

ABUSE OF DOMINANCE BY GRANTING REBATES IN EU COMPETITION LAW

KRZYSZTOF ROKITA*

* Assistant and PhD student, University of Wrocław (krzysztof.rokita@gmail.com). This paper has been financed from the funds of the National Science Centre granted by the decision no. DEC-2013/08/A/HS5/00642.

Single firm conduct in EU competition law is governed by Article 102 of the Treaty on the Functioning of the European Union (TFEU) which states that “[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”.² The aim of this paper is to analyse comprehensively the practice of using rebate schemes by dominant undertakings as an exclusionary abuse in EU competition law regime. It is fair to say that the treatment of rebates of dominant firms by the EU Courts (the Court of Justice of the European Union and the General Court) has been since long time ago one of the most controversial areas in EU competition law.³ In June 2014 the General Court (the GC) handed down its judgement in the *Intel* case⁴ in which it upheld in its entirety a decision of the European Commission (the Commission) in which the latter found that the US microprocessor manufacturer *Intel* had abused its dominant position by, *inter alia*, granting exclusivity rebates to four OEMs.⁵ According to the Commission’s decision, rebate schemes used by the American company were part of anticompetitive strategy aimed at excluding from the market *Intel*’s rival *Advanced Micro Devices*.⁶ For the said abuse the Commission fined Intel €1,06 billion⁷ – the largest fine ever imposed in EU competition law for abuse of dominance.

The GC’s judgement did not settle controversy surrounding rebates in EU scholarship. On the contrary, it gave rise to an unprecedented debate on the treatment of dominant undertakings’ rebate schemes in EU competition law.⁸ But what makes this discussion about

² The provision then goes on with non-exhaustive list of abusive practices.

³ Among general as well as specific literature, see: Christian Ahlborn and David Bailey, ‘Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison’ (2006) 2 *European Competition Journal* 101; Gianluca Faella, ‘The Antitrust Assessment of Loyalty Discounts and Rebates’ (2008) 4 *Journal of Competition Law and Economics* 375; Damien Geradin, ‘A Proposed Test for Separating Pro-Competitive Conditional Rebates from Anti-Competitive Ones’ <<http://papers.ssrn.com/abstract=1315292>> accessed 3 April 2015; Luc Gyselen, ‘Rebates: Competition on the Merits or Exclusionary Practice?’ in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Hart Publishing 2006); Alison Jones and Liza Lovdahl Gormsen, ‘Abuse of Dominance: Exclusionary Pricing Abuses’ in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar 2013) 457–472; Alison Jones and Brenda Sufrin, *EU Competition Law. Texts, Cases and Materials* (Oxford University Press 2014) 454–484; John Kallaughner and Brian Sher, ‘Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82’ [2004] *European Competition Law Review*; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford Studies in European Law 2011) 232–241; David Spector, ‘Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Structured Rule of Reason’ (2005) 1 *Competition Policy International* 89; Denis Waelbroeck, ‘Michelin II: A Per Se Rule Against Rebates by Dominant Companies?’ (2005) 1 *Journal of Competition Law and Economics* 149; Hans Zenger, ‘Loyalty Rebates and the Competitive Process’ (2012) 8 *Journal of Competition Law and Economics* 717.

⁴ Case T-286/09 *Intel Corp. v European Commission* EU:T:2014:547.

⁵ *Intel* (COMP/C-3 /37.990) Commission Decision of 13 May 2009 [2009] C227/13, 515.

⁶ See on “[t]he growing competitive threat from AMD”, *ibid* 50.

⁷ *ibid* 516.

⁸ See Christian Ahlborn and Daniel Piccinin, ‘The Intel Judgment and Consumer Welfare - A Response to Wouter Wils’ 1 *Competition Law & Policy Debate* 60; Bill Allan, ‘Loyalty and Fidelity Rebates: A Sense of Déjà Vu Again’ 1 *Competition Law & Policy Debate* 50; Maurits Dolmans and Thomas Graf, ‘Dealing with Intel Intelligently Delineating the Scope and Limits of the Court’s Ruling’ 1 *Competition Law & Policy Debate* 76; Damien Geradin, ‘Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche. Forthcoming in 11 (2015) *Journal of Competition Law & Economics*’ <<http://papers.ssrn.com/abstract=2586584>> accessed 12 April 2015; Pablo Ibáñez Colomo, ‘Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy’ LSE Law, Society and Economy Working Papers

discounting practices of dominant firms in the EU fascinating is that it is not confined to technicalities, but it touches upon the most fundamental issues of the EU's regime protecting competition. Those issues include: form and effects-based assessment of legality of firms' conduct and the boundaries of object restrictions, that is conduct which is so harmful to competition that it is justified to directly prohibit it without measuring its effects; the Commission's reformed approach to exclusionary abuses set forth in the Guidance Paper⁹ and whether (and to what extent) it should influence the case law of EU Courts; or objectives of EU competition law and whether they allow to adopt an approach which is focused more on consumer welfare.

This paper analyses rebates against the background of the above mentioned debate and case law of EU Courts with emphasis on the GC's judgment in *Intel*. The paper mainly concerns loyalty rebates with smaller emphasis on other types of rebates.¹⁰ The paper is structured as follows. Section 1 identifies the conduct that will be analysed in this contribution, that is various types of rebate schemes that may be employed by dominant firms. Section 2 reviews the case law of EU Courts in the area of rebates granted by dominant undertakings with the aim of establishing their current legal status. In section 3 rebates are analysed from the angle of methodologies used in competition law in order to identify restrictions of competition. The findings of this section are then applied to the categories of rebate schemes known in EU competition law. Section 4 analyses the foreclosure mechanism of loyalty rebates and modern legal and economic frameworks which may be used in competition law so as to evaluate their legality. These are then confronted with the analysis of rebates in the latest GC's judgement in *Intel*. Section 5 looks at discrepancies in analysis of similar conduct under Articles 101 and 102 TFEU. Section 6 confronts the current legal status in the area of rebates with the possibility of dominant firms to objectively justify the use of anticompetitive rebates. Section 7 focuses on the as efficient competitor test which forms part of the Commission's Guidance Paper in the area of price-based conduct including rebates. Compatibility of this test with EU competition law has recently been put in doubt.

The findings in this paper put the author among those who claim that changes to the current treatment of rebate schemes as exclusionary abuses in EU competition law are justified. What is more, the approach advocated by the Commission in which it refers to the

29/2014 <<http://ssrn.com/abstract=2530878>> accessed 17 April 2015; Alison Jones and Brenda Sufrin, 'The European Way - Reflections on the Intel Judgment' 1 *Competition Law & Policy Debate* 32; Paul Nihoul, 'The Ruling of the General Court in Intel: Towards the End of an Effect-Based Approach in European Competition Law?' (2014) 5 *Journal of European Competition Law & Practice* 521; Luc Peeperkorn, 'Conditional Pricing: Why the General Court Is Wrong in Intel and What the Court of Justice Can Do to Rebalance the Assessment of Rebates' [2015] *Concurrences* 43; Nicolas Petit, 'Intel, Leveraging Rebates and the Goals of Article 102 TFEU' <<http://papers.ssrn.com/abstract=2567628>> accessed 27 February 2015; Patrick Rey and James S Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38 *World Competition* 3; Richard Whish, 'Intel v Commission: Keep Calm and Carry On!' (2015) 6 *Journal of European Competition Law & Practice* 1; Wouter Wils, 'The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37 *SSRN* <<http://ssrn.com/author=456087>>; James S Venit, 'Case T-286/09 Intel v Commission—The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 *European Competition Journal* 203.

⁹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

¹⁰ Nonetheless, the findings of this paper are relevant to all types of rebates as they may be used to achieve the same result. Moreover, the position on other types of rebates in the EU stems from the status of loyalty rebates.

concept of the as efficient competitor seems to be particularly suited to EU competition law regime protecting undistorted competition within the internal market.

1. Conduct that is the subject of this paper – rebates of dominant undertakings

Rebates and discounts¹¹ represent a form of non-uniform (non-linear) pricing. They encompass various types of incentive schemes which may be used by firms to induce customers to purchase from them larger quantities of goods.¹² Such schemes may be built upon different types of mechanisms which, when triggered, allow the purchaser to pay lower price. In competition law literature and policy rebates are often divided into those which are granted on purchases of a single product and those which are given on purchases of two or more products belonging to different product markets (bundled/aggregated rebates).¹³ This paper concerns the former category of discounts. Based on how the threshold of required purchases is built one may distinguish¹⁴:

- a. **Quantity (volume) rebates** – which are granted to the buyer for purchases of certain objective amounts;
- b. **Market-share discounts** – which is a (neutral and technical) term used to refer to rebates in which the price reduction is triggered when the buyer acquires certain percentage of its requirements for a particular product. A different notion used in EU competition law, **loyalty** or **fidelity rebates**, is used for arrangements in which the buyer commits itself to purchase all or almost all of its requirements from the firm granting the discount. Recently, the GC referred to this type of discounts as **exclusivity rebates**. These terms will be used synonymously;
- c. **Target rebates** are given to customers if they obtain a certain individually set amount of goods. Usually the target must be achieved in a reference period and must exceed purchases in the past reference period.

Another feature of discount schemes is that they may be awarded on purchases above the required threshold (incremental rebates) or on all units purchased including the ones which were purchased so as to trigger the set mechanism (rolled-back or retroactive rebates).

Although these various features characterizing discounts are useful in showing a range of commercial possibilities available to market participants, it is crucial to notice that each category of rebates distinguished above may be used to achieve the same result. For example, a customer may simply be required to purchase 100% of its requirements from a single

¹¹ The two terms are often, and will be in this paper, used synonymously even though, technically, a distinction between them can be made, see Jones and Sufrin (n 3) 455.

¹² Faella (n 3) 375; Bruce H Kobayashi, ‘The Economics of Loyalty Discounts and Antitrust Law in the United States’ (2005) 1 Competition Policy International 1 <<http://papers.ssrn.com/abstract=794944>> accessed 27 April 2015.

¹³ As in US Department of Justice, ‘Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act’ (2008) 92 <<http://www.justice.gov/atr/public/reports/236681.pdf>> accessed 12 April 2015. Although this report has been withdrawn, it contains useful elucidation of many problems encountered in the area of law on discounts.

¹⁴ For different categorizations, see: Ahlborn and Bailey (n 3) 104; Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010) 256–257; Jones and Sufrin (n 3) 455.

supplier in order to achieve a discount, but the same result may be achieved by setting a target corresponding to the customer's perceived capacity of absorption.¹⁵

A useful way of approaching rebate schemes is to look at them as a form of conditional pricing practices.¹⁶ This is generally also the approach that the Commission takes in its Guidance Paper. There the Commission distinguishes conditional rebates and defines them as “rebates granted to customers to reward them for a particular form of purchasing behaviour.”¹⁷

Rebates are widespread both at retail and wholesale levels and in a number of industries of modern economy such as pharmaceuticals, medical equipment, computer software and components, flight industry, or consumer products.¹⁸ Antitrust enforcement and scholarship is generally focused on rebate schemes given by suppliers to distributors and retailers.

2. The fundamental cases setting the rules on rebates under Article 102 TFEU

In its *Intel* judgement the GC made a distinction between three categories of rebates. This is a useful summary of the current status of EU law on single product discounts of dominant undertakings.

The first category encompasses quantity rebates the granting of which is solely connected to the volume of purchases from a dominant undertaking. It is deemed that those rebates reflect cost savings from increased quantities supplied which, in turn, can be passed on in the form of price reduction to the customer. Moreover, those rebates reflect efficiency gains and economies of scale made by a dominant undertaking. But above all, a presumption exists that they generally do not have prohibited foreclosure effects.¹⁹

The second category includes those rebates the granting of which is conditional upon the customer's purchasing all or most of its requirements from a dominant undertaking which lately have been labelled by the GC as exclusivity rebates. Those types of rebates are prohibited by Article 102 TFEU and considered to be incompatible with the undistorted competition within the internal market.²⁰

Finally, into the third category the GC has put all other types of rebates which are not connected to a requirement of purchasing exclusively or quasi-exclusively from a dominant undertaking but which nevertheless may also have a fidelity-building effect. Examples of

¹⁵ See Case C-85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* EU:C:1979:36, [1979] ECR 461, paras 98–100.

¹⁶ See Allan (n 8); Daniel A Crane, ‘Conditional Pricing and Monopolization: A Reflection of the State of Play’ 1 *Competition Law & Policy Debate* 44.

¹⁷ Guidance Paper (n 9), para 37.

¹⁸ Joshua D Wright, ‘Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts’ 4 <https://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf>; Peepkorn (n 8) 55.

¹⁹ *Intel* (n 4), para 75.

²⁰ *Intel* (n 4), paras 76-77.

rebates of the third type include rebates granted upon achieving individually set sales objectives.²¹

The subsequent paragraphs will look at the major EU cases from which the GC in *Intel* drew its conclusions albeit in a slightly different order.

2.1. Loyalty rebates

The definitive statement of law on loyalty rebates has been laid down by the Court of Justice (the CJ or the Court) in 1979 in a landmark case of *Hoffmann-La Roche*. The judgement concerned a Swiss company *Hoffmann-La Roche (Roche)* operating on the vitamins markets which concluded with 22 large purchasers of vitamins exclusivity or quasi-exclusivity contracts. Whilst some of the contracts contained a formal undertaking from the purchasers to obtain all or most of their requirements for vitamins exclusively from *Roche*²², there were also instances where such an obligation was not established²³. Most of the agreements either explicitly or implicitly, the Court claimed, were designed so as to establish long-term relationships lasting for several years and, with one exception, they provided for granting of discounts and rebates calculated on the total purchases of vitamins.²⁴

The Court went out of its way on numerous occasions to underline the contradiction of exclusivity obligations with EU competition law provisions and the case could be seen as an example of the Court's reading of fidelity rebates as a de facto exclusivity. In the fundamental passages of the ruling the legal rule on exclusive dealing and fidelity rebates in light of EU law was laid down. According to the Court:

An undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.

*The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position.*²⁵

The rule laid down by the Court was clearly centred around exclusivity which encompassed both “full” exclusivity, that is obligation or promise to obtain all requirements

²¹ *ibid*, para 78.

²² *Hoffmann-La Roche* (n 15), para 83.

²³ *ibid*, para 84.

²⁴ *ibid*, paras 86–87.

²⁵ *ibid*, para 89.

from the dominant undertaking and quasi- or near exclusivity, that is obligation or promise to obtain most of requirements from the dominant firm.

2.2. Target sales rebates and other types of discount schemes

The definitive statement of law on rebates other than exclusivity rebates but which may nevertheless have fidelity-building effect has been given in *Michelin I*. The case concerned *Michelin NV*, a company incorporated under Dutch law, which was producing and selling *Michelin* tyres in the Netherlands.²⁶ The company was accused of committing an abuse on the market in new replacement tyres for heavy vehicles by operating an annual variable discount. The discount was granted to a dealer if the latter achieved a sales target which was fixed on the basis of number of heavy vehicle tyres sold by the dealer.²⁷

In its analysis of the sales target discounts at issue the Court pointed out that they were different from mere quantity rebates in that the discounts did not use objectively set quantities but they instead looked at sale results from the previous year and set the limits within which the discount could be triggered. Moreover, *Michelin NV*'s discounts could not have been equated with *Hoffmann-La Roche* type of rebates in that they did not require to enter into exclusivity arrangements or purchase a specific proportion of requirements from the dominant undertaking.²⁸ This in turn required the Court to apply a different type of analysis which was indicated by the following words:

*In deciding whether Michelin NV abused its dominant position in applying its discount system it is therefore necessary 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.*²⁹

In applying that formula to the case at hand the Court took into consideration several factors. First, the annual reference period which the discount system was based on put appreciable pressure on dealers in that even small variations in the quantities purchased could affect dealers' profits of margin for the entire year. Next, the Court took into consideration the divergence between *Michelin NV*'s and its main competitors' market shares. The significant difference that existed between those shares resulted in a situation whereby it would be "very difficult" for the *Michelin NV*'s competitors to put forward a competitive offer. Third, the pressure and uncertainty of dealers was further intensified by the lack of transparency of the discount system.³⁰ The analysis led the Court to conclude that the whole

²⁶ Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* EU:C:1983:313, [1983] ECR 3461 (*Michelin I*).

²⁷ *ibid*, para 67.

²⁸ *ibid*, para 72.

²⁹ *ibid*, para 73.

³⁰ *ibid*, paras 81-84.

discount system precluded dealers from taking advantage of competition freely at any time and selecting most favourable offers from those submitted by the dominant undertaking's competitors.³¹

2.3. Quantity rebates

Finally, the category of quantity rebates is generally deemed to lack the foreclosure effects prohibited by Article 102 TFEU. That dominant undertakings are, in principle, entitled to employ quantity rebates in their commercial relationships with customers has been recalled by the EU Courts in numerous cases. From the CJ's analysis in *Hoffmann-La Roche* it can be inferred that the grant of quantity rebates is dependent solely on purchasing quantities which are fixed objectively and apply to all customers (thus they are standardized rebates).³² It follows from this that when fixing thresholds which trigger the price reduction in quantity rebates undertakings must be driven only by costs savings which may result from bigger supplies without considering the specific requirements of their customers.

Moreover, according to the CJ, the objective of quantity rebates is to achieve maximum quantity supplied as oppose to, presumptively illegal, maximum requirements served.³³ The Court's reasoning implies that expressing a rebate in percentage of requirements is somehow driven by anticompetitive purpose. Such a conclusion is unjustified and ignores market reality since a customer itself may wish to obtain a rebate which is expressed in percentage of its requirements as it may give that customer valuable flexibility in situations where the market demand is uncertain and setting a fixed quantity as a discount threshold may increase the risk of customer's not reaching enough purchases.³⁴

3. Methodologies of assessing legality of conduct in competition law

This section will look at different methods in competition law systems employed with the aim of identifying anticompetitive conduct. Subsequently, the author will examine the case law of EU Courts in the area of rebates so as to identify the method used by the EU judicature.

One approach to this issue is to distinguish between form-based and effects-based assessment. The former way of assessment is concerned with various kinds of categories of practices used by firms and with attaching to those categories certain legal presumptions. Under this approach some forms of practices may be considered lawful based on their form and characteristics whereas to other types of conduct a label of illegality will be attached. The thrust of an effects-based approach, on the other hand, is that the legal evaluation of a given conduct is undertaken on a case by case basis, taking into consideration all the circumstances of the case, its facts, market characteristics, and all legal and economic factors which may

³¹ *ibid*, para 85.

³² *Hoffmann-La Roche* (n 15), para 100.

³³ *ibid*.

³⁴ cf Dolmans and Graf (n 8) 85.

help to conclude whether the practice in question ultimately results in outcome that is contrary to provisions of competition law.³⁵

In a similar vein, the above way of competition law assessment may also be expressed as using rules and standards in competition law adjudication. On the one hand, making use of rules envisages *a priori* determined categories of conduct with limited number of case specific factors taken into consideration by an adjudicator in deciding whether a given practice is lawful or not. On the other hand, evaluating firms' behaviour in light of a standard means that an *ex post*, broad analysis of facts, economic and legal context and motivation behind the conduct will be undertaken.³⁶

Insofar as these methodological approaches to identifying restrictions of competition and recognizing their effects are concerned, neither of them, in the author's view, should be condemned as such. Each may be useful in competition law assessment and applied simultaneously in one and the same jurisdiction to the effect that a hybrid approach is accepted.³⁷ One may also employ specific legal tests or tools which may act as proxies of anticompetitive effects so that effectively one conducts a structured legal evaluation. In particular, the as efficient competitor test may serve as a tool to infer harmful effects.³⁸

What is more, one may sometimes encounter linguistic terms which may invoke negative connotations, such as *formalistic* which has been attached to the form-based approach. Likewise, it is not uncommon to speak of effects-based approach as more-economics based with the indication that the form-based approach would somehow be less grounded in economics.³⁹

It is the author's view that the form-based approach is a simply way of guaranteeing procedural economy.⁴⁰ If a particular type of conduct is always or almost always likely to run counter to provisions of competition law in certain jurisdiction it is justified for that jurisdiction to prohibit such conduct based on its form without detailed inquiry into its effects.⁴¹ If effects of a different type of behaviour are difficult to determine, contingent upon

³⁵ See generally: International Competition Network, 'Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws' para 32ff <<http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf>> accessed 11 March 2015; Economic Advisory Group on Competition Policy, 'An Economic Approach to Article 82' (2005) <http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf> accessed 24 January 2015; Mark A Lemley and Christopher R Leslie, 'Categorical Analysis in Antitrust Jurisprudence' <<http://papers.ssrn.com/abstract=1026967>> accessed 11 March 2015.

³⁶ See Daniel A Crane, 'Rules Versus Standards in Antitrust Adjudication' (2006) 64 Washington and Lee Law Review <<http://papers.ssrn.com/abstract=927293>> accessed 11 March 2015. Another author, in the particular context of EU competition law, speaks of orthodox and analytical approach of assessing effects of undertakings' behaviour: Liza Lovdahl Gormsen, 'Are Anticompetitive Effects Necessary for an Analysis under Article 102 TFEU?' (2013) 36 World Competition 223, 225.

³⁷ International Competition Network (n 35) 34.

³⁸ Gormsen (n 36) 225; Ahlborn and Piccinin (n 8) 64.

³⁹ For example, the report prepared by the EAGCP synonymously speaks of an economics-based and effects-based approach Economic Advisory Group on Competition Policy (n 35). This has been recently criticized by a supporter of the current legal status in the area of rebates of dominant firms: Wils (n 8) 9. Advocates of changes have also referred to such use of terminology as unfortunate: Ahlborn and Piccinin (n 8) 61.

⁴⁰ See Case C- 67/13 P *Groupement des cartes bancaires (CB) v European Commission* EU:C:2014:1958, Opinion of AG Wahl, para 28.

⁴¹ Peepkorn (n 8) 46.

existence of numerous factors and if such conduct may be used for pro- or anticompetitive reasons, one should rather employ a case by case deeper market inquiry.

However, it seems to be a distinct issue, and not related to the employed methodology of identifying anticompetitive conduct, to determine what effects are necessary so as to conclude that a restriction of competition has occurred. In other words, one may use only a form-based or effects-based approach or one may mix these approaches together, but they as such do not determine that a particular conduct runs contrary to provisions of a given competition law system. The latter issue is rather related to objectives or values protected by competition law.⁴² Hence, a competition law regime whose objectives are fully informed by economic considerations such as consumer welfare may adopt one methodology over another with the aim of establishing whether a particular conduct reduces or improves consumer welfare. Another competition law regime may, however, pursue different objectives, some of which may be economic in character and others not, such as economic freedom, competitiveness of small and medium sized enterprises, conservation of energy and protection of environment, providing relief to victims of disaster or empowerment of minorities.⁴³

While the above-mentioned two methodological approaches to identifying anticompetitive conduct can be considered free of any competition law regime connotations, the recent debate on rebates in the EU is often filled with notions specific to a particular legal system protecting competition. Quite common is the use of *per se* or *rule of reason* concepts which originate in the US antitrust law⁴⁴. Under the rule of reason approach it has to be determined whether the evaluated arrangement promotes or suppresses competition by considering the industry conditions before and after it was implemented as well as the nature of it and its effects, both actual and probable.⁴⁵ Consequently, the rule of reason is a broad inquiry into all the circumstances before deciding whether the arrangement imposed unreasonable restraint on competition.⁴⁶ In contrast, this broad inquiry is redundant where the conduct that is being assessed is manifestly anticompetitive because it is clear it has pernicious effect on competition with no redeeming virtue. Such arrangements are illegal as

⁴² In a similar vein Ahlborn and Piccinin (n 8) 61. For a distinction between rules and standards, on the one hand, and objectives guiding and underpinning EU competition law, on the other hand, see also Jones and Sufrin (n 8) 34–37.

⁴³ On examples of different goals and values protected by competition law regimes, see Ariel Ezrachi, ‘Sponge’ [2015] The University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 42 12–15 <<http://papers.ssrn.com/abstract=2572028>> accessed 16 April 2015.

⁴⁴ As pointed out in Nihoul (n 8) 527.

⁴⁵ *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918): “the true test of legality is whether the restraint is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition. To determine this question, the court must ordinarily consider the facts peculiar to the business, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts, not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and predict consequences.” Gregory J Werden, ‘Antitrust’s Rule of Reason: Only Competition Matters’ 18 <<http://papers.ssrn.com/abstract=2227097>> accessed 11 March 2015. *Werden* notes that this remains the definitive statement of the rule of reason.

⁴⁶ *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 US 36 (1977): “Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”

such (*per se* illegal) with the mere finding of their existence concluding assessment of legality.⁴⁷

In the EU the form- and effects-based or rules and standard methodology is embodied in concepts of object and effect restrictions of competition and explicitly contained in Article 101 TFEU.⁴⁸ The latter provision prohibits all agreements “which have as their object or effect the prevention, restriction or distortion of competition within the internal market”. This division between object and effect restrictions of competition is alternative in its nature and, once it has been established that the object of the agreement is to restrict competition, there is no need to take into account its actual effects.⁴⁹

Recently in *Groupement des cartes bancaires* the Court, partly relying on the previous case law, has provided guidance as to the interpretation of object restrictions in EU competition law. First of all, object restriction is a conduct which “reveal a sufficient degree of harm to competition” so that there would be no need to measure its effects.⁵⁰ Conduct that is considered to be an object restriction is, by its very nature, harmful to the proper functioning of normal competition.⁵¹ Among behaviour which nature is inherently anticompetitive the Court pointed out price-fixing cartels. This is because they are so likely to have negative effects on price, quality or quantity of goods.⁵² According to the Court this presumption of negative effects is justified because “[e]xperience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.”⁵³

The concept of object restriction was even further elaborated on by AG Wahl in his opinion in *Groupement des cartes bancaires*. There AG Wahl cautioned against broad interpretation of the concept of object restriction since it may effectively result in false

⁴⁷ *Northern Pacific R. Co. v. United States*, 356 US 1 (1958): „However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.”

⁴⁸ It is not, however, uncommon to use the US notions of *rule of reason* or *per se* infringement even by Advocates General. See *Groupement des cartes bancaires*, Opinion of AG Wahl (n 40), para 31; Joined Cases C- 468/06 to C- 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* EU:C:2008:180, [2008] ECR I-07139, Opinion of AG Ruiz-Jarabo Colomer which is concerned with, *inter alia*, existence of *per se* abuses of dominant position.

⁴⁹ Joined Cases C-56/64 and C-58/64 *Consten and Grundig v Commission* EU:C:1966:41, [1966] ECR 299, 342; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* EU:C:2006:592, [2006] ECR I-8725, para 125; Case C-8/08 *T-Mobile Netherlands and Others* EU:C:2009:343, [2009] ECR I-4529, paras 28 and 30; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* EU:C:2008:738, [2009] ECR I-9291, para 55; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* EU:C:2011:631, [2011] ECR I-9083, para 135; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649, [2011] ECR I-9419, para 34; Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* EU:C:2013:160, para 34.

⁵⁰ Case C- 67/13 P *Groupement des cartes bancaires (CB) v European Commission* EU:C:2014:2204, para 49.

⁵¹ *ibid*, para 50.

⁵² *ibid*, para 51.

⁵³ *ibid*.

positives.⁵⁴ He concluded that “[o]nly conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition”.⁵⁵

Even though a comparable distinction between object and effects restrictions of competition cannot be found in the text of Article 102 TFEU, it is recognised that the case law of EU Courts provides grounds for distinguishing of object (anticompetitive by their very nature) and effects abuses.⁵⁶ Having in mind the latest judgement of the Court in *Groupement des cartes bancaires*, it is submitted that the judgment could provide guiding principles in regard to both Article 101 and 102 TFEU on the conduct most harmful to competition. Thus, the category of object restrictions should be interpreted narrowly as only encompassing conduct harmful effects of which are easily identifiable and confirmed in light of economics.

3.1. Loyalty rebates – object restrictions

In *Hoffmann-La Roche* the Court explained why exclusivity agreements and fidelity rebates are considered to be incompatible with the system of undistorted competition within the internal market. This is because the Court does not see any economic justification for those practices which are considered to be a tool for achieving an anticompetitive purpose of depriving or restricting purchasers’ freedom to choose sources of supply and denying other producers access to the market.⁵⁷

As to the existence of harmful effects the Court in *Hoffmann-La Roche* stated that loyalty rebates *tend* to consolidate dominant undertaking’s market position by means of competition not on the merits.⁵⁸ This statement, however, is not a conclusion reached on grounds of any kind of evaluation or analysis of circumstances of the case but it is rather *a priori* legal presumption.⁵⁹ This was also the approach taken in later cases in which exclusivity rebates (and other rebates as well) were similarly prohibited based on abstract anticompetitive tendency or anticompetitive nature.

⁵⁴ *Groupement des cartes bancaires*, Opinion of AG Wahl (n 40), para 55.

⁵⁵ *ibid*, para 56.

⁵⁶ See Allan (n 8) 53; Dolmans and Graf (n 8) 76–77; Ibáñez Colomo (n 8) 12–17; Alexander Italianer, ‘The Object of Effects’ (2014) <http://ec.europa.eu/competition/speeches/text/sp2014_07_en.pdf> accessed 13 April 2015.

⁵⁷ *Hoffmann-La Roche* (n 15), para 90: „Obligations of this kind ... are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market. The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers.”

⁵⁸ *ibid*: „Finally these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted.”

⁵⁹ *Intel* (n 4), para 81: “It follows from *Hoffmann-La Roche*, paragraph 71 above (paragraphs 89 and 90), that that type of rebate constitutes an abuse of a dominant position if there is no objective justification for granting it. The Court of Justice did not require proof of a capacity to restrict competition depending on the circumstances of the case.”; *ibid*, para 84: “It follows that, according to the case-law, it is only in the case of rebates falling within the third category that it is necessary to assess all the circumstances, and not in the case of exclusivity rebates falling within the second category.”

Consequently, in order to establish an abuse of dominant position it is necessary and enough to prove the existence of loyalty rebates system. The GC in *Intel* was very explicit on this issue. In justifying that there is no need to consider the circumstances of the case when dealing with exclusivity rebates it stated that this is due to their anticompetitive nature. Inherent in this nature is the capability of tying customers to dominant undertaking. Likewise, exclusivity rebates are by their very nature capable of having foreclosure effects.⁶⁰

It stems from the foregoing that loyalty rebates are considered to be object abuses, that is abuses which are by their very nature detrimental to competition. They are, in effect, put in the same category as price-fixing cartels under Article 101 TFEU. Accordingly, the legal presumption of incompatibility of loyalty rebates cannot be rebutted by arguments that a particular rebate scheme did not lead to anticompetitive foreclosure of rivals.⁶¹

3.2. Other rebates

It is sometimes assumed that the *Michelin I* test calling for consideration of all the circumstances is an effects-based analysis.⁶² But the inquiry is rather about whether a particular rebate scheme has the fidelity building effect, that is whether despite not requiring from customers exclusivity or *quasi*-exclusivity the rebate scheme can nevertheless have similar effects to these of loyalty rebates.⁶³ However, this is also an abstract conclusion without analysing whether a rebate scheme could in fact exclude competitors. In *British Airways* the dominant undertaking invited the (then) Court of First Instance (CFI) to undertake objective market effects analysis by pointing out that the implemented rebate schemes had not produced anticompetitive effects and that the dominant undertaking's competitors were able to increase their market shares.⁶⁴ In other words, objective effects analysis would point out to the fact that there was no foreclosure. However, the CFI declined this invitation and stated that had the dominant undertaking not implemented the anticompetitive practice, it may have been considered that the growth of rivals' market shares could have been more significant.⁶⁵ Consequently, a dominant undertaking will not escape

⁶⁰ *ibid*, paras 86-87.

⁶¹ See Case T-219/99 *British Airways plc v Commission of the European Communities* EU:T:2003:343, [2003] ECR II-05917, para 297; Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* EU:T:2003:250, [2003] ECR II-04071 (*Michelin II*), para 245; *Intel* (n 4), para: „Next, given that it is not necessary to prove actual effects of the rebates, it follows necessarily from this that the Commission is also not required to prove a causal link between the practices complained of and actual effects on the market. Thus, the circumstance claimed by the applicant that customers bought exclusively from it for business reasons which were entirely independent of the rebates, assuming that it were proved, does not mean that those rebates were not capable of inducing customers to obtain their supplies exclusively from it.” This implies that had Intel proved to the requisite legal standard that its rebates did not generate any market effects whatsoever, it would have made no difference to the final conclusion; *ibid*, para 186: “The fact that, over the period covered by the contested decision, AMD reaped great commercial success and, consequently, faced capacity constraints could at most show that the applicant's practices did not produce actual effects. However, that could not suffice to demonstrate that the practices implemented by the applicant were not capable of restricting competition.”

⁶² As seems to be suggested in *Italianer* (n 56) 12.

⁶³ In a similar vein *Ibáñez Colomo* (n 8) 17–19.

⁶⁴ *British Airways* (n 61), para 298.

⁶⁵ *ibid*.

condemnation of a practice which in eyes of the EU Courts amounts to a functional equivalent of loyalty rebates by showing that the (allegedly) expected results have not been achieved.⁶⁶

In *Michelin I* test the benchmark for the final conclusion of illegality of a rebate scheme is the judicial construction in *Hoffmann-La Roche* and, in particular, the legal presumption against exclusive dealing and fidelity rebates contained therein. As has been stated above, in loyalty rebates cases the competition authority is required to establish only the existence of the prohibited practice and in cases concerned with other types of rebates what needs to be proved is that the operated scheme *may* induce customers to purchase solely from the dominant undertaking. This is a sort of quasi-effects analysis which is premised on two grounds: that (i) loyalty rebates are object abuses therefore (ii) one need to establish that, even though having different threshold mechanism and structure, a discount is functionally equivalent to a loyalty rebate.

The *Michelin I* test has also been used in assessing the legality of quantity discount schemes employed by the French tyre manufacturer in *Michelin II*.⁶⁷ The Court conducted a quasi-effects analysis and concluded that the conduct was fidelity-building and therefore unlawful. This at least shows that the EU Courts are aware that various forms of rebates may be used in order to achieve the same result. They are aware that in certain circumstances one needs to disregard the form of conduct. Hence, it is the abstract and stringent rule prohibiting exclusive dealing and loyalty rebates in *Hoffmann-La Roche* that influences the legality and the degree of analysis of all other types of conditional pricing practices.

4. Foreclosure mechanism of rebates and legal frameworks of assessment

This section endeavours to establish whether loyalty rebates are anticompetitive by their very nature and whether they always generate anticompetitive effects so harmful to competition that it justifies their direct prohibition. Next, the section will also outline the legal frameworks which may be used to assess the legality of rebate schemes and contrast them with the jurisprudence of EU Courts and, in particular, the GC's latest judgment in *Intel*.

As has been stated above, conditional rebates, including loyalty discounts, are pricing schemes which are used by suppliers to incentivize buyers to increase their purchases. The main antitrust concern is that in certain circumstances rebates may foreclose the market to potential and actual competitors. For conditional rebates to have foreclosure effects it is necessary that the dominant undertaking hold substantial market power over a portion of customer's demand (referred to as the inelastic portion/assured base of sales/non-contestable share).⁶⁸ Otherwise, that is if competitors are able to compete for the entire demand of a customer, a rebate system is not likely to have foreclosure effects provided that the price

⁶⁶ Dolmans and Graf (n 8) 84; Ibáñez Colomo (n 8) 18. *British Airways* (n 61), para 297: „Furthermore, where an undertaking in a dominant position actually puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse of a dominant position within the meaning of Article 82 EC.”

⁶⁷ *Michelin II* (n 61), para 60.

⁶⁸ Faella (n 3) 379.

offered is not predatory. In such a situation a customer may simply compare suppliers' offers and accept whichever it deems the most advantageous.⁶⁹

The non-contestable share of demand is the range of customer's demand that the latter will in any event acquire from the dominant firm and which is effectively excluded from competitive pressure from rivals. Reasons for the existence of assured base of sales may be manifold and include, *inter alia*, existence of significant switching costs, strength of the brand of dominant firms' products which are must-have merchandise, or capacity constraints of smaller competitors who are unable to satisfy entire market demand.⁷⁰

But the existence of non-contestable share does not automatically mean that competitors of dominant undertaking will be excluded. They may still compete for the contestable part of demand. A rebate only enables a dominant firm to use the non-contestable share as a leverage to decrease the price for units on the contestable part of demand. In order to achieve this effect the threshold which triggers the price reduction has to be set above the amount that would be in any case purchased from the dominant firm. There is no leverage if the threshold is set at or below the non-contestable share.⁷¹ The strength of the inducement, that is the loyalty effect, will be contingent upon the level of rebate and the level of the threshold. A customer who switches part of its demand away from the dominant firm risks losing the entire discount. This means that a competitor would have to offer its own discount and compensate the customer for losing the rebate offered by dominant firm.

In the Guidance Paper the Commission proposes a framework whereby a rebate will be deemed abusive only if it could foreclose equally efficient competitors. In order to determine whether the rebate is capable of doing so the Commission will evaluate the effective price that equally efficient competitor would have to offer the customer if the latter would switch part of its demand away from the dominant firm. The effective price the competitor would have to offer is the list price of dominant firm less the rebate the customer loses calculated over the relevant range of demand. The relevant range of demand is the amount the customer is willing and able to switch to the competitor of dominant firm. In cases of retroactive rebates the relevant range is equal to the contestable part of demand. If the effective price remains above the LRAIC (long-run average incremental cost) of the dominant firm the Commission will infer that an equally efficient competitor would be able to profitably compete with the dominant firm. If the effective price is below the AAC (average avoidable cost) the rebate is capable of foreclosing equally efficient competitors. When the effective price is between these two cost measures the Commission will also take into account other factors in order to determine whether entry or expansion may be affected. This analysis will then be integrated in the general assessment that the Commission undertakes.⁷²

It has been stated that it is unsound to categorize exclusivity rebates as a price-based exclusionary conduct together with predatory pricing or that using cost-based tests may be

⁶⁹ 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' 40-42 <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> accessed 28 April 2015.

⁷⁰ Faella (n 3) 402.

⁷¹ 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (n 69) 44.

⁷² Guidance Paper (n 9), paras 41-45.

inappropriate.⁷³ Instead loyalty rebates should be analogized to exclusive dealing arrangements. This is somewhat misleading. It is true that some antitrust scholars have proposed to use a classic predatory pricing rule to single product discounts. Such test was for example advocated by *H. Hovenkamp*. According to that author one should simply determine whether the price of goods after taking into consideration all discounts exceeds marginal or average variable cost. If this is the case such above cost price cannot exclude equally efficient rivals and thus it should be considered lawful.⁷⁴ This approach has been followed by the US Court of Appeals for the Eight Circuit in *Concord v Brunswick*.⁷⁵ There a number of boat builders alleged that Brunswick, a stern drive engine manufacturer, violated Sections 1 and 2 of the Sherman Act by using market share discounts. Boat manufacturers could receive 1%, 2%, 3% or 5% discounts if they purchased certain percentage of their requirements from Brunswick. These requirements ranged from 60% to 80% and even 95% in certain years. The US Court of Appeals rejected the claims brought by boat manufacturers. It found that, *inter alia*, boat builders and dealers could switch part of their requirements and they did so when offered better discounts by Brunswick's rivals. Referring to US predatory pricing precedents *Brooke Group* and *Matsushita* the US Court of Appeals stated that above cost discounting is not anticompetitive.⁷⁶

In contrast to that position the Commission in its Guidance Paper explicitly emphasises that its theory of harm does not rely on predatory pricing.⁷⁷ Put differently, under the Commission's test above cost rebates may be held anticompetitive as the test it proposes is not a sacrifice test, but a matching test.⁷⁸ The theory of harm is that equally efficient competitor would be foreclosed from supplying a customer because of dominant firm's rebates which may not entail any sacrifice for the latter.

It is useful to look at the literature which equates loyalty discounts with exclusive dealing arrangements. Those who advocate this approach would simply see exclusive dealing as a subclass of loyalty discounts where the buyer is required to purchase all of its requirements from the dominant firm. Loyalty discounts with a threshold close to 100% of all the purchaser's requirements should be treated as partial or de facto exclusive dealing.⁷⁹ The proponents of this framework also recognize that the assessment of loyalty rebates should be conducted in light of economic theory of anticompetitive exclusion by raising rivals' costs (RRC).⁸⁰

⁷³ Wils (n 8) 21–22.

⁷⁴ Herbert J Hovenkamp, 'Discounts and Exclusions' [2005] U Iowa Legal Studies Research Paper No. 05-18 <<http://papers.ssrn.com/abstract=785966>> accessed 3 April 2015. Application of the classic predatory pricing rule to single-item discounts is also one alternative supported by Geradin (n 3) 29. See also US Department of Justice (n 13) 111–113.

⁷⁵ *Concord Boat v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000).

⁷⁶ *ibid.*

⁷⁷ Guidance Paper (n 9), para 37, footnote 3.

⁷⁸ Damien Neven, 'A Structured Assessment of Rebates Contingent on Exclusivity' 1 Competition Law & Policy Debate 86, 94.

⁷⁹ Wright (n 18) 6.

⁸⁰ See Thomas G Krattenmaker and Steven C Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96 The Yale Law Journal 209.

The RRC theory is based upon the premise that the dominant firm may cause competitive harm not by employing predatory prices but by acquiring exclusionary rights (such as exclusive dealing arrangements) over input necessary to the functioning on the market. Distribution may be seen as an input for dominant firm and its rivals. The purchase of exclusionary rights over a large fraction of the market may foreclose competitors from achieving minimum efficient scale thus rising their costs of operation and potentially forcing to leave the market. However, it is not necessary that competitors be driven out of the market for antitrust concerns, it is enough that their ability to constrain dominant firm's market power is impaired. When costs of rivals are raised, the dominant firm may raise its own prices under the umbrella which it has created.⁸¹

How should one then determine whether exclusive dealing and, accordingly, loyalty rebates are anticompetitive in light of the RRC theory? For example, *Dorsey* and *Jacobson* argue that exclusive dealing should be assessed in light of the equally efficient rival test. If a plaintiff can break the exclusivity by providing equally attractive offer or otherwise compete successfully in such a way that it continues to exercise pressure on the dominant firm there should be no antitrust violation. Moreover, they recognize that substantial foreclosure is necessary precondition in order to find antitrust liability and that plaintiff must demonstrate that it was impeded from achieving minimum efficient scale. *Dorsey* and *Jacobson* argue that one should not, however, focus solely on the percentage of the market foreclosed but instead try to determine whether an efficient rival has been so impaired that it can no longer effectively compete. They state that “[i]f, for instance, an efficient competitor could offer the same or a better deal than the defendant without enticing any customers away because of the defendant's arrangements, the likelihood the defendant is behaving in an exclusionary fashion is more likely.”⁸² When discussing loyalty discounts the said authors conclude that “the fundamental issue in each exclusive dealing and loyalty discount cases is also the same—in both instances, the essential question is whether the plaintiff is able to compete effectively by offering a comparable discount of its own.” If the plaintiff cannot offer comparable discount because it is less efficient or unwilling to match the dominant firm's discount then there is no antitrust violation.⁸³

In sum, the above analysis shows that it is not warranted to treat loyalty rebates as abusive by their very nature. Whether they will result in anticompetitive foreclosure of equally efficient competitors depends on a number of factors assessment of which should be determined on a case by case basis. Often equally efficient competitors may still be able to compete which depends on the structure of the discount offered by dominant undertaking.

⁸¹ *ibid* 234–238; Jonathan M Jacobson and Scott A Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing’ (2006) 73 *Antitrust Law Journal* 788.

⁸² Elyse Dorsey and Jonathan M Jacobson, ‘Exclusionary Conduct in Antitrust’ *St. John’s Law Review* 32 <http://awards.concurrences.com/IMG/pdf/jacobson-dorsey_exclusionary-conduct_december-2014.pdf>.

⁸³ *ibid* 40–41. See also Jonathan M Jacobson, ‘Exclusive Dealing, “Foreclosure,” and Consumer Harm’ (2002) 70 *Antitrust Law Journal* 311, 349–363; Wright (n 18) 11–26; Steven Salop, Sharis Pozen and John Seward, ‘The Appropriate Legal Standard and Sufficient Economic Evidence for Exclusive Dealing under Section 2: The FTC’s *McWane* Case’ [2014] *Georgetown Law Faculty Publications and Other Works*. Paper 1365 <<http://scholarship.law.georgetown.edu/facpub/1365>>.

Furthermore, labelling the framework used by the Commission as predatory pricing is misleading. The essence of the as efficient competitor test proposed by the Commission in the Guidance Paper is to measure whether such hypothetical rival would be able to match the discount offered by dominant firm and not whether the latter sacrifices profits.⁸⁴ The test does not presuppose that the price is the mechanism causing competitive harm; the price is one element in a rebate which strengthens loyalty effect, but the theory of harm is that a competitor is effectively foreclosed from supplying a customer. In other words, the test simply provides a precise measurement whether the cost of supplying a particular customer have been raised to a level that equally efficient rivals would not be able to compete with the dominant firm.⁸⁵

4.1. Foreclosure mechanism and the GC's judgment in *Intel*

In regard to the anticompetitive mechanism of loyalty rebates the jurisprudence of EU Courts have traditionally relied on the concept of an unavoidable trading partner,⁸⁶ which was continued by the GC in *Intel*. The position of an unavoidable trading partner entails that for a significant part of demand there are no substitutes for the products supplied by it.⁸⁷ In *Intel* the GC has further clarified how the position of an unavoidable trading partner affects the competitive chances of its rivals.

First, customers of an unavoidable trading partner will in any event acquire part of their requirements from the former; this part of their demand has been referred to by the GC as the non-contestable share. This share is excluded from the competitive pressure as competitors of the dominant undertaking are in a position to compete only for the remaining units lying on the contestable share of customer's demand. By switching part of its demand to competitors of the dominant firm a customer risks losing the rebate not only for the part that it switches, but also for the units that it would in any event obtain from the dominant undertaking. In other words, it loses an entire rebate. In order to compete with the dominant firm, the GC further explains, a competitor would have to provide an attractive offer for the contestable part of demand and, additionally, compensate the customer for the loss of the discount offered by the dominant firm. Thus, a large rebate would have to be apportioned by the competitor solely to the contestable share. It follows from this, the GC continued, that by granting exclusivity rebate the dominant undertaking makes the competitive situation and the access to the market by competitors more difficult. The exclusivity rebate serves as a leverage for the unavoidable trading partner and allows it to secure the contestable share by using its economic power from the non-contestable share.⁸⁸

The above-mentioned clarification from the GC as to the anticompetitive mechanism of exclusivity rebates almost mirrors the approach to loyalty rebates advocated by the Commission in its Guidance Paper. It is therefore all the more disappointing that the GC does

⁸⁴ Neven (n 78) 94.

⁸⁵ See Dolmans and Graf (n 8) 80–81.

⁸⁶ *Hoffmann-La Roche* (n 15), para 41; Case C-95/04 P *British Airways plc v Commission of the European Communities* EU:C:2007:166, [2007] ECR I-02331, para 75; Case T-155/06 *Tomra Systems ASA and Others v European Commission* EU:T:2010:370, [2010] ECR II-04361, para 269.

⁸⁷ *Intel* (n 4), para 91.

⁸⁸ *ibid*, paras 92-93.

not approve the Commission's as efficient competitor test. One reading of the GC's judgment in *Intel* is that it prohibits leveraging rebates whereby the threshold of the rebate is set above the non-contestable share and allows the dominant undertaking to use that portion of demand to lower the price in the contestable share.⁸⁹ The GC, however, did not state whether this is the case. Even if such interpretation is correct, this position is still problematic for several reasons.

First, even when leveraging is possible this should not warrant antitrust intervention as such. This is because equally efficient competitors will be able to compete with the dominant undertaking and thus there is no need to distort free play of competition. What is more, this may result in protecting inefficient competitors which is contrary to the objectives of EU competition law.⁹⁰

Next, dominant position does not necessarily entail that the undertaking holding substantial market power is an unavoidable trading partner. *Ahlborn* and *Piccinin* provide an example of a Dutch case where the Dutch Trade and Industry Appeals Tribunal found that rivals of the dominant undertaking were capable of competing for the entire demand of individual customers.⁹¹ This may be due to heterogeneous customer population in which some customers' demand is fully contestable while that of other customers is not. Furthermore, in some markets customers may themselves organise competitive bidding where they commit themselves to purchase exclusively from the supplier who will propose the best offer. If customers invite dominant firms and their rivals to submit offers this as such should not be held illegal as there is no leverage.⁹²

5. Analysis under Article 102 TFEU versus Article 101 TFEU

Another problematic aspect with the treatment of loyalty rebates by the EU Courts relates to its coherence with the analysis of practices which may have similar effects under Article 101 TFEU.⁹³ In *Delimitis*, while assessing an exclusive purchasing agreement between a supplier and a reseller of beer, the Court observed a number of efficiency justifications for the conclusion of such an agreement and did not ascribe to it the object of restricting competition. Instead, it was necessary to conduct effects analysis.⁹⁴ In particular, the Court required to analyse the impact of that particular and analogous agreements taken together on the opportunities of competitors to penetrate the market and range of products available to customers.⁹⁵ When conducting such analysis, the Court explained, one needs to take into consideration the nature and extent of exclusive purchasing agreements, the number of outlets tied, duration of these contracts, quantities of products which resellers undertake to purchase and quantities sold by free distributors. But even if such contracts have significant impact on

⁸⁹ Dolmans and Graf (n 8) 81; cf Petit, 'Intel, Leveraging Rebates and the Goals of Article 102 TFEU' (n 8) 9–14.

⁹⁰ See section 7 of this paper.

⁹¹ *Ahlborn* and *Piccinin* (n 8) 70.

⁹² Dolmans and Graf (n 8) 81–82.

⁹³ About consistency across competition rules Nicolas Petit, 'The Future of the Court of Justice in EU Competition Law - New Role and Responsibilities' 9–12 <<http://papers.ssrn.com/abstract=2060831>> accessed 29 March 2015.

⁹⁴ Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* EU:C:1991:91, [1991] ECR I-00935, paras 10-13.

⁹⁵ *ibid*, para 15.

the market access this is only one factor in the analysis and it is not in itself enough to conclude that there exist restrictive effects. Another factor that should be considered in the analysis is the availability of counter strategies which may be implemented by firms to enter the market such as, *inter alia*, acquiring sales outlets and the number of such outlets necessary for the operation of distribution system or the presence of wholesalers not tied who can facilitate market access for new producers.⁹⁶ Furthermore, conditions specific to the relevant market should also find their way into the legal evaluation. Only in the circumstances where such agreements cumulatively foreclose the relevant market, and the agreement under scrutiny considerably contributes to this sealing-off effect, can such exclusive purchase arrangement be held restrictive of competition.⁹⁷ This is a sound multi-factored effects-based analysis in which the Court speaks distinctly of pro-competitive aspects of exclusive purchasing arrangements.

Furthermore, in *Van den Bergh Foods* the CFI was required to rule on the legality of, what has been effectively considered as, de facto exclusive dealing type of arrangements pursuant to both Article 101 and 102 TFEU.⁹⁸ It was found, *inter alia*, that the dominant firm tied 40% of outlets to itself by de facto exclusivity clause. The CFI ruled that this was enough to condemn the practices as abusive in accordance with Article 102 TFEU.⁹⁹

If loyalty rebates are akin to exclusive dealing it seems that analysis under both Articles 101 and 102 should be similar. However, the GC in *Intel* stated that none of the above cases is relevant for the purpose of analysis of exclusivity rebates. Even if exclusivity conditions are beneficial for competition and it is necessary to assess them by looking at their effects, these considerations cannot be accepted where a dominant operator is present on the market.¹⁰⁰ According to the GC, such an approach is justified by the special responsibility that the dominant undertaking has not to allow its conduct to impair genuine undistorted competition.¹⁰¹ Moreover, that exclusivity conditions cover only small part of the market is irrelevant because “[w]here the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, any further weakening of the structure of competition may constitute an abuse of a dominant position”.¹⁰²

It is not clear why covering only a small portion of the relevant market by loyalty rebates should be considered abusive.¹⁰³ A rebate that forecloses access to one small customer does not have any structural effects that would prevent rivals from competing or potential competitors from accessing the market. Foreclosure effects can only appear if exclusive conditions cover substantial share of the market. However, what a substantial share of the

⁹⁶ *ibid*, para 21.

⁹⁷ *ibid*, paras 23-24.

⁹⁸ Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities* EU:T:2003:281, [2003] ECR II-04653.

⁹⁹ *ibid*, para 160.

¹⁰⁰ *Intel* (n 4), para 89.

¹⁰¹ *ibid*, para 90.

¹⁰² *ibid*, para 116.

¹⁰³ See Dolmans and Graf (n 8) 83.

market is should be determined in reference to objective market criteria such as minimum efficient scale of the market.¹⁰⁴

Furthermore, it is unjustified to prohibit dominant undertakings from entering into exclusive dealing contracts by referring to the concept of special responsibility. The GC stated in *Atlantic Container Line* that “special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings”.¹⁰⁵ However, the concept of special responsibility as such does not define any legal rules and should not be used to impose duties or obligations on dominant firms.¹⁰⁶ As one commentator has put it: “to impose a heavy fine on a dominant firm based on indeterminate concepts such as the doctrine of special responsibility or the general concept of abuse gives rise to the impression that the Commission acted arbitrarily and outside the boundaries of predictable decision-making firmly anchored to rule of law.”¹⁰⁷ Moreover, to hold that any weakening of the structure of the market *may* constitute an abuse of dominant position because it is conducted by a dominant firm without considering whether such a conduct can have foreclosure effects on the market seems like condemning the dominance as such and not the (allegedly) abusive conduct.

6. Objective justification and loyalty rebates

A dominant undertaking whose practices have been found to be liable to infringe Article 102 TFEU can escape condemnation under that provision if the conduct that it has undertaken can be justified because it was either objectively necessary or due to efficiency advantages that it produces.¹⁰⁸ This now seems to be available for any type of rebates although it was not clear in the beginning. While some authors consider that efficiency justification has been available to dominant undertakings since *Hoffmann-La Roche*¹⁰⁹, Advocate General *Colomer* identified in one of his opinions three types of practices which he considered to be *per se* abusive under Article 102 TFEU meaning that such conduct could not have been justified. The group included exclusivity agreements, loyalty rebates and pricing below average variable costs.¹¹⁰

¹⁰⁴ Geradin (n 8) 35. Worthy of note is that the Commission has in the past carried out an analysis where it concluded that fidelity rebates employed by a dominant undertaking prevented competitors from reaching critical mass of activity. See *Deutsche Post AG* (Case COMP/35.141) Commission Decision 2001/354/EC [2001] OJ L125/27, para 37.

¹⁰⁵ Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission of the European Communities* EU:T:2003:245, [2003] ECR II-03275, para 1460.

¹⁰⁶ Nazzini (n 3) 175.

¹⁰⁷ *ibid* 54.

¹⁰⁸ Case C-95/04 P *British Airways* (n 86), para 86; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, para 41. On objective justification in Article 102 TFEU cases see: Ekaterina Rousseva, ‘The Concept of “Objective Justification” of an Abuse of a Dominant Position: Can It Help to Modernise the Analysis under Article 82 EC?’ (2006) 2 *The Competition Law Review* 27; Tjarda Desiderius Oscar van der Vijver, *Objective Justification and Prima Facie Anticompetitive Unilateral Conduct: An Exploration of EU Law and Beyond* (Europa Institute, Faculty of Law, Leiden University 2014) <<https://openaccess.leidenuniv.nl/handle/1887/29593>> accessed 8 March 2015; Albertina Albors Llorens, ‘The Role of Objective Justification and Efficiencies in the Application of Article 82 EC’ (2007) 44 *Common Market Law Review* 1727.

¹⁰⁹ Wils (n 8) 25; Petit, ‘Intel, Leveraging Rebates and the Goals of Article 102 TFEU’ (n 8) 16.

¹¹⁰ *Sot. Lélos*, Opinion of AG Ruiz-Jarabo Colomer (n 48), paras 56-60.

Similarly, the Commission recently expressed its view that *Hoffmann-La Roche* excluded efficiency defence for fidelity rebates.¹¹¹

In any event, the possibility of advancing justification for using of anticompetitive rebates seemed to develop somewhat unwittingly alongside the still standing view of the EU Courts that they are anticompetitive in nature (and consequently there is no economic justification for them apart from excluding competitors). The position that exclusivity rebates may be justified and thus escape condemnation under Article 102 TFEU has been confirmed by the GC in *Intel*.¹¹² It has thus been suggested that the current legal status of EU law within the area of rebates is well-founded since dominant firms are allowed to justify their conduct in terms of efficiencies they achieve. Moreover, the current law on rebates would not warrant any changes since efficiencies that potentially can be achieved by using exclusivity rebates could also be achieved through the use of other business practices.¹¹³ It is submitted that such a position is unacceptable on several grounds.

It is of course true that competition law may prohibit undertakings from adopting certain practices in their competitive struggle in the marketplace, but unless such prohibition is justified because the conduct generates anticompetitive effects competition authorities should not interfere with the competitive process. The current standpoint effectively puts unjustified abstract belief of anticompetitive nature of loyalty rebates over the right of businesses to initiate whatever commercial behaviour they deem appropriate. It is not the State by way of their competition authorities that should determine what business strategies may be adopted by market participants.¹¹⁴

Moreover, according to *Post Danmark*, in order to justify its anticompetitive behaviour a dominant undertaking must (i) demonstrate that efficiency gains generated by its conduct counteract any likely negative effects on competition and consumer welfare in the markets affected; (ii) that it is the conduct under consideration that generates efficiency gains; (iii) the conduct is necessary for the achievement of efficiencies; and (iv) the conduct does not eliminate effective competition, that is it does not remove all or most of actual or potential competition sources that exist.¹¹⁵

To the author knowledge, there is no judgment of EU Courts to date that has exempted an otherwise anticompetitive conduct of dominant firm from the prohibition in Article 102 TFEU. Objective justification remains rather a theoretical concept than real possibility which makes loyalty rebates de facto *per se* prohibited.¹¹⁶ It is difficult to conceive how dominant firms can use efficiency justification described above if competition authorities are not in the first place required to demonstrate what anticompetitive effects have been or are likely to be generated by the conduct under scrutiny. Thus, if this efficiency defence, acknowledged by

¹¹¹ Commission decision in *Intel* (n 5), footnote 1935.

¹¹² *Intel* (n 4), para 94. The GC interprets *Hoffmann-La Roche* as allowing dominant undertakings to justify their rebate schemes.

¹¹³ Wils (n 8) 24–26.

¹¹⁴ In a similar vein Ibáñez Colomo (n 8) 28; Economic Advisory Group on Competition Policy (n 35) 10.

¹¹⁵ *Post Danmark* (n 108), para 42.

¹¹⁶ See Allan (n 8) 53.

the GC in *Intel*, is to be something more than illusionary concept the approach to exclusionary conduct which puts greater focus on actual effects should be adopted.¹¹⁷

7. Compatibility of the as efficient competitor test with EU competition law

The current approach of EU Courts towards abuse of dominance and exclusivity rebates in particular have been also defended on wider grounds concerning objectives of EU competition law. For example, *Wils* contends that the tests set out by the Commission in the Guidance Paper cannot become legality tests. That author criticizes the so-called “more economic approach” and its focus on consumer welfare because it takes unduly narrow view of benefits of undistorted competition. Referring to Protocol No 27 on the internal market and competition *Wils* submits that EU Treaties clearly specify the objective of EU competition law, namely a system of undistorted competition. This objective cannot be substituted for any other objectives and in particular consumer welfare. Thus, Article 102 TFEU protects the competitive process as such which encompasses benefits such as variety and consumer choice, the right to compete on the merits, or equality of opportunities between economic operators.¹¹⁸ Moreover, *Wils* contends that “the as-efficient-competitor test is fundamentally at odds with the objective of Article 102 TFEU and the philosophy underlying the EU Treaties.”¹¹⁹ The said author also claims that the as efficient competitor test “does not leave it to the free play of undistorted competition to determine which producers prove themselves to be efficient”.¹²⁰

In a similar vein, *Behrens* identifies the consumer choice paradigm and its impact upon EU competition law.¹²¹ That author praises the current legal status, including case law on rebates, as still being “good law”. He refers to the Commission’s “more economic approach” as misleading and also implicitly rejects the as efficient competitor approach which is part of the Commission’s Guidance Paper.¹²²

The remaining part of this sections is devoted to the as efficient competitor test and its role in EU competition law. It is true that according to the Protocol No 27 on the internal market and competition the internal market includes a system ensuring that competition is not distorted. Advocate General *Kokott* also expressed her opinion that the purpose of EU competition law is to protect the structure of the market and thus competition as such.¹²³ Moreover, in an often cited passage in *Continental Can* the Court held that the prohibition against abuses of dominant position “is not only aimed at practices which may cause damage

¹¹⁷ See Dolmans and Graf (n 8) 83.

¹¹⁸ *Wils* (n 8) 15–17.

¹¹⁹ *ibid* 30.

¹²⁰ *ibid*.

¹²¹ Peter Behrens, ‘The “Consumer Choice” Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law’ [2014] Europa-Kolleg Hamburg, Institute for European Integration, Discussion Paper No 1/14, <http://www.europa-kolleg-hamburg.de> <<http://papers.ssrn.com/abstract=2568304>> accessed 3 April 2015.

¹²² *ibid* 26, footnotes 67-68.

¹²³ Case C-95/04 *P British Airways plc v Commission* EU:C:2006:133, [2007] ECR I-2331, Opinion of AG Kokott, para 68.

to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty.”¹²⁴

However, the protection of the structure of the market or competitive process as such cannot constitute the ultimate objective of EU competition law. The Treaty does not further define what a competitive process is and without reference to other objectives it is impossible to distinguish between anticompetitive conduct and conduct which is part of normal competition. How does one determine whether market structure with several firms is to be preferred over that with one firm? If the answer is that the former situation is to be preferred because prices may be lower, then such a proposition already adopts some measure of welfare. Similarly, if a firm is excluded as a result of unilateral conduct of another firm, the objective of protection of competitive process fail to provide any standard of assessment. It is fair to say that undistorted competitive process is the subject matter of analysis in competition law.¹²⁵

Likewise, it is difficult to see how one could determine what a restriction of competition is by reference to such notions as economic freedom, fairness or equality of opportunities.¹²⁶ As will be illustrated below, this does not mean that such concepts are entirely irrelevant in EU competition law but that they need to be limited and guided by an economic objective. This economic objective can be the maximization of welfare.¹²⁷ In terms of economic welfare objectives of competition law one may traditionally distinguish between maximization of social (total) welfare or consumer welfare. Whether a particular standard of welfare has increased can be measured by looking at improvements in economic efficiency and, in particular, allocative efficiency, productive efficiency or dynamic efficiency. This orientation of competition law towards maximization of economic welfare allows one to determine which conduct should be considered anticompetitive, namely conduct whose impact reduces relevant measure of welfare.

It is beyond the scope of this contribution to determine what the ultimate objective of EU competition law is. Suffice it to mention that there are good arguments to accept that EU competition law does indeed pursue economic welfare objectives. This may be maximization of social or consumer welfare.¹²⁸

One of the legal tests that may be adopted to distinguish between anticompetitive conduct and conduct which does not harm competition is the as efficient competitor test. According to this test, conduct should be deemed abusive if it is capable of excluding a competitor which is as efficient as the dominant firm. The exclusion of equally efficient competitors may lead to reduction in economic welfare. The protection of equally efficient competitors of dominant firms has been endorsed in the case law of EU Courts.

¹²⁴ Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* EU:C:1973:22, [1973] ECR 215, para 26.

¹²⁵ Nazzini (n 3) 15–17; Peeperkorn (n 8) 48; Ahlborn and Piccinin (n 8) 61–63.

¹²⁶ For analysis of the said objectives of competition law see: Nazzini (n 3) 18–32.

¹²⁷ *ibid* 33.

¹²⁸ See *ibid* 107–154; Pinar Akman, ‘Searching for the Long-Lost Soul of Article 82EC’ (2009) 29 *Oxford Journal of Legal Studies* 267.

An early reference to the position of equally efficient competitors may be found already in *AKZO*. In developing the rules on predatory pricing the Court stated that even prices above average variable costs but below average total costs may eliminate competitors which are perhaps as efficient as the dominant undertaking but have smaller financial resources.¹²⁹ Some resemblance to the equally efficient competitor test may also be found in the test set out by the Court in *Oscar Bronner*.¹³⁰

Another line of cases in which the CJ endorsed the protection of equally efficient competitors concerns margin squeezes. In *Deutsche Telekom* the Court stated that Article 102 TFEU proscribes dominant undertakings from adopting pricing practices which have an exclusionary effect on their equally efficient competitors both actual and potential. Such practices are capable of making access to the market very difficult or impossible and, in the same manner, they may hinder opportunities of customers of dominant undertakings to diversify their sources of supply. Moreover, practices having exclusionary effect on equally efficient competitors unlawfully strengthen dominant position by methods outside the scope of competition on the merits.¹³¹ Furthermore, the Court also connected the reduction of competitive pressure exerted on dominant undertaking by equally efficient competitors with detriment to consumers who lose the prospect of lower prices in the long term.¹³²

Similarly, in *TeliaSonera* the Court also relied on the concept of equally efficient competitor. In particular, the Court stated that if a dominant undertaking, having been obliged to pay its own wholesale prices, would not be able to offer the retail services otherwise than at a loss then competitors who may be excluded as a result of that practice may not be considered less efficient. Exclusion of equally efficient rivals of the dominant undertaking is not competition on the merits.¹³³ The Court pointed out that taking into account costs and prices of a dominant undertaking in establishing existence of a margin squeeze conforms to the principle of legal certainty as it enables the dominant firm to assess lawfulness of its own conduct which, in turn, is consistent with the special responsibility under Article 102 TFEU.¹³⁴

Nevertheless, the application of the as efficient competitor concept in *TeliaSonera* is, to a certain extent, problematic. This is because the Court envisioned two possibilities when exclusionary abuse may be found. First, when equally efficient competitors are compelled to sell at a loss, that is when the price of the wholesale input is higher than the retail prices for

¹²⁹ Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* EU:C:1991:286, [1991] ECR I-03359, paras 71-72.

¹³⁰ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* EU:C:1998:569, [1998] ECR I-07791, para 46. See Martin Mandorff and Johan Sahl, 'The Role of the "Equally Efficient Competitor" in the Assessment of Abuse of Dominance' [2013] Konkurrensverket Working Paper Series in Law and Economics 7-8 <http://www.konkurrensverket.se/globalassets/publikationer/workingpaper/working_paper_2013-1.pdf> accessed 9 April 2015.

¹³¹ Case C-280/08 P *Deutsche Telekom AG v European Commission* EU:C:2010:603, [2010] ECR I-09555, para 177.

¹³² *ibid*, para 182.

¹³³ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83, [2011] ECR I-00527, para 43.

¹³⁴ *ibid*, para 44.

the services offered to end users, then exclusionary effect is probable (negative margin squeeze).¹³⁵ Second, the Court also envisioned positive margin squeeze, that is when equally efficient competitors may still operate albeit with reduced profitability. In such cases it must be proved that “it would be at least more difficult for the operators concerned to trade on the market concerned.”¹³⁶

The Court did not provide any explanation as to how much the profitability of rivals has to be reduced before an abuse may be found. Thus, the legal certainty which the Court advertised in the very same ruling a few paragraphs above has been effectively shattered. The existence of exclusionary effect due to a positive margin squeeze has been criticized and, it is submitted, successfully refuted,¹³⁷ but, above all, it has been arguably overruled by a judgment which, to date, is considered to be the most influential in terms of changing the traditional approach to exclusionary abuses in EU competition law and putting it more in line with the effects-based framework advocated by the Commission, namely *Post Danmark*.¹³⁸

Post Danmark may be considered as setting the direction which EU law on exclusionary abuses should follow as it has been rendered by the Court sitting in a Grand Chamber composition. Furthermore, it was a judgment rendered in the preliminary reference procedure which is significant for the development of EU law¹³⁹. What is more, it could be read as an attempt to dispel uncertainties around the Commission’s new effects-based approach and its compatibility with Article 102 TFEU.¹⁴⁰ Even though *Post Danmark* concerned selective price cutting the Court’s sweeping statements reached far beyond that practice and touched upon the most fundamental issues of EU competition law on single firm conduct.¹⁴¹

In *Post Danmark* the Court stated that the purpose of Article 102 TFEU is neither to prohibit firms from achieving, on their own merits, economic power equivalent to dominance nor does this provision “seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.”¹⁴² Taking these findings into account, the Court clarified that “not every exclusionary effect is necessarily detrimental to competition” since “competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or

¹³⁵ *ibid*, para 73.

¹³⁶ *ibid*, para 74.

¹³⁷ See Nicolas Petit, ‘Price Squeezes with Positive Margins in EU Competition Law: Economic and Legal Anatomy of a Zombie’ <<http://papers.ssrn.com/abstract=2506521>> accessed 9 April 2015.

¹³⁸ *Post Danmark* (n 108). See Ekaterina Rousseva and Mel Marquis, ‘Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU’ (2013) 4 *Journal of European Competition Law & Practice* 32.

¹³⁹ See Damian Chalmers, Gareth Trevor Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2014) 174.

¹⁴⁰ Petit, ‘Price Squeezes with Positive Margins in EU Competition Law’ (n 137) 8.

¹⁴¹ The view that the case has implications not only for the practice of selective price cutting but for exclusionary practices controlled by Article 102 TFEU in general is shared by Rousseva and Marquis (n 138) 41; Petit, ‘Price Squeezes with Positive Margins in EU Competition Law’ (n 137) 8; Mandorff and Sahl (n 130) 13.

¹⁴² *Post Danmark* (n 108), para 21.

innovation.”¹⁴³ That EU competition law does not strive to protect inefficient competitors has already been acknowledged by one of the supporters of the claim that the objective of the EU’s competition law regime is to protect competitive process as such.¹⁴⁴

Several conclusions could be inferred from the Court’s interpretation of Article 102 TFEU in *Post Danmark*. First, in principle, dominant undertakings are, as all other firms, entitled to compete on the merits with their competitors and expand further their market position. Natural result of competition on the merits is that less efficient competitors will exit the market. But this is in harmony with EU competition law which does not aim at protecting less efficient competitors. Therefore, only forms of competition capable of excluding equally efficient competitors of dominant undertakings should be considered as competition not on the merits.

The Court reconsidered the classic definition of abuse originating from *Hoffmann-La Roche* and clarified that prohibition on abuses of dominant position applies to “the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, *to the detriment of consumers*, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.”¹⁴⁵ It could be argued that in this version of definition of abuse of dominance the Grand Chamber added the consumer harm as a decisive factor in determining whether hindering the maintenance of existing competition or its growth should be considered contrary to Article 102 TFEU. Put differently, mere interference with the degree of existing competition cannot be the only factor in finding an abuse of a dominant position, but it must additionally be proven that consumer harm is the result of the said hindrance of degree of competition. One reading of this judgement would therefore be that consumer harm is a criterion which should be a decisive benchmark in controlling exclusionary abuses.¹⁴⁶

If dominant firms have the right to compete and possibly exclude their less efficient rivals and since Article 102 TFEU does not aim at protecting less efficient competitors then, in order to make these rules applicable, it is argued that the as efficient competitor test should also be used in determining whether rebate schemes of dominant undertakings are abusive or not.¹⁴⁷

The concept of the as efficient competitor allows to distinguish between exclusionary acts resulting from undistorted and distorted competition or, in other words, competition on the merits as oppose to competition based not on the respective merits of its participants. But the principle of protection of equally efficient rivals also embodies some non-welfare notions

¹⁴³ *ibid*, para 22.

¹⁴⁴ Heike Schweitzer, ‘Parallels and Differences in the Attitudes towards Single-Firm Conduct: What Are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC’ [2007] EUI Working Paper LAW No. 2007/32 33 <<http://cadmus.eui.eu/handle/1814/7626>> accessed 21 April 2015.

¹⁴⁵ *Post Danmark* (n 108), para 24. Emphasis added.

¹⁴⁶ Rouseva and Marquis (n 138) 42.

¹⁴⁷ Several commentators agree that *Post Danmark* could be read as advocating the use of as efficient competitor principle beyond practices that were the subject of that judgment, see Ahlborn and Piccinin (n 8) 66; Mandorff and Sahl (n 130) 13; Rouseva and Marquis (n 138) 45–48.

such as fairness and equality of opportunities.¹⁴⁸ Firms which are equally efficient are placed on equal footing and each has an individual right to take part in the competitive process and compete against its rivals by taking advantage of its efficiency. Every firm has a strong incentive to increase its efficiency because it is aware that superior efficiency will allow it to legitimately defend its commercial interests. On the other hand, not allowing dominant firms to exploit their efficiency would place them on unequal footing. What is also worthy of note is that the as efficient competitor principle is a proxy in protecting consumer welfare and not a calculation of the latter¹⁴⁹; at the same time it assumes individual rights of competitors to take part in competitive rivalry.¹⁵⁰

It has been suggested in the literature that the as efficient competitor concept does not allow the free play of undistorted competition to determine which firms will end up successful on the market.¹⁵¹ But, as has been argued above, the opposite is true. The principle of protection of equally efficient competitors places equally efficient firms on equal footing and allows them to compete against rivals within the system of undistorted competition. No competition authority is involved in deciding who has proved oneself to be efficient or who is to be allowed to operate in the marketplace.¹⁵²

It is, however, submitted that an exclusionary abuse should only be found when equally efficient rivals are forced to sell at a loss and not when they may still compete and offer their goods at prices above costs albeit not reaching the level of profits they would hope for. This has been an issue in *TeliaSonera* where the Court stated that in such a situation equally efficient competitors may be compelled to sell “at artificially reduced levels of profitability”.¹⁵³ The GC in *Intel* also seemed to suggest that this may be treated as an abuse.¹⁵⁴

Unless the dominant firm and competitive pressure put by it on other firms are considered to be something that is artificial and not part of normal competitive struggle, then such finding is correct. But this cannot be the case. Competitive pressure exerted by one firm on another may lead to the latter’s reduced profits which is a normal consequence of competition. If a firm proves to be successful on the market then, at least for some time, it may offer its goods at higher prices. Charging higher prices, in turn, motivates other firms to enter the market and the competitive struggle begins again. This seems to be the essence of competition. On the other hand, a ruling by a court that firms operate on artificially reduced levels of profitability is itself artificial, not least if a court would wish to set profits which should be made by market participants.¹⁵⁵ In any event, it could be argued that the Grand

¹⁴⁸ See Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* EU:T:2008:101, [2008] ECR II-00477, para 199; Case C-280/08 P *Deutsche Telekom* (n 131), paras 230-234.

¹⁴⁹ Ahlborn and Piccinin (n 8) 64.

¹⁵⁰ *ibid* 64; Nazzini (n 3) 73–74.

¹⁵¹ Wils (n 8) 30.

¹⁵² Ahlborn and Piccinin (n 8) 66.

¹⁵³ *TeliaSonera* (n 133), para 33.

¹⁵⁴ *Intel* (n 4), para 150.

¹⁵⁵ Peeperkorn (n 8) 51–52. See also Petit, ‘Price Squeezes with Positive Margins in EU Competition Law’ (n 137) 5.

Chamber in *Post Danmark* invalidated claims of exclusionary abuses in cases where as efficient competitors can stay and operate profitably on the market.¹⁵⁶

8. Conclusion

The above analysis showed that currently loyalty rebates are treated in EU competition law as “by object” abuses anticompetitive by their very nature and are thus put on an equal footing with such practices as horizontal price-fixing which constitute the “supreme evil” of antitrust. The problem with this position is that unlike cartels, the nature of loyalty rebates is not inherently anticompetitive and they may simply be treated as one form of competition for customers.

The recent case law of the Court suggests that object restrictions of competition should be interpreted narrowly and certain conduct may be directly prohibited when experience and economic analysis suggest that it leads to seriously harmful effects. Whatever was the reason to adopt such a strict rule against exclusive dealing and loyalty rebates over 30 years ago in *Hoffmann-La Roche*, it is now unwarranted and should be abandoned in light of modern economic teaching. The standard of assessment of rebates put forward by the Commission in the Guidance Paper is economically sound and fits the characteristic features of EU competition law, in particular the focus on protection of equally efficient competitors of dominant firms. Adopting this approach would thus improve consistency within the area of abuses of dominance.

The Court will have an opportunity to change to current position of EU law in the upcoming appeal proceedings in *Intel*.¹⁵⁷ Experience shows, however, that more serious developments of EU law occur when the Court provides interpretation of EU Treaties to national courts. The case of *Post Danmark* is one significant example and, like much of the EU competition law community, the author submits that *Post Danmark II*¹⁵⁸ should be another such instance.

¹⁵⁶ *Post Danmark* (n 108), para 38: “Indeed, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.” See Petit, ‘Price Squeezes with Positive Margins in EU Competition Law’ (n 137) 7.

¹⁵⁷ Case C-413/14 P *Intel Corporation v Commission*, pending.

¹⁵⁸ Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, pending.