

## **Reply to the European Commission Public Consultation on the Draft Guidelines on the Application of Article 102 TFEU to Exclusionary Abuses**

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### **I. Introduction**

I appreciate the opportunity to provide comments on the European Commission's Draft Guidelines on applying Article 102 TFEU. However, while the Draft Guidelines mark an important step in clarifying the application of Article 102 TFEU, many commentators have expressed concerns over a perceived shift away from the effects-based approach established in the 2009 Guidance and the case law.

Some commentators argue that the new approach places less emphasis on consumer harm and focuses more on formalistic rules, potentially weakening economic assessments of anti-competitive conduct. Others have raised concerns about the introduction of presumptions, which, by shifting the burden of proof onto companies, will reduce legal certainty. The downplaying of the As-Efficient Competitor (AEC) principle is also seen as problematic, highlighting potential conflicts with case law, including Intel and Post Danmark I.

Given these concerns, I believe further clarification could enhance transparency, legal certainty, and consistency in enforcing Article 102 TFEU. My comments below specifically address the concept of the AEC test in general and in the context of fidelity rebates.

### **II. General comments**

- 2.1 I welcome the Commission's approach in clarifying that dominant companies are required to ensure that their behavior does not depart from competition on the merits. This approach ensures that dominant firms, recognizing their special responsibility not to impair competition, must compete based on price, quality, and innovation rather than using exclusionary tactics to strengthen their position.
- 2.2 However, while this is a positive development, further explanation is needed to distinguish this approach from the established legal precedent regarding whether the conduct in question hampers or excludes competition from rivals that are considered **as efficient** as the dominant undertaking.
- 2.3 In this context, further clarification is needed to explain how the '**departure from competition on the merits**' standard aligns with or diverges from the **AEC principle** that has been central to recent case law. This will ensure greater legal certainty in distinguishing legitimate competition from exclusionary conduct that harms competition and consumer welfare.
- 2.4 Next, the introduction of presumptions in the Draft Guidelines seems appropriate and reasonable as a starting point in terms of saving enforcement costs and risk of errors – both false positives and false negatives - which create predictability and legal certainty and minimise the cost of enforcement. However, the introduction of presumptions could make

it more challenging for companies to predict enforcement outcomes. This is because the criteria for what kind of evidence would be sufficient to rebut the presumption of anticompetitive effects have not been clearly defined.<sup>1</sup>

2.5 While presumptions might streamline enforcement procedures, their broad application should be carefully considered to avoid undermining the rigorous economic analysis that has traditionally ensured a balanced and fair application of competition law. It is recommended that the Draft Guidelines include clearer provisions on when and how presumptions apply, ensuring they complement - rather than replace - the in-depth, effects-based analysis that is foundational to Article 102 TFEU.

### III. Specific recommendations

#### A. The as efficient competitor test (AEC) as a principle

3.1 The Commission should elaborate the As-Efficient Competitor (AEC) principle in the Draft Guidelines, as it plays a crucial role in the case law under Article 102 TFEU. The AEC principle has been consistently reaffirmed by the EU Courts, including in landmark cases such as *Intel*, *Post Danmark I*, and *Qualcomm*.<sup>2</sup>

3.2 More recently, the CJEU confirmed this principle in the *Unilever* judgment.<sup>3</sup> In its reasoning, the CJEU starts with reiterating that the purpose of Article 102 is to ensure that effective competition is not distorted, clarifying that a dominant undertaking is not prevented from competing on the merits, and that not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalization of less efficient competitors and so are less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.<sup>4</sup> Thus, only if a competitor which is at least as efficient as the dominant undertaking in terms of, among other things, price, choice, quality or innovation is excluded, should the conduct be considered abusive;<sup>5</sup> this is a principle already established in the case law.<sup>6</sup>

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<sup>1</sup> K. U. Kühn & M. Marinova, The Role of the 'As Efficient Competitor' Test after the CJEU Judgment in *Intel*, 4(2) Competition Law & Policy Debate 64 (2018).

<sup>2</sup> Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172 and judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632 (hereinafter the 2017 CJEU *Intel* judgment); case T-235/18 *Qualcomm v Commission* ECLI:EU:T:2022:358.

<sup>3</sup> Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33.

<sup>4</sup> *Unilever Italia*, para 37. The CJEU referred to its judgment in Case C-377/20 *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato* EU:C:2022:379, para. 73 and the case law cited therein.

<sup>5</sup> *Unilever Italia*, para. 37.

<sup>6</sup> *Unilever Italia*, para. 39. The CJEU referred to its judgment in *Servizio Elettrico Nazionale*, paras 69, 71, 75 and 76 and the caselaw cited therein.

- 3.3 Most recently, the principle was confirmed by the CJEU in the *Intel* judgment, where the Court held that Article 102 prohibits an undertaking holding a dominant position from engaging in practices, including pricing practices, which have an exclusionary effect on competitors considered to be as efficient as the dominant undertaking itself.<sup>7</sup> Next, the Court clarified that to prove that conduct restricts competition, all relevant facts and specific evidence must be considered - regarding the conduct itself, the market, and competition dynamics - to show that it is capable of causing exclusionary effects.<sup>8</sup>
- 3.4 These rulings emphasize that the primary concern under Article 102 is the exclusion of equally efficient competitors, ensuring that dominant firms compete on the merits without distorting effective competition.
- 3.5 This foundational idea behind the AEC principle is rooted in the belief that competition among efficient companies inherently leads to increased efficiency and greater consumer welfare. The rationale behind this idea is that conduct that excludes less efficient rivals is a consequence of effective competition, the so-called competition ‘on the merits’; in these circumstances, even if some competitors are excluded from the market, effective competition is not eliminated.<sup>9</sup> In this sense the AEC principle encapsulates the idea that competition policy should protect competition and not competitors.
- 3.6 In my view, the AEC principle also aligns with the Commission's perspective on what constitutes a ‘departure from competition on the merits,’ as discussed in the draft Guidance Paper. The AEC principle is abstract and flexible, encompassing situations where competitors may impose competitive constraints on the dominant company even if they are not strictly as efficient. This includes competitors who might be less efficient or not yet fully efficient. By incorporating this broader notion, the AEC principle helps to distinguish between genuine competition on the merits - where actions are driven by efficiency - and conduct that harm competition by unfairly excluding rivals, regardless of their efficiency level. I consider that this interpretation reflects the current case law under Article 102.
- 3.7 However, there is still confusion about the meaning of the AEC principle which is still conflated with the AEC price-cost test.<sup>10</sup> For example, one commentator observed that: ‘para. 145(f) (of the draft Guidance) recognizes the AEC principle as one potentially relevant factor to identify departure from competition on the merits...’ Here, the commentator considers the AEC test as a price-cost test, not as a principle.

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<sup>7</sup> Case C-240/22 P, *Intel Corp. v European Commission*, Judgment of the Court, ECLI:EU:C:2024:915, 25 October 2024 (hereinafter the 2024 CJEU judgment), para 177.

<sup>8</sup> *Ibid.*, para 179.

<sup>9</sup> M. Marinova, *Fidelity Rebates in Competition Law – Application of the ‘As Efficient Competitor’ test* (Wolters Kluwer 2018) and K. U. Kühn & M. Marinova, *The Role of the ‘As Efficient Competitor’ Test after the CJEU Judgment in Intel*, 4(2) *Competition Law & Policy Debate* 64 (2018)

<sup>10</sup> For a full analysis about the difference between the price cost test and the as efficient competitor test as a concept see Marinova (fn 9). Recently, this has been the established interpretation in the academic literature and policy speeches. However, at the time of the writing, this important clarification has not been confirmed by the EU Courts.

- 3.8 The same confusion can be seen in the case law. For example, the CJEU judgment in *Intel* in 2017 held that a dominant company can be prohibited from adopting pricing practices that can exclude a competitor as efficient as the dominant company, which strengthens its dominant position. The CJEU considered that the Commission is required to analyse all the circumstances and to assess the possible existence of a strategy aiming to exclude from the market competitors that are at least as efficient as the dominant undertaking.<sup>11</sup> From this perspective, the AEC test should be interpreted as a conceptual principle, according to which Art. 102 TFEU is only concerned about the exclusion of equally efficient rivals. However, in para 139 of the 2017 judgment, the CJEU did not clarify whether, in the evaluation of a strategy aiming to exclude an as efficient competitor, a price-cost test that measures whether an as efficient competitor with the same cost structure would be able to match its prices and, thus, to compete without incurring losses (this is because the price-cost test is a test that measure whether the dominant company is sacrificing profits) is required, or it has to be considered because the Commission decided to apply it and Intel raised it as a defence. However, some behaviors can still exclude an as efficient competitor and produce anti-competitive effects without the company needing to price below cost, such as in cases of non-price abusive practices.
- 3.9 The same position can be observed in the 2022 GC judgment in *Intel*, where the GC agreed with the initial judgment that the contested rebates were characterised as "exclusivity rebates." However, according to GC, the fact that these were "exclusivity rebates" did not negate the need for an AEC test and it was still essential to determine whether these rebates could restrict competition. Here, the Court considers the AEC test as a principle, indicating that competition is harmed only when an equally efficient competitor is excluded. It also clarifies that the AEC test is not an indispensable part of the assessment in examining the foreclosure capability of all rebate systems but can be a relevant factor where the Commission has carried it out as part of its assessment of the anti-competitive effects of the rebate schemes. Here, the GC considers the AEC test as a price-cost test. Indeed, a considerable part of the GC's decision was devoted to assessing the evidence used by the Commission in the application of the price-cost test and the arguments submitted by the applicants.<sup>12</sup>
- 3.10 However, despite the careful review of the price-cost test conducted by the Commission, the 2022 GC's decision in *Intel* left more questions than answers as it remains unclear how the results of the test, even if applied correctly, fit with the rest of the evaluative criteria/market conditions. In addition, the question of as to whether the price-cost test is a supportive or decisive factor in finding an infringement of Art. 102 is also omitted. Next, does the positive result of the price-cost test mean that the conduct is not an abuse of dominance even if the other circumstances suffice to show the risk of anticompetitive foreclosure? The correct question was whether the Commission's decision to use the price-cost test in this particular case was appropriate at all?<sup>13</sup>

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<sup>11</sup> The 2017 CJEU *Intel* judgment, para 139.

<sup>12</sup> *Ibid*, paras 128-149.

<sup>13</sup> For a colourful explanation of the inapplicability of the test see David Foster's note: The Almost Exsanguinated Corpse (AEC) and other crimes: the *Intel* saga returns, Published on January 27, 2022 at

- 3.11 Next, the 2022 GC judgment in *Intel* failed to address many important questions regarding the application of the AEC test, simply because the GC was following the framework set out by the CJEU. The GC assessed the evidence used by the Commission in the application of the price-cost test and the arguments submitted by the applicants and concluded that the Commission made an error in its application of the AEC test. The question as to whether the price-cost test was appropriate at all in this particular case was not discussed.
- 3.12 More concerning is the CJEU interpretation in the *Unilever* judgment. This is because the CJEU reaffirms the AEC as a principle stating that conduct is only considered abusive if it excludes a competitor that is at least as efficient as the dominant company. The CJEU refers to the AEC test as a principle encompassing various methods to assess whether a company's behavior could exclude a hypothetical equally efficient competitor. This statement refers to the general principle of the AEC as outlined above. However, the CJEU goes further by stating that this assessment includes determining if such a competitor could viably match the pricing or incentives offered by the dominant firm, effectively treating the AEC test as a price-cost test.<sup>14</sup> The CJEU also notes that this test may be unsuitable for assessing non-pricing practices or in markets with significant barriers, as it primarily focuses on price competition.<sup>15</sup> Despite this, the CJEU's approach creates confusion because it does not clearly distinguish between the broader AEC principle and the specific price-cost test, leading to ambiguity in how these concepts should be applied.
- 3.13 The CJEU's recent *Intel* judgment (October 29, 2024) has added further confusion. In paragraph 144 (also in paragraph 180), the CJEU interprets its 2017 judgment (paragraphs 137-139) as meaning the Commission must assess whether a dominant company's strategy excludes equally efficient competitors only if the company submits evidence during the administrative procedure to show its conduct wasn't anti-competitive or had no foreclosure effects. This creates ambiguity about whether the Court considers a price-cost test specifically or any form of evidence that can rebut the presumption of anti-competitive effect, and whether this test is required or only when evidence is provided by the dominant company.
- 3.14 Based on that, it is recommended that the Commission should explicitly incorporate the AEC principle, either as a core principle or as a conceptual tool to assess whether conduct by a dominant firm constitutes abuse and clearly **distinguish the concept from the price-cost test that is only one type of evidence that can be used in pricing practices.** Even if the Commission opts for a broader "competition on the merits" framework, it is essential to provide clarity on how the AEC principle will continue to be relevant and applied in future enforcement actions, ensuring alignment with existing case law and maintaining legal certainty.

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<https://www.linkedin.com/pulse/almost-exsanguinated-corpse-aec-other-crimes-intel-sagadavidfoster/?trackingId=LMJbwuwmWDgzqa%2BwmTlaDQ%3D%3D>

<sup>14</sup> *Unilever Italia*, para. 56.

<sup>15</sup> *Unilever Italia*, paras 56-57.

## **B. The distinction between price-based and non price-based conduct**

- 3.1 I welcome the clarification provided by the Commission in paragraph 56 of the Draft Guidelines, which aligns with my previously expressed views regarding the distinction between pricing practices - where a price-cost test is required - and non-pricing practices - where such a test is generally inappropriate. This position reflects the evolution of case law and economic theory.
- 3.2 In my previous submission, as well as my academic publications, I highlighted the importance of applying the price-cost test to price-based practices and argued that its application is critical in determining whether the exclusionary effects of pricing practices, such as margin squeeze or predatory pricing, are anti-competitive and should be excluded from the assessment of non-pricing conduct.<sup>16</sup> I am pleased to see that the Commission has incorporated this principle in paragraph 56 of the Draft Guidelines, where it is stated: "*In the case of certain pricing practices, namely predatory pricing and margin squeeze, a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on the merits.*" This fully reflects my earlier recommendation, and it is aligned with the case law.
- 3.3 In addition, the Draft Guidelines have made significant and important clarifications in the context of **non-price-based conduct**. In my previous recommendations, I supported the view that non-price-based practices, such as fidelity rebates, should not rely on the price-cost test as a necessary tool for determining exclusionary effects.<sup>17</sup> Instead, economic theory, particularly the raising rivals' cost framework, supports the conclusion that exclusionary strategies can be anti-competitive even when prices remain above cost. This view is consistent with the 2014 GC's judgment in *Intel* which made clear that the price-cost test is irrelevant for assessing exclusivity rebates because such rebates are not directly related to pricing conduct.<sup>18</sup> The Court found that the exclusionary effects of such rebates can arise even if an as-efficient competitor could theoretically compete.
- 3.4 This position has now been echoed in paragraph 56 of the Draft Guidelines, where the Commission asserts that '*a price-cost test is generally inappropriate for assessing whether non-pricing practices depart from competition on the merits.*'
- 3.5 The Draft Guidelines reflect this principle by confirming that the price-cost test should not be applied to non-pricing practices, which I view as a crucial clarification that aligns with

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<sup>16</sup> See in general Miroslava Marinova, *Fidelity Rebates in Competition Law – Application of the 'As Efficient Competitor' test* (Wolters Kluwer 2018) and more recently, Miroslava Marinova, 'Rethinking the "As Efficient Competitor" Test: Assessing the Wider Impact of the CJEU's Judgment in Unilever Italia and Its Implications in Shaping the European Commission's Agenda to Reform Article 102 TFEU' (2024) 23(1) Competition Law Journal 1.

<sup>17</sup> This position is reflected in my publications since 2016, e.g Miroslava Marinova, 'Should the Rejection of the "As Efficient Competitor" Test in the Intel and Post Danmark II Judgements Lead to Dismissal of the Effect-Based Approach?' (2016) 12(2-3) European Competition Journal 387; Miroslava Marinova, *Fidelity Rebates in Competition Law – Application of the 'As Efficient Competitor' test* (Wolters Kluwer 2018).

<sup>18</sup> Marinova, *Fidelity rebates in competition law*, p 156.

the case law and economic reasoning. This clarification is even more important in light of the 2024 *Intel* judgment of the CJEU, which gives mixed signals.

3.6 This is because in paragraph 181, the CJEU considers that the AEC test is generally used to assess whether loyalty rebates by a dominant company could exclude an equally efficient competitor. The Court added that this test evaluates if a competitor, facing the same costs, could replicate the dominant company's rebate strategy, thereby determining if the practice aligns with "normal" competition or fair market practices. This implies that the Court may view the AEC test as a standard approach for evaluating loyalty rebates. However, the Court's reference to the *CEN* judgment (paras. 80-82) raises an important point. It groups loyalty rebates with other price-related practices (such as predatory pricing and margin squeezing), treating them as forms of pricing conduct (the CJEU in referring only to *TeliaSonera* – a price-based abuse). On the other hand, an alternative line of case law suggests that the price-cost test might be unsuitable for assessing non-pricing practices (for example focused on contractual exclusivity rather than pricing alone). This distinction indicates that loyalty rebates could be analyzed either as pricing or non-pricing practices, depending on the context, reflecting an ongoing debate about their categorization. The 2009 Guidance Paper recognizes this and states that the assessment of anti-competitive foreclosure in cases of non-price conduct, such as exclusive purchasing, refusal to supply, and tying, should be evaluated without using a price-cost test. Arguably, the case law has long recognized that some forms of conduct can be exclusionary without involving below-cost pricing.

3.7 The Commission should clearly distinguish between price-based and non-price-based abuses, clarifying that the price-cost test is only applicable when exclusion is achieved through pricing or when effects are quantifiable. The revised Article 102 Guidelines should differentiate between conditional rebates with effects similar to exclusive purchasing obligations (non-price conduct) and those that function as pricing mechanisms. This distinction is essential to choose the appropriate assessment framework: if rebates are deemed pricing conduct, a price-cost test is relevant; if non-price, then qualitative evidence should guide the analysis of anti-competitive effects.

3.8 If fidelity rebates contain a combination of discount and other provisions leading to exclusivity, they should be evaluated under the law of exclusive dealing, in which case the existence of a strategy aiming to exclude an equally efficient competitor does not require the application of a price-cost test. In those cases, the treatment of fidelity rebates is clearly effects-based without necessarily conducting a price-cost test.

### **C. The price-cost test to conditional rebates**

3.9 In the 2009 Guidance Paper, the Commission introduced a modified price-cost test to evaluate retroactive conditional rebates, which was later applied in the *Intel* case.<sup>19</sup> This approach differs substantially from the standard price-cost tests endorsed by the EU Courts in other cases involving pricing abuses, such as *TeliaSonera*, *Deutsche Telekom*, and *Post*

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<sup>19</sup> *Intel* (Case COMP/37.990) Commission Decision [2009] OJ C227/13.

*Danmark I*.<sup>20</sup> The standard price-cost tests in these cases have been recognized as appropriate for assessing whether a dominant firm's conduct is anti-competitive, whereas the Commission's modified test for conditional rebates remains highly intricate and has not received similar recognition.

3.10 The Commission's decision to apply this test in *Intel* - despite clarifying it was only for completeness and not central to the legal assessment - contributed to the Commission losing the case, primarily on procedural grounds. There remains, however, no clear substantive guidance on how or when this modified price-cost test should be applied in future cases.

3.11 Although the Commission stated that the draft Guidance aims at reflecting the EU courts' case law on exclusionary abuses, the inclusion of the modified price-cost test to conditional retroactive rebated in the draft is concerning. The test is not only novel and intricate but also susceptible to implementation errors, and no court has endorsed it as a suitable tool for identifying abuse. I believe that it is precisely due to these complexities and the high risk of errors that the courts have not supported this approach.

3.12 In addition, para 149 of the Draft Guidelines attempts to clarify the test by explaining that it involves determining the "contestable share" - the portion of demand that customers can realistically switch to competitors. This is contrasted with the "non-contestable share," which represents the demand that customers will likely secure from the dominant company, assuming it remains an unavoidable trading partner. However, there is no clarity on how to estimate contestable and non-contestable shares. In addition, the footnote attached to this explanation (Footnote 327) complicates matters further, suggesting that assessing the contestable share may face significant limitations, including speculative evaluations regarding potential new entrants.

3.13 In my previous submission, I outlined the issues with the modified price-cost test applicable to retroactive conditional rebates, which will be explained in more detail below.<sup>21</sup>

3.14 When the dominant company is an unavoidable trading partner, customers normally buy a certain amount of their requirements from the dominant company, the so-called 'assured' base of sales (or non-contestable part of demand).<sup>22</sup> This results in the establishment of both a non-contestable and contestable part of demand, creating a situation where competitors are unable to compete for the entire demand (this is based on the fact that the dominant company is unavoidable trading partner).

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<sup>20</sup> Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-172, EU:C:2012:172 (*Post Danmark I*); Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, EU:C:2011:83; Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-955, EU:C:2010:603.

<sup>21</sup> This section is based on the paper: Miroslava Marinova, 'Rethinking the "As Efficient Competitor" Test: Assessing the Wider Impact of the CJEU's Judgment in *Unilever Italia* and Its Implications in Shaping the European Commission's Agenda to Reform Article 102 TFEU' (2024) 23(1) *Competition Law Journal* 1.

<sup>22</sup> Customers may prefer a dominant company's product because it is a 'must stock' product (i.e. the company is dominant because the product has a strong brand or because of the inelastic demand for it) or because a competitor is capacity constrained to serve the total demand, such that the dominant company is an essential trading partner and customers normally buy certain amounts of their requirements from the dominant company.



- 3.15 In the case of retroactive conditional rebates applied by a dominant company with unavoidable trading partner status, a traditional predatory pricing price-cost test becomes irrelevant. This is because the demand is divided into non-contestable and contestable parts, and real competition only occurs for the latter.<sup>23</sup> For this reason, a modified price-cost test, which aims to compare the price with the loyalty discount for all purchased units attributed only to the contestable sales with the costs of providing these incremental units, was proposed.<sup>24</sup> This is exactly the test that the Commission adopted in its 2009 Guidance Paper as the AEC test that is applicable to conditional retroactive rebates in the Draft Guidance. This is also the test applied in the *Intel* decision.
- 3.16 The implementation of this test requires identifying the effective price calculated over the relevant range of sales for the specific period, which is dependent on the contestable share of demand - i.e., how much of a customer's purchase requirements can realistically be switched to a competitor as specified in paragraph 149 of the Draft Guidance. Therefore, defining the contestable portion of demand is outcome determinative.<sup>25</sup>
- 3.17 However, determining the contestable portion of demand poses challenges as it varies for each customer and is likely to be influenced by industry and product characteristics, making its practical implementation difficult and leading to unpredictability.<sup>26</sup> This is exactly why the Commission used footnote 327, according to which: '*The exercise of assessing the contestable share may be subject to significant limitations. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible.*'

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<sup>23</sup> J. Jacobson, 'A Note on Loyalty Discounts' (2010), *The Antitrust Source* 1, available at <https://www.jdsupra.com/legalnews/a-note-on-loyalty-discounts-33738> [accessed 3 April 2024]; B. Klein and A. Lerner, 'Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts' (2016) 80(3) *Antitrust L.J.* 631, p.633.

<sup>24</sup> Initially, the modified price-cost test for fidelity rebates was recommended by Areeda and Hovenkamp (see P. Areeda and H. Hovenkamp, *Antitrust Law* (3rd edn, Boston, Little, Brown, 2008) p.341) and later on supported by Klein and Lerner, p. 633. At the EU level, see e.g. D. Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1(1) *Journal of Competition Law and Economics* 149 and G. Federico, 'When are Rebates Exclusionary?' (2005) 26(9) *European Competition Law Review* 477. The test was proposed by the US Department of Justice (see DoJ, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (September 2008), available at <https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act> [accessed 3 April 2024]) and withdrawn one year later (see DoJ press release, Justice Department Withdraws Report on Antitrust Monopoly Law (11 May 2009)). According to the Department for Justice, no court endorsed this modified test: see OECD, *Bundled and Loyalty Discounts and Rebates* (DAF/COMP(2008)29) (December 2008).

<sup>25</sup> D. Moore and J. Wright, 'Conditional Discounts and the Law of Exclusive Dealing' (2014) 22 *George Mason Law Review* 1205, 1242.

<sup>26</sup> In its submission to the OECD's 2008 report into Bundled and Loyalty Discounts and Rebates (the Office of Fair Trading Recognized that the estimation of the contestable part of demand is the most difficult aspect of the test: see OECD, p.126; see also OECD, *Fidelity Rebates* (DAF/COMP(2016)5) (March 2016), para. 64. See also H. Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8(4) *Journal of Competition Law and Economics* 717 and R. t Lande, 'Should Predatory Pricing Rules Immunize Exclusionary Discounts?' (2006) *Utah Law Review* 863, p.880.

3.18 Thus, the challenge lies in determining the contestable share of demand. Indeed, the ambiguity in defining the contestable share can lead to unpredictable outcomes and disagreements between parties relying on different calculations, as witnessed in the *Intel* saga.

3.19 In its latest judgment in the *Intel* case, the CJEU introduced further confusion around the application of the modified price-cost test. In paragraph 43, the CJEU listed paragraphs 152 to 159 of the 2022 GC judgment, which are devoted to general considerations on the AEC test (the modified price-cost test) carried out in the decision. In those paragraphs, the GC explains the essence of the modified price-cost test, which explains that the AEC test is designed to assess whether an equally efficient competitor could sustainably compete against Intel despite Intel's exclusivity rebates. The test assumes that Intel, given its brand, product profile, and dominant market position, is an unavoidable supplier for OEMs, meaning these OEMs would always buy at least some CPUs from Intel. Thus, Intel could leverage this "non-contestable share" to offer discounts on the remaining "contestable share." For an equally efficient competitor to capture this contestable share, it would need to offer a price that compensates OEMs for the exclusivity rebates they would lose by reducing their purchases from Intel. This "effective price" is then compared to Intel's average avoidable cost (AAC): if the effective price falls below AAC, the rebates are deemed to potentially foreclose competition (a negative AEC test result). If the price is above AAC, it suggests the competitor could cover costs and enter the market (a positive AEC test result).

3.20 In contradiction to this explanation, on the next paragraph of the judgment (paragraph 44, this is also repeated in paragraphs 146 and 182), the CJEU states that the Commission's AEC test methodology hinges on comparing the "contestable share" (the portion of a customer's demand potentially open to competitors) to the "required share" (the portion a competitor as efficient as Intel would need to capture to enter the market profitably). A positive AEC test result, favorable to Intel, occurs if the contestable share exceeds the required share. Conversely, a negative result suggests the rebates might foreclose an equally efficient competitor. This interpretation bases the test result on a simple comparison between the "contestable share" and the "required share" (**Contestable vs. Required Share**). However, in para 43, the test compares the "effective price" (the price a competitor would need to offer to offset Intel's rebates) to Intel's average avoidable cost (AAC) (**Effective Price vs. Average Avoidable Cost**).

3.21 In addition, there is a line of case law that does not provide sufficient clarification on this position as it discusses the application of a price-cost test in general.<sup>27</sup>

3.22 For example, the 2014 GC judgment in *Intel* clarified that the AEC test (in terms of price-cost test) cannot capture the rebates' anti-competitive nature and the foreclosure effects could arise even if an as efficient competitor could theoretically enter the market. This statement indicates that the GC considered that the test is prone to false negatives in

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<sup>27</sup> This part of my statement is based on my paper: Miroslava Marinova, "The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga." *European Papers-A Journal on Law and Integration* 2022.2 (2022): 627-639.

holding that even if a competitor is able to cover its costs, this does not mean that there is no foreclosure effect. This statement could be interpreted as suggesting that even if the test is passed by the dominant company, the existence of other evidence, such as unavoidable trading partner status, the significant part of demand secured for the dominant company, retroactivity of rebates in combination with additional anti-competitive conditions, i.e. the naked restrictions, would be sufficient for considering Intel's practice as capable of harming competition. The GC did not discuss the price-cost test in detail.

3.23 In addition, the GC's rejection of the price-cost test in its initial judgment in Intel is in line with the position of many academics arguing that the test is subject to significant implementation errors for a number of reasons.<sup>28</sup> Firstly, the accuracy of the test depends on the proper estimation of the contestable share of sales, which is a difficult, expensive and unpredictable task.<sup>29</sup> For example, in the context of bundled rebates, the discount for the bundle should be attributed to the competitive product in the bundle (which is a distinct product), whereas in the context of single product rebates, the discount should be attributed to the contestable share of demand for one product. From this perspective, although the economic logic of the test is similar for both single-product retroactive rebates and bundle rebates, its practical implementation differs significantly in terms of an estimation of the contestable part of demand.

3.24 In the *Post Danmark II* judgement, the CJEU considered the application of a price-cost test as irrelevant for this particular case for two main reasons. Firstly, the Court considered that the characteristics of the market under consideration in this particular case could not accommodate a competitor as efficient as Post Danmark, in which case the presence of a less efficient competitor still might impose a competitive constraint on the dominant company.<sup>30</sup> Secondly, the CJEU held that the application of the AEC test does not constitute a necessary condition for a finding of abuse, which means that there is no legal obligation to make use of that test. Again, no discussion of the test in detail.

3.25 More, recently, in *Google Android*, the General Court stated that the Commission was required to assess whether the practice excludes competitors that are at least as efficient as the dominant undertaking using a test known as the 'as efficient competitor', which can be useful, but did so without clarifying whether this test is always necessary.<sup>31</sup> However, the General Court was clear that where the Commission applies the AEC test, it

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<sup>28</sup> Steven Salop, 'The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-cost Test' (2017) 81 (2) Antitrust Law Journal.

<sup>29</sup> Hans Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8(4) Journal of Competition Law and Economics, 717; Derek Moore and Joshua Wright, 'Conditional Discounts and the Law of Exclusive Dealing' (2014) 22 George Mason Law Review 1205, 1242; Robert Lande, 'Should Predatory Pricing Rules Immunize Exclusionary Discounts?' (2006) Utah Law Review 863, 880.

<sup>30</sup> Indeed, many commentators argued that in certain markets the exclusion of a less efficient competitor can lead to persistent market power and as such, consumers could be better off if some less efficient competitors are protected. See Kuhn and Marinova, 67.

<sup>31</sup> *Google and Alphabet v. Commission (Google Android)*, paras 640 -641.

must do so ‘rigorously.’<sup>32</sup> In addition, the General Court expressed ‘*doubts as to the correctness and validity of the AEC test carried out by the Commission.*’<sup>33</sup> As a result, the General Court found the Commission’s analysis using this test to be erroneous, largely for procedural reasons and annulled the Commission’s decision; however, it nevertheless considered portfolio-based revenue sharing agreements to constitute a separate abuse.<sup>34</sup> For similar reasons, the Commission’s decision in *Qualcomm* was annulled by the General Court.

3.26 Even more confusing is the statement in paragraph 383 of the 2024 CJEU judgment in *Intel*. The Court is explaining that the AEC test is designed as a theoretical framework to assess whether an equally efficient competitor could be excluded by Intel’s rebate practices, regardless of whether AMD or other actual competitors remained in the market. This means that the test might show that rebates could foreclose an equally efficient competitor, even if no competitor was forced out in practice, or vice versa. The implication is that the test might yield results that are not necessarily indicative of actual abuse in every scenario. The Court points out that the AEC test assesses potential foreclosure in a hypothetical scenario, not actual market outcomes. However, if the test cannot reliably inform whether abusive practices exist, it raises questions about the added value of such a complex, costly, and time-consuming process.

3.27 This question is of great importance because the appropriate treatment of fidelity rebates needs not only to be accurate and to minimise enforcement errors but also easy to administer in terms of the limited resources of the National Competition Authorities and courts. On this point, the AG Kokott in her opinion argues that ‘...*the added value of expensive economic analyses is not always apparent and can lead to the disproportionate use of the resources of the competition authorities and the courts.*’ This statement puts into question whether the modified price-cost AEC test is appropriate given its cost of administering in practice and whether it justifies the resources for its implementation?

3.28 Another shortcoming of the modified price-cost AEC test is the uncertainty around an investigation of ‘other factors’ where the effective price is between average avoidable cost (AAC) and long-run average incremental cost (LRAIC). This additional qualification makes the approach even more uncertain and unpredictable.

3.29 From the above, it can be suggested that this modified price-cost test although economically rational is subject to implementation errors and cannot rule whether the conduct would lead to anticompetitive exclusion. In particular and based on a considerable set of academic sources, fidelity rebates granted by a dominant company can lead to anti-competitive exclusion even if the dominant company’s price is above an appropriate measure of costs.

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<sup>32</sup> *Google Android*, para. 644.

<sup>33</sup> *Google Android*, para. 752.

<sup>34</sup> *Google Android*, para. 802.

- 3.30 What matters is an exclusion of a competitor that is at least as efficient as the dominant one, regardless of whether a price-cost test is met or not. The Commission's Guidance Paper recognises this, and proposes that the assessment of anti-competitive foreclosure in cases of non-price conduct, such as exclusive purchasing, refusal to supply and tying should be evaluated without a price-cost test. Arguably, the case law has long recognised that some forms of conduct can be exclusionary without involving below-cost pricing.<sup>35</sup>
- 3.31 From this perspective, it seems that the modified price-cost test, although economically rational, does not 'meet the requirements of "administrability" and "certainty" that should always apply to the tests used by competition authorities and courts for assessing the legality of dominant firms' practices.' For that reason, the Commission should abandon the modified price-cost test applicable to conditional retroactive rebates in the new Article 102 Guidelines.

**D. The difference between incremental and retroactive conditional rebates (safe harbour)**

- 3.32 Whilst I welcome the clear differentiation between incremental and retroactive conditional rebates in paragraph 147 of the Draft Guidelines, I consider that more clarification is needed.<sup>36</sup> This is because, it is important to clarify when conditional rebates fall within a pricing or non-pricing category, ***which is crucial for the choice of the appropriate framework for their assessment.***
- 3.33 If conditional rebates are regarded as pricing conduct, like in some forms of incremental conditional rebates, an application of a price-cost test would be relevant for the evaluation of their anti-competitive effect; whereas if they are regarded as non-price conduct, an evaluation of qualitative evidence rather than comparing price and cost would be relevant. However, this clarification is omitted in the Draft.
- 3.34 For example, incremental rebates are granted to a customer, depending on the purchased volume and are applicable only to those units that exceed the threshold once the particular threshold has been reached. They could be applied either when the threshold is set as a standardised volume target applicable to all customers (**standardised incremental rebates**) or as an individualized volume target, specific to each particular customer (**individualised incremental rebates**). The difference is that in the former case, rebates are granted across the board, whereas, in the latter, rebates are offered taking into account the specificities of individual clients.
- 3.35 In the first case, discounts are offered to all customers regardless of their size and applied only for additional units once the threshold has been reached. In this format, the rebates are designed to expand manufacturer's production by selling more units. The higher

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<sup>35</sup> Case C-53/92 P *Hilti v Commission* [1994] ECR I-667; Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951, para 41.

<sup>36</sup> This section is based on Marinova, Fidelity rebates in competition law - Chapter 3.

sales will bring incremental cost savings and, thus, a realisation of economies of scale (because the unit costs of production fall with the increase of total production) and faster recovery of fixed costs.<sup>37</sup> On the other hand, customers have to increase their sales efforts to be able to purchase additional units and to obtain the discount.<sup>38</sup> As a result, total sales in the market will be increased. In this sense, volume rebate schemes serve as a tool that increases sales, total output and consumer welfare. In this sense, it is safe to assume that this form of rebate is beneficial to consumers because they reflect cost savings in distribution. Consequently, they have been considered by the EU Courts as legal.<sup>39</sup>

3.36 In the second case, discounts are offered and negotiated with each customer individually. They are linked to volume targets and applied only for the purchased additional units once the threshold has been reached. If the threshold is set as an individualised volume target depending on the customer's total demand, a loyalty effect is likely to occur. If the dominant company offers a very high percentage discount, and the threshold is set at a level that would anyhow be purchased by the client (i.e. individually), the customer will be induced to buy additional units at a lower price from the dominant company instead of another supplier. In this sense, the lower price for the additional units is the feature that urges the customers to purchase more units from the discounter, which means that the price is the feature that is driving customer's behaviour.<sup>40</sup>

3.37 In these cases, the price-cost test is an important part of the assessment and can be accepted as a decisive factor in determining whether a rebate scheme is anti-competitive (and, as such, used as a safe harbor). When a dominant company applies incremental rebates, the price for the incremental units might be lower than the average incremental cost per unit, it will fall under the law of predatory pricing where the price-cost test is applicable. This is because the lower price for the additional unit is the feature that urges the customers to purchase more units from the discounter, such that the price is the feature that is driving the customer's behaviour. In those cases, a rebate scheme is a pricing conduct and the assessment should be the same as in a 'normal' case of price predation.

3.38 In contrast, retroactive rebates are applicable for all purchases not only on those that exceed the threshold, which means that a customer will be more incentivised to buy additional units from the dominant company instead of another supplier so as to reach the rebate threshold and to obtain a lower price for all purchases. Thus, the retroactive rebates might have the effect of inducing loyalty.

3.39 However, this loyalty depends only on certain circumstances. Firstly, if the customers prefer a dominant company's product because it is a 'must stock' product (i.e. the company

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<sup>37</sup> Derek Ridyard, 'Exclusionary Pricing and Price Discrimination Abuses under Article 82 - an Economic Analysis' (2002) 23(6) European Competition Law Review 286.

<sup>38</sup> John Kallaugher, 'Rebates Revisited (Again) – The Continuing Article 82 Debate'

<sup>39</sup> In *Hoffmann La-Roche* the CJEU held that quantity discounts linked to customers' purchasing volume are legal. In *Irish Sugar*, para 153 the Court held that quantity discounts are normally unobjectionable. See also *Michelin I*, para 71; *Michelin II*, para 58 and *British Airways*, para 101.

<sup>40</sup> Anders Jessen, *Exclusionary Abuse after the Post Denmark I Case: The Role of the Effects-Based Approach under Article 102 TFEU* (Wolters Kluwer 2017) 101.

is dominant because the product has a strong brand or because of the inelastic demand) or because a competitor is capacity constrained to serve the total demand, the dominant company is an essential trading partner and customers normally buy certain amounts of their requirements from the dominant company.<sup>41</sup> This is the so-called ‘assured’ (non-contestable) base of sales, which is secured for the dominant company - i.e. customers will purchase these quantities at the list price anyway. This position of the discounter leads to the establishment of a non-contestable part of demand for which the competitors are not able to compete.

3.40 Thus, the real competition is for that part of sales for which the customer may prefer another supplier (non ‘assured’ part of sales/contestable part of demand). The situation might be completely different if the dominant company is dominant but not necessarily an unavoidable trading partner due to characteristics of the market and the product.<sup>42</sup> If the dominant company’s product is not essential, i.e. there is no assured part of sales, the dominant company and its competitors compete for the whole demand (not only for the non-assured base of sales), which means that an establishment of a non-contestable part of demand is not possible and as such, a fidelity enhancing effect described above cannot occur.<sup>43</sup>

3.41 When the dominant company is an unavoidable trading partner, it has information about the assured base of its customer’s demand; it might set the threshold above this level in order to attract additional purchases.<sup>44</sup> Thus, the position of as an unavoidable trading partner is the condition that makes it possible for the dominant company to use the non-contestable part of demand as leverage to decrease the price of the contestable part of demand, which leads to the creation of loyalty that incentivises customers to transfer the purchases of all or almost all of their requirements from the dominant company.<sup>45</sup>

3.42 Next, like incremental rebates, retroactive rebates could be applied when the threshold is set as a standardised volume target applicable to all customers (**standardised retroactive rebates**) or as an individualized volume target, specific to each particular customer (**individualised retroactive rebates**).

3.43 In the first scenario, the threshold is set at the same level for all buyers. It could be too high for smaller buyers and/or too low for large buyers, which means that it is not related to the total customer’s requirement. This means that a loyalty-enhancing effect is less likely to occur.<sup>46</sup> However, if the customers are limited in number and have similar demand patterns, the threshold may be standardised for all customers but still reflect their individual

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<sup>41</sup> Derek Ridyard, ‘Exclusive Contracts and Article 82 Enforcement: An Effects-Based Perspective’ (2008) 4(2) European Competition Journal 585.

<sup>42</sup> Jessen (n 40) 114.

<sup>43</sup> O’Donoghue and Padilla, p. 469. On this point see also the Discussion Paper, para 146.

<sup>44</sup> Janusz Ordover and Greg Shaffer, ‘Exclusionary Discounts’ (2013) 31(5) International Journal of Industrial Organization 569, 578.

<sup>45</sup> Derek Ridyard, ‘Exclusive Contracts and Article 82 Enforcement: An Effects-Based Perspective’ (2008) 4(2) European Competition Journal 585, 579.

<sup>46</sup> The Discussion Paper, para 159.

demands, in which case the rebate could still have a loyalty-inducing effect. This shows how, under certain circumstances, standardised retroactive rebates might create loyalty, leading to anti-competitive foreclosure.<sup>47</sup>

3.44 In the second scenario, the discounts are negotiated individually with each customer and applied for all units during a certain period once the threshold has been reached (retroactively). Because the threshold for obtaining rebates is negotiated individually depending on each customer's requirements, the dominant company may be able to set the threshold at levels above its customers assured base of sales, ensuring the rebate's loyalty-enhancing effect. The loyalty enhancing effect will be stronger when the level of the threshold is close to or reflects the total requirements of customers, and when the rebate percentage is higher.<sup>48</sup> Other factors that may contribute to the strength of the loyalty-inducing effect is whether the discounter has a large assured base of sales and whether the market is characterised with significant economies of scale.<sup>49</sup>

3.45 Since rebates represent one of the most complex and unsettled areas, I recommend that the Commission offer more comprehensive guidance on this topic.

3.46 The first judgment that develop the fidelity -enhancing effect of rebates was the GC decision in *Tomra*. In this judgment, the GC explained why the suction effect of rebates created an exclusionary mechanism/fidelity-enhancing effect and why it would be not possible for a competitor to offer a price for the incremental units (above the threshold) in order to compensate the customer for the loss of rebates for the units below the threshold (i.e. ***why the price-cost test applicable in retroactive conditional rebates does not make sense***). All these grounds need to be restated here as the recent case law does not provide this important clarification.

3.47 First, the Court established that Tomra had a position of unavoidable trading partner because there were not proper substitutes for a significant part of demand, naming this part of demand a 'non-contestable' part of the market.<sup>50</sup> This part of demand was secured for the dominant company, which means that customers would purchase these quantities at the list price anyway. Hence, customers would purchase only a limited portion of their purchases from a competing supplier; this part of demand was called a 'contestable part' of the market.<sup>51</sup> Therefore, the unavoidable trading partner status of the dominant company leads to the establishment of a non-contestable and contestable part of demand, making competitors unable to compete for the whole demand. In this regard, the GC observed that

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<sup>47</sup> See *Michelin II* judgment.

<sup>48</sup> The Discussion Paper, para 153.

<sup>49</sup> O'Donoghue and Padilla, 479.

<sup>50</sup> Customers may prefer dominant company's product because it is a 'must stock' product (i.e. the company is dominant because the product has strong brand or because of the inelastic demand) or because a competitor is capacity constrained to serve the total demand, the dominant company is an essential trading partner and customers normally buy certain amounts of their requirements from the dominant company.

<sup>51</sup> *Tomra*, para 269. The EU Courts refer to unavoidable trading partner status of the dominant company also in *Hoffmann-La Roche*, para 41; *Michelin I*, para 56; *British Airways*, para 75.



*‘competitors should be able to compete on the merits for the entire market and not just for a part of it.’<sup>52</sup>*

3.48 Tomra was able to establish the non-contestable part of demand on the basis of the customer’s estimated requirements and/or past purchasing volumes and to set thresholds for obtaining rebates above this level, i.e. to attract additional purchases from the contestable part of demand.<sup>53</sup> Because rebates were retroactive, they were applicable to all of the purchased units when the threshold is reached, not only for the incremental purchases above the threshold. This means, that Tomra was able to use that portion of demand of each customer, that would be purchased anyway from the dominant undertaking (non-contestable part) as leverage to decrease the price of the other portion of demand for which the customer may prefer and be able to find another source of supply. For the customers, this technically means that the price for the additional units is very low, while at the same time the dominant company was not required to sacrifice profit, because the lower price for the additional units can be recouped, since the cost of the rebates is spread across the whole range of sales.<sup>54</sup> For that reason, a competitor would not be able to offset the lower prices for the units above the threshold in order to compensate the customer for the loss of rebates for the units below threshold by selling additional units to the same customer due to fact that customers’ remaining demand is limited.<sup>55</sup> Accordingly, whether or not the price for the incremental units was very low or even negative was not considered as a prerequisite to finding rebate schemes abusive.<sup>56</sup>

3.49 Thus, customers were incentivised to buy additional units from Tomra instead of another supplier so as to reach the rebate threshold and to obtain a lower price not only for the additional units but for all purchases made during the reference period (including for those that would be purchased anyway at the list price); alternatively if a customer does not reach the threshold, it will lose the rebate on all purchases over the reference period.

3.50 When customers are close to the threshold, only a small increase in purchases will trigger rebates applicable to all purchased units in the past. This condition creates a stronger inducement for the customers to commit purchases preferably from the dominant supplier, thus, enhancing loyalty. Thus, the dominant undertaking may hamper their competitors ability to compete for that portion of the market (which is open to competition), as customers tempted by the discount when reaching the threshold will not transfer the sensitive part of the demand to an alternative supplier because they will lose the discount. Hence, placing a high threshold as a requirement for discounts combined with a high percentage discount will make it unprofitable for the customers to purchase part of their demand from a competitive supplier as they will lose the high discount and will pay a higher price if buying from another supplier. This means that the rebates artificially raised the cost of switching that the customer has to incur in order to purchase from a competitor.<sup>57</sup>

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<sup>52</sup> Tomra, para 241.

<sup>53</sup> Ibid, para 261.

<sup>54</sup> Ibid, para 267.

<sup>55</sup> Ibid, para 270.

<sup>56</sup> Ibid, para 266.

<sup>57</sup> Ibid, para 262.

- 3.51 Thus, the position of the dominant company as an unavoidable trading partner is the condition that makes possible the creation of a system that incentivises customers to transfer the purchases of all or almost all of their requirements from the dominant company. Alternatively, if the dominant company's product is not essential, there is no non-contestable part of sales.
- 3.52 Lastly, the fact that Tomra's conduct foreclosed a considerable proportion (two fifths) of total demand, which was regarded as a very high proportion of 'tied' demand, was considered as a complementary but not necessary for the finding of infringement of Art. 102 TFEU.<sup>58</sup>
- 3.53 From the above, it can be concluded that, a fidelity-enhancing effect of rebates was established on the grounds of the retroactive nature of rebates and the unavoidable trading partner status of the dominant company for a substantial part of demand.
- 3.54 However, the 'all the circumstances' test developed by the Courts was limited to the assessment of the criteria and rules for granting rebates, and did not take into account the extent of coverage and the percentage of the tied market, which is inconsistent with the evaluation of an anti-competitive effect in similar practices under Art. 101. However, This was developed later in the case law in the 2017 CJEU judgment in *Intel*, where the CJEU specified that the Commission is required to examine all the circumstances of the case, encompassing the extent of the undertaking's dominant position in the relevant market, the coverage and duration of the practice, and the conditions for granting the rebates. It also called for an assessment of the potential existence of a strategy aimed at excluding from the market competitors that are at least as efficient as the dominant undertaking.
- 3.55 The EU Courts emphasized that the degree of dominance is important to trigger the presumption that fidelity rebates are abusive. This implies not only that the company has a significant market share but also often means that the company is an unavoidable trading partner, which creates a strong preference for customers to purchase from them.<sup>59</sup> As a result of this market structure, customers can choose an alternative supplier only for a small proportion of their requirements, and these suppliers can compete only for those limited proportions. If a dominant supplier concludes agreements with its customers that ultimately amount to exclusivity arrangements, the dominant company's competitors access to even those limited proportions of the market is restricted, thereby leading to market foreclosure.
- 3.56 From the above, the Commission should clearly distinguish between conditional rebates that have effects that are similar to an exclusive purchasing obligation (non-price conduct) and those that might be regarded as pricing conduct. For that reason, it is important to clarify when conditional rebates fall within a pricing or non-pricing category of abuse, which is crucial for the choice of the appropriate framework for their assessment. If conditional rebates are regarded as pricing conduct, an application of a price-cost test would

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<sup>58</sup> Ibid, para 289.

<sup>59</sup> *Hoffmann-La Roche*, para 41; *Michelin I*, para 56; *British Airways*, para 75; *Tomra*, para 269.

be relevant for the evaluation of their anti-competitive effects; whereas, if they are regarded as non-price conduct, an evaluation of qualitative evidence rather than comparing price and cost would be relevant.

- 3.57 If fidelity rebates contain a combination of discount and other provisions leading to exclusivity, they should be evaluated under the law of exclusive dealing, in which case the existence of a strategy aiming to exclude an equally efficient competitor does not require the application of a price-cost test.

#### **4. The presumptions approach**

4.1 I welcome the introduction of presumptions in the Draft Guidelines. This is because the different business practices create different risks of competitive harm. It seems appropriate and reasonable as a starting point in terms of saving enforcement costs and risk of errors – both false positives and false negatives - which create predictability and legal certainty and minimise the cost of enforcement.

4.2 However, the introduction of presumptions could make it more challenging for companies to predict enforcement outcomes. To ensure compliance with competition rules, a dominant firm must understand which actions are considered problematic and under what conditions. For that reason, the criteria for what kind of evidence would be sufficient to rebut the presumption of anticompetitive effects have to be more clearly defined.

4.3 Considering that the recent case law established that to rebut the presumption that loyalty rebates are anti-competitive, is whether an equally efficient competitor is excluded from the market.<sup>60</sup> This is, in essence, the concept of the AEC principle, according to which competition policy should not protect inefficient competitors. However, in some circumstances, excluding less efficient competitors can sustain the dominant firm's market power, leading to anti-competitive outcomes.<sup>61</sup> This is especially relevant in markets with substantial economies of scale or scope, where no competitor can match the dominant firm's cost efficiency. In such cases, even a less efficient rival could impose competitive constraints on the dominant company's conduct. So, the question is how to distinguish pro-competitive practices (i.e., competition on the merits) from practices that can have an anti-competitive effect (conduct that deviates from the competition on the merits).

4.4 Over the years, there has been a growing concern about how to distinguish between pro-competitive and anti-competitive conduct. Some commentators claimed that it is impossible to distinguish these practices with certainty because in some cases the practice may be considered as abusive when it is not, the so-called 'false convictions'

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<sup>60</sup> Kuhn and Marinova, p 67.

<sup>61</sup> See JT Lang and R O'Donoghue 'The Concept of an Exclusionary abuse under Article 82 EC' (2005) (2005) GCLC Research Papers on Article 82 EC; A Gavil, 'Exclusionary Distribution Strategies for Dominant Firms: Striking a Better Balance' (2004) 72(1) Antitrust Law Journal 3.

or type I errors; in others the practice may be considered pro-competitive when it is abusive, the so-called ‘false acquittals’ or type II errors.<sup>62</sup> For them, the assessment of any practices should take into account the risk and cost of those mistakes. Thus, the appropriate legal test for exclusionary conduct requires a balance between the risk and cost of those mistakes.<sup>63</sup> In searching for the optimal standard to distinguish between exclusionary and pro-competitive behaviour, several different approaches have been developed.<sup>64</sup> These include the naked abuse test, the profit sacrifice test, the no economic sense test, the AEC test and the consumer welfare test. The courts and competition authorities have used each of the tests.<sup>65</sup>

4.5 These tests reflect the Commission’s view adopted in the Draft Guidelines using categorisation of practices properly calibrated presumptions for conduct highly likely to have anti-competitive effects, which makes sense.

4.6 According to the Draft Guidelines, the first category includes conduct for which it is necessary to demonstrate a capability to produce exclusionary effects in order to conclude that conduct is liable to be abusive. It is considered necessary to demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects. The Commission listed all the circumstances test developed by the CJEU in its 2017 judgment in *Intel*, including the possible existence of a strategy aimed at excluding actual or potential competitors of the dominant firm. This approach represents the AEC principle, which aligns with the effects-based approach, according to which conduct would be unlawful only if its ‘probable effect’ is likely to substantially lessen competition in the relevant market, which requires an evaluation of a possible anti-competitive effect considered in the light of any pro-competitive effect.

4.7 I consider that in all the circumstances, the test developed by the CJEU in its 2017 judgment in *Intel* (listed in paragraph 70 of the Draft Guidelines) needs more elaboration regarding the evaluation of the coverage and the duration of the rebates. The Commission has to include to what extent and under which circumstances the coverage and duration is important element of the assessments. This is because, in paragraph 75, the Commission considered that *‘there is no de minimis threshold for the purposes of determining whether conduct infringes Article 102 TFEU . Any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition, and as such will be captured by Article 102 TFEU. Once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature’* referring to the relevant case law, which is discussed below.

4.8 Indeed, in the 2014 judgment in *Intel*, the General Court considered the relevance of the coverage of the practices in consideration and concluded that in markets where the

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<sup>62</sup> Ahlborn and Padilla, 7.

<sup>63</sup> Susan Creighton and others, ‘Cheap Exclusion’ (2005) 72(3) Antitrust Law Journal 975, 979.

<sup>64</sup> The overview of the main tests was made by Vickers, ‘Abuse of Market Power’ and O’Donoghue and Padilla; OECD Report, Competition on the Merits (2005) DAF/COMP(2005)27.

<sup>65</sup> OECD Report (2005).

structure of competition is already weakened by the mere presence of a dominant company, even a small further weakening of the degree of competition may constitute an abuse of dominant position.<sup>66</sup> Accordingly, in *Post Danmark II*, the CJEU took the view that it was not appropriate to create a *de minimis* threshold beyond which a practice should be deemed anti-competitive simply because competition was already weakened by the dominant company's presence.<sup>67</sup> Arguably, the EU Courts have refused to evaluate the coverage of fidelity rebates so far. However, the General Court's position in *Intel* seems to be reasonable and is in line with the economic theories of exclusion and explanation that in some markets characterized by high fixed costs and constant demand a rival needs to achieve MES in order to enter the market or to compete effectively with the dominant company if it is already in the market. In these markets, the dominant company might tie an insignificant part of the demand, which might nonetheless be large enough to prevent its rivals from achieving MES.<sup>68</sup>

4.9 Finally, in the 2017 *Intel* judgment, the General Court considered that the duration of the dominant firm's supply contracts with customers is not relevant, but that the possibility of termination or switching to an alternative source of supply without incurring costs is. The General Court concluded that the incentive for customers to purchase exclusively from Intel was based on the existence of a financial incentive, which in practice would prevent them from terminating the contract, regardless of the possibility of termination.<sup>69</sup> Arguably, the relevance of the reference period had been acknowledged by the EU Courts, although the case law does not provide clear indications on how long is enough for an anti-competitive effect to be presumed.<sup>70</sup>

4.10 According to some empirical studies in the economic literature, the duration of the reference period (even though it is an essential part of any rebate system) cannot be endorsed as a part of the economic assessment of retroactive rebates and their potential foreclosure effect because the rebate percentage, the threshold and the amount already bought is sufficient for the conclusion in that respect.<sup>71</sup> Other empirical models have

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<sup>66</sup> *Intel* (GC (2014)), para. 116.

<sup>67</sup> *Post Danmark II*, paras 70-73. The position of the CJEU in *Intel* (fn **Error! Bookmark not defined.**) not to consider the second ground of Intel's appeal which dealt with the market coverage 'may be a signal that it still rejects, or is at least uncertain about, the possibility of a *de minimis* threshold under Article 102': see J. Venit, 'The judgment of the European Court of Justice in *Intel v Commission*: a procedural answer to a substantive question?' (2017) 13(2) *European Competition Journal* 172, p.186.

<sup>68</sup> This position is based on the economic theory of raising rivals' costs, according to which small amount of foreclosure might create strategic barriers and, as such, be enough to marginalize the competitors of a dominant company by preventing them from reaching a minimum efficient scale. According to this economic theory, the degree of foreclosure and that intervention might be appropriate irrespective of the percentage of the foreclosed market: see Jacobson, 'Exclusive Dealing, "Foreclosure," and Consumer Harm' (2002) 70(2) *Antitrust Law Journal* 311.

<sup>69</sup> *Intel* (GC (2014)), para. 113.

<sup>70</sup> Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR I-346, EU:C:1983:313, para. 81; Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-407, EU:T:2003:250, para. 88.

<sup>71</sup> F. Maier-Rigaud, 'Switching Costs in Retroactive Rebates-What's Time Got to Do with it?' (2005) 26(5) *European Competition Law Review* 272; G. Faella, 'The Antitrust Assessment of Loyalty Discounts and Rebates' (2008) 4(2) *Journal of Competition Law and Economics* 375, p.405; See also Jacobson (n 68) p.352. According

reported that looking only at the length of the contract is misleading; instead, it is important to assess ‘to what extent a contract of a given length locks the parties into a relationship’ due to the penalties that a customer has to incur in order to terminate a contract.<sup>72</sup> These statements could be interpreted as suggesting that the reference period in itself is not a sufficient indicator to be taken into account; instead the possibility for termination of the agreement with a short notice period and without penalties, such as a termination of the contract or a requirement to return the rebates, would suggest that the practice is capable of harming competition.<sup>73</sup> From this perspective, the General Court’s reasoning not to accept the duration of the contracts as short was based on the existence of a financial incentive, which, in practice, prevented customers from terminating the contract.<sup>74</sup> From this perspective, an evaluation of the reference period in itself seems to be redundant. The judgment of the General Court seems to be in line with the economic theory of exclusion and provides important clarification on that point too.

4.11 According to the Draft Guidelines, the second category includes conduct presumed to lead to exclusionary effects, recognized as highly likely to restrict competition. This presumption applies to (i) exclusive supply or purchasing agreements, (ii) exclusivity-based rebates, (iii) predatory pricing, (iv) margin squeezes with negative spreads, and (v) certain tying practices. Once the conduct is factually established, its exclusionary effect is presumed under applicable legal tests.

4.12 Next, the Draft Guidelines clarifies that the dominant undertaking will be able to rebut this presumption by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects, in which case the Commission will be bound to consider any evidence that the dominant company puts forward that shows that conduct is not capable of having exclusionary effects. I will comment only on the exclusive dealing and exclusivity-based rebates category.

4.13 In my view, the Draft Guidelines suggest an approach that is appropriate for practices with a high probability of being capable of harming competition. This approach is reasonable in cases when a company possesses significant market power; offering rebates on condition of exclusivity; rebates are retroactive; the product is ‘must have’, which puts the dominant company in a position of an unavoidable trading partner and separates the market into a contestable and non-contestable part, which means that competitors are not able to compete for the customers whole demand; there are economies of scale and barriers to entry. When all these conditions are met, the anti-competitive effect can be presumed with high probability, which means that the conduct is capable of strengthening and maintaining the dominant position.

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to Jacobson, in some of the recent US cases, ‘the duration of the agreements had little to do with the real-world lack of any credible ability of the affected customers to switch to alternatives.’

<sup>72</sup> P. Aghion and P. Bolton ‘Contracts as a Barrier to Entry’ (1987) 77 *American Economic Review* 388, p.389.

<sup>73</sup> See Jacobson (fn 68), p.352.

<sup>74</sup> *Intel* (GC (2014)), para. 113.

4.14 The criticism that this approach ignores the possible pro-competitive effect leading to type I errors is diminished by the possibility for the dominant company to rebut the presumption of illegality if it is able to provide sufficient evidence that the conduct is not anti-competitive and creates efficiencies. The 2017 CJEU judgment in Intel made it clear that the presumption of illegality of fidelity rebates stands but also clarified that now it can be rebutted if the defendant provides supportive evidence that its conduct is not capable of restricting competition. In those cases, the Commission is required to evaluate all the circumstances in order to assess the possible existence of a strategy aiming to exclude an as efficient competitor, including a price-cost test as an element of the assessment, if the Commission **or the defendant can substantiate that the rebates at issue are price-based conduct.** For example, a dominant company should consider whether to conduct a price-cost test in the case of fidelity rebates, which contain exclusivity clauses, without mentioning supportive arguments in economic terms in order to explain what differentiates those rebates from an exclusive dealing (or single branding obligation). This is because a price-cost test can be a useful tool for the evaluation of possible anti-competitive effects if the price is the mechanism of exclusion in price-based conduct. If fidelity rebates contain a combination of discounts and other provisions leading to exclusivity, they should be evaluated under the law of exclusive dealing, in which case the existence of a strategy aiming to exclude an efficient competitor does not require a price-cost test.

4.15 However, given that dominant companies will presumably always present economic evidence asserting that the examined conduct is not anti-competitive, the application and consideration of the AEC price-cost test might become an inevitable element in all abuse of dominance cases. For that reason, to reduce enforcement costs and improve predictability, the Commission should specify circumstances where it will not accept such evidence (see the section discussing the differences between incremental and retroactive rebates and suggested framework for their assessment depending on whether they can be categorized as pricing or non-pricing conduct).

4.16 According to the Draft Guidelines, the last category - naked restrictions – conduct that has no economic interest for an undertaking beyond restricting competition – are deemed to fall outside the scope of competition on the merits and can be presumed to be capable of exclusionary effects. This definition seems to align the concept of naked abuse of the ‘by object’ restriction of competition category.<sup>75</sup> It is useful to think about Art. 101 in this context. Some collusive agreements such as price-fixing, lack any cognisable efficiency justification and could be prohibited by object, whereas others can plausibly create efficiencies and, hence, require a further detailed analysis to determine whether the agreement is anti-competitive.<sup>76</sup> The idea behind the naked abuse test is that the same distinction can be drawn among different forms of exclusionary conduct.<sup>77</sup>

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<sup>75</sup> Jessen (n 40) Ch 4.

<sup>76</sup> Susan Creighton and others, ‘Cheap Exclusion’ (2005) 72(3) Antitrust Law Journal 975, 977.

<sup>77</sup> Ibid.

4.17 In some cases, the negative effect of a conduct can be presumed, as for example in naked exclusionary conduct in standard-setting process,<sup>78</sup> some tortious conduct<sup>79</sup> and some abuses of governmental process.<sup>80</sup> It seems, there are good reasons for the implementation of the naked abuse test, as it is easy to administer and saves enforcement costs. Moreover, the existence of such a standard creates legal certainty, so dominant companies are able to predict with reasonable certainty whether their conduct might violate competition law provisions.<sup>81</sup>

4.18 However, the test is appropriate only if it is possible to identify a conduct that is harmful without engaging in a thorough economic analysis. Still, the Commission introduces rebuttable presumptions for 'naked restrictions'. Under the naked exclusion test, when the conduct is presumably abusive, the dominant company still can provide evidence that the conduct creates efficiency beneficial to consumers, thereby justifying its behaviour. This means that a naked abuse violation does not amount to a '*per se*' violation of Art. 102.<sup>82</sup>

Overall, my proposals intend to make Commission's approach in line with the case law, appropriate and reasonable in terms of administrability, saving enforcement cost and improving legal certainty.

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31 October 2024, London

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<sup>78</sup> Ibid, 987-89 (This could be an opportunistic behaviour in a private standard-setting process where the dominant company adopts a standard to confer its market power)

<sup>79</sup> Ibid, 989-90 (This could be the case when the dominant company is engaged in deception, as for example disparaging the quality of rival's products. The deceptive conduct can immediately damage a competitor ability to operate. An extreme example could be when a dominant company is engaged in destroying or damaging rival's property to hamper them from making or distributing their products); See also Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253, 281.

<sup>80</sup> Susan Creighton and others, 'Cheap Exclusion' (2005) 72(3) Antitrust Law Journal 975, 979 (It means that the dominant company is using the rules of government against its competitors, such as obtaining a patent by perpetrating fraud on the Patent Office. It could be the case of engaging in abusive litigation when the lawsuit could very costly for the rival than for the dominant company with the aim of exclusion).

<sup>81</sup> Whish, 'Intel v Commission: Keep Calm and Carry on!' 2.

<sup>82</sup> Renato Nazzini, *The Foundations of European Union Competition Law* (OUP 2011) 110; Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (6th edn, OUP 2016) 369-70.