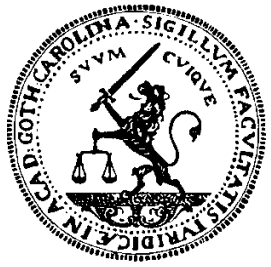

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Exclusivity rebates under Article 102 TFEU and the assessment after the Intel judgment

- Are there any justifications?

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Summary

Article 102 TFEU prohibits any abuse by one or more undertakings in a dominant position. A dominant undertaking offering exclusivity rebates falls under the prohibition laid down in Article 102 TFEU. The treatment of exclusivity rebates in case law has been a controversy, the first cases held a strict approach towards exclusivity rebates and established that exclusivity rebates are to be assessed as anticompetitive by nature, which entails that no circumstances of the case or the effect of the practice had to be taken into account. The CJEU case law evolved along with the Commission's launch of the Priority Guidance Paper in 2009, an effects-based approach in the assessment of abusive dominant undertakings. This shift gave rise to a new assessment, namely, assessing the effects of a practice rather than condemning the practice in itself with the rationale that the aim is to protect competition and consumer welfare. This new approach was expected to cover all abuses under Article 102 TFEU. However, the *Intel* case from 2014 demonstrates the opposite.

The two research questions deal with firstly, the current assessment for when a dominant undertaking offers exclusivity rebates under Article 102 TFEU, and secondly whether a dominant undertaking can use objective justifications to escape the prohibition in Article 102 TFEU when granting exclusivity rebates. The answer to these also presents the degree of legal certainty in this area of law.

Intel abandoned the new line of assessment and followed instead its old precedents establishing that a dominant undertaking granting exclusivity rebates abuses its dominant position ´per se´ and rejects the need to demonstrate any effects, consumer harm or cost based test. The General Court held that justifications as objective necessity or efficiencies could be taken into account. The analysis of the judgment demonstrates that it is merely practical impossible for a dominant undertaking to justify its behavior. Whether positive or negative, dominant undertakings have legal certainty in regard to exclusivity rebates, it is prohibited in a modified ´per se´ manner and there are no practical justifications.

Preface

Thank you,

I would hereby like to express my gratitude to the Juris Doctor, Professor, Pro-Dean as well as my supervisor, Xavier Groussot, for his professional input and directions providing a more profound analysis in this thesis. His dedication extends throughout my master studies, which made him an invaluable source of inspiration. The knowledge gained from his encouragement, time and discussions will remain as a treasured incentive in my future life as a lawyer.

Furthermore, I would like to take this opportunity to acknowledge and express my deep appreciation to my family and friends for their support and encouragement throughout these five years of Law School.

Gratefully,

Emelie Svensson
Lund May 27, 2015

Abbreviations

AEC-test	As efficient competitor test
CJEU	Court of Justice of the European Union
EU	European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

It is not the purpose of Article 102 TFEU to prevent an undertaking from becoming dominant, and holding a dominant position is not in itself an abuse.[1] Nor is it an abuse to offer rebates.[2] Nevertheless, a dominant undertaking offering rebates might be abusing its dominant position, if it impairs genuine undistorted competition.[3] It has been held that this is one of the most contentious areas of EU law, which might be due to the unclear law, making it difficult to foresee under which circumstances it is an abuse for a dominant undertaking to offer rebates.[4] Scholars argued, prior to the *Intel* judgment in 2014, regarding the necessity of a clearer guidance of the assessment of abuse of dominance when offering exclusivity rebates.[5]

The controversy about the legal treatment of exclusivity rebates has existed for long and is still a hot topic after *Intel*.[6] One of the main issues encountered by academics is the difficulty to reconcile the current assessment of dominant undertakings offering rebates under Article 102 TFEU, with prior case law on this topic. There are two main types of assessments under Article 102 TFEU case law, the first is a practice that is presumed abusive by its nature, it is then prohibited without the necessity to establish the anticompetitive impact that comes from it, it is also recognized as encompassing a rule based approach. The second is a practice that is not inherently abusive, but its prohibition depends on the exclusionary effects that it

[1] Case 322/81 NV Nederlandsche Banden Industrie Michelin v. Commission para 57; Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge Transports v. Commission para 37; Case C-52/09 Konkurrensverket v. TeliaSonera Sverige para 24.
[2] Case C-234/89 Stergios Delimitis v. Henninger Bräu AG paras 10-13.
[3] Case C C-209/10 Post Denmark para 21-32.
[4] Jones and Sufrin, EU Competition Law, 2014, p.271
[5] Kjølbe, Rebates Under Article 82EC: Navigating Uncertain Waters.
[6] See e.g Nihoul, The ruling of the General Court in Intel: Towards the end of an effects based approach in European Competiiton Law?; Venit, Case T.286/09 Intel v Commission – The judgment of the General Court: Allt steps backward no steps forward; Whish, Intel v Commission: Keep calm and carry on!; Wils The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance.

brings to the relevant market. The first is a rule and the latter a standard.[7] The latter one is also recognized as the effects-based approach due to being dependent on the effect the abuse brings to the relevant market. The effect-based approach evolved from case law, such as in *Deutsche Telekom, TeliaSonera* and *Post Denmark,* where cases, which would be prohibited under Article 102 TFEU as an abuse of dominance, where lawful due to taking into account the effects they had on the market.[8]

The Commission launched its Enforcement Priorities Guidance Paper in 2009, in which they shifted towards an effects-based approach to assess abuses under Article 102 TFEU.[9] The Guidance Paper takes into consideration the effects of an action and not the practice in itself and rationalize it by holding that their aim is not to protect individual competitors but instead, competition and consumer welfare.[10] Moreover, the Enforcement Priorities Guidance Paper proposed a shift towards an effects-based approach by basing their assessment on the AEC-test.[11] There is however old case law from the CJEU establishing a rule-based approach, such as in the *Hoffman-La Roche* case, which stipulated a strict outcome to rebates holding a strict 'per se' prohibition rule against 'fidelity' rebates. The 'per se' prohibition originated in that the CJEU did not require evidence of anticompetitive effects in order for the practice to be prohibited.[12]

The novelty of the *Intel* case was whether it would follow the evolutionary effects-based approach, which the CJEU seemed to have adopted in numerous cases regarding abuse by dominant undertakings, or whether it would follow older precedents establishing a strict per se prohibition towards exclusivity rebates.[13] The General Court followed the *Hoffman-La Roche* precedent and reached the decision

[7] Ibánes, Intel and Article 102 TFEU case law: making sense of a perpetual controversy p.4.
[8] Lovdahl Gormsen, Are anti-competitive effects necessary for an analysis under Article 102 TFEU? p.245.
[9] Faull & Nikpay, The EU Law of Competition p.352.
[10] Lovdahl Gormsen, Are anti-competitive effects necessary for an analysis under Article 102 TFEU p.234.
[11] Jones and Sufrin, EU Competition Law, 2014, p.483; Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.28-31, 37, 46; See also fn 84-87 and chapter 3.2 in regard to the AEC-test.
[12] Case 85/76 Hoffman-La Roche para 89; See also Advocate General Jacobs in Case C-53/03 para 52-72 on 'per se' abuses.
[13] Petit, Intel, leveraging rebates and the goals of Article 102 TFEU p.2.

that dominant undertakings offering exclusivity rebates where abusing their dominant position, per se.[14]

The *Intel* judgment came from the General Court in June 2014 and has since been highly commented by scholars within this area of law. The judgment follows a strict line prohibiting exclusivity rebates as an abuse under Article 102 TFEU. Certain commentators have argued it to be a modified 'per se' rule, whereas others perceive it as a strict rule and others see it as a new assessment solely applicable to exclusivity rebates. Furthermore, in regard to its alignment to the precedents in case law, there has been critics for not following the new line of an effect-based approach, while others have perceived it accurate not to follow the effect-based approach and instead follow older precedents, establishing an easy applicable law while simultaneously creating legal certainty.[15]

The economic reasoning when concluding that exclusivity rebates are to be prohibited per se has also been criticized, one of the reason is that the Courts should take into consideration the development of economics, instead of merely following earlier precedents which are arguably outdated.

One essential topic in this thesis is whether dominant undertakings offering exclusivity rebates have any justifications to escape the prohibition laid down in Article 102 TFEU after the *Intel* judgment. The reason behind the chosen topic lays in paragraph 94 of the judgment, where the General Court stipulated that a dominant undertaking can submit justifications demonstrating that the exclusivity rebates are objectively necessary or that the potential foreclosure effect that it brings may be counterbalanced by advantages in efficiencies that benefit the consumers.[16] The crucial part of this analysis is that the General Court argued that *Intel* had not put forward any justifications.[17] *Intel* made the following claims, which the General

[14] Case T-286/09 Intel Corp. v. Commission para 80-85; See also Case 85/76 Hoffman-La Roche.
[15] See e.g Wils The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance.; Nihoul, The ruling of the General Court in Intel: Towards the end of an effects based approach in European Competiiton Law?; Venit, Case T.286/09 Intel v Commission – The judgment of the General Court: Allt steps backward no steps forward; Whish, Intel v Commission: Keep calm and carry on!.
[16] Case T-286/09 Intel Corp. v. Commission para 94.
[17] Case T-286/09 Intel Corp. v. Commission para 94.

Court did not classify as justifications; (1) that the rebates regarded small financial sums; (2) that the Commission has to establish a foreclosure effect and they did not; (3) that the exclusivity rebates did not involve formal or binding exclusivity obligations; (4) that the exclusivity did not cover all the requirements of the customer; (5) that the exclusivity lasted for a short period and the counterparty could terminate it; (6) that the exclusivity regarded only a minimal portion of the market; (7) that the contracting party is a powerful undertaking; (8) that the AEC-test is an important factor which they should take into account when establishing foreclosure effect; (9) and lastly that their competitor had their greatest economic success in history.[18] A question that arises is, is it possible to actually raise justifications in relation to exclusivity rebates if they are prohibited 'per se'? And also, why do these not count as justifications put forward by *Intel*? The threshold for justifications seems to be set at a high level at least. This is a contemporaneous issue that has not taken part in the discussions after the *Intel* judgment.

Whether the *Intel* judgment expands the effects-based approach or establishes a 'per se' rule towards exclusivity rebates, along with the level of existing justifications is essential in order to comment on the approach towards Article 102 TFEU. Europe is currently experiencing a protracted crisis due to its lack of competitiveness, it is thus further essential to comment whether a strict approach to Article 102 TFEU either increases or decreases the competitive market.[19]

1.2 Purpose

The main purpose of this thesis is to clarify the current assessment of rebates under Article 102 TFEU and to analyze the outcome of this assessment, by taking into consideration, particularly, whether there actually exist objective justification for dominant undertakings offering rebates. It is further the purpose to assess whether legal certainty can be established in this field of law.

[18] Case T-286/09 Intel Corp. v. Commission para 99, 102, 106, 107, 110, 112, 114, 125, 138, 140, 185.
[19] Rey & Venit, An effects-based approach to Article 102: A response to Wouter Wils p.28.

1.3 Research questions and Delimitations

This master thesis will focus on the following questions:

(i) What is the current assessment for when a dominant undertaking offers exclusivity rebates under Article 102 TFEU?

(ii) Are there any objective justifications that a dominant undertaking can rely on to escape the prohibition laid down in Article 102 TFEU after having offered exclusivity rebates?

(iii) Has this area of law reached legal certainty?

The first question deals with the relevance of the AEC-test in relation to cases with exclusivity rebates after the assessment of the Intel judgment by the General Court.[20] Prior to the release of the judgment numerous scholars expected Intel to utilize the AEC-test used in the recent *Post Denmark*[21], *Tomra*[22] and *TeliaSonera*[23] cases and to further develop it.[24] This expectation was grounded in the Commissions adoptions of the Guidance Paper in 2009, were the Commission shifted its focus to the effects of a conduct rather than the mere practice.[25]

Furthermore, the first question also deals with how exclusivity rebates are assessed, whether they are assessed as a per se rule or if they are appraised on a case-by-case approach.[26] This will be prioritized due to being a major point in answering the research question of the current assessment.

The second question is the main priority of this thesis, namely answering whether there are any objective justifications when dominant undertakings grant exclusivity

[20] Case T-286/09 Intel Corp. v. Commission.
[21] Case C-209/10 Post Denmark A/S v. Konkurrencerådet.
[22] Case C-549/10 P Tomra.
[23] Case C-52/09 Konkurrensverket v. TeliaSonera Sverige AB.
[24] Venit, Case T.286/09 Intel v Commission – The judgment of the General Court: Allt steps backward no steps forward p.230.
[25] Stibbe, The Intel judgment: existing ”form based” case law prevails in test-case for conditional rebates; Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009.
[26] See e.g Ibánes Colomo, Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy p.14-16; See Petit, Leveraging rebates and the goals of Article 102 TFEU p.15.

rebates. The reason behind the importance of this question is based on the General Court's *Intel* case, stating that justifications can be taken into consideration if they demonstrate that the use of the rebates is objectively necessary or that the potential foreclosure is counterbalanced by advantages of efficiency that benefit consumers. The issue lays in that the General Court rejected all of *Intel's* defense arguments and stated that that exclusivity rebates are an abuse 'per se'. The question is thus, do justifications actually exist in this area of law, and if that is answered positive, what is a valid justification? This question includes arguing about the burden of proof and what significance that brings in this subject.

The third question highlights whether legal certainty exist for undertakings offering exclusivity rebates. Prior to the *Intel* judgment scholars argued and look forward to that future case law would bring clarity in regard to the assessment of exclusivity rebates offered by a dominant undertaking. The two first questions are the main questions and will lead to the answer of this third question.

In order to give a proper outline the thesis will have a chapter on Article 102 and its requirements, this will however be limited due to not being the focus of thesis. There will also be comparisons between Article 101 TFEU and Article 102 TFEU, however mostly in the analysis chapters and in the conclusion. A limitation will also be done in relation to other abuses in order to have a deeper analysis of a narrow subject.

1.4 Method and current knowledge

The centre of this thesis is the *Intel case*, which was released in June 2014 from the General Court. This still recent case has thus not been included in the latest legal doctrine and there has not been any case law following the Intel case outcome, yet. Articles written prior to the *Intel* judgment does not have the required standard to be utilized in this thesis. The specific issues which are dealt with have been mentioned in summary articles, but there is so far no research studies in regard to merely objective justifications which a dominant undertaking can rely on when offering

exclusivity rebates, or if this area of law has reached legal certainty. The *assessment* of exclusivity rebates after the *Intel case* has been vastly commented by academics, who have however not had coinciding analysis or outcome of their research studies.[27]

This research is carried out with a conventional legal dogmatic method, where relevant European legal source material, such as legislative text, preparatory work, case law, legal doctrine and articles are mainly used. The European legal method emphasizes the importance of case law from the CJEU, general principles and teleological interpretations. The highlighted topics of this essay are however contemporaneous leading to a lack of available sources in comparison with sources available concerning other legal issues.

1.5 Outline and structure

The second chapter of this thesis provides a background of competition law and of Article 102 TFEU. It further presents the requirements making Article 102 TFEU applicable. The next chapter presents the effect-based approach, the rule approach, the AEC-test as well as the significance of the Enforcement Priority Guidance Paper. The following chapter introduces objective justifications and how they have been utilized in Article 102 TFEU and also their role in the Enforcement Priority Guidance Paper. The fifth chapter introduces *Intel's* place in case law by presenting precedents established prior to *Intel*, in order to understand the motives behind the outcome of *Intel*. The subsequent chapter provides a detailed case summary of the *Intel* judgment. The following chapter analyses the outcome of the *Intel* case by analyzing the outcome of the case in relation to the assessment made and in order to label the current assessment. The following chapter analyses the degree of objective justifications in *Intel* case and discusses the role of justifications after the *Intel* case.

[27] See e.g Nihoul, The ruling of the General Court in Intel: Towards the end of an effects based approach in European Competiiton Law?; Venit, Case T.286/09 Intel v Commission – The judgment of the General Court: Allt steps backward no steps forward; Whish, Intel v Commission: Keep calm and carry on!; Wils The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance.

The following and last chapter analyses all the abovementioned matters in an integrated manner with regard to all the conclusions reached when analyzing, and thus finally answers the proposed researched questions, and affirms whether the CJEU needs to further clarify this area of law, follow the General Court's ruling, or whether it should annul the General Court's judgment and instead continue modernizing competition law by applying an effects-based approach towards exclusivity rebates.

2 Article 102

Article 102

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

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

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

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

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

Article 102 TFEU is an essential element in ensuring that competition within the internal market is not distorted.[28] Article 102 TFEU prohibits any *abuse* by one or more undertakings of a dominant position within the internal market if it affects trade between Member States. A mere creation or possession of a dominant position is thus not prevented.[29] The danger of a dominant firm is in the case it becomes a monopoly, since a monopolist is able to, without losing sales, to restrict output and increase prices.[30] The aim of Article 102 TFEU is thus to prohibit a dominant undertaking from exploiting its position in order to avoid the danger of a monopoly, this includes prohibition of exclusionary conduct as well as conduct which exploits consumers directly.[31]

[28] Faull & Nikpay, The EU Law of Competition p.330.
[29] Case 322/81 NV Nederlandsche Banden Industrie Michelin v. Commission para 57; Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge Transports v. Commission para 37; Case C-52/09 Konkurrensverket v. TeliaSonera Sverige para 24.
[30] Jones and Sufrin, EU Competition Law, 2014, p.270.
[31] See Case C-6/72 Europemballage Corp and Continental Can Co Inc v. Commission.

Article 102 TFEU has five cumulative criteria's that have to be satisfied in order for it to be applicable, namely; (1) one or more undertaking, (2) a dominant position, (3) the dominant position must be held within the internal market or a substantial part thereof, (4) an abuse and (5) affect trade between Member States. The examples of abuses set out in paragraphs a – d are not exhaustive.[32] Finding dominance and abuse has been the most complex and highlighted matter amongst scholars in regard to the requirements of Article 102 TFEU, this thesis will however primarily focus on abuse.[33] Even though Article 102 TFEU does not contain a provision similar to the one in Article 101(3) TFEU, exempting certain conduct which otherwise is perceived as abusive, it allows conduct which can be objectively justified by demonstrating that it generates efficiencies which outweigh the anticompetitive effects, to escape the prohibition laid down in Article 102 TFEU.[34]

The relationship between Article 101 and Article102 TFEU will play a large role in the analysis of this master thesis, in particular the relationship with Article 101(3) TFEU, which is the exemption provision to escape infringement that does not have a corresponding condition in Article 102 TFEU.[35] Furthermore, the CJEU has confirmed that Article 101 TFEU and 102 TFEU may apply to the same contractual agreements.[36] This is relevant for the later discussion of the *Delimitis* case, which deals with exclusivity rebates, just as *Intel,* but where the effects of the exclusivity rebates on the market as well as the available pro-competitive justifications vastly differed from the effects the General Court held *Intel's* rebates had.[37] That a practice can be assessed on both Article 101 TFEU and Article 102 TFEU depending on whether the undertaking has a dominant position on the market serves to aligning the approach of the provision.[38] This fact is further strengthen due to the stipulation of

[32] Case C-333/94 P Tetra Pak International SA v. Commission (Tetra Pak II) para 37; Case C-95/04 P British Airways v. Commission para 57; Case T-201 Microsoft v. Commission para 860; Case C-280/08 P Deutche Telekom v. Commission para 173.
[33] Jones and Sufrin, EU Competition Law, 2014, p.271.
[34] Ezrachi, EU Competition Law – an analytical guide to the leading cases, p.181.
[35] Brisini, The interface between competition and the internal market, Market separation under Article 102 TFEU p.71.
[36] Faull & Nikpay, The EU Law of Competition p.332; Case 85/76 Hoffman-La Roche v Commission para 116.
[37] Case C-234/89, Stergios Dilimitis v. Henninger Bräu AG.
[38] Jones and Sufrin, EU Competition Law, 2014, p.294.

the CJEU in *Continental Can*, where they held that Article 101 and 102 TFEU cannot be applied in contradicting manners.[39]

The purpose of Article 102 TFEU has been controversial, primarily in regard to how the Commission and EU Courts have interpreted Article 102 TFEU, scholars in this field have argued that Article 102 TFEU has often been applied in order to protect competitors, rather than protecting the competitive process for the benefit of the consumers.[40] Article 102 TFEU has however the purpose of prohibiting conducts that either directly exploits consumers or indirectly by excluding competitors, which leads to a reduction of the consumer welfare.[41]

The following sub-chapters will present the requirements making Article 102 TFEU applicable.

2.1 Undertaking

The notion of undertaking is interpreted in the same way under Article 101 and 102 TFEU, which is that an undertaking covers an entity engaged in an economic activity, regardless of its legal status and the way it is financed.[42] The economic activity, which constitutes of offering goods and services on a given market, is at focus when making this assessment, although actually profit making is not required.[43] The legal form in regard to whether it is a private or public institution is irrelevant, since according to established case law, the finance of the entity does not matter as long as it engages in an economic activity.[44] Moreover, the fact that an entity operates in an institutional form of a state actor does not entail that it cannot be considered an undertaking since it still can take part in economic activity.[45]

[39] Case 6/72 Continental Can v Commission para 25.
[40] See N. Kroes, 'Preliminary thoughts on policy review of Article 82'.
[41] See Nazzini, The foundations of European Union Competition Law; Faull & Nikpay, The EU Law of Competition p.332.
[42] Case C-41/90 Höfner and Elser v. Macrotron GmbH para 21; Case C-35/96 Commission v. Italy para 36; Case C-67/97 Albany v. Stichting Bedrijfspensioenfonds Textielindustrie para 77; Lidgard, Competition Classics p.81.
[43] Case C-118/85 Commission v. Italy para 7; Case C-309/99 J.C.J Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten para 47.
[44] Case C-82/01 Aéroports de Paris v. Commission para 75-79.
[45] Case C-118/85 Commission v ltaly, para 3 and 7.

2.2 Dominant position

According to settled case law, the definition of a dominant position is, a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[46] This definition has however been disputed by economist in accordance with the 'cellophane fallacy', claiming that a rephrase to "the ability to restrict output substantially in the market-place" would be positive since it would instead mean that the undertaking has power over price.[47] The finding of dominance of today conducted by utilizing economic factors and the legal guidelines adopted by the Courts and by the Commission.[48]

The dominance nature of an undertaking depends on the definition of the market it is alleged to be dominant in.[49] This is due to the fact that a narrow market definition conveys a smaller amount of undertakings, which leads to a facilitation in finding a dominant actor. Essential in this regard is that is it not illegal to hold a dominant position, only abusing the dominant position is prohibited.[50] Pro-competitive behavior, such as export bans or resale prices, can be abusive when conducted by a dominant undertaking, it is therefore crucial for an undertaking not be classified as dominant since its pro-competitive behaviour could be illegal.[51]

In order to establish dominant behavior the *relevant market* has to be defined, the *undertaking's position* on that market has to be established, and the *competitive*

[46] Similar wording has been esressed in Case 85/76 Hoffman-La Roche & Co AG v. Commission para 38; Case 27/76 United Brands v. Commission para 65; Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary conduct by Dominant Undertakings (2009) OJ C45/2 point 10; Case T-321/05 AstraZeneca v. Commission para 267.
[47] J. P Azevedo and M. Walker, 'Dominance: Meaning and Measurement' (2002) ECLR 363, 364.
[48] Rodger & MacCulloch, Competition law and policy in the EU and UK, p.95.
[49] Case 6/72 Europemballage Corp and Continental Can Co Inc v. Commission.
[50] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 21-22; Case C-52/09 Konkurrensverket v. TeliaSonera Sverige AB para 24.
[51] Cases C-2 and 3/01 P Bundesverband der Arzneimitte – Importeure EV; Commission v. Bayer AG; Case C-74/04 P Commission v. Volkswagen AG.

constraints of the undertaking, such as market share, factors indicating dominance as barriers to entry, and possibility to expand must also be analyzed.

The relevant market comprises both the relevant product and geographical market. The relevant product market is defined by using the SSNIP test, which states that if a 5-10% increase in price of one product causes the purchasers to buy another product making the price raise unprofitable, then the products are interchangeable.[52] The CJEU's major case on interchangeability was the *United Brands* case, where they had to define the product market as either solely 'bananas' or as 'fresh fruit' market.[53] In doing to they took into consideration the specific features of bananas distinguishing it from other fruits, such as that it is not a seasonal fruit, that it enjoys certain characteristics making it suitable for the very young, the old and the sick, the fact of its special appearance, softness, seedlessness and easy handling.[54] The result was thus that bananas are not interchangeable with other fresh fruits due to its market being sufficiently distinct from the fresh fruit market.[55] The CJEU has further clarified that it is not a pre-condition that the products are completely interchangeable in order to find dominance, partial interchangeable is enough but the main problem lies in whether the other product faces competitive restraint.[56]

The geographic market is defined by taking numerous considerations into account, for instance the exclusive geographical areas where the product is sold, if it is a global product, the costs of transport, the nature of the product and legal regulation.[57] The Commission's Notice on the Definition of the Relevant Market states in the point 12 that Commission will identify possible obstacles and barriers isolating the companies located in a given area in order to determine the degree of market interpenetration.

[52] Jones and Sufrin, EU Competition Law, 2014, p.67.
[53] Case 27/76 United Brands v. Commission para 12.
[54] Ibid 27, 31.
[55] Ibid para 35.
[56] Case 322/81 Nederlandsche Banden-Industrie Michelin v. Commission para 48.
[57] Case IV/M.1069 WorldCom/MCI (1999) OJ L116/1; Jones and Sufrin, EU Competition Law, 2014, p.82.

The market share of the undertaking indicates the present state of the undertaking and its market power. The higher market share an undertaking has, the more likely of finding dominance, and a very large market share held over some time indicates dominance since it entails that the undertaking is in a position of strength which makes it an unavoidable trading partner.[58] In relation to the percentage of the market share which constitutes dominance it has been stated that a 'very large market share' is above 50%, but the market share of the competitors must be taken into account, small market share of the competitors makes the alleged dominant firm an unavoidable trading partner, resulting in dominance.[59] The crucial range is between 40% to 50%, but British Airways was however found to be dominant when holding merely 39,7% and point 14 of the Guidance Paper states that dominance below 40% is not likely but can be possible in specific cases.[60] Essential to note is that the Commission has been criticized for determining markets too narrowly and also for finding market power when such power does not exist.[61]

Barriers to expansion or entry are essential when establishing whether a firm is monopolist or has significant market power. Barriers to entry has been defined by Harvard School as, when established firms can elevate their selling prices above the minimal average costs of production or distribution, without inducing entrants to enter the industry.[62] The Chicago school on the other hand defines it as where the cost of producing which must be borne by firm which seeks to enter the industry but is not borne by firms already in the industry.[63]

2.3 Abuse

As stated above, Article 102 TFEU does not prohibit a dominant position unless it is utilized abusively, the Article further provides a non-exhaustive list of what may be

[58] Case 85/76 Hoffman-La Roche & Co AG v. Commission para 41.
[59] Case C-62/86 AKZO Chemie BV v. Commission para 60; Case 27/76 United Brands v. Commission.
[60] Case T-219/99 British Airways v. Commission para 223-225.
[61] Jones and Sufrin, EU Competition Law, 2014, p.305.
[62] J.S. Bain 'Economies of Scale, Concentration and the Condition of Entry in Twenty Manufacturing Industries'.
[63] G. J. Stigler, The Organization of Industry 67.

considered as an abuse. These are further categorized as exploitative and exclusionary abuses. Exclusionary abuse relates to exploiting or preventing its trading partner, resulting in consumer harm through the impact on competition, and exploitative abuse to taking advantage of its market power to exploit its trading partners.[64]

There is further a third category of abuse, which prohibits discrimination that is neither exploitative nor exclusionary in Article 102 (C) TFEU, this has however not the main focus of the Commission, exclusionary abuses have on the other hand been the priority.[65]

What conduct an undertaking can pursue when it is dominant is a rather difficult topic, it depends on the whole purpose of the provision, which has not always been clear in relation to Article 102 TFEU.[66]

2.3.1 Rebates

Granting rebates has been a common practice to compete for customers, it is however constrained by Article 102 TFEU when conducted by a dominant undertaking. Apart from exclusivity rebates, which is the main topic of this thesis, there are numerous other types of rebates such as quantity, loyalty, target, aggregated and selective rebates.[67] The focus of the Commission has been combating exclusionary conduct, in detail practices that limit production, markets or technical development to the prejudice of consumers, as laid down in Article 102(b) TFEU. As mentioned above, rebates has been a contentious area of law due to the treatment of condemning rebates which makes no economic sense, where certain rebates are an abusive 'per se' without taking into account their effects on the market due to having exclusionary effects, there has been an assumption in case law that exclusionary effect equals consumer harm, this is the main reason for why no

[64] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 20.
[65] Faull & Nikpay, The EU Law of Competition p.332
[66] Jones and Sufrin, EU Competition Law, 2014, p.366.
[67] Ibid 2014, p.455.

account is taken to the effects of the practices.[68] These same rebates are however assessed as encompassing pro-competitive justifications in Article 101 TFEU, this is where there is a lack of economic sense. The base to prohibit a practice 'per se' must be based on clear empirical economical grounds, which is not the case in regard to exclusivity rebates since they have been assessed as differently in Article 101 TFEU.[69]

The Commissions Guidelines on Vertical Restraints from 2000, categorized fidelity rebates as a practice with a strong presumption of illegality, and especially prevented undertakings from applying such rebates. This presumption seemed to shift to the emphasis on economic analysis and consumer harm, which entailed that the effects of the practice had to be assessed instead of presumed, and that it should not be presumed that excluding competitors equalled to consumer harm. This was the public perception with the Enforcement Priorities Guidance Paper and *Post Denmark*, but was soon to be abandoned after the *Intel* judgment.

[68] Ibid p.454.
[69] Ibanes Colomos, Intel v Commission and the problem with wrong economic assumptions.

3 Effects-based approach and rule-based approach

The judgments regarding abusive conduct under Article 102 TFEU can be divided into two major categories. There are judgments where the practice is presumed to be abusive by its very nature and objective characteristics, it is then prohibited without being necessary to establish anticompetitive effect and is thus subject to a per se *rule* absent objective justifications.[70] This so called rule, or *form-based approach*, targets abstract conduct, such as sale below cost, without considering actual or likely anti-competitive effects.[71] Other practices are not abusive per se but are considered abusive in case they have exclusionary *effects* on the market. The focus lays in the *effect* of these practices and thus subject to a *standard*, where each case is assessed on a case-by-case basis.[72] The effects-based approach takes into consideration the pro-competitive and anti-competitive effects of a practice and analyzes the market conditions in order to differentiate between competition on the merits and anti-competitive conduct, by this it also considers were competition intervention enhances consumer welfare.[73] Simultaneously the effects-based approach is possibly more difficult to apply since dominant undertakings must assess the legality of their current behaviour constantly. It is essential to apply a predictable assessment in the AEC-test in order to increase legal certainty for the undertakings.[74]

Cases prior to the *Intel* judgment tended to adopt an effects-based approach were the Courts held that consumer welfare is one of the objectives of Article 102 TFEU. In *Post Denmark* the CJEU held that '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', which defines abuse as a practice that harms not

[70] Ibánez Colomo, Intel and Article 102 TFEU Case Law: Making sense of a Perpetual Controversy p.4.
[71] Faull & Nikpay, The EU Law of Competition p.348.
[72] Ibánez Colomo, Intel and Article 102 TFEU Case Law: Making sense of a Perpetual Controversy p.4; Faull & Nikpay, The EU Law of Competition p.348.
[73] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p. 5.
[74] Faull & Nikpay, The EU Law of Competition p.349.

consumers and not as certain practices which are abusive per se.[75] The CJEU further contended that the assessment of the anticompetitive effects were to take into consideration whether an actual or likely exclusionary effect was established to the detriment of the consumers interest.[76] In other words the CJEU emphasized that consumer welfare is an essential objective of Article 102 TFEU, however this does not entail that it is the only objective.[77]

3.1 Article 102 Enforcement Priorities Guidance

The Commission's Article 102 Enforcement Priorities Guidance was adopted in February 2009 with its main purpose to provide clarity and predictability to the assessment of Article 102 TFEU.[78] It constituted a shift to an effects-based approach to abusive rebates and other abuses under Article 102 TFEU.[79] Its aim is not to protect individual competitors but instead competition and consumer welfare.[80] This has been interpreted as an effects-based approach were the Commission will take into consideration efficiencies put forward by the undertaking such as beneficial effects for the consumers and with these justifications escape the prohibition laid down in Article 102 TFEU.[81] Scholars have expressed that there should not be any significant difference from the justifications applicable under Article 101 TFEU.[82] In regard to rebates the Guidance Paper is based on the AEC test in which it considers the anti-competitive foreclosure of the as efficient competitor and also at what price the efficient competitor would have to compensate their customers for the loss of the conditional rebate, in case they would switch from the dominant undertaking's grant

[75] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 24.
[76] Ibid 44.
[77] Faull & Nikpay, The EU Law of Competition p.350.
[78] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.2.
[79] Faull & Nikpay, The EU Law of Competition p.352.
[80] Lovdahl Gormsen, Are anti-competitive effects necessary for an analysis under Article 102 TFEU p.234.
[81] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p. 19, 28, 46.
[82] Faull & Nikpay, The EU Law of Competition p.352.

of rebates.[83] The AEC test has been portrayed as a tool increasing legal certainty for dominant undertakings since it is based on the cost structure of the dominant undertaking.[84]

These type of soft law instruments in EU law gave rise to legitimate expectations to that the effects-based approach was to be utilized in future decisions. Although the Guidance Paper brings forwards a rational framework of analysis, desired by practitioners after conflicting Commission Decisions and CJEU judgments, it has been criticised for its practical complexity on how to make the calculations required on the undertakings contestable share.[85]

3.2 As Efficient Competitor-test

The 'As Efficient Competitor Test' (AEC-test) has played a large role in the Priority Guidance Paper and in the European Court's cases regarding exclusionary abuses.[86] It is utilized in relation to exclusionary abuses. The CJEU's main clarification of the AEC-test took place in Post Denmark, where they concluded that a dominant undertaking offering prices below variable costs is abusing its dominance since it will drive out the competitors from the market. Nevertheless, if charging below average total costs and above average variable costs, then it is abusive if its part of a plan for eliminating a competitor.[87] The CJEU held that solely charging lower than total average costs is not an abuse in itself, since a competitor as efficient as the dominant undertaking should have the possibility to compete without making unsustainable losses.[88] However, if anti-competitive effect where to be found, then it is possible for the dominant undertaking to provide justification for this behaviour,

[83] Jones and Sufrin, EU Competition Law, 2014, p.483; Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.28-31, 37, 46.
[84] Lovdahl Gormsen, Are anti-competitive effects necessary for an analysis under Article 102 TFEU p.234; See also Deutche Telekom para 192-193 and Advocate General Mengozzi in Post Denmark para 96.
[85] L. Kjølbe, 'Rebates Under Article 82EC: Navigating Uncertain Waters' (2010) ECLR 66, 73, 80.
[86] Ridyard, Interpreting the as efficient competitor test in abuse of dominance cases, (Competition Law Review) p.125.
[87] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 27.
[88] Ibid para 37-38, 44.

such as if the behaviour is objectively necessary, if it benefits consumers, if it provides efficiency gains and consumer welfare as well as does not eliminate effective competition.[89]

[89] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 40-42, 44.

4 Justifications in Article 102 TFEU

Article 102 TFEU does not contain an exemption provision as Article 101(3) TFEU but has instead created the concept of 'objective justification' which allows a dominant undertaking to escape the prohibition laid down in Article 102 TFEU which otherwise would have constituted an abuse.[90]

4.1 Objective justifications in case law

Exclusivity practices may be objectively justifiable in cases when the anti-competitive effects are minimized in order to gain economic advantage. In *Soda Ash* the Commission accepted exclusive supply contracts based on that the customer, benefitted from the security of being supplied and thus created a balance between the customer's need for supply and the freedom to turn to another undertaking for supplies.[91] In *Van den Bergh Foods*, freezer cabinets where delivered on a condition of exclusivity, which was the standard business practice encouraged by both the ice-cream supplier and the retailer. The General Court did not accept any objective justifications and held that 'it cannot be accepted without reservation in the case of a market on which, precisely because of the dominant position held by one of the traders, competition is already restricted', which limited the possibility of claiming legitimate business practice as a justification for the abuse.[92]

In *Télémarketing,* regarding the refusal to supply justified by technical or commercial requirements owing to the nature of television, the CJEU concluded that

[90] Van der Vijver, Objective justification and Prima Facie anti-competitive unilateral conduct : an exploration of EU Law and beyond p.97.
[91] Soda Ash, XI Report on Competition Policy, 1981, paras 73-76; Faull & Nikpay, The EU Law of Competition p.424.
[92] Case T-65/98 Van den Bergh Foods para 159.

a dominant undertaking committed an abuse where it engaged in a practice without 'any objective necessity'.[93]

In both *Hilti* and *Tetra Pak II,* the Commission held that conduct necessary to protect legitimate public interest objectives could be objectively justified, and that it included the safety and health of consumers. The CJEU rejected however that tie-ins could be justified in order to ensure public safety based on that safety is ensured by public authorities enforcing safety regulations and not by private undertakings indulging in exclusionary practice.[94] In *British Airways*, regarding a bonus system, the CJEU argued that it was necessary to examine whether there was any objective economic justifications and further established that efficiencies could justify the conduct, unless the conduct went beyond what was necessary to attain those advantages.[95]

In *Post Denmark* the CJEU held that anti-competitive practices could be justified as objectively necessary or as producing efficiencies.[96] The CJEU gave its fullest account for justification in this case.[97] The CJEU found two grounds for justifications, firstly that the behaviour is objectively necessary, which is also brought up in the Priority Guidance Paper.[98] The second is efficiencies, the CJEU goes in-depth to identify what successful defences are, in particular, efficiency gains that counteract any negative effects con competition and consumer welfare; gains that will be brought as a result of the conduct; that the conduct is necessary for the achievement of the efficiency gains; and that the practice does not eliminate effective competition.[99] Specially note the wording, 'in particular', which entails that the list of justifications brought up is not exhaustive.

[93] Case 311/84 Centre Belge d'Etudes du Marché-Télémarketing v- Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux para 26-27.
[94] Jones and Sufrin, EU Competition Law, 2014, p.386; Case T-30/89 Hilti AG v. Commission para 118; Case C-333/94P Tetra Pak International SA v. Commission.
[95] Case C-95/04 British Airways v. Commission para 69.
[96] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 40-42.
[97] Jones and Sufrin, EU Competition Law, 2014, p.387.
[98] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.28, 31, 90; Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 41.
[99] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 41-43.

4.2 Justification in the Enforcement Guidance Paper

The adoption of the Article 102 TFEU Enforcement Guidelines entailed, as mentioned, a shift towards an effects-based approach, which includes taking justifications into consideration. The wording objective justification is however not mentioned, instead it is expressed that the dominant undertaking has to justify its conduct, which it does by demonstrating that its conduct is *objectively necessary* and by showing that it produces *efficiencies* which outweigh any anti-competitive effects on the consumers.[100]

4.2.1 Objectively necessary

Objectively necessary reasons to perform certain conduct has been established by the Commission to be 'factors external to the undertaking' such as health and safety reasons, which was presented in the abovementioned cases, *Tetra Pak* and *Hilti*, and has later been repeated.[101] Furthermore, the Commission has inserted this line of argumentation in the Enforcement Priority Guidance Paper, where it states that objectively necessary conduct is determined on factors external to the dominant undertaking, which can for example be health or safety reasons, while simultaneously taking into account that that it is normally the task of public authorities to set and enforce public health and safety standards.[102]

4.2.2 Efficiencies

The Commission has further included efficiencies in the Enforcement Priority Guidance Paper, and concluded in relation to efficiencies that a dominant undertaking can justify its conduct leading to a foreclosure of competitors, on the

[100] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.28, 31, 90.
[101] Case T-30/89 Hilti AG v. Commission para 118; Case C-333/94P Tetra Pak International SA v. Commission.
[102] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.29.

ground of efficiencies, guaranteeing that no consumer harm is likely to arise. The undertaking must then demonstrate, with a sufficient degree of probability, on the basis of verifiable evidence, that the following cumulative conditions are fulfilled; (1) that efficiencies such as technical improvements in the quality of goods or reduction of cost are likely to realize as a result of the conduct; (2) that the conduct is indispensable in order to realize those efficiencies and there are no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies; (3) the efficiencies brought outweigh any likely negative effects on competition and consumer welfare; (4) and the conduct must not eliminate effective competition by eliminating all or most sources of potential competition.[103]

4.3 Burden of proof

The burden of proof has been essential in relation to objective justifications, since it is a larger burden to claim than to overrule objective justifications. In *Microsoft* the General Court concluded that the dominant undertaking has to raise pleas of objective justification and to support it with evidence and arguments, although the existence of the circumstances are borne by the Commission.[104] It later lays on the Commission to demonstrate that the arguments cannot be accepted. This entails that the burden of proof is on the dominant undertaking and once abuse has been established it is up to the abusive undertaking to put forward evidence justifying its behaviour. Nevertheless, it is the part claiming an infringement that bears the burden of proof to demonstrate that the evidence put forward did not justify the conduct.[105]

It is also expressed in the Enforcement Priority Guidance Paper that it is upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct is objectively justified, and that it then falls into the Commission to make the ultimate assessment of whether the conduct is objectively necessary, weighs up

[103] Ibid p.30.
[104] Case T-201/04 Microsoft v. Commission para 688, 1114.
[105] Regulation 1/2013, Article 2.

its anti-competitive effects with efficiencies and whether it is likely to result in consumer harm.[106]

4.4 Comments on justifications

Dominant undertakings have, throughout competition case law, had the possibilities of escaping the prohibition laid down in Article 102 TFEU, although conducting abusive behaviour. The reasons presented above have been various, amongst other that customers have had the freedom to turn to other undertakings for supply, which is one of the pillars of market economy. Further justifications have been efficiencies and to demonstrate that the conduct did not go beyond necessary. The crucial case law in regard to justifications under Article 102 TFEU is *Post Denmark* since the CJEU expanded its clarifications for what 'efficiencies' as a part of justifying abusive behaviour, could comprise.

The CJEU adopted the efficiencies laid down in the Enforcement Priority Guidance Paper in *Post Denmark*. Nothing suggests that the conditions are easy to satisfy, on the other hand, no practice has been saved by justifying it on efficiency grounds.[107] Furthermore, the standard proof required, 'with a sufficient degree of probability' is a high standard of proof, in contrast to the Commission's standard of prove, which is 'likely anti-competitive effects'.

The impression of the Enforcement Priority Guidance Paper, a long with *Post Denmark* that adopted the Enforcement Priority Guidance Paper into case law, is that Article 101(3) TFEU is being imported to Article 102 TFEU as 'justifications'. As presented above, Article 101 and Article 102 TFEU can in certain occasions cover the same practices, and the CJEU has held that these provisions are not to be applied in contradicting manner.[108] The Commission held in Tetra Pak, that the dominant undertaking could benefit from the exemption provision laid down in

[106] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p.31.
[107] Jones and Sufrin, EU Competition Law, 2014, p.390.
[108] Faull & Nikpay, The EU Law of Competition p.332; Case 85/76 Hoffman-La Roche v Commission para 116; Case 6/72 Continental Can v Commission para 25.

Article 101(3) TFEU, even when operating under Article 102 TFEU.[109] However, Regulation 1/2013 does not offer any exemptions under Article 102 TFEU and the Notice of application of Article 101(3) stipulates that it cannot be used by a dominant undertaking to escape liability under Article 102 TFEU. The adoption of Article 101(3) into Article 102 TFEU seems therefore to originate from case law as well as the Enforcement Priority Guidance Paper. This will nevertheless be discussed in an in-depth manner in chapter 8 and 9.

[109] (1988) OJ L272/27, (1990) 4 CLMR 47; Jones and Sufrin, EU Competition Law, 2014, p.294.

5 *Intel's* place in case law

The legal features presented in *Intel* can be properly understood by bringing forward its precedents and thus putting it into context.

In regard to the *effects* based approach, the earliest case is *Continental Can*, which also was the first Article 102 TFEU judgment.[110] The CJEU confirmed that Article 102 TFEU was aimed at practices that caused consumer harm directly and to practices that are detrimental to consumers through their impact on an effective competitive structure.[111]

In *Hoffman-La Roche* on the hand, the CJEU adopted a *rule-based* approach to abuse. In this early precedent from 1976 the CJEU held that the concept of abuse is objective, relating to when a dominant undertaking influences the structure of the market, to the degree where competition is weakened and has the effect of hindering the maintenance of the degree of competition still existing in that market.[112] The CJEU further affirmed a strict 'per se' prohibition rule against 'fidelity' rebates. The 'per se' prohibition originated in that the CJEU did not require evidence of anticompetitive effects in order for the practice to be prohibited.[113] The precedent laid down in Hoffman-La Roche entails that the rule-based approach towards exclusive dealing and rebates conditional upon exclusivity presumes that that the those practices are based on anticompetitive intent and have the exclusion of its rivals as its sole purpose.[114] The CJEU referred to the restriction of the customer's freedom to choose its own suppliers and of the restriction to the rivals access of their customers and also to the effects of exclusivity rebates offered by an unavoidable trading partner.[115] They stated that exclusivity rebates offered by an unavoidable trading partner makes it harder for the customer to obtain supplies from a competitor

[110] Faull & Nikpay, The EU Law of Competition p.347.
[111] Case 6/72 EuropemballageCorpn and Continental Can Co Inc v. Commission para 26.
[112] Case 85/76 Hoffman-La Roche para 91.
[113] Ibid para 89.
[114] Ibánes Colomo, Intel an Article 102 TFEU case law: making sense of a perpetual controversy p.19.
[115] Case 85/76 Hoffman-La Roche para 77, 91.

due to the given failure of complying with the exclusivity, which results in further difficulties for the competitor to enter the market.[116] An essential precedent from *Hoffman-La Roche* is that the CJEU held that quantity rebates are pro-competitive, which has been compatible with any legal test for all quantity rebate cases since then.[117]

In *Michelin I* from 1982 regarded the dominant tire manufacturer, Michelin, which had granted sales target rebates to dealers.[118] The CJEU held that loyalty rebates prevents customers from obtaining their supplies from competing manufacturers amounts to an abuse within the meaning of Article 102 TFEU.[119] Both the Commission and the CJEU criticized the individualized as well as retroactive feature of the rebates, since it foreclosed the rival manufacturers. Moreover, the criteria to assess whether an abuse had taken place required considering *all circumstances*, in particular the criteria and rules for the grant of the discount, whether there were any economic justifications, if the buyer's freedom to choose his sources of supply where restricted or removed, whether competitors where barred from accessing the market or if it strengthen their dominant position.[120]

Following the *Michelin I* precedent the CJEU held in the *BPB case* that offering advertising expenses in exchange for exclusivity from their customers was an unlawful financial advantage with the aim of preventing their customers to deal with their rivals, which constituted an abuse under Article 102. TFEU.[121] *Michelin II* regarded a standardized rebate system, which did not depend on exclusivity requirements, unlike the individualized system in *Michelin I*.[122] The standardized bonus system provided financial advantages to customers that would increase their previous year purchases.[123] The General Court held that the rebates were loyalty

[116] Case 85/76 Hoffman-La Roche para 92-93.
[117] Ibánes Colomo, Post Denmark II: setting a legal test for rebates hwere there is none (II).
[118] Case 322/81 Nederlandsche Banden-Industrie Michelin v. Commission.
[119] Ibid para 14, 71.
[120] Ibid para 69, 120.
[121] Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission para 120.
[122] Petit, Intel, leveraging rebates and the goals of Article 102 TFEU p.6.
[123] Case T-203/01 Manufacture francaise des pneumatiques Michelin v. Commission para 56-57, 65.

inducing and therefore also abusive, but that the assessment required taking the effect of the conduct into consideration.[124]

The *British Airways* case from 1999 dealt with the airline targeting incentives to travel agents, if these targets were met it lead to an increase in the commission paid to the agents for all tickets sold, not just the tickets sold after having met the target.[125] These bonuses to travel agents, which could be deemed retroactive and were based on individualised sales targets.[126] The General Court held that these practices created a fidelity-building effect due to them being an unavoidable business partner thus preventing the travel agents to buy tickets from rival airlines, thus causing exclusionary effects.[127] Essential precedent from this case in regard to Intel is that the General Court held a formalistic approach holding that effect is not required and also that although British Airways gained market share during this period the General Court did not take it into consideration and stated instead that the growth in market share could have been even greater absent British Airways practices.[128] The CJEU upheld the General Courts judgment and stated that in order to determine whether the dominant undertaking had abused its position by applying a system of fidelity discounts it is necessary to *consider all circumstances* of the case and also whether there is any objective economic justification for the discount bonuses granted.[129] The CJEU upheld the judgment and confirmed the abuse of dominance by the fidelity building effects of the practice in a rather formalistic and short decision.[130]

In *Post Denmark*, the Danish dominant undertaking charged different rates to its own pre-existing customers in comparison to others.[131] The CJEU begun by emphasizing that being and becoming a dominant actor is not illegal, nor are all exclusionary effects detrimental to competition, unless it is offered by a dominant

[124] Case T-203/01 Manufacture francaise des pneumatiques Michelin v. Commission para 56-57, 239-241, 245.
[125] Case T-219/99 British Airways plc v. Commission para 6-10, 14-18.
[126] Ibid para 63
[127] Ibid para 244-249.
[128] Ibid para 293, 298.
[129] Ibid para 67-68; See also Case 322/81 Nederlandsche Banden-Industrie Michelin v. Commission para 67.
[130] Ezrachi, EU Competition Law, An analytical guide to the leading cases, p.230.
[131] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 8.

undertaking, by which it holds a special responsibility not to let the dominance impair genuine in distorted competition.[132] When a dominant undertaking practices exclusionary effect it strengthens its dominant position by using other methods than competing on the merits.[133] In order to determine whether an abuse of dominance has occurred, it is necessary to consider *all the circumstances* and to examine whether the buyer's freedom has been removed or restricted regarding its sources of supply.[134] The CJEU referred to the AKZO test, used in relation to predatory pricing, which entails that if prices are below variable costs, then it must regarded as abusive since it will drive out the dominant undertakings competitors from the market. However, if charging below average total costs and above average variable costs, then it must be abusive if its part of a plan for eliminating a competitor.[135] The CJEU held that solely charging lower than total average costs is not an abuse in itself, and a competitor as efficient as the dominant undertaking should have the possibility to compete without making unsustainable losses.[136] However, if anti-competitive effect where to be found, then it is possible for the dominant undertaking to provide justification for this behaviour, such as if the behaviour is objectively necessary, if it benefits consumers, if it provides efficiency gains and consumer welfare as well as does not eliminate effective competition.[137]

Tomra had abused their dominance by applying individual minimum purchasing obligations, loyalty and retroactive rebates as well as exclusivity rebates. They had restricted market-entry to one or few competitors and thus limited the intensity of competition on the market as a whole, this type of foreclosure by a dominant undertaking cannot by justified by demonstrating that a remaining contestable part of the market still accommodated a limited amount of competitors.[138] By doing this they limited access to the Austrian, German, Dutch, Norwegian and Swedish markets. The CJEU emphasized on this matter that competitors on the foreclosed market should be able to compete on the merits for the entire market and not just for

[132] Case C-209/10 Post Denmark A/S v. Konkurrenceråd et para 21-32.
[133] Ibid para 25.
[134] Ibid para 26.
[135] Ibid para 27.
[136] Ibid para 37-38, 44.
[137] Ibid para 40-42, 44.
[138] Case C-549/10 P Tomra para 41-42.

a part of it and that the dominant undertaking should not be able to decide the amount of viable competitors on the remaining portion of demand.[139]

Furthermore, to prove an abuse of dominant position it suffice to demonstrate that the conduct of the dominant undertaking tends to restrict competition or that it is capable of having that effect.[140] The CJEU also clarified that abuse of dominance occurs when the dominant undertaking uses a system of loyalty rebates without requiring a formal obligation and irrelevant of whether it regards large or small quantities.[141]

It was unnecessary to analyze the actual effects of the rebates, merely capability of having an effect on competition is sufficient.[142] As a result it was not needed to examine whether the costs were lower than *Tomra's* average incremental costs.[143] The AG stated that the Commission Guidance paper was not published and therefore not relevant for the case, the economic assessment of the rebates based on the Guidance Paper were therefore not necessary.

[139] Case C-549/10 P Tomra para 42.
[140] Ibid para 68.
[141] Ibid para 70.
[142] Ibid para 79.
[143] Ibid para 80.

6 The *Intel* judgement

6.1 Case summary

Intel gave exclusivity rebates to four large customers, paid a retailer to sell exclusively from them and paid three computer manufacturers to postpone or cancel the launch of their computers containing their rivals processors.

The CJEU held that an undertaking that is in a dominant position and ties its purchasers, even if it does so at their request, by obliging or promising on their part to buy all or most of their requirements exclusively from that undertaking, abuses its dominant position.[144]

According to the *Intel* case, by citing previous settled case law, there are three different types of rebates. The first type is the quantity rebates system, which is not considered to have the foreclosure effect prohibited by Article 102 TFEU, since it is merely linked to the volume of purchases made from the dominant undertaking which in turn results in a more favourable tariff for the latter's customer. Quantity rebates are therefore perceived as gains in efficiency and economies scale made by the dominant undertaking.[145]

The second type of rebates are those which are conditional on the customer obtaining all or most, not exclusively, of its requirements from the dominant undertaking. These rebates are referred to as fidelity or exclusivity rebates.[146] Exclusivity rebates as these are incompatible with the objective of undistorted competition when they are offered by a dominant undertaking since it restricts the

[144] Case T-286/09 Intel Corp. v. Commission para 72.
[145] Case T-286/09 Intel Corp. v. Commission para 75; Case T-203/01 Michelin v. Commission para 58; Case Portugal v. Commission para 50; Opinion of AG Mischo in Portugal v. Commission point 106.
[146] Case T-286/09 Intel Corp. v. Commission para 76.

purchasers freedom to buy other products and denies the producers the access to the market.[147]

The third type of rebate system covers all other financial incentives to buy, which are not linked to a condition of exclusive or quasi-exclusive supply from the dominant undertaking but where the rebate may have a fidelity-building effect. In order to determine the lawfulness of the third type of rebate, all circumstances must be considered such as the rules deciding over the grant of the rebate, whether the buyer's freedom to choose his sources of supply is restricted, whether the competitors are closed out from the market or whether the dominant actor's dominance is strengthen by distorting competition. [148]

In accordance with the *Intel* case, when dealing with the second type of rebate, exclusivity rebate, there is no need to look at either any foreclosure effect or to consider all circumstances since the nature of this type of rebates forecloses competition by nature.[149] All circumstances of the case must solely be assessed in relation to the third category of rebates.[150] The reason for its nature of being capable of foreclosing competition is that the customer has no incentive to obtain, due to the exclusive condition, any supplies from undertakings in competition with the dominant actor.[151] Although exclusivity can have beneficial effects, it cannot be accepted when a dominant actor practices it since competition has already been restricted.[152] The justification of this approach is the special responsibility that a dominant undertaking holds, which entails that it cannot allow its dominance to impair genuine undistorted competition in the common market, under which exclusive supply falls under.[153] The undertaking in a dominant position is an unavoidable trading partner and its competitor cannot compete for full supply, but

[147] Case T-286/09 Intel Corp. v. Commission para 71 and 77; Case 85/76 Hoffman-La Roche & Co AG v. Commission para 90; Case T-155/06 Tomra Systems and Others v. Commission para 208.
[148] Case T-286/09 Intel Corp. v. Commission para 78; See also Case T-203/01 Michelin v. Commission para 71-73; Case C-95/04 P British Airways para 62-65, 67-68; Case C-549/10 P Tomra para 70-71.
[149] Case T-286/09 Intel Corp. v. Commission para 80-85; See also Case 85/76 Hoffman-La Roche.
[150] Case T-286/09 Intel Corp. v. Commission para 84.
[151] Ibid para 87.
[152] Case T-286/09 Intel Corp. v. Commission para 89; See also Case C-310/93 P BPB Industries and British Gympsum v. Commission para 11 and Opinion of AG in that case point 42-45.
[153] Case T-286/09 Intel Corp. v. Commission para 90; Case T-65/89 BPB Industries and British Gypsum para 65-68.

only for the portion of the demand exceeding the non-contestable share, if even that, since under circumstances where the dominant undertaking utilizes rebate schemes the customers risk losing the exclusivity rebate when obtaining supplies from the dominant undertaking's competitor.[154] The dominant undertaking can submit justifications of the use of exclusivity rebates by demonstrating that it is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced by advantages of efficiency that benefit consumers. The General Court pointed out that Intel had not brought forward any arguments to justify their behaviour.[155]

Furthermore, it was argued whether an analysis of circumstances establishing a potential foreclosure effect was necessary. The General Court then differentiated between pricing practices, which were dealt with in Post Denmark, and on rebates conditional on exclusive or quasi-exclusive supply, where a pricing practice cannot be regarded as unlawful in itself, as exclusivity rebates, which therefore do not require an analysis to establish potential foreclosure effect since its unlawful in itself.[156] In which it is required to prove actual foreclosure effect, it is enough that they demonstrate that the practice is capable of restricting competition and when dealing with exclusivity rebates it is unnecessary to analyze the actual effects on competition, nor is it required to prove a causal link between the practices and the effects on the market, or demonstrating direct damage to consumers, since Article 102 aims at practices which are detrimental on consumers through impact on an effective competition structure.[157]

In regard to whether the Commission is required to prove actual foreclosure effect, it is enough that they demonstrate that the practice is capable of restricting competition and when dealing with exclusivity rebates it is unnecessary to analyze the actual effects on competition, nor is it required to prove a causal link between the practices

[154] Case T-286/09 Intel Corp. v. Commission para 91-92; Case 85/76 Hoffman-La Roche; Case C-549/10 P Tomra para 208 and 269.
[155] Case T-286/09 Intel Corp. v. Commission para 94; Case 85/76 Hoffman-La Roche; Case C-95/04 P British Airways para 62-65, 67-68, 85-86; Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 40-41; Case C-52/09 TeliaSonera Sverige para 31 and 75.
[156] Case T-286/09 Intel Corp. v. Commission para 95, 99-100; Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 8, 19, 40-41.
[157] Ibid. 102-105.

and the effects on the market, or demonstrating direct damage to consumers, since Article 102 aims at practices which are detrimental on consumers through impact on an effective competition structure.[158] In regard to what type of formal obligations or binding exclusive obligations that are required, it is enough that the dominant undertaking indicates that the grant of a financial advantage depends on exclusive or quasi-exclusive supply.[159]

The amount of the rebate is not the issue, but the exclusivity for which they were given, it is therefore sufficient to demonstrate that the rebates were granted with consideration of exclusivity, which therefore are capable of inducing the customers to purchase exclusive from them.[160] Furthermore, the duration of the exclusivity in the contract is irrelevant since the exclusivity continues to exist for as long as the dominant undertaking continues to grant it.[161] It is further irrelevant how big parts of the market that where concerned, since there is no 'appreciable effect' or 'de minimis' when applying Article 102 TFEU, since the mere fact that an undertaking holds a dominant position entails that competition has already been weakened and any further weakening is an abuse of that dominant position.[162] Whether the exclusivity conditions covered all of the customers' requirements or not is irrelevant, since competitors of the dominant actor must be able to compete on the merits for the entire market and not just for a part of it.[163] Moreover, the fact that the contracting partner is a powerful undertaking does not preclude the existence of an abuse of dominant position, since the unavoidable trading partner forces the competitor to obtain exclusive supplies on a market where competition has already been weakened due to the dominance of the dominant undertaking.[164]

An essential factor when comparing case law is the relevance of the AEC test, which determines whether an undertaking, as efficient as the dominant undertaking, can

[158] Case T-286/09 Intel Corp. v. Commission para 102-105; Case C-549/10 P Tomra para 70; Case C-52/09 TeliaSonera Sverige para 63, 88.
[159] Case T-286/09 Intel Corp. v. Commission para 106.
[160] Ibid para 107-109.
[161] Ibid para 112-113.
[162] Case T-286/09 Intel Corp. v. Commission para 116; Opinion of AG Mazák in Case C-549/10 P Tomra point 17; Case 85/76 Hoffman-La Roche para 123.
[163] Case T-286/09 Intel Corp. v. Commission para 132; Case C-549/10 P Tomra para 42 and 70.
[164] Case T-286/09 Intel Corp. v. Commission para 139.

cover its costs if it charges the same price as the dominant undertaking. When utilizing the AEC test in relation to rebates the Court holds that; (1) there is no need to examine the circumstances of the case and there is no need to demonstrate foreclosure capability of exclusivity rebates on a case-by-case basis, (2) even if the rebate would fall within the third category of rebates where an examination of the circumstances is necessary, there is no need to carry on an AEC test, (3) there is no need to demonstrate that the undertaking has charged prices lower than the cost price, it is sufficient to show the existence of a loyalty mechanism in order to find anti-competitive behaviour, (4) even if, when assessing the circumstances of the case, it would be necessary to demonstrate anti-competitive effects of the rebates, it would not be necessary to show it with the AEC test, (5) foreclosure effect does not only exist when access to the market is impossible, it is sufficient that the access is more difficult, and since the AEC test only demonstrates when access to the market is impossible and not when it has been made more difficult, in addition that even a positive result with the AEC test can entail that the access to the market is more difficult, the results from the foregoing is that it is not necessary to carry out an AEC test in relation to rebates. It follows therefore that a positive result from the AEC test does not rule out potential foreclosure effects.[165]

Furthermore, AEC test does not even have to be applied in the third category of rebates to examine whether a rebate system forces an as-efficient competitor to charge negative prices, it is therefore logical that it does not have to be applied on exclusivity rebates.[166] The foregoing applies to exclusivity rebates, where the grant and not the amount of the rebate is what makes it abusive, margin squeezes or low prices on the other hand have to be compared to other prices and costs since prices cannot be unlawful in themselves.[167]

Article 102 Priority Guidance Paper, which was published prior to the contested decision, was not applicable, but still the Commission followed it and made the AEC test just for the sake of completeness, which it clarified, and not due to it being necessary, no legitimate expectations could therefore be breached if the AEC test

[165] Case T-286/09 Intel Corp. v. Commission para 141-150.
[166] Ibid para 153.
[167] Ibid para 152.

were not to be applied.[168] Regarding the payments granted to MSH, there is no requirement to examine the circumstances of the case, only to demonstrate that there was a financial incentive subject to an exclusivity condition.[169]

In regard to the capability of the exclusivity rebates to restricting competition, there is no requirement of proving actual effect since when offered by an unavoidable trading partner, the exclusivity rebate restricts competition in itself since the beneficiaries comply with the exclusivity contributing to the capability of the rebates to restrict competition. By this the dominant undertaking ties important customers, which has a significant impact on the overall market.[170]

Demonstrating that the dominant actor's competitors had the greatest commercial success in history, had unique raid growth rates and likely, are arguments that cannot be accepted, since the competitors wealth could have been even greater. Furthermore, the success of the competitors merely demonstrates that no actual effects were caused, but it does not deny that the practices were capable of restricting competition, which is sufficient to make Article 102 TFEU applicable.[171]

[168] Case T-286/09 Intel Corp. v. Commission para 156-160 165.
[169] Ibid para 167, 171.
[170] Ibid para 172, 177-180.
[171] Ibid para 185-186.

7 Analysis of the current assessment after *Intel judgment*

This chapter analyses the different precedents of the Courts in order to reach a conclusion for why they adopted a form-based approach in *Intel*. This analysis takes into consideration the three most essential precedents which gave rise to high expectations in *Intel*, namely; *Hoffman-La Roche, Tomra* and *Post Denmark*. This will present the reasons for the General Court's decision, consequences and more aspects.

7.1 Precedents which lead to the General Court's decision

Post Denmark relies on an effects based approach in relation to 'selective low prices' given by a dominant undertaking, where it requires comparing prices and costs. It established that dominant firms can charge prices lower than total average cost as long as the price is higher than total incremental costs without being an exclusionary abuse in itself, but where the anti-competitive effects must be assessed.[172] The reason for this approach is that the effective competitor can compete with the dominant actor. This approach was followed in *TeliaSonera* for margin squeeze. The motive behind the General Court not following this line of argumentation in *Intel*, established by both the Enforcement Priority Guidance Paper as well as in *Post Denmark* is that firstly, the Enforcement Priority Guidance Paper was not applicable. The reasons for it is that the General Court dismissed its applicability since *Intel* was dealing with the second type of abuses, where the circumstances do not have to be taken into consideration, and even if the circumstances would have to be demonstrated the AEC-test is not accurate to utilize since it does not show when access to the market is merely made more difficult. Furthermore, *Post Denmark* does is not an exclusivity rebate case but rather a

[172] Supra note fn 134.

'selective low prices' case, without any exclusivity measures that therefore falls under category three abuses, instead of category two as *Intel*. The General Court differentiates between price-based abuses and exclusivity abuses, since exclusivity abuses tie's the consumer.

Tomra on the other hand does not rely on an effects based approach. One of the reasons is that it did not follow the Priority Guidance Paper since it had not been launched at the time. The rebate scheme's were an abuse since they were retroactive, individualised and applied to their largest customers. The Court focused on the theoretical capability of excluding competitors and did not take in to consideration any comparison between prices or costs. The Court further rejected the necessity of showing risk of market foreclosure and relied on the objective character of o the infringement of Article 102 TFEU, where competitors should be able to compete on the merits for the entire market.[173] The same approach was applied in *British Airways* and *Michelin II.* The General Court in *Intel* categorized these, again, as price abuses which may have loyalty inducing effect, but are not merely exclusivity abuses, they fall therefore under the third category whereas *Intel* falls under the second category of abuses under Article 102 TFEU.

Hoffman-La Roche on the other hand falls under category two, as Intel. The reason is that it dealt with exclusivity or fidelity rebates. Owing to the categorization made in Intel, these two fall under the same category and are thus to be assessed as all cases falling within that category. The General Court refers to exclusivity rebates as incompatible with the objective of undistorted competition when offered by a dominant undertaking by restricting the purchasers' freedom to buy other products. The General Court further concluded that there is no need to look at any foreclosure effects or to consider all circumstances since these type of rebates foreclosure competition by nature and referred to *Hoffman-La Roche* where the CJEU in 1976 held that exclusivity rebates are based on anti-competitive intent and have the exclusion of its rivals as its sole purpose as well as that no evidence of anticompetitive purpose is therefore needed.[174]

[173] Supra note fn 138-145.
[174] Supra note fn 112-117.

As clarified, the General Court's classification of three different categories of abuses in *Intel*, with different assessments for each category entailed a discrepancy with the expectations of the development of the effects-based approach supported by the Commission in the Priority Guidance Paper and by the CJEU in *Post Denmark*.

Intel was expected to develop the effects based approach under Article 102 TFEU, it instead rejected the need to demonstrate any actual effects or consumer harm or to apply a cost based test. The judgment resulted in a strict, non-effects bases approach to exclusivity rebates under Article 102 TFEU, which has been criticised.[175] It clarified that exclusivity rebates are to be assessed as anticompetitive by nature, where the undertaking providing them cannot demonstrate justifications and where no circumstances are to be assessed, no foreclosure must be demonstrated and where the AEC-test does not have to be applied, as long as the existence of loyalty building effect can be established. The General Court found all submitted justifications to be irrelevant, such as if the contracting party is powerful, the exclusivity last for a short period, if there are no formal exclusivity obligations, if the rebate regards a small amount, if it considers a small part of the market or if the competitors had their greatest commercial success, since exclusivity restricts competition on itself.

7.2 Current assessment

This thesis concludes that the current assessment, based on the outcome of the Intel case, is based on the following steps:

(1) The first step is the yes or no assessment, if the dominant undertaking deals with a practice not considered to have a foreclosure effect such as quantity rebates then it is permitted, or if it is a naked restriction then it constitutes an abuse in itself;
(2) The second category is conduct that constitutes an abuse in itself. The General Court clarified that exclusive rebates falls under this category, the

[175] Venit, Case T-286/09 Intel v. Commission – the judgment of the General Court: All steps backward no step forward, p.230.

only requirement is to demonstrate the "exclusivity". There is thus no need to show any foreclosure effect or to consider all circumstances of the case. These rebates foreclose competition by nature and are presumed to be illegal.

(3) The third type cover financial incentives to buy that may have a fidelity building effect but which do not depend on exclusive or quasi-exclusive supply. This category cover conducts where it is unclear whether they constitute an abuse. The assessment to determine its lawfulness is to consider all circumstances on the case, whether the buyers freedom to choose his sources of supply is restricted, whether the buyer's freedom to chose his source of supply is restricted or if the dominant actor's dominance is strengthen. In other words to reflect on whether the dominant actor is competing on his merits.

This assessment originates from the General Court's assessment in *Intel*, affecting the assessment of rebates under Article 102 TFEU with its precedent and clarification on 'categories' of rebates and with explained assessment to each. As clear from the test presented, it is not an economic test, no need to make an economic assessment of on the non-contestable parts of the market, there are no intense data econometric studies and there is no need to make an economic assessment of the consumer welfare. It is merely a legal test that foresees the economy behind competition law. In this legal test certain conduct is not to be considered 'competition on the merits', namely exclusivity rebates, since they are an abuse in itself, without any need of demonstrating anticompetitive effect.

The General Court presented the 'current assessment' based on older precedents instead on following the modernization of competition law towards the effects-based approach. It is a safe path, there are precedents underlying the same ideas that are referred to, and it is structured in a easy to apply manner enforcing legal certainty. It might have been the easy way out for the General Court, leaving the transformation of competition law, that is to extend the effects-based approach to exclusivity

rebates, to the grand chamber of CJEU in the appeal of either *Intel* or *Post Denmark II*.[176]

7.3 The AEC-test

One major question that arises is, why does the General Court in *Intel* not take into consideration the precedents from the CJEU in for instance *Post Denmark*, paragraphs 141-150, where a complete dismissal of the AEC-test takes place. The General Court essentially clarifies that the AEC-test is not necessary in either of the categories for the assessment of the legality of the rebates. The AEC-test is thus irrelevant in relation to, at least, rebate cases. Since the CJEU has applies the AEC-test in *AKZO* and *Post Denmark* in relation to margin squeeze and selective low prices, the current test with three categories should be limited to rebate cases. The logical outcome is for the AEC-test to continue to be applied to cases where it is unclear whether the dominant firm competes on its merits in order to find anticompetitive effect, in Article 102 TFEU cases not dealing with rebates. Essential to comment in relation to the AEC-test is that there is now a division of Article 102 TFEU cases, some assessed by the effects-based approach a long with the AEC-test, whereas rebate cases will use the 'current assessment' presented above. The grey zone established by this is how cases that have a mixture of both will be treated.

The uncertain future of the AEC-test might be positive for those scholars that heavily criticized the AEC-test. The main criticism in relation to the AEC-test is based on that exclusivity is treated similar to predatory pricing, when the later practice should be price tested and the first one merely needs to show exclusivity since that it is where the harm is found and not in the price. Other negative aspects is that the assessment only cares about equally efficient competitors but disregard less efficient that may have competitive pressure and might even exit market without consequences. Further comments are that the AEC-test finds abuse when the competitor sells at loss prices, but does not take into account if the undertakings

[176] Case C-23/14 Post Danmark A/S v Konkurrencerådet.

profits are reduced.[177] The General Court also highly criticized the AEC-test in *Intel* where it also dismissed its applicability to large range of Article 102 TFEU cases. Scholars were not surprised of the General Court's exclusion of the AEC-test, and also agreed with the General Court in the conclusion that the AEC-test only allows to check whether the access to the market is impossible and does thus not evaluate whether the access has been made more difficult.[178] This is also a main reason for why dominant undertakings should not limit the assessment of their rebates to the AEC-test in the future.[179]

A unifying theory in case law in relation to the AEC-test is necessary, for selective pricing (*Post Denmark*) as well as for margin squeeze (*TeliaSonera, Deutsche Telekom*) the CJEU took into consideration the less efficient competitor, it is however difficult to understand why rebates cannot be treated in that same manner. The CJEU has the appeal of *Intel* and of *Post Danmark II* before them, to apply a inform method of assessment is essential in order to establish legal certainty, especially for cases falling in between category 2 and 3.[180]

7.4 What is the role of the Enforcement Priority Guidance Paper?

Richard Whish has argued that the Intel judgment is in no conflict with the Enforcement Priority Guidance Paper, together with Brian Sher I must respectfully disagree. The Enforcement Priority Guidance Paper represented a shift of assessment towards an effects-based approach.[181] Commentators have argued that Intel followed an effects-based approach due to the General Court mentioning in paragraph 94 of the judgment that Intel could submit justifications of the use of exclusivity rebates by demonstrating that it is objectively necessary or that the

[177] Wouter, The judgment of the General Court in Intel and the so-called 'more economic approach' to abuse of dominance, p.28-29.
[178] Petit p.226.
[179] Fulbright, Thill-Tayara & Asins, Intel judgment: persistence in formalism in the legal analysis of rebates.
[180] Ahlborn & Piccinin, The Intel judgment and consumer welfare – a response to Wounter Wils p.75. Sher, Keep Calm – Yes; Carry on – No! A Response to Whish on Intel.
[181] Sher, Keep Calm – Yes; Carry on – No! A Response to Whish on Intel.

potential foreclosure effect that it brings about may be counterbalanced by advantages of efficiency that benefit consumers. Whether this sentence entails that an effects-based approach was used towards exclusivity rebates is difficult to argue. The future of the application of the Enforcement Priority Guidance Paper is uncertain.

7.5 Is it a 'per se' abuse?

As stated above the General Court held that exclusivity rebates are abusive by nature and presumed to be illegal, while at the same time affirming that justifications exists. The judgment also stipulated that the Commission does not have to wait for actual exclusion to occur before taking enforcement action. This is close to a 'per se' abuse, but the sentence claiming that justifications are available hinders it from falling under that categorization. It is easy to consent to Petit's phrase, namely that *Intel* can be classified as a modified 'per se' prohibition rule. The inclination towards a plain 'per se' rule depends on the justifications available when offering rebates, which will be presented in more detail manner in next chapter. It is however difficult to understand the role of justifications when there is a presumption of illegality simultaneously as the General Court rejected *Intel's* claims of justification as irrelevant and further held that no such claims had been put forward.

7.5.1 Object instead of rule of reason

The concept of rule of reason originated from *Dassonville*[182] and was later further established in *Cassis de Dijon*[183], in relation to Article 34 TFEU, where the CJEU established that the effect rather than the intent was to be decisive.[184]

The theory of harm has been a significant instrument in the ten last years in competition law matters.[185] The theory of harm takes into consideration how

[182] Case 8/74 Procureur du Roi v Dassonville.
[183] C-120/78 – Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
[184] Craig & De Burca, EU law text, cases and materials p.640.

competition and consumers are harmed, their incentives and is based on available empirical evidence, in other terms, an effects-based approach. The efficiency-based approach promotes assessment of proper justifications on the base of economic analysis and grounded on the facts of the case.[186] One of the essential European law principles, proportionality, is an essential element in relation to the assessment in competition law cases. It holds that the practice under scrutiny should be necessary to achieve the desired aim, there should not be any less anticompetitive means, the conduct is disproportionate, balance between the means to achieve and the impact on the market.[187] Needless to argue that this general principle enshrined from the treaty supports the necessity of an effects-based approach in relation to exclusivity rebates.

In competition law, in relation to Article 101(1) TFEU, the CJEU in *Delimitis*[188] found that exclusivity obligations, irrespective if imposed directly or indirectly through rebates can be observed in effective competitive markets, as well as that their underlying rationale does not necessarily have to deal with the exclusion of rivals. The CJEU further held that exclusivity obligations are in the interest of both the supplier and the buyer, since the supplier can plan its distribution and production while the buyer can obtain guarantees of supply based on better conditions. *Delimitis* conducted a two-step assessment, first whether exclusive dealing leads to leads to market foreclosure, and secondly whether the agreements contribute to significantly to such anticompetitive effect.[189] The CJEU reached the decision that the pro-competitive motivations of such an agreement does not categorize it as restrictive of competition by its very nature. The US Supreme Court had a similar argumentation in *Tampa Electric*.[190] The Commission soft law material are in line with *Delimitis* and have identified justifications such as that exclusivity obligations can be an effective means to address free riders at the level of suppliers.[191]

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[185] Zenger & Walker, Theories of harm in European Competition Law: A progress report p.1.
[186] Rey & Venit, An effects-based approach to Article 102: A response to Wputer Wils p.21.
[187] Craig & De Burca, EU law text, cases and materials p.1041; Jones and Sufrin, EU Competition Law, 2014, p.107.
[188] Case C-234/89 Stergios Delimitis v Henninger Bräu.
[189] Ibid para 19.
[190] Tampa Electric Co v Nashville Co, 365 U.S 320 (1961).
[191] Guidelines on vertical restraints para 107.

This line of argumentation in Article 101(1) is difficult to adopt to the motives current deciding the Article 102 TFEU cases, namely that anticompetitive intent is presumed, that exclusivity rebates hamper competition in themselves and therefore do not require an effects analysis. Scholars have observed the difficulty in reconciling *Delimitis* with *Hoffman-La Roche*, and as stated above there has been difficulties to *Post Denmark* with both *Hoffman-La Roche* and *Intel*.[192] This inconsistency does thus not depend on the special responsibility of dominant firms, since margin squeezes and price cuts in the Article 102 TFEU case *Post Denmark* are treated with an effects-based approach, it is therefore not obvious why the same approach is not applied to exclusivity rebates in *Intel*.[193]

The General Court's presumption of illegality towards exclusivity rebates in *Intel* as held above, is not in line with the economic reasoning's in *Delimitis*. The Courts, not only in Europe but also in the United States, have presumed illegality only if it is empirically grounded in economics and the objectives behind the rules, the presumption has therefore been 'rule of reason', by assessing the effects of the practice.[194] Whether exclusivity rebates should fall under this presumption requires a clear constant and obvious economic reasoning, but due to the CJEU not arguing that line in *Delimitis*, it should not be regarded as a clear, constant and obvious economic reasoning, in particular when certain economic theories find valid pro-competitive justifications of exclusivity rebates.[195]

Article 101 TFEU followed the modernization of competition law by requiring effects in order to prohibit practices by object. Older 'prohibited by object' precedents established that the direct prohibition was applicable when the practice was 'sufficiently deterious', this assessment was changed to 'potential of negative impact on competition' in *T-Mobile*.[196] *Allianz Hungary* created a drastic modernization when the CJEU held that the content, context and objectives of the

[192] Ibanes, Intel and Artciel 102 TFEU Case Law: Making Sence of a Perpetual Controversy p.21.
[193] Sher, Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel.*
[194] Allan, Loyalty and fidelity rebates: a sense of déjà vu again; Jones & Sufrin, The European way – reflections on the Intel judgment p.36.
[195] Ibanes Colomos, Intel v Commission and the problem with wrong economic assumptions.
[196] Case C-56/65, Société Technique Minière (STM), EU:C:1966:38, page 249; Case C-8/08, T-Mobile para 31.

agreements had to be analyzed as well as if competition would be eliminated or seriously weakened, in order to determine whether the practice was going to be restricted by object.[197] The same modernization that has taken place in Article 102 TFEU in for instance *Post Denmark* or *TeliaSonera* as well as in the Enforcement Priority Guidance Paper, where the effects need to be taken into consideration, has taken place in Article 101 TFEU in order to establish 'restriction by object'.[198] In *Cartes Bancaires* the CJEU further confirmed this evolvement when they firstly concluded that the General Court had made a 'general failure of analysis' and by holding that the effects of the practice have to be taken into consideration in order to establish 'object restriction', since the object restriction cannot 'come out of the blue'.[199] The CJEU warned for superficial analysis of a practice and argued against restriction by object by holding that it should only be applied to situations were an agreement is reveals a sufficiently harm on competition, such as in cartel cases.[200] The modernization in Article 101 TFEU entails that the assessment of effect-abuses is imported in to object-restriction, removing the differences between them.[201] The effect for the market and the consumers, which are protected by competition law, entails that practices that were restricted by object, but had positive secondary effects, are no longer prohibited 'per se'.

The Courts have established that exclusivity rebates are presumed abusive when provided by dominant undertakings, but not when offered by a non-dominant undertaking, the Commission appears not to share that view. This brings me to the next area of analysis, which is why are exclusivity rebates condemned harshly.

The CJEU established the *Hoffman-La Roche* precedent in 1979, presuming anticompetitive intent in exclusivity rebates. However, it failed to actually logically explain why certain cases require evidence of exclusionary effects, and others not. If exclusionary effects are presumed when offering exclusivity rebates, then the undertaking should be able to defend itself by demonstrating that the practice did not

[197] Case C-32/11, Allianz Hungária para 48.
[198] Supra Note 131 and page 41.
[199] Case C-67/13 P, Groupement des Cartes Bancaires para 50-51, 55.
[200] Ibid para 58.
[201] Killick & Jourdan, Canrtes Bancairs: A revolution or reminder of old pricniples we should never have forgotten?

have such effects on the market, that is however not possible currently. A rule condemning a practice by nature should be foreseeable since the practice effects should be undoubtedly exclusionary, such as in cartel cases that almost always lead to inefficient allocation of resources, exclusivity does however not fall under this type of practices.[202]

To change the presumption that exclusivity rebates are anticompetitive, the CJEU would have to change its *Hoffman*-approach in the *Intel* appeal or in the pending judgment of *Post Denmark II*. The presumptions established in the old precedent would be modified to the modern approach towards competition law, encompassing an effects-based approach with an economic analysis. The Courts have rather followed old-dated precedents than taking into consideration the development of economic theory as in other areas of competition law.[203] Rejecting the old precedent establishing a rule-based approach would be in resonance with the Commission's soft law materials, the CJEU case law on exclusive dealing in Article 101(1) TFEU, as well as the CJEU adoption of an effects-based approach on recent Article 102 TFEU cases. The expectations of the CJEU to change their approach towards exclusive dealing cases legitimatize the change. Such was the case in *Van Der Bergh Foods* in an Article 101 and 102 TFEU exclusive dealing scenario, where the General Court left the *Hoffman*-rule behind and held that exclusive dealing may have pro-competitive motivations.[204] Another competition law example where the Court changed its view was from *Hag 1* to *Hag 2*.[205] The CJEU must follow the Treaty of the functioning of the EU, overruling precedents is not an object to successfully continuing following the treaty and following precedents is not an obligation of the Courts.[206] It is however convenient for the Courts to follow a well-established rule, as mentioned above, and for the General Court to leave the

[202] Case C-67/13 P Groupement des cartes bancaires (CB) v Commission.
[203] Ibanes Colomo, Intel and Article 102 TFEU Case Law; Making Sence of a Perpetual Controversy p.30.
[204] Case T-65/98 Van Den Bergh Foods Ltd v. Commission para 159; O'Donoghue & Padilla, The Law and the Economics of Article 102 TFEU.
[205] Sher, Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel.*
[206] Wils – the judgement of the eu general court in Intel and the so-called more economic approach to abuse of dominance p.426; See also Article 256 TFEU; Sher, Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel.*

transformation of competition law to the grand chamber of the CJEU in either the *Intel* appeal or in the pending judgment of *Post Denmark II.*

The text of Article 102 TFEU does not stipulate how to assess the abuse of dominance and does not include any justification provision, this entails that the Courts have to fill in these gaps in order to remove the lack of coherence and clarity. The CJEU has put effort on establishing a standard for finding abuse of dominance, the foreclosure of equally effective competitors, and has in the abovementioned appeals the chance to apply this standard to exclusivity rebates.[207] The current ban on exclusivity rebates does not consider the positive side effects it may bring to the market and in turn to the consumers, while it simultaneously bringing legal clarity and a foreseeable application of Article 102 TFEU.

[207] AHlborn & Piccinin – The Intel judgment and consumer welfare – a response to Wouter Wils p.75.

8 Analysis of justifications under Article 102 for dominant undertakings offering rebates - after the *Intel* judgment

In reference to chapter 4, Article 102 TFEU does not encompass an exemption provision as Article 101(3) TFEU, but holds instead the concept of objective justifications in order to escape the prohibition laid down in Article 102 TFEU. Abuse of dominance exist thus only in the absence of objective justifications.[208] In contrast from Article 101 TFEU, Article 102 TFEU deals merely with dominant undertakings. Case law has established that solely the presence of a dominant undertaking entails that competition is weakened, which is the reason for why dominant undertakings hold a special responsibility and do not have the same possibilities of escaping the prohibition when practicing abusive behaviour.[209] Disregarding of these differences the CJEU has stipulated that Article 101 and 102 TFEU cannot be applied in contradicting manners.[210]

Chapter 4 further confirms that the CJEU has not conducted in-depth analysis of objective justifications but rather made a notional exercise of them. Well-applied objective justifications, in a consistent, well-structured and practical manner would lead to a reasoned analysis in abuse of dominance cases, and thus strengthening legal certainty.[211]

Essential in relation to the analysis of justifications after the *Intel* judgment is that a 'per se' abuse can never be justified, on the other hand objective justifications reject the existence of a 'per se' abuse. A 'per se' approach is inconsistent with any analysis under Article 102 TFEU, since a 'per se' approach does not take into

[208] Van der Vijver, Objective justification and Prima Facie anti-competitive unilateral conduct : an exploration of EU Law and beyond p.97.
[209] Case C-280/08 P Deutsche Telekom v Commission para 182.
[210] Case 6/72 Continental Can v Commission para 25.
[211] Van der Vijver, Objective justification and Article 102 TFEU p.60.

consideration the specific circumstances of the case and may therefore rely on assumptions that might not be accurate for that specific case. For instance, conduct that is listed as abusive under Article 102 TFEU may have pro-competitive effects in certain circumstances.[212] The Commission has for this reasons stepped away from this approach in the Enforcement Priority Guidance Paper, and also in their *Intel* decision, where they made an economic analysis of the effects of the alleged abuse. As mentioned above, the CJEU has also been keen in departing from 'per se' approaches towards an effects-based approach, for instance in *Post Danmark*.

As confirmed in chapter 4, justifications for abusive behaviour under Article 102 TFEU has existed throughout case law, and the Enforcement Priority Guidance Paper emphasized the role of justifications as well as relying on the effects of a practice, instead of condemning the practice in itself. The CJEU confirmed this evolvement of Article 102 TFEU in *Post Danmark*.[213] The General Court adopted however another line of assessment in *Intel*. [214]

In *Intel* the General Court held that a dominant undertaking that utilized exclusivity rebate systems could justify and thus escape liability, if it in "particular, showed that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counter balanced, outweighed even, by advantages in terms of efficiency that also benefit consumers". The General Court further pointed out that *Intel* had not put forward any argument in that regard. Intel made the following claims, which as stated in chapter 1, the General Court did not classify as justifications; (1) that the rebates regarded small financial sums; (2) that the Commission has to establish a foreclosure effect and they did not; (3) that the exclusivity rebates did not involve formal or binding exclusivity obligations; (4) that the exclusivity did not cover all the requirements of the customer; (5) that the exclusivity lasted for a short period and the counterparty could terminate it; (6) that the exclusivity regarded only a minimal portion of the market; (7) that the contracting party is a powerful undertaking; (8) that the AEC-test is an important

[212] Van der Vijver, Objective justification and Prima Facie anti-competitive unilateral conduct : an exploration of EU Law and beyond p.106.
[213] See Chapter 5 above; Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 26, 40-42, 44.
[214] See chapter 6 above.

factor which they should take into account when establishing foreclosure effect; (9) and lastly that their competitor had their greatest economic success in history.[215] In the Commission's decision Intel claimed two major grounds for justification; firstly that Intel only responded to price competition from their rivals and thus met competition, and secondly that the rebate system used vis-á-vis each individual AEM was necessary to achieve efficiencies such as; lowering prices, scale economies, other cost savings and production efficiencies; and risk sharing and marketing efficiencies. [216] The General Court found thus all submitted justifications to be irrelevant and did not offer any guidance on the available scope of the justifications in exclusivity rebate cases, the possibility of justifications was left as an unknown route.[217]

Numerous scholars verify the General Courts reasoning, that *Intel* in fact could have escaped liability if they had put forwards justifications, which the did not, since they had the liability standard to raise economic efficiencies or objective justifications.[218] On the other hand, it has also been held that *Intel* would had been able to justify their actions if the effects-based approach would have been utilized.[219] Other academics argue instead that the presumption of illegality removed the possibility to claim objective justifications, another argument supporting this statement is that there was no need to establish any foreclosure effect, also supporting a 'per se' approach towards exclusivity rebates.[220]

Commentators have also stated the possibility of justifying abusive behaviour with efficiency defences may be limited since Courts have taken a narrow approach efficiency defences, which chapter 5 highlights. *Hoffman-La Roche* and *Van Der Bergh Foods* constrain the possibility of objective justifications for instance. Venit

[215] Case T-286/09 Intel Corp. v. Commission para 99, 102, 106, 107, 110, 112, 114, 125, 138, 140, 185.
[216] Commission Decision of 13 May 2009, COMP/37.990 Intel para1625, 1626, 1632.
[217] Stibbe, The Intel Judgment: existing "form-based" case law prevails in test-case for conditional rebates.
[218] Petit p.16; whish, keep calm and carry on; Wils – the judgement of the eu general court in Intel and the so-called more economic approach to abuse of dominance p.426.
[219] Wils – the judgement of the eu general court in Intel and the so-called more economic approach to abuse of dominance p.426.
[220] Ahlborn & Piccinin, The Intel judgment and consumer welfare – a responde to Wouter Wils p.64; Fulbright, Thill-Tayara & Asins, Intel judgment: persistence in formalism in the legal analysis of rebates.

holds that *Intel* submitted justifications by stating that their discounts were a part of normal price competition and by arguing that their discounts involved several efficiencies including scale economics, other cots, production efficiencies, risk sharing marketing efficiencies etc. The argument that exclusivity intensified price competition was rejected as illegal irrespective of offered by Intel or by their customers. The Commission rejected *Intel'*s arguments for not being linked to the exclusivity condition. Although their arguments were not accepted, it cannot be said that they failed in presenting objective justifications.[221]

The fact that certain scholars have discussed the possibility of a 'per se' abuse in *Intel* does not rule out the possibility of *Intel* establishing a two step analysis in Article 102 TFEU, holding that exclusivity rebates are a prima facie abuse, where the next step depends on the objective justifications brought forward by the dominant undertaking. This reflection is confirmed in *Microsoft* where the General Court argued that the undertakings abuse had to be established prior to considering the justifications brought forward.[222] The assessment in *British Airways* and in *Post Danmark* supports this line of argumentation and further established a similarity with the assessment under Article 101(3) TFEU.[223]

It essential to emphasize that justifications differentiate the approach towards exclusivity rebates from a 'per se' assessment to an effects-based approach. The stipulated justifications in case law have been to either argue that the abusive conduct was objectively necessary or that it brought efficiencies. As concluded in chapter 4, objectively necessary comprises health or safety reasons, which is difficult to argue for non-governmental undertakings. It therefore falls down to the availability of efficiencies. As presented above, *Post Danmark* and the Priority Guidance Paper relies on a broad view of efficiencies, leading to justifications being available and thus enforcing an effects-based assessment of abuse. This view supported the argument made in chapter 7, that Article 101(3) TFEU was being imported to Article 102 TFEU through soft law instruments as well as case law.

[221] Rey & Venit, An effects-based approach to Article 102: A response to Wputer Wils p.26.
[222] Case T-201/04 Microsoft v Commission para 709.
[223] Case C-209/10 Post Denmark A/S v. Konkurrencerådet para 42.

Intel, on the other hand, supports a stricter view moving away from Article 101(3) TFEU.

As mentioned above, Article 101 TFEU held a different approach with different economic reasoning's towards exclusivity rebates in *Delimitis* since it found that exclusivity rebates had several positive perspectives, whereas the General Court in *Intel* in Article 102 TFEU establishes that exclusivity rebates are anticompetitive by nature and that the motives behind the practice are solely anticompetitive. The economic assumption underpinning this argument is unclear, if there are valid pro-competitive justifications for exclusivity rebates, in both economic literature and in the CJEU case law in *Delimitis*, why can this not be adopted, or at least be a possible plea to raise in Article 102 TFEU. The mere fact that the General Court relied on the old established precedent in *Hoffman-La Roche* entails that the legality of the argument is correct, not that the economic reasoning is accurate.[224]

The General Court further held in *Intel* that it had not brought forward any justifications, which leads this analysis to the proof required by undertakings. The burden of proof, as presented above, lays on the dominant undertaking to raise the justification in which it has to prove its justifications with evidence and arguments that reach a sufficient degree of probability, which is a high standard of probability. The Commission on the contrary has to demonstrate that the justifications cannot be accepted by proving that the practice is likely to have anticompetitive effects, which is a lower burden than the undertaking's. Nothing in case law suggest that reaching the required level of probability is simple, but arguing that *Intel* did not put forward any justifications might raise the level to a 'probatio diabolica', where the burden of proof is impossible.[225]

Advocate General Jacobs has confirmed that by the mere finding of a prima facie abuse, that first stage is already a negative outcome, before the justifications have

[224] Ibanes Colomos, Intel v Commission and the problem with wrong economic assumptions.
[225] See more on the concept of probatio diabolica in Ven Der Vijver, Article 102 TFEU: How to claim the application of objective justifications in the case of prima facie dominance abuses? p.122.

been claimed or assessed.[226] The General Court has in previous cases rejected the objectivity and efficiency defences as proper defences and concluded in another case that Article 102 TFEU does not contain any exemptions to the prohibition laid down in Article 102 TFEU since abusive practices are to be prohibited regardless of the advantages they entail.[227] Although the General Court concluded these harsh assessments for dominant undertakings, the CJEU and the Commission in its Enforcement Priority Guidance Paper argued a different line of assessment, where the prima facie abuse is established and where the efficiency claims modelled on economical justifications are relied on, also referred to as denial defence.[228] As presented earlier in the *Microsoft* case, both the CJEU and the Commission relies on the dominant undertaking's burden of raising justifications claims.[229] To claim however, that a conduct 'does not eliminate competition', when it has already been held that the mere existence of a dominant actor hampers competition, is a difficult claim.[230]

The mere text of Article 102 TFEU along with the application of this same text causes confusion. It does not contain any justification provision, nor does it encompass an effect clause, it has yet been applied interpreted as containing such. The lack of legal certainty in this area is due to the practical application of Article 102 TFEU. The CJEU has put effort on making a clear consistent application to Article 102 TFEU where all practices are assessed in the same manner, taking into consideration the effects of a practice and the justifications claimed by the dominant undertaking.[231] As held previously, the General Court did not follow the CJEU's recent efforts in creating a consistent application, which as argued might be a reform left for the CJEU to conduct. Case law is one way to clarify legal certainties, another is the mere text of the provision. Which should incorporate that a dominant

[226] Advocate General Jacobs in Case C-53/2003 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and others v.GlaxoSmithKline AEVE para 72.
[227] Joined Cases T-191/98 and T212/98-214/98 Atlantic Container Line AB and others v Commission.
[228] Nazzini, The wood begun to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases; Brisimi, The interface between competition and the internal market – market separation under Article 102 TFEU p.72.
[229] Suora Note 101,.
[230] Brisimi, The interface between competition and the internal market – market separation under Article 102 TFEU p.73.
[231] AHlborn & Piccinin – The Intel judgment and consumer welfare – a response to Wouter Wils p.75.

undertaking that cannot justify its practice is abusing its dominance, and would then fall under the prohibition laid down in Article 102 TFEU, it would then require an establishment of lack of justifications in order to find abusive conduct. On the contrary, if the justifications are found to be legitimate and proved, then the prohibition of Article 102 TFEU should be hindered. Or the other way around, as in *Post Danmark*, where there CJEU found that there had not been any abusive conduct, and therefore did not assess the justification, which also supports the two-step analysis.[232]

Essential to note in regard to the modest number of justification cases under Article 102 TFEU might depend on the work of the Commission, the main prosecutor of undertakings abusing their dominance, who conducts in-depth analysis of dominant undertaking prior to taking any actions. The Commission is aware of the justifications the dominant undertaking can claim and probably pursues therefore undertakings obviously abusing their dominance and where justification claims serve a minimal role as a defence. Justifications might play a larger role in private litigation cases, where the initial screening is limited in comparison to the Commission's.[233]

To conclude, the General Court opened the door of justifications when stating that they were available, and slightly closed it when arguing that *Intel* had not brought forward any justifications. The Commission and the Courts have interpreted justifications narrowly, the outcome of the *Intel* judgment along with the fact that bringing forward efficiencies in rebate cases is an uphill battle, results in a practical impossible claim, while not qualifying as a 'per se' prohibited, but rather a *modified* 'per se' prohibition.[234]

[232] Brisimi, The interface between competition and the internal market – market separation under Article 102 TFEU p.74: See also Case C-52/09 Konkurrensverket v. TeliaSonera Sverige AB.
[233] Ibid.
[234] See Brian Sher, Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel.*

9 Conclusion

This thesis presented the historic evolvement of the treatment towards exclusivity rebates, where *Hoffman-La Roche* in 1972 established a strict approach holding that exclusivity rebates are anticompetitive by nature and are therefore to be prohibited without taking the circumstances of the case into consideration. The CJEU case law evolved a long with the Commission's launch of the Priority Guidance Paper in 2009, an effects-based approach in the assessment of abusive dominant undertakings. This shift gave rise to a new assessment, namely assessing the effects of a practice rather than condemning the practice in itself with the rationale that the aim is to protect competition and consumer welfare. This new approach was expected to cover all abuses under Article 102 TFEU. However, the *Intel* case from 2014 demonstrated the opposite.[235]

The new approach towards an effects-based assessment has not only taken place in Article 102 TFEU, but also in Article 101 TFEU were practices that have previously undergone a 'per se' prohibition, now require an assessment of the context, content and objectives of that practice. It appears that the general principle of EU law, the proportionality principle, has stepped into competition law and required consumer harm prior to prohibiting a practice, and in relation to both Article 101 and 102 TFEU, by this also creating an alignment of the approaches of assessment and blurring out the contradictory assessments.

The General Court adopted instead an approach that can merely be described as a modified-'per se' approach. The reason for why it is 'modified' is that the General Court held that justification could be brought forward, and the mere existence of justifications removes the presumption of a 'per se' abuse, since it would be contradictory for a practice to be 'per se' abusive but simultaneously justifiable.

[235] See Petit p.16, ithe fact that they could raise justifications supports the 'modified' per se prohibition rule.

The General Court's assessment left the future of the developing effects-based approach uncertain. It firmly concluded that no effects and no circumstances have to be taken into consideration. The General Court left by this, also the future of the Priority Guidance Paper and of the AEC-test uncertain. They emphasized inapplicability and the negatives outcome of the AEC-test. The fresh delivered Advocate General Opinion in *Post Denmark II* of May 21 2015, confirms the reasoning in *Intel* and held that there is no obligation to carry out the AEC-test, that it is prohibited to carry out the AEC-test in a market where it is impossible to be as efficient as the dominant undertaking but that Courts can take it into consideration when assessing all the circumstances of the case.[236] The CJEU supported this line of argumentation by holding that Court's have never classified abuses by solely applying the AEC-test or price/cost analysis, and that it is not an effective economic analysis.[237] The future of the legitimacy of the AEC-test and the Priority Guidance Paper appears to be critical.

The General Court enforced a legal test for rebates based on older precedents, where there are three different categories of abuses and each has to be assessed in a separate manner. The main difference, apart from quantity rebates which are always permitted, are rebates with exclusivity elements and those that do not have any exclusivity elements. The General Court's distinction between exclusive and non-exclusive rebates is not in line with the reasoning in *Delimitis*, which therefore hampers the evolvement of importing Article 101(3) TFEU reasons into Article 102 TFEU, at least concerning exclusivity rebates. The reasons for the distinction between exclusive and non-exclusive rebates is therefore confusion, why is the exclusivity element viewed that negative in comparison to other rebates and why are the economic reasoning that different from those put forward in *Delimitis*, considering that they should not be applied in contradicting manners. Legal certainty must however be argued in regard to dominant undertakings dealing with pure exclusivity rebates, it falls under 'anticompetitive by nature'. However, as Sher put forward, in the real world, where all types of practices are mixed, what happens

[236] Opinion of the Advcate General Kokott in Case C-23/14 Port Danmark A/S v Konkurrencerådet para 69, 72, 74-75.
[237] Ibid para 63-64.

then, what can an undertaking expect?[238] It is a judgment that is inconsistent with other Article 102 TFEU cases, as *Post Denmark*, inconsistent with the economic reasoning of exclusivity rebate cases in Article 101 TFEU, *Delimitis*, but consistent with *Hoffmann-La Roche*. *Hoffmann-La Roche* hinders the General Court's *Intel* judgment from erring in law, which is however no the same as positive judgment for the sake of competition law.

To conclude, the General Court's assessment did not contain an effects-based approach, their approach was very clear, a dominant undertaking offering exclusivity rebates is abusing its dominant position. This is a straightforward approach that would be categorized as a 'per se' approach towards exclusivity rebates, if the General Court would not have argued that justifications are available. Certain scholars argue that this is 'a new test under Article 102 TFEU', which is not in line with my conclusions, which are that the categorization and assessment of rebates presented by the General Court, relies on old established precedents, however organized in a foreseeable way for the dominant undertaking offering rebates. The General Court could have adopted the shift of assessment evolving an effects-based approach towards abuses under Article 102 TFEU, but it selected to follow the old well-established case law precedents.

The General Court's relation to justifications in *Intel* is crucial to understand for future cases. They hold that justifications can be put forward, but that *Intel* did not bring forward any. A rephrase of this sentence to, 'the arguments put forward by *Intel* cannot be accepted', would be more suitable due to that Intel did argue justifications. As presented above, the burden of proof that the dominant undertaking carries is heavy, the objective necessities claim is not addressed for private undertakings and as held above, nothing suggests that efficiencies are easy to claim, on the other hand, they are interpreted narrowly. The outcome of Intel is merely that justification are practical impossible for a dominant undertaking to claim, but that the General Court mentioned them for the sake of completeness.

[238] Sher, Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel.*

The practical impossibility of claiming justifications, a long with the, 'per se' prohibition if we disregard the non-available justifications, puts the dominant undertaking in a prohibited path, where it does not have any practical way out. This is clear for those undertakings offering pure exclusivity rebates, in other term, legal certainty exist for undertakings offering exclusivity rebates, it is prohibited and there are no exemptions to the prohibition. The relationship between the justifications and the abuse is dependent of one another, the more justifications the smaller is the scope of falling under abuse, and vice versa.[239]

This outcome has been heavily criticised by the supporters of the effects-based approach. A preliminary observation is, are the supporters of the effects-based approach for reasons of a modernization of competition law, for the lack of rational economic basis in the 'per se' approach, or due to the self-interest of lawyers? earning large amounts when counselling, who would not be counselled in exclusivity rebate cases since it constitutes an abuse that fall under the prohibition, without any need of assessment.[240]

Rey & Venit hold that Europe is facing a lack of competitiveness, to which my solution would be more competition and fewer prohibitions in order to increase the competitiveness. Competition authorities are inclined to emphasize cooperation rather than competition when disregarding if the as efficient undertaking can compete with its rival when the focus should instead lay on the competition in the market, and on the survival of the fittest, at the same time, even if the as efficient competitor would not survive and thus be excluded from the market, would that cause consumer harm? Preventing consumer harm has after all been the main reason behind competition law politics. As the Opinion of AG Mazák in *AstraZeneca*, how much anticompetitive effect must be found in order to amount to an abuse of dominance is essential, if the requirements are set high, then there is a risk that anticompetitive behaviour will go unchallenged, but if the threshold is low, then there will be a stifling in the legitimate efforts of dominant undertakings.[241]

[239] See e.g. Van Der Vijver.-
[240] See Rey & Venit, An effects-based approach to Article 102: A response to Wouter Wils, p.27.
[241] Opinion of AG Mazák in Case AstraZeneca point 62.

Simultaneously, the behaviour of *Intel*, being a dominant actor and thus encompassing special responsibilities, was a mere attempt to foreclose the market for its competitors, resulting in consumer-harm. Exclusivity rebates, paying retailers to be exclusive and paying computer manufacturers to postpone or cancel the launch of computers containing their rivals processors, is behaviour which the aim of Article 102 TFEU should prohibit is an abuse of dominance. Although the General Court failed to explain why the economic reasoning in *Delimitis* does not apply for dominant undertakings, it cannot be held that *Intel* should have escaped liability, however with other reasonings.

The General Court revived and brought to light well-established precedents to the assessment of exclusivity rebates in the era of the modernization of competition law. It entails a strict approach, were the exclusivity measure is the only prove needed to the prohibition to apply, a prohibition without practical justifications. An area of law that was previously impugned of a lack of legal certainty has now, in sharp contrast, legal clarity in regard to the assessment and the prohibition of exclusivity rebates. Whether the utilization of justifications will be practical possible, awaits in the future, but for now it is practical impossible to claim justification for a dominant undertaking offering rebates. The transformation of competition law towards an effect-based or 'more-economic' approach', in the field of exclusivity rebates, is left for the CJEU in the appeal of *Intel* or *Post Danmark II.*

10 Bibliography

10.1 Table of legislation

Treaty on the Functioning of the European Union (TFEU)

2003 Council Regulation 1/2013/EC of December 16 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

10.2 Case law from The European Court of Justice

Case C-56/65
Société Technique Minière (STM)

Case C-6/72
Europemballage Corp and Continental Can Co Inc v. Commission.

Case 8/74
Procureur du Roi v Dassonville

Case 27/76
United Brands v. Commission

Case 85/76
Hoffman-La Roche & Co AG v. Commission

Case C-120/78
Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.

Case 322/81
Nederlandsche Banden-Industrie Michelin v. Commission

Case 311/84
Centre Belge d'Etudes du Marché-Télémarketing v- Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux

Case C-118/85
Commission v. Italy

Case C-62/86
AKZO Chemie BV v. Commission

Case C-234/89
Stergios Delimitis v. Henninger Bräu AG

Case C-41/90
Höfner and Elser v. Macrotron GmbH

Case C-310/93
P BPB Industries and British Gympsum v. Commission para 11 and Opinion of AG in that case

Case C-333/94
P Tetra Pak International SA v. Commission (Tetra Pak II)

Case C-35/96
Commission v. Italy

Joined Cases C-395/96 P and C-396/96
P Compagnie Maritime Belge Transports v. Commission para 37

Case C-67/97
Albany v. Stichting Bedrijfspensioenfonds Textielindustrie

Case C-309/99
J.C.J Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten

Cases C-2 and 3/01
P Bundesverband der Arzneimitte – Importeure EV

Case C-82/01
Aéroports de Paris v. Commission

Case C-74/04
P Commission v. Volkswagen AG

Case C-95/04
P British Airways v. Commission

Case C-8/08
T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit.

Case C-280/08
P Deutche Telekom v. Commission

Case C-52/09
Konkurrensverket v. TeliaSonera Sverige AB para 24.

Case C-209/10
Post Danmark A/S v. Konkurrencerådet

Case C-549/10
P Tomra Systems ASA v. Commission

Case C-32/11
Allianz Biztosító Zrt. and others v. Gazdasági Versenyhivatal

Case C-67/13
P Groupement des Cartes Bancaires (CB) v Commission

10.3 Case law from the General Court

Case T-30/89
Hilti AG v. Commission

Case T-65/89
BPB Industries Plc and British Gypsum Ltd v Commission

Case T-65/98
Van Den Bergh Foods Ltd v. Commission

Joined Cases T-191/98 and T212/98-214/98 Atlantic Container Line AB and others v Commission

Case T-219/99
British Airways v. Commission

Case T-201
Microsoft v. Commission

Case T-203/01
Manufacture francaise des pneumatiques Michelin v. Commission

Case T-321/05
AstraZeneca v. Commission

Case T-286/09
Intel Corp. v. Commission

10.4 Case Law from the United Kingdom

Case IV/M.1069 WorldCom/MCI (1999) OJ L116/1

10.5 Case law from USA

US Supreme Court:
Tampa Electric Co v Nashville Co, 365 U.S 320 (1961).

10.6 Commission Decision

Commission Decision of 13 May 2009, COMP/37.990 Intel Corp

10.7 Opinion of Advocate Generals

Case C-310/93 P BPB Industries and British Gympsum v. Commission
Opinion of Advocate General

Case C-163/99 Portugal v. Commission
Opinion of Advocate General Mischo

Case C-53/2003 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and others v.GlaxoSmithKline AEVE
Opinion of Advocate General Jacobs

Case C-209/10 Post Danmark A/S v. Konkurrencerådet
Opinion of Advocate General Mengozzi

Case C-457/10 P AstraZeneca v. Commission
Opinion of Advocate General Mazák

Case C-23/14 Post Danmark A/S v Konkurrencerådet
Opinion of the Advocate General Kokott

10.8 Commission's soft law instruments

XI Report on Competition Policy
(Published in conjunction with the 'Fifteenth General Report on the Activities of the European Communities in 1981')
1981

Commissions Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C 372

Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/08

Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary conduct by Dominant Undertakings (2009) OJ C45/2

Guidelines on Vertical Restraints
OJ 2010 C 130/1

10.9 Doctrine

Brisini	The interface between competition and the internal market, Market separation under Article 102 TFEU Published by, Hart Publishing Oxford 2014
Craig & De Burca	EU Law, text, cases and materials Fifth edition Published by, Oxford University Press Oxford 2011

Ezrachi	EU Competition Law, An Analytical Guide to the Leading Cases Fourth edition Published by, Hart Publishing Oxford 2014
Faull & Nikpay	The EU Law of Competition Third edition Published by, Oxford University Press Oxford 2014
Lidgard	Competition Classics, Material & cases on European Competition Law and Practice Part I Published by, Maria Magle Publishing Lund 2011
Jones and Sufrin	EC Competition Law, text cases and materials Third edition Published by, Oxford University Press Oxford 2014
Roger & MacCulloch	Competition Law and Policy in the EU and UK Fifth edition Published by, Routledge New York Suffolk 2015

VerLoren & van Themat

European Competition Law
Published by, Edward Edgar Publishing Limited
Cheltenham
2014

10.10 Articles

Ahlborn & Piccinin, The Intel judgment and consumer welfare – a response to Wounter Wils (2015). Access through: http://library.coleurop.be/pdf/Claeys%20&%20Casteels/CLPD/CLPDissue01.pdf

Allan, Loyalty and fidelity rebates: a sense of déjà vu again (2015)
Access through:
http://library.coleurop.be/pdf/Claeys%20&%20Casteels/CLPD/CLPDissue01.pdf

Azevedo J. P and M. Walker, 'Dominance: Meaning and Measurement' (2002) ECLR 363, 364.

Bain J.S .'Economies of Scale, Concentration and the Condition of Entry in Twenty Manufacturing Industries'.

Fulbright, Thill-Tayara & Asins, Intel judgment: persistence in formalism in the legal analysis of rebates (2014) Access through: http://www.lexology.com/library/detail.aspx?g=6187aefa-a8bc-496e-a0c2-3d76ab856279

Ibánes Colomo Pablo, Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy. LSE LAW Society and Economy Working papers 29/2014. London School of Economics and Political Science, Law Department.

Ibánes Colomo Pablo, Inten v Commission and the problem with wrong economic assumptions (2015) access through: http://chillingcompetition.com/2014/06/16/intel-v-commission-and-the-problem-with-wrong-economic-assumptions/

Ibánes Colomo Pablo, Intel and Article 102 TFEU case law, yet another (this time my very own) paper. Chillin' Competition blog, access through:

http://chillingcompetition.com/2014/12/10/intel-and-article-102-tfeu-case-law-yet-another-this-time-my-very-own-paper/

Ibánes Colomo Pablo, Post Danmark II: setting a legal test for rebates where there is none (I)). Chillin' Competition blog, access through: http://chillingcompetition.com/2015/03/10/post-Danmark-ii-setting-a-legal-test-for-rebates-where-there-is-none-i//

Ibánes Colomo Pablo, Post Danmark II: setting a legal test for rebates where there is none (II). Chillin' Competition blog, access through: http://chillingcompetition.com/2015/03/10/post-Danmark-ii-setting-a-legal-test-for-rebates-where-there-is-none-ii//

Jones & Sufrin, The European way – reflections on the Intel judgment (2015) Access through: http://library.coleurop.be/pdf/Claeys%20&%20Casteels/CLPD/CLPDissue01.pdf

Killick & Jourdan, Canrtes Bancairs: A revolution or reminder of old principles we should never have forgotten? (2014). Access through: https://www.competitionpolicyinternational.com/cartes-bancaires-a-revolution-or-a-reminder-of-old-principles-we-should-never-have-forgotten

Kjølbe L., 'Rebates Under Article 82EC: Navigating Uncertain Waters' (2010)

Kroes, N., 'Preliminary thoughts on policy review of Article 82'

Lovdahl Gormsen Liza, Are Anti-competitive effects necessary for an analysis under Article 102 TFEU? World Competition 36, no 2 (2013): 223-246. @Kluwer Law International BV, The Netherlands

Nazzini, The foundations of European Union Competition Law

Nazzini, The wood begun to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases
European Law Review, 31(4), 518-539 (2006)

Nihoul, The ruling of the General Court in Intel: Towards the end of an effects based approach in European Competiiton Law?
Journal of European Law & Practice, 2014, Vol.5, No.8

O'Donoghue & Padilla, The Law and the Economics of Article 102 TFEU

Sher Brian, Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel.*
Journal of European Competition Law & Practice, 2015, Vol.6, No.4
Published by Oxford University Press

Stibbe, The Intel judgment: existing "form based" case law prevails in test-case for conditional rebates (2014) Access through:
http://www.lexology.com/library/detail.aspx?g=4322128d-d89f-4a1d-1d9c8ce0c73e

Stigler G. J., The Organization of Industry

Petit, Leveraging rebates and the goals of Article 102 TFEU (2014), Available through SSRN: http://ssrn.com/abstract=2567628

Rey & Venit, An effects-based approach to Article 102: A responde to Wouter Wils
World Competition 38, no 1 (2015): 3-30. Kluwer Law International BV, The Netherlands

Ridyard, Derek, Interpreting the as efficient competitor test in abuse of dominance cases, The Competition Law Review, Volume 10 Issue 2 pp 125-143 December 2014

Venit, J, CASE T-286/09 Intel V Commission— The judgment of the General Court: Allt steps backward no steps forward
European Competition Journal, Vol.10, No.2, August 2014,
DOI:10.5235/17441056.10.2.203

Van der Vijver, Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?
Journal of European Competition Law & Practice, 2013, Vol.4, No.2

Van der Vijver, Objective justification and Prima Facie anti-competitive unilateral conduct : an exploration of EU Law and beyond

Van der Vijver, Objective justification and Article 102 TFEU
World Competition 35, no.1 (2012): 55-76. Kluwer Law International BV, The Netherlands

Whish Richard, Intel v Commission: Keep calm and carry on!,
Journal of European Competition Law & Practice Advance Access published November 23, 2014, DOI:10.1093/jeclap/lpu108

Wils Wouter P. J, The Judgement of the General Court in Intel and the so-called 'more economic approach' to abuse of dominance
World Competition 37, no 4 (2014): 405-434- Kluwer Law International BV, The Netherlands

Zenger & Walker, Theories of harm in European Competition Law: A progress report (2012). Access: http://ssrn.com/abstract=2009296