohibiting the dominant firm from using conditional pricing will effectively force the dominant firm to focus more on this uncontestable part of demand where it is able to command high prices, maintaining its “monopoly” profits, and leaving the rest of the market more to the rival(s). The extent to which it will concentrate on “its” part of the market will depend on its expectations about the dynamics of the market, but compared to the situation where it could lower the price selectively for the contestable part, it will certainly focus more on the uncontestable part of demand, as any general lowering of its price will lower its profits. In the example above, if it would lower the price across the board to 75 euro, the additional turnover resulting from selling 40 extra units would only be 1,500 euro (100 x 75 euro minus 60 x 100 euro) and its profits would decrease from 1,800 to 500 euro (100 x (75-70) euro). The result will be that the dominant firm will no longer compete (fiercely) for the contestable part of the market and competition policy, by prohibiting conditional rebates, would effectively be providing a price umbrella for the rival(s), a place where the rival(s) can shelter against competition from the dominant firm.

6. Competition hurts competitors and benefits consumers

50. It is for this reason that it is worrying that the GC (for instance in § 150) expresses a concern that conditional rebate systems may not only foreclose competition and make access to the market impossible, but may also, while leading to prices above cost, make access to the market more difficult for competitors. Effectively, the GC says here that it is abusive to give a conditional rebate which, by lowering the price for a certain part of demand, lowers profits of competitors. This is worrying because lowering prices, even if only for part of demand, and therewith lowering profits of competitors and increasing the pressure to improve, is what many would see as the essence of competition.

51. What we see here are two fundamentally opposed views on how competition will bring its usual benefits of increased incentives to lower costs and prices and increase quality and choice. The GC seems to think that competition and consumers are best served by protecting the rivals against competition from the dominant firm, by creating a shelter where the dominant firm cannot force them to price low and compete fiercely for those customers that are willing to switch (part of) their demand. By saying that the level of the rebate or the resulting price do not matter, and that it is only the conditionality that matters (§ 107-109 of the judgment), it subscribes to the view that protecting rivals against competitive pressure exerted by the dominant firm will protect competition.

52. The ECJ in *Post Danmark* seems to adhere to the more common view that it is pressure on competitors that will breed competition, innovation and excellence, while protection will only lead to rent seeking behaviour

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35 For simplicity, fixed costs are assumed absent in the example, and the 70 euro costs per unit are thus all variable costs, but the overall conclusion would be the same with fixed costs.

36 For reasons explained later in section VIII.5, conditional pricing cases with negative competition effects are usually about dominant firms which are, at least for a certain part of demand, an unavoidable trading partner, be it because of their superior production capacity, because of brand loyalty of certain customers or for other reasons.

37 An across the board lowering of the price to 90 euro will simply not be enough to increase demand with 40 units, as only an effective price of 75 euro was able to do that. It will in addition also lower the dominant firm’s profits.
and undermine the incentives to compete. Protecting inefficient competitors against competition is not only bad for consumers but is also bad for the economy in general as it will hamper efficient reallocation of factors of production. The ECJ showed in Post Danmark, and in earlier cases such as Akzo, that it understands very well that in case of pricing conduct, only too low pricing can foreclose and harm competition. It is generally not possible to foresee efficient rivals by charging a price above cost. This logic—that in case of pricing conduct only too low pricing can foreclose and harm competition—holds not only if the dominant firm simply charges a low price to all customers, but also if the dominant firm offers the low price only to certain customers, or only for a certain part of the demand of customers, or only in return for exclusivity. However, whether rivals can compete for the complete demand of customers (“competition for the customer”) or whether rivals are able to compete only for part of customers’ demand (“competition for the contestable part of customers’ demand”) has a consequence for calculating the effective price a rival has to offer in order to convince customers to switch (part of) their demand (see section VIII.5).

53. The GC’s attempt to distinguish the Intel case from Post Danmark and to draw from that distinction the conclusion that conditional pricing is not about pricing is not very convincing. The GC argues that Post Danmark concerned “a policy of charging low prices,” but did not involve “an exclusivity rebate system” (§ 100 of the GC judgment). However, from the ECJ judgment in Post Danmark (§ 6-7 of that judgment) it is self-evident that Post Danmark and its rival Forbruger-Kontakt were competing for the complete business of handling the unaddressed mail of each of the supermarket groups in question and that the rebate was effectively linked to obtaining (quasi) exclusivity. Whether the condition of exclusivity was expressly part of the negotiations that both rivals had with each of the supermarket groups or whether exclusivity simply resulted from an efficient business strategy of the customers should not matter for the foreclosure analysis, or at least not to that degree, if an unbiased and consistent competition policy is the objective. What was different compared with the Intel case was that in Post Danmark there was competition for the customer, as each customer was willing and able to switch all or practically all of its demand to one or the other main supplier. It thus made perfect sense in Post Danmark to make a ruling based on the overall price and cost and not to apply the more sophisticated price-cost test developed in the Article 102 Guidance for dominant firms that are an unavoidable trading partner and applied by the Commission in Intel.

VII. Types of rebates and presumptions of legality and illegality

54. The third problematic point in the reasoning of the GC concerns its classification of conditional rebates. As described in section II, the GC distinguishes between three types of rebates: quantity rebates, exclusivity rebates and other rebates. The first category of rebates are deemed generally unproblematic, the second are presumed to be abusive, and the third require particular consideration of the criteria and rules governing their grant to investigate whether the rebate tends to restrict the buyer’s freedom to choose its sources of supply, to foreclose competitors or to strengthen the dominant position. There are three problems with this classification: (1) the categories are not very clear, (2) the focus on the criteria for granting the rebate for the third category indicates that only a limited effects-based approach is required and (3) the presumptions are not justified. The latter in particular has major negative consequences for the balance and consistency of EU competition policy enforcement.

1. Quantity rebates

55. The first category creates a safe harbour for rebates linked solely to the volume of purchases made from the dominant firm. It is not clear what type of rebates fall in this category. Is it only rebates linked to one-off purchases (i.e. linked to individual transactions), and then only when these rebates are not individualized but are standardized and available to all customers at the same time? Does it also cover standardized incremental rebates (i.e. rebates given on purchases above a particular volume threshold if achieved in a certain period, and where the rebate percentage may increase whenever a buyer’s purchases over that period exceed additional higher volume thresholds)? And what about retroactive rebate schemes with standardized volume thresholds, where the rebate applies to all purchases once a particular volume threshold is exceeded? The reference to Michelin II, where such a rebate system was at issue and deemed abusive, seems to indicate that such rebate systems are unlikely to be accepted as quantity rebates.

56. Without clear boundaries, the presumption that quantity rebates will be pro-competitive may lead to under-enforcement. One could argue that this risk is not so high, as it does not concern a real legal presumption, as it is anyhow up to the authority or complainant in court to demonstrate convincingly that the conduct in question may lead to likely or actual negative effects. However, given the diverse types of rebates that could be understood to fall under this category, the presumption seems

unjustified and would merit at least a qualification along the lines of what is expressed concerning standardized rebate schemes in the Article 102 Guidance: standardized volume thresholds may indeed be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect, but this could be different where “it can be established that a standardized volume threshold approximates the requirements of an appreciable proportion of customers” (pt 45 of the Guidance).

2. Other rebates

57. The third category of “other rebates” requires, in principle, an effects-based approach, where all legal and economic circumstances may have to be investigated. However, the way the GC describes this assessment, by focusing on the criteria and rules governing the grant of the rebate and by stating that “In order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty mechanism” (§ 78 and 145 of the judgment), it seems that to find abuse it suffices to show that the rebate tends to result in (quasi) exclusivity for certain customers. That is not a credible and consistent effects-based approach.

3. Exclusivity rebates and the distinction between by object and by effect

58. The third and main problem with the GC’s classification of rebates concerns the negative presumption as regards exclusivity rebates. This presumption effectively puts such rebates in the by object category and this has negative consequences for a consistent competition policy enforcement, not only in the area of rebates, but also beyond in areas such as single branding/exclusive purchasing and tying. It distorts a proper application of the distinction, made in EU competition law, between restrictions and conduct “by object” and “by effect.”

59. Restrictions and conduct by object are those which generally have net negative effects for consumers. They can be expected to have net negative effects because these are restrictions and conduct which are highly unlikely to be used to create efficiencies, basically because they are not able to create efficiencies or because other restrictions or conduct are superior to create the concerned efficiencies. At the same time, by object restrictions and conduct are very well suited to create negative effects.

60. It is because of the inability or low likelihood of creating efficiencies, combined with the capability of creating negative effects, that by object restrictions/ conduct are generally used only by those who have (individually or collectively) considerable market power. As is well known, only those with market power can restrict competition to increase their own profits at the expense of their customers without competition punishing them for that.

61. Cartel agreements are the obvious example: collectively agreeing to increase the price will practically never create efficiencies and will thus only be used by companies who can collectively control the market to the detriment of their customers. Even if a cartel is formed, by mistake, by a group of producers who collectively are too small to control the market—and who will thus fail to produce an appreciable negative effect on the market as any price rise they initiate will be met by customers going to the non-participating competitors resulting in serious loss of market share for the cartel participants—not allowing such a cartel does not risk destroying any efficiencies.

62. It is this expected outcome of “normally having a net negative effect on consumers” that justifies that in cases involving a by object restriction/conduct, the presumption is used that the agreement or conduct will have negative effects and, except in the rare case where the parties can convincingly show countervailing benefits, there is a short-cut in the investigation.

63. Usually restrictions and conduct are defined as “by object” based on sufficient experience that the restriction or conduct in question will normally have an overall negative effect on consumers.40 In the case of a truly new type of restriction or conduct, it thus seems prudent to first acquire sufficient experience before classifying the new restriction or conduct. However, in some cases it may be clear enough, based on investigating in theory what the effects could be, that the new type of restriction or conduct can safely be defined to be by object. Examples of the latter are provided in pt 22 of the Article 102 Guidance: not allowing customers to test competitors’ products (an example based on the Tomra case41) or to pay a customer to delay the introduction of a competitor’s product (example based on the Intel case, where this was described as a “naked restriction”). For both types of restriction, it is difficult to imagine what efficiency could be reached with that restriction.

64. Restrictions and conduct by effect are those which have the capacity to be used both to create efficiencies and to create negative effects. Because the negative effects can only arise where one or more of the parties involved has a certain degree of market power (see above), the Commission has adopted a de minimis threshold (safe harbour for “being too small to have negative effects”).42 Because of the potential to create efficiencies, the Commission has adopted also block exemption regulations with a market share threshold (safe harbour for “insufficient market power to expect net negative

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40 See Case C-67/13 P Groupement des cartes bancaires (CB) v. European Commission, not yet reported, § 51.
effects”). Outside those safe harbours, the Commission has adopted guidelines to describe its framework of analysis, providing a structured effects-based approach.  

4. Why it is the wrong choice to treat exclusivity rebates as a by object conduct

65. It should be clear that creating a category of restrictions or conduct which is considered by object above some market power threshold and by effect below that threshold (a “soft by object”) does not fit this picture. If truly by object (“normally having a net negative effect on consumers”), it will lead to under-enforcement and unnecessary complexity and enforcement costs.  If it concerns a by effect restriction or conduct, it leads to over-enforcement and unnecessary legal uncertainty for firms.

66. This debate is not new. Using a market power screen or a dominance screen, including the approximation by a market share screen, is not an appropriate tool to distinguish between by object and by effect restrictions. The two main reasons are, firstly, that the likelihood of efficiencies is in general not negatively correlated with having market power. In other words, restrictions which are by effect below the threshold do not suddenly change character above that threshold and will not start to generally have net negative effects. Also in case the firm(s) in question has (have) market power, the restriction or conduct may very well be used to create efficiencies. Secondly, and related, it is evidently wrong to consider that the effects will be much different just above and below the threshold. In other words, introducing a sharp break regarding the assessment (below the threshold “by effect” and above the threshold “by object”) is not justified.

67. It could be argued, at least in the past, that Article 102 implied such a sharp break in EU competition law. Not because unilateral conduct, different from restrictions in agreements between firms, can only be addressed once the firm in question is dominant, which is self-evident from the text of Article 102, but because, as explained in sections V.2 and V.4 above, for a long time the dominant view was that the last condition of Article 101(3)—that of no elimination of competition—was factually the same as no dominance and that a dominant position thus implied elimination of competition. It was only logical to consider that the same applied to exclusionary unilateral conduct under Article 102. However, this no longer holds since Atlantic Container Line and certainly since the recognition in Post Danmark of what is, in effect, a full-blown “Article 102(3)” defence.

68. The GC still seems to grapple with the consequences of this development when it states in § 89: “Although exclusivity conditions may, in principle, have beneficial effects for competition, so that in a normal situation on a competitive market, it is necessary to assess their effects on the market in their specific context (…), those considerations cannot be accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted (…)”

69. However, at the same time, the GC does refer to Post Danmark and the possibility of the dominant firm objectively justifying its conduct (§ 94 of the judgment). It could thus also be that the GC had the intention of creating a “soft by object category”: conduct and restrictions—such as exclusivity rebates, single branding/exclusive purchasing obligations and tying obligations—which are not by object below the level of dominance but which become by object once practiced by a dominant firm. Establishing such a category would however be a very unfortunate development for a number of reasons.

70. The first reason is the earlier described need for consistency between the application of Articles 101 and 102. As indicated in section IV, this is necessary because in many instances the same conduct, such as single branding obligations, can and sometimes is assessed under both provisions of the Treaty. It would be unfortunate if the procedure—and possibly also the outcome—depended on which Article is applied. It would be practically impossible and legally contradictory if both Articles are applied simultaneously and under Article 102 the authority could, after having established dominance, immediately require the firm(s) in question to show efficiencies while under Article 101 the authority is required first to show likely harm to competition and consumers.

71. The second reason is that, as explained before, the likelihood of efficiencies is in general not negatively correlated with having market power, and restrictions by effect do not suddenly have a net negative effect at or beyond the dominance threshold.
72. Lastly, such by object classification will create a significant degree of legal uncertainty as the threshold itself is not necessarily clear and predictable in individual cases. The effect of such classification will thus also be felt on the behaviour of non-dominant firms, whose incentives to give conditional rebates will be undermined, which in many cases will mean a loss of competition and consumer welfare.

73. It would be good for the consistency of EU competition law if the ECJ confirmed the line to apply an effects-based approach also under Article 102, as expressed in Van den Bergh and Microsoft and other cases, for conduct and restrictions which are generally considered to fall in the by effect category.

5. Efficiencies of exclusivity rebates

74. Some of the arguments used to advocate the by object classification for exclusivity rebates seem to be based on the absence of efficiencies in the Intel case and previous Commission rebate cases. This however only shows the good choice the Commission made when picking its cases, its nose for abuse (but see footnote 8). However, this limited number of cases does not say much about the likelihood in general for such rebates to create efficiencies.

75. One line of argument supporting the view that such rebates may often be used for pro-competitive reasons comes from the use of such rebates in competitive markets. As explained in section VII.3, by object restrictions/conduct are normally only used by those who (collectively) can control the market. In case a particular restriction or conduct is being used widely also in competitive markets or by firms not having significant market power, this is a strong indication that in many cases increasing competition and efficiencies is what drives the conduct/restriction in question.

76. Rebates which are linked to the customer purchasing all or quasi all of its requirements over a particular period from the same supplier are found in many industries. Competing for customers' demand means that suppliers are willing to offer, and customers expecting to receive, lower prices the more the customer is willing to buy, both in absolute terms and in terms of requirement, for one product or a mix of products. Competition for the customer can be expected to intensify competition. In addition, higher sale/purchase volumes achieved with a particular supplier/customer may help to create certain cost benefits for supplier and/or customer. However, this drive to obtain better conditions by engaging in (quasi) exclusive purchasing may be limited and held back by other interests of the buyer, in particular its preference for variety in case products are differentiated and multi-sourcing in case security of supply is important. As a result, in industries where competition for the customer is common, because ensuring multi-sourcing is not seen as a high priority by the customers, competition often takes place with rebates linked to obtaining exclusivity. Examples are for instance industries where training of personnel to deal with the purchased product provides buyers with an incentive to choose one supplier (e.g. medical equipment, aviation, software). Energy contracts are another example, where the different attractiveness of supplying base- and peak-load is often the reason to prefer to have contracts for the entire demand of a customer. However, also in markets where the transaction costs of multi-sourcing are less important and the advantages of single sourcing are thus less obvious, competition for the whole customer is found, if only as a way to intensify competition. In many sectors, large buyers organise a bidding process to obtain competitive offers to fill their demand for a certain period, which is effectively trading exclusivity against rebates. Lastly, just as another example, it was not uncommon, at least until recently, for some law firms to have exclusivity agreements with certain of their customers for specific areas of law, where the exclusivity is offered against reduced lawyers' rates. In general, not because this is the most effective way to distort competition on the market for specialised law services, but because it is the result of fierce competition where the law firm buys some certainty about future work and the client obtains a lower price in return for giving up some flexibility.

77. A second line of argument supporting the view that conditional rebates in general and exclusivity rebates in particular may often be used for pro-competitive reasons comes from the literature, where possible reasons for such conduct are investigated at the conceptual level. Some efficiencies resulting from conditional rebates and exclusivity rebates in general and exclusivity rebates in particular may often be used for pro-competitive reasons comes from the literature, where possible reasons for such conduct are investigated at the conceptual level. Some efficiencies resulting from conditional rebates and exclusivity rebates prevent such free riding and help to preserve the incentive to invest. Similarly, such obligations and rebates may solve hold-up problems in case the supplier has to make specific investments to supply a particular customer (so-called “relationship specific investments” such as having to adapt or build specific machines or tools to produce components that suit a particular customer’s demand). Such obligations and rebates may also be helpful to create economies of scale in distribution, by allowing the supplier to concentrate on

47 See, for instance, Wils, referred to in footnote 5, section 3.2(b)(ii).

48 In case of large customers, a supplier may prefer not to become too dependent on supplying one main customer and prefer to supply more to other customers.

49 Many retailers, including shoe shops, restaurants and coffee shops, use loyalty schemes where, once the customer has accumulated enough points or stamps, the next purchase will be at a lower price or even for free. These are simple retroactive rebate schemes, trying to increase demand from that customer and possibly having as effect that some customers purchase their shoes, Chinese meals or coffee and donuts quasi exclusively from “their” retailer.
less customers and larger orders. Exclusivity obligations and rebates may also be helpful to overcome capital market imperfections. The supplier may have better information on the quality of the buyer as a borrower than a bank and may be able to obtain extra security for a loan through an exclusive supply relationship, which may thus help the buyer to obtain credit at better conditions. Finally, such obligations and rebates may be helpful to force distributors to focus on one brand, and while this may lead to less in-store competition, it may also lead to more inter-store and inter-brand competition.

78. Other efficiencies are specific to rebates and cannot be obtained by exclusive purchasing/single branding obligations with uniform pricing. For instance, conditional rebates including exclusivity rebates can be helpful to prevent double marginalisation problems. In situations where both the supplier and buyer have significant market power, each will add its margin and their margins together may increase price beyond the level a vertically integrated profit maximising firm would charge. By lowering the marginal price for the customer, such rebates provide the incentive for the buyer to purchase more and lower its price downstream, thus benefitting consumers while also increasing the collective profit of supplier and buyer. While, as said earlier, there is no negative correlation between market power and efficiencies, for double marginalisation the correlation is even positive; this efficiency is only possible in case the parties have significant market power.

79. One may still wonder why firms would need to use retroactive rebates and why not only incremental rebates. Let us return to the example in section VI.5. In this case, the supplier aims at inducing the buyer to purchase 100 units with the help of a rebate and starts from a list price of 100 euro at which the buyer is purchasing 100 units in excess of 40 units. The supplier is now paying a rebate partly over demand that would not switch anyway at a price of 100 euro, which is to the benefit of the buyer. However, the supplier, in order to still achieve 3000 euro additional turnover, i.e. limit the cost of the rebate scheme to 1000 euro, will lower the rebate per unit and increase the price to more than 75 euro per unit for purchases above the lower threshold. In case the incremental rebate is given on all units in excess of 40 units and the supplier does not want to spend more than 1000 euro on the rebate scheme, he will increase the price per incremental unit. Logically, the buyer, confronted with a higher marginal price than before, will purchase less and the supplier will not sell its 100 units. The supplier will also not achieve an additional 3000 euro turnover. To avoid this type of gaming, the supplier will prefer retroactive rebates and be willing to spend more on rebates in case he is allowed to use retroactive rebates. Depending on the situation, retroactive rebates may thus simply be a more effective way to achieve efficiencies.

80. The problem for the supplier is that the buyer has an interest in overstating its possibilities to switch, i.e. to give the impression that the uncontestable share of its demand is smaller than it really is. This might lead the supplier to lower the threshold from which the incremental rebate is available—for instance for all purchases in excess of 40 units. The supplier is now paying a rebate partly over demand that would not switch anyway at a price of 100 euro, which is to the benefit of the buyer. However, the supplier, in order to still achieve 3000 euro additional turnover, i.e. limit the cost of the rebate scheme to 1000 euro, will lower the rebate per unit and increase the price to more than 75 euro per unit for purchases above the lower threshold. In case the incremental rebate is given on all units in excess of 40 units and the supplier does not want to spend more than 1000 euro on the rebate scheme, he will increase the price per incremental unit. Logically, the buyer, confronted with a higher marginal price than before, will purchase less and the supplier will not sell its 100 units. The supplier will also not achieve an additional 3000 euro turnover. To avoid this type of gaming, the supplier will prefer retroactive rebates and be willing to spend more on rebates in case he is allowed to use retroactive rebates. Depending on the situation, retroactive rebates may thus simply be a more effective way to achieve efficiencies.

81. Similar reasoning can be applied to answer why firms may sometimes want to use retroactive rebate schemes with thresholds set as percentages of the requirements of the buyer and not simply in terms of purchased volumes. In particular, in case demand is uncertain and varies significantly between periods, buyers may be less willing to agree on retroactive rebate schemes if the thresholds are set in volumes, as this increases the uncertainty that they will be able to achieve sufficient sales to ensure a lower price. In order to increase predictability of the resulting prices, while keeping the demand increasing effect of lowering the marginal price, supplier and buyer may prefer a retroactive rebate scheme with thresholds set as percentages of the requirements of the buyer.

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51 While double marginalisation cannot be avoided by uniform pricing, in principle two-part tariffs (where customers pay a lump sum and a low per unit price), could also help to avoid the problem. However, in practice two-part tariffs are not very popular, presumably because it is not attractive to customers, for various reasons including risk of contractual break-up, to pay upfront a lump sum.

52 Be aware that simply lowering the price uniformly to 90 euro, without a condition, will reduce the effective marginal price much less (only with 10 euro) and will not be enough to increase demand to 100 units and will not be an attractive option; see section VI.5.
VIII. The AEC test as part of the assessment of conditional rebates

1. Focus on protecting efficient competitors

82. As indicated in section II, the fourth main problem with the Intel judgment is that the GC rules that a price-cost test in general and the “as efficient competitor test” (AEC test) in particular are not only not necessary for the assessment of conditional rebates (whether exclusivity or other rebates), as the GC considers it sufficient to demonstrate the existence of a loyalty mechanism to establish a potential anticompetitive effect, but would also be erroneous as “an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult” (§ 150).

83. As explained in section VI.6, the GC seems here to adhere to the view that competition is best served by protecting competitors; that protecting rivals against competitive pressure exerted by the dominant firm will protect competition. While the ECJ in Post Danmark seems to adhere to the more common view that it is pressure on competitors that will breed competition, innovation and excellence, while protection will only lead to rent seeking behaviour and undermine the incentives to compete.

84. As stated previously, this goes back to the basic question of how competition brings its benefits of lower prices and more choice. In case a dominant firm operates in a market with a fringe of less efficient rivals, these cannot be expected to have more than a marginal price lowering effect. As a general rule, less efficient competitors will be happy and even dependent on sheltering below the dominant firm’s price umbrella. They cannot afford to compete fiercely and will behave accordingly. Real and effective competition will come from those that, through innovation, whether process or product innovation, are able to compete head on in terms of price and quality and challenge the position of the dominant firm. However, whether or not they will have the incentive to compete depends, as indicated in section VI.6, partly on the conduct open to the dominant firm. In case fierce competition for the marginal customers/contestable the conduct of firm A may have the tendency to incurring avoidable losses which only make sense in view of the likely foreclosure effects—intervention will quickly require civil servants or courts to think they are better able than firms to decide on competitive strategies. As in a centrally planned economy, it would then be the (competition) authority that decides on what price level and choice and variety is good for consumers, which is fundamentally at odds with the philosophy underlying the EU Treaties.

2. Retroactive rebates and dampening of competition

85. The ECJ showed in Post Danmark, and in earlier cases like AhC20, that it understands very well that in case of pricing conduct only too low pricing can foreclose and harm competition. It is generally not possible to foreclose efficient rivals by charging a price above cost. This view is confirmed by the economic literature (see below). This does not mean that competition and, as a result, consumer welfare are automatically harmed by pricing below cost. A price-cost test is a step in the effects-based assessment, which will also take into account the part of the market affected by the conduct, the options for competitors and customers to counter the conduct, etc., in order to come to a cogent and convincing story that the allegedly abusive conduct is likely to lead to anticompetitive foreclosure. It also does not mean that pricing above cost can never be harmful to consumers. However, it does mean that a case concerning abusive above cost pricing must contain proper reasoning as to why in that particular case pricing above cost, even if it would only lead to the foreclosure of less efficient rivals, is not to the benefit of consumers and not an expression of healthy competition. Also here the economic literature is helpful in describing those more exceptional circumstances (see below).

86. This is an issue that extends beyond pricing conduct. In general, competition will hurt competitors. In the words of the ECJ in Post Danmark: “competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation” (§ 22). Competition takes place along a number of dimensions, such as pricing, branding, advertising and product differentiation and product development. On all these dimensions, the conduct of firm A may often hurt the interests of firm B. But this does not mean that competition is harmed: it is the essence of competition. For example, it is not difficult to point to product differentiation by a (dominant) firm that makes life more difficult for competitors, such as creating products that are near the rivals’ products in the product space. Without a limiting principle for intervention—such as to find abuse in general only in case the strategy leads to incurring avoidable losses which only make sense in view of the likely foreclosure effects—intervention will quickly require civil servants or courts to think they are better able than firms to decide on competitive strategies. As in a centrally planned economy, it would then be the (competition) authority that decides on what price level and choice and variety is good for consumers, which is fundamentally at odds with the philosophy underlying the EU Treaties.
88. The first group of models can be named “competition dampening” models. What binds these models is that they show that retroactive rebates can be used to dampen competition between the incumbent dominant firm and a rival firm, whether already present on the market or a new entrant. The models show that such dampening of competition is possible if the dominant firm employs a retroactive rebate scheme with a threshold that leaves a sufficient part of the market to the competitor(s). In other words, the theory of harm is not about exclusion but about dampening of competition. The rebate scheme with a threshold at, for instance, 60% or 80% of customers’ demand (whether by an explicit requirement based threshold or with a threshold in terms of volume or turnover) will create a loyalty enhancing effect in particular just below the threshold, while maintaining a relatively high price above the threshold. The competitor is now put in the position of choosing either to compete for demand beyond the threshold, which will require low pricing to overcome the rebate, or to accommodate and settle for the remaining 40% or 20% of the market while being able to charge a high price itself. This strategy to dampen competition will of course only be successful if the dominant firm leaves sufficient space for the competitor. In case there is more than one competitor, such a strategy will only work if the competitors are few enough to overcome the coordination problem between them and can avoid competing fiercely for market share.

89. In the case of such a competition dampening theory of harm, the facts of the case should indicate that the threshold leaves sufficient space to the competitor(s), that there are, at most, few competitors and that the competitor(s) is (are) not complaining as the resulting high price and high profits is in its (their) interest, but that customers may complain because of high prices. In that scenario, it does not make sense to apply the AEC test to the rebate scheme, as it does not concern exclusion. However, the Intel case did not fit this fact pattern and did not concern a competition dampening or tacit collusion theory of harm.

3. Dampening of competition versus exclusion

90. In general, these “competition dampening” models show that dampening of competition and exclusion cannot be obtained simultaneously, with the same retroactive rebate scheme. Either the scheme induces a dampening of competition by leaving sufficient space on the market for the competitor(s), in which case it does not make sense to apply the AEC test, or the scheme may exclude by lowering the price and competing fiercely for the contestable part of the market, in which case it does make sense to apply the AEC test. The reason is simply that if the rebate scheme is harming the interest of the competitor(s)—by trying or having the effect to foreclose—the latter will compete by lowering the price of its (their) offer and will usually be able to do so effectively as long as the dominant firm is not pricing below cost.

91. The only exception in these models to the dichotomy between dampening of competition and exclusion and to the general rule that foreclosure of an equally efficient competitor is only possible with pricing below cost, is the particular scenario where the competitor is only a potential competitor or recent entrant which may not yet be able to make a credible offer to the customers. If customers fear that in due course the entrant may not be able to deliver, for instance because it has not obtained sufficient demand to enter or stay in business, each customer could be persuaded to opt to buy only from the dominant firm, even though the rebate is only minimal, in order to stave off the risk of not being able to fulfil all its requirements or being forced to purchase the remainder from the dominant firm at a higher non-rebated price. For this fear to be realistic, the entrant must not be able to make a credible offer without a number of customers having committed to purchase from it and the customers must be too small individually to make, through their demand, the entrant become a credible supplier. This was however not the scenario in the Intel case.

4. Conditional rebates and exclusion

92. All the other groups of models concern the possible foreclosure effect of (retroactive) rebate schemes. These models are trying to find reasons why a customer would be willing to help the supplier foreclose an upstream competitor while this is generally not in the interest of the customer, which normally will prefer the benefits of low prices and wider choice from competition upstream. As explained in section VI.3, the main reason is the existence of a prisoners’ dilemma if there are many customers, preventing the customers from protecting the collective good of competition. However, in general these models confirm the rule that foreclosure of an equally efficient competitor is only possible with pricing below cost.

93. The only situation in which, in these models, foreclosure of an efficient competitor is possible with pricing above cost is found in the “naked exclusion” models, which are based on the existence of important economies of scale. In case the


55 See Elhaug and Wickelgren referred to in the previous footnote. In their model, there is yet another possibility to exclude equally efficient competitors with pricing above cost, which however is not linked to the rebate scheme but to the condition that customers have to decide on accepting the rebate and exclusivity before they are allowed to obtain the offer(s) from the competitor(s). In that situation, where customers have to choose without knowing the alternatives, they may fear that if insufficient customers choose to buy from the competitor(s), the latter may not enter or stay on the market or may choose to only charge a high price as a result of the dampening of competition effect. What is however at stake here is the competition assessment of a condition that does not allow customers to obtain binding offers from competitors before agreeing with the dominant firm, which may indeed be a variation of the by object restrictions already mentioned in pt 22 of the Article 102 Guidance (see section VII.3).

competitor must obtain a significant proportion of the market in order to reach important economies of scale, the dominant firm may, by using a sufficiently high threshold in its rebate scheme, be able to keep the competitor small and increase its costs, and possibly exclude it, while pricing above its own cost (as its own cost can be lower as a result of it having realised the necessary economies of scale). Note that the competitor may be as efficient (or possibly more efficient) as the dominant firm as it is on the same (or possibly lower) cost curve as the dominant firm, but its actual costs are higher as it is currently below minimum efficient scale.  

94. This is a special situation, which is also recognised in the Article 102 Guidance (see pt 24), and which may allow a finding of anticompetitive foreclosure even though the rebated price remains above the costs of the dominant firm. However, it does require finding that effectively economies of scale are an important feature of the market concerned, that the relevant competitors are currently below minimum efficient scale and that the number of customers is high enough to have a coordination problem between them. Such was not argued in the Intel case.

95. All the other models, as previously stated, provide additional reasons why a customer would be willing to help the supplier foreclose an upstream competitor. The “rent shifting” models show how a supplier and buyer may collude too hard and actually exclude the entrant, “collude too hard” and actually exclude the entrant. The “downstream collusion” models and “rent sharing” models respectively suggest that customers may benefit from upstream foreclosure if that foreclosure helps to limit competition downstream, for instance by denying possible entrants on the downstream market access to new suppliers, and that a dominant firm may be willing to share its profit with customers in order to foreclose competitors upstream. While these models suggest a number of scenarios in which foreclosure upstream may be in the interest of customer(s) downstream, none of these models show that foreclosure of an equally efficient competitor is possible with pricing above cost; for that they all require the price, if only for the contestable part of demand, being below cost.

96. In short, application of the AEC test makes perfect sense if the theory of harm concerns foreclosure, like in Intel, except if the rebate scheme in combination with economies of scale deprives competitors of the possibility to produce at minimum efficient scale or if the foreclosed competitor is a potential entrant which cannot yet be expected to make a credible offer to customers.

5. Are there specific practical problems with applying the AEC test to conditional rebates?

97. Sometimes the argument is made that price-cost tests in general and thus the AEC test are cumbersome and costly to apply, for instance because of difficulties in compiling good data, and therefore not appropriate to apply in a competition case. These arguments are not without merit and should force competition authorities and courts to use such tests sensibly, having regard to the context in which they are used. For instance, it should be clear that an authority should not be prevented from intervening in case a dominant firm is unwilling to provide the necessary data in a timely manner, in which case the authority should be able to proceed on the basis of more qualitative evidence only.

98. However, this article is not the right place nor is it necessary to discuss in general the pros and cons of using price-cost tests. This balancing of the relative merit of price-cost tests in general has been done already and has not kept the Commission or the EU Courts from requiring the application of the AEC test in the case of unconditional price cuts, predation and margin squeeze. The question is thus, given that the arguments are not strong and convincing enough not to use a price-cost test for pricing conduct in general, whether there are specific arguments why the AEC test should be discarded as part of the assessment for conditional pricing.

99. A specific argument that is sometimes made is that in case of conditional pricing it is uncertain what the contestable share is over which the effect of the rebate needs to be calculated. This would make it more difficult for the dominant firm to self-assess its pricing and would, also if applied by the competition authority, increase the margin of error of the outcome of the AEC test. This argument requires first some explanation and then an analysis of whether and when the argument is valid.

100. In order to argue convincingly that conditional pricing is used to foreclose anticompetitively, it must be shown, as a first step, that in the market in question competition does not take place for the customer but that, for whatever reason, the competitors of the dominant firm are not able to compete for the complete demand of customers but only for part of their demand. The reason may be because customers are unwilling to switch completely away from the dominant firm, for instance because its product is a must stock product.
In short, the dominant firm must be an unavoidable trading partner. If that is not the case, conditional pricing, including exclusivity rebates, cannot exclude as efficient competitors unless the overall price is predatory. The reason is simply that if competitors compete for the whole customer, the customer will compare the complete package offered by each competitor, including possible rebate schemes, on its attractiveness and overall price.

101. However, if the dominant firm is an unavoidable trading partner, a conditional rebate scheme may, in the words of the Article 102 Guidance (pt 39), “enable it to use the ‘non-contestable’ portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the ‘contestable’ portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes).” How this works depends on whether it concerns an incremental or a retroactive rebate. As defined in the Article 102 Guidance (pt 37), a conditional rebate is a rebate given to the customer if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates).

102. In case an incremental rebate is used to foreclose, the dominant firm will generally try to put the threshold at the point where demand becomes contestable and will provide the rebate only on the sales above the threshold where customers may want to switch. The effective price which the competitors have to match in order to be equally attractive, is the rebated price charged by the dominant firm for the incremental units. In case a retroactive rebate is used to foreclose, the dominant firm will try to put the threshold at a level which includes the contestable part of demand (i.e. at the level of demand which it wants to obtain from the customer). The effective price which the competitors have to match in order to be equally attractive is the price a hypothetical competitor producing the same product would have to offer in order to compensate the customer for the loss of the rebate if the latter would switch part of its demand (“the relevant range”) away from the dominant firm. This requires taking the non-rebated price, deducting the rebate lost in case of switching and calculating the effective price over the relevant range of sales (see also the example in section VI.5). It is this effective price which has to be below the cost of the dominant firm for the rebate scheme to be able to foreclose an as efficient competitor.

103. From the above analysis, it is immediately clear that there is no good reason not to apply the AEC test in case of incremental rebates, although the GC denies the usefulness of the AEC test for all conditional rebates. In case of incremental rebates, it is not necessary to determine the relevant range and it is obvious what the effective price is: it is the price charged for the sales above the threshold where the rebate kicks in. In addition, it does not matter whether the incremental rebate scheme is standardized (the same for all customers) or individualized and whether it has only one threshold or a number of steps with each step having its own rebated price.

Is establishing the relevant range in a retroactive rebate scheme generally so wrought with difficulties that applying the AEC test to retroactive rebates should be discarded?

104. The next question is whether establishing the relevant range in a retroactive rebate scheme is generally so wrought with difficulties that applying the AEC test to retroactive rebates should be discarded? To answer that question we may want to distinguish between difficulties for the dominant firm in question and difficulties for the authority or court to establish what may be abusive pricing conduct.

105. As regards the first, it is important to recognize that a dominant firm applying a retroactive rebate scheme has every interest in assessing and estimating the relevant range, as it is important for its profitability to know over which part of demand it has to take competition into account as customers may want to switch. If it would not do so, it risks either giving rebates where it cannot be expected to know the costs of its competitors or giving too little to keep its customers. In other words, it is part of the usual marketing efforts of firms to analyse which part of demand is vulnerable to switching and how much of a rebate might prevent it switching. In addition, it is not uncommon in competition law to use concepts which require firms to assess customers’ preferences and to evaluate possibilities of rivals countering a strategy. For instance, market definition is based on the preferences of, and options available to, customers. But no one would argue that defining the relevant market cannot be expected from firms, let alone dominant firms. The reason is, again, that analysing what is the relevant market is part of developing a proper marketing strategy. Similarly, it is accepted that in case of refusal to supply scenarios, the dominant firm is expected to be able to analyse whether or not the input is indispensable for its competitors to operate on a downstream market, or to analyse in case of tying whether or not its competitors can compete with a similar bundle. The fact that the EU Courts have stressed in a number of judgments that a dominant firm cannot be expected to know the costs of its competitors is not relevant because applying the AEC test requires only knowledge about the dominant firm’s own costs. This counters the possible argument that dominant firms lack the possibilities to self-assess whether or not their retroactive rebate scheme could be abusive.
106. What about the difficulties for competition authorities and courts assessing the relevant range and applying the AEC test to retroactive rebates? It is again important to recognise that similar issues do not seem to hinder authorities and courts to defining relevant markets, etc. In other words, there is a priori no reason in case of assessing a retroactive rebate scheme that the relevant range over which customers are willing and able to switch cannot be investigated, for instance, by surveying a representative group of customers or by analysing past switching behaviour. It may be more difficult to find and obtain relevant information and data, as they may be less readily and widely available as market definition evidence, but this demonstrates that the possible problems are indeed a matter of degree.

107. It may be reassuring to know that in case of standardised retroactive rebate schemes with multiple steps/thresholds, defining the relevant range is usually no problem. In case of such, often used, standardised retroactive rebate schemes, it can be expected that competition takes place (at least) over each step. In that case, each step is a relevant range and the calculation of the respective effective prices requires little work, as shown by the example below. If the relevant range would be smaller than a step, customers might not even lose any rebate, as they are likely to stay within the step while switching part of their demand, unless they were all purchasing amounts just above the step thresholds. In case of such switching of demand within a step, there is no need to calculate the relevant range in the first place, as no rebate step is lost and no “leverage” is taking place.

108. As an example we could look at the rebate system described in the reference for a preliminary ruling in Post Danmark II, on which the ECJ still has to rule. In that case, the ECJ is asked which factors to take into account when assessing the standardized retroactive rebate scheme described in the first two columns of the table below. The first column gives the thresholds in terms of number of letters handled by Post Danmark for a particular customer. It indicates the number of letters that the customer needed to send yearly in order to obtain a particular rebate. The second column gives the retroactive rebate percentages that were given by Post Danmark from a list price if the client exceeded the relevant thresholds. The third and fourth columns have been added by the author. Adding these columns required little work; in effect any undergraduate law student with a pocket calculator could do it in 15 minutes. The third column indicates the rebated price, as a percentage of the list price, that the customer is paying to Post Danmark, and this for each step. It is 100 (the list price as 100%) minus the applicable retroactive rebate percentage from the second column. The third column would provide the effective price in case switching would take place within each step, but let us assume that competitors are able to compete at least for a full step. The last column is the effective price that the customer pays per step, which is the price that the competitor will have to offer to be equally attractive in terms of price if switching the full amount of the last step makes that the customer loses one-step of the rebate scheme. So, for instance, if the customer is currently sending 150,000 letters and obtains a rebate of 8% and would switch 75,000 letters (the amount of the previous

<table>
<thead>
<tr>
<th>Number of letters</th>
<th>Rebate %</th>
<th>Average price</th>
<th>Effective price</th>
</tr>
</thead>
<tbody>
<tr>
<td>30,000 – 74,999</td>
<td>6</td>
<td>94</td>
<td>94</td>
</tr>
<tr>
<td>75,000 – 149,999</td>
<td>7</td>
<td>93</td>
<td>92.3</td>
</tr>
<tr>
<td>150,000 – 299,999</td>
<td>8</td>
<td>92</td>
<td>91</td>
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<tr>
<td>300,000 – 499,999</td>
<td>9</td>
<td>91</td>
<td>90</td>
</tr>
<tr>
<td>500,000 – 749,999</td>
<td>10</td>
<td>90</td>
<td>88.5</td>
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<tr>
<td>750,000 – 999,999</td>
<td>11</td>
<td>89</td>
<td>87</td>
</tr>
<tr>
<td>1,000,000 – 1,499,999</td>
<td>12</td>
<td>88</td>
<td>85</td>
</tr>
<tr>
<td>1,500,000 – 1,999,999</td>
<td>14</td>
<td>86</td>
<td>82</td>
</tr>
<tr>
<td>2,000,000 or more</td>
<td>16</td>
<td>84</td>
<td>78</td>
</tr>
</tbody>
</table>

64 See the reference for a ruling by the Danish court on the website of the Danish competition authority: http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomaadfer/Praejudicielle-afgoerelser/20142802-Kendelse-fra-Soe-og-Handelsretten-verd-Post-Danmark-AS-Direct-mail?tc=E538038E-B1E94A96B9964BE4C0F85F46.

65 It is surely easier and less work than making the bill for a serious corporate client, taking into account various local and non-local experts having worked for the client, and, not to forget, the possible overall rebate scheme agreed between the law firm and its customer.
step) to the competitor, it will go down one step and only obtain a 7% rebate on its remaining 75,000 letters with Post Danmark. In order to compensate the customer for this loss in rebate, the competitor would have to offer at least a price of 91, compared to the average price of 92 that Post Danmark would receive if the customer did not switch. Application of the AEC test for that step would thus require finding out whether a price of 91 was above or below Post Danmark’s costs. For the table, as long as Post Danmark’s costs were below 78% of the list price, the rebate scheme did not lead to pricing below cost for any of the steps involved.

109. The remaining question is thus how difficult it is to assess the relevant range in case of, usually individualised, one-step retroactive rebate schemes. A first remark to be made here is that it may be instructive to look at the negotiations which led to the final agreement. These negotiations may indicate that effectively a number of thresholds with different rebate percentages were discussed, from which in the end one was chosen and agreed. This could indicate that at the time the customer was choosing between competing offers, the dominant firm was effectively offering a multi-threshold rebate. It could also indicate that if the threshold is not attained for whatever reason, including switching part of demand, this could possibly lead to a renegotiation for a lower rebate instead of a loss of the full rebate. In other words, what may appear to be a single threshold rebate could effectively be a multi-threshold rebate.

110. But in general, in case of individualised one-step retroactive rebate schemes, it will depend very much on the circumstances of the case how difficult it is to estimate the relevant range. In the Intel case, it was obvious that competition took place over the CPUs required for a new model computer or laptop, as each model is designed around a particular central processing chip and demand for chips for the production of existing models (the installed base) can thus not anymore switch. As a large part of the existing models were equipped with Intel CPUs, and production of the installed base still required these chips to be purchased, Intel could leverage the rebate provided over these chips to lower the effective price for the chips to be supplied for new models for which the customers were in the process of deciding which central processing chip to choose. The main difficulty in this case was therefore not what, in principle, the relevant range was—which was the demand of CPUs for these new contestable models—but to estimate how large the expected demand for some of these future models was or had been. This was a peculiarity of this case, which was overcome by the Commission analysing in depth the available documents expressing expectations about demand and, where available, draft contracts for certain numbers of CPUs.

111. In short, the above does not provide good reasons for not applying the AEC test to conditional rebates in general or retroactive exclusivity rebates in particular. It does show, as for most tests, that the reliability and relevance of the outcome depends very much on the quality of the data used. This means in the first place that such tests should only be used as part of a more elaborate effects-based analysis, as also required in the Article 102 Guidance (see pt 27). It means in the second place that sufficiently reliable data must be available and that the level of precision of the data must be taken into account when drawing conclusions from the AEC test (see pts 25, 41 and 42 of the Article 102 Guidance). Where sufficiently reliable data is available, it would be sub-optimal not to use it, but where such data is not available, conclusions may have to be drawn on the basis of qualitative evidence only.

IX. Conclusion

112. The Intel appeal and the Post Danmark II preliminary ruling provide the ECJ with the opportunity to develop considerably the consistency and balance in the application of Articles 101 and 102 by supporting a structured effects-based approach. Conditional rebates, including the so-called exclusivity rebates, and single branding/exclusive purchasing and tying obligations, should not be dealt with under a "by object" standard once the firm in question is dominant. Such treatment is not justified in view of the possible efficiencies, it would undermine the consistent application of Articles 101 and 102 in view of the similarities of the possible effects of the various rebate systems and obligations, and it would discourage pro-competitive agreements and conduct by both dominant and non-dominant firms.

113. In this context it would also be helpful, and even necessary, for the ECJ to confirm its position taken in Post Danmark that the goal of EU competition law is to protect competition for the benefit of consumers and that its aim is not to protect competitors against competition, even if this competition is waged by a dominant firm. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation. Protecting inefficient competitors against competition is not only bad for consumers; it is also bad for the economy in general as it will hamper the efficient reallocation of factors of production.
114. The ECJ demonstrated in *Post Danmark*, and in earlier cases like *Akzo*, that it understands very well that in the case of pricing conduct only too low pricing can foreclose and harm competition. It is generally not possible to foreclose efficient rivals by charging a price above cost. This logic, that in case of pricing conduct only too low pricing can foreclose and harm competition, holds not only if the dominant firm simply charges a low price to all customers, but also if the dominant firm offers the low price only to certain customers or only for a certain part of the demand of customers, or only in return for exclusivity. Not allowing dominant firms to use conditional rebates will incentivise them to charge higher prices and create price umbrellas.

115. It would thus make eminent sense if the ECJ confirmed the useful role that the AEC test in general can and should play as part of the overall effects-based assessment of conditional rebates, including exclusivity rebates. It would be useful to recognise that the reliability and relevance of the outcome depends very much on the quality of the data that are used and that the availability and reliability of the data must be taken into account when drawing conclusions from the AEC test.
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