No data, no abuse: The lesson from Intel's 'more economic approach'

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Introduction

It was once said that 'Too often we forget that genius, too, depends upon the data within its reach, that even Archimedes could not have devised Edison's inventions.'[1] Is it possible that in competition law it can be forgotten that the ability to enforce new legal tests also depends upon the data within reach of the enforcement authorities? This problem is illustrated by the law on conditional rebates and in particular the significant change to the law that has been implemented through the 'the Intel Saga'.[2] The first GC judgment[3] followed the previous case law and applied a test intended to protect the economic freedom of undertakings and to protect competition as a process. However, the judgment handed down by the CJEU[4] and subsequently applied by the GC in its second judgment,[5] takes a different approach, seeking to protect only undertakings that have costs that are the same or lower than the dominant undertaking.[6] It will be shown that this new approach, although simply expressed by the CJEU, is very complex in that requires a number of data points, many of which are in a state of regular change. It is argued that the new law, as set out by the CJEU and applied by the GC, is so data dependent that, since the necessary data is not publicly available, it is now extremely difficult for the Commission to successfully pursue cases against conditional rebates.

It will be further argued that this need not be the case. It will be argued that the appeal of the Intel case to the CJEU for the second time[7] creates the ideal opportunity for the CJEU to clarify the ambiguity that was present in its original decision and make the law more administrable. The original decision stated that if an undertaking presented evidence that it was not possible for their conditional rebates to restrict competition, the Commission must apply the 'As-Efficient Competitor' (AEC) test. However, the CJEU did not specify what evidence it is that must be presented. It will be argued that the CJEU should now clarify that the evidence presented must be the data necessary for the Commission to calculate the AEC test. This would mean there is a rebuttable presumption that conditional rebates are illegal, but where the dominant firm provides the data necessary for the Commission to apply the AEC test, the Commission can apply the test and if the effective price of the products with the rebate is one that could be matched by a competitor with the same or lower costs than the dominant firm, then the rebates will be legal. This provides the defendant with the opportunity to defend their behaviour, whilst furnishing the Commission with the data necessary to verify the validity of the defendant's position.

To demonstrate the above this paper will be structured as follows: First the law as it stood prior to the Intel Saga will be explained. Then the Intel Saga itself will be unpacked looking at the original GC decision, the CJEU decision and then finally the new renvoi judgment that has been delivered by the General Court after it was returned by the CJEU. This judgment will be considered in detail as it will show the difference between the simplicity of the legal test as set out by the CJEU and the difficulty of its application as demonstrated by the General Court. After this a number of arguments will be made: It will be shown that the new test requires several new aspects of the allegedly anti-competitive behaviour to be considered, such as for example, the rebate amount and duration. However, not all these aspects are observable in themselves, but rather require calculation and this

[1] Ernest Dimnet, priest, writer, and lecturer

[2] Within this phrase is included the Commission decision, the General Court's (GC) judgment, the Court of Justice of the European Union's (CJEU) judgment and the GC's second judgment after the CJEU handed the case back due based on a mistake in law.

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

[4] C-413/14 Intel v Commission P EU:C:2017:632

[5] Case T-286/09 RENV Intel v Commission EU:T:2022:19

[6] This is referred to as protecting 'as efficient' undertakings.

[7] C-240/22 P - Commission v Intel Corporation (pending)

requires extensive amounts of data. Once this is shown it will be argued that due to these new data requirements and their lack of availability to the Commission, this new test might make the most important conditional rebates cases all but impossible to successfully prosecute. Finally, it will be argued that this problem can be remedied by the CJEU clarifying the law to explain that the undertaking under investigation is required to provide this data in order to rebut the presumption that their conditional rebates are anti-competitive.

EU law prior to *Intel*

Hoffmann-La Roche[8] 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.[9]

Hoffmann-La Roche related to either exclusivity agreements or rebates, the next case, *Michelin I*, related specifically to rebates and stated that the court would:

> 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[10]

This was accepted law for decades. However, in 2000 the Competition Commissioner sought to adopt a new approach. One that was going to be purported based more on the effect of a behaviour implicitly reducing the importance of whether the behaviour satisfied the legal test that had been established. The problem was that the Commissioner and the Commission has no authority to change the law or the Treaty it is based on. So instead, the Commission produced 'guidance' on the enforcement priorities of the Commission in relation to Article 102 TFEU. This started to take a different tac:

> 'Undertakings may offer such [conditional] rebates in order 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]

In order to distinguish between good and bad rebates the Commission would assess 'whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient [as the dominant undertaking]'.[12] The Commission also helpfully gave some guidance on some of the circumstances in which a conditional rebate might be pro-competitive. This could include investigating claims that the rebate system achieves cost or other advantages which are passed on to customers. The Commission started to engage with more detailed scenarios when it

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[8] Case 85/76, Hoffmann-La Roche & Co v Commission [1979] ECR 461

[9] Case 85/76, Hoffmann-La Roche & Co v Commission [1979] ECR 461, para 89

[10] Case 322/81, Nederlandsche Banden-Industrie-Michelin v. Commission, 1983 E.C.R. 3461, para 14

[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

said that 'the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those arrangements are necessary for the dominant undertaking to make certain relationship specific investments in order to be able to supply those customers.'[13]

The full extent of this change was difficult to gauge at the time. Although the reference to a equally efficient competitor was a clear link to Chicago School and post-Chicago economics, the language was unclear when it came to the importance of these issues. For example, the Guidance says that the Commission will 'normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking'[14] and that the Commission intends to investigate 'whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient'. The use of the words 'normally' and 'even' here giving the Commission leeway to intervene even when behaviour would not exclude an 'as efficient competitor'. This could have been to give the Commission flexibility or perhaps seeking to retain the impression that this Guidance merely dictated priorities for the direction of scare resources for enforcement rather than re-writing the law, which the Commission had no authority to do.

The Intel decision

The General Court

The facts of the *Intel v Commission*[15] 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.[16] In this context Intel began granting rebates to four large OEMs: Dell, Lenovo, HP and NEC. These rebates were granted on the condition that these OEMs purchased all or almost all of their x86 CPUs from Intel.[17] In addition, Intel made payments to OEMs so that they would delay, cancel or restrict the marketing of certain products equipped with AMD CPUs.[18]

The GC decision followed the preceding case law as would normally be expected. It determined from the case law that there were three types of rebate, a quantity rebate that was presumed legal.[19] 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.[20] These 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

[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] 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 23
[15] C-413/14 *Intel v Commission* P EU:C:2017:632
[16] Intel (COMP/C-3 /37.990 - Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, para 150-159
[17] C-413/14 *Intel v Commission* P EU:C:2017:632
[18] C-413/14 *Intel v Commission* P EU:C:2017:632, para 11
[19] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 75
[20] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 76

> the market … Such rebates are designed … to prevent customers from obtaining their supplies from competing producers'[21]

Then there was a third category where abuse could only be determined by reference to 'all circumstances' as per *Michelin I* quoted above.[22]

The court explained that Intel's rebates were exclusivity rebates[23] and consequently 'whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect'.[24] Instead the rebate constitutes an abuse of a dominant position if there is no objective justification for granting it.[25]

It is also important to note for later discussion 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'[26] and that for a substantial part of the OEMs' demand there were no substitutes for the dominant undertaking's products.[27] The law up until this decision represents an Ordoliberal Approach, explicitly protecting economic freedom as set out in the quotes above from *Intel*[28] and *Michelin I*.[29] The approach protects the freedom of competitors to compete and the freedom of the customer to choose their preferred supplies;[30] a key aspect of Ordoliberalism.[31]

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,[32] nor is it to protect competitors that are less efficient than the dominant undertaking.[33] Although notably, while the other principles are well established the reference to competitors that are 'less efficient' comes from *Post Danmark*,[34] suggesting it is relatively new. The Court explained that competition on the merits may lead to the departure from the market or marginalisation of competitors that are less efficient,[35] but that also, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted

[21] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 77
[22] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 78
[23] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 79
[24] Case T-286/09 *Intel v Commission* EU:T:2014:547. para 80
[25] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 81
[26] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 88
[27] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 91
[28] Case T-286/09 *Intel v Commission* EU:T:2014:547, para 77
[29] Case 322/81, Nederlandsche Banden-Industrie-Michelin v. Commission, 1983 E.C.R. 3461, para 14
[30] A detailed analysis of how this is done in each scenario is beyond the ambit of this paper.
[31] Jochen Mohr, 'Wettbewerbsrecht und Ökonomie im digitalen 21. Jahrhundert' (2018) 69 ORDO 259, 270; David J. Gerber, Law and Competition in Twentieth Century Europe, Protecting Prometheus (first published 1998, OUP 2001) 240
[32] C-413/14 Intel v Commission P EU:C:2017:632, para 133, citing Post Danmark,C-209/10, EU:C:2012:172, paragraph 21, which in turn cites Case C-52/09 TeliaSonera Sverige [2011] ECR I-527, para 24
[33] Post Danmark,C-209/10, EU:C:2012:172, paragraph 21
[34] C-209/10 Post Danmark A/S Konkurrenceradet EU:C:2012:172
[35] Post Danmark, C-209/10, EU:C:2012:172, paragraph 22; citing in turn Case C-52/09 TeliaSonera Sverige [2011] ECR I-527, para 43

competition.[36] The next two paragraphs then state that loyalty rebates are abusive behaviour as per the established case law of *Hoffmann-La Roche*.[37] 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.'[38]

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 analyse a number of new factors. These are as follows:[39]

- the extent of the undertaking's dominant position on the relevant market
- the conditions and arrangements for granting the rebates in question
- the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market[40]
- the share of the market covered by the challenged practice
- the rebate's duration and amount

The first two of these steps would normally have been carried out anyway. Dominance must be established for an undertaking to be subject to Article 102 TFEU in the first place. The conditions and arrangement for granting the rebates would be established in order to determine whether the rebate was a quantity rebate, a loyalty rebate or a third category rebate.[41] The next three points however, are all new.

These new points can be broken down into two parts, 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 General Court 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'[42] 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.[43] This, from a legal perspective was an accurate appraisal of the law as it stood. Now however, given the likelihood of defendant

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[36] Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 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.

[37] C-413/14 Intel v Commission P EU:C:2017:632, para 136-137; citing Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 89

[38] C-413/14 Intel v Commission P EU:C:2017:632, para 138

[39] The order of these measures has been changed for ease of explanation.

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

[41] 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'), paragraphs 71 to 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

[42] T-286/09 Intel v Commission EU:T:2014:547 para 80-93 and 143

[43] T-286/09 Intel v Commission EU:T:2014:547 para 144-145, citing Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, para 81 to 86; Case C-549/10 P Tomra Systems and Others v Commission [2012] ECR, para 73 and 74

firms providing some sort of evidence that their rebates are not capable of foreclosing the market the Commission will 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) 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, since this would naturally require balancing the pro- and anti-competitive effects of the rebate[44] and to do this, one would have to be able to measure the anti-competitive effects and thus the breath and duration of the anti-competitive behaviour, but this goes further in requiring a calculation of the anti-competitive impact *to even characterise the behaviour as abusive*.

A new test for loyalty rebates

The CJEU's judgement in *Intel* essentially sets out a new test for assessing conditional rebates in EU law. The authorities must now consider:

- the extent of the undertaking's dominant position on the relevant market;
- the conditions and arrangements for granting the rebates in question;
- the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market;
- the share of the market covered by the challenged practice;
- their duration and their amount.

The new test applied: General Court RENV

Upon return to the General Court, the GC set about redeciding the case subject to the 'clarification' provided by the CJEU.[45] The decision was challenged on the basis on a number of errors relating to the Commission's calculation of various aspects of the new test:

Dell

The Commission's decision that rebates provided to Dell were illegal was nullified because the Court said the Commission had not calculated the contestable market share appropriately. They should have given evidential weight to statements made by Intel Executives regarding the contestable share.[46] They should also have provided an explanation of why they choose 7.1% as the contestable market share beyond just averaging out the range given by Dell in internal documents of 5.6-10.4%.[47] 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 still abusive, this was rejected because the GC is not able to substitute its own reasoning for that of the

[44] Something acknowledged by the Court of Justice in paragraph 140
[45] Case T-286/09 RENV Intel v Commission EU:T:2022:19
[46] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 225, 228
[47] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 239

Commission in the original decision.[48] The Commission also did not calculate any changes to the contestable share over time.[49] So, the Commission's calculations were rejected.[50]

HP

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 two months of data from the calculation.[51] The Commission argued that the information for those months were included in the annex and if the data were included it would make no difference[52] or if based on HP's quarterly calculations the figures make Intel's position look even worse.[53] 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[54] and regarding HP's figures that it was not for the GC to substitute its own reasoning for that of the Commission.[55] Consequently this evidence was also rejected.

NEC

There were two rebate payments provided to NEC by Intel. One was called ECAP and the other MDF (Market Development Fund). Only the MDF was conditional.[56] The Commission however had made their calculations based on the idea that both the ECAP and MDF rebate was conditional[57] and there was insufficient evidence that this was the case.[58]

Further when calculating the AEC analysis, the Commission used data from a single quarter in 2002 as representative of the whole period under investigation.[59] Given the evidence provided by Intel that the actual figures varied[60] (although it does not appear to be the case that Intel provided the actual data,[61] but it did argue that the prices, discounts and volumes varied through continuous renegotiation[62]) 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,[63] as representative of the whole group.[64] This was again inaccurate. So, the GC considered this also to be vitiated by errors.

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.[65] The Commission then used those values as an accurate

[48] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para252-253
[49] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 268-269
[50] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 287
[51] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 307
[52] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 316
[53] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 310
[54] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 312
[55] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 317
[56] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 356
[57] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 347
[58] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 387
[59] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 390
[60] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 410
[61] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 399
[62] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 401
[63] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 336
[64] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 406
[65] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 417

reflection of the value of those benefits and added it to the value of the cash rebates to provide a final value of the rebates provided by Intel to Lenovo. The Commission argued that this was fair because it should be the cost of a non-dominant undertaking providing those same benefits for the purposes calculating whether an AEC could offer the same without losing money and a non-dominant 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.[66] Intel argued it was the cost of the services to Intel itself[67] that mattered since the test was essentially to check whether Intel itself was selling at a loss. In contrast to the 44 million USD figure, Intel said the actual cost of providing the in-kind benefits were about 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.[68] Therefore, the Commission was condemned for not having a cost based analysis for the value of the in-kind benefits[69] except what Intel presented to Lenovo, which the Court expected to be presented by Intel in a way that would make its offer look favourable.[70] So again, the Commission's calculations were considered to be flawed and rejected.[71]

MSH

MSH was the only retailer involved. Intel's rebates to MSH were cumulative[72] 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 effects of the double rebates as if all OEMs had benefited from the same rebates as NEC.[73] The GC rejected this as the rebates varied from OEM to OEM and some OEMs had not had any rebates whatsoever.[74] The Commission had also assumed the rebate levels were stable for a ten year period, which was unproven.[75] Therefore once again, the Commission's calculations were rejected.

The market covered by the agreements

The Commission did evaluate the market covered by the agreements, however it did so after reaching the conclusion that the rebates provided were abusive.[76] This was perfectly valid under the law as it stood at the time. As already said under *Hoffman-La Roche* there was no need to measure how much of the market was covered by the practice to establish it was abusive, although it would have been relevant to the severity of the breach. However, after the CJEU judgment 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.

As a result, because the Commission stated that the rebates were abusive *before* considering their market coverage, the Commission's examination of the market coverage was rejected out of hand by the GC as insufficient. The GC did not say that the analysis was in any way defective, merely that

[66] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 420
[67] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 423
[68] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 436
[69] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 447
[70] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 451
[71] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 456
[72] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 462
[73] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 463
[74] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 472
[75] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 478
[76] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 494

by condemning the rebates as abusive before considering the market coverage, it was unacceptable. However, the GC also stated that the analysis only covered certain companies at certain times and was therefore incomplete.[77]

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.[78] The Court found however that those aspects of the time horizon were only examined by the Commission in a 'haphazard and limited manner'.[79] '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.'[80] Consequently the Commission did not investigate the duration as a factor 'intrinsically relevant' to their abusive character.[81] The Commission must therefore consider duration as part of the foreclosure, not just its duration in other contexts such as perhaps 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 it examine them as sufficient issues had already been identified to invalidate the claim.

What is the impact of the decision?

The change in the law through the *Intel* saga is significant. The Commission faces a new set of requirements to establish an abusive rebates agreement. The novel elements being:

- the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market;
- the share of the market covered by the challenged practice;
- their duration and
- their amount.

This sounds like four additional points to prove, but in reality the test has now been broadened in such a way as to raise more legal questions as to how the test should be applied and further, it now requires the competition authorities to undertake an exhausting level of data analysis. This will now be explained in reverse order of complexity.

The share of the market covered by the challenged practice

The share of the market covered by the challenge practice must be considered. However, there is no guidance as yet how much of the market actually needs to be covered. Does it merely need to be a 'significant' amount of the market or specifically a precise amount of the market that would prevent an AEC from surviving because there is too little of the market remaining to allow an AEC to cover their costs? There are hints within the Intel case that the former is applicable, but there is a high possibility that unless the latter approach is used the Commission and courts would once again be criticised as insufficiently economic by those who think that only those undertakings with costs the same or lower than the dominant firm are worthy of protection. Therefore, it may be set out in

[77] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 495
[78] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 513
[79] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 514
[80] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 514
[81] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 515

future that it is necessary to calculate a precise amount of the market that remains and whether an AEC would be able to survive by trading with this segment of the market. It is also unclear how matters such as the prominence of a particular buyer might be relevant as their apparent refusal to stock a product may be seen by customers (who act under constrained rationality) as an indication of a new product's inferior quality, sending signals to the market beyond that of the price of the product.

Their rebate's duration and amount

This is probably the most deceptive of the requirements. The duration of a rebate and its amount appears on first sight to require two relatively simple data points. The Intel case revealed the duration of a rebate and its amount may be very difficult to calculate indeed. A rebate may be for a set period of time then terminated, it may automatically renew on the same terms unless terminated or it may be subject to constant renegotiation. These possibilities start off quite simple and get increasingly complicated. In the Intel case, it is the third that was applicable.

Things become far more complicated when considering the amount of the rebate. When the gross quantity of the rebate is renegotiated on a frequent basis, as was the case in Intel, each time the gross amount of a rebate changes it means that one period ends and a new period begins. This means that the whole calculation needs to be undertaken again. For example, if in a six-year period a rebate is renegotiated quarterly, this means there will be 16 periods where the Commission will have to calculate the amount of the rebate. For each period it will need to have precise data on the gross amount of the rebate and the number of units that particular customer purchased in order to calculate the effective price of each unit to prove whether the price is so low that an AEC would not be able to sell at the same price profitably. So, the Commission will also need unit sales figures for each period and for each customer with whom a rebate agreement is agreed.

The possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market

This limb of the test can be broken down into elements that need to be calculated. First, it is necessary to work out what the costs of an AEC would be. Second, it is necessary to establish whether the price would permit a strategy of exclusion. Each will be considered in turn.

The costs of an AEC

In order to prove the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market the Commission must now work out the costs of the dominant undertaking. The costs of the undertaking will then form the benchmark of an AEC. In other words, could an undertaking with the same costs of production as the dominant firm compete profitability in the market. Establishing costs can be challenging because there are a number of different ways of calculating costs, each one may or may not be relevant depending on the market concerned. There is little to establish, by way of law, which is the correct costs measure. It is possible that there are a number of appropriate cost measures or that different cost measures should be used in specific markets. This in itself could lead to a number of legal challenges as these questions are answered piece meal case by case.

An exclusion strategy

Once costs are calculated, the Commission will also need to show that the effective prices charged by the dominant undertaking could be part of a strategy aiming to exclude as efficient competitors.

The required test for this is set out in the Commission decision[82] and was based on the analysis submitted to the Commission by Intel's own economic consultant.[83] This will mean that the Commission will have to calculate the contestable share of a customer's demand (such as Dell or NEC), work out the level of the rebate that will be lost should the customer purchase from the non-dominant supplier, then divide this lost rebate between the units in the contestable share.[84] This will give the effective price that a competitor would need to offer to allow the customer to switch away from the dominant supplier without losing profit. If the price is below the dominant undertaking's costs, then an AEC could not sustainably enter the market and a possible exclusion strategy exists. This sounds clear, but once again, raises numerous complications:

How the contestable share should be established is unclear. In *Intel* this was based on the opinions of Dell's employees, but the court also stated that the views of Intel's employees should also be considered. Taking a dominant undertaking's view of a contestable share is odd as they will have incentives to overestimate the contestable share to make their case more favourable. But in any event, ultimately the dominant undertaking will be trying to guess customer preferences when, especially in the case of a new product release, they have no real data to measure what the contestable share is.[85] This subjectivity makes the contestable share difficult to establish and highly contestable in court. Also, different customers are likely to have different contestable shares, and therefore the calculation may have to be repeated for every customer with whom a conditional agreement is agreed.

There is also the issue of a partial loss of a rebate. While a conditional rebate may clearly set out the requirements for its award and its removal, given situations where rebates are in constant renegotiation, it may be difficult to establish whether an entire rebate would be lost if alternative supplies were procured or whether just a portion would be lost. For strategic reasons a dominant undertaking is likely to threaten a large reduction in the rebate, but refuse to give too much detail as they would not wish to lose even more business should the customer follow through with the new supplier anyway. This is clear from the Intel case where clients of Intel were regularly considering the 'anticipated responses'[86] and 'expected'[87] loss of their rebate rather than using precise figures.[88] So once again, in the pursuit of economic precision, the authorities are forced to rely on guess work rather than data.

What data is needed?

This raises the question what data are actually needed to allow the Commission to satisfy the test set out by the CJEU? There are three categories of data:

Measures calculated only once	Measures calculated for each customer subject to the conditional rebate	Measures calculated for every customer and for every period of renegotiation

[82] Intel (COMP/C-3 /37.990 - Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, para 1006
[83] Intel (COMP/C-3 /37.990 - Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, para 1007
[84] Robert O'Donoghue, Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Oxford, 2edn, Hart Publishing 2018) 478-479
[85] Ironically, prohibiting conditional rebates as per the pre-*Intel* law would allow the market to demonstrate what the contestable share is empirically, by just letting the market work.
[86] Intel (COMP/C-3 /37.990 - Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, para 224
[87] Intel (COMP/C-3 /37.990 - Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, para 232
[88] Intel (COMP/C-3 /37.990 - Intel) [2009] OJ C 227/07 or Commission decision of 13 May 2009, consider also para 231

Costs for dominant firm	Contestable market share	Gross rebate per period with exclusivity
		Gross rebate per period without exclusivity
		Units sold per period

This can be formulated as the following:

$$D = d + c(3p)$$

This is where *d* is the number of dominant firms involved, *c* is the number of customers with whom a rebate is agreed, *p* is the number of periods in which a rebate is negotiated or renegotiated, *D* is the number of data points necessary to make the calculation. So that a single dominant firm that negotiates rebates with four different customers quarterly over six years (so 24 separate periods) is 1 + 4 x (3 x 24) = 289 data points. This number is also based on the fiction that costs for the dominant firm are a single observable figure rather than a complex calculation that is itself likely to draw its own contention. The result of this is that even though the original Commission decision contained 574 paragraphs over 151 pages of analysis just for the AEC test, nonetheless every single element of the decision was vitiated due to errors.

No data, no abuse

The new rigorous data requirements of this test bring to light an important question: can the Commission actually acquire this data? The answer appears to be 'no'. It is possible that all the relevant data was available and accessible to the Commission during the *Intel* investigation, but the Commission did not search for it vigorously as it thought that its assessment of the AEC test would not be as carefully scrutinised as it was. If this is the case then perhaps the new test is not such an impassable obstruction as it initially seems. However, there is evidence from the decision to suggest that such data might be difficult to obtain in any event. This can be seen from a number of aspects of the *Intel* case. First, the Commission used certain data as representative because that was the only data available to it.[89] Second, it also tried to challenge Intel to provide its own data. When discussing the size of its rebates to NEC the Commission had put forward as a defence of its figures that 'if it were true that Intel's payments to NEC had undergone significant variations during that period, Intel could easily have provided evidence to that effect during the administrative procedure.'[90] This sounds like an authority that just does not have access to the data that is being asked of it, while the defendant is very aware that it has the necessary data, but every incentive not to disclose it. After all, if there is no data, insufficient data or even missing data, there is a good chance the decision will be vitiated by error. And this relates to the data that is objectively identifiable, things are even more complex when seeking to establish contestable share, as has already been mentioned.

It is therefore worth considering at this point whether it is even possible to successfully challenge a conditional rebate under the new law set out by the CJEU and applied by the GC. Does this mark the end of the period where conditional rebates are abusive, not just by object, but de facto, abusive at all? If the Commission is not able to acquire all the data necessary to bring proceedings against an undertaking, then dominant undertakings are *ipso facto* free to use conditional rebates as they wish.

[89] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 478 (referencing paragraph 1567 in the original Commission decision)

[90] Case T-286/09 RENV Intel v Commission EU:T:2022:19, para 399

Reform

In many areas of law reform is often complicated and subject to trade-offs. Changing laws or policy often makes the situation of one party better but another's worse. It is rare therefore, to find such an instance where there is a clear need for reform and the resolution to the problem is not beset by trade-offs.

The CJEU has in practice through its *Intel* decision[91] incorporated the AEC test into the law by requiring the analysis of the market share covered by the 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. This analysis is required when '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.'[92] The simple solution to this problem, one that is still in reach as long as the *Intel* decision is on appeal to the CJEU, is to specify that the 'supporting evidence' that the undertaking concerned must provide relates to all the relevant data that the Commission requires to apply the AEC test. At the moment, the exact evidence required appears to be unspecified. However, given the analysis above, it is both fair and logical to require the dominant undertaking to provide the various data required for the test to be accurately applied. That way the law essentially presumes that conditional rebates are anti-competitive by object, (unless objectively justified) until the dominant undertaking proves that it is not through the provision of the appropriate data, such as the size of it discounts over each period that is covered by the behaviour. Opponents of this reform might argue that it inverts the presumption of innocence. However, the law is sufficiently clear that conditional rebates are presumed to be anti-competitive, and so it is fair to require the dominant undertaking to show that in their particular circumstance it is not. On a practical level, the dominant firm is best placed, if not uniquely placed, to provide the hard data that would show there is no anticompetitive effect.[93]

The Commission appears to always have been aware of this issue. In the Guidance on the Commission's enforcement priorities in applying Article [102] the Commission states in relation to price-based exclusionary conduct:

> 'In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing. *This will require that sufficiently reliable data be available*.'[94]

And in relation to conditional rebates specifically it says:

> 'the Commission intends to investigate, *to the extent that the data are available and reliable*, whether the rebate system is capable of hindering expansion or entry even by

[91] C-413/14 Intel v Commission P EU:C:2017:632

[92] C-413/14 Intel v Commission P EU:C:2017:632, para 138

[93] That is to say no anticompetitive effect in terms of a price that is below cost, the AEC test does not take into account exclusion, which is another issue, but outside the ambit of this paper.

[94] Italics added for emphasis. 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 25

competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers.'[95]

It appears clear then, that the Commission has always been aware of the challenge of applying the AEC standard when the data is not available or only available to the firm that is being investigated. If the CJEU takes this into account and changes the law to require the necessary data to be supplied by the dominant undertaking, this will clarify the law as set out by the CJEU and also enhance the efficiency and administrability of the law by making it possible for the defendant to genuinely show their prices are not below cost, whilst simultaneously making it possible for the Commission to verify whether their claim is objectively true. There will still be difficulties in applying the law, the exact level of the contestable share of the market and the correct measure of costs for the dominant undertaking will always be a source of contention if the law insists on using the AEC test to analyse conditional rebates,[96] however this clarification will at least make it possible both for the Commission to apply the law and for the dominant firm to rebut the presumption of anti-competitive effect, bringing an effective balance between enforcement and the right of defence.

[95] Italics added for emphasis. 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

[96] Whether or not applying the AEC test to conditional rebates at all is another question worthy of investigation, but it beyond the ambit of this paper.

Conclusion

It has been shown that prior to the Intel Saga, the law on conditional rebates targeting those rebates that tend to remove or restrict a buyer's freedom to choose his sources of supply and to exclude competitors from the market.[97] This started to change with the Guidelines on the enforcement priorities of the Commission when applying Article [102]. In the Guidelines the Commission explained that they would assess 'whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient [as the dominant undertaking]'.[98] The law was consistent for decades, until the Intel Saga began. The Intel Saga began with the GC applying the law as it was, but swiftly changed when the CJEU explained that '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'[99] the Commission is required to analyse the share of the market covered by the conditional rebates, their duration and their amount. It must also 'assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market'.[100] This test was applied by the GC with the effect that the entire Commission decision was vitiated due to errors made in the Commission's calculations.

It has been argued that the sheer amount of data that the new test requires makes it difficult for the Commission to successfully bring a case against conditional rebates, as the data required (where it exists) is held by the undertaking being investigated for abuse. The defendant has an almost unassailable position if the Commission is unable to get access to the information that it needs to satisfy the new test.

Consequently, it has been argued that the CJEU is in an excellent position to clarify the law and improve its application. Since the second GC judgment is again being appealed to the CJEU, the Court could greatly increase the efficacy of the law if it ensured that conditional rebates were unlawful, unless the defendant, during the course of administrative proceedings provided the following evidence to show that the rebates could not have had an anti-competitive effect; in particular the number of units sold, the gross value of the discount and the duration of the rebates given to each customer, during the period covered by the alleged abuse and any other data that might reasonably be necessary to allow an independent observer to calculate the effective per unit price of the goods or services covered by the rebates. This would make it feasible for the Commission to independently verify whether there is a possible strategy aiming to exclude from the market competitors that have the same or lower costs than the dominant undertaking. This requirement would mean that the Commission and the courts would be able to administer the test accurately and effectively, while protecting the right of defence of the dominant undertaking rather than the law and the protection of competition failing for want of data.

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[97] Case 322/81, Nederlandsche Banden-Industrie-Michelin v. Commission, 1983 E.C.R. 3461, para 14

[98] 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

[99] C-413/14 Intel v Commission P EU:C:2017:632, para 138

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