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Article

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CONDITIONAL REBATES AND INTEL: A STEP BACKWARDS BY ANY STANDARD?

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ABSTRACT

This paper considers the law on conditional rebates. It sets out the changes introduced by the Court of Justice of the European Union (CJEU) Intel decision and how these have been applied in the General Court Intel Renv case. It is explained that the changes are part of a broader move to bring EU competition law in line with a Consumer Welfare Standard (CWS). An analysis of the new test then reveals that it is flawed for five reasons: the new test ignores the fact that low prices and exclusion are separable. The test incorporates the As-Efficient Competitor test, which only protects firms with low costs, not those that are more competitive as a whole. The test introduces a new standard of harm, which means that the law no longer prevents the restriction of competition, but rather prevents making it impossible for a firm with the same costs as the dominant undertaking to compete, which is a different standard. The new standard diminishes the deterrent effect of the law. Finally, compared with the original test, the CJEU test fails to maximize consumer surplus (despite that being the aim of the CWS). Therefore, there is no reason to retain the test and it is recommended that it is reversed.

JEL: K21; L40

I. INTRODUCTION

On 26 January 2022, the General Court (GC) handed down its judgment on the Intel case for the second time after it was sent back (renvoi) from the Court of Justice of the European Union (CJEU).[1] This new decision is so wholly different from the original[2] one could be forgiven for thinking that it was written by a different institution, applying a different jurisdiction's law. However, to understand this volte-face, it is necessary to turn to events occurring at the very start of the saga:[3] in 2000, AMD, an American computer chip manufacturer, submitted a complaint to the EU Commission regarding a breach of EU competition law.[4] That same year Mario Monti, the then Competition Commissioner, unveiled his plans for what he described as a 'more economic approach' or an 'effects-based approach'[5] to EU competition law. Mario

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1 Case T-286/09 RENV Intel v Commission EU: T:2022:19.

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

3 And at ∼22 years in the making and more to come saga probably is the right word.

4 Commission decision of 13 May 2009, (COMP/C-3/37.990—Intel), para. 5.

5 Speech made by Commissioner Mario Monti at the UNICE Conference on Competition Policy Reform Brussels, 11 May 2000.

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Monti's speech was the starter gun for a wholesale reform of EU competition law that has found expression, step by step, almost in parallel with the EU competition case against Intel. Is this a change for the better? It is reasoned that this new approach, as applied in Intel, is less logical, a weaker deterrent towards abusive behaviour, and fails on its own terms.

This article is structured in three parts. In the first part, an explanation of how the law was applied originally with be given. Before the *Intel* case, it will be shown that the Court examined all the circumstances to determine whether a conditional rebate restricted the buyer's freedom to choose their sources of supply, bar competition or apply dissimilar conditions to similar transactions. This original test was reaffirmed in the first Intel GC judgment;[6] a case of significance that will be analyzed in this article. However, marking a departure from the position established in the case law, a new test was laid down in the CJEU *Intel* decision.

The second section of this article will examine the CJEU *Intel* decision, which sets out that in practice whether or not a conditional rebate is abusive depends on: the extent of the undertaking's dominant position; the conditions and arrangements for granting the rebates in question; the share of the market covered by the challenged practice; the rebate's duration and amount; and the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market. This last limb of the test incorporates the 'As-Efficient Competitor' (AEC) test into the law. This tests whether the rebate makes it impossible for a hypothetical competitor with the same costs as the dominant undertaking to profitably remain in the market. It will be explained that this new test is the implementation and fruition of the EU Commission's attempts to reform EU competition law to focus on protecting consumer surplus, which is known as the Consumer Welfare Standard (CWS), instead of protecting economic freedom, which is referred to in this article for ease of comparison as the Economic Freedom Standard (EFS).

In the third part of this article, it will be argued that the new test is inappropriate for five reasons. These reasons are roughly set out in ascending importance. First, the new test assumes that the anticompetitive impact of a conditional rebate (exclusion) is necessary to obtain the pro-competitive effect (lower prices). However, there is no economic or logical reason to assume that a conditional rebate is necessary to compete on price. Second, the AEC test fails to protect firms that are competitive in ways other than price. Third, this article will show that the new test introduces a new standard of harm into competition law, which no longer prohibits a restriction or distortion of competition, but rather only prohibits behaviour that makes competing impossible for a firm with the same costs as (or lower than) the dominant undertaking. This offers a lower standard of protection for the competitive process. Fourth, the new standard will in practice undermine the deterrent effect of the prohibition of abusive conditional rebates. Finally, and perhaps most importantly, it will be shown that even if one accepts the purpose of competition law is to protect consumer surplus, as per the CWS, the new test, as applied by the CJEU, fails on its own terms. This is because the new approach fails to protect consumer surplus as effectively as the original EFS under EU competition law. To show this, the Intel scenario will be used illustratively, the outcome under the EFS and the CWS will be compared. It will be shown that the CWS results in reduced consumer choice and consequently a decrease in consumer surplus vis-à-vis the outcome under the original EFS. So, the CWS fails, even on its own terms.

[6] Case T-286/09 Intel v Commission EU:T:2014:547.

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II. THE LAW BEFORE INTEL

Until the *Intel* decision, the law with respect to loyalty rebates was well settled. The main case setting out the position on loyalty rebates was *Hoffmann-La Roche*[7] where it was established that:

> An undertaking which is in a dominant position on the 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 [102], 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-whether the quantity of its purchases be large or small-from the undertaking in a dominant position.[8]

This position was then elaborated upon in another well-established case, *Michelin I*, where it was established that the Court was:

> to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount 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[9]

In 2009, Guidance[10] was published on the enforcement priorities of the Commission in relation to Article 102 TFEU. Here the Guidance stated that

> Conditional rebates are not an uncommon practice. Undertakings may offer such rebates to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates—when granted by a dominant undertaking—can also have actual or potential foreclosure effects similar to exclusive purchasing obligations.[11]

Further it stated that when looking at conditional rebates the Commission intends to investigate 'whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient [as the dominant undertaking]'.[12] There was also the express the acknowledgment of the possible justifications for such a practice saying: the Commission will consider claims by dominant undertakings that rebate systems achieve cost or other advantages that are passed on to customers and that 'the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those

[7] Case 85/76, Hoffmann-La Roche & Co v Commission [1979] ECR 461.
[8] Case 85/76, Hoffmann-La Roche & Co v Commission [1979] ECR 461, para. 89.
[9] Case 322/81, Nederlandsche Banden-Industrie-Michelin v Commission, 1983 E.C.R. 3461, para. 14.
[10] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2.
[11] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2, para. 37.
[12] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2, para. 41.

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arrangements are necessary for the dominant undertaking to make certain relationship specific investments to be able to supply those customers.'[13]

While this signalled some possible changes in the Commission's approach, due in particular to the references to 'equally efficient competitors', this Guidance was not necessarily a significant change of course in the law because it was purportedly a guide as to the priorities of the Commission, not a declaration of what the law prohibited, therefore it did not have the binding force of the law. Also, it was at times vague, consider the phrase 'even by competitors that are equally efficient', and the Commission in any event has no authority to change the law itself. A significant change in the law has arrived however, in the form of the *Intel* decision.

A. The Intel Decision

The facts of the *Intel v. Commission*[14] case are as follows: the Commission alleged that there had been two types of conduct by Intel, a dominant manufacturer of x86 processors, intended to exclude a competitor, AMD, from the market for x86 CPUs. Although Intel had historically been dominant in this market, in 2001 AMD started producing chips that were both superior in performance and price to Intel's.[15] In this context Intel began granting rebates to four large Original Equipment Manufacturers (OEMs): Dell, Lenovo, HP, and NEC. These rebates were granted on the condition that these OEMs purchased all or almost all of their ×86 CPUs from Intel.[16] In addition, Intel made payments to OEMs so that they would delay, cancel, or restrict the marketing of certain products equipped with AMD CPUs.[17]

B. The General Court

The GC decision followed the preceding case law as would normally be expected. It is determined from the case law that there were three types of rebate: quantity, exclusivity, and third category rebates. Quantity rebates are presumed legal.[18] This is likely on the basis that the rebate reflects economies of scale. Exclusivity rebates, which it defines as those granted on the condition the customer obtains most of or all of their requirements from the dominant undertaking,[19] are:

> incompatible with the objective of undistorted competition within the common market, because they are not based—save in exceptional circumstances—on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market . . . Such rebates are designed . . . to prevent customers from obtaining their supplies from competing producers[20]

Third category rebates are where abuse can only be determined by reference to 'all circumstances' as per *Michelin I* quoted above.[21]

The Court explained that Intel's rebates were exclusivity rebates[22] and consequently 'whether an exclusivity rebate can be categorized as abusive does not depend on an analysis of the

[13] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2, para. 46.
[14] C-413/14 *Intel v. Commission* P EU:C:2017:632.
[15] Intel (COMP/C-3/37.990—Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, paras 150–159.
[16] C-413/14 *Intel v. Commission* P EU:C:2017:632.
[17] C-413/14 *Intel v. Commission* P EU:C:2017:632, para. 11.
[18] Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 75.
[19] Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 76.
[20] Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 77.
[21] Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 78.
[22] Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 79.

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circumstances of the case aimed at establishing a potential foreclosure effect'.[23] Instead the rebate constitutes an abuse of a dominant position if there is no objective justification for granting it.[24]

It is also important to note for later analysis that the Court observed 'a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult'[25] and that for a substantial part of the OEMs' demand there were no substitutes for the dominant undertaking's products.[26] The law up until this decision explicitly protected economic freedom as set out in the quotes above from *Intel*[27] and *Michelin I*.[28] In particular, the law protects the freedom of competitors to compete and the freedom of the customer to choose their preferred suppliers.[29] Thus this approach will be referred to in this paper as the EFS. This approach reflects key aspect of Ordoliberalism,[30] an economic school of thought prevalent and highly influential in Germany, and through Germany on EU competition law,[31] but little known outside the German speaking world.[32]

C. The Court of Justice of the European Union

The majority of the CJEU judgment follows well-established caselaw. The CJEU explains that the purpose of Article 102 TFEU is not to prevent undertakings from acquiring on the merits of their behaviour a dominant position,[33] nor is it to protect competitors that are less efficient than the dominant undertaking.[34] Although notably, while the other principles are well established the reference to competitors that are 'less efficient' comes from *Post Danmark*,[35] suggesting it is relatively new. The Court explained that competition on the merits may lead to the departure from the market or marginalization of competitors that are less efficient,[36] but that also, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition.[37] The next two paragraphs then state that loyalty rebates are abusive

23 Case T-286/09 *Intel v. Commission* EU:T:2014:547. para. 80.
24 Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 81.
25 Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 88.
26 Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 91.
27 Case T-286/09 *Intel v. Commission* EU:T:2014:547, para. 77.
28 Case 322/81, Nederlandsche Banden-Industrie-Michelin v Commission, 1983 E.C.R. 3461, para. 14.
29 A detailed analysis of how this is done in each scenario is beyond the ambit of this paper.
30 Jochen Mohr, *Wettbewerbsrecht und Ökonomie im digitalen 21. Jahrhundert*, 69 ORDO 259, 270 (2018); David J. Gerber, Law and Competition in Twentieth Century Europe, *Protecting Prometheus* (first published 1998, OUP 2001) 240.
31 There is a rich literature on this. See; Matthew Cole, *Ordoliberalism: What We Know and What We Think We Knew*, 86(6) MLR 1309 (2023). David J. Gerber, Law and Competition in Twentieth Century Europe, *Protecting Prometheus* (first published 1998, OUP 2001); K. K. Patel, H. Schweitzer (ed), *The Historical Foundations of EU Competition Law* (OUP 2013); Ernst-Joachim Mestmäcker, The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008 *in European Competition Law: The Impact of the Commission's Guidance on Article 102* (Pace ed., Edward Elgar Publishing 2011) 25; Peter Behrens, "The Consumer Choice Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law" (2014) Europa-Kolleg Hamburg, Discussion Paper 1/14, 8; Heike Schweitzer, The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC, *in European Competition Law Annual 2007* (C.D. Ehlermann, M. Marquis eds, Oxford, Hart Publishing 2008). Also consider against: Pinar Akman, Searching for the long-lost soul of art.82 EC, 29 *OJLS* 270 (2009); Pinar Akman and Hussein Kassim 2010. Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy, *Journal of Common Market Studies*, 48(1): 111; Lisa Gormsen 2008. The Parallels Between the Harvard Structural School and Article 82 EC and the Divergences Between the Chicago School and Post-Chicago Schools and Article 82 EC, *European Comp Journal*, 4: 221; Pinar Akman 2014. The Role of 'Freedom' in EU Competition Law, *Legal Studies*, 34(2): 2.
32 It is beyond the ambit of this paper however to provide an analysis of Ordoliberalism. However, there is a slowly increasing body of English language research on the topic, not least many of the sources in footnote 31 above.
33 C-413/14 Intel v Commission P EU:C:2017:632, para. 133, citing Post Danmark, C-209/10, EU:C:2012:172, para. 21, which in turn cites Case C-52/09 TeliaSonera Sverige [2011] ECR I-527, para. 24.
34 Post Danmark, C-209/10, EU:C:2012:172, para. 21.
35 C-209/10 Post Danmark A/S Konkurrenceradet EU:C:2012:172.
36 Post Danmark, C-209/10, EU:C:2012:172, para. 22; citing in turn Case C-52/09 TeliaSonera Sverige [2011] ECR I-527, para. 43.
37 Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, para 57, and of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172, para. 23; Post Danmark itself citing Case C-202/07 P France Telecom v Commission [2009] ECR I-2369, para. 105.

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behaviour as established in *Hoffmann-La Roche*.[38] Until this point, this is nothing more than a regurgitation of established case law. Then there is a significant statement:

> However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.[39]

The use of the word 'clarified' here appears to bear the meaning that can only be attributed to it when used in a judicial capacity, which is to say 'a significant revision or total reversal'. This clarification sets out that while loyalty rebates are abusive, if the undertaking puts forward evidence that its conduct was not capable of restricting competition and foreclosing the market, which presumably will now be a standard course of action for any competent legal team defending a dominant undertaking, the Commission then has to analyze five factors:[40]

1) the extent of the undertaking's dominant position on the relevant market;
2) the conditions and arrangements for granting the rebates in question;
3) the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market;[41]
4) the share of the market covered by the challenged practice; and
5) the rebate's duration and amount

The first two of these steps would normally have been carried out anyway because dominance must be established for an undertaking to be subject to Article 102 TFEU and the conditions and arrangements for granting the rebates would be established to determine whether the rebate was a quantity rebate, a loyalty rebate, or a third category rebate.[42] The final three factors, however, are all new and bring the law into conformity with the CWS as will be analyzed below.

The third point (as listed above) incorporates the AEC test into the law on rebates. Previously applying the AEC test to rebates would have been unnecessary. In fact, the GC when deciding the *Intel* case at first instance stated: 'a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case'[43] and that even when a rebate is of such as nature as to warrant investigation of the circumstances this does not require the application of the AEC test.[44] From a legal perspective, this was an accurate appraisal of the law as it stood. However, given the likelihood of defendant firms providing some sort of evidence that their rebates are not capable of foreclosing the market, the Commission will now need to apply the AEC test as a matter of law if they are to establish that a rebate is abusive.

The fourth and fifth elements (as listed above) are also new. They change the law so that a loyalty rebate, even without objective justification, does not establish abuse. Rather the breadth (how much of the market it covered) and the duration (the length of time the rebate applied)

[38] C-413/14 Intel v Commission P EU:C:2017:632, paras 136–137; citing Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, para. 89.
[39] C-413/14 Intel v Commission P EU:C:2017:632, para. 138.
[40] The order of these measures has been changed for ease of explanation.
[41] C-413/14 Intel v Commission P EU:C:2017:632, para. 139.
[42] T-286/09 Intel v Commission EU:T:2014:547, paras 74–78 Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461 ('Michelin I'), paras 71–73; Case T-203/01 Michelin v Commission [2003] ECR II-4071; Case C-95/04 P British Airways v Commission [2007] ECR I-2331.
[43] T-286/09 Intel v Commission EU:T:2014:547 paras 80–93 and 143.
[44] T-286/09 Intel v Commission EU:T:2014:547 paras 144–145, citing Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paras 81–86; Case C-549/10 P Tomra Systems and Others v Commission [2012] ECR, paras 73 and 74.

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are now factors that must be considered when establishing whether abuse exists. This is a significant change. Previously the breadth and duration of a rebate may have been relevant when considering whether or not the rebate can be objectively justified because this would naturally require balancing the pro and anticompetitive effects of the rebate[45] and to do this, the Commission would have to be able to measure the anticompetitive effects and thus the breath and duration of the anticompetitive behaviour, but this goes further in requiring a calculation of the anticompetitive impact to even characterize the behaviour as abusive.

The CJEU's judgment in *Intel* essentially sets out a new test for assessing conditional rebates in EU law. When the case was handed back to the GC, it was possible to see how this test would then be applied in practice.

III. A NEW TEST FOR CONDITIONAL REBATES: THE RENV CASE

Upon return to the GC, it set about redeciding the case subject to the 'clarification' provided by the CJEU.[46] The decision was challenged on the basis of a number of errors relating to the Commission's calculation of various aspects of the new test:

A. Dell

The Commission's decision that rebates provided to Dell were illegal was nullified because the Court said the Commission had not demonstrated to the requisite legal standard that the assessment of the contestable market share was well founded.[47] They should have given evidential weight to statements made by Intel Executives regarding the contestable share.[48] They should also have provided an explanation of why they choose 7.1 percent as the contestable market share beyond just averaging out the range given by Dell in internal documents of 5.6–10.4 percent.[49] When the Commission submitted updated analysis using the actual market shares that AMD obtained with Dell to show that using these real world figures Intel's behaviour was abusive, this was rejected because the GC is not able to substitute its own reasoning for that of the Commission in the original decision.[50] The Commission also did not calculate any changes to the contestable share over time.[51] So, the Commission's calculations were rejected.[52]

B. Hewlett-Packard

When calculating the required share (the share of HP's orders sufficient for an AEC to sell profitably), the Commission made a mistake by missing 2 months of data from the calculation.[53] The Commission decided that the information for those months was included in the annex and if the data were included it would make no difference to the outcome legally[54] or if based on HP's quarterly calculations the figures make Intel's position look even worse.[55] The Court rejected these points saying that reference to other annexed documents cannot be a substitute for arguments that must be made in the application[56] and regarding HP's figures that it was not

[45] Something acknowledged by the Court of Justice in para. 140.
[46] Case T-286/09 RENV Intel v Commission EU:T:2022:19.
[47] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 256.
[48] Case T-286/09 RENV Intel v Commission EU:T:2022:19, paras 225, 228.
[49] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 239.
[50] Case T-286/09 RENV Intel v Commission EU:T:2022:19, paras 252–253.
[51] Case T-286/09 RENV Intel v Commission EU:T:2022:19, paras 268–269.
[52] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 287.
[53] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 307.
[54] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 316.
[55] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 310.
[56] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 312.

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for the GC to substitute its own reasoning for that of the Commission.[57] Consequently this evidence was also rejected.

C. NEC

There were two rebate payments provided to NEC by Intel. One was called ECAP (Exception to Customer Authorized Pricing) and the other MDF (Market Development Fund). Only the MDF was actually conditioned upon NEC exclusively using Intel chips.[58] The Commission, however, had calculated their rebates on the basis that both the ECAP and MDF rebates were conditional[59] and there was insufficient evidence that this was the case.[60]

Further when calculating the AEC analysis, the Commission used data from a single quarter in 2002 as representative of the whole period under investigation.[61] Given the evidence provided by Intel that the actual figures varied[62] (it does not appear that Intel provided the actual data,[63] but it did reason that the prices, discounts, and volumes varied through continuous renegotiation[64]), this was rejected as erroneous by the Court. In addition, the Commission treated agreements made with NECCI, which is a single division of NEC, which is made up of NECCI and NEC Japan,[65] as representative of the whole group.[66] This was again inaccurate. So, the GC considered this also to be vitiated by errors.

D. Lenovo

Intel gave benefits to Lenovo that went beyond cash rebates. Intel also provided 'in kind' benefits in the form of the use of its Chinese supply hub and providing extended warranty benefits for the processors Lenovo purchased. During negotiations with Lenovo, Intel claimed these benefits were worth 20 and 24 million USD, respectively.[67] The Commission then used those values as an accurate reflection of the value of those benefits and added it to the value of the cash rebates to provide a final value for the rebates provided by Intel to Lenovo. The Commission decided that this was fair because it should be the cost of a nondominant undertaking providing those same benefits for the purposes calculating whether an AEC could offer the same without losing money and a nondominant firm would not be expected to have a supply hub in China, so presumably they would be expected to compensate Lenovo in cash benefits accordingly.[68] Intel decided it was the cost of the services to Intel itself[69] that mattered because the test was essentially to check whether Intel itself was selling at a loss on the contestable share.[70] In contrast to the 44 million USD figure, Intel said the actual cost of providing the in-kind benefits was ∼3 million USD and that this should be the figure used for the calculation. The GC agreed with Intel that the correct calculation was the cost to a hypothetical competitor in the same position as Intel.[71] Therefore, the Commission was condemned for not having a cost based analysis for the value of the in-kind benefits[72] except what Intel presented to Lenovo, which the Court

57 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 317.
58 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 356.
59 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 347.
60 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 387.
61 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 390.
62 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 410.
63 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 399.
64 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 401.
65 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 336.
66 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 406.
67 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 417.
68 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 420.
69 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 423.
70 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 432.
71 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 436.
72 Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 447.

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expected to be presented by Intel in a way that would make its offer look favourable.[73] So again, the Commission's calculations were considered to be flawed and rejected.[74]

E. MSH

MSH was the only retailer involved. Intel's rebates to MSH were cumulative[75] because MSH was selling computers, for example from Dell and NEC, that had already been subject to rebates at the OEM level. Therefore, it was necessary to add the rebates offered to MSH to those offered at the OEM level. However, rather than calculating the effect of the rebates for each individual OEM, some of whom had never received rebates, the Commission took NEC's rebates as representative and calculated the effect of the double rebates as if all OEMs had benefited from the same rebates as NEC.[76] The GC rejected this as the rebates varied from OEM to OEM and some OEMs had not had any rebate whatsoever.[77] The Commission had also assumed the rebate levels were stable for a 10 year period, which was unproven.[78] Therefore once again, the Commission's calculations were rejected.

F. The Market Covered by the Agreements

The Commission did evaluate the proportion of the market covered by the agreements, however it did so after reaching the conclusion that the rebates provided were abusive.[79] This was perfectly valid under the law as it stood at the time. Under *Hoffman-La Roche* there was no need to measure how much of the market was covered by the practice to establish that it was abusive,[80] although it might have been relevant to the severity of the breach. However, after the CJEU changed the law a new set of requirements needed to be determined before a rebate could be determined to be abusive, including the amount of the market covered.[81]

There was some dispute as to whether it was significant that the Commission determined that the rebates were abusive and then later (in the order of the decision) measured the proportion of the market covered by the rebates.[82] However, the Court decided that, regardless of this, the examination of the proportion of the market covered by the rebates by the Commission was insufficient.[83] The Commission took account of Dell and HP's market shares and excluded the other OEMs concerned by the same contested practice.[84] The market shares took account of only the period from the first quarter of 2003 to the final quarter of 2005, despite the decision covering from October 2002 to December 2007.[85] This disregarded the period from 2006 to 2007, which were relevant for Lenovo and MSH.[86] Finally the Commission's market share figures reflect Dell and HP's market shares in all segments despite the contested practice only relating to corporate desktops.[87] Therefore, the Court considered that the Commission had failed to determine the share of the market covered by the relevant rebates.[88]

[73] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 451.
[74] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 456.
[75] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 462.
[76] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 463.
[77] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 472.
[78] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 478.
[79] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 494.
[80] Case 85/76, Hoffmann-La Roche & Co v Commission [1979] ECR 461, para. 89.
[81] C-413/14 Intel v Commission P EU:C:2017:632, para. 139.
[82] Case T-286/09 RENV Intel v Commission EU:T:2022:19, paras 486–487.
[83] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 494.
[84] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 495.
[85] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 495.
[86] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 495.
[87] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 495.
[88] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 499.

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G. The Duration and Amount of the Rebates

The Commission noted that it did examine the duration and form of the OEMs commitments to Intel and that they had regard in particular to the temporal scope of the commitments and Intel's ability to adjust its rebates within a short period of time.[89] The Court found, however, that those aspects of the time horizon were only examined by the Commission in a 'haphazard and limited manner':[90]

> It did not carry out a thorough and exhaustive examination for all OEMs of those aspects in so far as they were capable of determining or strengthening the capability of Intel's pricing practices at issue to have a foreclosure effect.[91]

Consequently, the Commission did not investigate the duration as a factor 'intrinsically relevant' to their abusive character.[92] The Commission must therefore consider duration as part of foreclosure, not just in other contexts such as the severity/duration of the offence.

As a result, the Commission's arguments were rejected across the board. Often, with the GC noting that there were further errors that Intel had identified, but it was not necessary to examine them as sufficient issues had already been identified to invalidate the claim. What appears to be a major issue is the difficulty the Commission faced in obtaining all the data necessary to prove the numerous elements of the test,[93] however an analysis of this is outside the scope of this paper.[94] Instead, what is useful now is to consider why the CJEU changed the conditional rebates test.

H. From Economic Freedom to 'Consumer Welfare'

The test that was set out by the CJEU to a certain extent is based on the approach taken by the Commission in its own decision, which itself appears to be based on the analysis submitted to the Commission by Intel's own consultant.[95] However, stepping back from the Intel Saga, it is possible to see that the adjustment to the law is part of a broader change in EU competition law. For almost two decades, there has been an attempt to implement within EU competition law what Mario Monti called a 'more economic approach'.[96] A more economic approach could mean a number of different things. It could mean the greater use of economic theory to understand how markets work or the greater use of econometric tools and models while retaining the primary aims usually associated with EU competition law: protecting competition, protecting economic freedom, and more recently protecting consumer welfare.[97] This has

[89] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 513.
[90] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 514.
[91] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 514.
[92] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 515.
[93] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para. 478.
[94] Consider instead; Matthew Cole, No data, no abuse (2023) (forthcoming ECLR).
[95] Intel (COMP/C-3/37.990—Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, para. 1007.
[96] Speech made by Commissioner Mario Monti at the UNICE Conference on Competition Policy Reform Brussels, 11 May 2000. See for an in-depth discussion: Anne C. Witt, *The More Economic Approach to EU Antitrust Law* (Oxford, Hart 2019).
[97] There is extensive analysis surrounding the aims of competition law. A sample includes: Konstantinos Stylianou and Marios Iacovides 2022, The Goals of EU Competition Law: A Comprehensive Empirical Investigation, *Legal Studies* 1; Rex Ahdar, Consumers, Redistribution of Income and the Purpose of Competition Law 23 ECLR 341 (2002); Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Oxford: Hart Publishing, 2012); Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart Publishing, 1997); Oles Andriychuk 2010. Rediscovering the Spirit of Competition: On the Normative Value of The Competitive Process, *European Competition Journal*, 6: 575; Adi Ayal, *Fairness in Antitrust* (Oxford: Hart Publishing, 2016); David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: OUP, 1998); Louis Kaplow, On the Choice of Welfare Standards in Competition Law, *in The Goals of Competition Law* (Daniel Zimmer ed., Cheltenham, Edward Elgar, 2012); Ioannis Lianos, The Poverty of Competition Law, *in Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Gerard, D. and Lianos, I., eds., Cambridge, Cambridge University Press, 2019); Frederic Marty, Is the Consumer Welfare Obsolete? A European Union Competition Law Perspective, GREDEG Working Paper No 2020-13 at https://ideas.repec.org/p/gre/wpaper/2020-13.html [https://perma.cc/HWW5-7GYF]; Massimo Motta, *Competition*

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previously been thought to be the case.[98] This would be a middle ground between protecting economic freedom on one hand and on the other placing greater emphasis on preventing direct consumer harm, and for some this is still how the law is to be interpreted.[99] The other possibility is that the 'more economic approach' is not only a matter of taking on new economic theory to understand business behaviour or the greater use of econometric tools, but rather, a wholesale shift in the foundational aims and objectives that EU competition law seeks to achieve. From this perspective, the aims of economic freedom and consumer welfare are conflicting,[100] therefore the aim of preserving economic freedom and any other aim should be completely replaced with protecting consumer welfare[101] and failing to do so renders the 'more economic approach' partial. As Schweitzer put it 'implicit is the suggestion that a rational competition policy can only be achieved once the "economic freedom" paradigm is replaced with the consumer welfare goal.'[102] If this is the case, the purpose of the 'more economic approach' is to change the aims of EU competition law from protecting competition through the protection of economic freedom to protecting what is nominally called 'consumer welfare' alone.[103] For this reason, the original approach of the GC can be said to pursue the EFS while the CJEU approach pursues the CWS.

The CWS seeks to maximize 'consumer welfare', which can mean either total surplus or consumer surplus,[104] in the EU the latter being favoured. This sounds relatively uncontroversial, until it becomes necessary to establish how to do this. Bork, a seminal advocate of the CWS, criticized US antitrust policy in the 1960s because he considered there was a tension between the 'policy of preserving competition and the policy of preserving competitors from their more efficient rivals.'[105] But no jurisdiction will claim to protect inefficient competitors. So, the crucial question becomes: what is an efficient competitor? This is important because Brodley noted in the context of US antitrust in 1987: 'efficiency and consumer welfare have become the dominant terms of antitrust discourse without any clear consensus as to what they exactly mean'.[106]

For those who favour the CWS, the way to determine which competitors are efficient is through costs analysis. Only those competitors that can produce a product or service at the same or a lower cost than the dominant firm are classed as 'AECs'. To this end, the CWS tends to make great use of the 'As-Efficient-Competitor' test (AEC test). This test essentially checks

Policy: Theory and Practice (Cambridge: CUP, 2004); Okeoghene Odudu, The Wider Concerns of Competition Law, 30 OJLS 559 (2010); Laura Parret, 2010. Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy, *European Competition Journal* 6: 339; Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing, 2009); Dina Waked, 2020. Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice, *The Antitrust Bulletin* 65: 87.

[98] Consider: Matthew Cole, 2019. Does the EU Commission Really Hate the US? Understanding the Google Decision Through Competition Theory, *European Law Review*, 44(4): 468.

[99] Pablo Ibáñez Colomo, Anticompetitive Effects in EU Competition Law, 17(2) JCLE 309 (2020).

[100] Liza Lovdahl Gormsen, 2007. The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC, *European Competition Journal*, 3: 329.

[101] Consider Akman's analysis on whether anticompetitive foreclosure should be expected to harm consumers or whether direct harm to the consumer should need to be identified for abuse to be established, favouring the later; Pinar Akman, The European Commission's Guidance on Article102 TFEU: From Inferno to Paradiso?, 73(4) MLR 605, 614 (2010).

[102] Heike Schweitzer, The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC, *in European Competition Law Annual 2007* (C.D. Ehlermann, M. Marquis, eds, Oxford: Hart Publishing 2008) 122.

[103] The European Commission during the Monti Era stated that the purpose of protecting competition was to protect consumers and efficient market outcomes; European Commission, Thirty-second Report on Competition Policy 2002; European Commission, Thirty-third Report on Competition Policy 2003. Consider also; Anne C. Witt, 2019. The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning? *The Antitrust Bulletin*, 64(2): 172; Joshua Wright, Douglas Ginsburg, Goals of Antitrust: Welfare Trumps Choice, 81 The Fordham LR 2405 (2012); Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing, 2012); Keoghene Odudu, 2010. The Wider Concerns of Competition Law, *Oxford Journal of Legal Studies*; Pinar Akman, 2009. Consumer Welfare and Article 82 EC: Practice and Rhetoric, *World Competition*, 32(1): 71; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011).

[104] Barak Orbach, 2011. The Antitrust Consumer Welfare Paradox, *Journal of Competition Law & Economics*, 7: 133.

[105] Robert Bork, Ward Bowman, 1963. The Crisis in Antitrust, *Fortune*, 138.

[106] Jospeh Brodley, 1987. The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress, *NYU Law Review*, 1020: 1020.

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whether the challenged behaviour would exclude a hypothetical competitor with the same costs as the dominant undertaking. If it does, the behaviour is abusive. If a behaviour does not result in the hypothetical competitor having to sell below cost then even if the behaviour drives an undertaking from the market, this will not be considered abusive behaviour. This contrasts with the EFS where the purpose is to preserve economic freedom so that customers are able to choose their own sources of supply. By protecting economic freedom, [107] customers themselves determine which undertakings are efficient (by buying from them) and which are inefficient (by not buying from them). This distinction explains why each time a decision is made by the EU competition enforcement authorities if it uses the EFS or CWS; the proponents of each will endorse their own and cry foul when their standard is not implemented or not implemented in the form they see appropriate. The *Intel* decision is ideal to illustrate the tension between the two approaches. The first GC decision was made largely in conformity with the EFS and was decried by its opponents as a 'form-based approach'[108] that proscribes a *per se* prohibition of loyalty rebates,[109] that protects competitors and not competition[110], and that is not in line with accepted mainstream economic thinking.[111] Yet for those who support the EFS, it was the right decision and the most coherent economically.[112] This disagreement extends even to the Advocate Generals in much the same way with Advocate General Wahl favouring a CWS pursuing efficiency[113] and Advocate General Kokott advising against it.[114] Trying to pursue both together is also unadvisable because it would likely lead to uncertainty and unpredictability in applying the law. Also, depending on what one considers 'consumer welfare' to really mean there may be times when the CWS and EFS lead to mutually exclusive ends. Therefore, it is necessary for one to generally take precedence over the other.

It is reasoned that the economically logical approach is to pursue an EFS. This article will not recount the established arguments that have been articulated in support of the EFS based on superior administrability, that is, the EFS makes better use of enforcement resources, is quicker and more predictable for market actors.[115] Rather, this article sets out the following arguments:

[107] Paul Nihoul, 2012. 'Freedom of Choice': The Emergence of a Powerful Concept in European Competition Law, *Concurrences*, 3: 55; Matthew Cole, 2019. Does the EU Commission Really Hate the US? Understanding the Google Decision Through Competition Theory, *European Law Review*, 44(4): 468. Consider contra; Pinar Akman, 2014. The Role of "Freedom" in EU Competition Law, *Legal Studies*, 34: 183.

[108] Rey, Patrick & Venit, James S. 2015. An Effects-Based Approach to Article 102: A Response to Wouter Wils, *World Competition*, 38(1): 3, 4, 18; Damien Geradin, 2005. Loyalty Rebates After Intel: Time for the European Court of Justice to Overrule Hoffmann-La Roche, *Journal of Competition Law & Economics*, 11(3): 579, 580, 599; Lars Kjolbye, Jorge Padilla and Robbert Snelders, The Intel Controversy: An Introduction, 1 CLPD 28, 28 (2015); C-413/14 Intel v Commission P EU:C:2017:632 Opinion of AG Wahl, paras 84–88.

[109] See articles in *supra* n. 36 and in addition: Christian Ahlborn and Daniel Piccinin, The Intel Judgment and Consumer Welfare—A Response to Wouter Wils, 1 CLPD 60, 72 (2015); Damien Neven, A Structured Assessment of Rebates Contingent on Exclusivity, 1 CLPD 86, 87, 93 (2015).

[110] Rey et al. (*supra* n. 36) 17; Ahlborn and Piccinin (*supra* n. 37) 72; Kjolbye et al. (*supra* n. 36) 29.

[111] Alberto Pera, Vito Auricchio, 2005. Consumer Welfare, Standard of Proof and the Objectives of Competition Policy, *European Competition Journal*, 1(1): 153, 160; Geradin (*supra* n. 36) 598; John Kallaugher, Brian Sher, Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse Under Article 82, 25(5) ECLR 263, 272 (2004); Peter van Wijck, 2021. Loyalty Rebates and the More Economic Approach to EU Competition Law, *European Competition Journal*, 17(1): 1, 2; Although there are more nuanced assessments on many of these points, consider: Alison Jones and Brenda Sufrin, The European Way—Reflections on the Intel Judgment, 1 CLPD 32 (2015); Nicolas Petit, 2015. Intel, Leveraging Rebates and the Goals of Article 102 TFEU, *European Competition Journal*, 11(1): 26; Maurits Dolmans and Thomas Graf, Dealing with Intel Intelligently Delineating the Scope and Limits of the Court's Ruling, 1 CLPD 76 (2015).

[112] Wouter Wils, 2014. The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance, *World Competition: Law and Economics Review*, 37(4): 405. Also more favourable; Paul Nihoul, 2014. The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law? *Journal of European Competition Law & Practice*, 5(8): 521.

[113] C-413/14 Intel v Commission P EU:C:2017:632 Opinion of AG Wahl, paras 84–88, 172.

[114] Opinion of Advocate General Kokott, Case C-23/14 Post Danmark A/S v Konkurrencerådet [2015] ECLI:EU:C:2015:343, paras 65–75.

[115] For consideration of the latter see Viktor J. Vanberg, Consumer Welfare, Total Welfare and Economic Freedom—On the Normative Foundations of Competition Policy, *in Competition Policy and the Economic Approach: Foundations and Limitations* (Josef Drexl, Wolfgang Kerber, Rupprecht Podszun, eds, Edward Elgar 2012).

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first, it is reasoned that the incorporation of the AEC test into the law on conditional rebates is not appropriate because there is no need to assume that a conditional rebate is necessary to compete on price. Second, the AEC fails to protect firms that are competitive in ways other than price. Third, it is submitted that the new test introduces a standard of harm into competition law so that the law no longer prohibits a restriction or distortion of competition, but rather only prohibits behaviour that makes competing impossible for a firm with the same costs as the dominant undertaking. This lowers the standard of protection for competition. Fourth, the new test also undermines the deterrent effect of the prohibition of abusive conditional rebates. Fifth and finally, it will be reasoned that even if one accepts the CWS premise that the aim of competition law is to protect consumer surplus, the CWS, as applied by the CJEU, fails on its own terms. The CJEU *Intel* decision fails to protect consumer surplus as effectively as the EFS and consequently should be rejected. These problems will now be explained.

IV. PROBLEMS WITH THE NEW APPROACH

A. Low Prices and Exclusion

Using the AEC test in the context of rebates appears implicitly based on the idea that because rebates lead to pro-competitive effects, that is lower prices, they should be legal unless the price would exclude an AEC, this is similar to how predatory pricing is treated. But this ignores an important difference between predatory pricing and conditional rebates: unlike with predatory pricing, the pro-competitive effect of a conditional rebate can be separated from the anticompetitive effect. With predatory pricing, looking at the dominant undertaking's own costs is useful because the behaviour that is anticompetitive—low prices—is the exact same behaviour that provides a benefit to customers.[116] They are inextricably linked, one simply cannot have low prices without also having low prices, consequently the law must have a measure to determine when there is 'too much of a good thing'. With conditional rebates things are different. The pro-competitive element of a rebate is the reduction in price for customers, the anticompetitive element of a rebate is the exclusionary effect.[117] But companies *can* offer low prices without a conditional rebate. Just consider the facts of *Intel*: if Intel wanted to offer their customers low prices to compete against AMD, they could have done this by dropping their per unit price. Each ×86 computer chip could be made cheaper by the same magnitude as would have been achieved by the rebate. The pro-competitive behaviour is retained (low prices) while the anticompetitive behaviour is removed (exclusivity). This benefits customers without restricting competition. If there are reasons why it is necessary for a conditional rebate to be employed because it is not possible to offer the lower price without it, then this can be raised to show the rebate is objectively justified. Examples of objective justifications are not just hypothetical either, they are acknowledged by the Commission in the Guidelines on Vertical Restraints.[118] These include first time investment problems; free-rider problems; hold up problems; minimizing vertical externalities; capital market imperfections and so forth. The law as applied under the EFS recognized that there are times exclusivity is required to produce a pro-competitive effect, but there is no economic logic that means the law should assume that conditional rebates will only be used when they are necessary to produce lower prices. Therefore, it is more logical to require an objective justification before considering them pro-competitive.

[116] Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 292.

[117] Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 460.

[118] Guidelines on Vertical Restraints OJ [2010] C 130/1.

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B. The AEC Test and Protecting Competition

The next problem with using the AEC test is the narrow definition of what constitutes an 'as efficient' competitor.[119] When the AEC measures whether an 'as efficient' competitor could compete with a particular rebate, it is not measuring efficiency in the common sense of whether an undertaking is on the whole producing the better product balancing performance and cost. Instead, it equates efficiency to the narrow technical sense that it has lower costs. But this is not the only way a firm can be competitive. Imagine there is a dominant undertaking called 'D' and a competitor called 'C'. C's costs are 3 percent higher than D's, but C's product is superior to D's. The AEC test does nothing to measure the quality of a product only its cost of production. This means C can be excluded from the market using a conditional rebate, which prevents customers from accessing C's superior product, but the CWS will not deem this behaviour harmful merely because D is not selling below their own costs. This does not make sense. The test has an inherent bias towards low prices, when consumers obviously take price as but one element in the equation of what makes their ideal product. If this were not the case, the consumer information journals, such as 'Which?' or 'What Hi-Fi?', would be pointless as consumers would merely need to pick the cheapest product or service. As a result, using the AEC test in this context can fail to protect competition, because it only protects competitors that have low costs, not those that are more competitive on the whole.

C. The New Standard for Determining Consumer Harm

According to the CJEU, where the undertaking concerned submits supporting evidence that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the Commission is required to analyze the share of the market covered by the challenged practice, the rebate's duration and amount to see if it has the capacity to foreclose the market.[120] One might think that this change is merely a reversal of the burden of proof. Under the EFS, the defendant had to prove objective justification, while under the CWS the Commission has to prove that the rebate has an exclusionary effect. Is this just giving undertakings the benefit of the doubt? It is far more than that.

The new approach raises the level of exclusion necessary for a behaviour to be considered abusive, albeit subtly. This is because what is being required is not an analysis of whether the market is foreclosed, but how much of it is foreclosed and for how long. No rebate is ever likely to foreclose 100 percent of the market, so this is not an absolute question, it is a question of gradation. To understand why the Court has done this, it is informative to look to O'Donoghue and Padilla's work on the law and economics of Article 102.[121] In this work, O'Donoghue and Padilla analyze various practices prohibited under Article 102 and explain how they can be pro- and anticompetitive in abstract before analyzing how harmonious the law is with current economic thinking. O'Donoghue and Padilla state that consumer welfare (read consumer surplus) should be the overriding test for abusive conduct.[122] This means consumer harm needs to be proved to establish abuse. If competition is restricted in some way this is not considered enough. Direct harm to consumers must be shown. This leads to the question

[119] Consider for an excellent analysis of the spectrum of efficiencies and the numerous difficulties inherent in considering 'efficiency' a single goal: Albert Foer, 2015. On the Inefficiencies of Efficiency as the Single-Minded Goal of Antitrust, *The Antitrust Bulletin*, 60(2): 103. See also Scherer and Ross, *Industrial Market Structure and Economic Performance* (3rd edn, Houghton Mifflin 1990); Eleanor Fox, The Efficiency Paradox, *in How the Chicago School Overshot the Mark* (Robert Pitofsky, ed., OUP 2008) 77, 78; Richard Whish, David Bailey, *Competition Law* (9th edn, OUP 2018) 5–7.

[120] C-413/14 Intel v Commission P EU:C:2017:632, para 139.

[121] Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018). For the purposes of this article, I will deliberately reference the 2nd edition of this work as it contains their critique of the law on conditional rebates as it was before it being changed by the Intel CJEU decision.

[122] Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 274.

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how to prove consumer harm? What is interesting is that O'Donoghue and Padilla seem to apply two different standards, depending on whether they are talking about consumer harm in general or in the context of specific behaviours. When considering consumer harm in general they observe that although the best evidence of consumer harm is a material effect on output and prices[123] in many cases it will not be possible to determine the direct impact on consumers this way. Therefore, they recognize that 'difficult cases arise where a dominant firm's practices *do not cause a competitor's market exit*, but raise their costs or distort competition in some other indirect way.'[124] So, they accept that there is harm that can be caused to competition beyond the obvious and immediate exit of the competitor who is subject to the allegedly abusive conduct. Yet when analyzing *Tomra*[125] they criticize the Court for using largely formalistic reasoning because the Court held that the market coverage of the rebates was not strictly relevant and that it was insufficient for the dominant undertaking to show that the contestable part of the market is sufficient to accommodate competitors.[126] They highlight that the Court's errors in calculating contestable shares meant that Tomra's prices would 'allow an equally efficient rival to survive'.[127] This emphasis on the fact that a rival could 'survive' shows that although in abstract O'Donoghue and Padilla accept that competition can be distorted without a competitor's exit from the market, when considering how the law should be applied in specific circumstances, the standard of harm appears to be so high that it is only crossed when a competitor cannot survive and will inevitably be driven from the market.

By requiring an enquiry into the market coverage and duration of the rebates, the CJEU now appears to have incorporated this view into the law. It is no longer sufficient to restrict competition for conditional rebates to be abusive, the restriction must be so severe that it will be enough to drive competitors with the same costs as the dominant undertaking completely out of the market. So, if there was a hypothetical market where 50 percent of demand was tied into conditional rebates so that customers would not buy a competitor's product, even though that might mean that the competitor's costs might be driven higher and they may be unable to achieve the scale needed to grow, this will not be abusive if there is still enough of the market available for them 'to survive'. This changes the standard of harm from distorting competition to destroying it. (This point was clearly articulated by the GC in its original decision.[128]) This appears to be born from the inconsistency between generally accepting that consumers can be harmed by distorting competition and raising rivals' costs but assuming that if a competitor can conceivably 'survive' there is no harm to consumers. Even aside from the fact that on a positive level this does not follow the aim of undistorted competition sought by the Treaty[129] on a normative level this standard will be bad for competition within the EU, as competition will not as strong and as vibrant, compared with if the standard were to protect undistorted competition.

123 Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 276.

124 Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 277.

125 Case C-549/10 P Tomra Systems ASA and others v Commission [2012] ECR I.

126 Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 270.

127 Italics added for emphasis. Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Oxford, Hart Publishing 2018) p. 270. Consider also p. 479, which also focuses on rivals' ability to 'survive'.

128 Case T-286/09 *Intel v. Commission* EU:T:2014:547, para 150.

129 Consider Article 101 TFEU that prohibits: 'all agreements . . . decisions . . . and concerted practices . . . .which have as their object or effect the prevention, restriction or distortion of competition'; EUMR recital 7: 'Articles [now 101 and 102] . . . are not sufficient to control all operations which may prove to be incompatible with *the system of undistorted competition envisaged in the Treaty*.' See for detailed analysis: Wouter Wils, 2014. The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance, *World Competition*, 37(4): 405.

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Table 1. Comparison of the possible outcomes under the original and new test

	Only conduct that can drive an 'as efficient' competitor from the market prohibited (CJEU in *Intel*)	**Loyalty rebates without justification prohibited regardless of market coverage (Law before *Intel*)**
Insufficient market coverage and duration to exclude rival, rival remains	Legal, no fine	Illegal, fine
Sufficient market coverage and duration to exclude rival, rival is driven out	Illegal, fine	Illegal, fine

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D. Diminished Deterrent Effect

Apart from weakening competition more generally, the new approach that only deems behaviour anticompetitive if it does not allow an 'equally efficient' rival to survive also has a major impact on the incentives and disincentives that exist for dominant firms considering undertaking anticompetitive behaviour. Consider the following table that sets out the possible outcomes for a dominant undertaking that is considering using conditional rebates to drive a competitor from the market. Before the behaviour is implemented the dominant undertaking is operating under uncertainty as to whether they will agree sufficient rebate contracts (covering enough of the market) for the strategy to succeed. The column on the left sets out the possible factual outcomes. The column in the middle is where the law stands as decided by the CJEU in *Intel* and the right-hand column is where the law stood before *Intel* (Table 1).

Under the law before Intel, the dominant firm has a significant disincentive against engaging in an exclusionary strategy. It may succeed and drive out the competitor and get fined, but it might also fail to drive out the competitor and still get fined. This would be a very undesirable outcome as competition would still exist and yet they would lose profit. This risk provides a strong disincentive against engaging in the strategy. Under the test set out in Intel by the CJEU if the strategy fails and they do not agree sufficient rebate contracts to drive out the competitor, they will face no fine. And if they succeed, they will face a fine, but they will have successfully driven out their competition. This means there is much less of a disincentive for a dominant undertaking to attempt to exclude competitors through conditional rebates. The strategy under the new law holds little risk.

One could reason that the fine itself would provide sufficient disincentive even if the strategy was successful and the competitor is removed, but the case of *Intel* usefully highlights why this is unlikely to be the case. If Intel's rebates drove AMD from the market, it would be fined €1Bn but would be likely to gain the $5Bn of market revenue otherwise won by AMD.[130] This would allow them to increase margins as they would be effectively a monopolist. Even if Intel did not gain any economies of scale or raise prices once their competitor was gone, based on the figures reported in 2009[131] a rough calculation of Intel's margins would suggest that Intel would recover the cost of the fine in net income in ~14 months. In short, if the dominant firm is only fined when they successfully implement sufficient loyalty rebates to drive the competitor from the market, the fine can be easily internalized as a cost of doing business.

It should be noted that this is not an argument that fines are sub-optimal generally. Rather, if the law only levies fines on rebates with sufficient market coverage to drive out an 'as-efficient'

130 SEC filing reporting on 2008 figures Advanced Micro-Devices 2009.

131 AMD's $5.808 Bn revenue and Intel's net income on net revenue.

undertaking it will be less effective. It is akin to the pre-*Intel* law prohibiting an attempt to abusively drive a competitor from the market and the post-*Intel* law only prohibiting a successful attempt. If the fine is less than the benefit to the dominant firm driving out its competitor, attempting to drive the competitor out using abusive rebates becomes the economically rational course of action. This problem is mitigated under the pre-Intel law as there is the chance to be fined and still be subject to competition.

The very best scenario possible would be for the behaviour to be considered exclusionary to an AEC but to be stopped before it driving the competitor from the market. This would be unlikely to occur as the Commission would have to be able to make all the calculations necessary to determine the exclusion of an AEC and issue a decision before it has its inevitable outcome. Something unlikely given there was a 9-year lag between AMD's complaint[132] and the Commission's decision.[133] So this best-case scenario is very unlikely to happen. As a result, the law's deterrent effect is significantly undermined.

To summarize, the CJEU decision now requires a test that only finds abuse when the rebate sets an effective price so low, where the rebates cover so much of the market and for so long that it is impossible for an undertaking with the same costs to compete. As long as the restriction is not so severe as to make it impossible for such a competitor to survive, the dominant undertaking does not even have to show there is an objective justification for using conditional rebates over a flat reduction in price. This means that the test does not effectively protect competition. In the next section, it will be reasoned that it does not maximize consumer surplus either.

E. Promoting Consumer Surplus

A significant irony of the CJEU decision as it attempts to change the law to maximize consumer surplus is that the new test actually makes markets yield lower consumer surplus, the complete reverse of what the CWS is intended to achieve.[134] Allowing conditional rebates without objective justification is less efficient than declaring conditional rebates abusive unless objectively justified. Thus, the original approach yields the most efficient outcome for consumers.

To show this, consider two possible scenarios; one scenario where Intel is allowed to provide conditional rebates and the other where they are prohibited unless the rebates are objectively justified. When they are prohibited an OEM such as Dell is able to build some computers with AMD chips and also some with Intel chips. In this scenario, a consumer shopping for a Dell has the opportunity to buy a Dell computer with whichever CPU that provides them with the greatest utility. This is efficient. In the alternative scenario, where conditional rebates are permitted, Dell has to decide whether to sell computers with only Intel CPUs to obtain the rebate or provide both, but purchase Intel CPUs at a higher price, which may make Dell's computers uncompetitive with their competitors. What the conditional rebate does is push the decision of which chip is best up away from the consumer (who is best placed to know their own needs) to Dell, who then has to guess whether on balance more customers would prefer Intel and a rebate price or the choice of Intel without the rebate and AMD.[135] Because some customers will prefer

[132] Intel Commission decision of 13 May 2009, para 5.

[133] Intel Commission decision of 13 May 2009.

[134] Consider also: Einer Elhauge, 2009. How Loyalty Discounts Can Perversely Discourage Discounting, *Journal of Competition Law and Economics*, 5(2): 189; Einer Elhauge, Abraham Wickelgren, Robust Exclusion and Market Division Through Loyalty Discounts, 43 Int'l. J. Indus. Org. 111 (2015); George Bulkley, 1992. The Role of Loyalty Discounts When Consumers Are Uncertain of the Value of Repeat Purchases, *International Journal of Industrial Economics*, 10: 91.

[135] On a basic level this is the same knowledge problem that afflicts central planning. It is simply more effective to allocate resources through free markets that allow consumers to make their own choices than for such decisions to be decided by central government. Similarly, it is more efficient to allow firms to determine the demand for AMD and Intel CPUs by stocking both and letting consumers freely decide rather than OEMs having to decide for consumers.

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one and some the other,[136] this will inevitably lead to a loss of utility for some customers. This does not just effect Dell either, but every OEM. For example, OEMs that agree to the rebate will only sell Intel based computers, while those OEMs that do not pursue the rebate may struggle to sell Intel based computers because they cannot compete on price with those who get the rebate. Thus, many OEMs may end up selling only one type of CPU and this will reduce consumers' choices each time this happens. Again, this is allocatively inefficient.

The proponents of the CWS might suggest that this reduction in consumer surplus has to be balanced with the decrease in price for the Intel CPUs. But Intel, should it wish to offer discounts to compete on price can still do this. They simply offer the same price reduction per chip without a conditional rebate, then the price for consumers will be no different. There is no prohibition on reducing prices of course. Proponents may then try to counter reason that the discount from the rebate might only be possible due to the conditional rebate, but if this were true, then Intel could raise this as an objective justification and the practice could still be allowed. However, if there is no objective necessity for the discount to require loyalty, the argument holds and there is a reduction in consumer welfare. The CJEU's approach assumes that the conditional rebate's discount in price must only be possible due to the loyalty effect of the rebate. There is no reason in economics or law to assume this is the case, which is why it is better to require objective justification. Contrary to what might be expected then, the EFS protects competition more effectively *and* maximizes consumer surplus, while the 'CWS' as implemented by the CJEU fails on both counts.

V. CONCLUSION

This article has set out the law on conditional rebates both before the *Intel* CJEU decision and after. It has been explained that the prior approach pursues what can be described as an EFS, while the latter approach pursues what is often called a CWS. An analysis of the law has shown that the new test established in the CJEU *Intel* decision is flawed. It has no requirement for conditional rebates to be objectively justified, which is sub-optimal because unless there is an objective reason why a conditional rebate is necessary, the optimal outcome is for firms to offer the best price per unit. This maximizes consumer surplus, with no negative effect on the competitive process. In addition, the new test incorporates the AEC test, which means the law only protects undertakings with low costs, which is too narrow a measure to determine whether an undertaking is in fact more competitive than the dominant firm and thus should be protected. Whereas the law previously prevented undertakings from behaving in a way that distorted or restricted competition, the new test only prevents undertakings making competition impossible for an AEC. If it is not impossible for an AEC to complete, the behaviour is legal. This undermines the law significantly as it is a higher standard of harm and thus a lower standard of protection for competition. This change also means that the dominant undertaking is only likely to be found liable once they have succeeded in removing their competitor/s from the market. This undermines the deterrent effect of the law.

Finally, the test implemented by the CJEU forces decisions regarding the allocation of goods away from consumers to the level of OEMs, which is inefficient as OEMs have to guess which combination of goods consumers prefer rather than giving them the freedom to choose. It also means that customers are likely to have fewer choices of product, which will lead to lower consumer surplus. So even by its own standard of protecting consumer surplus the CWS is less efficient than the EFS. Consequently, there is no reason to retain the test as set out in *Intel*.[137] Reversing the test and reestablishing the EFS would benefit competition and consumers alike.

[136] If there was no demand for AMD CPUs in the first place, then it would be unnecessary and illogical for Intel to offer a rebate for exclusivity.

[137] C-413/14 *Intel v. Commission* P EU:C:2017:632, para. 139.

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