The Assessment of Rebate Schemes Under Article 102 TFEU

Master’s thesis
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The thesis concerns the assessment of rebate schemes under European Union competition law. Particularly exclusivity rebates have recently been under assessment of the European Union courts with the *Intel* judgement. This thesis aims to establish that the courts have historically assessed exclusivity rebates in a way that is incoherent with the assessment of other kinds of rebates. In particular, the courts seem to mistakenly view exclusivity rebates as practices similar to exclusive dealing whereas other rebates are considered more akin to pricing practices.

This thesis provides an overview of case law and economic theory on rebate schemes so as to demonstrate that the economic theory behind exclusivity rebates does not justify the current treatment. The thesis also indicates that the mechanism of foreclosure pertinent in exclusivity rebates does not differ substantially from the mechanism of foreclosure in other rebate schemes. The thesis then advances the argument that the European Union courts' assessment of rebates is in need of reform. In order to attain better results, competition law assessment should aim to bring itself in line with the economic theory.

The thesis argues that the courts should recognize that exclusivity rebates, along with other rebate schemes, are closer to predatory pricing than exclusive dealing in their theory of harm. This entails that the European Union courts develop their assessment of rebates toward coherently assessing them as pricing practices with a potential to foreclose competitors.
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1. Introduction

1.1. On Rebates and the Relevance of This Study

It is very common for undertakings, be they dominant or not, to offer discounts to their customers. These discounts need not necessarily be aimed at all of the undertaking’s clients. In fact, selective discounts have been claimed to be the “bread and butter of competition”. It is therefore no surprise that the European Union courts have been faced with several cases in which they have had to assess the possible anticompetitive effects of rebates. Some academics have noted that the EU courts have implemented a very restrictive competition law analysis. Moreover, the current case law on rebates is somewhat disjointed. Evidence for this can be seen in the way that two recent cases, Post Danmark I and Intel, have progressed. In particular, the General Court in Intel seems to have assessed the case contrary to the spirit of the CJEU’s judgement in Post Danmark I. The General Court, in Intel considered that Post Danmark I did not deal with rebates that could be considered similar to those employed by Intel and was thus able to issue its own verdict. While the Intel case is still being appealed, and thus has not definitively been judged on, it can be said that undertakings applying rebate schemes are still in uncertain waters with regard to how such schemes will be assessed from a competition law point of view. This is particularly an issue, because it would seem that the Courts have made justifying rebate schemes rather difficult.

The current amalgam of assessment techniques creates issues in the consistency of assessment in the sphere of price discrimination and rebates in particular. There has been movement toward a so called more economic approach to competition law, but it is not without its critics. The prevalence of rebates in addition to their apparent uncertain effects on competition justify

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1 Faella, p. 409
2 Simpson, p. 27
3 see f. ex. Irish Sugar, Hoffmann-La Roche, British Airways, Michelin I and II
4 Wood and Visser
5 Batchelor and Meyer, p. 12
6 Case C-209/10 Post Danmark A/S v Konkurrencerådet
7 Case T 286/09 Intel Corp. v European Commission
8 Venit 2014, p. 209
9 Intel, para 100
10 Wood and Visser
11 Lundqvist, p. 573
12 Borlini, p. 413
a need to consider how rebates are assessed and, more importantly, how their assessment should be developed. To this end, this paper will aim to firstly, provide an overview of the current landscape of the case law on rebates in an effort to provide a basis for subsequent analysis. Building on the case law with economic theory pertaining to the rebates in question, the paper will attempt to advance the argument that the General Court has, in Intel, taken a definitive step in the wrong direction by creating three distinct categories of rebates for EU competition law to consider. The paper will then aim to suggest how the case law should be developed going forward in order to advance coherence in the assessment of rebates in general and to bring the legal assessment of exclusivity rebates in particular more in line with economic theory.

This paper will begin by discussing the General Court’s categorization of rebates in the recent Intel case. Such discussion will consist of an overview of the case law pertaining to these categories as well as considerations of the economic theory behind the effects of each category. The paper will continue on to discuss various other factors that affect the assessment of these rebates. In particular, the paper will consider various market and rebate characteristics that the Courts have considered relevant to their analysis of rebate schemes. Following this, the paper will briefly consider foreclosure and the debate between form-based and effects-based approaches to competition law in the context of rebates. The first part will be concluded by a section bridging the previous discussions together in an attempt to explain the flaws in the General Court’s categorization. The paper will then briefly discuss the EU courts’ reliance on Article 102(2)(c) in particular prior to concluding in consideration of the future of rebate scheme assessment under European Union competition law.

To attain the goals described above, the paper will primarily draw on economic theory in conjunction to applying the formal dogmatic approach to jurisprudence. In other words, the paper will be preoccupied by the structuring and systematizing of the case law and legal theory in question. This will be done, in particular, in the context of the economic theory on the same subjects. To this end, it should be noted that, as shall be briefly considered later, the role that economics takes in competition law is affected by the legal standard adopted. Irrespective of the legal standard taken, however, it must be recognized that much of the underlying thought

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13 Petrov and Zyryanov, p. 972
14 Avdasheva et al., p. 278
behind Articles 101 and 102 TFEU is based on economic rationale. Consequently, the legal assessment cannot be wholly divorced from economic theory in this sphere.

1.2. On Article 102 TFEU

Article 102 of Treaty on the Functioning of the European Union (TFEU) bears its history in Article 82 of the Treaty establishing the European Community (TEC), which in turn derives from Article 86 of the Treaty of Rome. Article 102 states the following:

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

Such abuse may, in particular, consist in:

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

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

The scope of this Article requires, first, that the practice under scrutiny is employed by an undertaking found to be in a dominant position on the relevant market. Secondly, the practice must constitute an abuse of this dominant position. Thirdly, in order to fall within the scope of the European Union’s powers, there must be an effect on trade between member states. Whereas the concept of effect on trade between member states is beyond the scope of this paper, it is useful to briefly summarize the first two concepts.

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15 Geradin et al., p. 19-23
16 Article 102 TFEU
1.2.1. Dominant Position

In order to assess the possible dominant position of an undertaking, it is critical to define the relevant markets in question. To this end, the Commission recognizes that the definition of the relevant market often has important influence on the assessment of the case.\textsuperscript{17} It has become standard practice for the Commission to define the market from two perspectives: the relevant product market and the relevant geographic market.\textsuperscript{18} In defining the relevant market, the Commission considers that undertakings are primarily constrained by the following three factors: demand substitutability, supply substitutability, and potential competition.\textsuperscript{19} Of these, demand substitutability is, in principle, economically the strongest constraint faced by the undertaking.\textsuperscript{20} The definition of the relevant market often requires careful assessment, however further discussion of the issues of market definition fall beyond the scope of this paper.

The concept of dominant position was considered by the Court of Justice of the European Union (CJEU) in \textit{United Brands} as follows:

\begin{quote}
\textit{The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.}\textsuperscript{21}
\end{quote}

It is clear that this description of the concept leaves questions unanswered, and subsequent judgements have served to clarify the term further. Nonetheless, this early description already indicates that the dominant position is closely tied to an undertaking’s ability to act independent of market forces. In this light, it would seem very closely tied to the economic concept of market power, which deals with an undertaking’s ability to price above market price.\textsuperscript{22}

In \textit{Tomra}, the Court once again repeats its position on dominant position by stating:

\begin{quote}
\textit{[I]t is clear from paragraph 79 of TeliaSonera that the dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which}
\end{quote}

\begin{flushleft}
\textsuperscript{17} Commission Notice, para 4
\textsuperscript{18} Commission Notice, para 4
\textsuperscript{19} Commission Notice, para 13
\textsuperscript{20} Commission Notice, para 13
\textsuperscript{21} \textit{United Brands}, para 65
\textsuperscript{22} Leivo et al., p. 692
\end{flushleft}
enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors and its customers.

[…] Article 102 TFEU does not envisage any variation in form or degree in the concept of a dominant position. Where an undertaking has an economic strength such as that required by Article 102 TFEU to establish that it holds a dominant position in a particular market, its conduct must be assessed in the light of that provision. None the less, the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.”

The Court’s judgments indicate that the concept of dominance has no degree. Either an undertaking is dominant or then it isn’t. As such, although closely linked, market power and dominance are, to some extent, independent of each other. This seems to allude that there are situations in which the legal term employed by the Court may, in fact, be in some contradiction to the economic term that it relates to. Particularly, while the Court acknowledges that market strength and dominance are intimately tied, the fact that market strength is a scalar attribute whereas the dominant position is a binary, may give rise to instances in which an undertaking is found to be in a dominant position while its market strength is not particularly strong. In such cases, it is somewhat misleading to describe the undertaking as having dominance, because its market strength is such that the undertaking’s ability to act independently of its customers and competitors is still fairly limited.

One could envision a situation in which an undertaking holds enough market power to be considered dominant but not enough to effectively employ a rebate scheme, for example, that would result in anticompetitive foreclosure from the market. The Court, however, separates anticompetitive effect from abuse as such in paragraph 39 of Tomra. Consequently, it would seem possible that an undertaking could be found liable for an infringement of Article 102 TFEU even though its practices have very limited effect on competition.

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23 Tomra II, paras 38 and 39
24 Whish and Bailey, p. 187
Several Article 102 TFEU cases have hinged on the degree of market power of the dominant undertaking.\textsuperscript{25} It is, however, inappropriate to base market power on market share alone,\textsuperscript{26} although market share does provide some indication of market power, and consequently, dominance. Paragraph 12 of the Commission’s Guidance on Article 102 Enforcement Priorities sets out that important factors to be taken into account include: actual competitors, potential competitors and countervailing buyer power. \textsuperscript{27} However, the Commission also notes that a stronger dominant position will signal a higher likelihood that conduct protecting that position will have foreclosing effects on the market. \textsuperscript{28} This would indicate that the Commission, at least, is placing some focus on the actual effects of market practices when assessing Article 102 cases. To this end, the nature of barriers to entry on the market, for example, may constitute a relevant factor in the assessment of a possible dominant position. \textsuperscript{29} The Commission ties dominance to market power by stating that it “considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant.”\textsuperscript{30}

The Court of Justice of the European Union has stated that the existence of a dominant position may derive from several factors, which do not necessarily have to be determinative on their own.\textsuperscript{31} In particular, the Court states that a major factor is the existence of very large market shares. The Commission further explains that higher market share and longer period of time holding the market share tend to more clearly indicate a dominant position.\textsuperscript{32} In this regard, in \textit{Hoffmann-La Roche}, the Court found that very large market shares can usually be taken as evidence of the existence of a dominant position in themselves.\textsuperscript{33} Similarly, in \textit{AKZO}, the Court found that a market share of 50\% was enough for a finding of dominant position.\textsuperscript{34}

\textsuperscript{25} Whish and Bailey, p. 195
\textsuperscript{26} \textit{Hoffmann-La Roche}, para 39 see also Monti, p. 52
\textsuperscript{27} Commission Guidance, para 12
\textsuperscript{28} Whish and Bailey, p. 195-196
\textsuperscript{29} Commission Notice, para 16
\textsuperscript{30} Commission Notice, para 11
\textsuperscript{31} \textit{Hoffmann-La Roche}, para 39
\textsuperscript{32} Commission Notice, para 15
\textsuperscript{33} \textit{Hoffmann-La Roche}, para 41
\textsuperscript{34} \textit{AKZO}, para 60
While high market share provides an indicator of possible dominant position, it should not be taken as a substitute for a thorough economic analysis. This is particularly the case, when the undertaking is not clearly dominant. Although an undertaking holds a high market share, it may be experiencing significant actual competition from other undertakings on the market; it may be facing potential future competition from expected entrants on the market; and it may be constrained by countervailing buyer power.

The Court bestows upon dominant undertaking a “special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.” This has generally come to mean competition with regard to attributes such as price, quality, and functionality. In this regard, the Court has clarified that competition on the merits may, indeed, lead to foreclosure from the market. When genuine competition forecloses or marginalizes less efficient competitors, it is not, in principle, an infringement of Article 102 TFEU. It is also worth noting that some academics have claimed that discounts should be considered instruments for competing on the merits.

1.2.2. The Concept of Abuse

The Court of Justice of the European Union has consistently held that the finding of a dominant position itself, does not yet constitute an infringement of Article 102 TFEU. However, the Court has also consistently held, that a dominant undertaking has a special responsibility not to further impair genuine undistorted competition on the market. Such further impairment of competition would result in an abuse of its dominance.

Abuses of dominant position can broadly be categorized into exploitative and exclusionary abuses. Whereas exploitative abuses deal with the direct exploitation of consumers, for example, through charging excessive prices, exclusionary abuses concern practices that

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35 Bellamy and Child, p. 707
36 Commission Notice, para 12
37 Michelin I, para 57
38 O'Donoghue and Padilla, p. 218 see also Temple Lang, p. 12
39 Post Danmark I, para 22
40 Pera and Auricchio, p. 168 see also Zenger, p. 739
41 See f. ex. Michelin I, para 57; Compagnie Maritime, para 37; Post Danmark I, para 21
42 See f. ex. Michelin I, para 10
43 Leivo et al., p. 687
negatively affect consumers by excluding competitors, be they actual or potential. Rebates can be regarded as an example of exclusionary abuses as rebates tend to deal with unusually low prices and so are not likely to exploit consumers directly.

Since Hoffmann-La Roche, the Court has held that:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

A literal reading of this could allow for the somewhat absurd conclusion that, a dominant undertaking has itself, by the mere fact of being dominant, weakened competition to the extent that it cannot be allowed to further impede competition. This, in turn, could imply that a dominant undertaking is barred from taking actions that could impede competition, even if such actions could be considered legitimately competitive actions. Such a static view is often not supported by the facts, however. Actions such as legitimate price competition may also result in competitors being driven from the market. As such, the CJEU has found it necessary to further clarify in subsequent judgments that the dominant undertaking is still free to participate in competition based on, for instance, price, choice or innovation.

1.3. The Objectives of European Union Competition Law and Article 102

Recent case law has clarified, that the objective of Article 102 TFEU is not protect competitors on the market that are less efficient than the dominant undertaking. This, however, does not explain whether Article 102 aims at protecting the process of competition itself or protecting

44 Bellamy and Child, p. 791
45 Hoffmann-La Roche, para 91
46 Oliver, p. 316-317
47 Venit 2014, p. 214
48 Post Danmark I, para 22
49 To this effect, see f. ex. Intel II, paras 133-134
50 See f. ex. Intel II, para 133 and cited case law
consumers through protecting competition. At first, these proposals may seem nearly identical, but the slight difference has been the subject of academic discussion.\textsuperscript{51} While an in-depth discussion of this issue is beyond the scope of this paper, it should be noted that the choice of perspective may have impact on the analysis of the effects of anticompetitive behavior in some cases.\textsuperscript{52}

Recent case law suggests, that the Court places some weight on the eventual impact on consumers. In particular, in \textit{TeliaSonera} the Court states that the function of Article 102 is to “prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.”\textsuperscript{53} The Court further states, “Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition.”\textsuperscript{54} For this reason, it would seem more natural to focus on the effects of abuses of Article 102 as they relate to the consumer welfare standard.\textsuperscript{55}

Price competition is a central factor in competitive markets.\textsuperscript{56} As a market becomes more competitive, the tendency is to allocate resources with more efficiency. In most cases, this implies that price will be set closer to marginal cost. As prices fall toward marginal costs, it can be expected that the dead weight loss associated with lack of competition begins to diminish as more units are sold. This translates to gains for the consumers.\textsuperscript{57} It would thus seem that competition law should also aim to incentivize undertakings in the direction of more vigorous price competition. On this point, AG Fennely has stated that price competition favors the more efficient undertakings and is therefore beneficial for customers in the long run.\textsuperscript{58}

\textsuperscript{51} Bishop and Walker, p. 29-32 see also Petit 2015, p. 53-59, Rey and Venit, p. 1-29
\textsuperscript{52} Auricchio, p. 374
\textsuperscript{53} TeliaSonera, para 22
\textsuperscript{54} TeliaSonera, para 24
\textsuperscript{55} This approach is supported by f. ex. Pera and Auricchio, p. 154
\textsuperscript{56} O’Donoghue and Padilla, p. 291
\textsuperscript{57} see f. ex. Bishop and Walker, p. 22
\textsuperscript{58} Fennelly 1998, para 117
2. Rebates

Rebates in practice may take many different forms. Loyalty rebates, in particular, can be held to constitute a form of price discrimination.\textsuperscript{59} The aim of such price discrimination is to expand sales by inducing the customer to purchase more from the supplier due to lower unit prices.\textsuperscript{60} At its simplest, a rebate passes the efficiencies a supplier achieves on to its customers. These efficiencies may be, for example, from economies of scale due to large purchase quantities. A fairly simple rebate could take the form of a 2% discount for buying 10 units at a time.

For the purposes of competition law analysis, there are several issues to assess. In the first instance, it is necessary to consider how various types of rebates should be legally assessed. However, the legal considerations cannot be devoid of the economic context. Rebates may have effects on two different levels on the market. Primarily, a rebate may foreclose competitors from sales to a single customer due to changing incentives as prices lower. This, in turn, may aggregate into foreclosure from a substantial part of the market, which may even result in foreclosure from the market entirely. Hence, competition analysis needs to consider the foreclosure effects at the individual customer level as well as possible foreclosure from the market.

In its recent \textit{Intel} case, the General Court of the European Union chose to categorize rebates into three distinct categories. The General Court, firstly, distinguishes between quantity rebates\textsuperscript{61} and exclusivity rebates\textsuperscript{62}, which also encompasses quasi-exclusivity rebates. In the General Court’s view quantity rebates are linked solely to the volume of purchases made\textsuperscript{63}, whereas exclusivity rebates are linked to the customer purchasing all or most of its requirements from the dominant supplier\textsuperscript{64}. The General Court then notes that this leaves an ambiguous middle ground where the mechanism of granting the rebate may have fidelity building effect without being directly linked to exclusive supply from the dominant undertaking. The General Court

\textsuperscript{59} Bishop and Walker, p. 250
\textsuperscript{60} to this effect, see Bishop and Walker, p. 252-253
\textsuperscript{61} \textit{Intel}, para 75
\textsuperscript{62} \textit{Intel}, para 76
\textsuperscript{63} \textit{Intel}, para 75
\textsuperscript{64} \textit{Intel}, para 76
dubs these rebates “third category” rebates.\textsuperscript{65} On appeal, the Court of Justice of the European Union, unfortunately, made no mention of this categorization.

Economic theory on the various rebates suggests that this tripartite categorization may not be strictly necessary. Additionally, Advocate General Wahl in his opinion on \textit{Intel}\textsuperscript{66} as well as some academics\textsuperscript{67} have considered that it may be more useful to divide rebates into those that are prima facie acceptable and those that need to be evaluated. The following sections will, however, discuss each category in turn before turning to considering rebates’ potential to foreclose from the market.

2.1. Quantity rebates

2.1.1. Legal Considerations

The Courts of the European Union have generally considered quantity rebates to lack a foreclosure effect that would infringe Article 102 TFEU. For example, in \textit{Solvay}, the General Court states:

\textit{“Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position.”}\textsuperscript{68}

The idea that a dominant undertaking is allowed to pass its efficiency gains on to its customers was not new at the time. In fact, Commissioner Van Miert had gone further in 1999 by stating that the case law of the CJEU at the time should be construed as allowing dominant undertakings to only grant rebates that pass specific savings on to its customers.\textsuperscript{69} It has, however, been argued that neither the current case law nor economic considerations support such a strict reading. In particular, it has been asserted that a strict interpretation of the Commissioner’s statement would

\textsuperscript{65} \textit{Intel}, para 78  
\textsuperscript{66} \textit{Wahl}, para 106  
\textsuperscript{67} Geradin 2015, p. 22  
\textsuperscript{68} \textit{Solvay}, para 318  
\textsuperscript{69} Commission Press Release
imply that many, if not most, rebate schemes applied by dominant undertakings would infringe Article 102, since the rebate scheme often does not solely reflect the savings made by the dominant undertaking.\textsuperscript{70} This is because individual customers tend to have such a small effect on costs, that linking a single customer’s purchases to cost savings would be difficult.

Quantity rebates based purely on the volume of purchases are held to be presumptively in accordance with Article 102 TFEU even if the discount increases as the volume of purchases increases.\textsuperscript{71} The Court does, however, consider the possibility that a quantity rebate may infringe Article 102 in the case that the rebate “is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors.”\textsuperscript{72} In these cases the Court deems that an assessment of “all the circumstances” is required in determining if a quantity rebate constitutes an abuse of dominance.\textsuperscript{73} The wording of the Court’s statement is somewhat ambiguous as to whether it considers it necessary for quantity rebates to be based solely on a countervailing, economically justified advantage.

The Court, however, considers that when a quantity rebate is not linked solely to an economically justified advantage, there is a need to investigate whether the rebate tends to “remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.”\textsuperscript{74} In Michelin II, the Court confirmed that quantity rebates may indeed constitute an abuse of dominance when they are found to restrict competition.\textsuperscript{75} In this light, it would seem that the Court’s case law has developed to place emphasis on the effects that the rebate has on the market.

2.1.2. Economic considerations

The Court is somewhat ambiguous on what exactly it considers a quantity rebate. A very strict reading of the case law leaves the impression that the rebates can only be based on gained

\textsuperscript{70} Mutanen, p. 1109 see also Batchelor and Meyer, p. 11
\textsuperscript{71} Michelin II, para 59
\textsuperscript{72} Solvay, para 319 and Michelin II, para 59
\textsuperscript{73} Michelin II, para 60
\textsuperscript{74} Solvay, para 320 and Michelin II, para 60
\textsuperscript{75} Michelin II, para 95
economic efficiencies. In other words, any setting any conditions on the achievement of the rebate, could give rise to possible infringement of Article 102 TFEU. Indeed, any threshold set for rebates is likely to change the customers purchasing incentives. However, because the Court, in *Michelin II*, seemed to equate Michelin’s rebates with quantity rebates, this section will consider the effects of such a rebate on individual customers.

In *Michelin II*, Michelin had created a rebate scheme in which its customers would get discounts based on their purchasing volumes over a given period. Michelin had several different thresholds at which the rebate was gradually increased. For instance, someone purchasing 10000 of the tires in Michelin’s rebate scheme would be liable to receive a rebate that was different from someone purchasing 50000 such tires. Michelin, therefore, applied a rebate scheme utilizing quantity thresholds as well as retroactive discounting.

In order to separate the two effects, it is useful to first consider a rebate scheme in which the rebate is not applied retroactively. Incremental rebates refer to rebate schemes for which the rebate comes into effect following the achievement of some volume of cumulative purchases. This incremental rebate may also take the form of several increments at different intervals. As an example, an undertaking might implement a rebate scheme where the first 10 units are sold at full price, units between 10 and 20 cumulative units are sold at a 20% discount, and units beyond 20 units are sold at a 30% discount. The following figure shows an example of the cost curve faced by a customer when this rebate is implemented, where the full unit price is 10:

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76 *Michelin II*, para 67
77 *Michelin II*, para 69
78 The effects of retroactivity will be discussed in detail in Section 3.2.
As can be seen, the effect of an incremental rebate is to decrease the marginal cost of following purchases. This naturally implies that as the customer purchases more beyond the rebate threshold, its average unit cost gradually decreases. Moreover, due to the rebate only being realized for additional purchases, the effective unit cost drops as more purchases are made. In the example above, purchasing 22 units leaves the customer with an effective unit cost of approximately 8,82 whereas the effective unit cost for purchasing 25 units is 8,6. Both, of course, are lower than the full price of 10. Further, it is clear that the average unit cost will never fall below the unit cost when the highest rebate is applied, which in this case would be 7. This can be represented by the following set of equations:

\[
\begin{align*}
    x_1 > Q & \Rightarrow C = Qp_1 \\
    x_2 > Q > x_1 & \Rightarrow C = x_1p_1 + d_1p_1(Q - x_1) \\
    Q > x_2 & \Rightarrow C = x_1p_1 + (x_2 - x_1)d_1p_1 + (Q - x_1 - x_2)d_2p_1
\end{align*}
\]

79 In this case, $x_1$ is the first threshold, $x_2$ is the second threshold, $Q$ is the actual amount purchased, $C$ is the total cost of purchases, $p_1$ is the full price of the product and $d_1$ and $d_2$ refer to the discounted portion of price after the first and second thresholds respectively in decimal form (i.e. 0,80 and 0,70 for the example)
If it is assumed that the competitor is unable to employ its own rebate, the alternative function the customer faces is: \( C = Qp_2 \) where \( p_2 \) is the price offered by the competitor. This implies that, as expected, if total demand falls below the initial rebate threshold, the suppliers are in simple price competition. On the other hand, if demand falls between the thresholds, the customer chooses the competitor if the following conditions are met:

\[
Qp_2 < x_1p_1 + d_1p_1(Q - x_1)
\]

\[
p_2 < \frac{d_1p_1Q + x_1p_1(1 - d_1)}{Q}
\]

Differentiating the right side with respect to \( Q \) we get the following:

\[
dQ = \frac{x_1p_1(d_1 - 1)}{Q^2}
\]

Since we have defined the discounted rate to be less than 1, the above equation implies that as \( Q \) increases, the competitor’s price must decrease for it to be an attractive competing offer. The same conclusion can be drawn from the graph.

As the customer purchases more from the rebate, its average unit price drops. The competitor’s price doesn’t change with the amount of purchases. As a result, if the competitor matches the average price for a given demand, the customer is nonetheless better off purchasing within the rebate scheme if it decides to purchase an extra unit.\(^{80}\) This implies that a competitor with a rigid price will be required to price equal to or lower than what the rebate applying undertaking is pricing. When both suppliers have identical prices on average, the customer can minimize its costs by purchasing all of its needs from either supplier, but any mix of suppliers will lead to a suboptimal cost.\(^{81}\) Naturally, if the competitor prices below this price point, it should theoretically gain the customer’s entire demand.

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\(^{80}\) Here we assume that the customer makes these decisions prior to committing any purchases.

\(^{81}\) If the rebate will not be achieved, it would be better to solely purchase from the competitor. If the rebate is achieved, and the competitor offers the same price, the customer with a rigid demand will be indifferent between the two. Strategically, it is better for a customer that has a dynamic demand, to focus purchases into the rebate. In either case purchasing less than the full demand within the rebate scheme will result in the competitor’s offer being better in the short term.
2.2. Exclusivity rebates

2.2.1. Legal considerations

Hoffmann-La Roche seems to mark the first time that the CJEU considered exclusivity rebates. As such, Hoffmann-La Roche provides the basis for the consideration of exclusivity rebates under European Union competition law. The case concerns Hoffmann-La Roche’s rebate schemes on a variety of vitamins. Roche offered rebates to several of its larger customers on the condition that these customers purchased at least 50% - in some cases even 95% - of their total need from Roche. The CJEU reasoned that such rebates infringe Article 102 (then Article 86) as follows:

“An undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 86 of the treaty whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position.”

This ruling by the CJEU very much suggest that the issue with exclusivity rebates in particular is that they exclude competitors from selling to the customers affected by the rebate because the customer is obliged to purchase all or most of its requirements from the dominant undertaking. In this sense, prima facie, the case law seems to assess exclusivity rebates in a way that is different from the treatment of quantity rebates.

Exclusivity rebates refer to a subcategory of conditional rebates that are predicated on the customer remaining loyal to the dominant undertaking in its purchasing habits. Therefore, as opposed to quantity rebates, these rebates are not linked directly to the volume of purchases. Rather, they are linked to the ratio of total purchases for each customer. The Court, in Hoffmann-La Roche, further clarified that such obligations incentivize the customer to purchase supplies

82 Hoffmann-La Roche, para 89
exclusively from the dominant undertaking. In this sense they, firstly, are individualized in their volume requirement and, secondly, are thought to restrict the customer’s freedom to choose suppliers and therefore foreclose or hinder competition on the market. Therefore, it would seem that the Court tends toward categorizing exclusivity rebates as something akin to exclusive dealing.

The Courts of the European Union have taken a generally hostile stand on exclusivity rebates. In fact, some academics have claimed that the case law suggests that exclusivity rebates should be considered so called *per se* infringements of Article 102 TFEU. However, others have claimed that the Court merely takes the form-based distinction as a starting point without dealing in absolutes. It has been noted by critics of the case law that a form-based assessment such as the one seemingly employed by the Courts fails to recognize that exclusivity rebates are also capable of bringing about economic efficiencies. It may well be that an exclusivity rebate employed by a dominant undertaking is in fact pro-competitive, or at least not anti-competitive. As such, the dominant undertaking is not necessarily employing an exclusivity rebate solely to foreclose competitors. This reasoning is, unfortunately, in contrast to the Court’s statements to the effect that retroactive rebates tend to not be linked to gains in economic efficiency or cost savings.

In light of the preceding, exclusivity rebates could be presumed to infringe Article 102. The case law, however, allows at least for a theoretical possibility of rebutting this presumption. Worryingly, the General Court reasons that, “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.” The idea of presumed,
indefensible infringement strengthened by the General Court’s reasoning that “the question whether an exclusivity rebate can be categorized as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect.”

Due to the ambiguous competitive effects of exclusivity rebates, the Court’s position is liable to imply two somewhat absurd results. Firstly, if exclusivity rebates are to be understood as infringing Article 102 TFEU based on the form, it becomes impossible for the dominant undertaking to assert any objective justification for its rebate scheme. This would make the court’s repeated statements to the contrary effectively dead letter. Secondly, by not considering the effects on competition that an exclusivity rebate may have, the Court runs the risk of effectively protecting less efficient competitors rather than protecting competition to the benefit of consumers.

Fortunately, the CJEU, in considering Intel’s appeal stated that “Case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.” The Court considered that in such cases, the Commission in required to analyze the extent of the undertaking’s dominant position as well as the covered market share and conditions for granting the rebates. Moreover, the Commission is required to assess whether there is an existence of a strategy aiming at the foreclosure of as efficient competitors. The Court seemingly also verified that loyalty rebates may be objectively justified by stating, “The exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.” Nonetheless, the Court particularly judged that in the case at hand, the General Court had made a mistake by not affording sufficient weight to the AEC test that the Commission had, in fact,

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92 Intel, para 80
93 O’Donoghue and Padilla, p. 480
94 See f. ex. Intel, para 81
95 Intel II, para 138
96 Intel II, para 139
97 Intel II, para 139
carried out, rather than making a judgement on whether or not Intel’s rebate scheme was loyalty inducing.\footnote{\textit{Intel II}, paras 142-147}

2.2.2. Economic considerations

Exclusivity and quasi-exclusivity rebates refer to rebates that are conditioned on the purchase of all or most of the customer’s requirements from the undertaking that is applying the rebate. As such, exclusivity rebates that do not apply retroactively tend to be both ineffective and hard to implement from a practical point of view. Without retroactivity, the conditionality on a ratio of purchases implies that the supplier should know the customer’s total demand before it implements the rebate scheme. Nonetheless, such a scheme will be briefly considered.

With some minor changes, the example rebate from the section on quantity rebates may be utilized here. Consider that now the supplier knows that the customer will want to purchase exactly 25 units. The supplier then sets up a rebate scheme where the purchase of 80\% of demand, or 20 units, qualifies for a rebate of 20\% and the purchase of 88\% of demand, or 22 units, qualifies for an additional 10\% rebate. In other words, the customer pays a full unit price of 10 for its first 20 units, after which it purchases another two units for 8 each and gets the last 3 units for 7 each:
An astute reader may already observe that this does not significantly differ from an incremental rebate as discussed previously. In fact, a competitor here faces a similar problem in that following the achievement of the first rebate, it is facing decreasing effective average unit price. As such, the pricing problem it faces is largely the same. There are, however, two differences that must be considered. Firstly, in this instance, the customer has an exact amount of demand. In other words, the decreasing effective average price is not a significant problem, because the customer is only concerned with the effective average price at 25 units. Secondly, as opposed to the incremental rebate, where the quantity thresholds are known but the customer’s demand is not known, both might be unknown in this situation. That is, because the rebate scheme is based on a percentage of demand, the competitor does not know what quantities are needed for a given threshold unless it knows the customer’s demand. If, however, the competitor knows the details of rebate scheme, such information is not strictly necessary. It is possible for the competitor to calculate the effective average discount at full demand\(^9\).

\[^9\text{Where } p_{\text{avg}}, x_1 \text{ and } x_2 \text{ are the decimal forms of the percentages for the thresholds respectively, } d_1 \text{ and } d_2 \text{ are the percentages of price left over after rebate in decimal form, and } p_1 \text{ is the initial price.}\]
Following the formula above, a competitor for the above example could easily calculate that it needs to offer a price lower than 9.48 without knowing exactly how much the customer intends to purchase.

2.3. ”Third category” rebates

2.3.1. Legal considerations

In its Intel decision, the General Court described “third category” rebates as those rebates that have a mechanism of granting the rebate in such a way that, while not directly linked to an exclusivity condition, they have fidelity building effect.\(^{100}\) That is, so called third category rebates provide the incentives to purchase some quasi-exclusive amount from the dominant undertaking without conditioning the rebate on the customer purchasing all or most of its requirement from the dominant undertaking.

The General Court’s assessment of the rebates in British Airways can be considered as an example of an assessment of this category of rebates. British Airways had agreed to pay a commission to travel agents for tickets they sold. However, upon reaching a certain, individualized thresholds of sales, the travel agents would gain a retroactive increase of their commission.\(^{101}\) As such, British Airways’s rebates can be considered to constitute an exclusivity rebate hiding in conditional quantity rebate form. Being quantity rebates, British Airways’s rebates were not directly linked to a condition of quasi-exclusive supply and thus were not explicitly conditioned on exclusivity. The General Court regarded that is not necessary for rebates to be explicitly conditioned on exclusivity for them to have fidelity building effect.\(^{102}\) This was later confirmed by the CJEU.\(^{103}\)

When a rebate falls into the “third” category, the Court has deemed it necessary to assess the relevant circumstances to decide whether the rebate is capable of anticompetitive foreclosure. For example, the General Court states the following in Intel:

\(^{100}\) Intel, para 78  
\(^{101}\) British Airways, para 239  
\(^{102}\) British Airways, paras 68, 77 and 90  
\(^{103}\) British Airways II, para 90
“In examining whether the application of such a rebate constitutes an abuse of dominant position, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition.”

Case law suggests that what circumstances should be included in an assessment of “all the circumstances” is also dependent on the context of the rebate. Such various circumstances as well as other possible factors will be discussed in further detail later in this paper.

2.3.2. Economic considerations

As has been noted, the General Court of the European Union considers “third category” rebates to be such that the rebate granting mechanism may have fidelity building effects although the rebate is not explicitly conditioned on a purchase of at least a quasi-exclusive ratio of demand. As such, “third category” rebates tend to be some form of quantity rebates with any of the several modifications that can be made to affect customer fidelity. Consequently, it is more appropriate to consider these various added mechanisms and their effects together in the next section.

3. Factors affecting assessment (so called “All the relevant circumstances”)

In Post Danmark II, the CJEU indicated that there was a necessity to take relevant circumstances into account as follows:

“Having regard to the particularities of the present case, it is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark’s dominant position and the particular conditions of competition prevailing on the relevant market.

In that regard, it first has to be determined whether those rebates can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between

104 Intel, para 78
105 See f. ex. Intel II, para 119, Intel, para 82, Michelin II, para 60, British Airways II, para 67 and Tomra II, para 71
various sources of supply or commercial partners. It then has to be examined whether there is an objective economic justification for the discounts granted”\textsuperscript{106}

The case law, which is legally binding, forms the context for how the relevant circumstances should be interpreted. The following sections will consider various factors that have been discussed as relevant circumstances by the European courts, the Commission and as arise from economic theory. To this end the Commission has published a discussion paper on the application of Article 82 of the Treaty to exclusionary abuses and Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings\textsuperscript{107}. While the Commission’s communications are not legally binding, they are relevant for this discussion in that they provide an indication as to the Commission’s thought process in deciding when to enforce Article 102 TFEU in the context of rebate schemes. The Commission’s communications also provide a more thorough reasoning as to why the issues it brings up may be relevant factors in assessing possible anti-competitive foreclosure through rebate schemes than what can be gleaned from the judgements of the General Court or the CJEU.

3.1. Conditionality

Conditionality is an integral part of any rebate scheme. If a rebate were to be given unconditionally, it would simply amount to a price cut. For example, an unconditional rebate of 20% must, by definition, apply from the first unit on and so does not differ substantially from just lowering the price of a product by 20%. As such, even quantity rebates, which the CJEU presumes to be in accordance with Article 102 TFEU are usually based on some conditions that must be fulfilled.

Conditional rebates may take many different forms. The previous discussion has focused on the two primary basic types of rebate. However, it is worth briefly considering another type of rebate. Growth rebates require the customer to purchase a number of units in addition to

\textsuperscript{106} Post Danmark II, paras 30-31
\textsuperscript{107} The relevance of the Guidance as a document concerning the assessment of rebates is evident in the Intel judgement. The General Court rightly noted that it had no bearing on the judgement as it had been adopted in 2009, after the Commission had decided to initiate proceedings in 2007. However, in recital 916 of its decision, the Commission, nonetheless considered that its decision was in line with the Guidance. (Intel, paras 155 and 158)
matching its purchases for a given reference period in order to be granted the rebate.\textsuperscript{108} This is to say, the rebate aims at increasing the purchases from the supplier by at least the amount that is the condition for acquiring the rebate. Consequently, if the customer attempts to achieve such a rebate, it will be forced to purchase more from the dominant undertaking. Growth rebates do not necessarily require the customer to purchase all or most of its demand from the dominant undertaking, but they are liable to increase the ratio of demand that the customer ties to the dominant undertaking. Consequently, there is a risk of the dominant undertaking consolidating its market shares through the use of such rebates.

3.2. Retroactivity

Retroactive rebates refer to a type of rebate that is retroactively granted on all purchases over a certain reference time period rather than just for future purchases.\textsuperscript{109} This substantially changes the customers incentives. As the customer purchases further units within such a rebate scheme, the marginal price begins to drop as it gets closer to the cusp of the rebate threshold. At this point, the customer generally faces a severely discounted price, as a purchase of one additional unit would allow it to recoup discount from all of its previous purchases. This effect has sometimes been termed as the suction effect.\textsuperscript{110} Although a similar effect happens in basic incremental rebates, the effect tends to be much stronger when the discounts are reaped for all purchases rather than only future purchases.\textsuperscript{111}

It is inherent in retroactive rebates that the closer the customer gets to the rebate threshold, the less attractive it is to switch suppliers. The Commission’s guidance on Article 102 enforcement priorities states, “The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.”\textsuperscript{112} That is, the foreclosing potential of a retroactive rebate is strongest at the point just before the rebate is achieved. At the cusp of the threshold, the effective price may indeed be very low or even negative in rebates.\textsuperscript{113} Moreover, the Commission notes the size of the rebate affects the strength of the suction effect in that a
larger rebate creates stronger suction.\textsuperscript{114} The guidance, however, makes explicit note that the last unit is not the only relevant factor for the foreclosing potential of a retroactive rebate.

3.2.1. Retroactive exclusivity rebate

Let us consider an exclusivity rebate of 20\% that is retroactively applied to all purchases if the customer purchases more than 80\% of its needs from the undertaking in question. The base price of the product is 10. In the following figure the customer has a total demand of 25 units:

As the customer nears the threshold for the rebate, it is facing increasingly diminishing marginal cost. In this specific case, the customer is, in fact, facing negative costs at the cusp of the rebate. That is, for purchasing one additional unit from the undertaking, the customer essentially gets paid 40, because it simultaneously becomes eligible for the rebate on all of its previous purchases. It is also worth noting that, because of this retroactive rebate, the customer must pay

\textsuperscript{114} Discussion paper, para 167
the same amount for 16 units and 20 units. However, if it decides to purchase a 17th unit, it has major incentives to purchase at least 20 units in order to benefit from the rebate.

On a more general note, once the customer has purchased 20 units, its average unit price suddenly drops from the original 10 to 8, due to the applicability of the rebate on all previous purchases. As opposed to the incremental rebate discussed previously, which only applied on future purchases, the retroactivity actually makes the decision of future purchases rather easy. Because the rebate has been applied on all purchase, further purchases do not affect the customers average unit price. In this sense, the customer is, at least theoretically, indifferent between suppliers as long as they can provide the same price of 8 per unit.

In light of the foregoing, the retroactive exclusivity rebate can be contrasted with the basic incremental rebate. In particular, whereas the incremental rebate causes a progressive shift in the average unit price, the retroactive exclusivity rebate can be seen as a single jump from one average unit price to another. Therefore, the competitor’s strategy is also slightly different in this case.

There are two important points regarding the competitor’s strategy. At the threshold volume \((x_1)^{115}\), the customer gains the full rebate, and so this unit is effectively the cheapest for the customer. The other interesting point is the volume prior to the rebate, where the customer’s cumulative cost equals the cost just after receiving the rebate \((x_2)^{116}\). As alluded to earlier, if the customer’s demand falls at a point beyond \(x_2\) the competitor only needs to match the rebated price per unit. Similarly, if the customer’s demand is less than \(x_1\), it will never be eligible to receive the rebate, and, thus, the competitor only needs to compete against the full price.

If demand falls between \(x_1\) and \(x_2\), the situation is slightly more ambiguous. In principle, if the customer has a rigid demand, for example, it cannot store more than its demand, then the competitor only needs to worry about competing against the full price, because there is no risk of the customer being induced to buy at least \(x_2\) units. However, if the customer can store extra units, it may be induced to buy at least \(x_2\) units, because it would be facing the same cost at \(x_1\) and \(x_2\) units. That is, by purchasing \(x_2\) units, it essentially gets all of its actual demand between

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115 This corresponds to 16 units in the example above.
116 This corresponds to 20 units in the example above.
\(x_1\) and \(x_2\) units for free. Consequently, the competitor cannot charge a cumulative cost that is equal more than \(x_1p\), which is what the customer pays at \(x_1\) or \(x_2\) units using the rebate. If the customer gains no marginal utility from extra units, then the customer can essentially set its price so that it cumulatively adds up to \(x_1p\).\(^{117}\) However, if the customer gains utility from units that are technically extra to its actual demand, the competitor needs to compensate customer for the free extra units it would be getting from the rebate scheme.\(^{118}\)

3.2.2. Retroactive Quantity Rebate

It is worth noting that similar effects arise, when retroactivity is applied to quantity rebates. Consider a retroactive quantity rebate, where quantity thresholds are placed at 10 units and 20 units. Once a customer purchases 10 units, it gets a retroactive rebate of 10% on all of its previous purchases. At 20 units, the rebate jumps to 20%. The following figure shows the cumulative cost up to 25 units for a product with base price 10:

\(^{117}\) This essentially means that the price offered by the competitor can follow the formula \(p = \frac{x_1p_1}{Q}\), where \(p_1\) is the full price in the rebate scheme and \(Q\) is the actual demand of the customer. \(^{118}\) In this case, the competitor’s pricing is dependent on the utility that the customer gains from the extra units: \(p = \frac{p_1dx_2 - U}{Q}\), where \(p_1\) is the full price in the rebate scheme, \(Q\) is the actual demand of the customer and \(U\) is the total utility from the free units. In the particular situation, where the customer’s utility per unit stays constant, we can substitute the cost savings it incurs into the formula to arrive at the following:
\[p = \frac{p_1dx_2 - p_1(x_2 - Q)}{Q}\].
As in the case of the retroactive exclusivity rebate, the incentives to from the supplier’s competitors decrease as the customer nears the threshold. In this particular example, the marginal cost for purchasing a 10 unit is 0. Similarly, the customer effectively faces negative costs for purchasing an additional unit when purchasing the 20\textsuperscript{th} unit. Specifically, purchasing 19 units costs 171 whereas purchasing 20 units costs 160.

Similarly to the case of the retroactive exclusivity rebate, in the case of a retroactive quantity rebate, the average unit price changes once the new level of rebate has been reached. Thus, an exclusivity rebate in general moves the customer from one unit price level to another only at the thresholds. This is in contrast to the incremental rebate scheme, which affects the average unit price on every purchase because it only applies to future purchases. As with the example for retroactive exclusivity rebates, the customer is therefore theoretically indifferent between the rebate scheme and a competitor that offers the average price, assuming that it has not yet committed to the rebate scheme.

The analysis regarding the customer’s incentives when facing essentially negative marginal costs in the section above may be applied similarly to the case of retroactive quantity rebates.
In essence, then, the loyalty inducing effects of retroactive exclusivity rebates are rooted in the retroactivity of the rebate rather than the exclusivity condition of the rebate. This is to say that it should be recognized that loyalty rebates are essentially individualized quantity rebates, both of which are capable of inducing loyalty at the margin of the threshold. As the preceding sections have shown, this loyalty inducing capability is strengthened when the rebate applies over all of the customer’s purchases rather than just its future purchases.

To underline this finding, we can compare the retroactive exclusivity rebate in the previous section with a retroactive quantity rebate that has a single threshold at the same level of purchase and same level of rebate. That is, a retroactive quantity rebate scheme where the customer gains a 20% rebate retroactively upon purchasing 20 units looks exactly the same as a retroactive exclusivity rebate of 20% for purchasing 80% of demand, if the customer’s demand is more than 20 units:

![Graph](image)

3.3. Assured Base of Sales or Non-Contestable Share of Demand

In many situations the customer will, for whatever reason, purchase from a supplier regardless of the suppliers’ competitors’ offers. This share that is essentially assured sales for one
undertaking is referred to as the non-contestable share or assured base of sales. Simply, it is a share that competitors are unable to contest. This uncontestable part of demand may arise for various reasons including switching costs\textsuperscript{119}, product differentiation and even the fact that the supplier is so large that it is an unavoidable trading partner\textsuperscript{120}.

The sections above have dealt with a market that is totally contestable. However, the counterstrategy available to the competitors of an undertaking applying a rebate scheme will differ somewhat when the market is not wholly contestable. This is because when the customer will buy some number of products from the rebate applying undertaking, the competitor will need to reimburse the customer for the rebate it would need to forego in buying from the competitor instead of purchasing everything from the undertaking applying the rebate.

3.3.1. Timing of Purchasing Decisions

Favoring a static focus on incentives at the last unit before the threshold as opposed to taking a more dynamic view of the rebate has some drawbacks\textsuperscript{121}. The static view may give a false impression of the effects of the rebate, because the incentives of the customer vary depending on the relation of the demand and the threshold. In other words, focusing on the threshold will only allow the analysis of the incentives at the threshold. However, the customer considers the incentive scheme as a whole, rather than solely at the threshold\textsuperscript{122}. Consequently, it is more appropriate to consider how the customer’s incentives change across its demand when it faces a rebate.

The analysis so far has been conducted with the premise that the customer is making its purchasing decisions at the beginning of the time-period. That is, the customer has not yet made any purchases, before it decides whether to purchase from the supplier applying the rebate or from the supplier’s competitor. Letting go of the premise that the customer is making purchasing decisions at time-period 0, affects the dynamic incentives of the customer.

The analysis for customer incentives at a later point in time is analogous to the customer having a non-contestable share of demand. This is because if the customer has already made purchases

\begin{itemize}
\item \textsuperscript{119} Morell et al., p. 431-432 and Björkroth, p. 55
\item \textsuperscript{120} OECD, p. 173
\item \textsuperscript{121} Bishop and Walker p.266
\item \textsuperscript{122} Bishop and Walker p. 268
\end{itemize}
from the supplier, it has essentially committed to buying that number of units from the supplier. Consequently, these form a portion of the demand for which the competitors can no longer compete. Competitors are, however, still free to compete for future purchase, or the rest of the customer’s demand. As such, a competitor of the supplier has numerous chances to compete for the customer’s demand if the customer makes several individual purchases over the time-period. However, as the customer commits more of its demand to the supplier, the supplier’s competitors will need to offer lower prices to compete for the remaining demand.

3.3.2. Duration

The case law of the European Union courts has generally judged the duration over which the rebate is accrued to be a relevant factor in assessing the anticompetitive capabilities of a rebate scheme.\textsuperscript{123} While the Commission asserts in its discussion paper that the reference duration has no impact on loyalty, it does admit that in certain cases the reference may, in fact, be relevant. To this end, the Commission notes that particularly long reference periods may disincentivize a customer to switch suppliers once committed when the products are homogenous.\textsuperscript{124} However, even in the case of long reference periods, a competitor is not, in principle, precluded from competing for the customer with a more favorable price. In fact, in the early stages of commitment to the rebate, it could be argued that it is still fairly easy for a competitor to persuade the customer to switch as it would be foregoing a rebate only for a few units.\textsuperscript{125}

It could be considered that what is more relevant than the duration of the rebate scheme is when customers must make choices regarding their purchases.\textsuperscript{126} Insofar as the economic incentives of the customer are concerned, the previous purchases within the same reference period can be considered to be similar to an assured base of sales. However, the Commission notes in its \textit{Intel} decision, that in the short term, the customer may face more obstacles to switching suppliers than in the long term.\textsuperscript{127}

These additional switching costs are likely to deter the customer if the competitor is unable to compensate for them. This is, naturally, less likely when the duration in which these costs may

\textsuperscript{123} See f. ex. \textit{British Airways}, para 63 and \textit{Michelin}, paras 81-83
\textsuperscript{124} Discussion paper, para 161
\textsuperscript{125} see also Maier-Rigaud, p. 274-276
\textsuperscript{126} O’Donoghue and Padilla, p. 497
\textsuperscript{127} \textit{Intel Decision}, para 1013
be recouped is shorter. The timing of customers’ choice to switch suppliers also affects the foreclosure potential of the rebate in that when customers switch earlier, it allows competitors to recoup the compensation of these switching costs over a larger quantity of units. Therefore, they are able to price more competitively than if the switching costs were divided over a smaller quantity of purchases.

The author of this paper notes that the rate of development of new products may also be tied to the issues of duration of the reference period. On the one hand, rapid development of new products has the potential to make long reference periods redundant as customers’ demand for the product quickly drops with the development of new substitutes. However, this does not preclude the theoretical possibility of formulating rebate scheme that induces customers to delay purchasing significant amounts of a new substitute. In particular, if customers are close to the rebate threshold, they may be induced to opt for the old product rather than move on to the new one because the economic gains of a small amount of further purchases of an inferior product outweigh the gains of the new product. With this caveat, the rate of development of substitutes may also be a factor in assessing the anticompetitive foreclosure potential of rebate schemes.

3.3.3. Unavoidable Trading Partner

The term “unavoidable trading partner” refers to a trading partner that, for whatever reason, cannot be avoided. The rest of the market may, for example, be unable to supply all of the customer’s need, and, therefore, the customer would purchase some amount from the unavoidable trading partner regardless of the prices its customers offer. In effect, this allows the trading partner to leverage the assured sales for additional market power on the contestable part of the market.128 That is to say, the unavoidable partner can essentially target the rebates on the contestable part of the market.129

It is only in very specific cases where unavoidability as a trading partner can be taken as anything more than an aggravating factor. The existence of an unavoidable trading partner implies that some part of the market is closed off to competitors. However, this only means that

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128 Intel Decision, para 1005
129 Ibid., para 1005
the loyalty-inducing effects of rebate schemes are stronger, not that it is necessarily anti-competitive.

The rebate scheme essentially targets the contestable part of demand because the unavoidable trading partner will have the assured amount of sales even without the incentives of the rebate scheme. The result is that customers of the unavoidable trading partner are more likely to be induced to loyalty than if it were an avoidable trading partner. It does not follow that a larger part of the market becomes tied, in fact. It is only more likely that the part of the market that becomes foreclosed grows. Therefore, the amount of demand that is locked in by the fact that an undertaking is an unavoidable trading partner rather affects the level of rebate that is necessary to induce loyalty. As such, the more unavoidable a trading partner is, the more likely it is that its rebate scheme has foreclosing effects, but on its own it is inconclusive factor.

3.3.4. Effects on Quantity and Exclusivity Rebates

To consider the effects of an assured base of sales in more detail, let us return to for a moment to the previously discussed example rebate of Section 3.2.1. We will modify the basic premises by assuming that the customer either already has purchased or will purchase regardless of circumstances 5 units from the supplier. The contestable share of demand is therefore the remaining 20 units in both cases.

In this modified case, the customer will commit to pay 50 to the dominant supplier regardless of the supplier’s competitor’s pricing schemes. Consequently, it is that much closer to receiving the rebate over all of its purchases. By not achieving this target threshold, the customer therefore foregoes a rebate on the 5 units it has committed to. As has been considered previously, once it has reached the threshold, it is theoretically indifferent between products with the same average price as the supplier’s post rebate average price. Therefore, the threshold is an interesting place of analysis.

For the customer to be indifferent at the threshold, the competitor must offer a cumulative price that is at least as low as the one offered by the supplier. In effect, then, the competitor must match the supplier’s post-rebate cumulative price although the customer is purchasing less units
from it. The following equation\textsuperscript{130} states the condition at which the customer will choose the competitor over the supplier:

\[
x_t dp > (x_t - x_n)p_c + x_n p
\]

\[
p_c < \frac{x_t dp - x_n p}{x_t - x_n}
\]

In the example rebate of section 3.2.1., the threshold was at 20 units and the rebate was 20\%. Substituting these into the equation above, gives the following:

\[
p_c < \frac{20 \times 0,8 \times 10 - 5 \times 10}{(20 - 5)}
\]

\[
p_c < 7,33
\]

The following table visualizes the difference in pricing schemes:

<table>
<thead>
<tr>
<th>Option</th>
<th>Quantity purchased from Supplier</th>
<th>Quantity purchased from Competitor</th>
<th>Cumulative Price</th>
<th>Average Unit Price (Supplier)</th>
<th>Average Unit Price (Competitor)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
<td>20</td>
<td>0</td>
<td>160</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Option 2</td>
<td>5</td>
<td>15</td>
<td>160</td>
<td>10</td>
<td>7,33</td>
</tr>
</tbody>
</table>

As can be seen, the competitor must offer a price that, in addition to matching the post rebate average price, also reimburses the customer for the commitment it has made to the rebate scheme. The same analysis, naturally, applies to a retroactive quantity rebate where the supplier has some portion of non-contestable demand. It is, however, worth noting, that because the competitor has to offer lower than post rebate prices, it should theoretically also gain all post rebate demand as well. The problem is slightly mitigated by this as can be seen here:

<table>
<thead>
<tr>
<th></th>
<th>Quantity purchased</th>
<th>Quantity purchased</th>
<th>Cumulative Price</th>
<th>Average Unit Price (Supplier)</th>
<th>Average Unit Price (Competitor)</th>
</tr>
</thead>
</table>

\textsuperscript{130} In the equation \(x_t\) is the quantity at threshold, \(d\) is the discount as a decimal, \(p\) is the full price offered by the supplier, \(x_n\) is the non-contestable share, and \(p_c\) is the competitor’s price
3.4. Market Share & Market Coverage

In principle, the market share of the undertaking employing the rebate does not impact the effect of the rebate directly. That is to say, a large market share does not logically cause the effect of a rebate to be foreclosing. This is because even a dominant undertaking is able to employ a rebate scheme that does not tie its customers enough to itself. Market share is, however, not an irrelevant factor. A larger market share, for example, implies a larger risk that the rebate covers a larger part of the market, because it is more likely that customers must purchase at least some of their requirements from the undertaking. Naturally, market share is also important as a proxy in assessing whether the undertaking has a dominant position, without which the practice is not covered by 102 TFEU.

At this point, it should be recalled that, assuming the rebate scheme is such that it does not require below cost pricing, a competitor losing profits because it cannot compete with the prices of the dominant undertaking for some customers is not the same as the competitor becoming unprofitable and thus being foreclosed from the market. Indeed, simply stating that a competitor should be able to compete for the whole market would be to imply that a dominant undertaking cannot implement any rebate scheme. It is, after all, the nature of rebate schemes

\[ \text{Option 1} \]

<table>
<thead>
<tr>
<th></th>
<th>from Supplier</th>
<th>from Competitor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
<td>25</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>200</td>
<td>8</td>
</tr>
<tr>
<td>Option 2</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>200</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7,5</td>
</tr>
</tbody>
</table>

The discussion above raises to the forefront the issues discussed in the earlier parts of this section. In particular, the effect of a non-contestable share of demand is to focus the effects of the rebate in such a way that the rebate is strengthened. The result, then, is that a competitor must factor into its own pricing scheme the customer’s commitment to the supplier. Hence, the competitor will have to offer prices that are even lower than those implied by the rebate scheme. Consequently, an as efficient competitor is more likely to be foreclosed by such a rebate as it will be more likely that it will need to offer prices that are below its costs. As a corollary, a competitor is unlikely to be foreclosed, if it can offer the required average unit price while making a profit.

\[ \text{131 Tomra II, para 42 and Tomra, para 241} \]
to offer lowered prices to certain customers, thus possibly inducing them to choose to purchase from that undertaking rather than another one. Nonetheless, as an increasing number of customers are tied by a rebate scheme, the contestable part of the whole market becomes smaller.

As the contestable part of the market becomes smaller, it tends to be able to support fewer competitors. That is to say, a smaller contestable share of the market is an indication that the effects of a rebate may be more harmful for competition because competitors are more likely to be foreclosed from the market.\(^{132}\) It stands to reason that as more of the market becomes foreclosed, it becomes increasingly likely that a competitor cannot achieve sales that will allow it to profitably stay on the market. Conversely, a larger contestable share of the market indicates that the rebate scheme is less likely to anti-competitively foreclose competitors.

The Commission’s discussion paper considers the relationship between effective price and market coverage. In particular, the Commission notes that in assessing rebate schemes, a calculation of whether an entrant is able to capture a share of the market that allows it to price at least as high as the average total cost of the dominant company should be a first step.\(^{133}\) This “required share” of the market may provide an indication as to possible foreclosure effects. Logic dictates that if competitors’ market shares are lower than the required share, they would have to be more efficient than the dominant undertaking to not face a risk of foreclosure.\(^{134}\) Thus, this situation would indicate a significant risk of anticompetitive foreclosure. Conversely, competitors with market shares that are much larger than the required share are unlikely to face a similar risk of foreclosure. Where the Commission cannot come to conclusions based on actual market shares, it attempts to assess the required share in relation to a hypothetical share that an efficient competitor could be expected to capture.\(^{135}\) This “commercially viable share” can be the same as the minimum efficient scale, but it does not have to be.\(^{136}\)

The courts have rightly noted that it is unnecessary to determine a precise threshold at which market coverage indicates that rebate is likely to foreclose competitors.\(^{137}\) Because the foreclosure effect of exclusivity rebates is context dependent and because markets differ, the

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\(^{132}\) O’Donoghue and Padilla, p. 500 and Wahl, para 140

\(^{133}\) Discussion Paper, para 155

\(^{134}\) Ahlborn and Bailey, p. 113 and Ridyard, p. 854-585

\(^{135}\) Discussion paper, para 156

\(^{136}\) Ibid., para 157

\(^{137}\) see f. ex. Tomra para 46 see also Wahl para 141
market coverages that the Court has held to be anticompetitive do not necessarily translate into other cases. Nonetheless, it should be noted that in *Intel* the General Court held that an average market coverage of 14% was significant.\(^{138}\) In *Tomra* the practices tied an average of 39% of the market. However, as Advocate General Wahl points out, in certain instances even a market coverage of 5% could foreclose competitors from the market.\(^{139}\) Consequently, market share must be relegated to just one of the factors considered when taking a holistic approach to assessing the anti-competitive effects of a rebate scheme.

3.5. Appreciability

3.5.1. Evidence of Non-Effects

In *Intel*, one part of Intel’s appeal was based on the fact that its competitor, AMD, had been performing well on the market regardless of Intel’s rebate scheme.\(^ {140}\) In other words, Intel argued that its rebate did not have the effect of foreclosure that is integral to the theory of harm that rebates, and in particular exclusivity rebates, are assessed by. Indeed, AMD’s growth on the market gave no indication as to a risk of foreclosure. It could be asserted that whereas the poor performance of a competitor does not necessarily imply foreclosure effect, the success of a competitor points toward an exclusivity rebate not having anticompetitive effects. Further, it is somewhat perverse to consider that a practice has foreclosing effects or potential when the market evidence shows that competitors are growing. In this context, the General Court replied that if not for Intel’s rebates, its competitor could have grown more.\(^ {141}\) Advocate General Wahl, however, points out that the same conclusion could be made if AMD’s performance had been poor and, thus, AMD’s performance is inconclusive.\(^ {142}\)

In light of the foregoing, one could question if disregarding competitors’ successful performance nears prohibiting the dominant undertaking from competing on the market. It is especially the General Court’s reasoning that AMD’s performance could have been better if it did not have to compete against Intel’s rebate that the author finds particularly questionable. Indeed, academics

\(^{138}\) *Intel*, paras 271-272  
\(^{139}\) Wahl, para 192  
\(^{140}\) *Intel*, para 1621  
\(^{141}\) ibid., para 186  
\(^{142}\) Wahl, para 159
have argued that the growing success of competitors should present rebuttable evidence that there is no risk of foreclosure.\footnote{Bishop and Walker, p. 262}

3.5.2. Proper Level of Risk of Foreclosure

_**Intel** is by no means the first time the Court has had to consider lack of foreclosure effects on the market. There is little doubt that effective competition cannot be maintained regarding the application of rebates if intervention can only happen in the case that actual foreclosure of a competitor has happened already.\footnote{Wahl, para 113} This would prevent the effective maintenance of the level of competition prior to the anticompetitive rebate. In this regard, the Court has been clear, that actual foreclosure on the market is not necessary for a rebate to infringe Article 102 TFEU. The General Court has reasoned as follows:

“[…] for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.”\footnote{British Airways, para 293}

The General Court’s statement implies that there needs to be an appreciable risk of foreclosure for current or potential competitors. That is, it is not sufficient that the practice in question has theoretical effects, because a merely theoretical effect does not have capability to foreclose competition. However, it is not entirely clear what this level of actual risk of foreclosure should be.

As has been discussed, a rebate may tie a single customer to a dominant undertaking. However, in most instances, it is unreasonable to assume that the foreclosure of a single customer is likely to prevent a competitor from competing on the market in any significant way. It seems, therefore, that it would not be logical to consider the foreclosure of a single customer to constitute a risk of anticompetitive foreclosure within the meaning of Article 102 TFEU. As
Advocate General Wahl points out, this would lead to a situation where it would be unnecessary to consider the circumstances of the rebate in any case.\textsuperscript{146}

The necessary level of capability to foreclose must therefore fall somewhere between actual foreclosure and a mere hypothetical possibility. While EU competition law enforces a special responsibility on a dominant undertaking not to further impede competition\textsuperscript{147}, this should not lead to such a low threshold as to make the threshold nonexistent. Advocate General Wahl further suggests that even a finding of the risk of foreclosure being more likely than not does not meet the requisite standard.\textsuperscript{148} This is because there is an unacceptably high risk of overinclusion and thus intervention in procompetitive rebates. In other words, in order to intervene, a competition authority should consider it likely that the rebate has anticompetitive effects.\textsuperscript{149} Hence, an analysis of all the circumstances should aim to confirm that the effects of the rebate are such that there is an actual potential of anticompetitive foreclosure.

The current inconsistency of the European Courts on the appreciability of effects on the market has led to some academics to go as far as asserting that the results of the assessment are primarily influenced by which judges are assessing the case.\textsuperscript{150} This is, without a doubt, a major concern in terms of consistent application and assessment of European Union competition rules. Considering that an undertaking may be fined up to 10\% of its annual revenue, it would seem fairly important that such fines are not based on the whims of the EU courts and regulators. Rather, the courts should provide a backstop of assurance that the rebate in question creates an actual risk of anticompetitive effects to a consistent degree. Currently, this consistency is not to be found in the case law.\textsuperscript{151} The courts have also been inconsistent in whether anticompetitive effects can be found from potential risk of foreclosure, or if actual risk of foreclosure is necessary.\textsuperscript{152}

\textsuperscript{146} Wahl, para 114  
\textsuperscript{147} Hoffmann-La Roche, para 89  
\textsuperscript{148} Wahl, para 119 see also Faella, p. 410  
\textsuperscript{149} Wahl, para 130  
\textsuperscript{150} O’Donoghue and Padilla, p. 89  
\textsuperscript{151} Petit 2016, p. 9  
\textsuperscript{152} Petit 2016, p. 262
3.6. The As-Efficient-Competitor Test

The goal of the as-efficient-competitor test (the AEC test) is to verify that a competitor that is as efficient as the dominant undertaking is able to compete against the dominant undertaking in genuine competition.\textsuperscript{153} Within the assessment of rebate schemes, this effectively means that AEC test focuses on the anticompetitive foreclosure potential of the rebate scheme. To this extent, the AEC test does not necessarily have to refer to a standard test that is applied similarly in all cases.\textsuperscript{154} The methods employed to test whether an as-efficient-competitor can effectively compete against the dominant undertaking can vary depending on the circumstances of the case. Nonetheless, a substantial amount of reliable market data is likely needed in order to sufficiently carry out the test.\textsuperscript{155}

The Commission’s Guidance explains a basic framework for what is generally considered the AEC test.\textsuperscript{156} The Commission will endeavor to use the dominant undertaking’s relevant data in its AEC test, as the test is supposed to assess the ability of a hypothetical copy of the dominant undertaking.\textsuperscript{157} However, in certain cases, such as in natural monopolies, it may be more appropriate to consider a modified version of the dominant undertaking as it is not reasonable to assume that an entrant could reach the same economies of scale as the incumbent.\textsuperscript{158} Moreover, when the dominant undertaking’s data is not available, the Commission may rely on a competitor’s data, but this will be an inferior data set as the dominant undertaking cannot be assumed to make pricing decisions based on the cost structure of its competitors.\textsuperscript{159}

Because the AEC test aims to assess whether an as-efficient-competitor is able to profitably compete on the market, it will also have to account for other market factors, such as what part of the market is actually contestable.\textsuperscript{160} Accounting for these market factors may provide further challenges to an effective application of the AEC test. For instance, the contestable part of the market is not strictly tied to market share and will therefore require its own determination.\textsuperscript{161}

\begin{footnotesize}
\begin{enumerate}
\item Niels et al., p. 186 and Geradin et al., p. 210
\item Peeperkorn 2018
\item Commission Guidance, paras 25 and 27
\item Commission Guidance, paras 23-27 and 67
\item Commission Guidance, para 25
\item Commission Guidance, para 25
\item Peeperkorn 2018, p. 3
\item O’Donoghue and Padilla, p. 494
\item O’Donoghue and Padilla, p. 494-495
\end{enumerate}
\end{footnotesize}
Determining the contestable part of the market correctly is important for the AEC test\textsuperscript{162}, because the foreclosure effects are realized specifically in this part of the market. Moreover, because the dominant undertaking may be able to leverage its assured base of sales to target the rebates on the contestable part of the market,\textsuperscript{163} these parts of the market are essential in reliably determining whether the undertaking’s pricing has the potential to foreclose its competitors in an anticompetitive way.

The Commission itself does not consider the use of the AEC test to be a necessity in the assessment of rebates.\textsuperscript{164} In \textit{Intel}, the General Court unequivocally rejected the relevance of the AEC test in this form.\textsuperscript{165} The General Court also considered that in \textit{Intel}, there was also no need to assess whether the AEC test was in line with the Commission’s Guidance.\textsuperscript{166} However, this was overturned on appeal as the CJEU held that the Commission had placed such emphasis on its AEC test that the General Court was required to actually examine Intel’s appeals regarding the AEC test.\textsuperscript{167} For this reason, at the time of writing, the General Court is re-examining the case. Unfortunately, this is not a very satisfactory answer from the CJEU, because it has evaded substantive questions on the assessment of the AEC test by reference to a procedural slight.

The CJEU’s judgement leaves various questions unanswered with regard to the relevance of the AEC test. In particular, the CJEU has not considered the relationship between the AEC test and an assessment of all the relevant circumstances is. Indeed, the Court did not make a statement on the necessity or irrelevance of the AEC test in the context of an assessment of all the circumstances. Instead, it stated that in this particular case, it was necessary to consider the AEC test, precisely because the Commission had carried one out and it clearly was a significant part of their anticompetitive analysis. From this, it can be concluded, however, that in such cases where an AEC test is carried out, the test will have at least some significance. However, based on the CJEU’s \textit{Intel} judgement, it is unclear, whether the CJEU considers it possible that an

\begin{itemize}
  \item \textsuperscript{162} Neven, p. 22
  \item \textsuperscript{163} Commission Guidance, para 39
  \item \textsuperscript{164} Commission Guidance, para 22
  \item \textsuperscript{165} \textit{Intel}, para 144 and 146
  \item \textsuperscript{166} \textit{Intel}, paras 156 and 157
  \item \textsuperscript{167} \textit{Intel II}, paras 142-144
\end{itemize}
exclusivity rebate is anticompetitive even when its effective prices are above the relevant cost thresholds.\textsuperscript{168}

\textbf{3.7. Individualized Rebates and Customers’ Demand}

One substantial difference between rebates and simple price cuts are in the way they are applied. The application of a price cut affects every customer that deals with the undertaking. However, the characteristics of a rebate can be individualized for specific customers. This allows the undertaking to create rebate schemes that specifically address the individual customer’s demand. As such, it provides a much better opportunity for creating a scheme that cuts prices in such a way as to effectively foreclose competitors from dealing with these customers.\textsuperscript{169} This would not be possible to the same extent if the undertaking could only price its products uniformly. The Commission considers that when the threshold is well targeted, there is a presumption that the level has been chosen in order to hinder the customers’ ability to purchase substantial amounts from competitors.\textsuperscript{170}

Because the customers in a given market are likely to be a heterogenous bunch, it is more likely that a standard rebate volume threshold is going to less effectively foreclose competitors.\textsuperscript{171} The needs of individual customers tend to differ. Therefore, a uniform volume threshold is unlikely to affect all customers in the same way. In particular, some customers may require much more or much less than what is required for the rebate. In these cases, the customer is unlikely to be significantly swayed to purchase additional units from the dominant undertaking because their requirements are nowhere near the threshold.\textsuperscript{172} The Commission has noted that individualized purchase targets are more likely to be anticompetitive than a rebate standardized rebate scheme. The reasoning behind this is that when all customers face the same threshold, the target may be too high for smaller customers to achieve and/or too low to affect large customers.\textsuperscript{173}

\textsuperscript{168} Komninos et al., p. 4
\textsuperscript{169} to this effect, see Michelin I, paras 70-86
\textsuperscript{170} Discussion paper, para 159
\textsuperscript{171} Discussion paper, para 159
\textsuperscript{172} Discussion paper, para 159
\textsuperscript{173} Discussion paper, para 169
3.8. Competitors’ Rebates

If the customer faces multiple suppliers that are offering differing rebate schemes, it has the opportunity to optimize its purchases in light of these multiple rebates. This does not necessarily result in the customer purchasing exclusively from the dominant supplier. In fact, the customer may even choose to forego the dominant undertaking entirely. The following example\(^{174}\) aims to clarify the preceding argument:

Let us assume that retailer X is being supplied by suppliers A and B and the price that retailer X can charge from its customers is constant. For simplicity, we further assume that the only difference between the rebate schemes is the target threshold quantity:

\(^{174}\) Bishop and Walker, p. 271
<table>
<thead>
<tr>
<th></th>
<th>Supplier A</th>
<th>Supplier B</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Target Threshold</strong></td>
<td>220</td>
<td>55</td>
</tr>
<tr>
<td><strong>Initial unit cost</strong></td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td><strong>Discount per unit</strong></td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td><strong>Current Sales</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scenario #1</td>
<td>219</td>
<td>60</td>
</tr>
<tr>
<td>Scenario #2</td>
<td>230</td>
<td>54</td>
</tr>
<tr>
<td>Scenario #3</td>
<td>219</td>
<td>54</td>
</tr>
<tr>
<td>Scenario #4</td>
<td>230</td>
<td>60</td>
</tr>
<tr>
<td><strong>Incremental cost</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scenario #1</td>
<td>-2190</td>
<td>10</td>
</tr>
<tr>
<td>Scenario #2</td>
<td>10</td>
<td>-540</td>
</tr>
<tr>
<td>Scenario #3</td>
<td>-2190</td>
<td>-540</td>
</tr>
<tr>
<td>Scenario #4</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

As indicated by scenarios 1 and 2, at the cusp of either threshold the incentives of retailer X are likely to point it toward fulfilling the threshold requirement because an extra purchase has negative incremental cost. Similarly, if the retailer is simultaneously at the cusp of both thresholds – scenario #3 - it is likely incentivized to purchase from the supplier that it has already made more purchases to. However, once retailer X has fulfilled both threshold requirements (scenario #4), it is indifferent as to which supplier to purchase from. This is because it is facing the same price from both. It follows that a retroactive rebate threshold that is too low in relation to the customer’s demand is likely to have less impact on the customer’s purchasing choices than a retroactive rebate threshold set close to the customer’s total demand. Moreover, the foregoing example shows that, in particular, the rebates applied by the dominant undertaking’s competitors are likely to affect the incentives of the customer. As such, these should not be ignored when considering the effects of a dominant undertaking’s rebate practices.

3.9. Alignment with Cost Efficiencies

The Court of Justice of the European Union has repeatedly considered that quantity rebates are presumptively in accordance to Article 102 TFEU because they represent efficiency gains of
undertakings gained from larger purchase volumes.\textsuperscript{175} The Court holds that undertakings are free to pass such efficiency gains on to their customers. Although the Court has not explicitly stated so, its judgements seem to imply that the basis of the rebate has important effect in terms of its relation to Article 102 TFEU. For example, in\textit{ British Airways}, the Court considers that the bonus commission granted by British Airways, which acted as a retroactive rebate, was devoid of an economically justified basis.\textsuperscript{176} In a subsequent paragraph the Court condemns the rebates as an abuse of British Airways’s dominant position as follows:

\textit{“The Commission was therefore right to hold that BA abused its dominant position on the United Kingdom market for air travel agency services by restricting, through the application of performance reward schemes not based on a justified economic consideration, the freedom of those agents to supply their services to the airlines of their choice and, in consequence, restricting the access of those airlines to the United Kingdom market for air travel agency services.”}\textsuperscript{177}

The wording used by the CJEU implies that British Airways’s rebates fulfilled two criteria. Firstly, they did not have an economically justified basis, and secondly, they restricted access to the market. As such, it is not entirely clear whether a lack of economic justification or more significantly, partial lack of economic justification is in itself enough to cause a rebate to infringe Article 102 TFEU. However, since the presumption of legality that is given to quantity rebates based on the assumption that they are based on an economic efficiency gain, it would be somewhat difficult to argue that rebates lacking this characteristic could be presumptively non-infringing.

3.10. Objective Justification

In theory, a dominant undertaking is able to attempt to rebut a finding of potential for anti-competitive foreclosure by providing objective justifications for its rebate scheme.\textsuperscript{178} Such claims have been made in\textit{ Hilti} and\textit{ Tetra Pak II}, for instance.\textsuperscript{179} However, a valid justification has yet to be provided to the courts of the European Union. In\textit{ Hilti}, the Court judged that Hilti’s

\textsuperscript{175} See f. ex.\textit{ Intel}, para 75 and case law cited
\textsuperscript{176} \textit{British Airways}, para 281
\textsuperscript{177} \textit{British Airways}, para 292
\textsuperscript{178} \textit{Intel}, para 81 see also O’Donoghue and Padilla, p. 289
\textsuperscript{179} see\textit{ Hilti}, para 33;\textit{ Tetra Pak I}, para 126;\textit{ Tetra Pak II}, para 37
behavior was not, in fact, motivated solely by a concern for safety as it did not provide evidence as to the inferiority of its competitors’ products.\textsuperscript{180} In Tetra Pak I, the General Court stated that, “It is not for the manufacturers of complete systems to decide that, in order to satisfy requirements in the public interest, consumable products such as cartons constitute, with the machines with which they are intended to be used, an inseparable integrated system.”\textsuperscript{181} The General Court continued in stating that the proper remedy for such concerns lay in legislation and regulation rather than the unilateral actions of manufacturers.\textsuperscript{182} Moreover, the CJEU explicitly noted that this reasoning was not defective.\textsuperscript{183}

The Commission discusses possible objective justifications in its Guidance under the heading of “Objective necessity and efficiencies”.\textsuperscript{184} Here the Commission states that it will examine claims put forth by the undertaking under investigation asserting that the conduct is justified.\textsuperscript{185} The Commission sets out three cumulative conditions that the undertaking will generally be required to demonstrate to a sufficient degree of probability.\textsuperscript{186} Firstly, the conduct must be a source of the efficiencies. Secondly, the conduct must be indispensable for the attainment of those efficiencies. Finally, the conduct cannot eliminate effective competition.

The Commission’s cumulative conditions for “objective efficiencies” bear striking resemblance to Article 101(3) TFEU, which states:

“\textit{The provisions of paragraph 1 may, however, be declared inapplicable in the case of:}
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
\textit{which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:}”

\textsuperscript{180} Hilti, para 135
\textsuperscript{181} Tetra Pak I, para 83
\textsuperscript{182} Tetra Pak I, para 84
\textsuperscript{183} Tetra Pak II, paras 36-37
\textsuperscript{184} Commission Guidance, Ill. D.
\textsuperscript{185} Commission Guidance, para 28
\textsuperscript{186} Commission Guidance, para 30
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.  

Here we see that the idea for an exemption from the prohibition in Article 101(1) TFEU largely follows the same idea as the “objective necessity” conditions laid out by the Commission for Article 102 TFEU. In effect, both instances require the undertaking to show that the efficiencies it gains are a result of the conduct, that the conduct is necessary for attaining such efficiencies and that the conduct does not eliminate a substantial part of competition.

Notably, the Commission’s Guidance does not explicitly require the efficiencies to be passed on to consumers in a fair share as stated in Article 101(3) TFEU. Nonetheless, the similarities between Article 101(3) and the “objective necessity” afforded to dominant undertakings by the Commission in its Guidance have the added benefit of furthering coherence between Article 101 and Article 102. The Commission’s Guidance in this context, however, does not address the issue of dominance, which is likely to factor into the assessment of elimination of effective competition. In particular, the Commission runs the risk of concluding that dominance itself leads to an elimination of competition to the point that further elimination of competition amounts to a failure to prove the final condition for “objective necessity”.

3.10.1. Some Pro-Competitive Effects of Loyalty Rebates

As has been alluded to previously, rebates may also have pro-competitive effects. However, these pro-competitive effects need not necessarily be solely based on lower prices for the customer. For example, when the customer is an intermediary, a loyalty rebate may be a more efficient way of inducing a customer to provide a certain level of service to the supplier than specifying the level of service through an explicit clause in a contract. This is because the actual level may be hard to explicitly qualify, monitoring may be costly, and enforcement of the

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187 Article 101 TFEU
188 It should be noted that the Commission can afford this only insofar as it can deprioritize cases that do not fit its guidance priority rationale. This does not have the same legal implications have judgements of the General Court and especially of the CJEU.
189 Bishop and Walker p. 264
breach will incur additional costs. Therefore, the loyalty rebate may be used to align the incentives of the supplier and the customer.

Loyalty rebates may also have pro-competitive effects downstream in the market. A loyalty rebate may, for example, be used to reduce double marginalization. The customer knows that reaching a certain target quantity of sales will result in a lower average price. Consequently, it is incentivized to moderate its markup on the wholesale price in order to guarantee that it reaches the threshold. Therefore, the supplier and customer are applying a lower margin in total than would be the case without the rebate. In this regard, it has been proposed that the issue of double marginalization may be even better addressed by retroactive rebates than rebates on future sales.

Finally, loyalty rebates may provide for efficient fixed cost recovery. In markets with high fixed costs and low marginal costs, the supplier will need to charge prices that are relatively high compared to its marginal costs to recoup its fixed costs. As a result, there is likely to be some amount of inefficiency from customers being unwilling to pay the charged cost although they would be willing to pay a price above the marginal cost. The ability to price discriminate through a rebate will allow the supplier to more fully supply the market and therefore better recover its fixed costs. Moreover, as the supplier’s customer base increases, its output will be expanded. Consequently, the portion of fixed costs that it needs to recoup per unit will decrease. As a result, the supplier can actually charge lower prices across the board than it would without the rebate.

3.11. Some Other Factor to Consider

In its Discussion paper, the Commission has noted that the loyalty inducing effect of the rebate scheme is strengthened when the rebates are important with respect to the profits of the customer. That is, when the customer cannot reliably expect to make a profit before it gains the rebate, it is likely to induce loyalty to the rebate scheme. However, this cannot be considered in a void. In particular, it should be remembered that in these cases the customer is an intermediary and therefore, the price of the product constitutes a part of its costs. As such, if a

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190 Bishop and Walker p. 265
191 O’Donoghue and Padilla, p. 467
192 Bishop and Walker p. 266
193 Discussion Paper, para 160
competitor of the dominant undertaking can offer a lower price sans a rebate scheme, the customer will have an option of supply that lowers its costs immediately rather than on achieving some rebate threshold. Consequently, it may be true that the competitor’s offer creates a situation in which the customer can choose between a rebate scheme where it sees its profits once the rebate is achieved or a source of supply that allows it to make profits on each sale individually.

When the rebate scheme employed by a dominant undertaking results in an effective price that does not fall below average total cost, it is unlikely that the rebate scheme has market foreclosing effects. Therefore, it could be argued that a rebate scheme that is able to fulfill this requirement should be considered presumptively lawful with regard to Article 102 TFEU. It should be noted that, contrary to the Commission’s considerations in its Discussion paper, the General Court in Intel stated that Intel’s exclusivity rebates could not be considered similar to the pricing practices at issue in Post Danmark I and thus there is no requirement to assess whether an as efficient competitor could continue on the market. The General Court, however, comes to this conclusion because it believes that the abuse of exclusivity rebates derives from the exclusivity condition.

The Commission notes that in exceptional cases, such as when the dominant company enjoys non-replicable advantages, the rebate system may be employed to restrict entry even when the effective price stays above average total cost. To some extent, it could be considered that economies of scale constitute this kind of non-replicable advantage. If the dominant undertaking is facing a lower average total cost solely due to economies of scale, it could charge a price that has potential to foreclose a competitor that is only facing a larger average total cost because it is not supplying to enough customers. In such cases, it should not be presumed that the rebate does not have anticompetitive effects on the market.

4. On Foreclosure

As is apparent from the case law, the European Union courts place emphasis on the foreclosure effect that a rebate scheme might have on an individual customer. This is particularly the case

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194 Discussion Paper, para 165
195 Intel, para 152
196 Discussion Paper, para 165
when dealing with exclusivity rebates. The previous, preliminary discussion on the effects of rebates certainly shows that rebates of any kind are capable of foreclosing competitors. However, this foreclosure from the market is possible only insofar as the competitor is unable to set a profitable price that is lower than the effective average price set by the dominant undertaking. In other words, the economic evidence and theory so far suggests that an as efficient competitor would be foreclosed in the case that the dominant undertaking applies a rebate scheme where its effective average price drops below costs. In this light, rebates in general could be considered part of the normal competitive process in that they constitute competition on price. 197

Although rebates are not necessarily exclusionary, this does not preclude the possibility that they are exclusionary. First and foremost, if the loyalty rebate conditions are such that the effective unit price that a customer faces is below the marginal unit cost, it is possible that competitors are foreclosed from selling to that customer. 198 As previously indicated, a non-contestable share of demand changes the incentives of the customer. This can make the competitive situation decidedly more difficult, and therefore poses a greater risk for anticompetitive exclusion. Additionally, it should be considered that the demand of customers is prone to change, which will also affect how the rebate changes purchasing incentives for customers. 199

From the economic perspective, foreclosure from a single competitor is unlikely to be crucial in determining whether or not “as efficient” competitors are foreclosed from the market as a whole. Most markets are characterized by the presence of multiple customers. Additionally, the customers in any single market are highly unlikely to be homogenous in their demand. Therefore, if an undertaking is unable to compete for one customer, it does not necessarily follow that it will be unable to compete for the other customers. Hence, a competitor being foreclosed from a single customer does not necessarily result in that competitor being unprofitable. A rebate scheme that forecloses certain customers will not necessarily foreclose competitors, if they are able to achieve the profitable amount of sales through other customers.

197 Motta, p. 499
198 Bishop and Walker p. 274
199 Bishop and Walker p. 273
The concept of foreclosure, instead, should apply to the market as a whole rather than for single customers.\(^{200}\)

To determine whether an undertaking may be foreclosed from the market, it is more important to focus on whether that undertaking is able to operate profitably on the market. A strict evaluation of foreclosure risk of as efficient competitors that a rebate may pose largely hinges on whether it is likely that an as efficient competitor can achieve the minimum efficient volume. In other words, irrespective of the plight of other potential competitors, is the market environment such that when the rebate is applied an as efficient competitor can still achieve enough sales to stay profitable.

It is possible for the as efficient competitor to stay profitable even if it cannot compete for all of the demand on the market. This can be achieved, for example, if the rebate ties only a part of the customers’ demand or if the undertaking is able to obtain a sufficient volume of sales from customers that are unaffected by the rebate.\(^{201}\) This, of course, is not to say that it is the place of dominant undertakings to decide how much of the market can be foreclosed. Rather, this implies that the enforcement of competition law, in this regard, should focus on cases where there is sufficient potential to foreclose as efficient competitors from the whole market.

5. Considering the Assessment of Rebates

The General Court’s reasoning with respect to exclusivity rebates in Intel, and more generally also the CJEU’s at least to some extent in the case law, suggests that the theory of harm behind exclusivity rebates is that they create an exclusive relationship between the dominant undertaking an its customer.\(^{202}\) Indeed, a requirement for the customer to purchase all or most of its requirements from the dominant undertaking in order to achieve the rebate certainly seems suspect and similar to an exclusive purchasing agreement. This was implicitly confirmed by the CJEU with its reiteration of Hoffmann-La Roche.\(^{203}\)

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\(^{200}\) Bishop and Walker p. 273
\(^{201}\) Bishop and Walker p. 273
\(^{202}\) Intel, paras 86-88, 99
\(^{203}\) Intel II, para 137
Advocate General Wahl points out in his opinion for Intel, there is not necessarily a penalty to the customer for switching suppliers.\textsuperscript{204} In this light, it could be argued that a more appropriate way to assess exclusivity rebates is to consider them as pricing practices. Interestingly, the Commission’s discussion paper on the application of Article 102 TFEU seems to confirm this line of thought, by stating, “\textit{In case it is clearly established that the effective price is above ATC, it is unlikely that the Commission will conclude that a market distorting foreclosure effect results.}”\textsuperscript{205} In other words, the Commission, at that point, seemed to agree that foreclosure is unlikely when competitors can still profitably compete with the retroactive rebate scheme.

The theory of the mechanism of foreclosure related to pricing practices, predatory pricing in particular, differs somewhat from that of exclusive dealing. As such, it is necessary to take a moment to discuss each of these mechanisms in turn. Following this, the optimal way to assess rebates can be considered.

5.1. Predatory Pricing

The basic idea of predatory pricing is that a dominant undertaking deliberately reduces its prices to such a level that it does not make a profit on sales.\textsuperscript{206} The motivation for this is that the below-cost pricing will either deter new entrants or drive existing competitors from the market, at which point the dominant undertaking can raise its prices again.\textsuperscript{207} This kind of pricing practice has been found to be contrary to competition “on the merits” by the CJEU as unreasonable price cutting aiming at exclusion.\textsuperscript{208} This, of course, should not preclude the dominant undertaking from competing on price, and, in fact, it would be somewhat perverse if competition law were to incentivize dominant undertakings to not compete for fear of being found to infringe competition law.\textsuperscript{209} This would, no doubt, be the result, if competition law were to find dominant undertakings merely answering price competition as infringing Article 102 TFEU.

In AKZO the Court viewed that the reason for a dominant undertaking to charge prices that generate loss on each sale – that is to say, prices that are below average variable costs – is to

\textsuperscript{204} Wahl, para 153  
\textsuperscript{205} Discussion Paper, p. 50  
\textsuperscript{206} Whish and Bailey, p. 756  
\textsuperscript{207} Whish and Bailey, p. 756-757  
\textsuperscript{208} Whish and Bailey, p. 757  
\textsuperscript{209} Whish and Bailey, para 757
eliminate competitors from the market.\textsuperscript{210} It further stated, that when the dominant undertaking has a plan to eliminate competition, then even prices that are below average total costs but above average variable costs can be regarded an abuse of dominance.\textsuperscript{211} In consequent cases, the Court has confirmed the basic framework for assessing whether pricing may be predatory and thereby infringe Article 102 TFEU.\textsuperscript{212} While it can certainly be discussed whether these are the correct benchmarks to use\textsuperscript{213}, the Court seems to be relatively clear that prices above average total cost are unlikely to infringe Article 102.\textsuperscript{214}

In general, the Court has tended to consider predatory pricing in terms of how price relates to average total cost and average variable cost. In particular, there are three positions that the price can take in relation to these values.\textsuperscript{215} When a dominant undertaking prices below both measures of cost, it is presumed to be acting abusively, although this presumption is rebuttable. When prices are below average total cost but above average variable cost, the Court considers predation a possibility, but it does not presume this is the case. When the dominant undertaking charges prices above both measures of cost, the Court presumes that the undertaking is not engaging in predatory pricing.

In its Guidance, the Commission places predatory pricing apart from exclusive dealing, and consequently conditional rebates, under the heading of “Predation”. This would seem to imply that the Commission considers conditional rebates to be separate from predatory pricing in their mechanism of exclusion. It should be noted, however, that the Commission’s Guidance treats the AEC test in a very similar fashion to its assessment of predatory pricing.\textsuperscript{216} With regard to predation, the Commission considers deliberately incurring losses or foregoing profit with a view to foreclose competitors to constitute an abuse of Article 102 TFEU.\textsuperscript{217} As such, the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{210} AKZO, para 71
\item \textsuperscript{211} AKZO, para 72
\item \textsuperscript{212} Tetra Pak I, para 8 and France Télécom v Commission, para 130
\item \textsuperscript{213} See f.ex. Whish and Bailey p. 762-764
\item \textsuperscript{214} In Post Danmark I, the Court held that prices above average incremental cost but below average total cost were unlikely to be abusive if it could not be shown that the dominant undertaking had a strategy of foreclosure. In such cases, the exclusionary effect must be shown to at least be likely. It can thus be assumed that the same is true more strongly, when the pricing is above average total cost.
\item \textsuperscript{215} Whish and Bailey, p. 759
\item \textsuperscript{216} Commission Guidance, para 67
\item \textsuperscript{217} Commission Guidance, para 63
\end{enumerate}
\end{footnotesize}
Commission looks for sacrifice of profits, anti-competitive foreclosure, and lack of efficiencies being created as signs of predatory pricing.\textsuperscript{218}

5.2. Exclusive Dealing

The idea behind exclusive dealing agreements is that one or both of the parties to the agreement are prevented from dealing with other parties.\textsuperscript{219} In this sense, one of the simplest vertical exclusive dealing agreements could be one that requires the customer to purchase all or most of a particular good from the supplier\textsuperscript{220}. It has been argued that the Court’s early case law on rebates implies that exclusive dealing agreements do not necessarily have to be strictly exclusive.\textsuperscript{221} To this end, \textit{Hoffmann-La Roche}, does suggest that a dominant undertaking tying its purchasers by an obligation to obtain most or all of its requirements exclusively from the said undertaking is an abuse of dominant position within the meaning of Article 102.\textsuperscript{222}

The Commission’s \textit{Guidelines on Vertical Restraints} discuss exclusive dealing agreements in light of Article 101 TFEU under the heading of “Single branding”.\textsuperscript{223} Granted these guidelines refer to Article 101, they nonetheless provide some insight into how the Commission considers exclusive purchasing agreements. In particular, in the context of Article 101, the Commission considers that agreements or incentive schemes to purchase more than 80% of demand from a single supplier may result in foreclosure of the market to competing and potential suppliers.\textsuperscript{224} In this context, the Commission also states that, “\textit{If competitors can compete on equal terms for each individual customer’s entire demand, single branding obligations of one specific supplier are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations. The higher its tied market share, that is, the part of its market share sold under a single branding obligation, the more significant foreclosure is likely to be.}”\textsuperscript{225} In other words, the Commission seems to consider market level foreclosure to be the important factor when

\begin{itemize}
\item \textsuperscript{218} Commission Guidance, paras 64-74
\item \textsuperscript{219} Wikberg, p. 272
\item \textsuperscript{220} Niels et al., p. 224 see also Ramseyer and Rasmusen, p. 145
\item \textsuperscript{221} Whish and Bailey, p. 699
\item \textsuperscript{222} \textit{Hoffmann-La Roche}, para 89
\item \textsuperscript{223} Vertical Guidelines, paras 129-150
\item \textsuperscript{224} Vertical Guidelines, paras 129-130
\item \textsuperscript{225} Vertical Guidelines, para 133; see also Ramseyer and Rasmusen for further consideration of lack of anticompetitive effects in exclusive dealing.
\end{itemize}
assessing the potential of single branding agreements to anticompetitively foreclose competitors.

In its Guidance, the Commission discusses exclusive dealing from the perspective of Article 102 TFEU. In this section, the Commission discusses exclusive purchasing separately from conditional rebates. It is, however, worth noting that the Commission has decided to put conditional rebates under the heading of “Exclusive dealing”, which would imply that this is the mechanism of harm that the Commission considers more pertinent. In particular, the Commission states “A dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing.”

With respect to exclusive purchasing, the Commission states “An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertaking. Certain other obligations, such as stocking requirements, which appear to fall short of requiring exclusive purchasing, may in practice lead to the same effect.” Moreover, the Commission states that it will prioritize enforcement of Article 102 TFEU in this regard on those cases that have the effect of preventing the entry or expansion of competing undertakings. On conditional rebates the Commission, on the other hand, states “However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking.” As such, the Commission clearly considers conditional rebates to be distinct from predatory pricing. Nonetheless, the Commission does not explicitly consider foreclosure from a single customer to necessarily constitute infringement, instead choosing to state, “As with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer.”

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226 Commission Guidance, para 32
227 Commission Guidance, para 33
228 Commission Guidance, para 34
229 Commission Guidance, para 37
230 Commission Guidance, para 39
The Commission has taken action in several cases regarding what it has considered exclusive dealing.\textsuperscript{231} For example, in \textit{Solvay} the Commission fined Solvay and ICI for granting fidelity and top-slice rebates as well as requiring customers to enter into long-term contracts with them.\textsuperscript{232} It should, however, be noted that the Court spends quite some time in detailing other arrangements in addition to the rebates that were employed to establish exclusivity.\textsuperscript{233} Such arrangements included cheque payments and competition clauses\textsuperscript{234} indicating that all supplies would be cut off if exclusivity was not maintained. Thus, it could be argued that Solvay’s practices constituted of a combination of fidelity rebate and contract terms aimed at creating the effect of an exclusive dealing agreement. That is, while the goals are similar, the rebates employed by Solvay could be seen as a practice apart from the issue of exclusive dealing.

More interestingly, the Court of Justice of the European Union has considered exclusive purchasing obligations in some cases. For example, in \textit{Van den Bergh Foods}, the CJEU considered that HB’s supplying of free freezers on the condition that the freezers be stocked with only HB’s products constituted a de facto exclusive purchasing agreement.\textsuperscript{235} Hence, it can be seen that motivation for these more direct exclusive dealing arrangements is similar to that of exclusivity rebates. The aim is to lock the downstream customer so as to limit the sales volume available to the upstream competitor and affect its ability to achieve economies of scale.\textsuperscript{236}

5.3. Form-Based or Effects-Based Assessment

5.3.1. Form-Based Assessment

Academics have argued that the form-based assessment results in a quicker and more predictable process.\textsuperscript{237} However, this would entail that there is a judicial and economic basis for presuming the infringement of a particular form.\textsuperscript{238} The form-based assessment has also been argued to

\textsuperscript{231} see f. ex. \textit{Solvay}, para 47, \textit{Prokent-Tomra}, para 114
\textsuperscript{232} Whish and Bailey, p. 701
\textsuperscript{233} \textit{Soda-ash}, paras 14-38
\textsuperscript{234} By competition clauses, the Commission meant English clauses of the type discussed in \textit{Hoffmann-La Roche}, which provided a way for Solvay to monitor the offers its customers were receiving.
\textsuperscript{235} \textit{Van den Bergh Foods}, paras 2 and 90
\textsuperscript{236} Lugard, p. 163
\textsuperscript{237} See f. ex. Kuoppamäki 2003, p. 931 and Wils, p. 21
\textsuperscript{238} Wils, p. 21
better protect the process of competition rather than as efficient competitors.\textsuperscript{239} This claim, however, is largely rooted in a discussion on the primary goals of European Union competition law.

Especially in the context of exclusivity rebates, the old form-based assessment has drawn some academic critique.\textsuperscript{240} Particularly, it has been argued that this way of assessing rebates results in conserving the framework of competition rather than aiming at increasing consumer welfare and economic efficiency.\textsuperscript{241} This form-based assessment has been considered to mirror the “by objective” category of infringements found in the case law of Article 101 TFEU.\textsuperscript{242} Following this logic, form-based assessment under Article 102 should arguably be confined to those practices that can legitimately be presumed to have anticompetitive effects. The Court has provided some support for this by stating the following in \textit{Michelin II}:

\textit{“The Court points out that Article 82 EC prohibits, in so far as it may affect trade between Member States, any abuse of a dominant position within the common market or in a substantial part thereof. Unlike Article 81(1) EC, Article 82 EC contains no reference to the anticompetitive aim or anti-competitive effect of the practice referred to. However, in the light of the context of Article 82 EC, conduct will be regarded as abusive only if it restricts competition.”}\textsuperscript{243}

The form of a rebate does not necessarily correlate with any positive or negative effect on competition in a consistent manner.\textsuperscript{244} Therefore the same rebate may have negative or positive effects on competition depending on the context in which it is applied. As such, it would seem somewhat inappropriate to consider exclusivity rebates to infringe Article 102 TFEU based on form alone.

Further, as the form-based assessment is based on a presumption of anticompetitive effect of a particular form of rebate, it is likely to lead to inappropriate outcomes in terms of regulatory intervention. That is to say, by focusing on the form of the rebate, the competition authority is

\begin{itemize}
\item \textsuperscript{239} Wils, p. 16
\item \textsuperscript{240} O’Donoghue and Padilla, p. 267
\item \textsuperscript{241} Faull and Nikpay, p. 347
\item \textsuperscript{242} See Geradin, p. 21 and Ibanez Colomo p. 1
\item \textsuperscript{243} \textit{Michelin II}, para 237
\item \textsuperscript{244} Spector, p. 1
\end{itemize}
more likely to intervene when there is no anticompetitive effect in the case of presumed infringements and more likely to not intervene in the case of presumed non-infringement. For example, an undertaking can create a rebate scheme largely following a quantity rebate pattern that would nonetheless be anticompetitive, but a form-based approach would be more accepting of such a rebate scheme. The argument has also been made, that this results in the protection of less efficient competitors, which does not benefit competitive efficiency.

Finally, the form-based assessment has drawn critique in that it treats exclusivity rebates as fundamentally different from other types of rebates. Whereas other forms of rebate are considered anticompetitive if their effect is to foreclose the market, exclusivity rebates seem to be assumed to close the market. Moreover, such assessment of exclusivity rebates also implies that once an undertaking becomes dominant, its rebate scheme immediately becomes an infringement of Article 102 TFEU. This would result in major difficulties for undertakings that may or may not be dominant prior to being found as such by the Courts.

5.3.2. Effects-Based Assessment

The effects-based assessment is based on the evaluation of economic evidence and facts in the context of the market. In this respect, the effects-based assessment requires that there is an actual assessment of the anticompetitive effects of the rebate. This puts a clear focus on the effects that the practices under scrutiny have on the welfare of consumers. Therefore, an effects-based assessment is more likely avoid unnecessary intervention, which would itself affect competition on the market, which has also been the recommendation of the Economic Advisory Group on Competition Policy. As has been discussed, the form of rebate does not necessarily imply a specific effect regardless of its context. As such, the effects-based approach attempts to identify anti-competitive and pro-competitive practices based on their actual effects on the market.

245 Geradin 2015, p. 599
246 Peeperkorn 2015, p. 62
247 Vitzilaiou, p. 3
248 Gual et al. 2005, p.2
249 Faull and Nikpay, p. 347
250 Gual et al. 2005, p. 2
251 Faull and Nikpay, p. 347
252 Venit 2014, p. 204-205
253 Faull and Nikpay, p. 349
It has been argued that moving to a more effects-based approach to Article 102 TFEU would bring further coherence to the application of European Union competition law. In particular, it has been noted that such an approach is already in use in the Union’s case law on mergers and Article 101.\textsuperscript{254} Consistency, especially in the application of Articles 101 and 102, is relevant particularly because the EU Courts have judged that Articles 101 and 102 do not preclude each other.\textsuperscript{255} The coherent application of both Articles is also supported by the fact that they have similar goals, namely ensuring efficient competition on the internal market.\textsuperscript{256}

The effects-based assessment is clearly more resource intensive than the form-based assessment in most cases. This is because it requires the regulator to assess the effects of the rebate.\textsuperscript{257} As such, legal certainty may initially suffer as the courts find the requisite threshold of risk of foreclosure. The threshold for a sufficient level of risk of foreclosure has been the subject of academic discussion as well.\textsuperscript{258} To this end, it has been asserted that it may be more efficient to consider certain rebates as prima facie infringements, while leaving room for the dominant undertaking to prove the lack of anticompetitive effect.\textsuperscript{259}

The context dependency of the effects of rebates is likely to affect the dominant undertaking’s ability to self-assess even when the case law is relatively clear on the threshold.\textsuperscript{260} In addition, the prominence of the AEC test in the effects-based approach has drawn critique from some academics.\textsuperscript{261} For example, Wouter Wils has been a vocal critic of using the AEC test in the context of rebates offered by a dominant undertaking.\textsuperscript{262} However, it should be noted that the AEC test has not explicitly been considered necessary by the Commission or the EU courts. In particular, the Commission indicates in its Guidance that, “\textit{With a view to preventing anticompetitive foreclosure, 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,}”\textsuperscript{263} and “\textit{If the data clearly}

\begin{itemize}
\item \textsuperscript{254} Granslandt 2006, p. 6
\item \textsuperscript{255} \textit{Hoffmann-La Roche}, para 116
\item \textsuperscript{256} O’Donoghue and Padilla, p. 34
\item \textsuperscript{257} Faull and Nikpay, p. 347
\item \textsuperscript{258} O’Donoghue and Padilla, p. 445
\item \textsuperscript{259} Marinova 2016, p. 408
\item \textsuperscript{260} Faull and Nikpay, p. 349
\item \textsuperscript{261} See Jones 2015, p. 147
\item \textsuperscript{262} See Wils, p. 27
\item \textsuperscript{263} Commission Guidance, para 23
\end{itemize}
suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking’s pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene.”

That is, the AEC test – when considered as a specific test of pricing conduct – constitutes only a part of a more holistic evaluation of foreclosure risks due to a dominant undertaking’s conduct on the market.

Further, critique has also be focused on the uneven capabilities of Member States. In particular, it has been noted that all Member States may not have the significant resources needed to apply the effect-based approach. This, in turn, risks inconsistent application across the Member States of the European Union as well as under enforcement due to insufficient capabilities in showing anticompetitive effects.

5.4. The tripartite categorization

In his opinion on Intel, Advocate General Wahl writes that the General Court erred in law “in finding that “exclusivity rebates” constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish and abuse of a dominant position contrary to Article 102 TFEU.” The Advocate General, therefore, seems to support the proposition that there are only two legal categories of rebate. The first category is quantity rebates, which are presumed to not infringe Article 102. The second category then, would consist of all other types of rebates, which would require an assessment of all the circumstances in order to assess whether they infringe Article 102. It should be noted that is not necessarily the case.

If we accept the Court’s apparent reasoning in Intel that foreclosure of a single customer could potentially infringe Article 102, there is an argument to be made based on economic theory that exclusivity rebates could be presumed to infringe Article 102. However, the economic theory clearly shows that this presumption must be rebuttable. As such, the practical result is likely to be similar whether or not exclusivity rebates are, in fact, collated with the Court’s “third category rebates”. That is, even if exclusivity rebates are presumed to be unlawful, undertakings

264 Commission Guidance, para 27
265 Faull and Nikpay, p. 349
266 Wahl, para 173
are likely to attempt to rebut this presumption, which effectively forces an assessment of all relevant circumstances on the rebate.

As has been discussed previously, once the rebate has been granted, the customer’s effective price per unit is changed. However, if an equally efficient competitor is able to profitably price at a rate lower than the effective price faced by the customer, the competitor is offering a better deal to the customer. In this case, the customer is better off choosing the competitor than fulfilling the requirements for the rebate. In other words, competitors are not necessarily excluded from the market. Conversely, it is possible for an undertaking to create a rebate scheme that results in exclusivity even if there is no direct necessity for exclusivity267 as has been discussed particularly in relation to “third category” rebates.

Competition on price would imply that the competitor does not make as much profit as it would if not for the rebate. Consideration of the competitor’s profits beyond its ability to compete profitability, however, implies a protection of the competitor rather than the process of competition. In particular, it suggests an idea that if the dominant undertaking were unable to apply rebate schemes, it would meet the price competition in some alternative way such as cutting its initial price.

It can be seen that in terms of potential for foreclosure, the most important factor to focus on is whether the effective price that the competing undertaking must compete against falls below the costs incurred by the competitor.268 This implies that the analysis for potential to foreclose through rebate schemes is actually similar to the principles employed in evaluating predatory pricing.269 As a result, it can be argued that any rebate scheme, where the effective price is still above the relevant measure of cost, is unlikely to be more than mere price competition. Therefore, competitors are likely to be able to make less profit, but they are not likely to be foreclosed from the customer as a result of the rebate scheme. Nonetheless, it cannot be precluded that a rebate scheme could not foreclose an as efficient competitor without sacrificing profits.

267 Whish and Bailey 2015, p. 774
268 O’Donoghue and Padilla, p. 469
269 Bishop and Walker p. 275 see also Funk and Jaag, p. 293, 301-307
Reduced but positive profits imply stronger competition on price. This in turn implies that there is a welfare gain for customers in the form of reduced prices on the market. The consideration of “lost” profits of competitors implies that we would accept a higher price for the product or service in the “more competitive” market, where the dominant undertaking is not applying a rebate scheme. Where the competitors of the dominant undertaking do not face appreciable risk of foreclosure even in the long run, this seems antithetical to the idea that competition should be promoted in the interest of consumer welfare. Indeed, punishing rebate schemes that do not risk foreclosure of competitors could have the contrary effect of chilling competition.270

The preceding sections have considered the assessment of assessment of rebate schemes and exclusivity rebates in particular. The conclusion that may be drawn is that the potential risk of foreclosure from a rebate scheme tends to arise from the incentives it gives to a customer to purchase a further number of units from the dominant undertaking. In this regard, exclusivity rebates do not substantially differ from other types of rebates, although the incentive and motivation are clearer. However, even exclusivity rebates differ from exclusive purchasing agreements in that the customer is free to choose its sources of supply. In other words, foreclosure is based on the price incentives rather than explicit terms of agreement. Therefore, a customer may choose to forego the rebate, if the supplier’s competitor is able to offer a better overall price. As such, it can be concluded that all rebate schemes should be considered as pricing practices resulting in possible foreclosure.

If rebates are considered pricing practices, it stands to reason that they be assessed similarly to other pricing practices insofar as the mechanisms of foreclosure have similarities. In Compagnie Maritime Belge, the shipping conference was found infringing on Article 102 TFEU for selectively cutting prices although it was not below cost pricing as with predatory pricing.271 This could be considered similar to the Commission’s statement, that conditional rebates do not necessarily require sacrifice of profits to foreclose competition.

In Post Danmark I, the Court held that without evidence of a plan to exclude its competitors Post Danmark could not be held to infringe Article 102 when its pricing was above incremental

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270 The point on predatory pricing can be transferred to rebates, Whish and Bailey p. 757
271 Whish and Bailey p. 195
costs but below average total cost even when it was selectively applying such prices.\textsuperscript{272} The Court further held that the abusiveness of such pricing would have to be evidenced by actual or likely exclusionary effects.\textsuperscript{273} It reasoned this by referring to the ability of an as efficient competitor to compete with such prices without suffering unsustainable losses.\textsuperscript{274} It could be argued that \textit{Post Danmark I} could be a point of consideration when assessing the level of potential to foreclose that a rebate might have.

6. Intermediate Conclusions

The above discussion has aimed to provide a basis for considering the assessment of the various characteristics of common rebate schemes. To this end, it has been shown that the mechanism for potential foreclosure does not vary between the different rebate schemes. In particular, each rebate scheme has the potential to foreclose competitors through prices that the competitor is unable to profitably compete with. As has been discussed, if a competitor is able to compete for the customer’s whole demand, the rebate scheme is unlikely to affect competition.\textsuperscript{275} The implicit assertion, here, is that above cost pricing generally does not preclude the as efficient competitor from either replicating the rebate scheme or answering it in an alternative way, such as changing its unit prices.

It has been claimed that conditional rebates differ slightly from predatory pricing in that they do not necessitate profit sacrifice.\textsuperscript{276} However, the mechanism of foreclosure is largely the same. For example, Fumagalli and Motta consider that the conditional rebates used by Intel fit a predation mechanism.\textsuperscript{277} This is in opposition to the mechanism of foreclosure in exclusive dealing in that the customer is required to quasi-exclusively source from the supplier only insofar as it wants to achieve the rebate whereas exclusive dealing can be thought to stem from contract terms that require it. In particular, a customer is not in direct breach of contract if it fails to achieve the terms of the rebate.\textsuperscript{278} This is in contrast to, for example, the terms in \textit{Van den Bergh Foods}, which required the use of freezers exclusively for the dominant undertaking’s

\begin{flushright}
\textsuperscript{272} Whish and Bailey p. 760 \\
\textsuperscript{273} \textit{Post Danmark I}, para 44 \\
\textsuperscript{274} \textit{Post Danmark I}, para 38 \\
\textsuperscript{275} See also Wikberg, p. 273 \\
\textsuperscript{276} See Wikberg, p. 273; Commission Guidance, para 37 \\
\textsuperscript{277} Fumagalli and Motta, p. 601 \\
\textsuperscript{278} see also Kallaugher and Sher, p. 274
\end{flushright}
products.\textsuperscript{279} Thus, there is an open-endedness to the foreclosure mechanism of rebate schemes – including exclusivity rebates – that is not inherent in more traditional exclusive dealing.\textsuperscript{280}

It has been asserted that the Court’s stern view on exclusive dealing stems from the ability to separate markets, which is contrary to the primary European Union goal of market integration.\textsuperscript{281} This could go some way in explaining the Court’s issue with exclusivity rebates. Because exclusivity rebates in particular, and rebates in general, also allow for a differentiation of markets based on price, there is some risk that markets are segregated in such cases. However, as has been discussed, the foreclosure effects of rebate schemes are not as straightforward as those employed in more traditional exclusive dealing.

In light of the foregoing, the argument can be made that all rebates should be considered forms of price competition, which implies that the mechanism of foreclosure and, consequently, the theory of harm are similar to those at issue in predatory pricing. An ancillary finding, therefore, is that the current assessment of rebates places is somewhat awkward. Whereas quantity rebates are currently presumed to not infringe Article 102 TFEU and “third category” rebates require an assessment of the possible foreclosure effects, exclusivity rebates are presumed to infringe Article 102 despite a lack of economic theory backing this assumption. Instead, there is reason to suggest that the anticompetitive assessment should focus on the effects of the rebate and, in particular, on whether competitors of the dominant undertaking are barred from market.

A preferred categorization of rebate schemes is therefore a division between rebate schemes presumed to not be anticompetitive and those that may be anticompetitive given the circumstances in which they are implemented.\textsuperscript{282} That is, there is no cause for presuming that a rebate scheme will foreclose competitors from the market. Within this categorization, the case law suggests that the Courts have applied a similar categorization in that the CJEU has only discussed rebates that are presumptively lawful and those that have not been upon assessment.\textsuperscript{283}

In the following section, the paper will consider how rebates may run afoul of competition law,

\textsuperscript{279} Van den Bergh Foods, para 2
\textsuperscript{280} see, f. ex. Ridyard, p. 583-584
\textsuperscript{281} Hampton, p. 1
\textsuperscript{282} Waelbroeck, p. 171
\textsuperscript{283} The current case law is not without controversy in this regard either. For example, Chan (p. 46) advances the argument that the CJEU’s judgement in Post Danmark II boils down to presuming that retroactivity causes anti-competitive harm.
particularly with reference to subsections c and d of Article 102 TFEU, which will inform the considerations of future development of competition law assessment in the sphere of rebates.

7. Price Discrimination/102(2)(c) Considerations

In its analysis of the anticompetitive nature of rebates, the Court has invoked Article 102(2)(c) in particular. For example, in *Portugal v Commission*, the Court reiterates that a dominant undertaking is free to quantity rebates to its customers but continues that such rebates should not result in applying dissimilar conditions to equivalent transactions. The Court, however, elaborates that the differences in average discount that are inherent to quantity rebates should not be taken as being discriminatory within the meaning of subparagraph (c). The discount received from a quantity rebate should, however, be justifiable by the volume of business it entails. Conversely, the system may fall within the meaning of subparagraph (c) when the threshold is set so high that only a select few customers can reach it, for example. In this case, it may be considered that the dominant undertaking is treating the few customers that do reach the discount in a dissimilar fashion from its other customers. In particular, it may be granting an unjustified competitive advantage to these selected customers because its rebate scheme is so removed from the economic efficiencies it is gaining.

In the case of a simple quantity rebate, customers face a different unit price depending on the quantity they purchase. Similarly, conditional rebates, such as loyalty rebates, may constitute a form of price discrimination as the rebate is tied to the customer’s purchases.

In economics, price discrimination can roughly be divided into three categories. Perfect price discrimination, which is highly unlikely to happen, is termed first degree price discrimination. When an undertaking is able to perfectly price discriminate, it is able to price the product exactly at each customer’s willingness to pay. In second degree price discrimination, the undertaking is

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284 For example, Wikberg has argued that exclusivity rebates can be considered as falling within subparagraph d. (Wikberg, p. 291) He has also considered how exclusivity rebates treat customers with similar purchase quantities unequally. (Wikberg, p. 285-286)
285 See f. ex. *Portugal v Commission*
286 *Portugal v Commission*, para 50
287 *Portugal v Commission*, para 51
288 *Portugal v Commission*, para 52
289 *Portugal v Commission*, para 53
290 Bishop and Walker p. 250
291 Bishop and Walker p. 251, see also Geradin and Petit, p. 483
able to induce the customer to self-select its willingness to pay to some extent. This happens, for example, in the case of volume discounts and two-part tariffs, where the customer first pays a lump sum and is then charged by usage. The final category of price discrimination is third degree price discrimination. Here the undertaking has no way of inducing the customer to self-select much less knowing the customer’s actual willingness to pay. Therefore, the undertaking uses directly observable information about the customer to give discounts to certain groups of customers such as pensioners or children.

The welfare effects of price discrimination are a priori largely ambiguous. In third degree price discrimination, for example, undertakings charge a higher price to consumers with a lower elasticity of demand and the converse for those with a high elasticity of demand. Consequently, uniform pricing would result in welfare losses for consumers with high price elasticity of demand and welfare gains for consumers with low price elasticity of demand. The choice of welfare standard further complicates this issue, but it seems that the Commission, at least, is moving toward the consumer welfare standard. As discussed in Section 1.3, however, it is not entirely clear that this should be the case as European Union law is ambiguous on the choice of welfare standard.

Third degree price discrimination, further, involves inefficiency in that there are likely to be some consumers who would be willing to pay the lower price but not the higher price that would still fall into the higher pricing category and therefore do not purchase. However, this inefficiency is generally outweighed by the gains compared to uniform pricing that leads to lower total output. Moreover, this same effect may also work in the opposite direction. That is, price discrimination may lead to the undertaking supplying some consumers that would not have been willing to pay the uniform price, who fall into the lower price category when price discriminating. Therefore, generally it can be assumed that third degree price discrimination

292 Bishop and Walker p. 251, see also Geradin and Petit, p. 483
293 Bishop and Walker, p. 251, see also Geradin and Petit, p. 483
294 Motta, p. 499, see also Bishop and Walker, p. 252 and Geradin and Petit, p. 483
295 Bishop and Walker, p. 252
296 Geradin and Petit, p. 480
297 See f. ex. Commission Guidance to this effect
298 Bishop and Walker, p. 253
299 Bishop and Walker, p. 253
300 Bishop and Walker, p. 253
will decrease consumer welfare in cases where total output is not increased.\textsuperscript{301} The inefficiencies encountered with second degree price discrimination are largely similar.\textsuperscript{302} Thus, it can be assumed that a volume rebate is unlikely to increase welfare when it does not concurrently increase total output.

Bishop and Walker note that price discrimination is likely to be welfare enhancing in industries characterized by high fixed costs and low marginal costs.\textsuperscript{303} The intuition here is that when marginal costs are close to zero, all positive gains can be used to set off the fixed costs. In certain cases, the undertaking may even face the problem of not having enough demand to cover its fixed costs without price discriminating. In such a case, price discrimination is clearly welfare enhancing. Moreover, price discrimination, it has been argued, has similar effects to predation.\textsuperscript{304} It creates a possibility that actual or potential competitors are foreclosed from the market due to low pricing practices.

Because the Court has taken the time to refer to Article 102(2)(c) it is worth considering the prohibition it lays down. Subparagraph c prohibits applying dissimilar conditions to similar transactions. In other words, it prohibits price discrimination. The wording of Article 102(2)(c) raises five requirements. Three of these are of interest for the ongoing discussion: are the transactions equivalent; if so, are dissimilar conditions being applied; and could this discrimination place trading parties at a competitive disadvantage.

\textbf{7.1. The conditions of Article 102(2)(c)}

The first condition, as mentioned, requires that the transactions in question are considered similar. The identification of similar transactions is not as simple as one might expect at first glance. As Geradin and Petit point out, the majority of transactions differ at least slightly.\textsuperscript{305} For example, the costs for the supplier may differ depending on customer. Similarly, the customers’ situations may be different. Therefore, most transactions could not be considered similar, if only slight deviations were to make two transactions dissimilar. Consequently, it is somewhat disheartening to see that the Commission and the courts have assumed two transactions to be

\begin{footnotesize}
\textsuperscript{301} Geradin and Petit, p. 484, see also Bishop and Walker p. 252 and Tirole 1988, Ch 3
\textsuperscript{302} Bishop and Walker, p. 254
\textsuperscript{303} Bishop and Walker, p. 255
\textsuperscript{304} Bishop and Walker, p. 256, see also Geradin and Petit, p. 484
\textsuperscript{305} Geradin and Petit, p. 486
\end{footnotesize}
equivalent without much consideration. The CJEU has, however, recognized that different prices may be the result of different market conditions when an undertaking operates on several markets. Considering the European Union’s aim at creating a single common market, it is perhaps understandable that the General Court has, in *Clearstream* and *Irish Sugar*, found an equivalence in cross-border transactions.

The second condition requires that dissimilar conditions are applied to the transactions that have been found to be similar. Dissimilar conditions may be applied when similar transactions have different prices, but also when dissimilar transactions have similar prices. Hence, it is relatively clear that most rebate schemes fall within this category as the price of the unit differs in accordance to whether the rebate conditions have been met or not. For example, in *British Airways*, the CJEU considered that the rebate scheme offered agents in similar circumstances different amounts of reimbursement. In particular, the General Court noted that two agents that generated the same amount of revenue achieved different levels of rebate. Similarly, a loyalty rebate may discriminate between customers purchasing the same quantity but different percentages of their own demand.

The final condition of Article 102(2)(c) requires that the dissimilarity of conditions places trading parties at a competitive disadvantage. It has been suggested that this implies that once discriminatory treatment has been found, it can be presumed to cause competitive harm to trading partners of the undertaking. It has been noted that this should not preclude the dominant undertaking from putting forth an objective justification for its practices. With particular regard to the case of rebates, competitors are very unlikely to enter the market on every segment. Allowing the dominant undertaking to selectively lower its prices could promote

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306 Van Bael and Bellis, p. 915  
307 United Brands, para 228  
308 Case T-301/04 Clearstream Banking AG and Clearstream International SA v Commission of the European Communities  
309 Case T-228/97 Irish Sugar plc v Commission of the European Communities  
310 Wikberg, p. 280  
311 British Airways II, paras 133-141  
312 British Airways, paras 235-236  
313 Wikberg, p. 286 and Oliver, p. 322  
314 Oliver, p. 334  
315 Lundqvist, p. 572
welfare in that higher profit segments become the subject of price competition.\textsuperscript{316} On the other hand, Geradin and Petit, for example, posit that the Commission and the Court have a responsibility to show that trading parties are, in fact, placed at a competitive disadvantage.\textsuperscript{317} The CJEU seems to be on the same lines on this issue, stating in \textit{British Airways} that: “\textit{in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others.}”\textsuperscript{318} It is, however, somewhat unclear just how far the Commission needs to go in showing that there is a tendency to distort the competitive relationship.

Price discrimination may be acceptable, if there is an objective justification for the practice in question.\textsuperscript{319} In this regard, Simpson, in her discussion on the “meeting the competition” defense, points out that dominant undertakings regularly have to consider if competition law allows them to respond to competitors’ offers or if such action would run them afoul of competing “on the merits”.\textsuperscript{320} Her conclusion is that case law suggest it should be possible for dominant undertakings to objectively justify attempting to keep old clients, because competitive forces differ between clients, and win new clients with price discrimination insofar as competitive pressure is increased.\textsuperscript{321}

Several academics agree that this final condition requiring trading parties to be placed at competitive disadvantage indicates that the aim of subsection c is to protect customers, not competitors.\textsuperscript{322} To this end, it has been argued that Article 102(2)(c) is not the proper route to consider in exclusionary practices.\textsuperscript{323} Instead, Article 102(2)(b) may be more suited for the assessment of exclusionary practices as it requires the limiting of markets to the prejudice of

\begin{footnotesize}
\begin{enumerate}
\item Lundqvist, p. 572
\item Geradin and Petit, p. 524
\item \textit{British Airways II}, para 144
\item \textit{Wikberg}, p. 280
\item Simpson, p. 1
\item Simpson, p. 27
\item see f.ex. Geradin and Petit, p. 487 and \textit{Van Bael and Bellis}, p. 915
\item Geradin et al., p. 305
\end{enumerate}
\end{footnotesize}
consumers.\textsuperscript{324} It is worth noting that the list of abuses in Article 102 is only indicative.\textsuperscript{325} However, the choice to consider one of the subsections is liable to lead the assessment in a certain direction, which may result in the application of the wrong legal tests\textsuperscript{326}. In this light, it should be recognized that while it may be considered that dissimilar conditions are being applied to similar transactions to the detriment of the competitive advantage of trading parties of the dominant undertaking, rebate schemes are practices that may restrict the output of competitors by foreclosing them from the market\textsuperscript{327}.

8. Conclusion

In his analysis of the General Court’s initial judgement of Intel, Nicolas Petit reminds the reader of the words of Nobel Prize economist, Friedrich Hayek:

\begin{quote}
“Much more serious than the fact that prices may not correspond to marginal cost is the fact that, with an entrenched monopoly, costs are likely to be much higher than necessary. A monopoly based on superior efficiency, on the other hand, does comparatively little harm so long as it is assured that it will disappear as soon as anyone else becomes more efficient in providing satisfaction to the consumers.”\textsuperscript{328}
\end{quote}

That is to say, European competition law should remember that it is possible for dominant undertakings to be legitimately more efficient than its competitors. It is for the EU institutions then, to ensure that competitors are protected when they are at least as efficient as the dominant undertaking. Otherwise, the Courts risk addressing problems to the detriment of competition and ultimately the consumers. To this end, proponents of an approach that considers the effects of the dominant undertaking’s practices can be relieved that the CJEU in Intel reaffirmed its judgement that dominant companies may compete on the merits even if this causes less efficient competitors to be excluded from the market\textsuperscript{329}. However, the CJEU has refrained from definitively answering questions, especially considering the AEC test.

\textsuperscript{324} Geradin and Petit, p. 489
\textsuperscript{325} Continental Can, para 26
\textsuperscript{326} Geradin et al., p. 307
\textsuperscript{327} Geradin and Petit, p. 489
\textsuperscript{328} Hayek
\textsuperscript{329} Intel II, para 134
The CJEU’s judgment in *Intel* forces the General Court to examine the AEC test. While the CJEU’s judgement does not rule on whether an AEC test is necessary, it does seem to state that if an AEC test is considered by the Commission, the undertaking under investigation can target its appeal on the AEC test as well. As such, the future of exclusivity rebates is also likely to be affected by the Commission’s future conduct. In particular, if the Commission continues to assess exclusivity rebates with the use of an AEC test, exclusivity rebates are likely to move further toward the effects-based evaluation as undertakings will also argue against the correct application of the test. However, if the Commission refrains from further using the AEC test in cases of exclusivity rebates, appeals will not be focused on the application of the test, and, therefore, the Courts may be able to evade economics-based assessment on these issues for the time being. Regardless, it should be noted that the European Courts will have scant ability to effect change on the interpretation of case law until they are provided with appeals that allow them to weigh in on the issue.

This paper has aimed to describe the current state of competition law as regards the assessment of rebate schemes. In particular, so called exclusivity rebates have been discussed at length so as to consider their place in the legal framework. At the time of writing, the General Court has somewhat worryingly decided to partition rebate schemes into three distinct categories. The assessment of the rebate scheme seems to vary substantially depending on which category it falls into. The CJEU has yet to weigh in on the General Court’s tripartite categorization. This paper has brought about evidence that such distinctions between rebate schemes are not necessary.

Rather than just being redundant, the equivalence made between exclusive dealing and exclusivity rebates may itself result in judgments to the detriment of competition. In this light, the CJEU should affirm its apparent consideration that there are only two categories of rebates, namely the presumptively allowed and those that must be judged on their circumstances and, hence, effects. To this end, this paper has outlined many of the possible circumstances that may factor in on an effects-based approach to the assessment of rebate schemes in general. The implicit conclusion has been that while each single factor may not in itself result in anticompetitive foreclosure, such factors influence the customer’s purchasing incentives and therefore, may in combination create foreclosing effects for single customers. To this end, it has
been shown that how much of the customer’s demand is non-contestable and whether or not the rebate applies retroactively are among the stronger influences on purchasing decision.

If enough of the market is closed through the aggregated effects of foreclosure against single customers, as efficient competitors face actual risk of foreclosure, meaning that the rebate scheme should be considered anticompetitive. In this regard, it is clear that a higher market coverage with regard to foreclosed customer implies a higher risk of foreclosure from the market. It has, however, been noted that it is difficult to assert a single threshold over which market coverage could be considered to reflect risk of foreclosure from the market. Because market environments differ, one threshold may be too high for one market or too low for another.

This paper has also briefly considered the European Union courts’ references to subsection c of Article 102 TFEU in their assessment of rebates. It has been brought forward, that while rebates would seem to fit the conditions required by Article 102(2)(c), it is unclear whether this the proper framework for considering rebate schemes. It has been proposed that the theory of harm behind rebate schemes has little to do with the downstream market and much more to do with attempting to exclude competitors from the market. Hence, considering the practice in light of subsection c risks focusing on the wrong aspects of the practice. In this regard, the first section has established that all rebate schemes should be assessed similarly, whereas the second section establishes that the assessment of rebate schemes should focus on considering the effects they have on competitors. In particular, the competition law analysis should aim to establish whether as-efficient competitors are forced to leave the market.

It is inappropriate to circumscribe market intervention to only such cases where foreclosure has already factually happened. However, the risk of foreclosure should not be merely theoretical either. As such, it would seem that it is left to competition authorities and, ultimately, the Courts to assess the correct threshold of potential to foreclose. In particular, however, the Courts should consider whether the as efficient competitor can achieve a viable scale of sales rather than whether its profits are impeded as such by the rebate scheme. Although an elaborate discussion is beyond the scope of this paper, some inroads have already been made in considering how this analysis could be done and how potentially as efficient competitors can be identified. With its judgements on Post Danmark and Intel the CJEU has seemingly been creeping toward an

330 See f. ex. Mateus, p. 244

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effects-based assessment of all rebate schemes, which would bring about further consistency in this realm of competition law. However, as Venit notes in his analysis of the CJEU’s judgement on Intel, “The law moves slowly at best,”\textsuperscript{331} so undertakings and competition lawyers are left waiting for the next chapter in this saga.

\textsuperscript{331} Venit 2017, p. 198