Dealing with Intel intelligently delineating the scope and limits of the Court's ruling

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The proposition that it may be problematic for a dominant company to condition discounts on exclusivity is not particularly surprising. It has been the rule since *Hoffman-La Roche* more than 35 years ago.[1] On one level, therefore, the General Court's *Intel* judgment merely confirms what has been standard advice in daily practice.[2] As such, the judgment could be said to enhance legal certainty and simplify the task of practitioners.[3] But a closer look at the Court's discussion casts doubt on this conclusion.

The practical interest of the judgment lies less in the finding that exclusivity conditions are "*by their very nature*" abusive.[4] It lies in the portions of the judgment that discuss the considerations that underpin this conclusion and that may more generally influence the scope for establishing "by nature" abuses. And here matters are more ambiguous. On the one hand, some of the language used by the Court could be understood as rendering the boundaries for "by nature" abuses more vague and amorphous, which risks capturing conduct that is neutral or even positively beneficial for consumers. Such an outcome would be worrying, given the limited defenses that are available and the draconian consequences that can be imposed once a particular form of conduct is categorized as an abuse "by nature". On the other hand, the reasons that the Court advances for its findings imply that its conclusions are subject to inherent limitations.

This article explores in more detail the scope and limits of "by nature" abuses of the kind identified in *Intel*. We take as our benchmark the standard established by the Court of Justice in its recent *Cartes Bancaires* judgment for finding "by object" restrictions under Article 101 TFEU. The Court held in that case that the concept of "by object" restrictions has to be applied "*restrictively*".[5]

As Advocate General Wahl noted, "*the method of identifying an 'anti-competitive object' [...] is not without danger from the point of view of the protection of the general interests pursued by the rules on competition in the Treaty*".[6] An overly broad application of the concept would risk prohibiting conduct with "*beneficial externalities*"[7] and would be in conflict with the "*principles which must govern evidence and the burden of proof in relation to anti-competitive conduct*".[8] The Court therefore concluded that "by object" restrictions can only be found where the conduct at issue "*reveals in itself a sufficient degree of harm to competition*",[9] such as to render an examina-

1 Case 85/76 *Hoffmann-La Roche* [1979] ECR 461.
2 Case T-286/09 *Intel*, judgment of June 12, 2014 ("*Intel*"). For a general overview and discussion of the judgment, *see* for example Paul Nihoul, "*The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?*", Journal of European Competition Law & Practice, 2014, 521; and Stephan Bartelmess, "*Die Intel Entscheidung des Europäischen Gerichts*", NZKart, 2014, 492.
3 *See* Richard Whish, "*Intel v Commission: Keep Calm and Carry on!*", Journal of European Competition Law & Practice, 2014.
4 *Intel*, ¶¶ 85, 88.
5 Case C-67/13 *Groupement des Cartes Bancaires*, judgment of September 11, 2014 ("*Cartes Bancaires*"), ¶ 58.
6 *Cartes Bancaires*, opinion of Advocate General Wahl, ¶ 54.
7 *Ibid.*, ¶ 55.
8 *Ibid.*, ¶ 57
9 *Cartes Bancaires*, ¶ 57.

tion of its actual effects on the market "*redundant*".[10] The same principles must govern the analysis of "by nature" abuses under Article 102 TFEU. That concept is, after all, equivalent to "by object" restrictions under Article 101 TFEU,[11] and is subject to the same considerations with regard to the dangers of suppressing benefits and disregarding due process principles.

The General Court's finding that exclusivity discounts are by their nature abusive (if it should be upheld on appeal) must therefore be bounded by meaningful criteria that are apt to distinguish competitively harmful practices. In the following sections, we discuss three main limiting principles that may serve as relevant boundaries:

- Exclusivity conditions that qualify as "by nature" abusive must be subject to a clear legal definition and a high evidentiary threshold;
- The context within which an exclusivity condition operates should not be ignored; and
- The test for justifications must be practicable and realistic.

I. Exclusivity Conditions That Qualify As "By Nature" Abusive Must Be Subject To A Clear Legal Definition And A High Evidentiary Threshold

An initial question that the *Intel* judgment raises is under what circumstances a supplier can be said to have conditioned a discount on exclusivity in the first place. Given the importance that the Court ascribes to the conditions attached to a discount, as opposed to its overall economic characteristics,[12] this is a critical threshold issue. Under the Court's logic, once a dominant company's discounts qualify as having been conditioned on exclusivity, a finding of abuse – with its potential for large fines and damage claims – is almost automatic.

One would therefore expect that the kind of exclusivity arrangements that qualify as "by nature" abusive would be subject to a clear legal definition and a high evidentiary threshold. Yet, the General Court's reasoning seems to dilute the standard for a finding of exclusivity both in terms of legal definition and evidentiary threshold.

A. Requirement Conditions Limited To A Fraction Of A Customer's Total Demand Cannot Be Equated With Exclusivity

As a legal matter, the Court appears to give the notion of exclusivity an expansive interpretation. The Court starts reasonably enough by describing discounts conditioned on exclusivity as "*rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position*". This is consistent with how such discounts have been generally understood in the past.[13] But the Court goes beyond this definition in its discussion of the rebates that Intel granted to OEM customers for only certain segments of their overall requirement for x86 CPUs, such as x86 CPUs for enterprise PCs in the case of HP or for notebooks in the case of Lenovo.[14]

The Court suggests that even if requirement conditions are attached to only one or a few segments of a customer's demand, such conditions nevertheless qualify as exclusivity conditions, irrespective of the share of total requirements that the affected segments represent. In the case of HP, the enterprise PCs to which Intel's conditional discounts applied represented only around 28% of HP's total requirements of x86 CPUs. Moreover, the CPUs that Intel supplied for HP's enterprise PCs appear to have been substitutable with the CPUs HP bought for the consumer segment.[15] Clearly then, the condition did not apply to "*all or most requirements*" of HP. Almost three-quarters of HP's demand was unaffected by the exclusivity condition, a share that was well above the market share of Intel's rival AMD.

The Court offers no explanation as to why such a situation can be equated with genuine exclusivity.

10 *Ibid.*, ¶ 51.

11 The Courts regularly describe "by object" restrictions under Article 101 TFEU as restrictions that are "by their nature" anti-competitive, *see* for example Case C-209/07 *Beef Industry Development Society* [2008] ECR I-8637, ¶ 18; C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, ¶ 29; Case C-226/11 *Expedia* [2012] ECR, ¶ 36; *Cartes Bancaires*, ¶ 50. *See* too Commission Guidelines on the application of Article 81(3) EC [2004] OJ C 101, p. 97.

12 *Intel*, ¶¶ 100 and 152: "*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*", *see* too, ¶¶ 99, 124.

13 *Intel*, ¶ 76. Compare, for example the definition of single branding and non-compete obligations in Article 1(d) of the Commission's Vertical Restraints Block Exemption Regulation and the discussion of such restrictions at ¶¶ 128-129 of the Commission's Vertical Restraints Guidelines.

14 *Intel*, ¶¶ 129-137.

15 *See* the Commission's decision at ¶ 831 (2).

It only notes that a dominant company "*may not justify the grant of a rebate subject to a quasi-exclusive purchase condition by a customer in a certain segment of a market by the fact that that customer remains free to obtain supplies from competitors in other segments*".[16] But this statement is conclusory and assumes what needs to be established, namely that a condition affecting a fraction of a customer's total requirements can be treated as "by nature" abusive, in the same manner as true exclusivity, without further examination.

The Court states that a condition to buy 28% of a customer's total demand "*in all segments*" is "*neither identical to nor comparable*" to a condition to buy 95% of a customer's demand "*in a certain segment*".[17] This is questionable, in particular where the products at issue are substitutable across segments. In fact, a requirement to buy 28% of total demand is arithmetically identical to a requirement to buy 95% of requirements in a segment that represents 29.5% of total demand. More generally, a percentage number is not meaningful without its denominator. To focus on the percentage figure of the requirement condition without considering the base from which that percentage is calculated is therefore dubious.

This is not to say that requirement conditions limited to a particular segment of demand could never raise competition problems. But such problems would arise, if they do, from the specific nature of the affected segment. For example, in the case of Intel, one could in theory imagine that the enterprise segment may have been of particular competitive importance because it offered higher margins or represented a development and proofing ground for advanced CPUs. However, such theories would need to be validated by actual evidence.

It is equally possible that a requirement condition limited to a fraction of total demand is harmless or positively beneficial. Especially in relations with OEMs there can be good reasons for attaching requirement conditions to fractions of an OEMs total demand, such as conditions related to individual product models or model families. There may, for example, be a need to protect the supplier's intellectual property if the product comes with relevant know-how, or, alternatively, exclusive cooperation on individual product models may offer a means for brand differentiation. If such arrangements cover only a small portion of a customer's total demand, it is difficult to see why they should be treated, without further examination, as "by nature" abusive.

Importantly, in such cases, the potentially harmful nature of the arrangement does not reveal itself "*in a sufficient degree*" from the discount condition alone, as required under the *Cartes Bancaires* standard.[18] Instead, it depends on the particular competitive characteristics of the affected segment. Discount conditions and other arrangements that affect only limited portions of a customer's requirements should therefore not be equated with *per se* abusive exclusivity.

To hold differently would be formalistic and detached from reality. It would arbitrarily ascribe meaning to the outward form of a condition, such as the level of a percentage figure, without any objective basis.

B. A Finding That A Company Applied Exclusivity Conditions Must Be Supported By Strong And Consistent Evidence

The Court's review of the Commission's factual evidence raises questions too. The Commission did not identify direct evidence showing that Intel had conditioned discounts on exclusivity. It cited no contracts or other written exchanges between Intel and its customers that stipulated exclusivity conditions. Instead, the Commission based its findings on indirect evidence, notably responses to information requests and internal communications of Intel and its customers.

In reviewing this evidence, the Court correctly notes that the Commission bears the burden of proving the abuse beyond reasonable doubt: "*Any doubt in the mind of the Court must operate to the advantage*" of the defendant.[19] But the Court then appears to qualify this principle by stating that it is "*not necessary for every item of evidence produced by the Commission to satisfy*" this standard. "*It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement*".[20]

16 *Intel*, ¶ 132.
17 *Intel*, ¶ 129.
18 *Cartes Bancaires*, ¶ 57.
19 *Intel*, ¶ 62.
20 *Intel*, ¶ 64.

It is not easy to understand what the Court means by this statement. If it is meant to refer to the possibility of establishing proof indirectly through a chain of evidence, the statement seems questionable since an evidentiary chain can only be as strong as its weakest link. The strength of each evidentiary piece in the chain therefore matters.

If the reference to "*evidence [...] viewed as a whole*" is meant to suggest that deficiencies in the quality of the evidence can be compensated by its quantity that seems problematic too. The whole of the evidence cannot be worth more than the sum of its parts.

> The whole of the evidence cannot be worth more than the sum of its parts

The passage from *PVC* that the Court invokes in support of this point does not fit the circumstances.[21] In *PVC*, the Court of Justice merely held that it is not necessary to prove participation of each cartel member in each cartel meeting, as long as participation in the "*cartel as a whole*" is established.[22] This is different from suggesting that individual items of evidence need not comply with the requisite evidentiary standard. The *PVC* judgment only dealt with the type and frequency of the conduct that needs to be proven, not with the quality of the evidence. Here, on the other hand, the General Court appears to postulate a lower quality standard for the evidence advanced by the Commission. This is difficult to reconcile with the evidentiary principles established by the Court of Justice in *Tetra Laval*, which require evidence to be "*factually accurate, reliable and consistent*", to contain "*all the information which must be taken into account*", and to be "*capable of substantiating the conclusions drawn from it*".[23]

In the case of Intel's discounts, a portion of the evidence discussed by the Court for some of the OEMs involved consisted of internal assumptions or speculations by Intel's customers about the possibility of losing some or all of the discounts if they bought from AMD.[24] As a general matter, it is not obvious that one can jump from such internal speculation to the conclusion that this speculation was caused by the dominant company's conduct. In particular, in the case of established commercial relations, it cannot be excluded that customers might independently worry about the possible consequences of changing existing relations, without the dominant company having actually stipulated exclusivity conditions.

The proposition of the Court that "*nothing precludes the Commission from relying on the internal estimates of a customer in order to establish evidence of the actual conduct of the dominant undertaking*"[25] is therefore problematic. It conflates internal customer speculation with the external conduct of the dominant company, when it would be for the Commission to prove the nexus between the speculation and the conduct. At best, such internal customer discussion can serve as a final confirmatory element in a chain of evidence where other evidence independently provides a sound beginning of proof that the dominant company rendered discounts conditional on exclusivity through some form of communication or action. A mere "*weak degree of corroboration*", with which the General Court appears to be satisfied, is not good enough.[26]

Otherwise, a dominant company could be held liable based on nothing more than internal assumptions and speculations of customers over which it has no control or knowledge and that it therefore cannot correct. This would be inconsistent with basic principles of law since it would expose companies to liability for circumstances for which they bear no responsibility. If exclusivity conditions are to be treated as by nature abusive, then clear and strong evidence must be advanced to establish that the dominant company did in fact impose such conditions.[27]

21 *Ibid.*, refering to Joined Cases C-238/99 *Limburgse Vinyl Maatschappij et. al.* [2002] ECR I-8375 ("*PVC*"), ¶¶ 513-523.
22 *PVC*, ¶ 513.
23 Case C-12/03 *Tetra Laval* [2005] ECR I-987, ¶ 39.
24 *See* for Dell, *Intel*, ¶ 466, for Lenovo, *Intel*, ¶¶ 1066, 1072.
25 *Intel*, ¶ 1087.
26 *Intel*, ¶¶ 727 and 810.
27 It might well be that in *Intel* the body of evidence was sufficient

II. The Context Within Which An Exclusivity Condition Operates Should Not Be Ignored

On its face, the Court's reasoning suggests that once the existence of an exclusivity condition is established in fact and in law, this is sufficient to find an abuse. But the context within which the exclusivity condition operates cannot be ignored. The Court of Justice has consistently held[28] – and most recently confirmed in *Cartes Bancaire* – that an examination of whether conduct is "by object" restrictive cannot "*be divorced*" from its economic and legal context.[29] If it could, the analysis would become "*purely theoretical and abstract*".[30] The context within which conduct takes place must therefore be taken into account before concluding that the conduct is restrictive by nature.

This must apply *a fortiori* under Article 102 TFEU because the dominant position of the company seeking exclusivity is itself context that is considered in the abuse analysis. It is a contextual factor outside the exclusivity clause itself. Under these circumstances, it would be artificial and arbitrary to take into account market power as relevant context, but to ignore other contextual factors that may exclude or mitigate the exercise of market power. Such relevant circumstances include in particular situations where the exclusivity discount (i) does not extend to non-contestable portions of demand or (ii) covers only a negligible share of the total market.

A. There Is No Exercise Of Market Power If Exclusivity Discounts Do Not Cover Both Contestable And Non-Contestable Portions Of Demand

The fundamental rationale that the Court identifies for finding exclusivity conditions to be abusive by nature is that such conditions allow a company to leverage a non-contestable portion of the customer's demand.[31] As the Court puts it, such conditions enable the dominant company "*to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share*".[32]

This is also the basis for the Court's conclusion that Intel rendered market access "*structurally more difficult*" for AMD[33] and that this was sufficient for a finding of foreclosure without the need to apply an "as-efficient-competitor" test.[34] If the exclusivity discount covers a non-contestable portion of demand, it is not sufficient for a rival to offer a competitive price "*for the units that that competitor can itself supply to the customer*". Instead, the condition forces the rival "*to compensate the customer*" for the loss of the rebate it receives on the non-contestable portion of demand.[35] In other words, the exclusivity condition creates an additional cost for the rival on the units that it sells because it must, in effect, offer a discount also on the non-contestable units that it does not sell. The exclusivity discount operates in these circumstances as a means to raise a rival's per-unit costs for contestable units.

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One can, of course, debate whether such an increase in costs alone is sufficient for a finding of anti-competitive foreclosure. The District Court of New Jersey reached the exact opposite conclusion in its recent judgment in the *Eisai v. Sanofi* matter, holding that it is not the purpose of competition

to establish the existence of requirement or exclusivity conditions. But it is not clear in that case why the General Court needed to make statements about the evidentiary standard that could cast doubt on the thoroughness of the judicial review exercised *vis-à-vis* the Commission's evidence.

28 For example, Joined Cases 56/64 and 58/64 *Consten Grundig* [1966] ECR 299, p 497; Case 19/77 *Miller International Schallplatten*, [1978] ECR 131, ¶ 7; Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink* [1984] ECR 1679, ¶ 26; Case C-551/03 *General Motors* [2006] ECR I-3173, ¶ 66;

29 Case C-67/13 *Groupement des Cartes Bancaires*, judgment of September 11, 2014, ¶¶ 53, 78; and Opinion of Advocate General Wahl at ¶ 41.

30 Case C-67/13 *Groupement des Cartes Bancaires*, Opinion of Advocate General Wahl, ¶¶ 41 and 148.

31 *Intel*, ¶¶ 92-93.

32 *Intel*, ¶ 92.

33 *Intel*, ¶ 93.

34 *Intel*, ¶¶ 88, 149.

35 *Intel*, ¶¶ 93, 141.

law to protect the margin of competitors.[36] The District Court pointed out that "*any alleged incontestable demand did not prevent Eisai from reducing its 85% profit margins to decrease the span of the dead zone and increase its market share*" and that "*the fact that Eisai could not maintain its 85% profit margins [...] and compete with Sanofi for business does not translate into an injury for antitrust purposes*".

Importantly, however, irrespective of the view one takes on this issue, it is evident from the General Court's reasoning that the Court does not dismiss the "as-efficient-competitor" test as a matter of general principle, as some appear to suggest.[37] It only rejects the test in the specific circumstance of discount conditions that create a linkage between contestable units and a non-contestable portion of demand. Indeed, the Court confirms the appropriateness of the test in other circumstances, as discussed in more detail below.

Nor can the Court's discussion be understood to suggest that any means of rendering competition for rivals more difficult is anti-competitive. Otherwise, it would be impossible to distinguish competition on the merits from anti-competitive behavior. All competition is ultimately aimed at making competition more difficult for rivals. If rivals are kept out from the market, for example, because of better products or lower prices that is not anti-competitive. It is the manifestation of competition on the merits.[38] As is apparent from the Court's reasoning, the reference to rendering competition "*more difficult*" relates only to the creation of a structural foreclosure mechanism that increases costs for rivals.[39]

It follows that the rationale that underpins the Court's qualification of exclusivity conditions as abusive by nature assumes a specific context for the exclusivity condition, namely that the exclusivity condition covers both non-contestable and contestable portions of demand. If the discount is conditional on achieving a threshold that is below the non-contestable portion of demand, or if the discount applies only to contestable demand, there is no leveraging, and there should be no finding of abuse.

Intel apparently did not contest the existence of non-contestable demand.[40] But it would be wrong to conclude more generally from the existence of a dominant position that an exclusivity discount always leverages a non-contestable portion of demand. The concept of dominance relates to a company's position in the market overall. In contrast, the question of whether a discount applies to the non-contestable demand of a customer concerns the specific situation of that customer and the particular conditions of the discount arrangements it has concluded with the dominant company. It is possible therefore for a company to hold a dominant position, but for its exclusivity discounts not to leverage non-contestable demand. This can arise for example in the following scenarios:

- **Heterogeneous customer population.** If the customer population is heterogeneous, it is possible that the demand of some customers may be fully contestable, even if the demand of others is not. Some customers may, for example, be more price sensitive and place less relevance on established brands. Or some customers may be more easily reachable by rivals than others. If exclusivity discounts are applied only to customers that are fully contestable, then the exclusivity does not leverage a non-contestable portion of demand. In such a situation, the arrangement operates essentially as a selective, customer-specific discount similar to those reviewed in *Post Danmark*.[41]
- **Segmented customer demand.** Similarly, if demand of an individual customer is segmented, it is possible that some segments are fully contestable. This may occur, for example, if for the affected segments, specifications are easier to meet, reputation plays less of a role, or volume needs do not cause capacity problems. This is also a further reason why requirement conditions applying to individual demand segments cannot be treated as abusive by nature. Not only do such conditions not create exclusivity over a customer's full requirements, they may also not create barriers for the segment that they cover if that segment is fully contestable.

36 District Court of New Jersey, *Eisai v. Sanofig*, judgment of March 28, 2014.
37 Wouter 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, Volume 37, Issue 4, December 2014.
38 Case C-209/10 *Post Danmark*, judgment of March 27, 2012, ¶¶ 21-22: "*Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient*".
39 *Intel*, ¶ 93.
40 *Intel*, ¶ 91.
41 Case 209/10 *Post Danmark*, judgment of March 27, 2012.

- **Full-requirement tenders.** The contestability of demand is especially apparent in the case of customers that awards supply contracts through tenders that cover the entirety of their requirements. The price a supplier offers in such tenders is naturally conditioned on exclusivity. It is an inherent characteristic of this form of competition. If customers, following the tender, were able to buy from suppliers other than the winner, that would undermine the competition created by the tender. It would render the tender meaningless. Thus, the Commission in *Coca-Cola* expressly permitted Coca-Cola to stipulate exclusivity conditions in the case of "*commercial agreements [...] entered into following competitive tendering*".[42]
- **Full requirement requests from customers.** Even if supply contracts are not awarded in formal tenders, demand is fully contestable if customers tend to conclude contracts for most or all of their requirements and rivals of the dominant company can and do negotiate for such contracts. In *Intel*, the General Court suggested that the fact that the dominant company responds to a customer request does not change the analysis.[43] What matters, however, is not whether the customer made a request to the dominant company, but whether the customer also invites rivals to negotiate for its full requirements. If this is so, there is no reason to assume *a priori* that any portion of demand is non-contestable.

In situations where exclusivity discounts do not cover both contestable and non-contestable demand, the basis identified by the Court for finding a by nature abuse falls away. There is no exercise of market power because the dominant company is not leveraging a non-constable portion of demand. And no structural barriers to market access are created because rivals need not offer a compensation for units that they are unable to sell themselves.

To treat exclusivity conditions as abusive by nature in such circumstances would be artificial and divorced from reality. Such treatment would also risk restricting, rather than promoting, competition by preventing a dominant company from competing for contracts that are awarded on a full requirements basis, including by bidding in full requirement tenders. Consistent with the principles established by the Court of Justice in *Cartes Bancaires*, it is therefore necessary to take into account the absence of a non-contestable portion of demand.[44]

B. There Is No Exercise Of Market Power If The Exclusivity Discount Covers Only A Small Portion Of The Relevant Market

There is also no relevant exercise of market power if exclusivity discounts apply only to a small portion of the relevant market. If the exclusivity condition applies to distributors, rather than end-customers, and there are ample alternative channels to market, there is no reason for assuming that the exclusivity condition will prevent rivals from accessing any customers.[45] But even if the condition applies to end-customers, it is difficult to see why the condition should cause competitive harm if it is limited to a small share of the market. It would therefore be unrealistic to qualify exclusivity conditions that are circumscribed in this way as by nature abusive only because they are adopted by a dominant company.

In situations where exclusivity discounts do not cover both contestable and non-contestable demand, the basis identified by the Court for finding a by nature abuse falls away

In its judgment, the General Court maintains that "*smallness of the parts of the market which are concerned by the practices at issue is not a relevant*

42 Case COMP/A.39.116 *Coca-Cola*, Commission decision of June 22, 2005.

43 *Intel*, ¶¶ 139, 787

44 *See* too the Commission's Vertical Restraint Guidelines at ¶ 133 and the Commission's Abuse Guidance Paper at ¶ 36, where the Commission recognizes that in the absence of a non-contestable portion of demand exclusivity arrangements "*are generally unlikely to hamper effective competition*".

45 For the competitive relevance of the level of trade, see the Commission's Vertical Restraint Guidelines, ¶¶ 138-139: "*There is no real risk of anticompetitive foreclosure if competing manufacturers can easily establish their own wholesaling operation*".

argument". The Court refers to *Hoffman-La Roche*[46] or *Tomra*[47] in support of its position and argues that where the "*structure of competition has already been weakened*" as a result of a dominant position "*any further weakening of the structure of competition may constitute an abuse*".

In both *Hoffman-La Roche* and *Tomra*, however, the exclusivity arrangements at issue covered sizable portions of the relevant market. The reasoning of these judgments therefore does not suggest that the Court of Justice meant to qualify *de minimis* exclusivity conditions as by nature abusive.[48] More fundamentally, if only a small part of the market is covered by exclusivity conditions, no "*further weakening of the structure of competition*" takes place. The General Court's assumption to the contrary is without basis.

In a recent speech Director General Italianer explained that the Commission would likely take the scope of exclusivity conditions into account in determining enforcement priorities.[49] But leaving this issue to the prosecutorial discretion of competition authorities is not a satisfactory solution. It creates legal uncertainty because under that view companies would technically be in breach of the law and would depend on the benevolence of the enforcing authority. And it would create tensions with the principles of equal treatment and judicial protection. If there is a dispute about the market share that is covered by exclusivity discounts, the matter could not be put to judicial review, even if a closer examination were to reveal that the Commission overestimated the relevant share. The size of the market share covered by exclusivity arrangements cannot therefore be a mere discretionary element, but must constitute a relevant substantive criterion for the legal analysis of such arrangements.

III. The Test For Justifications Needs To Be Practicable And Realistic

The General Court recognizes that exclusivity discounts are in principle open to justification.[50] But it does not discuss this possibility further since Intel apparently did not advance justifications.[51] The question of whether invoking objective justifications represents a real option therefore remains unanswered.

For the objective justification test to have genuine relevance it must be practicable and realistic. The four-pronged test proposed by the Commission in its Guidance Paper seems overly restrictive and one-sided in this respect.[52] In particular, imposing on the dominant company the burden of proving that "*the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition*" results in an inappropriate shift in the burden of proof. This is especially so in the case of "by nature" abuses where the Commission has not established any restrictive effects, let alone quantified these effects.

It must be sufficient for the dominant company to demonstrate that there are legitimate reasons for the contested arrangements. The Commission then has the burden of proving that these reasons are not proportionate and thus cannot justify the arrangement. This is consistent with how the General Court described the objective justifications test in *Microsoft*: "*It is for the dominant undertaking concerned [...] to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission [...] to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted*".[53]

It follows that in cases where the dominant company advances substantiated justifications for its arrangements, the Commission cannot limit itself to a "by nature" analysis. Rather, to find a violation of Article 102 TFEU in such circumstances it must establish actual adverse competitive effects and demonstrate that these adverse effects outweigh the advanced justification.

IV. Other Discount Forms

The General Court makes clear in its judgment that its finding relates specifically to discounts that are conditioned on exclusivity. As noted, the Court

46 Case 85/76 *Hoffmann-La Roche* [1979] ECR 461.
47 Case C-549/10 *Tomra Systems*, judgment of April 19, 2012.
48 *See* too Richard Wish, "*Intel v Commission: Keep Calm and Carry on!*", Journal of European Competition Law & Practice, 2014.
49 Alexendar Italianer, "*The Object of Effects*", speech, December 10, 2014.
50 *Intel*, ¶ 81.
51 This is not particularly surprising given that Intel's main defense seems to have been that it did not stipulate exclusivity conditions in the first place.
52 Commission Abuse Guidance Paper, ¶ 30.
53 Case T-201/04 *Microsoft* [2007] ECR II-3601, ¶ 688.

takes the position that it is the exclusivity condition that is at issue in these cases, not the discount as such.[54] And the Court itself clearly distinguishes between exclusivity discounts and other pricing practices.

A first and important distinction that the Court draws is between non-conditional and conditional pricing practices. For non-conditional pricing practices, the Court expressly confirms the need to apply a full "as-efficient-competitor" test. As the Court notes, "*the level of a price cannot be regarded as unlawful in itself*".[55] Low pricing reflects competition on the merits and therefore cannot be characterized as anti-competitive, unless it fails the "as-efficient-competitor" test. In the absence of that test "*it is impossible to assess whether a price is abusive*".[56]

This conclusion must hold more generally for all conduct where the abusive and harmful character of the conduct does not "*reveal itself*" sufficiently from the nature of the conduct alone within the meaning of the *Cartes Bancaires* standard. In such circumstances, the conduct is only liable to create anti-competitive effects if it is capable of foreclosing equally efficient competitors. This includes, for example, product design decisions, which, like pricing, are an inherent aspect of competition on the merits. Thus, in *Microsoft*, the Commission specifically recognized that "*a closer examination of the effects that tying has on competition*" was required and that there were "*good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition*".[57]

A second distinction that the Court draws is between different forms of conditional discounts. In addition to exclusivity discounts, the Court here identifies (i) "*quantity rebates linked solely to the volume of purchases made*"[58] and (ii) rebate systems that are not expressly conditioned on exclusivity, but that are based on mechanisms that "*may also have a fidelity-building effect*".[59]

The Court suggests that quantity rebates are presumed to be lawful because they generally have no anti-competitive effects and are "*deemed*" to reflect "*gains in efficiency*".[60] As to fidelity-enhancing discount systems, the Court states that such systems require an assessment of "*all circumstances*" to determine whether they are equivalent to an exclusivity mechanism, or, as the Court puts it, they "*tend to remove or restrict the buyer's freedom to choose his sources of supply*".[61] But, once equivalence to an exclusivity mechanism is established, there is no need to engage in an "as-efficient-competitor" test.[62]

> For non-conditional pricing practices, the Court expressly confirms the need to apply a full "as-efficient-competitor" test

It is, however, not entirely clear what type of discounts the Court would put in the first category of quantity rebates that can be presumed to be lawful. One possible candidate is a price reduction offered for firm upfront commitments to purchase a minimum quantity of product. In such circumstances, the price concession is not conditioned on future purchasing behavior and the customer's volume commitments will generally create pro-competitive benefits in terms of supply and capacity planning. It is also possible that the Court had in mind discount systems that are based on standardized volume thresholds that a customer must achieve over a reference period to earn discounts. The Court's category of "fidelity-enhancing rebates", on the other hand, seems to refer primarily to individualized retroactive rebates of the type at issue in *Tomra*,[63] *British Airways*,[64] and the *Michelin*

54 *Intel*, ¶¶ 99, 100, 124, and 152.
55 *Intel*, ¶ 99.
56 *Intel*, ¶ 152.
57 Case COMP/C-3/37.792 *Microsoft*, decision of March 24, 2004, ¶ 841.
58 *Intel*, ¶ 75.
59 *Intel*, ¶ 78.
60 *Intel*, ¶ 75.
61 *Intel*, ¶¶ 78, 82, 84,
62 *Intel*, ¶¶ 144, 153.
63 Case C-549/10 *Tomra*, judgment of April 19, 2012.
64 Case C-95/04 *British Airways* [2007] ECR I-2331.

cases.[65] That said, the boundaries between these categories seem to be fluid.

If, on the one hand, examination of all circumstances shows that a standardized retroactive volume discount is leveraging non-contestable demand, it cannot be excluded that the discount would be placed in the "fidelity-enhancing" category. On the other hand, if an individualized retroactive discount does not create a linkage between contestable and non-contestable portions of demand, then it cannot be characterized as fidelity-enhancing.[66]

More fundamentally, the various types of conditional discounts, whether crafted as exclusive, retroactive, or incremental discounts, are simply different methods for calculating the value of a monetary concession granted to incite additional business. The choice of discount mechanism will not necessarily be driven by foreclosure strategies, but other considerations such as risk allocation, information asymmetry, or concerns about arbitrage. For example, an upfront, binding, take-or-pay volume commitment provides the supplier with the greatest planning certainty, but leaves all the risk of unneeded units with the customer. A discount conditioned on exclusivity, on the other hand, may still improve planning certainty for the supplier, but at the same time increases flexibility and reduces risk for the customer. Moreover, if the effective value of an exclusivity discount or individualized retroactive discount, when calculated over the contestable portion of demand, remains above cost, such a discount is in effect equivalent to an incremental volume discount of the corresponding size. It is then not obvious why these discount forms should be treated differently as a matter of law.

V. Conclusion

The distinction that some have drawn in the wake of the General Court's judgment between a more economic approach and a form-based approach is to some degree a false dichotomy.[67] The General Court's judgment, too, is based on economic theories and assumptions about the operation of discount conditions and their impact on competition. Where these assumptions do not hold, discount conditions should not be treated as by nature abusive.

Requirement conditions limited to fractions of a customer's demand cannot be equated with exclusivity. Conditions that do not create a linkage between contestable and non-contestable demand, or that affect only a small portion of the relevant market, do not involve the exercise of market power. And without clear and consistent evidence firms cannot be found to have conditioned discounts on exclusivity in the first place. If such matters are not considered, competition law analysis would degenerate into abstract dogmatism in conflict with the principles established by the Court of Justice in *Cartes Bancaires* and *Post Danmark*.

65 Case 322/81 *Michelin I* [1983] ECR 3461; Case T-203/01 *Michelin II* [2003] ECR II-4071.

66 For example, assume the non-contestable share of a given customer is 80% of requirements and the dominant company pays a retroactive discount once that customer purchases 60% of its requirements from it, then there is no linkage between contestable and non-contestable demand.

67 Wouter 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, Volume 37, Issue 4, December 2014; Paul Nihoul, "*The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?*", Journal of European Competition Law & Practice, 2014, 521.